Neutral Citation Number: [2017] EWCA Civ 1426

Case No: C1/2016/4313

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2017

Before:

SIR TERENCE ETHERTON, MR
LADY JUSTICE GLOSTER
and
LORD JUSTICE BEATSON

- -

Between:

HM CHIEF INSPECTOR OF EDUCATION, CHILDREN'S SERVICES AND SKILLS	**Appellant**
- and -	
THE INTERIM EXECUTIVE BOARD OF AL-HIJRAH SCHOOL	**Respondent**
- and -	
THE SECRETARY OF STATE FOR EDUCATION	**First Intervener**
- and -	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Second Intervener**
- and -	
SOUTHALL BLACK SISTERS and INSPIRE	**Third Interveners**

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Helen Mountfield QC and Sarah Hannett (instructed by **Ofsted Legal Services**) for the **Appellant**
Peter Oldham QC and Joseph Barrett (instructed by **Birmingham City Council Legal Services**) for the **Respondent**
Martin Chamberlain QC and Tom Cross (instructed by the **Government Legal Department**) for the **First Intervener**
Daniel Squires QC (instructed by the **Equality and Human Rights Commission**) for the **Second Intervener**
Karon Monaghan QC and Aileen McColgan (instructed by the **Public Law Project**) for the **Third Interveners**

Hearing dates: 11th & 12th July 2017

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Approved Judgment

Sir Terence Etherton, MR and Lord Justice Beatson:

1. The issue of principle on this appeal is whether it is direct discrimination, contrary to sections 13 and 85 of the Equality Act 2010 ("EA 2010"), for a mixed-sex school to have a complete segregation of male and female pupils over a certain age for all lessons, breaks, school clubs and trips.

2. The appellant is Her Majesty's Chief Inspector of Education, Children's Services and Skills ("HMCI"), and, as we explain below, the most senior officer of Ofsted. She appeals from the order of Jay J dated 8 November 2016, by which, among other things, he granted an application by the respondent, the Interim Executive Board ("the Board") of Al-Hijrah School ("the School"), for the judicial review of the report of HMCI following an inspection of the school on 14 and 15 June 2016. That report not only criticised the Board for the adverse educational consequences of its policy of segregating pupils by gender but, in its final form, said that such segregation was contrary to EA 2010.

3. The Judge granted the application because he concluded that HMCI's approach to EA 2010 was wrong in law since segregation of male and female pupils without more is not discrimination. The material part of the order required HMCI to excise the parts of the report that refer to a breach of EA 2010 by reason of sex segregation and to give the Board an opportunity to comment prior to publication.

EA 2010

4. Some relevant provisions of EA 2010 are set out or described in Appendix 1 to this judgment.

Background

5. Reference should be made to the Judge's judgment for a full statement of the background facts. The following is a summary sufficient to understand the context of this appeal. It is considerably shorter than the Judge's fuller version, not least because he had to address an allegation of bias on the part of HMCI, which was no longer an issue on this appeal by the time of the oral hearing.

6. The 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 9th birthdays by 1 September in the relevant academic year) is obligatory. Segregation of boys and girls in the age range of 9–16 is one of the defining characteristics of the School. It is a policy which is made public by the School and is apparent both to parents who might wish to send their children to it and to regulators who might take a different view. Ofsted did not comment adversely on this segregation in its reports on the School before June 2016.

7. It is common ground that the School is not the only Islamic school which operates such a policy and that a number of Jewish schools with a particular Orthodox ethos and some Christian faith schools have similar practices.

8. An Ofsted inspection of the School in December 2013 concluded that the School was inadequate and in 2014 the School was placed in special measures (as to which see Appendix 2) and the Board was appointed. The Board is the "responsible body" for the purposes of the relevant anti-discrimination provisions of EA 2010. For all practical purposes relevant to this judgment the Board and the School are interchangeable. Accordingly, except where strictly necessary to distinguish between them, in the rest of this judgment we shall refer to both of them as "the School".

9. The office of HMCI was established pursuant to section 113 of the Education and Inspections Act 2006 ("EIA 2006"). HMCI is the most senior officer of Ofsted, which is a non-ministerial Government department established by EIA 2006 s.112. Anything authorised or required by or under any enactment to be done by HMCI may be done by Ofsted, or by any additional inspector who is authorised generally or specifically for the purpose by HMCI. Ofsted's functions are set out in EIA 2006 ss.116 and 117. HMCI's functions are set out in EIA 2006 ss.118 and 119. Except where strictly necessary to distinguish between them, in the rest of this judgment we shall refer to both of them as "Ofsted".

10. Some statutory and other material about Ofsted which is relevant to this appeal is set out in Appendix 2 to this judgment. It suffices here to refer to the two types of inspection contemplated by Part I of the Education Act 2005 ("EdA 2005"), which deals with inspections of schools. The first is an inspection under section 5 ("section 5 inspection"). This is required of every school at prescribed intervals. The second is an inspection under section 8 ("section 8 inspection"). It is an inspection Ofsted is required to undertake if requested to do so by the Secretary of State or which Ofsted decides to undertake in circumstances where it is not required to do so.

11. Monitoring inspections after the December 2013 inspection, which concluded that the School was inadequate, disclosed a measure of improvement but the designation of special measures remained in place. The School was subjected to a further section 5 inspection in early December 2015. Improvement was judged to be sufficient to enable special measures to be removed but the School's overall effectiveness was assessed to require improvement. The report, published on 5th January 2016, noted that girls and boys were segregated for lessons, breaks and lunchtimes from Year 5, but again no adverse comment was made.

12. On 8 June 2016 HMCI and Ms Lorna Fitzjohn, one of Ofsted's regional directors, visited the School. In the light of Ofsted's concerns about segregation, HMCI asked Ms Fitzjohn to arrange an inspection of the School as soon as possible. She arranged a section 8 inspection, with James McNeillie as the lead inspector.

13. The section 8 inspection started on 14 June with Mr McNeillie leading a team of six other inspectors.

14. On 14 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 expressed her views as follows:

> "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."

15. 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".

16. 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. That was in accordance with Ofsted's practice, mentioned in its section 8 Handbook, that (pursuant to EdA 2005 s.9) inspectors may convert a section 8 inspection to a section 5 inspection if, during the inspection, they are sufficiently concerned about the overall standard of education provided by the school.

17. On 4 July 2016 Ofsted sent the head teacher of the School a draft report on the June 2016 inspection and invited comment pursuant to EdA 2005 s.13(2)(b). The head teacher made extremely detailed comments. Amongst the many points he made, he stated that segregation had not previously been raised as an issue by Ofsted. The report was revised and on 15 July 2016 the final version ("the June 2016 Inspection Report") was sent to the head teacher.

18. The June 2016 Inspection Report assessed the School as "inadequate" in three respects, namely (i) "effectiveness of leadership and management", (ii) the "personal development, behaviour and welfare" of pupils, and (iii) "early years provision".

19. The "inadequate" assessment in relation to leadership and management was based on three factors. The first was that 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".

20. The second factor related to the segregation of pupils. 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 [segregated] 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 [EA 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."

21. The third aspect of the critical leadership and management assessment related to ineffective arrangements for safeguarding. The report referred in particular to 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.

22. There were other criticisms in the June 2016 Inspection Report but it is not necessary to mention them in this judgment.

23. On 26 July 2016 Ofsted upheld a complaint on behalf of the School that the views about segregation expressed in the June 2016 Inspection Report were inconsistent with those reached in December 2015.

24. On 10 August 2016, after the commencement of these proceedings, Ofsted sent the School an amended version of the June 2016 Inspection Report ("the revised June 2016 Inspection Report"). This expressly acknowledged that segregation had not been commented on adversely in previous inspections, and made the following statements explicitly referring to unlawful discrimination:

> "[The School's segregation policy] does not accord with fundamental British values and amounts to unlawful discrimination."
>
> "Although this has not been addressed by previous inspection teams, [the School's segregation policy] 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 Equality Act 2010 …"

25. In neither version of the June 2016 Inspection Report do the inspectors express the opinion that girls receive a different 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. Ofsted's position, then, was that, although the girls and the boys were taught the same subjects and to the

same standard, they all suffered educationally from the restriction on social interaction.

The proceedings

26. The School commenced these proceedings for judicial review on 21 July 2016. The claim form requested, as an interim remedy, that Ofsted be prevented from publishing any report of its inspection of the School and an order anonymising the School, and, as a final remedy, that such report be quashed and that Ofsted be prevented from publishing it.

27. There were successive orders granting the interim relief sought by the School.

28. The matter came before the Judge on 27 and 28 September 2016 as a "rolled up" application for permission to apply for judicial review and, if granted, for the final relief claimed.

The Judge's judgment

29. The Judge handed down his clear, careful and comprehensive judgment on 8 November 2016.

30. He identified (in paras [70] – [79]) the following 10 grounds of challenge to the revised June 2016 Inspection Report:

> Ground 1: Ofsted acted irrationally in that the June 2016 Inspection Report was inconsistent with prior inspections where the relevant features and circumstances of the School had not changed.
>
> 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.
>
> Ground 3: the powers of inspection were not used for statutory purposes.
>
> Ground 4: The June 2016 Inspection Report was irrational and/or based on no evidence. The inspectors wrongly assumed that separation of pupils on the basis of sex meant or implied unequal treatment.
>
> Ground 5: The June Inspection 2016 Report was based on the erroneous view that the School had committed unlawful sex discrimination.
>
> Ground 6: Ofsted's reasoning in relation to single sex schools is irrational and/or incorrect.

Ground 7: Inadequate regard paid to parental preference, contrary to the Education Act 1996 ss. 9 and 14 and Article 2 of the First Protocol to the Convention.

Ground 8: Forbidding segregation without any policy or published guidance, and applying confused and inconsistent reasoning to the issue.

Ground 9: failure to abide by EA 2010 s.149.

Ground 10: The revised June 2016 Inspection Report (1) postdates the School's challenge and introduces additional reasoning, and (2) does not reflect the views and reasons of the inspectors at the time of the inspection.

31. By his order made on 8 November 2016, and amended on 9 November 2016, the Judge granted permission to apply for judicial review on Grounds 1, 2, 4 and 5. He refused permission on all the other Grounds. He allowed the claim for judicial review on grounds 4 and 5. He dismissed the claim for judicial review on Grounds 1 and 2. He granted Ofsted permission to appeal and the School permission to cross-appeal on Grounds 1 and 2. By the time of the hearing of the appeal, the School had decided not to pursue Ground 2, the allegation of bias by the lead inspector.

32. The Judge's order also provided for reconsideration by Ofsted of the revised June 2016 Inspection Report, continued anonymity of the School and restriction on publication, as follows:

> "4. The Defendant shall re-examine the June 2016 report (including the amended version dated 10th August 2016), shall in the light of the Judgment excise those parts that refer to a breach of the Equality Act 2010 by reason of sex segregation, shall reconsider the judgments and assessments reached and shall afford the Claimant an opportunity to comment pursuant to section 13(2)(b) of the Education Act 2005 prior to publication.
>
> 5. The case will continue to be known and reported as in the title set out above.
>
> 6. Pursuant to CPR 39.2(4), no report of or relating to this claim and in whatever form shall name or refer to in such a way that they can be identified the school that is the subject of these proceedings.
>
> 7. Nothing in this order prevents publication of a report of or relating to this claim naming the school, upon the Defendant having published a revised report after taking the steps referred to in paragraph 4 hereof."

33. We do not need to set out all the careful reasoning of the Judge. We address specific passages in his judgment later when considering the merits of the appeal. It is sufficient for present purposes to refer to the following points in his judgment.

34. The Judge said (in para [118]) that, at least in principle, the denial of 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)(d), 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 section 85(2)(f).

35. He said (in para [119]) that the key question is whether the denial of that opportunity to both sexes amounts to "less favourable treatment" for the purposes of section 13(1) read in conjunction with section 23(1). On that issue, he said (at para [124]) that each sex must be viewed as a group, and the comparison must be made between the two groups. His analysis (at para [127]) was that the treatment of both groups is of equivalent nature and character, with equivalent consequences for both sexes, and so it cannot be said that one sex is being treated less favourably than the other.

36. The Judge rejected two further submissions of Ofsted, namely (1) the loss of opportunity to mix and socialise with the opposite sex imposes a particular detriment on girls, because the female sex is the group with the minority of power in society; and (2) 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.

37. He rejected (at para [133]) the first of those submissions because there was no evidence that segregation in a mixed school, still less segregation in an Islamic school, has a greater impact on female pupils.

38. He rejected (at paras [140] – [146]) the second of those submissions on the grounds that (1) 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, (2) he was not prepared, in the absence of evidence, to conclude that segregation in the School generates a feeling of inferiority as to the status of the female gender in the community, and (3) he was not prepared to accept, in the absence of evidence and anything to the point in the revised June 2016 Inspection Report, that faith schools in general, and Islamic schools in particular, segregate the sexes because they regard the female gender as inferior or that girls should be separately prepared for a lesser role in society.

The Appeal

Grounds of appeal

39. There are 5 matters in the written Grounds of Appeal which are relied upon by Ofsted as reasons why the Judge was wrong to conclude that the School's segregation of pupils

by sex does not constitute less favourable treatment for the purposes of EA 2010 s.13(1). They are as follows:

(1) The loss of an opportunity for girls to choose to learn and socialise with boys or individual boys (which boys at the School enjoy) ("Appeal Ground 1")

(2) The loss of an opportunity for boys to choose to learn and socialise with girls or individual girls (which girls at the School enjoy) ("Appeal Ground 2")

(3) The loss of an opportunity for girls to socialise confidently with boys (and vice versa) and/or to learn to socialise confidently in preparation for personal, educational and work-related contexts on leaving the School ("Appeal Ground 3")

(4) Each loss of opportunity imposes a particular detriment on girls because the female sex is the group with the minority of power in society, so restrictions upon female children learning, socialising and feeling comfortable with male children and upon male children learning to work and interact socially with female children have adverse social implications for women which outweigh the adverse social implications for men. This is because those with the minority of power are socialised to be regarded, by themselves and those with the majority of power, as relevantly different in contexts where gender should be treated as irrelevant ("Appeal Ground 4").

(5) The very fact of segregation constitutes less favourable treatment of girls as it amounts to an expressive harm caused by the necessary implication that girls are inferior or otherwise relevantly different to boys in day to day social and working contexts ("Appeal Ground 5").

40. By order dated 28 April 2017 Beatson LJ directed that the Secretary of State for Education and the Equality and Human Rights Commission have permission to intervene by written and oral submissions and the Southall Black Sisters and Inspire have permission to intervene by written submissions only. Southall Black Sisters is an organisation whose work is particularly directed at assisting vulnerable and marginalised BME women and children. Inspire is a non-governmental, counter-extremism and women's rights organisation, which focuses on the influence of Islamic extremism in the UK and its impact on Muslim women and girls.

Anonymity

41. In a letter dated 6 July 2017, very shortly before the appeal was due to be heard, Associated Newspapers Limited applied to lift the anonymity order made by the Judge. This was strictly unnecessary since, in accordance with the guidance of Lord Neuberger MR in *Pink Floyd Music Ltd v EMI Records Ltd, Practice* Note [2011]1 WLR 770 at [68], where a party to an appeal wants a private hearing or anonymisation the correct procedure is for that party to make an appropriate written application to this court. It

was therefore for the School to apply to this Court for an anonymity order in relation to proceedings before the Court of Appeal. This having been pointed out by the Court, the School applied for an anonymity order. That application was heard by us on Monday 10 July.

42. We refused that application. We did so because, whatever the outcome of the appeal, it would not be appropriate to continue to grant the School anonymity. If the appeal was successful, and the School's objections to the revised June 2016 Report were found to be unwarranted, the basis for any anonymity and any restriction on publication would disappear. If the appeal was unsuccessful, then the School would be entitled to say that its policy of gender segregation is entirely lawful and so again anonymity would be unnecessary.

Discussion: the merits of the appeal

Appeal Grounds 1, 2 and 3

43. Ofsted's case on the first three grounds of appeal is that the Judge made a mistake of law in approaching the issue of discrimination by comparing the girls, as a group, with the boys, as a group, rather than looking at the matter from the perspective of an individual pupil. The Judge's approach appears clearly from the following paragraphs in his judgment:

> "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 [Counsel for Ofsted'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."

44. The Judge's approach was to categorise the arrangements at the School as "separate but equal". Ofsted says that those arrangements are nevertheless discriminatory for the purposes of EA 2010 ss. 13 and 85.

45. Ms Helen Mountfield QC, for Ofsted, presents Ofsted's case on this part of the appeal very simply. She submitted that a girl pupil who wishes to mix or socialise with a boy pupil is precluded from doing so because of her sex, a protected characteristic; whereas, if she did not have that characteristic, and was a boy pupil, she would be able to mix or socialise with all the other boys. Equally, if a boy pupil wishes to mix or socialise with a girl pupil, he is precluded from doing so because of his sex; and if he did not have that characteristic, and was a girl pupil, he would be able to mix or socialise with all the other girls. Ofsted's view was that this restriction on the freedom of a girl pupil to mix or socialise with boy pupils and on a boy pupil to mix or socialise with girl pupils was detrimental to their education. The Judge appears to have accepted the existence of such a detriment in principle when he said (at para [118]):

> "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)."

46. It was submitted that the point can be put on the basis of a comparator, namely (in the case of discrimination against a girl pupil) a boy pupil who can mix with other boy pupils, and (in the case of discrimination against a boy pupil) a girl pupil who can mix with other girl pupils, or it can be advanced without any comparator by simply asking what would have been the position if the girl pupil or the boy pupil did not have the protected characteristic of their sex. It is said that, either way, there is discrimination contrary to any one or all of EA 2010 s. 85(2)(a)(b)(d) and (f). Viewed from the perspective of an individual pupil, in that way, both the girl pupil and the boy pupil are treated less favourably than the other.

47. We agree with those submissions of Ofsted.

48. There is no doubt that the restriction on a girl pupil socialising with boy pupils, and on a boy pupil socialising with girl pupils, is by reason of their respective sex. There is no doubt that Ofsted could reasonably take the view, which it did, that the differential treatment, as Ofsted portrays it, was detrimental to both the girl pupil and the boy pupil. As it happens, there was direct evidence from some, albeit a small number, of the pupils in the present case that they regarded the complete separation of the sexes as detrimental to their social awareness and development, and there is equally no doubt that that view was a reasonable one to hold, reasonableness of perception of adverse detriment being the touchstone of detriment in this context: compare *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] IRLH 16 at [37]; *Birmingham City Council v Equal Opportunities Commission* [1989] 1 AC 1155 at p. 1193H. The Judge reached the same conclusion on detriment in paragraph [118] of his judgment.

49. The Judge considered (at para [118]), that "detriment" is not, without more, to be equated with "less favourable treatment" as required by EA 2010 s. 13(1), and so he regarded the key question as whether the denial of the opportunity to mix socially and interact with pupils of the opposite sex amounts to "less favourable treatment" for the purposes of EA 2010 s.13(1) read in conjunction with EA 2010 s.23(1). It was at this point that (in the passage from para [124] set out above) he approached the question of "less favourable treatment" on the footing that "each sex must be viewed as a group - there is no material difference (*inter se*) between any of the boys and the girls - and the comparison must be made between the two groups [and the two groups] … can be considered simultaneously, because that is the effect of segregating them down the middle".

50. We agree with Ofsted that the Judge was wrong to approach the matter in that way. The starting point is that EA 2010 s.13 specifies what is direct discrimination by reference to a "person". There is no reference to "group" discrimination or comparison. Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective. That is consistent with the following observation by Lord Mance in *R(E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728 at [90]:

> "Finally, I also consider it to be consistent with the underlying policy of section 1(1)(a) of [the Race Relations Act 1976] that it should apply in the present circumstances. The policy is that individuals should be treated as individuals, and not assumed to be like other members of a group: *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1, paras 82 and 90, per Baroness Hale of Richmond and *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, paras 44 and 90, per Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood. To treat individual applicants to a school less favourably than others, because of the happenstance of their respective ancestries, is not to treat

> them as individuals, but as members in a group defined in a manner unrelated to their individual attributes."

51. Viewed in that way, Ofsted's analysis of "less favourable treatment" is correct. An individual girl pupil cannot socialise and intermix with a boy pupil because, and only because, of her sex; and an individual boy pupil cannot socialise and intermix with a girl pupil because, and only because, of his sex. Each is, therefore, treated less favourably than would be the case if their sex was different.

52. Mr Peter Oldham QC, for the school, submitted that there was no finding by the school inspectors in June 2016 of less favourable treatment. We do not agree. The findings of the revised June 2016 Inspection Report include the following:

> "From Year 5, there are few chances for boys and girls to mix while they are in school. Therefore, the development of pupils' social skills is not as strong as it could be and there are few opportunities to foster good relations. In discussion with inspectors, some pupils explained that they worry that this lack of mixing will be a hindrance to them when they leave school. 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 Equality Act 2010, and ought to have been picked up on in the previous inspection.".

53. While this is not an express finding of "less favourable treatment", and it would have been better to make such a finding, we consider that it is an implicit finding of such treatment. We consider that "less favourable treatment" follows inevitably from Oftsed's findings in the revised June 2016 Inspection Report. Looked at from the perspective of each individual boy pupil and girl pupil, which is the correct legal approach, both boy pupils and girl pupils suffer a detriment from the operation of the school's segregation policy and, in respect of that detriment, each boy and each girl suffers less favourable treatment since the girls are denied the opportunity, which the boys have, of mixing with other boys, and the boys are denied the opportunity, which the girls have, of mixing with other girls.

54. On this approach, the School's objection, repeated in its Respondent's Notice, that the arrangements for segregation do not deny pupils access to a benefit, facility or service within EA 2010 s.85(1)(d) misses the point. The argument advanced by the School before the Judge and on this appeal was that there is no discrimination within that statutory provision because there has always been strict gender segregation and so the "benefit" or "facility" of mixing and social interaction between girl pupils and boy pupils has never existed. Mr Oldham referred to *Clymo v Wandsworth Borough Council* [1989] ICR 250 in that regard.

55. The Judge was correct to reject that argument (in para [131]). Mixing and social interaction between boy pupils has always taken place, and it is the denial to girl pupils of the benefit and facility of such interactions with boy pupils that constitutes both the detriment and less favourable treatment giving rise to unlawful discrimination; and the

same is true in relation to the mixing and social interaction between girl pupils, which is unlawfully denied to boy pupils.

56. Furthermore, we do not accept the School's argument that, whether looked at from an individual or group perspective, separate but equal treatment by reason of gender cannot be unlawful discrimination even if it is detrimental. The way Mr Oldham put it in the course of his submission was there cannot be unlawful discrimination if both the complainant and the comparator suffer the same detriment even if they would have been treated differently if they were a different sex. The following cases support the rejection of that argument, as does the general principle that the discrimination legislation should be given a wide and purposive interpretation rather than a narrow one: see, for example, *Jones v Tower Boot Co Ltd* [1997] IRCR 168 at [31].

57. *Smyth v Croft Inns Ltd* [1996] IRLR 84 was a Northern Ireland case, in which the Fair Employment Tribunal found that the applicant was unlawfully discriminated against by his employer on the ground of religious belief when he was constructively dismissed from his employment as a barman. The applicant was a Roman Catholic and was employed as a barman in a pub with Protestant customers in a "loyalist" area of Belfast. A message was delivered by a regular customer saying that the applicant should be advised not to be in the bar in the following week. The applicant having been told by the bar manager that he could stay or go, and the employers having done nothing else about the threat, the applicant resigned and successfully claimed constructive dismissal and discrimination on grounds of religious belief. The Northern Ireland Court of Appeal dismissed the appeal of the employers. Sir Brian Hutton LCJ, with whom the other members of the court agreed, gave the following example (at para [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 would not be guilty of religious discrimination because he did not treat either barman less favourably than the other. In my opinion the employer would be guilty of religious discrimination against both barmen. If the employer owned only one bar in a Protestant neighbourhood, patronised by Protestants, in which he employed two barmen, one a Roman Catholic and the other a Protestant, and he dismissed the Roman Catholic barman, telling him that his customers did not like being served by a Roman Catholic and that in future both his barmen would be Protestants, I consider it to be clear that the employer would be guilty of religious discrimination. His conduct cannot cease to be unlawful discrimination if, instead of owning only the one bar patronised by Protestants, he also owns a second bar in a Roman Catholic neighbourhood, patronised by

> Roman Catholics, in which he dismisses a Protestant barman."

58. *Gill v El Vino Co Ltd* [1983] 1 QB 423 is also instructive even if it was not, strictly speaking, a case of mirror treatment. The plaintiffs, who were both women, wanted to stand and drink at the bar in the defendants' wine bar but the barman refused to serve them and said that, if they sat at a table, the drinks would be brought to them. That was because only men were permitted to stand and drink at the bar. The Court of Appeal held that the plaintiffs were the victims of unlawful discrimination contrary to the Sex Discrimination Act 1975. As Griffiths LJ said: (at p. 431H).

> "But if a woman wishes to go to El Vino's, she is not allowed to join the throng before the bar. She must drink either at one of the two tables on the right of the entrance, or she must pass through the throng and drink in the smoking room at the back. There is no doubt whatever that she is refused facilities that are accorded to men, and the only question that remains is: is she being treated less favourably than men? I think that permits of only one answer: of course she is. She is not being allowed to drink where she may want to drink, namely standing up among the many people gathered in front of the bar. There are many reasons why she may want to do so. Her friends may be there. She may not want to break them up and force them to move to some other part of the premises where she is permitted to drink. Or she may wish, if she is a journalist, to join a group in the hope of picking up the gossip of the day. If male journalists are permitted to do it, why shouldn't she? If she is denied it she is being treated less favourably than her male colleagues."

59. Sir Roger Ormrod said as follows (at p. 432D-E):

> "The question posed by section 29(1)(a) of the Act of 1975 is unusually simple compared with most questions posed by statutes. We are enjoined simply to ask whether on this evidence the plaintiffs in this case were "treated less favourably" than a man or men would have been. To my mind, the fact that men have the three options which Griffiths L.J. has mentioned makes only one answer to that question possible. Men have these options and the options are valuable to them, and I find it impossible to say, where one sex has an option and the other has not, that there is not a differentiation between them and, prima facie, a differentiation which results in less favourable treatment."

60. The legal position would undoubtedly have been exactly the same if there had been a separate bar area for women only since women would still have been denied the opportunity to mix with the men for their social and professional advantage.

61. In *Ministry of Defence v Jeremiah* [1980] 1 QB 87 it was held that obliging men to undertake some particularly dirty work, for which they were paid extra, but not obliging

women to do so constituted unlawful discrimination in the work place contrary to the Sex Discrimination Act 1975. Brightman LJ said (at p.104E]:

> "I think a detriment exists if a reasonable worker would or might take the view that the duty was in all the circumstances to his detriment. It may be said that, on this interpretation of the Act, both a male worker and a female worker might complain about the same discrimination and that both might be right. I see no anomaly in such a result. The purpose of the legislation is to secure equal treatment of the sexes so far as appropriate."

62. The statutory scheme embodied in EA 2010 also supports the conclusion that separate but equal treatment may constitute unlawful discrimination, and it will do so (subject to statutory exceptions) if such treatment is based on gender and is more detrimental than it would have been but for that gender. Part 7 of Schedule 3 sets out exceptions to Part 3 of EA 2010, which deals with "Services and Public Functions". That Part does not apply in the present case (see s.28 (2) (a)) but it is relevant that the exceptions in paragraph 26 of Part 7 show that Parliament did have in mind that both separate but equal treatment as well as separate but different treatment could constitute unlawful discrimination. Paragraph 26 is as follows:

> (1) A person does not contravene section 29 [providing for non-discrimination in the provision of a service to the public or a section of the public], so far as relating to sex discrimination, by providing separate services for persons of each sex if-
>
> (a) a joint service for persons of both sexes would be less effective, and
>
> (b) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if-
>
> (a) a joint service for persons of both sexes would be less effective,
>
> (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the services otherwise than as a separate service provided differently for each sex, and
>
> (c) the limited provision is a proportionate means of achieving a legitimate aim."

63. The Explanatory Notes to EA 2010, which are admissible to illuminate the mischief at which the legislation is aimed (see *Flora (Tarlochan Singh) v Wakom (Heathrow) Ltd*

[2006] EWCA Civ 1103 at [15]-[17]), state that paragraph 26 "contains exceptions to the general prohibition of sex discrimination which allow the provision of separate services for men and women". The Notes give, by way of example of a situation falling within paragraph 26(1), the situation where a charity has set up separate hostels, one for homeless men and one for homeless women, where the hostels provide the same level of service to men and women because the level of need is the same but a unisex hostel would not be as effective. As with the School in the present case, this is an example of separate but equal treatment which, but for the exemption in paragraph 26, would be capable of constituting unlawful discrimination.

64. In *R(Coll) v Secretary of State for Justice* [2017] UKSC 40, [2017] 1 WLR 2093, the Supreme Court acknowledged the capacity of separate but equal treatment to be discriminatory and that paragraph 26 of Schedule 3 proceeds on the basis that, subject to the exception there specified, such treatment is unlawful discrimination. Baroness Hale, with whom all the other Justices agreed, said as follows:

> "34. This brings us, therefore, to paragraph 26 of Schedule 3 to the 2010 Act … . The history of the United States of America and of the Republic of South Africa, to take the two most obvious examples, has taught us to treat with great suspicion the claim that, if the races are segregated, "separate but equal" facilities can be provided for both, quite apart from the affront to dignity in the assumption that the races have to be kept separate. There have been periods in our own history where segregation of the sexes has led to separate facilities which were very far from equal. Paragraph 26 recognises that there may be good reasons for providing separate facilities for men and women. … [P]aragraph 26 proceeds on the assumption that, without it, the provision of single sex services would be unlawful discrimination. The question, therefore, is whether in this case the discriminatory effect of providing only single sex establishments can be justified.
>
> "35. [Counsel for the claimant] characterises paragraph 26(1) as providing for "separate but equal" facilities for men and women. This permits the provision of separate services for persons of each sex, provided that a joint service for both sexes would be "less effective" and the "limited provision is a proportionate means of achieving a legitimate aim". She characterises paragraph 26(2) as referring to "separate and different" services. It permits providing separate services differently for persons of each sex, provided that a joint service for both services would be "less effective", that "the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex", and that the "limited provision" is a "proportionate means of achieving a legitimate aim". She argues that "limited" must here mean "limited by sex". I agree, because there is nothing else that "the limited" can be referring back to, other than

providing separate services for each sex, whether equally or differently."

65. The decision of the Supreme Court in *Coll* came after the reserved judgment was handed down by the Judge in the present case, and so the Judge did not have the opportunity to consider it.

66. The School seeks to discount those comments of Baroness Hale by describing them as "a passing comment" made by Baroness Hale after she had already stated her conclusion that less favourable treatment was made out on the facts. The School also says that *Coll* is not authority for the proposition that it is not necessary to establish less favourable treatment in order to demonstrate a breach of EA 2010 s.13; Baroness Hale's judgment does not address the type of situation with which the present case is concerned, namely segregation in the same facility; the context was entirely different because Schedule 3 only provides exceptions to liability under Part 3 whereas the present case is concerned with discrimination under Part 6 of EA 2010; and, in any event, even as regards Part 3, the existence of paragraph 26 of Schedule 3 does not necessarily imply that the provision of separate services in a particular case would be direct discrimination since it might be indirect discrimination under EA 2010 s.19 or harassment under EA 2010 s.26.

67. We do not agree with any of those points. It is clear that Baroness Hale was making a general observation about the assumption underlying paragraph 26, and hence EA 2010 s.13, that the provision of single sex services is capable of amounting to unlawful discrimination. For the reasons we have already given, there is less favourable treatment in the present case because of the finding of Ofsted, which it was entitled to reach, that segregation has an adverse impact on the quality and effectiveness of the education given by the School to girl pupils and boy pupils respectively. The fact that *Coll* was, on its facts, concerned with men and women in separate facilities does not undermine the relevance of Baroness Hale's general observation about equal but separate treatment. Again, the fact that paragraph 26 of Schedule 3 provides an exception to Part 3 of EA 2010 does not undermine the relevance of Baroness Hale's general observation and does not undermine its significance in relation to equal but separate treatment under Part 6. It is consistent with other provisions in Schedule 3, Schedule 11 and elsewhere in EA 2010, which we address below, that, subject only to certain specified limited exceptions, separate but equal treatment is capable of amounting to an unlawful discrimination. Finally, we do not consider that paragraph 26 of Schedule 3 has anything to do with indirect discrimination under section 19 or harassment under section 26. As Mr Dan Squires QC, for the Commission, observed, paragraph 26 applies only where the limited provision specified there is a proportionate means of achieving a legitimate aim, but such means and aim are, in any event, a defence to indirect discrimination under section 19(2)(d). It is obvious that the limited exceptions in paragraph 26 have nothing whatever to do with the statutory provisions for harassment in section 26.

68. The legislative assumption that the provision of separate but equal treatment is capable of being unlawful discrimination within EA 2010 s.13(1) is also underscored by paragraph 27 of Schedule 3, which provides that a person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if certain specified conditions are satisfied and the limited provision is a

proportionate means of achieving a legitimate aim. Examples given in the Explanatory Notes include separate male and female wards to be provided in a hospital; separate male and female changing rooms to be provided in a department store; and a massage service to be provided to women only by a female muscle therapist with her own business operating in her clients' homes because she would feel uncomfortable massaging men in that environment.

69. The same assumption underlies paragraph 29 of Schedule 3, which provides that a minister of religion does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex or separate services for persons of each sex, if certain specified conditions are satisfied. The Explanatory Notes give the example of a synagogue having separate seating for men and women at a reception following a religious service.

70. Part 14 of EA 2010 contains general exceptions, including the provision in section 195(1) that a person does not contravene EA 2010, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity. Such an activity is defined in section 195(3) as a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage to average persons of the other sex as competitors in events involving the activity. Section 195(4) relates those provisions to children by providing that, when considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of a stage of development of children who are likely to be competitors. This too is an illustration of a limited exception for a particular type of separate but equal treatment in relation to children's activities.

71. Schedule 11 specifies exceptions to the provisions of chapter 1 of Part 6, which deals with schools and includes section 85: section 89(12). Schedule 11 does not contain an equivalent provision to paragraph 26 of Part 7. The clear inference, however, from the provisions of Schedule 11 is that Parliament did not envisage the kind of strict gender separation in a notionally co-educational school that is practised in the present case.

72. Paragraph 1 of Schedule 11 provides that section 85(1) (admissions), so far as relating to sex, does not apply in relation to a single–sex school. There is no general exception to the provisions of section 85(2). Schedule 11, however, expressly moderates the provisions of section 85(2)(a) to (d) in relation to those single-sex schools which admit a comparatively small number of pupils of the opposite sex, whose admission is confined to particular courses or classes. Paragraph 1(4) provides that, in the case of such a school, section 85(2)(a) to (d), so far as relating to sex, does not prohibit confining pupils of the same sex to particular courses or classes. The fact that Parliament did not consider it necessary to make any such exception in the case of a co-educational school is a powerful indication that it did not envisage or intend any such relaxation of section 85(2) in the case of such a school.

73. That inference is strongly reinforced by the examples in the Explanatory Notes of the operation of paragraph 1 of Schedule 11. They state that "a boys' school which admits girls to A-level science classes is not discriminating unlawfully if it refuses to admit them to A-level media studies or maths classes"; but, by contrast, "a boys' school which admits girls to the Sixth Form but refuses to let them use the same cafeteria or go on the

same visits as other Sixth Form pupils would be discriminating unlawfully against them". That is precisely analogous to what the notionally co-educational school does in the present case and it is striking that this is not even permitted in a single sex school where there are a limited number of children of the opposite sex.

74. Mr Oldham submitted that *Smith v Safeway plc* [1996] ICR 868 is clear and binding authority that different but equal treatment for reasons of sex cannot constitute unlawful discrimination unless those of one sex are treated less favourably than the other sex, and so the same is necessarily true where they are treated similarly. In that case, the applicant, a male delicatessen assistant, was dismissed by his employers because his hair, which he wore in a ponytail style, breached the employers' rules for male staff, which stipulated tidy hair not below collar length and no unconventional hair styles. The Court of Appeal held that he had not been discriminated against on the grounds of sex, contrary to the Sex Discrimination Act 1975, because he had not been treated less favourably than female staff who were allowed to have their hair long. Phillips LJ, with whom Peter Gibson LJ agreed, said as follows (at 876H-877A and 878B-D):

> "Discrimination is defined as being treated less favourably. In my judgment, this is plainly the meaning of discrimination in the Directive and the Act of 1975 fully reflects that Directive. In many instances discrimination between the sexes will result in treating one more favourably than the other, but this will not necessarily be the case. If discrimination is to be established, it is necessary to show not merely that the sexes are treated differently, but that the treatment accorded to one is less favourable than the treatment accorded to the other.
>
> …
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> As [counsel for the employers] has pointed out, a code which made identical provisions for men and women but which resulted in one or other having an unconventional appearance, would have an unfavourable impact on that sex being compelled to appear in an unconventional mode. Can there be any doubt that a code which required all employees to have 18-inch hair, earrings and lipstick, would treat men unfavourably by requiring them to adopt an appearance at odds with conventional standards? I put that question to [counsel for the applicant], and he accepted that such a requirement would operate unfavourably towards men. The reason for that is that the appropriate criterion to be applied when considering that question is: what is the conventional standard of appearance? Indeed, it seemed to me that [the applicant's counsel] implicitly conceded that when he submitted to us that what is discrimination can change as society changes. A code which applies conventional standards is one which, so far as the criterion of appearance is concerned, applies an even-handed approach between men and women and not one which is discriminatory."

75. Leggatt LJ said (at 881G):

> "Discrimination consists, not in failing to treat men and women the same, but in treating those of one sex less favourably than those of the other. That is what is meant by treating them equally. If men and women were all required to wear lipstick, it would be men who would be discriminated against. Provided that an employer's rules, taken as a whole, do not result in men being treated less favourably than women, or vice versa, there is room for current conventions to operate."

76. We do not consider that *Smith* is of any assistance on this appeal. As the Judge pointed out (at para [126]) the facts of that case are very different from those of the present case. They are so different, and the social context in which they arose was so different, that the observations quoted above cannot usefully be translated by analogy to the application of EA 2010 s.13 in conjunction with EA 2010 s.85(2) to the facts in the present case.

77. The same is equally true of *SG v Head Teacher & Governors of St Gregory's Catholic Science College* [2011] EWHC 1452, [2011] EqLR 859, which concerned a school's policy on hairstyles for boys, in which the judge held, following *Smith*, that there had been no unlawful sex discrimination. In any event, in the present case, for the reasons we have given, the School's policy of strict segregation does cause detriment and less favourable treatment for both girl pupils and boy pupils by reason of their respective sex.

78. The School contended before the Judge, and the Judge accepted, that EA 2010 s.13(5) provides support for the School's case that segregation on grounds other than race is not inherently discriminatory, although the Judge only considered that it provided "some modest support". Ofsted and the Secretary of State contend that section 13(5) provides no assistance to the School because it can be traced back to section 1(2) of the Race Relations Act 1968 ("RRA 1968") and they seek, if necessary, to rely on Hansard material suggesting that it was an avoidance of doubt provision and that is its function in EA 2010. The School maintains, on the other hand, that there is no ambiguity in the legislation and so reference to Hansard material is impermissible and, furthermore, EA 2010 is not a consolidating enactment but the creation of a new statutory code, and the only proper inference is that segregation, other than in the case of race, is not of itself inherently discriminatory. Reference was made to other material relating to the meaning, interpretation and significance of section 13(5).

79. The Judge appears to have accepted, and we consider it is clear, that section 13(5) can be traced back to RRA 1968 s.1(2) in which it was declared that, for the purposes of determining whether a person discriminates against another on the ground of colour, race or ethnic or national origins because he has treated that other less favourably than he treats or would treat other persons, segregating a person from other persons on any of those grounds is treating him less favourably than they are treated.

80. We do not consider that EA 2010 s.13(5) is of any material assistance in the present case. We do not find that there is discrimination in the present case merely because of the fact of segregation. So far as concerns the School, in the context of section 85(2), we find that the strict segregation by gender is a detriment which involves less favourable treatment because it diminishes the quality of education that the girl pupils

and the boy pupils would receive but for their respective sex. It is not the mere fact of segregation which gives rise to discrimination, as would be the situation under section 13(5) in the case of race, but rather it is the impact on the quality of education which the pupils would receive but for their respective sex.

81. It is common ground, and well-established by authority, that the motive for discrimination is irrelevant: the *JFS* case at [20], [35], [65]. There are certain exemptions from section 85(1) and (2) in Part 2 of Schedule 11 of EA 2010 relating to religion but they are not relied upon by the School in the present case. It is irrelevant, therefore, that in adhering to its strict policy of segregation of sexes the School is motivated by conscientious adherence to what it regards as the applicable tenets of Islam.

82. The same is also true of parental satisfaction with the School's policy and indeed the decision of parents to choose the school precisely because of its segregation policy. Mr Oldham drew attention to section 9 of the Education Act 1996, which provides that, in exercising or performing their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents. He also referred to section 86 of the School Standards and Framework Act 1998, which provides that a local authority shall make arrangements for enabling the parent of a child in the area of the authority to express a preference as to the school at which he wishes education to be provided for his child in the exercise of the authority's functions. Those provisions, however, and parental choice more generally plainly cannot negate the statutory right of a child to be educated in a non-discriminatory manner as required by EA 2010: compare *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246. In that connection, the following observation by Lord Hope in the *JFS* case, which concerned the admission policy of an oversubscribed voluntary aided Jewish school that gave priority to children recognised as Jewish according to the Office of the Chief Rabbi, is pertinent:

> "160. It is accepted on all sides in this case that it is entirely a matter for the Chief Rabbi to adjudicate on the principles of Orthodox Judaism. But the sphere within which those principles are being applied is that of an educational establishment whose activities are regulated by the law that the civil courts must administer. Underlying the case is a fundamental difference of opinion among members of the Jewish community about the propriety of the criteria that the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth … applies to determine whether a person is or is not Jewish. It is not for the court to adjudicate on the merits of that dispute. But the discrimination issue is an entirely different matter. However distasteful or offensive this may appear to be to some, it is an issue in an area regulated by a statute that must be faced up to. It must be resolved by applying the law laid down by Parliament according to the principles that have been developed by the civil courts."

83. Mr Oldham referred us to *Birmingham City Council v Equal Opportunities Commission* [1989] 1 AC 1155. That case concerned the discriminatory effect on girls of the

provision by Birmingham City Council of fewer single-sex grammar schools for them than for boys. Our attention was directed to passages in the leading speech of Lord Goff when rejecting the argument of the council that the discrimination claim could not succeed unless it was shown that selective education was better than non-selective education. He said (at p.1193H) that it was enough that, by denying the girls the same opportunity as the boys, the council was depriving them of a choice which was valued by them, or at least by their parents, and which (even though others might take a different view) was a choice obviously valued, on reasonable grounds, by many others. Mr Oldham made submissions on subjective and objective approaches to what is discriminatory by reference Lord Goff's speech, and he criticised the inspectors in the present case for taking into account views expressed by a very small number of pupils. We do not consider that the *Birmingham* case or those submissions assist the School on the very different facts and context of the present case. Insofar as the School requires permission to raise those points on this appeal, we refuse permission.

84. Mr Oldham devoted a considerable part of his submissions to what may broadly be described as complaints of process, procedure and fairness. Many of these are matters for which the School requires permission to appeal. They may be conveniently summarised under the following heads: (1) the revised June 2016 Inspection Report, which expressly referred to unlawful discrimination by reason of gender segregation, was only written after the commencement of these proceedings; (2) it does not reflect the understanding or reasoning of Ofsted; (3) the Commission only supported Ofsted's stance on that issue long after the proceedings had begun, and that stance was inconsistent with their previously published guidance - guidance to which the court is required to have regard; (4) there is inconsistency in the position taken by Ofsted, the Department for Education ("the DFE") and the Commission in several other respects: inconsistency in relation to acceptance of segregation generally in the past, inconsistency in relation to acceptance of segregation in the School itself in the past, inconsistency between the current criticism of segregation in the School and the lack of criticism of other schools similarly organised, and inconsistency in the various ways in which the current legal position has been presented by Ofsted and those supporting it; (5) if the appeal is successful, thousands of people, including pupils and parents, will be affected - without there being any hint of understanding by Ofsted, the DFE or the Commission of the consequences. Permission to appeal is required in respect of all those matters, other than inconsistency with previous reports by Ofsted on the School.

85. We do not consider that any of those points is properly capable of affecting the outcome of this appeal. Our reasons are as follows.

86. The School appears to contend that the revised June 2016 Inspection Report, and its allegation that the School's segregation policy was unlawful discrimination, should be ignored in determining the success or otherwise of these judicial review proceedings both because its contents, so far as concerns the complaint of unlawful discrimination, was not truly held by Ofsted and also because that complaint was an *ex post facto* attempt to legitimise an otherwise flawed report. The basis for that submission was, we understand, *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302.

87. That case concerned the homelessness obligations of a local housing authority under the Housing Act 1985. The council's homelessness officer wrote to the applicant, who had come from Greece, to inform him that the council did not accept the applicant's

explanation that he and his family had experienced threats and persecution in Greece and to notify him that it had been decided that the applicant had become homeless intentionally. The applicant applied for judicial review of the decision. The officer swore an affidavit explaining that the true reasons for his decision were not those expressed in the decision letter but rather that he was satisfied that it would have been reasonable for the applicant and his family to continue to occupy accommodation he rented in Greece. The Court of Appeal held that the decision of the housing authority should be quashed since the only reasons given for it were defective, in that they were not the true reasons, and it would not be right in all the circumstances to admit the subsequent evidence of the officer to give different reasons.

88. Hutchison LJ, who gave the leading judgment, with which the other judges agreed, expressed the general principle as follows (at p. 316(e)):

> "While it is true, as Schiemann J recognised in *Ex p Shield*, that judicial review is a discretionary remedy and that relief may be refused in cases where, even though the ground of challenge is made good, it is clear that on reconsideration the decision would be the same, I agree with Rose J's comments in *Ex p Carpenter* that, in cases where the reasons stated in the decision letter have been shown to be manifestly flawed, it should only be in very exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings. Accordingly, efforts to secure a discretionary refusal of relief by introducing evidence of true reasons significantly different from the stated reasons are unlikely to succeed."

89. Hutchison LJ accepted that the court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons given where, for example, an error has been made in transcription or expression or words inadvertently omitted, or where the language used may be in some way lacking in clarity. He said (at p. 315j) that such examples were "not intended to be exhaustive, but rather to reflect [his] view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction".

90. This principle does not assist the School in the present case. Mr McNeillie was the lead inspector at the June 2016 inspection. In his witness statement dated 12 September 2016 he explains that Lorna Fitzjohn, the Regional Director of Ofsted, informed him on 5 August 2016 that changes were proposed to the June 2016 Inspection Report. He says that he was not asked for his views, or invited to make any comment on the amended version of the Report since all Ofsted reports are subject to quality assurance and it is not unusual for changes to be made to a report before it is published and the lead inspector then informed about the changes. Mr McNeillie says that: "Although the changes made were not my words, I confirm that I support the changes made".

91. It is clear that, unlike the situation in *Ermakov*, the alterations made to the June 2016 Inspection Report in August 2016 were an elucidation of the original reasons and not the introduction of wholly new ones. The original Report contained statements that the School was inadequate because its leaders had failed to have due regard to the need to achieve equality of opportunity; the leaders' decision to segregate pupils by gender as

implemented at the School limited the opportunities for pupils' social development and the extent to which they were prepared for interaction with the opposite sex when they left school; some older pupils told inspectors that they were worried that being segregated by gender would mean that they would not be prepared well for life beyond school; the Board had not ensured that all steps had been taken to comply with its duty under EA 2010 to have due regard to the need to achieve equality of opportunity for pupils; leaders and members of the Board needed to comply fully with their duties under EA 2010.

92. The Judge concluded (at paras [39], [40] and [170]) that the changes were to add clarity and that HMCI had not participated in the decision making process. The Judge was entitled and right to reach those conclusions. We refuse permission to cross-appeal on this point.

93. Moving on to the issue of consistency, on the evidence before the Court the School is plainly correct to say that, prior to the revised June 2016 Inspection Report, neither Ofsted nor the DFE nor the Commission had publicly expressed the view that the kind of segregation carried on by the School was unlawful discrimination. That had not been expressed in Ofsted's reports of the School or in reports on inspections of other schools carrying on a similar practice or an in any issued guidance. Indeed, the June 2016 Inspection Report was amended to acknowledge that previous inspections of the School did not address the issue of segregation and that they were wrong not to do so. None of those matters assists the School in its claim for judicial review because it would have been a breach of Ofsted's duties to fail to report that the School was being operated in an unlawfully discriminatory manner.

94. Ofsted has a duty, in law and pursuant to its own policy, to assess a school's compliance with EA 2010 when carrying out an inspection. The Judge referred to the legal and policy framework relating to Ofsted in paragraphs [55] to [60] of his judgment. In summary, (1) EIA 2006 ss. 117(2) and 119(3) require Ofsted to carry out its functions having regard to the need to safeguard and promote the rights and welfare of children; (2) upon the conversion of the inspection of the School on 15 June 2016 to a section 5 inspection, Ofsted was required to consider the spiritual, moral, social and cultural development of pupils at the School; and (3) Ofsted's own policy guidance in "*The Common Inspection Framework: education, skills and early years*" (August 2015) and "*Ofsted's Equality Objectives 2016-2020*" (April 2016) required it to assess the extent to which a school complies with EA 2010.

95. Mr Oldham submitted that Ofsted is not concerned in this case with sex discrimination but that is simply unarguable insofar as such discrimination impinges on the rights and welfare of the pupils at the school. It is to be noted that Ofsted's obligation under EdA 2005 s.5(5B), when conducting a section 5 inspection, to report on the spiritual, moral, social and cultural development of pupils at the school dovetails with the duty placed on the governing bodies of maintained schools by section 78(1) of the Education Act 2002 to promote the spiritual, moral, cultural, mental and physical development of pupils at the school and of society.

96. Ofsted has made it clear that, if this appeal succeeds, it will apply a consistent approach to all similarly organised schools.

97. This also answers the School's criticism that, by acting inconsistently in the various respects mentioned above, Ofsted was in breach of the public sector equality duty in EA 2010 s.149 ("the PSED").

98. Mr Oldham said that, if the appeal succeeds, every parent and child of this and similarly segregated schools would have a claim against their School but we cannot see how this advances the legal argument as to whether such segregation is unlawful discrimination on the proper meaning and application of EA 2010 and, if it is, whether there should nevertheless be some relief, and, if so, what relief granted.

99. The same is also true of Mr Oldham's submissions that assurances given by the Secretary of State through her counsel, Mr Martin Chamberlain QC, that she would work with this and similarly segregated schools to regularise the position and would not immediately close them down are vague and uncertain; that they would not in any event bind the Charity Commission or prevent other local persons and institutions from taking judicial review proceedings; that no such assurances had been given by Ofsted or the Commission; and that conversion into one or more single sex schools is far from straightforward and the closure of this and other maintained schools would leave a shortage of school places.

100. Mr Oldham submitted that the PSED required Ofsted to give the School more time to adjust in the light of the unanticipated change in Ofsted's policy and approach; and, in any event, the Judge should have made a declaration that the finding of unlawful discrimination in the revised June 2016 Inspection Report was inconsistent with previous inspection reports. There is nothing in either of those points. As we have said, Ofsted was obliged to include in its Report its conclusion that the segregation policy constituted unlawful discrimination. What steps may be required to be taken to address the discrimination and within what timescale fall outside the present application for judicial review, the purpose of which is to quash the June 2016 Inspection Report and the revised June 2016 Inspection Report.

101. We consider, nevertheless, that there is a strong argument for the Secretary of State and Ofsted to recognise that, given the history of the matter, their failure (despite their expertise and responsibility for these matters) to identify the problem and the fact that they have *de facto* sanctioned and accepted a state of affairs which is unlawful, the schools affected should be given time to put their houses in order in the light of our conclusion that this is unlawful sex discrimination. The relevant central government authorities should not pivot in the way they have gone about this without recognising the real difficulties those affected will face as a consequence.

102. So far as concerns the suggested declaration, this is entirely unnecessary since the revised June 2016 Inspection Report itself makes clear (albeit in rather muted terms) that previous inspections of the School did not address the issue of the lawfulness of the School's segregation policy.

103. We refuse permission to appeal in respect of all those matters insofar as such permission is required.

Conclusion on Appeal Grounds 1, 2 and 3

104. For all those reasons, we allow the appeal on Appeal Grounds 1, 2 and 3.

Appeal Grounds 4 and 5

105. It is not necessary, in the circumstances, to address Appeal Grounds 4 and 5. We will do so, however, in deference to the arguments that were developed before us and because the court is divided on them.

106. Neither Appeal Ground 4 nor Appeal Ground 5 is supported by the Secretary of State or the Commission.

107. The essence of Appeal Ground 4 is that segregation at the School causes greater psychological harm to girl pupils because the female sex has the minority of power in society and that power imbalance will be reinforced in adulthood by the loss of opportunity for girls and boys to socialise with each other and to regard each other as equals. Rather than seeing each other as equals, both groups learn to perceive the separation between them as natural and members of the opposite sex as in some intangible but fundamental way as "different" or "other", with girls being perceived by the boys and the girls perceiving themselves as in some way inferior or otherwise relevantly different to boys in social and working contexts, with the likelihood that those perceptions will be carried into adulthood.

108. The Judge was right (in para [133]) to take judicial notice of the fact that women have been, and still are, the group with minority power in society. He was, however, correct to reject Ofsted's reliance on this ground. As we shall explain, while taking judicial notice of that fact as a generality was correct, to move from that to taking judicial notice of the particular proposition relied on by Ofsted in support of Appeal Ground 4 can be seen an example of moving from an indisputable fact to a disputable gloss, something which *Cross & Tapper on Evidence,* (12th ed., 2010, OUP) at 76 note 10) caution against.

109. What is asserted by Ofsted is that segregation at this particular School will perpetuate and reinforce in the minds of its pupils the notion that females are inferior to men in both a social and employment context since (to quote Appeal Ground 4) "those with a minority of power are socialised to be regarded by themselves and those with the majority of power, as relatively different in contexts where gender should be treated as irrelevant". The difficulty for Ofsted, as the Judge pointed out, is that these judicial review proceedings are directed at an Ofsted report which does not contain any such assertion.

110. Nor, as the Judge also pointed out, was there any evidence from expert educationalists to support the general proposition in Appeal Ground 4. Nor is there any evidence of the views and perceptions of the pupils about the status of girl pupils and women in society generally. Appeal Ground 4, as expressed in the written grounds of appeal, cannot succeed in those circumstances.

111. In her dissenting judgment on this ground of appeal Gloster LJ has concluded that, even though the revised 2016 Inspection Report does not say so, an objective inference can be drawn from the entirety of the evidence that the sex segregation in place at the School involved greater practical detriment for girls than for boys. That evidence

comprises (1) views expressed in books in the school library, (2) excerpts from work written by children at the School, and (3) the girl pupils having to wait one hour longer than the boy pupils for their break. None of that evidence was relied upon by Ofsted in its skeleton argument or oral submissions on this ground of appeal. That was because Appeal Ground 4 rests on a general proposition about the effect of sex segregation in a co-educational school in the context of society's treatment of women and not on a contention that the particular conduct of education at this particular school (other than the fact of segregation itself) might reinforce or create misogynist attitudes among the boy pupils towards the girl pupils. Gloster LJ also refers to "The Casey Review" but that too was not mentioned in Ofsted's skeleton argument or oral submissions on this ground of appeal. It formed part of the evidence on which the Third Interveners wished to rely but for which there was no permission. Accordingly, neither the School nor the Secretary of State nor the Commission has had the opportunity to address that analysis which has found favour with Gloster LJ or the Casey Review.

112. Ofsted contends that Appeal Grounds 4 and 5 are related, and what is important is their cumulative effect when considering the particular detriment suffered by girl pupils as a result of the segregation. For the reasons which we give below, however, there is no admissible evidential basis to support Appeal Ground 5 and so it adds nothing to Appeal Ground 4.

113. We would dismiss Appeal Ground 4.

114. Appeal Ground 5 is based on the notion of "expressive harm". In the context of the School, this means that 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 which serves to perpetuate a clear message about that status. Expressed in different language in Ofsted's skeleton argument, gender segregation in the School results in expressive harm to girls because, seen in its historical and social context (both in and outside the common–law world), it perpetuates – or, at the very least, risks perpetuating – stereotypes about girls and women that are still pervasive in society and which are widely recognised as detrimental and unduly limiting. To conclude that the systematic separation of girls and boys within a single establishment does not therefore disadvantage girls more than boys constitutes an error of law.

115. Pursuant to the order of Beatson LJ of 28 April 2017 the Third Interveners, Southall Black Sisters and Inspire, have served written submissions addressing this issue, with particular reference to BME women and Muslim women. Those written submissions refer to and rely upon the evidence in a witness statement of Pragna Patel, who is the founder of and director of Southall Black Sisters. No permission, however, was granted by Beatson LJ for such evidence. As we have said earlier, he directed that Southall Black Sisters and Inspire have permission to intervene by written submissions only. It appears that this limitation was not appreciated by them.

116. We agree with the Judge, for the reasons he gave, that this argument of OFSTED must fail.

117. Ms Mountfield referred in her skeleton argument and in her oral submissions to a large number of foreign cases in support of this ground of appeal. Those cases included the US cases *Brown v Board of Education* 247 US 483 (1954), *City of Richmond v JA Crosson Co* 448 US 469, *Mississippi University for Women v. Hogan* 458 U.S. 718 (1982) and *United States v. Virginia*, 518 U.S. 515 (1996), the South African case *Ministry of Home Affairs v Fourrie* (2005) Cases CCT 60/04, the Canadian cases *Halpern v Canada (Attorney General) 95 C.R.R. (2d) 1* (Ontario Superior Court, July 12, 2002) and *Canada v Moore* 1998 FCJ No. 1128, and the Israeli cases *Noar KeHalacha Association v Ministry of Education* [2009] IsrLR 84 and *Ragen et al v. Ministry of Transport* [2011] HCJ 746/07.

118. Those cases all turned on their particular facts, including the particular constitutional and statutory provisions in issue. They cannot, without more, simply be imported into our domestic jurisprudence to enable Ofsted to succeed on Appeal Ground 5. Indeed, Ms Mountfield accepted that.

119. The evidence was that the segregation was mandated by religious considerations. There was no evidence before the Judge that today's society as a whole or the Islamic community or the pupils at the School or their parents or any significant proportion of those groups regard segregation by sex as indicating by itself, whether by reinforcing an historic stereotype or otherwise, that the girl pupils or women are in some way inferior to or relevantly different from the boy pupils or men, especially in the context where there was no finding by Ofsted that the quality, scope and content of the education given to the boy pupils and the girl pupils were materially different. In that state of the evidence, there is nothing to contradict the School's case that the segregation had nothing to do with historic stereotyping or societal views about the status of girl pupils or women, and did not endorse, reflect or perpetuate any such matters, but was to do solely with religious reasons and objectively should and would be perceived in that light. It may be that such evidence of sex segregation endorsing, reflecting or perpetuating historic stereotyping and societal views about the status of girls and women could have been made available, but it was not.

120. Gloster LJ in her dissenting judgment on this ground of appeal has relied again on the evidence of what was found and took place at the School itself (library books, excerpts from the children's work and the girl pupils waiting later than the boy pupils for their break) but, again, this was not relied upon by Ofsted itself because Appeal Ground 5, like Appeal Ground 4, is directed to the stereotyping of girls and women in a general historic and societal context.

121. Gloster LJ also refers to the evidence of Ms Patel and quotes extensively from The Casey Review but both are evidence for which no permission was given. The Casey Report was not referred to by Ofsted in its oral submissions or its skeleton argument, and accordingly the School, the Secretary of State and the Commission had no reason or opportunity to address it. We do not accept that it would be right to circumvent those difficulties by the court taking judicial notice of the findings and conclusions in the Review. We observe that Jeremy Bentham qualified the conclusion in his *Rationale of Judicial Evidence* that a judge should be allowed "at the instance of either party to pronounce, and in the formation of the ground of the decision, assume, any alleged matter of fact as notorious" by making it subject to the right of the other party to deny

the notoriety and call for proof: see "*The Works of Jeremy Bentham", ed. Bowring, vol* vi (1843) book 1, chap. 12 at p. 277.

122. This is not to say that there may not be a discrimination case in the future in which the notion of expressive harm, as articulated in the submissions of the Southall Black Sisters and Inspire, might be relevant, important and supported by the necessary evidence. On the particular facts of the present case, however, we would dismiss Appeal Ground 5.

Conclusion

123. For all those reasons, we allow this appeal on Appeal Grounds 1, 2 and 3.

Lady Justice Gloster:

Introduction

124. I have read the judgment of the Master of the Rolls and Beatson LJ ("the majority") in draft. I agree with their conclusions and reasoning in relation to Appeal Grounds 1, 2 and 3 and the School's cross-appeal. I also concur with their reasons for dismissing the School's application to anonymise the appeal.

125. However, I do not agree with their conclusions in relation to those grounds which they have designated as Appeal Grounds 4 and 5[1]. This judgment sets out my reasons as to why I consider that the appeal should be allowed additionally, or alternatively, on those grounds. I use the same abbreviations as those contained in the majority judgment.

126. Many parents and educationalists believe that girls and boys respectively achieve better academic results if they are educated separately from pupils of the opposite sex, at least from, or up to, a certain age. Indeed, historically, the United Kingdom has had a tradition of educating children in single-sex schools. Schedule 11 preserves the ability for single-sex schools, as defined in paragraph 1 of the Schedule (for practical purposes a school which admits pupils of one sex only), to operate on the basis that they are exempt from the relevant provisions of section 85 of the EA 2010 in relation to sex and accordingly to admit and educate either only girls or only boys.

127. This case is not concerned with a single-sex school of that type, or with the perceived educational or social advantages, or disadvantages, of educating children in such schools. It is concerned with a co-educational school (to which the exemptions contained in Schedule 11 do not apply) which admits both girls and boys and educates them on the same site but which, from the age of nine, segregates them in all aspects of their school life, both educational and social, on grounds of sex. The evidence showed that, once pupils entered the school gates, there was no co-mingling of boy and girl pupils over the age of nine.

[1] In the appellant's skeleton argument these grounds were designated as grounds 3 and 4 respectively.

Ofsted's submissions and the judge's and the majority's conclusions in relation to them

128. Ofsted's submission in relation to both Appeal Grounds 4 and 5 was that, even if contrary to the submissions on Appeal Grounds 1, 2 and 3, it were to be held that "separate but equal" treatment was not direct discrimination, sex segregation in an educational context imposed a particular and greater level of harm on girls in comparison with boys. Thus, even on the hypothesis that some greater harm to one sex rather than the other was required in order to amount to less favourable treatment on grounds of sex, segregation on grounds of sex in a mixed sex school, unsupported by a section 158 or 195 reason, did result in a detriment which was of greater magnitude for girls than for boys.

129. I consider that this issue is of such importance that it requires to be determined, notwithstanding my agreement with the majority that, in any event, the School's policy of strict segregation unlawfully discriminated against both girl and boy pupils.

130. Ms Mountfield QC, on behalf of Ofsted, put forward what she submitted were two separate, but interrelated and cumulative, reasons to support her argument that sex segregation in a mixed sex school resulted in a greater detriment to girls than the boys. The first was what she defined as *the practical consequences* of segregation (Appeal Ground 4), and the second was what she referred to as the *symbolic consequences* or "*expressive harm*" (Appeal Ground 5). She made it clear that, although the judge considered these arguments in the alternative, and either would be sufficient for the appellant to succeed, their cumulative impact had to be taken into account, when determining the extent of the particular detriment suffered by female pupils as a result of the treatment.

Practical detriment

131. The thrust of Ofsted's argument in relation to the *practical consequences* of segregation was that because, as the Judge recognised[2], in general in today's society women have been and remain "the group with minority power in society" in terms of the distribution of wealth and influence, an educational system which preserves segregation between the sexes, so that both groups, from an impressionable age, find it more natural and comfortable to form exclusive and different social networks around working life only with those of their own sex, has the result that women lose out in later life more than men, because women are disproportionately excluded from networks of power and influence.

132. The Judge did not accept this submission. In rejecting it, he said as follows at paragraph 133 of his judgment:

> "133. The third submission [i.e. the submission in relation to the practical consequences] did not feature heavily in oral argument. Mr Oldham chose to ignore it, taking the view that the third and fourth submissions [i.e. the latter being the submission in relation to symbolic or expressive harm] are synonymous. I would tend to agree that there may not be

[2] At paragraph 133 of the judgment.

> 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[3].** 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."

133. The majority in this court likewise takes the view that there is no evidence to support the submission that the practical consequences of segregation in this case cause a greater detriment to girls rather than boys; see paragraph 107 above where they say:

> "That was not, however, a conclusion stated by Ofsted in the revised 2016 Inspection Report. As we have said earlier, Ofsted made no finding that the education of girls and boys, as separate groups, was any different in extent or quality."

Expressive harm

134. The essence of Ofsted's submission in relation to *expressive harm*, as articulated by the Judge in 134 of the judgment was as follows:

> "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."

[3] All bolded text in this judgment is my emphasis.

135. As Ms Mountfield put it in her written submissions, the underlying principle, as accepted by the judge at paragraphs 137–139, is that the historical and social context of an apparently neutral division based on a protected characteristic, such as race or sex, can invest that treatment with meaning that is not neutral. In support of her submission, that an expressive harm can amount to unlawful discrimination, even where the treatment is ostensibly "separate but equal", Ms Mountfield referred both the judge and this court to various overseas cases including *Brown v Board of Education,* 247 US 483 (1954), where the Supreme Court of the United States held that the provision of "separate but equal" facilities for black and white Americans was in fact inherently unequal, as it generated "a feeling of inferiority as to the status of [black Americans'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

136. Although the Judge described Ofsted's submission in relation to *expressive harm* as "sophisticated and compelling"[4], he ultimately rejected it on the grounds that sex segregation in this country does not have the same direct and institutional history as race segregation does in the United States, and on the basis that it is not, and has never been the practice, of the Government, and does not directly reflect the mores and attitudes of British society at large. He concluded:[5]

> "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.
>
> 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

[4] See paragraph 134.

[5] See paragraphs 140-142.

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[5]; 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."

137. The majority have come to a similar conclusion; see paragraphs 110-116 above. In particular, they agree with the Judge that there was no evidence of expressive harm to female pupils and that, accordingly, "in the absence of evidence as to expressive harm both generally and in relation to this particular School, this argument of the School must fail." They also conclude, in relation to Ms Mountfield's submissions based on the US and South African cases, that such cases all turned on their particular facts, including the particular constitutional and statutory provisions in issue and that they cannot, without more, simply be imported into our domestic jurisprudence to enable Ofsted to succeed on Appeal Ground 5.

Analysis and determination

138. Like the Judge, I have some difficulty in defining where the dividing line should be drawn as between *practical detriment or disadvantages* on the one hand and *expressive*

detriment on the other - in other words the difference between Ofsted's submissions under Appeal Ground 4 and Appeal Ground 5. I am not convinced that they are amenable to a distinct analysis. Subject to this caveat, I would have allowed Ofsted's appeal in relation to both grounds. My reasons may be shortly stated as follows.

Practical detriment

139. First, I do not agree with the majority, or with the Judge, that there was no evidence of greater *practical detriment*, or potential detriment, to girls, as opposed to boys, as a result of the regime of sex segregation in operation at the School. It is correct, as was accepted by Ofsted, that the June 2016 Inspection Report does not suggest that girl pupils receive a different, or qualitatively poorer, level of education than boys, or that the former achieved worse examination results or other educational outcomes than the boys. But, in my view, in order to judge the impact of the segregation regime, one has to assess its operation *in its actual context* in this particular school. And the picture disclosed in the evidence clearly demonstrates that the environment at the School, including, and underlined by, the segregation regime, had a real potential for exposing girls to greater detriment than the boys.

140. The evidence[6] showed the following:

i. The school library contained recently published books, freely available to any pupil in the library, including one that was prominently displayed on a display rack. The inspectors considered that these books were:

> "of grave concern not only because of the messages about the subjugation of women but because these are books that have been written in modern times, within our lifetimes, that contain rules and expectations of life in the modern world.[7]"

These books "included derogatory comments about, and the incitement of violence towards, women[8]". The inspectors also considered that the books contained "views, which were not consistent with a tolerant, respectful and equal society"[9] and "did not promote equality of opportunity because of the intolerant views about women[10]". These statements included the following:

> 'The Muslim Women's Handbook'. Huda Khattab (1993) …… included; *'The wife is not allowed to refuse sex to her husband'*(page 42).
>
> 'The Rights of Husband and Wife in Islam', Maulana Mufti Abdul Ghani (2009) included on page 34, 9 points in which obedience to husband is obligatory; *'she cannot go out of her husband's house without his permission and without a genuine excuse'*. Page 36 of the same text stated *'Right of beating the*

[6] This includes the three witness statements of James McNeillie, a Senior Her Majesty's Inspector in the West Midlands region of Ofsted, the exhibits to such statements and the June 2016 Inspection Report.
[7] See paragraph 33 of Mr McNeillie's second witness statement dated 25 August 2016.
[8] See page 3 of the June 2016 Inspection Report.
[9] Ibid.
[10] See paragraph 38 of Mr McNeillie's second witness statement.

> *woman: if for some reason he does not like to divorce, then he should be patient and continue to advise and he has also the right of intimating to her his right and in such cases the man by way of correction and as a punishment can also beat her, then beat her without causing any mark'.*
>
> 'Islamic Family Guidelines' by Aboo Ibraheem Abdul-Majeed Alee Hasan (1998) included; *'gives the husband the position of leadership over the family…The women have thus been commanded to obey their husbands and fulfil their domestic duties'.*
>
> 'The Laws of Marriage in Islam' by Sheikh Muhammad Rifat Uthman (1995) ……. and contains at page 82 *'not leaving the house without his permission'* and page 84, *'he can beat her but not harshly'.*

ii. Although the headteacher and some staff at the School had thought that inappropriate books had been removed from the library as a result of an earlier inspection, in fact that was not the case and a number of such books remained available.[11] That led the inspectors to conclude that [12]:

> "Leaders and governors are failing to keep pupils safe from the risks of extreme and intolerant views. They are failing to have due regard to the need to achieve equality of opportunity. They could do more to tackle prejudice and discrimination." and
>
> "The fact that these texts remain available suggests that some staff believe them to be acceptable. This is a serious failure of leadership and in example of where the school's published mission, aims and ethos of promoting equality and keeping pupils safe are not put into practice."

iii. Excerpts from work written by children and approved by the teachers showed highly gender stereotyped views being expressed within the school:

> "men's role was to work, women's role was to care for children, cook, clean and provide love"; "men should earn more as they have families to support" and "men are physically stronger and better at being engineers and builders"; "women are emotionally weaker"."

iv. The segregation regime involved the girls, invariably, waiting one hour longer than the boys for their break, so that the sexes would not mix socially.[13] There was no evidence to suggest that this regime was, for example, changed on alternative days of the week or on a weekly basis, so that the boys would on

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[11] See paragraphs 34 and 35 of Mr McNeillie's second witness statement.
[12] See page 3 of the June 2016 Inspection Report.
[13] See paragraph 38 of Mr McNeillie's second witness statement.

occasions have to wait for the girls to have their break period first. In discussion with pupils the inspectors identified that girls felt it was unfair that this was the case. To my mind this is not a trivial point, although it might appear so to some people. What possible justification could there be for always requiring girls to wait for their mid-morning snack until such time as the boys had finished theirs?

v. No educational justification was put forward to the inspectors by the School to support the segregation regime. Such justification as was provided, was said to be on grounds of "faith". The inspectors also found no evidence that school leaders had considered or addressed the issue of segregation or lack of equality of opportunity arising from such segregation.

141. In my judgment, although the June 2016 Inspection Report does not expressly say so, an objective inference can be drawn from the entirety of the evidence found by the inspectors and their conclusions, that the risks identified by them had at least the potential adversely to affect girls more than boys. One does not need to be an educationalist, a sociologist or a psychiatrist to conclude that a mixed sex school:

i. which, whether intentionally or otherwise, tolerates an environment where extreme and intolerant *contemporary* views about the role and physical subservience of women, and the entitlement of men physically to dominate and chastise them, are on display, or available to read, in the school library;

ii. whose teachers approve the expression by the pupils of gender stereotyped views about the roles of women as homemakers and child minders and the role of men as the breadwinners;

iii. where girls are always required to wait for an hour during the school day so that the boys can take a break first; and

iv. where no, or no sufficient, consideration is given to promoting equal opportunity,

is a school where a strict sex segregation policy subjects girls to a greater risk of extreme and intolerant views and is likely to reinforce or create misogynist attitudes amongst the boy pupils towards them. Support for this view, if needed, is to be found in *The Casey Review*[14] to which I refer in greater detail below.

142. For the above reasons, I would conclude that, on the specific evidence in this case, Ofsted has indeed demonstrated that the sex segregation regime in place at the School involved greater practical detriment for girls than for boys. Accordingly, I would have allowed Ofsted's appeal on this ground.

143. Second, I would also accept Ofsted's more conceptual argument under Appeal Ground 4, notwithstanding that in my view its logic merges with Appeal Ground 5 - *expressive detriment*. The argument under this head is not based on the specific facts of this case. Rather it is based on the proposition that, because, as the Judge (and indeed the majority) recognised[15], in general in today's society women have been and remain "the

[14] A report by Dame Louise Casey DBE CB published in December 2016 by the Department for Communities and Local Government: "*The Casey review: a Review into Opportunity and Integration*" (DCLG).
[15] At paragraph 133 of the judgment.

group with minority power in society" in terms of the distribution of wealth and influence, that means that strict segregation in a mixed sex school, where both girls and boys are educated on the same site, has a greater practical adverse impact on the girls than the boys.

144. Ms Mountfield's argument, in summary, is that, at an impressionable age, those with the minority of power are socialised to be regarded, by themselves and by those with the majority of power, as relevantly different in contexts where gender should be treated as irrelevant; and that creates a particular detriment for females as neither male nor female pupils are socialised to regard women as normal working and social companions for men, or "like them", in a society in which men still hold the significant majority of power. If men and women find it more natural and comfortable to form exclusive and different social networks around working life only with those of their own sex, women lose out more than men, because women are disproportionately excluded from networks of power and influence in later life.

145. I accept these arguments, nebulous as they might appear to be at first sight. In my judgment, once the principle is accepted, as it was by the Judge (and the majority in this court), that, as a generality, men exercise more influence and power in society than women, and that persistent gender inequalities remain in the employment market,[16] evidence is not required to establish that an educational system, which promotes segregation in a situation where girls are not allowed to mix with boys or to be educated alongside them, notwithstanding they are studying the same curriculum and spending their days on the same single school site, is bound to endorse traditional gender stereotypes that preserve male power, influence and economic dominance. And the impact of that is inevitably greater on women than on men. One does not need to have been educated at a women's college at a co-educational university, at a time when women were still prohibited from being members of all-male colleges, to take judicial notice of the career opportunities which women are even today denied, simply because they are prevented from participating in hierarchical male networking groups, whether in the social, educational or employment environment.

Expressive harm

146. I turn now to consider Ms Mountfield's argument in relation to *expressive harm*, which she presented as a cumulative argument in addition to her argument in relation to *practical detriment.*

147. Her argument is that such segregation, viewed in the historical and social context of English perspectives as to the inferiority of the female sex, not only has a practical adverse effect on women, but will also perpetuate and reinforce in the minds of its pupils the notion that females are *inferior* to men in both a social and employment context, despite the fact that they are following the same curriculum or doing the same job. She argues, by analogy with authorities from the United States and other jurisdictions[17], that, irrespective of the subjective intention of those adopting the policy, segregation based upon gender stigmatises women in an unfavourable way, and sends out the message that women are less worthy or somehow "different" from men. She also submitted by reference to the comparative jurisprudence that expressive harm falls

[16] See e.g. pages 104-5 of "*The Casey review*".
[17] *Brown v Board of Education*, 247 US 483 (1954).

to be considered even where the message promulgated may be more equivocal; thus "[c]lassifications based upon race carry a *danger* of stigmatic harm", meaning "unless they are reserved for remedial settings, they *may* in fact promote notions of racial inferiority" (her emphasis added).[18]

148. Ms Mountfield did not seek to argue that faith schools in general, or Islamic schools in particular, segregated the sexes because they regarded females as inferior or took the view that the girls should be separately prepared for a lesser role in society. Thus she did not suggest in this court (and indeed had not done so below) that the School agrees with, is motivated by, or seeks to perpetuate any message – religious or otherwise – that "denigrates or deprecates" women, or considers them "inferior". Rather, she submitted that treatment which so unequivocally and systematically marks out boys and girls as separate and different will – or is at least liable to – strengthen stereotypical and detrimental perceptions of girls' and women's character, capacity, role or place; the fact that the intention was not malign; or even that it was benign (to satisfy the religious preferences of some parents) was irrelevant for the purposes of section 13 of the Equality Act. It was for the legislature, if it so wished, to make such policy-based exceptions to general principles of non-discrimination: see *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 AC 728 at §70 per Baroness Hale. As the Judge said, Ms Mountfield tethered her submissions to "society as a whole".

149. However, the third interveners, Southall Black Sisters ("SBS"), a leading organisation for black and minority women, and Inspire, a non-governmental counter-extremism and women's rights organisation focusing on the influence of Islamic extremism in the UK and its impact on Muslim women and girls, argued that

> "gender segregation within mixed sex Muslim faith schools is driven by illiberal cultural norms which locate responsibility for the maintenance of collective purity in women, both curtailing their freedom in order to pursue that end and simultaneously blaming them for male sexual incontinence. The cost to South Asian women is severe: [Ms Patel's] Witness Statement details the abuse disproportionately suffered by them and their disproportionately high vulnerability to suicide."

150. They seek to rely upon the evidence of Ms Pragna Patel, a director of SBS, Their skeleton argument, submitted on their behalf by Ms Karon Monaghan QC and Ms Aileen McColgan, refers to Ms Patel's statement which sets out how illiberal/ fundamentalist interpretations of Islam have increasingly come to the fore in recent years and that the emphasis on gender segregation in schools, as well as universities and elsewhere, is strongly associated with this trend. They rely on Ms Patel's explanation as to how gender segregation results from, and in turn reinforces, cultural and religious norms. They point to her view that the support of violence against women and gender stereotyping, as demonstrated in the publications and pupils' work found in the School, are mainstays of ultra-conservative and fundamentalist approaches to Islam in which control of women and, ultimately, the removal of women from the public sphere and their relegation to the private sphere, is key. They conclude by submitting that:

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[18] See per the United States Supreme Court in *City of Richmond v JA Crosson Co* 448 US 469, 493.

> "The gendered norms which are at issue here do not fall with equivalent weight on men and women, but are concerned to keep women out of the public space. Importantly, they result in the exclusion of women, their viewpoints and voices, from public life, which then has implications for how those communities conceptualise and press their interests."

In other words, by their evidence and submissions, the third interveners support the appellants' submissions in relation to practical detriment and expressive harm, but additionally seek to do so by reference to the particular context of a Muslim faith school.

151. At paragraph 39 of his judgment, the Judge accepted in principle that, by analogy with the approach taken by the United States Supreme Court in *Brown*, perpetuating notions about the inferiority of women could be regarded as being "in effect the same factor which constitutes less favourable treatment and "detriment" for the purposes of section 13 of the Equality Act." I agree that, if segregation on grounds of race or sex can be shown to perpetuate notions of the inferiority of one race or one gender, such segregation can indeed be regarded as discrimination because of a protected characteristic within section 13 of the Equality Act. The fact that there has been no reported judgment to date on expressive harm in domestic law does not concern me. The authorities clearly recognise that: although some people regard sex discrimination as trivial, it is not perceived as trivial by those concerned; that discrimination can have a severe negative psychological effect on the individual involved; and that discrimination violates a person's dignity and self-esteem as a human being, may damage social cohesion, and is "the reverse of the rational behaviour we now expect of government and the state": see e.g. per Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at §§131-132; and per Arden LJ in *R (Elias) v Defence Secretary* [2006] 1 WLR 3213 at §§269-271.

152. The Judge's reasons for rejecting Ofsted's argument on expressive harm are not, in my view, sustainable.

153. I disagree with the Judge, and with the majority, that there is a lack of evidence in the present case to support the appellant's arguments in relation to expressive harm. Evidence is not needed to inform the court of the historic, and indeed recent and continuing, struggles of women for equal rights, equal opportunities and equal pay in UK society. The fact that "the UK government does not routinely, still less compulsorily, segregate on the grounds of sex in public education" nor "have a policy on this issue", or that segregation "cannot be envisaged as any reflection of the mores and attitudes of wider society", factors upon which the judge relied[19], are comments which appear to me to be wholly beside the point. As Ms Mountfield cogently submitted, "protected characteristics are protected because they all have long histories in which one group has been regarded as fundamentally different or inferior in ways which the law today recognises are unjustified and unacceptable but which (the Court can take judicial notice) persist in power imbalances which continue to exist across society at large". One cannot shut one's eyes to the objective reality that, whatever the good intentions of government and equality legislation, stereotypical attitudes to girls and women, to their role in the family and in society and as to their ability, or

[19] See paragraphs 141 and 142 of the judgment.

entitlement, to command equality of opportunity and pay in the marketplace remain current in certain sections of UK society today. In those circumstances, in my judgment, the segregation by sex on a mixed sex educational campus necessarily endorses and perpetuates, or at the very least risks endorsing and perpetuating, stereotypes about girls and women that are still pervasive in society and which are widely recognised as detrimental and unduly limiting. And that in turn results in expressive harm to girls.

154. The fact that expressive harm caused as a result of segregation on grounds of race in an educational context would be both more obvious and more severe than the expressive harm caused by sex segregation, is not a reason for rejecting the appellant's argument in relation to segregation on grounds of sex, as the judge seemed to have thought.

155. The Judge's second reason for rejecting the appellant's argument that segregation on grounds of sex "generates a feeling of inferiority as to the status of the female gender in the community" was the absence of what he referred to as any "supporting evidence" from either the parents or the girls themselves in circumstances where the parents had positively elected to send their daughters to such a school. Although he referred to comments from some of the girls (complaining that segregation was unfair), he relied upon the fact that none of them suggested that it made girls feel or appear to be inferior.

156. Again, in my judgment, the absence of such evidence in relation to expressive harm is irrelevant. The issue has to be approached by the courts objectively, by reference to the principles and standards of British democracy. Apart from the fact that religious or culturally motivated choices made by parents in connection with their children's education may not be in the latter's best interests, Parliament is entitled to decide what amounts to discrimination or other breach of a child's human rights, irrespective of the views of the child's parents, albeit paying appropriate regard to the latter's beliefs. This was judicially recognised in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 - the case in relation to the universal statutory ban on corporal punishment in schools, which was opposed by certain parents and teachers at independent schools.

157. Likewise, the absence of any clear views from the girls at the school themselves that they felt inferior as a result of the practice of segregation is also in my view irrelevant, even on the assumption that such views could reliably be ascertained from adolescent children.

158. An instructive case in this context is *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100. In that case the House of Lords allowed the appeal of a school against a decision of the Court of Appeal that it had breached the Article 9 rights of the claimant, a Muslim pupil, by refusing to allow her to wear a jilbab (a long coat-like garment which effectively concealed the shape of the female body and which was considered to represent stricter adherence to the tenets of the Muslim faith). The school's uniform policy permitted pupils to wear headscarves and shalwar kameeze but the claimant argued that her religious views required her to wear the jilbab. Lord Bingham, with whom Lord Nicholls agreed, made reference in his speech to concerns expressed by staff and some parents that the acceptance of the jilbab as a permissible variant of the school uniform would lead to undesirable differentiation between Muslim groups according to the strictness of their views (§18). Lord Hoffmann, with whom Lord Nicholls also agreed, referred with approval to the finding below that the uniform policy was aimed at protecting the rights and freedoms of the

"not insignificant number of Muslim female pupils at Denbigh High School who do not wish to wear the jilbab and either do, or will, feel pressure on them either from inside or outside the school" (§58, see too Lord Bingham at §18).

159. Most significantly, for present purposes, is the speech of Baroness Hale. Because of its importance to the present case, I quote the relevant paragraphs in full:

> "92. I too agree that this appeal should be allowed. Most of your lordships take the view that Shabina Begum's right to manifest her religion was not infringed because she had chosen to attend this school knowing full well what the school uniform was. It was she who had changed her mind about what her religion required of her, rather than the school which had changed its policy. I am uneasy about this. The reality is that the choice of secondary school is usually made by parents or guardians rather than by the child herself. The child is on the brink of, but has not yet reached, adolescence. She may have views but they are unlikely to be decisive. More importantly, she has not yet reached the critical stage in her development where this particular choice may matter to her.
>
> 93. ……..The fact that they are not yet fully adult may help to justify interference with the choices they have made. It cannot be assumed, as it can with adults, that these choices are the product of a fully developed individual autonomy. But it may still count as an interference. I am therefore inclined to agree with my noble and learned friend, Lord Nicholls of Birkenhead, that there was an interference with Shabina Begum's right to manifest her religion.
>
> 94. However, I am in no doubt that that interference was justified. It had the legitimate aim of protecting the rights and freedoms of others. The question is whether it was proportionate to that aim. This is a more difficult and delicate question in this case than it would be in the case of many similar manifestations of religious belief. If a Sikh man wears a turban or a Jewish man a yamoulka, we can readily assume that it was his free choice to adopt the dress dictated by the teachings of his religion. I would make the same assumption about an adult Muslim woman who chooses to wear the Islamic headscarf. There are many reasons why she might wish to do this. As Yasmin Alibhai-Brown (*WHO do WE THINK we ARE?,* (2000), p 246) explains:
>
> "What critics of Islam fail to understand is that when they see a young woman in a *hijab* she may have chosen the garment as a mark of her defiant political identity and also as a way of regaining control over her body."

Bhikhu Parekh makes the same point (in "A Varied Moral World, A Response to Susan Okin's 'Is Multiculturalism Bad for Women'", *Boston Review,* October/November 1997):

"In France and the Netherlands several Muslim girls freely wore the hijab (headscarf), partly to reassure their conservative parents that they would not be corrupted by the public culture of the school, and partly to reshape the latter by indicating to white boys how they wished to be treated. The hijab in their case was a highly complex autonomous act intended to use the resources of the tradition both to change and to preserve it."

…...

95. **But it must be the woman's choice, not something imposed upon her by others. It is quite clear from the evidence in this case that there are different views in different communities about what is required of a Muslim woman who leaves the privacy of her home and family and goes out into the public world. There is also a view that the more extreme requirements are imposed as much for political and social as for religious reasons. If this is so, it is not a uniquely Muslim phenomenon. The Parekh Report on *The Future of Multi-Ethnic Britain* (Runnymede Trust, 2000, at pp 236-237, para 17.3), for example, points out that:**

"In all traditions, religious claims and rituals may be used to legitimise power structures rather than to promote ethical principles, and may foster bigotry, sectarianism and fundamentalism. Notoriously, religion often accepts and gives its blessing to gender inequalities."

Gita Saghal and Nira Yuval-Davis, discussing "Fundamentalism, Multiculturalism and Women in Britain" (in *Refusing Holy Orders, Women and Fundamentalism in Britain*, (2000), p 14) argue that the effect of and on women is

". . . central to the project of fundamentalism, which attempts to impose its own unitary religious definition on the grouping and its symbolic order. The 'proper' behaviour of women is used to signify the difference between those who belong and those who do not; women are also seen as the 'cultural carriers' of the grouping, who transmit group culture to the future generation; and proper control in terms of marriage and divorce ensures that children who are born to those women are within the boundaries of the collectivity, not only biologically but also symbolically."

According to this view, strict dress codes may be imposed upon women, not for their own sake but to serve the ends of

others. Hence they may be denied equal freedom to choose for themselves. They may also be denied equal treatment. A dress code which requires women to conceal all but their face and hands, while leaving men much freer to decide what they will wear, does not treat them equally. Although a different issue from seclusion, the assumption may be that women will play their part in the private domestic sphere while men will play theirs in the public world. Of course, from a woman's point of view, this may be a safer and more comfortable place to be. Gita Saghal and Nira Yuval Davis go on to point out that, at p 15:

"One of the paradoxes . . . is the fact that women collude, seek comfort, and even at times gain a sense of empowerment within the spaces allocated to them by fundamentalist movements."

96. If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticise or prevent her. Judge Tulkens, in *Sahin v Turkey*, at p 46, draws the analogy with freedom of speech. The European Court of Human Rights has never accepted that interference with the right of freedom of expression is justified by the fact that the ideas expressed may offend someone. Likewise, the sight of a woman in full purdah may offend some people, and especially those western feminists who believe that it is a symbol of her oppression, but that could not be a good reason for prohibiting her from wearing it.

97. **But schools are different. Their task is to educate the young from all the many and diverse families and communities in this country in accordance with the national curriculum. Their task is to help all of their pupils achieve their full potential. This includes growing up to play whatever part they choose in the society in which they are living. The school's task is also to promote the ability of people of diverse races, religions and cultures to live together in harmony. Fostering a sense of community and cohesion within the school is an important part of that. A uniform dress code can play its role in smoothing over ethnic, religious and social divisions. But it does more than that. Like it or not, this is a society committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law. Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them.** This particular school is a good school: that, it appears, is one reason why Shabina

Begum wanted to stay there. It is also a mixed school. That was what led to the difficulty. It would not have arisen in a girls' school with an all-female staff.

98. In deciding how far to go in accommodating religious requirements within its dress code, such a school has to accommodate some complex considerations. These are helpfully explained by Professor Frances Radnay in "Culture, Religion and Gender" [2003] 1 International Journal of Constitutional Law 663:

". . . genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialised according to the implications of veiling while still attending public educational institutions. . . . A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also, for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women's and girls' rights to equality and freedom . . . On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions. In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends upon the balance between these two conflicting policy priorities in a specific social environment."

It seems to me that that was exactly what this school was trying to do when it devised the school uniform policy to suit the social conditions in that school, in that town, and at that time. Its requirements are clearly set out by my noble and learned friend, Lord Scott of Foscote, in para 76 of his opinion. Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shalwar kameez, and by allowing those who wished to do so to wear the hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed their concern that if the jilbab were to be allowed they would face pressure to adopt it even though they do not wish to do so. Here is the evidence to support the justification which Judge Tulkens found lacking in the *Sahin* case.

> 99. In agreement with your lordships, therefore, I would allow this appeal and restore the order of the trial judge."

160. Taking into account the points made by Baroness Hale in the passage I have quoted, I conclude:

    i. Evidence as to the parents' wishes as to the desirability (or otherwise) of segregation was irrelevant as to whether segregation in the School was in fact discriminatory on the grounds that it caused expressive harm.

    ii. Evidence from the girls themselves was not necessary to demonstrate expressive harm arising from the sex segregation policy at the School. They were likely to be under the influence of their parents or otherwise in a position where they could hardly demonstrate a free adult choice.

    iii. In any event, what mattered was whether the regime in the School itself, assessed on an objective basis, resulted in the girls being subjected to stigmatic harm.

161. The third reason which the judge gave was that Ofsted's argument would only have been 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."[20]

Because neither Ofsted itself in its report, nor Ms Mountfield, made such an argument specifically directed at faith schools, and Muslim schools in particular, the judge rejected Ms Mountfield's arguments on expressive harm.

162. Again, I do not consider that it was necessary for Ofsted to have adduced evidence showing that:

> "Islamic schools in particular, segregate the sexes because they regard the female gender as inferior"

in order to have shown expressive harm. The subjective views of the School, or its motivation, in imposing segregation are irrelevant. What is relevant is an objective assessment of *the impact of segregation* on these girl pupils, not only generally but also in the context of a school in relation to which the evidence showed a disrespectful, and non-accepting, attitude to the equal position of women in the home and society.

163. Whether one looks at the outcome generally from the perspective of the education of girls in modern British society, or whether one focuses more specifically on the fact that this was a faith school, I agree with Ms Mountfield that segregation in the case of this ostensibly mixed sex school, especially one where the sexes were mixed for the first five years, clearly conveys the pejorative message that the segregation of girls from boys endorses a particular role for girls in the family and in society.

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[20] See paragraph 144 of the judgment.

164. This was a school where (applying the language used in Baroness Hale's speech in *R (Begum)* or in the reports to which she referred) the School's mandatory policy of imposing strict sex segregation did not provide "a crucial [or indeed any] opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families" or any "message that the benefits of state education are tied to the obligation to respect women's and girls' rights to equality and freedom . . .". The School's segregation regime did nothing to enable or support "[y]oung girls from ethnic, cultural or religious minorities growing up here" to "face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture" or to "grow…… up to play whatever part they choose in the society in which they are living."

165. In my judgment, it is not difficult to conclude that in such circumstances, and against the background of the past history and current reality of gender relations, not only generally in UK society, but also in the cultural and community context of this particular School, segregation on grounds of sex necessarily endorses gender stereotypes about the inferiority of women or their perceived place in a society where predominantly men exercise power. Parliament has clearly decided that in the context of mixed sex schools (as opposed to the exceptions in relation to admissions for single sex schools contained in Schedule 11 of the Equality Act) discrimination on grounds of sex is not permissible save for very limited exceptions not relevant here. Accordingly, the result is that, whether taken alone or (especially) in conjunction with the practical consequences identified above, sex segregation at the School does indeed impose on girls a detriment which is greater in magnitude than that suffered by boys. Thus, to the extent that such a differential detriment is required for less favourable treatment, in my judgment it is present in this case.

166. However, I would also accept the submissions of the third interveners that the effect of gender segregation, in the specific context of this Muslim school, is not gender neutral. In coming to this conclusion, I have not had to rely on the evidence (as opposed to the submissions), of Ms Pragna Patel, assisted by the views of Sarah Khan, a director of Inspire, instructive as I found such evidence to be. Both women have considerable experience in addressing gender inequality in BME communities. No doubt because their evidence was not available below, Beatson LJ did not consider it appropriate to grant permission for such evidence to be relied upon on the appeal before us, notwithstanding that the application of the third interveners specifically sought permission to rely upon such evidence.

167. However, I see no reason why this court cannot take judicial notice of the findings and conclusions in the report by Dame Louise Casey DBE CB published in December 2016 by the Department for Communities and Local Government: "*The Casey review: a Review into Opportunity and Integration" (DCLG)*, which was referred to in such evidence, in much the same way that Baroness Hale in *R (Begum) v Headteacher and Governors of Denbigh High School* had regard to: *The Parekh Report on The Future of Multi-Ethnic Britain*; in that it Gita Saghal and Nira Yuval-Davis, *"Fundamentalism, Multiculturalism and Women in Britain"*; and Professor Frances Radnay in *"Culture, Religion and Gender"*.

168. The remit of *The Casey review* was to investigate integration and opportunity in isolated and deprived communities. Her conclusions included the following[21]:

> "Black boys still not getting jobs, white working class kids on free school meals still doing badly in our education system, **Muslim girls getting good grades at school but no decent employment opportunities**; these remain absolutely vital problems to tackle and get right to improve our society.
>
> But I also found other, equally worrying things including high levels of social and economic isolation in some places and **cultural and religious practices in communities that are not only holding some of our citizens back but run contrary to British values and sometimes our laws. Time and time again I found it was women and children who were the targets of these regressive practices.** And too often, leaders and institutions were not doing enough to stand up against them and protect those who were vulnerable."

In its chapter on "Inequality and harm" *The Casey review* states, inter-alia:

> "7.3. **Our analysis in earlier chapters of this report on social and economic integration has thrown up some worrying indications of inequality and harm which should be of significant concern in 21st Century Britain**. These concerns have been reinforced by people we have heard from during the review – in visits and meetings, and in written submissions – and in events that occurred as we conducted the review. This chapter reflects what we have seen and heard.
>
> 7.4. The causes of inequality vary and can be both internal and external to the communities in which they are suffered. Common traits which we observed were that they:
>
> - **often affect women – but have a knock-on, negative impact on children and the wider community;**
>
> - ……
>
> - in some cases are directly harming children;
>
> - ……
>
> - can also feed division, suspicion, fear, prejudice and hatred between communities and be exploited by extremists, pushing people further away from mainstream society and creating a vicious cycle; and

[21] See page 5.

• may be described, excused and all too often ignored or 'swept under the carpet' as cultural or religious practices. The causes of inequality vary and can be both internal and external to the communities in which they are suffered.

……

7.17. **Throughout our review we have encountered countless examples of abuse and unequal treatment of women enacted in the name of cultural or religious values, or as a reaction to those values:**

• Islamophobic hate crime attacks, discussed later in this report, can be disproportionately targeted at women. This appears to relate to more visible and identifiable forms of cultural dress, such as wearing a hijab, veil, niqab or burkha.

• Pressure from families or wider communities to marry against one's will, posters being put up instructing women to only walk on one side of the road, and preferred dress codes issued for parents.

• Mosques and Islamic organisations offering regressive advice about the behaviours expected of Muslim women and girls – including not being allowed to travel more than 48 miles from home without their husband or male chaperone, or not being able to wear jeans – despite noted Islamic theologians dismissing such advice as inappropriate.

• The segregation of women and men in mosques is common but has also been found by Ofsted in independent Muslim and Orthodox Jewish faith schools and reported in wider non-religious community meetings, including meetings of political parties and in universities.

• Several ethnic and faith minority women's groups told us of a misogynistic culture that prevails in their communities, with women disempowered and treated as second-class citizens, and with the abusive and controlling behaviour of men often reinforced by their mothers, by religious leaders and through religious councils or courts.

169. The submissions of the third interveners, the evidence in relation to the School itself to which I have referred above, together with the findings in *The Casey review,* support my conclusion that gender segregation in a Muslim faith school such as the School does not have a neutral impact on boys and girls.

170. For all the above reasons, I conclude that segregation on grounds of sex in the School is not only discriminatory against both boys and girls, but also is particularly discriminatory against girls in that it reinforces "the different spaces - private and public

- that men and women must occupy, and their respective stereotyped roles which accord them differential and unequal status[22]" in accordance with the precepts and practices of certain Muslim communities. That, in my view, amounts to both practical and expressive detriment within section 13 of the Equality Act.

171. As Baroness Hale said in *R (Begum),* if an adult woman freely chooses to adopt such a way of life for herself, it is not for others who have chosen differently to criticise or prevent her. But before a girl has reached adulthood, any school she attends[23] has an obligation to enable and support her to make free and informed choices, as to the role she wishes to undertake as an adult in a democratic British society, whether it be in the workplace or in the home[24]. Such choices may well reflect her cultural, religious and community background - but they should not be predicated by it. And segregation on grounds of sex in a mixed sex school does just that.

Disposition

172. For the above reasons, I would additionally have allowed the appeal in respect of Appeal Grounds 4 and 5.

………………………………………………………………………………………

APPENDIX 1

EA 2010

"13. Direct discrimination

(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."

"23. Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."

[Section 4 provides that sex is a "protected characteristic"]

"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.

[22] See paragraph 14 of the submissions of the third interveners.

[23] See per Baroness Hale in paragraph 97 of *R(Begum).*

[24] See ibid.

(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."

"149 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."

EA 2010 s.158 permits the taking of positive action in relation to those who are reasonably thought to suffer a particular disadvantage.

EA 2010 s.195 permits the taking of steps which would otherwise be discriminatory in the context of sporting activities, including those relating to children.

EA 2010 Schedule 11 disapplies section 85(1) in relation to single-sex schools. It does not disapply sub-section (2).

……………………………………………………………………………………

APPENDIX 2

Part I of the Education Act 2005 ("EdA 2005") deals with inspections of schools. EdA 2005 contemplates two types of inspection: those under section 5 ("section 5 inspection") , and those under section 8 ("section 8 inspection").

Section 5(1) provides:

"(1) It is the duty of the [HMCI] —

> (a) to inspect under this section every school in England to which this section applies, at such intervals as may be prescribed, and
>
> (b) When the inspection has been completed, to make a report of the inspection in writing."

Pursuant to subsection (2), this duty applies to foundation schools such as the School.

EdA 2005 s.5(5) provides that it is the general duty of HMCI, when conducting a section 5 inspection, to report on the quality of the education provided in the school. Subsection (5A) requires HMCI's report under section 5 to cover the following: (a) the achievement of pupils at the school, (b) the quality of teaching in the school, (c) the quality of the leadership in and management of the school, and (d) the behaviour and safety of pupils at the school. Subsection (5B) requires HMCI to consider when reporting under subsection (5), among other things, "the spiritual, moral, social and cultural development of pupils at the school".

EdA 2005 s.8(1) requires HMCI to inspect a school if and to the extent requested to do so by the Secretary of State.

EdA 2005 s.8(2) empowers HMCI to inspect any school in England in circumstances where he is not required to do so by section 5 or section 8(1). Section 8 inspections are sometimes referred to as "short inspections".

In respect of both section 5 and section 8 reports, EdA 2005 s.11(1) provides that HMCI may arrange for any report of an inspection carried out to be published in such manner as he considers appropriate.

EdA 2005 s.13 places specific duties on HMCI where, on the completion of a section 5 inspection, HMCI is of the opinion that special measures are required to be taken in relation to the school.

EdA 2005 s.44(1) defines "special measures" as being 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.

EIA 2006 s.117(2)(a) provides:

> "(2) In performing its functions [Ofsted] is to have regard to – (a) the need to safeguard and promote the rights and welfare of children."