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Case No: CO/2756/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2019

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

The Queen
on the application of
Barking & Dagenham College

Claimant

- and -

The Office for Students

Defendant

- -
- -

Ms Fenella Morris QC and **Ms Nicola Greaney** (instructed by **Bates Wells**) for the **Claimant**
Ms Monica Carss-Frisk QC and **Mr Tom Coates** (instructed by **the Office for Students**) for the **Defendant**

Hearing dates: 8 October 2019

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The Claimant, Barking & Dagenham College ('the College'), is a long-established provider of vocational, technical and professional education and training in East London. It serves a community which has a higher than average level of social deprivation.

2 The Defendant, the Office for Students ('OfS'), was established by the Higher Education and Research Act 2017 ('HERA') with effect from 1 January 2018. Its functions under that Act include establishing and maintaining a register of English higher education providers (s. 3(1)). The information contained in the register must be made publicly available (s. 3(9)). By s. 3(3), the OfS must register an institution if certain requirements are met. One of these is that the institution 'satisfies the initial registration conditions applicable to it in respect of the registration sought'. The OfS must determine and publish the initial registration conditions (s. 5(1)(a)) and may revise them (s. 5(3)). By s. 13(1)(a), initial registration conditions may in particular include a condition relating to the quality of, or the standards applied to, the higher education provided by the provider (including requiring the quality to be of a particular level or particular standards to be applied)'.

3 Registration as a higher education provider is not compulsory. However, from 1 August 2019, English higher education providers which are not registered are ineligible to receive certain benefits. These include:

(a) automatic designation of higher education courses for the purposes of permitting the existing and future students to receive funding from the student loan system;

(b) various types of public funding to the provision of higher education and/or research;

(c) a Tier 4 sponsorship license for overseas students; and

(d) the ability to apply for powers to award degrees and other higher education qualifications and, after a period of time, the ability to use the legally protected term 'university' in a provider's name.

Institutions not registered as higher education providers are also not subject to the conditions of registration, which are intended to protect the interests of students.

4 On 23 May 2018 the College applied to the OfS for registration as a higher education provider. On 29 January 2019 the OfS sent the College a 'Minded to Refuse Registration' letter, inviting representations from College. The College made representations. Having considered them, the OfS decided to refuse the application ('the Decision') and communicated it on 14 August 2019.

5 On 21 August the College wrote to the OfS urging it not to publish the Decision pending the resolution of a claim for judicial review which it indicated it intended to issue. On 23 August 2019 the College sent a pre-action letter outlining its proposed grounds. On 18 September 2019 the OfS replied to the College explaining that it had decided to make the Decision public.

6 On 23 September 2019 the College agreed to defer publication of the Decision until 2pm on Friday 11 October 2019 so as to allow time for an oral hearing of any application by the College for interim relief.

7 On 24 September 2019 the College issued a claim for judicial review challenging the Decision and making an application for interim relief to restrain publication. It applied in form N463 for urgent consideration of the latter application.

8 On 26 September 2019 Sir Duncan Ouseley, sitting as a High Court judge, directed an oral hearing, which is before me today, of the College's application for interim relief. He ordered the parties to file and serve skeleton arguments and the Defendant to file and serve any evidence on which it wished to rely by 2pm on Friday 4 October 2019. He also ordered that the Claimant should be referred to, and the case listed, as 'A College' and that the papers filed with the court should remain private to the parties (including external counsel), and such persons as the Department for Education whom the OfS considers it necessary to inform, until further order.

The challenged decision

9 As I have said, the Decision was communicated by letter dated 14 August 2019. The reasons for it were set out in a detailed annex running to 96 paragraphs. The principal reason was that the College was found not to meet condition B3, which provides: '*The provider must deliver successful outcomes for all of its students, which are recognised and valued by employers and/or enable further study*'. In assessing the College's compliance with this condition, the OfS considered three 'data indicators': (a) student continuation and completion rates; (b) degree and other outcomes, including differential outcomes for students with different characteristics; and (c) graduate employment and, in particular, progression to professional and managerial jobs and postgraduate study. The OfS identified continuation rates and progression rates to graduate employment as areas of concern or significant concern.

10 One of the points that had been made by the College in its representations was that these rates had to be seen in their proper context, which included among other things, the characteristics of the student body, the availability of employment opportunities in the locality and the types of employment or self-employment to which students on the particular courses offered by the College would be likely to be attracted.

11 The OfS's reasons included the following:

> '27. The characteristics of a provider's higher education student body are relevant context to the assessment of Condition B3. However, the OfS expects providers to deliver successful outcomes for higher education students regardless of their backgrounds and, as set out in the regulatory framework, the OfS assesses performance in relation to higher education student outcomes in absolute terms.
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> …

> 34. In the light of the above and given that Condition B3 requires that the provider must deliver successful outcomes for all of its students and the indicators show that the college is delivering very weak outcomes for higher education students, the OfS does not consider that it would be appropriate to place much, if any, weight on the representations based on student characteristics or the context of the College.
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> …
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> 57… A large number of withdrawals on the basis that the students were unable to achieve the necessary academic standards suggests that the College may be recruiting students who do not have the capability of succeeding in higher education. This increases the risk in relation to Condition B2 as it suggests that the College may be recruiting students who are not capable of succeeding and raises concerns about the extent to which this condition is satisfied.
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> 58. The data indicators show that the College's students are receiving very weak outcomes. If a provider is recruiting students with characteristics which mean that they are more likely to experience higher rates of non-continuation the OFS expect courses to be designed to match their needs and mechanisms to be in place to ensure students are supported and are reasonably likely to achieve the same outcomes as other students.
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> 59. The OfS's judgement is that the College's representations may have some relevance but for the reasons stated above it considers that it is appropriate to place little, if any, weight on the representations in this area.'

The College's grounds of challenge

12 The College challenges the Decision on six grounds. For present purposes, and because the question whether to grant permission is not before me, it is sufficient to summarise each pleaded ground of challenge and the OfS's response to it at a high level of generality.

Ground 1

13 The College's case is that the OfS wrongly narrowed the test for satisfaction of Condition B3 by focusing exclusively on graduate progression and continuation rates, calculated according to its algorithm, thereby adopting a '*narrow rules-based approach*' of the kind it had itself disavowed in its Regulatory Framework, a document in which it set out the approach it would take to assessing applications for registration.

14 Ms Carss-Frisk QC relied in response on paragraphs 340, 350 and 355 of the Regulatory Framework and at 128 and 130 of the OfS's Regulatory Advice. These, she says, see make clear that the OfS would consider indicators including continuation rates and graduate employment rates and would consider whether a minimum level of performance had been achieved.

Ground 2

15 The College contends that the OfS gave little or no weight to contextual factors. This, it says, was: irrational; contrary to the OfS's cases duty under s. 2(1)(b) HERA to have regard to the need to promote equality of opportunity in connection with access to and participation in higher education; contrary to its duty under s. 2(1)(g)(i) HERA to have regard, so far as relevant, to the principle that regulatory activities should be proportionate; in breach of the public sector equality duty imposed by s. 149 of the Equality Act 2010; and contrary to the duty under s. 2(1)(g)(i) HERA to have regard to the principle that regulatory activities should be transparent.

16 Ms Carss-Frisk responds that the decision to use raw performance indicators, rather than to adjust them by reference to a sector-adjusted benchmark, was the result of a deliberate, reasonable and lawful decision to eschew an approach that '*locked in*' disadvantage. But in any event, on a fair reading of the Decision as a whole, contextual factors were not left out of account.

Ground 3

17 The College argues that the OfS reached its Decision on the basis of criteria that were not made clear at the outset of the application process and/or that shifted during the process. In particular, it did not disclose the algorithms that played so central a part in the Decision until the point when it sent the Minded to Refuse letter.

18 Ms Carss-Frisk responds that the technical document which accompanied the Minded to Refuse letter (which contained the algorithms) was just '*putting flesh on the bones*' of what had gone before. In any event, if the College had wished to comment on the technical document (including the algorithms), it had ample opportunity to do so.

Ground 4

19 The College claims that the OfS failed to take into matters that were relevant to the Decision, in particular the view of independent assessors under previous statutory regimes as to the quality of the education provided, continuation rates and outcomes. These views were not mentioned in the Decision.

20 Ms Carss-Frisk responds that it is for the OfS as decision-maker to decide, subject only to *Wednesbury* review, what is relevant to its decision. There was nothing irrational about the OfS's decision, that little or no weight should be given to the previous decisions of different regulatory authorities under different regimes, which were not concerned with Condition B3.

Ground 5

21 The College complains that the OfS reached a decision based upon matters which it had not given the College the opportunity to address. In particular, although the OfS had asked the college for a copy of its Quality Improvement Plan, it had not foreshadowed the criticisms of that plan which it made in the Decision.

22 Ms Carss-Frisk responds that fairness did not require the OfS to put each and every part of its reasoning to the College for comment prior to reaching its decision.

Ground 6

23 The College contends that the OfS breached its rights under Article 1 of Protocol 1 to the ECHR ('A1P1') by wrongly and belatedly refusing its Application for registration and that damages are payable in respect of this breach.

24 Ms Carss-Frisk responds that the time taken to determine the application was not unreasonable. She adds that, even if it were, the delay could hardly justify the court quashing the OfS's decision, since that would just lead to more delay while the Decision was re-taken. As to A1P1, it is clear that revenues contingent upon registration could not amount a to possession in the relevant sense: see e.g. *Kopecky v Slovakia* (2005) 41 EHRR 43 at [52].

The additional ground raised shortly before the hearing

25 Shortly before the hearing began Ms Morris QC produced a supplementary note in which she identified a '*further and significant issue'*: the dataset submitted by the College to the OfS's predecessor, and used by OfS, related to *all* its higher education students, including not only those on prescribed higher education courses, but also those on non-prescribed higher education courses (which are not subject to the OfS's regulation). It appeared, although it was not clear, that the OfS's assessment was based on data relating to state-funded students on prescribed courses only. If so, the conclusions reached in the assessment are unfair and misleading.

26 Because this point was only raised shortly before beginning of the hearing, Ms Carss-Frisk was unable to respond to it. In those circumstances she submitted that it would not be fair for me to take it into account in deciding the application for interim relief.

The sole issue for determination

27 I heard oral argument on the question of interim relief over the best part of a day. That is the sole issue for determination at this stage. Notwithstanding the way the hearing was listed, the question whether to grant permission was not before me. There has been no direction abridging time for the OfS to file an Acknowledgment of Service and the OfS has not yet done so. In those circumstances, it would not be fair to decide permission today, even though the merits of the claim, which are in principle relevant to the determination of the application for interim relief, have been the subject of submissions by both sides.

The proper approach to the grant of interim relief

Section 12 of the Human Rights Act 1998

28 Section 12 of the Human Rights Act 1998 ('HRA'), headed 'Freedom of expression', provides as follows:

> '(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
> …
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.'

29 Prior to the hearing I invited Counsel to consider whether the relief sought in this case might affect the exercise of the right of members of the public to receive information and so engage s. 12(3). Ms Carss-Frisk submitted that the answer was 'Yes'. Ms Morris accepted that relief of the kind sought here could in principle engage s. 12(3) in this way, but, on the facts, there were no individuals whose right to receive information was engaged.

30 For reasons which I explain in more detail below, I consider that the relief sought would affect the right of members of the public – in particular, existing and potential students of the College – to receive information which OfS wishes to communicate to them in the exercise of its statutory functions. For that reason, I consider that s. 12(3) applies. That means that I have no power to grant relief unless satisfied that the College is 'likely' to establish at trial that publication should not be allowed. In this context, 'likely' usually means 'more likely than not', but may mean something less than that, for example in a case where the consequences of publication would be very severe: *Cream Holdings v Banerjee* [2005] 1 AC 253, [22] (Lord Nicholls).

31 If I were otherwise minded to grant interim relief, I would have had to consider carefully whether the College was likely to establish that publication should not be allowed. However, for reasons which will appear, it has not been necessary for me to decide that question. I have instead approached the application for interim relief on the assumption most favourable to the College – i.e. assuming, without deciding, that the claim is more likely than not to succeed and so surmounts the highest threshold that s. 12(3) HRA could impose.

<u>The case law on the grant of interim relief to restrain publication by a public authority</u>

32 There is an established line of authority addressing the test to be applied when considering an application for interim relief to restrain the publication by a public authority of a report adverse to the Claimant. The principles were summarised recently by Nicklin J in *Taveta Investments Ltd v Financial Reporting Council* [2018] EWHC 1662 (Admin) at [95], as follows:

> 'i) there is a significant public interest in publication of reports by public bodies, particularly when they are under a duty to publish ([32]; *Cambridge Associates in Management v Ofsted* [2013] EWHC 1157 (Admin) [60]; and *R (City College Birmingham) v Ofsted* [2009] ELR 500 [28];
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> ii) in such cases the grant of an injunction requires "pressing grounds": *R (Matthias Rath BV) v Advertising Standards Authority* [2001] EMLR 22 [30]; "the most compelling reasons [are required] to prohibit a public body which is embarked on a quasi-judicial task… from publishing its decision": *R*

> *(Debt Free Direct Ltd) v Advertising Standards Authority* [2007] EWHC 1337 (Admin) [24]; or "exceptional circumstances": *R(J) v A* [2005] EWHC 2609 (Admin) [23];
>
> iii) where, as in Taveta's case, what is sought to be restrained is allegedly defamatory allegations, then the Court should have regard to the fact that, in private law cases, the principle in *Bonnard v Perryman* [1891] 2 Ch 269 would usually prevent the grant of an order to restrain publication of defamatory statements where the respondent contends that the proposed publication was defensible: [34]; and *R v Advertising Standards Authority ex parte Vernons Organisation Ltd* [1992] 1 WLR 1289 , 1293E-1294B.'

33 In the *Vernons* case, Laws J explained why the analogy with defamation was apposite. He said this:

> 'If a private individual will not be restrained from expressing his opinion save on pressing grounds I see no reason why a public body having a duty, other things being equal, to express its opinion should be subject to any less rigid rules. It seems to me that the case is, if anything, analogous to one where an administrative body has an adjudicative function and in the course of its duties publishes a ruling criticising some affected person and the ruling is later disturbed or reversed by an appropriate appellate process. There are many such instances and many of them involve the criticism of members of the public, corporate or natural.'

34 At [97]-[98] of his judgement in *Taveta*, Nicklin J expressed reservations about the decision of Laws J in *Vernons* and the analogy he drew with private law defamation proceedings. One of the reasons for these reservations was the presumptive priority he thought Laws J had given to the right of freedom of expression (now protected by Article 10 ECHR) over the right to respect for private life, including reputation (now protected by Article 8 ECHR). Nicklin J noted that such priority had been said not to be justifiable in subsequent high authority: *Douglas v Hello! Ltd* [2001] QB 967 [133], [135] (Sedley LJ), approved in *Campbell v MGN Ltd* [2004] 2 AC 457 [55] (Lord Nicholls), [111] (Lord Hope); [138]-[139] (Baroness Hale); and *In re S (A Child)* [2005] 1 AC 593, [17] (Lord Steyn). Nonetheless, at [98] of his judgment in *Taveta*, Nicklin J noted that Laws J's decision in *Vernons* had been repeatedly applied in public law cases since and was so well-established that he was bound to follow it.

35 Like Nicklin J, I consider that I am bound to follow the line of authority summarised by him in the passage I have set out from [95] of his judgment in *Taveta*. Unlike him, I have no reservations in doing so. The position adopted by the common law authorities seems to me to be fully in conformity with the analysis required by the ECHR. In *In re S (A Child)*, Lord Steyn made clear at [17] that '*neither article [10 or 8] has as such precedence over the other*' (emphasis in original). But, as he went on to explain, this meant only that '*where the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary*'. Furthermore, '*the justifications for interfering with or restricting each right must be taken into account*'. Where a public authority has the function of publishing a report, that function will often be conferred for the benefit of a specific section of the public. Ofsted's reporting powers are conferred primarily for the benefit of pupils and

parents (existing and prospective) of the inspected schools. The Advertising Standards Authority's powers are conferred primarily for the benefit of consumers (existing and potential) of the products or services advertised. In each case there is a specific section of the public with an interest in receiving the information in question. This interest is protected by Article 10 ECHR, which confers the right not only to express but also to receive information. The right of a section of the public to receive information which a public authority wishes to communicate to them in what it regards as their interest must carry very substantial weight in the balancing exercise.

36 On the other side of the scales, the weight of the Claimant's and any third party's interest relied upon to oppose publication will vary. Sometimes, the interest relied upon to restrain publication is limited to the private interest of a corporate entity. In other cases – and Ms Morris says this is one of them – damage to third party or public interests is also relied upon. But even so, it is important not to lose sight of the fact that, if interim relief is refused and the Decision is published, those to whom it is published can be told that the Decision is the subject of legal challenge. Laws J made this point in *Vernons*. I accept that there will be some who will not be prepared to suspend judgement pending the resolution of the claim, but a fair-minded observer learning of a decision critical of the Claimant would factor in the existence of a pending challenge before reacting to it.

37 In these circumstances, and other things being equal, the authorities rightly impose a high hurdle ('pressing grounds', 'the most compelling reasons' or 'exceptional circumstances') for the grant of interim relief to restrain publication of a report by a public authority. The high hurdle is consistent with, and indeed flows from, the '*intense focus on the comparative importance of the specific rights being claimed*'.

38 Ms Morris rightly drew attention to the decision of Stuart-Smith J in *R (Interim Executive Board of X School) v Ofsted* [2017] EMLR 5. In that case – uniquely among those cited by counsel – interim relief *was* granted to restrain publication of a report by Ofsted about a school whose teaching arrangements were said to give rise to unlawful sex discrimination. However, in that case there was a constellation of unusual factors. There was a discrepancy between the challenged report and previous reports produced by the same regulator in the recent past under the same regulatory regime, which the Judge said was '*extraordinary'*; the challenged report was '*frankly inconsistent*' with previous ones: [40]. There was '*clear evidence of antagonistic behaviour*' by inspectors during the inspection which had given rise to the challenged report, corroborated by a contemporaneous complaint: [41]. Overall, the evidence gave rise to an arguable case that the process which led to the challenged report was '*infected by a pre-determined mindset or prejudice that would be quite alien to the proper and independent inspection process upon which the education system and the public at large rightly depends*': [45]. There was also compelling evidence that the effect of publication could be both '*extremely adverse and irreparable*' including in terms of social and community cohesion: [46]. Finally, the Judge rejected the submission that the school could effectively mitigate the damage by communicating the fact that the report was under challenge. On the particular facts, the school's ability to muster a coherent communication strategy would be hampered by the fact that publication was due on the last day before the summer holidays: [49].

39 The *X School* case is also of interest for another reason. In the passage noted above from [95] of Taveta, Nicklin J noted that the public interest in publication of reports was

particularly strong particularly when the authority in question was under a duty to publish. But in the *X School* case, Stuart-Smith J held at [32] that the public interest in favour of publication of Ofsted's report arose '*[w]hether acting pursuant to duty or (as in this case) pursuant to power*'. In agreement with Stuart-Smith J, I find it difficult to see why the strength of the public interest in favour of publication should depend on whether the public authority is acting pursuant to a duty or a power. In the latter case, the public authority will necessarily have had to turn its mind to the question whether to publish and decided to do so. A case where a public authority has made a conscious decision of that kind in principle engages the public interest in publication just as much as one where the law requires publication.

The College's case for interim relief

40 The College's application for interim relief was supported by detailed witness statements from Yvonne Kelly, its Principal and Chief Executive Officer; Brendan James, who leads the College's higher education provision; Darren Rodwell, Leader of Barking & Dagenham Council; and Stuart Fraser, a Governor of the College with extensive and impressive experience in the construction. On 5 October 2019, the College served a second witness statement of Darren Rodwell. Ms Carss-Frisk objected to the admission of this second witness statement, for which no provision had been made in the directions given by Sir Duncan Ouseley and which, she said, was too late to allow any meaningful response. Having regard to its contents, however, I decided to admit that statement and have taken it into account, together with the other witness statements filed on behalf of the College, in reaching my decision. I have also considered the witness statement of Susan Lapworth, Director of Competition and Registration at the OfS, in response.

41 Ms Morris for the College submits that the OfS is under no statutory duty to publish decisions not to register providers of higher education. She contrasts the position with other aspects of the OfS's statutory functions, where there is an express duty to publish: see e.g. ss. 3(9), 11, 16(3), 18(7) and 22(7) HERA. Ms Morris adds that the purpose of ensuring that students are not offered what is judged by the OfS to be inadequate provision is adequately served by the taking of the decision. From this, she invites the conclusion that 'there is no statutory obligation of publication, and no purpose to publication'.

42 Ms Morris characterises the flaws she has identified in the Decision – in particular, '*privileging the application of the newly-devised algorithms over the statements of principle in its Regulatory Framework and over the social context in which an institution operates*' – as going '*to the heart of the way in which the OfS is proposing to exercise its new functions*' – as therefore as constituting the type of error that could ground interim relief even given the heightened test applicable where such relief is sought against a public authority.

43 Ms Morris QC says that the reputational damage that would be caused by publication would be '*widespread and irreparable*'. Publication would lead students, employers and partners to lose confidence in the College. This would be damaging not just to the College itself but also to the local community. In this regard, Ms Morris notes that the College is '*deeply embedded within the wider strategy of the Council for regeneration of an area of very substantial deprivation*'. The effect on the reputation of the College will be particularly keenly felt because the College is being launched this autumn as an Institute

of Technology ('IoT'), following a rigorous selection procedure run by the Department for Education, and will be one of the few providers of the new T-Levels (a new alternative to A-Levels for post-GSCE study involving an industry placement).

44 Insofar as the OfS relies on the fact that the Decision relates only to certain regulated higher education courses, Ms Morris complains that this fails to have proper regard to the likely audience, many of whom will not appreciate the fine distinctions between courses regulated by the OfS and other courses and will accordingly take the Decision as '*an indictment of the whole of its educational offering*'.

45 In response to the suggestion that restraining publication would deny existing and potential students information that it relevant to them, Ms Morris made the following submissions in her supplementary note:

(a) Of the existing students at the College, only '*just over 30*' are affected by the Decision. They will be able to continue to access student loans to finish their courses, provided that the College's application to 'teach out' these students is accepted by the OfS. (The application has been submitted but has not yet been determined.) Informing these students of the Decision now is '*likely to cause anxiety without the possibility of assuaging it with a worked-out plan to mitigate the effects of the decision*'.

(b) Because in July 2019 the OfS issued a limited registration, the College was not able to recruit students to start in autumn 2019 for the courses covered by the Decision. So none of the students who have just started are studying for such courses.

(c) Although the College is advertising some higher education courses on its website, these are all non-prescribed courses (i.e. courses not subject to regulation by the OfS), so students enrolling on these courses will be unaffected by the Decision. If the Decision it set aside, and the OfS retakes it in the College's favour, it should be possible to start recruiting for some courses beginning in January 2020, but it is likely that most new higher education students will wish to start in September 2020.

(I should record that Ms Carss-Frisk objected to the contents of Ms Morris's supplementary note, on the ground that it contained evidence which should have been, and was not, in a witness statement. There is force in that submission, but in view of the speed with which the application came on for hearing, I have nonetheless taken Ms Morris's points into account.)

46 Finally, Ms Morris submitted that any interim relief could be granted for a limited period only. She suggested that, if permission were granted, a substantive hearing could be expedited so that the claim could be dealt with in a matter of weeks.

Conclusions

47 In my judgment, the matters relied upon by Ms Morris fall far short of the 'compelling grounds', 'most compelling reasons' or 'exceptional circumstances' required to justify interim relief to restrain the OfS from publishing its decision. I have reached that conclusion for seven reasons.

48 First, as I have said at [39] above, I see no reason why an application to restrain publication pursuant to a power should as a matter of principle be easier to sustain than an application to restrain publication pursuant to a duty. Even if the distinction might in some cases be relevant, I do not see how it could avail the College here. Section 2(1)(g) imposes on the OfS a duty to have regard to the principle that regulatory activities should be transparent. The OfS's decision to publish, even though not mandated by statute, was taken by a public authority mandated by statute to have regard to have regard to that important principle. Moreover, s. 3(9) – one of the provisions with which Ms Morris invites comparison – requires the OfS to make the information contained in the register public. If the register is required to be public, it is a short step to the principle that regulatory decisions about which institutions should be entered in the register should also be public unless there is a compelling reason why not.

49 Second, I am not persuaded by the argument that existing students do not '*need to know*' that the application has been refused. The just over 30 existing students studying for courses affected by the Decision have an important practical interest (which, as I have indicated, is protected by Article 10 ECHR) in knowing that, because of the refusal of the application for registration, their continued eligibility to receive student loans is now contingent on the success of the College's application to the OfS to 'teach out' their courses. Some of them may know that the College has an application for registration that has not yet been determined; some may be assuming that the application would in due course succeed. If it had, there would be no need for the 'teach out' application. As it is, their continued eligibility for student loans in the future has become somewhat more precarious than it was before. I accept that some of these students, on hearing that the application has been refused, may suffer some anxiety. But I find it difficult to conceive of a case where it would be appropriate to use the coercive powers of the Court to shield members of the public from information that could affect them on the ground that it might make them anxious. The present, certainly, is not such a case.

50 Third, those considering applying to study at the College have an equally strong interest in knowing that the College's application for registration has been refused. I accept that the College will be unable to accept new students on to courses regulated by the OfS unless and until it is registered by the OfS. But Ms Morris's supplementary note indicates that the College hopes to recruit students for regulated courses starting in January and September 2020. Even if such courses are not currently being offered on the College's website, there may be students intending to enrol in courses at the College if the registration application is successful. They are entitled to know that it has not been successful, so that they can consider whether they should make alternative plans.

51 Fourth, I accept that some of those who learn of the Decision will inevitably see it, as Ms Morris put it, as an indictment of the whole of the College's educational offering, rather than as directly relevant only to the College's regulated higher education courses. But the fact that information published by a public authority may be misconstrued by some of those who receive it is not in general a good reason for restraining publication. The College is of course free to offer its own explanation – if it considers that such an explanation is required – of the significance of the Decision, its flaws (as the College sees it) and the fact that it is under challenge (and, in due course, the progress and outcome of the challenge). It would be wrong to assume that those affected will not understand the significance of the fact that the College considers the Decision to be legally flawed and is challenging it in judicial review proceedings. Students who are

following or considering following a course of higher education should be assumed to have the intelligence and maturity to make rational decisions for themselves, based on all the available and relevant information. The Court should be slow to deprive them of part of that information.

52 Fifth, I accept that Ms Kelly is sincere when she says at paragraph 72 of her witness statement that publication of the Decision would cause *'considerable reputational harm'*. But I have seen nothing to justify Ms Morris's description of the harm as *'irreparable'*. If the claim is successful, the Decision will be quashed and the court's judgment will expose its flaws. Of course, the reports of the original decision may still be discoverable on the internet. But if questions were raised about it, the College would be able to refer to the judgment (if it is in the College's favour) as vindicating its position. I accept also that that the College plays an important part in the regeneration plans of Barking and Dagenham Council. I have borne particularly in mind what Mr Rodwell says about this. It is much to the College's credit that he has been prepared to submit evidence in its support. But the fact that the College forms an important plank of the Council's regeneration strategy is not a reason to suppress the Decision, even temporarily. On the contrary, it is, if anything, a reason that favours transparency. Finally, I do not accept the suggestion at paragraph 74 of Ms Kelly's witness statement that publication of the Decision could cause reputational damage to the IoT initiative in which the College is a participant: I see no reason why anyone would assume that a critical report about the quality of certain regulated higher education courses offered by one IoT participant reflected badly on the initiative as a whole.

53 Sixth, without reaching any view about the arguability or merits of the claim, it is right to note that the grounds of challenge do not raise any allegation that the OfS's decision was tainted by pre-determination or prejudice (or any other kind of bad faith). This is one important respect in which the decision in *X School* is distinguishable. I do not doubt that the errors which the College says the OfS has made are capable, if made out, of vitiating the OfS's decision. But the College's grounds of challenge are well within the mainstream for judicial review pleadings. There is nothing exceptional about them.

54 Seventh, I accept Ms Morris's submission that, if interim relief were granted, expedition may make it possible for that relief to be of relatively short duration, though I think the particular timescale Ms Morris suggested (a substantive hearing within weeks allowing the decision to be retaken and the College to recruit students for regulated courses starting in January 2020) was probably too optimistic. But the fact that expedition would make it possible for the claim to be resolved within a relatively short time cuts both ways. As well as shortening the period during which existing and potential students would be kept in the dark, expedition would shorten the period during which the Decision could cause reputational damage prior to a judgment by the court that could, if it is in the College's favour, substantially mitigate the damage.

55 For these reasons, I refuse the application for interim relief. As I indicated at the hearing, I shall hear the parties as to whether any further directions are appropriate for the future management of the claim.

Postscript: the form of the College's proposed press release

56 In the course of argument, Ms Morris made some criticisms of the OfS's draft press release, which she said was potentially misleading in not sufficiently identifying the particular courses to which the Decision relates (i.e. a subset of the higher education courses offered by the College). Given that I have refused the relief sought in this case (an injunction restraining publication of the Decision), it is not for the Court to approve what the OfS can or cannot say. However, Ms Morris's points seemed to me to have some force; and the OfS may wish to reconsider the precise wording of its press release with a view to identifying with greater precision the courses that are, and are not, affected by the Decision.