IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 1834 (Admin)

No. CO/1858/2023

Royal Courts of Justice

Thursday, 22 June 2023

Before:

MR JUSTICE LINDEN

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

B E T W E E N :

THE KING
on the application of
ALL SAINTS ACADEMY DUNSTABLE

Claimant

- and -

(1) THE OFFICE FOR STANDARDS IN EDUCATION, CHILDREN'S SERVICES AND SKILLS (OFSTED)
(2) HIS MAJESTY'S CHIEF INSPECTOR OFEDUCATION CHILDREN'S SERVICES AND SKILLS

Defendants

MR P GREATOREX (instructed by Irwin Mitchell Solicitors) appeared on behalf of the Claimant.

MR T FISHER (instructed by Ofsted) appeared on behalf of the First Defendant.

THE SECOND DEFENDANT did not appear and was not represented.

J U D G M E N T

MR JUSTICE LINDEN:

Introduction

1 This is a hearing by order of Morris J dated 22 May 2023 to consider, firstly, whether the claimant school should be granted permission to claim judicial review in relation to a graded inspection of it which was carried out by Ofsted in November 2022 and January 2023; and, secondly, whether the court should restrain, on an interim basis, the publication of the final report which resulted from that inspection, pending the outcome of the claim for judicial review.

2 The evidence before me in support of the School's case comprised of three witness statements made by Ms Elizabeth Furber, Principal of the School, the last of these dated 21 June 2023; and witness statements made by Mr David Fraser, Chair of Governors of the School; Ms Caroline Doolan, Deputy Principal Personal Development; Mr Simon Millar, Deputy Principal Behaviour and Attitudes; and Ms Kate Searle Deputy Principal Quality of Education, all made in May 2023. The Defendants relied on two witness statements of Mr John Young, an Assistant Regional Director of Ofsted who oversees the East Midlands and East of England Regions, dated 8 and 19 June 2023.

3 At the beginning of this hearing, a preliminary issue arose as to whether I should adjourn the hearing or refuse to admit the third witness statement of Ms Furber on the grounds that it was served late. Ultimately, that issue was resolved by agreement between counsel, with some encouragement from the court. The approach which I adopted, with their agreement, was to hear all of the arguments and to take the third witness statement into account, but leaving the position open for Mr Fisher, if he wished to in the light of the arguments as they unfolded, to seek to put in evidence in reply to her witness statement and/or to adjourn grounds to which it was relevant and/or to make further submissions at a subsequent hearing or on paper. In the event, those steps have not proved necessary.

Background

4 Ofsted is a body corporate established under section 112 of the Education and Inspections Act 2006. His Majesty's Chief Inspector of Education, Children's Services and Skills (who I will refer to as the "Chief Inspector") is appointed by the Secretary of State and is a member of Ofsted. As is well known, Ofsted inspectors carry out inspections of schools and then publish a report of their inspection in which they grade the school under various headings and provide a commentary to explain and justify the grade.

5 Under section 133 of the 2006 Act, the Chief Inspector is required to devise a common set of principles to be applied in the course of inspections. These principles are set out in the Education Inspection Framework (the "EIF), the current version of which was last updated on 11 July 2022. The EIF identifies a four-point grading scale - "Outstanding", "Good", "Requires Improvement" and "Inadequate" - which is applied to four key areas of judgment: "quality of education", "behaviour and attitudes", "personal development" and "leadership and management". A judgment is also required to be made by the inspectors as to the overall effectiveness of the school and one of the four grades awarded in respect of this consideration. For each of the judgments which inspectors are required to make, the EIF provides detailed guidance as to what they must consider in deciding on a grade.

6 Ofsted also publishes the School Inspection Handbook ("SIH") which runs to more than 100 pages, and 460 paragraphs. This provides very detailed and prescriptive guidance as to what the process of inspection entails, primarily as a guide for inspectors. It is also available to

schools and other organisations so that they are well informed about the processes and procedures of inspection. There are also very detailed criteria for the awarding of each grade for each of the areas of assessment. These tell inspectors what they should have found in the evidence if they are to award, for example, "Outstanding" for "quality of education" or "Requires Improvement" for "leadership and management".

7 There are various other protocols and procedures applicable to inspections, including the "Protocol on gathering extra evidence to secure an incomplete inspection", the "Code of Conduct guidance on the conduct of inspectors and Ofsted's expectations of providers during inspection or wider regulatory activity" and the Ofsted complaints procedure. These documents are all publicly available.

8 The School is a secondary school academy in Dunstable in Bedfordshire. It has approximately 655 pupils.

9 The School has been subject to various graded and ungraded inspections by Ofsted over the years. After an inspection in November 2013, it was graded "Requires Improvement"; in July 2015, it was graded "Inadequate"; and after inspections in January 2017 and May 2019, it was graded "Requires Improvement". There was an ungraded inspection in March 2021 and a second one in July 2021. The second of these ungraded inspections involved a site visit, the outcome of which was that the leaders and those responsible for governance were deemed not to be taking effective action to enable the School to become a good school. The School was asked to make various improvements.

10 On 22 and 23 November 2022, there was a graded inspection of the School as part of which a team comprising one of His Majesty's inspectors ("HMI") and three Ofsted inspectors visited. They carried out various forms of observation, including watching lessons. They inspected the School's procedures and protocols and its disciplinary, attendance and other records. They talked to staff and pupils about the School, and they took into account the results of surveys of parents, pupils and staff.

11 At the end of the visit, the inspection team fed back to the leaders of the School that their provisional judgment was that the School would be graded "Good" in four categories: quality of education, personal development, leadership and management and the sixth form. The provisional grade for behaviour and attitudes was "Requires Improvement" and safeguarding arrangements were provisionally judged to be "Effective".

12 There is a dispute between the parties about the provisional grade for the overall effectiveness of the School. Ms Furber's evidence is that, at the debrief, the inspection team said that they wanted to award a grade of "Good" but said that, after speaking to a senior HMI, they were advised that others may not think that behaviour had improved fast enough. Hence, they should award an overall effectiveness judgment of "Requires Improvement". She says that the inspectors said that the School should use the Ofsted complaints procedure to challenge this.

13 Mr Young says that the inspection team decided that the provisional overall grade should be "Requires Improvement". The documentary evidence which I have seen includes as part of a document prepared by the School at an unspecified point after the feedback session: "Overall effectiveness?". The provisional grades which I have referred to are then recorded and there is then the following passage:

> "Exceptional circumstances

> Has BA improved sustainably and securely with a clear direction of travel. I have tried really hard to get you a 'good' under exceptional circumstances, but others may think you have not improved behaviour fast enough.
> Overall RI."

So it is, at least, agreed between the parties that the provisional grade for overall effectiveness which was awarded by the first team was "Requires Improvement".

14 As to what was said by the inspector about the views of others, Mr Young says, and I accept, that the inspectors had discussed their emerging judgments with a senior HMI, who was on the duty desk. This was standard practice. The duty HMI effectively acts as a sounding board for those who carry out the inspection and challenges their evaluations by reference to the evidence which they have gathered and the criteria for assessment which are required to be applied. The duty HMI does not direct the inspectors as to the judgments which they should reach, however. That remains the task of the inspection team itself.

15 Mr Young also says, and I accept, that the inspectors told the School that the grades were provisional, and that they would be subject to a quality assurance process which could result in changes. The grades would not be final until the final result was published. This position is, in any event, quite clear from the various guidance and protocol documents produced by Ofsted, and must therefore have been known to the School.

16 In accordance with standard practice, the draft report of the inspection was prepared by the lead inspector of the team and submitted to Ofsted with the evidence base for the team's assessment. It was then subject to quality assurance. At the first stage of this process, a more senior HMI reads the report to check that there are no major weaknesses and suggests amendments, corrections or improvements. If no major weaknesses are identified, the draft report is sent to the school for a factual accuracy check.

17 In this case, however, on 5 December 2022, major weaknesses were identified at the first stage of the quality assurance process. In summary, the concerns included issues about whether the provisional grade awarded matched the explanatory commentary, which it was intended to reflect, as well as about inconsistencies in the evidence base.

18 The draft report therefore went to the second stage of the quality assurance process, which was an enhanced check by a senior HMI ("SHMI"). This review was carried out on 11 December 2022 and it cast further doubt on the findings of the inspection team.

19 In accordance with standard procedure, the findings in the draft report therefore moved to the next level of scrutiny, which is a full evidence-based review by the responsible HMI in which the evidence base for the judgments of the inspection team is considered. The entirety of the evidence gathered by the inspection team was revisited and re-evaluated so as to consider whether its judgments stacked up against the evidence. The outcome of this stage of the process was that the inspection process failed a number of Ofsted's internal quality standards, and the evidence base was found not to support the provisional judgments which had been reached. The concerns were about both the quality of the evidence which had been gathered and whether the evidence which there was supported the judgments which had been reached. There were important gaps in the evidence relating to safeguarding, leadership and management and alternative provision. Some issues had been highlighted, but others not followed through, and the summaries produced did not match the evidence gathered. The conclusion of the evidence-based review was, therefore, that the provisional judgments did not reflect the evidence.

20 In the light of this conclusion, the Regional Director instructed colleagues to trigger the gathering additional evidence protocol. Mr Young therefore phoned the School on 20 January 2023 and informed Ms Furber that the first inspection had been deemed to be incomplete. This was followed up with a letter to the School on the same day which said:

> "Following your telephone call with John Young, Assistant Regional Director, I confirm that inspectors will return to your organisation shortly to collect additional evidence.
>
> This is because our quality assurance process has concluded that your graded inspection on 22 and 23 November 2022 should be deemed as incomplete. The 'provisional' judgements reached are not securely verified and substantiated by the existing evidence collected and evaluated. This leaves a question mark over the validity and reliability of the inspection findings. Therefore, it is imperative inspectors revisit your school to gather additional evidence and complete the evidence base. I recognise that this may place strain on staff and apologise for that. However, we need to be satisfied that the evidence base is secure and the inspection process complete before publication of any subsequent report.
>
> I can confirm that the main areas of focus will be safeguarding, leadership and management and aspects of the quality of education that need further evaluation. This is because there needs to be further scrutiny against the handbook to determine the accuracy of the provisional findings. Inspectors will also gather additional evidence linked to behaviour and attitudes and the Sixth form. This is necessary because we believe that the evidence for the inspection has not been triangulated sufficiently with the views of parents, staff and pupils." (emphasis added)

21 The letter went on to identify a new inspection team, including an SHMI and three HMIs. Mr Young says, and I accept, that this combination was selected because it was felt that experienced inspectors were needed, given the delicacy of the situation, and that the four inspectors were handpicked because of their strong reputations for fairness, objectivity and integrity. The letter also provided the School with a link to the gathering of additional evidence protocol so as to ensure that it was aware of the process.

22 The School's evidence, which I accept and Ofsted does not contest, is that staff and leaders at the School were upset by this development, having been through a two-day inspection process which they believed had gone relatively well.

23 On 24 January 2023, the new team visited the School and gathered further evidence in the usual ways, albert the inspection was shorter and more focused on the particular issues identified in the letter of 20 January 2023 than the inspection which had taken place in November 2022. This was also because the first visit had gathered a good deal of evidence.

24 The view of the new team was that what they saw, taken with the evidence gathered in the first inspection, confirmed that the judgments of the first inspection team were not secure. Their views was that the School had serious weaknesses and required improvement in a number of areas. Their provisional judgments were that the School was "Inadequate" in the categories of behaviour and attitudes, and leadership and management. The categories of

quality of education and personal development were provisionally graded "Requires Improvement"; safeguarding arrangements were graded "Ineffective", and the sixth form was graded "Good". Overall effectiveness was provisionally graded "Inadequate". There was, therefore, a significant downgrading in the grades which would have been awarded by the original inspection team.

25 These views were fed back to the leadership of the School at a meeting at the end of the visit. The inspection team explained orally to Ms Furber – the meeting being joined by the Chair of the Governors, whilst it was in process –why the first inspection results were being revisited. They then announced, under each of the areas for assessment, the views of the team and some explanations were given.

26 Ms Furber made a note of the meeting, as did the Ofsted inspectors. The lead inspector then prepared a draft report which set out the views and assessments of the team. That report went through a quality assurance process, which was enhanced because, by reason of the team's assessment of the overall effectiveness of the School, it was now deemed to be in a formal category of concern. The draft report was subject to the first stage of the standard quality assessment process, which I have described, and then an enhanced assessment, in any event, to ensure that the report met Ofsted's quality standards and was ready to progress to the next stage.

27 That next stage was a moderation process, which was completed by a SHMI who, like the HMI who dealt with the earlier stages of the quality assurance process, had not been involved in either of the visits to the School. The moderation process involved a review of the entirety of the available evidence, checking that the judgments reached were underpinned by secure and reliable evidence and that the appropriate processes had been adhered to.

28 The outcome of the quality assurance and moderation processes was that the draft report was deemed to be secure. It was, therefore, sent to the School on 9 March 2022, with an invitation to provide any comments. As I have explained, and pursuant to section 44(2) of the Education Act 2005, the inspectors expressed the opinion that the School was in the category of "requires significant improvement".

29 On 16 March, the School submitted extensive and detailed comments as part of the factual accuracy stage of the process. These comments challenged the findings in the draft report based on the School's analysis of the evidence of which it was aware. The School highlighted what it said were factual inaccuracies, suggested alternative wording, challenged and sought to discredit the judgments which were made by the inspectors and said that there was insufficient evidence to make the assertions which had been made in the draft report. The School also criticised the conduct of the inspector.

30 The School's comments ran to a number of pages. They were considered by the lead inspector of the second team of inspectors. Some amendments to the draft report were made, but it was concluded that the comments did not warrant any material changes.

31 The final report was then sent to the School under cover of a letter dated 22 March 2023. This letter explained that amendments had been made in response to the School's comments where this was warranted by the evidence, but not otherwise. The evidence, including the evidence from the first team visit, had been fully evaluated and reviewed and the report had been subject to quality assurance processes. It also invited the School to complete a post-inspection survey to express its views on the process.

32 On 30 March 2023, the School lodged a detailed complaint in relation to the inspection and the report. This complaint ran to 21 pages. It made a number of criticisms of the second inspection team, the scope of the inspection which had been carried out and the process which had been followed. It also challenged the way in which the comments on the draft report had been dealt with and each of the grades in the inspection report, other than the grade for sixth form, in turn, arguing that on the evidence they were wrong, and that the contrast with the provisional grades awarded by the first inspection team was a further indication of this. There were also allegations that the regional Ofsted team was biased against the School and there were complaints that the members of the second inspection team appeared only to be interested in negative views about the School, and that there had been instances of dismissive and bullying behaviour by three members of the team.

33 The publication of the report was, therefore, paused while the School's complaint was considered. Pursuant to Ofsted's complaints procedure, an SHMI was appointed to consider the matter. Exceptionally, Ofsted arranged for that person to be from a different region, so as to enhance the level of independent scrutiny and to minimise the risk of bias or the perception of bias. It is apparent from the decision letter in relation to the complaint that the SHMI reviewed the evidence so as to determine whether the inspection report was accurate and reconsidered the judgments of the inspection team.

34 On 12 May 2023, the outcome of the complaint was communicated to the School. This decision dealt with the complaint under 11 headings. Under nine of these, the complaint was rejected, under one it was upheld. Three relatively minor amendments were required to be made to the report so as to make certain findings more specific and less generalised in terms of how they were expressed. In short, to ensure that they more accurately reflected the evidence. These amendments related to the question of safeguarding but they did not undermine the substance of the shortcomings which had been found, or lead to any alteration of the grade awarded for this criterion.

35 In relation to the eleventh heading – the School's concern about the conduct of the inspectors – the decision letter said that Ofsted's approach to such complaints is to pass them to the line managers of the inspectors concerned for consideration as part of internal performance management arrangements. This has been done and, as such, said the letter, it would not be appropriate to comment further on the outcome of that process.

36 The outcome of the complaints process was, therefore, that the judgments in the final report stood and the text which explained them stood, save for minor amendments which I have mentioned.

37 On 16 May 2023, the final report was provided to the School and Ofsted stated that it intended to publish it on 23 May 2023. Correspondence followed in which Ofsted declined to delay publication whilst the School considered the amended report and responded to it, and then declined to delay the report whilst the School prepared an application to the court. It was in these circumstances that, on 22 May 2023, the School issued proceedings and applied for interim relief to restrain publication

38 A hearing before Morris J took place that day and, an indication having been given by the Judge that he was minded to make the Order, Ofsted agreed not to publish the report pending today's hearing. Morris J then gave directions.

Statutory Framework

39 Under section 116(1) of the Education and Inspections Act 2006, the statutory functions of Ofsted are, in summary, (a) to determine strategic priorities for the Chief Inspector in

connection with the performance of her functions; (b) to determine strategic objectives and targets relating to such priorities; and (c) to secure that the Chief Inspector's functions are performed efficiently and effectively.

40 Under section 119, the Chief Inspector's duties include a duty to perform her functions for the general purpose of encouraging the improvement of activities within her remit. Section 119(2) provides that:

> "The Chief Inspector must ensure—
>
> (a) that his functions are performed efficiently and effectively, and
>
> (b) that, so far as practicable, those functions are performed in a way that responds to—
>
> (i) the needs of persons for whose benefit activities within the Chief Inspector's remit are carried on, and
>
> (ii) the views expressed by other relevant persons about such activities."

41 Section 133(1)(a) of the 2006 Act provides:

> (1) "The Chief Inspector must devise—
>
> (a) a common set of principles applicable to all inspections conducted under this Chapter…"

42 Section 5 of the Education Act 2005, which was handed up in the course of the hearing, places a duty on the Chief Inspector to inspect relevant schools at prescribed intervals and, under section 5(1)(b) "to make a report of the inspection in writing".

Grounds of challenge

43 There were originally eight grounds of challenge pleaded in the Statement of Facts and Grounds, but Mr Greatorex puts forward a ninth in his skeleton argument and referred to a complaint which then became a proposed tenth Ground.

44 Ground 1 is that the system of single-word judgments in the EIF is unlawful because it is not in accordance with the Defendants' statutory functions and duties. Under this Ground, Mr Greatorex refers to the duties of Ofsted and the Chief Inspector under sections 116 and 119 of the 2006 Act, which I have summarised. He places particular emphasis on the requirement for the Chief Inspector to perform her duties efficiently and effectively and her duty, under section 119, to ensure, so far as practicable, that her functions are performed in a way which responds to the needs of the persons for whose benefit the activities within her remit are carried on, and to the views expressed by other relevant persons about such activities. He argues that the grading system in the EIF is inconsistent with these duties and/or an irrational way of discharging them. His case is that it is clear from reporting by well-established media outlets that this system is extremely unpopular and is not performing

in a way which complies with section 119. Mr Greatorex argues that the one-word grading system may be simple and accessible to parents, but that is at the cost of fairness. The system is unfair, subjective, and liable to lead to wildly differing outcomes, as this case, he says, illustrates, given the contrast between the views of the first and the second inspection teams. He also says that the grading system is denigrating and demoralising for staff and liable to result in unnecessary and unhelpful criticism and pressure on them.

45 Under Ground 2, it is contended by Mr Greatorex that the effect of the SIH is that where safeguarding is judged to be ineffective this leads, in principle and/or in practice, to (a) a judgment that leadership and management is inadequate, (b) a judgment that the overall effectiveness of the school is inadequate and, consequently, (c) a finding that the school has serious weaknesses, as defined in section 44 of the Education Act 2005. This, Mr Greatorex argues, is procedurally unfair, amounts to a fettering of the Defendants' discretion and is irrational. The effect is that a school can be outstanding in every other respect but, nevertheless, be found to be inadequate in terms of leadership and management and overall effectiveness. It is also said that this Ground is linked to Ground 1, because of the domino effect of a finding that safeguarding is inadequate is also a consequence of the one-word grading system. And it is said, in the alternative, that, even if Grounds 1 and 2 are unsound, they underline the need for particular care when assessing the issue of safeguarding and this, in turn, heightens the degree of scrutiny required under the other grounds relied on by the School.

46 Under Ground 3, it is contended that the inspection and the final report in this case were procedurally unfair. There are the following subpoints to this complaint:

i) Firstly, it is alleged that there appears to have been some sort of improper interference with the work and judgments of the first inspection team, as indicated by the fact that they indicated to the School that they had wished to award a grade for overall effectiveness of "Good" but that, having spoken to an unidentified person, they were only going to judge it as "Requires Improvement".

ii) Secondly, Mr Greatorex argues that, although the protocol on gathering additional evidence emphasises the importance of maintaining full and sensitive communication with the provider, and the need to explain the reasons for the further visit and if appropriate to offer an apology, none of this happened in the present case.

iii) Thirdly, the School complains that the draft report stated for the first time that the additional inspection was in order to gather more evidence about the quality of education for pupils with special educational needs and pupils who attend alternative provision, leadership and management and effective safeguarding. The letter of 20 January 2023 had merely said that safeguarding, leadership and management and aspects of quality of education would need further evaluation against the SIH: the gathering of additional evidence was to be confined to behaviour and attitudes and to the sixth form.

iv) Fourthly, Mr Greatorex complains that the names of all eight inspectors who visited the School are on the final report, although the report reflects the judgment of only four of them. It is said that it appears that unnamed individuals have had an influence on the report.

47 Under Ground 4, it is alleged that the conduct of the second team of inspectors was procedurally unfair, lacking in objectivity and contrary to the Ofsted Code of Conduct. This refers to criticisms of the manner of certain of the inspectors at points during the inspection, where it is said, as it was in the School's written complaint, that they were unduly negative,

dismissive, undermining, unreasonable and bullying or at least staff felt that they were so. A handful of instances is given in the witness statements in support of this claim and I will come back to them in due course.

48 Under Ground 5, it is alleged that Ofsted's complaints procedure and/or the way in which it handled the Claimant's complaint was procedurally unfair and not one any reasonable body could adopt. The School complains that all but one of its complaints were dismissed, but without further evidence or examples being provided and without providing the further evidence base on which the judgments of the inspection team were made. It is suggested in the Statement of Facts and Grounds that Ofsted refused to disclose the evidence base and that this was irrational and procedurally unfair. Authority from the First-tier Tribunal is also said to establish that the Freedom of Information Act 2000 may require disclosure of this information and it is said that it was irrational and procedurally unfair to respond to a complaint by saying, as the SHMI did, that he had reviewed the evidence and agreed with the judgments which had been reached. Given this approach, it is said to be unclear what is the purpose of the complaints procedure.

49 Under Ground 6, the complaint is that Ofsted has failed to give reasons for the adverse judgments in the final report and for the radical change in those judgments as compared with the views of the first inspection team. Here Mr Greatorex submits, in reliance on *Dover District Council v. CPRE Kent* [2017] UKSC 79, that there is no doubt that there is a duty on Ofsted to give reasons and the reasons must be intelligible, adequate and proper. That standard, he submits, is not met in this case and the reasons given in the final report do not enable the School to understand the adverse judgments, on what they are based and what it has to do in order to meet the criticisms which are made. He characterised the comments criticising the School, and stating what the School needs to do in order to improve, as "an executive summary", and I note that that characterisation was not contested by Mr Fisher. Rather, it was defended as being an appropriate or adequate approach.

50 Under Ground 7, it is contended that the adverse judgments in the inspector's final report are unlawful as they are based on material errors of fact and were not reasonably open to Ofsted on the evidence. Here, the Statement of Facts and Grounds pleads that the detail is contained in its comments on the initial draft of the report, which it submitted on 16 March 2023, and in its formal complaint of 30 March 2023. The number and detail of the points is said to be too great to set them out in the pleaded case, but six key points are pleaded. It is worth setting these out in full, so as to get a flavour of this Ground:

> "(1) the progress 8 (P8) data has been misunderstood, does not support the findings made, and is inconsistent with relevant guidance, standards and recommendations;
>
> (2) a number of assertions about the views of pupils and parents are wrong or unfair and are based upon an unfairly selective approach to the evidence;
>
> (3) the findings about behaviour appears to be based upon minimal and selective evidence rather than all of the evidence looked at fairly and objectively;
>
> (4) the findings about attendance are similarly selective and unfair and failed to take into account a number of obviously relevant considerations;

(5) the findings about safeguarding are inaccurate, unclear, unsupported by evidence or inconsistent with the evidence, and are again selective and unfair;

(6) the adverse judgments are inconsistent with the approach and findings taken by the Defendants to other similar schools."

51 Under Ground 8, it is said that the Defendants' refusal to delay publication to allow the School more time to prepare this Claim was procedurally unfair, failed to take account of relevant considerations and was irrational. It might be thought that this Ground falls away in the light of the agreement to delay publication, which was reached before Morris J on 22 May 2023, but Mr Greatorex seeks a declaration on it notwithstanding.

52 The School seeks to add a ninth Ground of challenge based on the information in the Summary Grounds of Defence and Mr Young's first witness statement that, in December 2022, Ofsted received credible intelligence from a whistleblower that Ms Furber had been bullying staff in relation to the inspection. The claims included that staff had been suspended until they disclosed what had been said to the inspection team and that certain staff did not feel safe in following the School's policies. It is said that this was obviously an irrelevant consideration and/or that Ofsted acted unfairly in taking it into account without putting the allegation to Ms Furber. Mr Fisher was content for me to consider this contention on its merits and I will, therefore, refer to it as Ground 9.

53 In his skeleton argument, Mr Greatorex also relies on an interview with the Chief Inspector conducted by the BBC on 12 June 2023 in which he says that her remarks amounted to her saying that she did not have the legal power to alter the grading system under the EIF that this was a matter for Government rather than her. He submits that this was an error of law and a misdirection, given that she does have the power and, indeed, the duty under section 133 of the 2006 Act to establish the relevant framework. I indicated that if he wished to pursue this point, Mr Greatorex would need to formulate it and to apply to amend the Statement of Facts and Grounds to add it as a tenth Ground of challenge. Despite discouragement from the court, he formulated a proposed tenth Ground over the short adjournment and applied to amend.

Discussion and conclusions

Ground 1

54 I accept Mr Fisher's submission that this Ground is not realistically arguable, whether on its own or in combination with Ground 2. The reality is that the School is impermissibly seeking to draw the court into a political argument and/or an area of judgment which is a matter for Ofsted and the Chief Inspector, and without any public law basis for doing so.

55 Under section 133, the Chief Inspector has a broad discretion as to the framework which she puts in place in relation to inspections. There is room for disagreement about what is the best way to report outcomes from inspections, but it is not the role of the courts to decide this issue. Nor is it the case that there is universal disagreement with the current approach. Views differ, but the fact that they do does not mean that the current system is irrational or unfair, nor that the Chief Inspector is failing in her duties under section 119 of the 2006 Act.

56 The merit of the current approach is that, overall, the grades assist parents in interpreting the commentary and other information which appears in the inspection report in relation to each of the areas of judgment. The grades also assist in standardising the approach and making comparisons with other years and other schools. It is inevitable that the awarding of grades will involve the making of judgments, but this does not mean that the process is entirely subjective as the EIF sets out the matters which must be considered by inspectors in making

a judgment in each of the areas of assessment. There is also very detailed guidance as to grade descriptors in the SIH which the inspectors are required to apply. Moreover, the quality assurance process in relation to a draft report reduces the risk of inconsistent grading.

57 Contrary to the School's case, the disparity between the judgments of the first and second teams in the present case is not simply accounted for by the fact that the teams were different and each was applying its subjective judgment. The second team gathered additional evidence and triangulated the evidence which had been gathered, so the evidence was not identical on the second occasion. Equally importantly, the view taken was that the first team had not applied the EIF and the SIH correctly. This was not a case of the framework being applied correctly to the same evidence by two different teams which then came up with different results or radically different results. As a matter of logic and rationality, the two outcomes in this case were not inconsistent because the circumstances in which each set of judgments was made were different.

58 Nor is the approach under the EIF one which has been adopted without careful consideration. The EIF was the subject of consideration by Ofsted in 2019 and public criticisms of it were taken into account, including criticisms of the system of grading. Whilst the four areas of assessment were modified, the grading system was seen to have more advantages than disadvantages and was, therefore, retained. The Defendants were fully entitled to come to this conclusion whether or not everyone would agree with it.

59 Subject to Ground 2, nor am I at all convinced that removing the grading approach would materially reduce the adverse consequences for a school when it is criticised by Ofsted inspectors. The commentary and other information in support of the judgment may be very critical, as the current case illustrates, and this is likely to have essentially the same impact on the perception of the school and the morale of staff, even if the judgment is not then summarised in a single word.

60 None of this is to say that I agree or disagree with the approach under the current EIF. It is not my function to do so. My function is merely to decide whether it is arguable that the current approach is unlawful. In my view, it is not.

<u>Ground 2</u>

61 This point makes no difference to the outcome for the School, as Mr Fisher points out.

i) First, the marks for leadership and management and overall effectiveness were not consequences of the judgment on safeguarding. They were based on the evidence about the quality of leadership and management and an overall judgment about the effectiveness of the School. The relevant judgments were not affected by the feature of the EIF which the School complains and which it challenges.

ii) Second, there was debate before me as to potential adverse consequences for the School in the present case, notwithstanding that it is already an academy, arising out of the overall effectiveness grading. But, again, that overall effectiveness grade was not a consequence of the alleged domino effect which Mr Greatorex identifies.

62 Ground 2, therefore, does not arise in the present case.

63 Third, in any event, Ground 2 is unsound. It is not the case that a grading of "Inadequate" automatically follows from a finding that safeguarding at a school is "ineffective": see para.26 of the SIH which states that such a consequence is likely rather than inevitable.

64 Fourth, I accept Mr Young's evidence that, although para.147 of the SIH is not expressed consistently with that evidence, there is a similar discretion in respect of overall effectiveness.

65 Fifth, the very fact that there is a general approach with a discretion to depart from it shows that the relevant statutory powers have not been fettered. It is the function of a policy to set out how a discretional power will be exercised. Provided that policy may be departed from in a given case, it will, in principle, be perfectly lawful: *British Oxygen v Minister of Technology* [1971] AC 610.

66 The policy position of Ofsted, in relation to safeguarding is also, in my view, plainly rational. Given the central importance of this issue, the safety of the children at a school is a matter which is specifically required to be addressed in the inspectors' report: see section 5(5A) of the 2005 Act. Moreover, para.1 of the Department of Education's document "Keeping Children Safe in Education 2022" defines safeguarding and promoting the welfare of children as follows:

> "• protecting children from maltreatment
>
> • preventing the impairment of children's mental and physical health or development
>
> • ensuring that children grow up in circumstances consistent with the provision of safe and effective care, and
>
> • taking action to enable all children to have the best outcomes."

67 It can hardly be said to be irrational that the leadership and management, and overall effectiveness, of a school which has inadequate safeguarding measures in place, are also likely to be held to be inadequate. Although the hypothetical seems unlikely, if, however, the school is outstanding in all other respects, there is a discretion to take a different approach.

68 I therefore refuse permission in respect of Ground 2. As I have said, the complaint itself does not seem to me to have merit; second, it does not arise in this case; and, third, for that reason the outcome in the present case would be the same even if the School is right: section 31(3D) of the Senior Courts Act 1981. There is no exceptional public interest which would justify the point being litigated in the present case, nonetheless.

Grounds 3 to 6

69 There are two preliminary points in relation to Grounds 3 to 6.

70 First, there was disagreement about whether these Grounds should be looked at under one heading or separate headings. I will do both, but I agree with Mr Fisher's submission that it is important that, in *Durand Academy Trust v. Ofsted* [2018] EWCA Civ. 2813, the Court of Appeal examined Ofsted's inspection and complaints procedure and made two points. First, that the process up to and including the final report of an inspection should be looked at as a whole, in terms of assessing its fairness, and second that, in principle, the process is fair.

71 Although the inspection, reporting and complaints process has since been amended, Mr Greatorex did not suggest that this was in a way which would undermine these two key conclusions. On the contrary, he accepted that the fairness of the process should be looked at as a whole where a systemic challenge is made. His submission was that what mattered was how the process had been operated in this particular case. His was, in other words, not a systemic challenge. His argument was that the process had been operated unfairly at each stage and that the unfairness which he identified at each stage had not been addressed by any subsequent stage. He also argued, and ultimately Mr Fisher did not dispute this, that in *Durand*, whilst the process was found to be fair in principle, the Court of Appeal was not considering a case in which it was being argued that insufficient information had been provided to the school to enable it to challenge the provisional views of the inspectors. Nor were there arguments about the adequacy or otherwise of the reasons set out in the decisions made by Ofsted.

72 The second preliminary point is that Mr Fisher reminded me of the summary of the duty of fairness at common law drawn from *Ex parte Doody*, but conveniently located in para.69 of Singh LJ's judgment in *Citizens UK v. Secretary of State for the Home Department* [2018] EWCA Civ. 1812, as follows:

> "'… (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer'."

73 As to what the gist of the case is, Mr Fisher reminded me of the well-known authorities and, in particular, of what Lord Denning said in *Re Pergamon Press* [1972] Ch. 388, i.e. that:

> "where a public body is to make criticism of a person, fairness requires that they must be given a fair opportunity for correcting and contradicting what is said against them, but that there need not be chapter and verse".

74 Mr Fisher also referred in his skeleton argument to *Re R* [2001] EWHC Admin, 571, where Collins J said:

> "Fairness does not require that a person to be criticised knows from whom or from what source or why those criticisms have been made.

> What he needs to know is that the criticism has been made and what that criticism is and to be given sufficient information about it to enable him to deal with it and to make the necessary investigations on his own side and to come up with any explanations or to set right any errors of fact which may lie behind it…"

Ground 3

75 As to the first of the criticisms made by the School under this heading, what was said at the end of the first inspection is contested but, in any event, the reference to an unidentified person is to the duty HMI. I accept Mr Young's evidence about the role of the duty HMI and conclude that it is not arguably improper that such a person should be involved in the process in the way that they were in this case.

76 Secondly, as to the point about insensitive communication, the Ofsted letter of 20 January 2023 did comply with the gathering of additional evidence protocol. It explained why the second visit was necessary. Although the School pleads that there was no apology, there was an apology in the letter as is apparent from the passage which I have quoted. Indeed, in Ofsted's notes of the debrief at the end of the 24 January 2023 inspection, it is recorded that the inspectors explained what had been wrong with the process in relation to the first inspection and had said, "we can only apologise".

77 As to the complaint that the letter of 20 January 2023 did not properly or fairly identify the scope of the second visit, I agree with Mr Young that this is based on an overly narrow reading of the letter of 20 January 2023 and it takes the matter nowhere. The subject areas which were to be focused on were clearly identified in the letter. Education for children with special educational needs and children who attend alternative provision are aspects of quality of education, which was specifically mentioned as a focus of the further inspection. In any event, it is not clear how unfairness resulted from this, given that there were meetings with the relevant people, including staff who were concerned with special educational needs, and who therefore had an opportunity to say what they wished to say.

78 There is nothing in the fourth point under Ground 3 either. It seems to me that this point (amongst others) is indicative of a kitchen sink approach on the part of Mr Greatorex, as Mr Fisher submits. It is the case that eight inspectors took part in the inspection and I very much doubt Mr Greatorex's contention that it would make a material difference to the reader that eight inspectors were said to be parties to the report as opposed to four.

79 I therefore refuse permission on Ground 3.

Ground 4

80 The evidence does not support the conclusion that the conduct of the second team of inspectors, or any of them, was such as to render the process unfair. It consists principally of evidence about a handful of instances of behaviour which the witnesses say they felt was dismissive, uninterested in what they had to say or hostile. But a good deal of this aspect of the evidence is based on assertions or what they say they felt, sometimes in hindsight. There is not a great deal of concrete evidence about actual behaviour and much of that is capable of differing interpretations.

81 It is natural that, in their disappointment, staff should make this sort of criticism of inspectors, who were critical of them. Moreover, they may have detected at the time that the inspectors were critical and interpreted this as being dismissive or not listening. But the allegations of bullying etc. do not sit easily with the evidence that, at the beginning of the

feedback session after the second visit, Ms Furber was asked about whether she had any concerns about the conduct of the visit and said that she did not. During the feedback meeting she was asked if she had anything to add, and said that she did not. At the end of the meeting she and the Chair of Governors were asked if they had any comments they wished to make. They paused for thought and then did make comments which challenged what they had been told. But they did not say that the inspectors had behaved badly during the inspection. On the contrary, the Chairman of Governors said that he was not blaming the second team of inspectors.

82 In addition to this:

i) Mr Young reports, and I accept, that the relevant inspectors strongly deny the allegations;

ii) They have no history of substantiated complaints of this nature: on the contrary, they were chosen for their experience and for their reputations for objectivity, fairness and integrity;

iii) The allegations against them were taken into account in the factual accuracy check in relation to the draft report, and in the complaints process, but it was concluded that their judgments were supported by the evidence base, including the evidence gathered by the first team of inspectors.

83 Having regard to the inspection reporting, quality assurance moderation and complaints process as a whole, I am satisfied that the School has not made out an arguable case that this aspect of its evidence, on its own or taken with its other criticisms of the process, shows that the process was unfair.

Ground 7

84 I will come back to Grounds 5 and 6 but, before I do so, I turn to Ground 7.

85 I agree with Mr Fisher that this Ground has not established material errors of fact which are capable of vitiating the judgments which were reached by the inspectors (see *E v. Secretary of State for the Home Department* [2004] QB 1044). In truth, the thrust of the complaints under this heading is an attempt to argue that the evidence should have been interpreted in a different way, and different judgments reached. As the pleaded list of key points which I have quoted from the Statement of Facts and Grounds makes clear, the exercise that the court is invited to undertake under Ground 7 is impermissible in a claim for judicial review. As Lindblom LJ said in *Crown (Governing Body of X) v. Ofsted* [2020 EWCA Civ. 594:

> "43. Two general points can be made at the outset. First, an allegation of irrationality is never easy to establish. In the context of a school inspection, undertaken within a statutory framework by inspectors familiar with the task, and involving issues on which the exercise of evaluative judgment is an essential part of the process, it is likely to be particularly difficult. Secondly, as was recently held by this court in *R. (on the application of Durand Academy Trust) v Office for Standards in Education, Children's Services and Skills* [2018] EWCA Civ 2813; [2019] E.L.R. 100, Ofsted's inspection, evaluation and reporting process, and its procedure for handling complaints, are inherently procedurally fair (see the judgment of Hamblen L.J., as he then was, at paragraph 63). The contrary was not argued before us.

> 44. To amplify the first of those two points: dissatisfaction with the findings and conclusions of the inspection report does not, of itself, amount to a demonstration of irrationality."

86 In the present case, the School is clearly dissatisfied with the judgments made in the final report, but it has not come close to establishing an arguable case that they are irrational notwithstanding the detailed internal scrutiny which they have undergone through the quality assurance, moderation and complaints process.

Ground 8

87 Section 13 of the Education Act 2005 requires Ofsted to send the final report to the relevant school without delay. Section 16(3)(c) then requires the school to take such steps as are reasonably practicable to ensure that every parent of a registered pupil at the school receives a copy of the final report within such period following receipt of the report by the proprietor as may be prescribed. The prescribed period is five days.

88 In addition to this, section 11 empowers Ofsted itself to publish a report and I am told – and this was not disputed – that the practice of Ofsted is indeed to publish reports itself. I also accept that there is a public interest in the publication of a report, although not only from the point at which it has become final, as Mr Fisher submitted. Tthere is a public interest in the outcome of the inspection of a school being published sooner rather than later, so that the information which the final report contains is current and this interest therefore arises from the point at which the inspection takes place.

89 In this context, it is understandable that the position of Ofsted was that it would publish the report on the day on which the School was required under statute to do so. When the application to the court was made, however, Ofsted was, in effect, obliged not to publish the report pending the outcome of the application which is currently before me.

90 I do not accept that, arguably, this was a breach of any public law duty to act fairly towards the School. Mr Greatorex argued that the court should revisit the decisions that were made leading up to Morris J's Order because the question was one of public interest. In my view, the position leading up to Morris J's Order has been examined and has been adjudicated on by the grant of interim relief. Insofar as the court may or may not wish to express disapproval of the approach which Ofsted took in relation to the initial application, that is a matter which can be debated in relation to the question of costs when the time comes. In my judgment, it is not appropriate and not central to the present case that the judicial review claim should concern itself with litigation decisions made earlier on in the proceedings.

Ground 9

91 There is nothing in Ground 9 either. Mr Young explains that the whistleblowing intelligence merely reinforced the concerns which had already arisen in the evidence-based review which I have described and which formed part of the quality assurance process in relation to the first inspection. The decision to gather further evidence, the assessment after the second inspection, the decisions made on the School's comments on the first draft of the report and on the School's formal complaint were not affected by this intelligence which, in any event, Ofsted was not in a position to investigate. I also accept that Ofsted was entitled to maintain the confidentiality of this information and that no unfairness resulted to the School as a consequence of it doing so.

92 I therefore refuse permission on Ground 9, not only on the merits of the Ground but also on the basis that section 31(3D) of the Senior Courts Act 1981 applies and there is no exceptional public interest which would justify this point going forward.

Ground 10

93 The pursuit of this Ground by Mr Greatorex was surprising. There was a factual dispute as to what the Chief Inspector said or meant in the interview in question, but even if she misdescribed her powers this was of no consequence in the present case. It was common ground that she has the power, and indeed the duty, under section 133 to determine the EIF and Mr Greatorex acknowledged this in his draft amendment. Moreover, this is not a case in which she was formally asked by the School to amend the EIF but declined to do so because, she said, she did not have the power to do so. There was therefore no issue as to the Chief Inspector's powers in this regard which required adjudication in this case. I therefore refused permission to amend and would have refused permission had the point been pleaded.

Grounds 5 and 6

94 I return, then, to Grounds 5 and 6. In summary, I propose to grant permission to allow the School to complain that, in the course of the process which I have described at length, it was not provided with sufficient information to enable it fairly to contest the findings about the School which were proposed by the inspectors to be made. Secondly, I propose to grant permission for the School to complain about the way in which the final report was expressed, in other words to make a reasons-based challenge. These two points reflect the key theme running through Mr Greatorex's oral submissions and the emphasis of his case, although he spread his net far more widely than this and Grounds 5 and 6 were not formulated in precisely the way in which I have indicated that they are arguable.

95 I give permission with considerable misgivings and real doubts as to whether the arguments which Mr Greatorex puts forward will succeed, but I note that this appears to be an unusual case in terms of the passage of events that I have described. I note the difference of view as between the first team of inspectors and the second, and I note that the views about the School which were expressed in the final report were extremely critical and, in all likelihood, very damaging.

96 It seems to me that there is an arguable case that greater information about the evidence on which the draft inspection report was based should have been provided to the School and/or more information should have been provided in writing so as to give the School a better ability to understand and challenge the provisional findings of the inspectors before the report was made final. The likely effect of the final report when published arguably supports the argument that there was a need for greater transparency. Arguably, it was not enough to give oral feedback at the end of the second inspection in the way that it was, particularly given that the outcome was likely to come as a surprise, and/or the reasons given in the draft report were insufficiently detailed.

97 Expressed as it was, the final report seems likely to have significantly harmed staff morale and parent and pupil confidence in the School and consequently to have led to wider harm to the School in terms of recruitment and retention of staff and enrolment and retention of pupils. That is not to say that it was wrong of the inspectors to criticise the School, but arguably the final report ought to have provided more context for the criticisms made by the inspectors so that the School and parents could understand the scale of the problems identified and, more precisely, what required to be done. Arguably, comments like "Too many pupils do not feel safe at" the School, or "Pupils experience frequent disruption to learning" or "Aggressive and abusive language towards peers and staff is common. Bullying

happens." without additional context to indicate the numbers involved or the scale of each problem meant that the final report was unnecessarily damaging. Arguably the steps needed for the School to improve also lacked precision as to what the flaws in the School were.

98 I also note that, with respect to counsel, the question of the purpose of the final report was not fully argued before me with reference to the relevant parts of the statutory framework, although certain provisions were produced after the short adjournment in the light of observations by me. My point was that, whilst the parties agreed that the reasons given in the final report had to be "adequate" the question was: "adequate" for what purpose? This was not an adjudication of a legal or a planning dispute. The parties did not agree as to what the purpose of the final report was – was it simply to inform parents or to assist the School to improve, or neither, or both – and I considered that this issue would inform the question as to adequacy of the reasons for the grades which were given in the present case. That question would fall to be considered in the context of the statutory framework and other relevant materials. Neither party had adopted this approach to the reasons issue and the result was that a number of conflicting assertions about the role of Ofsted were made in the course of the hearing.

99 I also note that the issues which I have identified have not, as far as I am aware, been considered authoritatively by the court.

100 So, for all these reasons, I am prepared to allow these particular issues to go forward, which may require reformulation of Grounds 5 and 6, but the essence of what I am allowing to go forward I hope is clear. If not, it can be discussed when I conclude my judgment.

Interim Relief

101 I turn, then, to the question of interim relief. The principles applicable to the application for interim relief were helpfully summarised by the judgment in the judgment of the Court of Appeal in *Crown (Public and Commercial Services Union and Others) v. Secretary of State for the Home Department* [2022] EWCA Civ. 840. In summary, the *American Cyanamid* principles are modified in relation to public law claims. The principal relevance of the public law context is that, as Sir Clive Lewis said in his book **Judicial Remedies in Public Law**, 6th Edition 2020 at para.8-24:

> "The adequacy of damages as a remedy will rarely determine whether or not it is appropriate to grant or refuse an interim injunction. For that reason, the courts will normally need to consider the wider balance of convenience and, in doing so, the courts must take the wider public interest into account."

102 Second, in considering where the balance of convenience lies, the court has a wide discretion and its task is to take the course which minimises the risk of injustice.

103 Third, it is well established that in the public law context, the court will have regard to the principle that it is in the public interest that, unless and until it is set aside, a decision of a public body should be respected (see, for example, *Crown v. Ministry of Agriculture, Fisheries and Food*, *ex parte Monsanto PLC* [1999] QB 1161 at 1173E).

104 The relevant principles were also fully considered by the Court of Appeal, specifically in relation to applications to restrain the publication of Ofsted reports, in the *X* case to which I have referred (see paras.61 to 85 in particular). The key points are that, firstly, at para.66, Lindblom LJ said:

> "There is support at first instance for the proposition that, in a public law claim, the court will generally be reluctant to grant interim relief in the absence of a 'strong prima facie case' to justify the granting of an interim injunction…. This is not to say that the relevant case law at first instance supports the concept of a 'strong prima facie case" being deployed as a 'threshold' or 'gateway' test in such cases, but rather that the underlying strength of the substantive challenge is likely to be a significant factor in the balance of considerations weighing for or against the granting of an injunction."

105 Secondly, Lindblom LJ went on to consider the authorities on the level of justification which a court will require for restraining the report of a public body which has a statutory duty to prepare one, including Ofsted reports. At paras.78 and 79, he said:

> "78. Unsurprisingly, and in my view correctly, the case law at first instance has been consistent in emphasizing the need for a suitably demanding approach to applications for an interim injunction to prevent the publication of an Ofsted report. It is important to recognize the scope of Ofsted's functions under sections 5, 13 and 14 of the 2005 Act, including their powers and duties to secure the timely publication and dissemination of their inspection reports. The inherent purpose of this part of the statutory regime is to promote the public interest in parents, pupils and local communities knowing, without delay, the results of school inspections, and to uphold the rights of those entitled to receive that information. The considerations that would warrant impeding these functions would have to be very powerful.
>
> 79. Chamberlain J. was therefore right to refer to the concept of a "high hurdle", and the various phrases corresponding to it that one sees in the authorities. As the case law shows, the facts will vary from case to case. But it is, I think, highly unlikely that the kind of circumstances justifying the grant of injunction that arose in *Interim Executive Board of X* will often occur; they were indeed exceptional. In striking the balance overall, the court will keep in mind that only if the factors weighing in favour of an order to restrain publication are nothing less than compelling should such relief be granted".

106 At paras.91 and 92, Lindblom LJ said:

> "While the judge found that the inspection report contains conclusions that could have severe reputational consequences for the school, this point has another side. It may fairly be said that the greater the possible reputational damage, the greater the public interest in parents, pupils and the local community being made aware swiftly of Ofsted's concerns. As Farbey J. rightly observed in *Remus White Ltd.* (at paragraph 26), public confidence in the statutory regime for school inspections is important in the public interest, and this requires Ofsted's concerns about a school's performance to be brought into the public domain promptly.
>
> 92. But as Sir James submitted, the school is not powerless to minimize any potential reputational damage. There is nothing to stop

it communicating to parents and pupils its criticisms of the Ofsted report, bringing to their notice other reports and surveys that – in its belief – cast doubt upon or disprove the conclusions of that report, and publicizing the measures it has taken to deal with the concerns expressed."

107 Mr Greatorex argued that the claim in this case is a strong one and that there were also exceptional features of this case which supported the conclusion that there were compelling reasons for granting interim relief.

i) He relied, in particular, on delays by Ofsted. He pointed out that there was a delay of around two months between the first and second parts of the inspection. It then took around six weeks for the draft report to be sent to the School. There was then a period of around six weeks whilst the School's complaint was investigated. As Mr Greatorex said, the School did what it needed to do speedily but there were delays whilst Ofsted dealt with the matter at each stage. Mr Greatorex pointed out that the timeline was inconsistent with the aims of Ofsted, in terms of the production of a draft report within 18 working days of inspection, and he argued that it cannot lie in the Ofsted's mouth, having delayed in this way, to say that it is now particularly urgent that the final report be published.

ii) Mr Greatorex relied on the conduct by inspectors alleged under Ground 4.

iii) He relied on the contrast between the outcome of the first inspection and the outcome of the second. He said that it must be an exceptional case in which Ofsted's position is that a team of its inspectors fell below the standards of competence expected of them and a second team then reached radically different views, as in this case.

iv) Mr Greatorex relied on the fact that the approach to inspection and reporting by Ofsted is a matter of public discussion at the moment and that the process is under consideration with a view to potential modifications. He said that this may bear on the present case.

v) He said that there was a risk of statutory consequences for the School if the report were to be published containing its current grades.

108 In my judgment, interim relief in this case should be refused. Firstly, as I have indicated, the claimant has not established a strong *prima facie* case. I have given permission, as I said, with some misgivings, to complain or to raise concerns about the level of information provided to the School so as to enable it to challenge the inspectors' provisional views, and about the adequacy of the reasons set out in the final report, at least in the context of the exceptional circumstances of the present case. But I have expressed doubts about whether, ultimately, those arguments will succeed and have stated, as is the case, that my decision to grant permission is, in part, because the questions raised have not previously been considered in this particular context by the court. So I do not carry out the balancing exercise on the basis that there is a strong *prima facie* case that the final report will in due course succeed. Moreover, even if the Claim ultimately succeeds it is far from clear that the final report will be quashed given the quality assurance processes which it underwent.

109 As far as the points raised by Mr Greatorex are concerned, in relation to delay my view, as I have said, is that there is a public interest in the publication of Ofsted reports taking place as rapidly as is consistent with fairness. That is principally because the report reflects an assessment of a school at a particular point in time and it is important that it is therefore as

current as possible when it is published. In my judgment there is therefore an imperative to publish which goes into the balance. Moreover, the delays alleged against Ofsted were significant but they were not as a result of dilatory conduct, as Mr Fisher submitted. They were the result of very careful scrutiny of what had been done by the first inspection team and then careful consideration of the arguments put forward by the School.

110 As far as the conduct of inspectors is concerned, I have expressed my views about that and, in my judgment, the evidence does not amount to the sort of exceptional circumstance which might warrant the publication of the final report being delayed.

111 As far as the contrast between the outcome of the first inspection and the second is concerned, again, as I have explained in addressing the grounds of challenge in the Statement of Facts and Grounds, rationally or logically there is no inconsistency between the views which were taken. Those views were based on different evidence bases, in the one case applying the relevant criteria correctly and, in the other, not doing so.

112 As far as the fact that the Ofsted processes are under public scrutiny is concerned, I do not give that a great deal of weight. It seems to me that the contrary can be argued, namely that, given that that is so, it is in the public interest for the report to be in the public domain so that, insofar as there is any discussion of the present case, the public are aware of what the inspectors decided.

113 In relation to the risk of statutory consequences for the School resulting from the report, I have no doubt that any decisions taken in that regard will be taken in the knowledge that the final report is under challenge in the way in which I have identified. Any such decisions can be examined in due course on their merits.

114 Individually and cumulatively, in my judgment, there are neither a strong *prima facie* case, nor the sorts of exceptional compelling features in this case which would justify granting the relief sought by the School pending the determination of the grounds of challenge that I have identified as being arguable.

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