

## Judicial review of OFSTED judgments

**Leon Glenister**

**[lglenister@landmarkchambers.co.uk](mailto:lglenister@landmarkchambers.co.uk)**

## Overview

- As a public body, susceptible to judicial review on usual grounds:
  - Illegality
  - Procedural fairness
  - Irrationality
- Two high profile judicial reviews in 2017

## Success rates of judicial review

- FoI request of all judicial review claims challenging OFSTED inspections since 2007:
  - 22 challenges (not clear whether issued or PAP); 1 of these is ongoing
  - Majority were settled or withdrawn, but unclear as to the terms
  - Excluding those which settled or were withdrawn and the basis is unclear, there are 5 cases where the school benefitted in some tangible way



## Illegality: outside statutory powers

### **Old Co-operative Day Nursery v HM Chief Inspector, Children's Services and Skills [2016] EWHC 1126**

- Inspection following complaint from member of the public that child had stepped into the road and there was inadequate supervision
- It was agreed between the parties (and reflected in both the Childcare Act 2006 and guidance that an OFSTED inspection is not a complaints adjudicator

## Illegality: outside statutory powers



### **Old Co-operative Day Nursery v HM Chief Inspector, Children's Services and Skills [2016] EWHC 1126**

“We are not a complaints adjudicator. We have no legislative duty or power to investigate complaints against providers to determine whether complaints are upheld, partially upheld or substantiated. Our role is to establish whether a registered person is meeting the *Statutory Framework for the Early Years Foundation Stage...*”



## Illegality: outside statutory powers

### **Old Co-operative Day Nursery v HM Chief Inspector, Children's Services and Skills [2016] EWHC 1126**

- Outcome summary on OFSTED website dealt only with the complaint – specifically that the nursery had compromised child's safety and did not adequately investigate the incident.
- This summary was outside the power of OFSTED as it is not entitled to undertake an individual investigation or adjudication into an individual complaint.

## Illegality: equality

### **Chief Executive of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2017] EWCA Civ 1426**

- Mixed sex voluntary aided Islamic faith school.
- From Year 5, operated a gender segregation policy for religious reasons. Many parents chose school for this reason.
- Some girls spoken against segregation, e.g. it “is dumb”

## Illegality: equality

### **Chief Executive of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2017] EWCA Civ 1426**

- Graded inadequate in three respects, among reasons relying on segregation policy and stating it was less favourable treatment.
- OFSTED did not say there was a difference between quality of education between boys and girls, but said the segregation policy meant girl pupils could not learn and socialise with boy pupils solely because of their sex; and vice versa
- Question was whether this was direct discrimination



## Illegality: equality

### **Chief Executive of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2017] EWCA Civ 1426**

- Court of Appeal:
  - Girl pupil who wishes to mix with boy pupil is precluded from doing so because of her sex. And vice versa.
  - Less favourable treatment is judged on an individual rather than group basis.
  - Not accepted separate but equal treatment in respect of gender cannot be unlawful discrimination.

## Illegality: equality

### **Chief Executive of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2017] EWCA Civ 1426**

- Consequences
  - Association of Muslim Schools (of which Al-Hijrah is a member) refused permission to be added as a party in order to appeal
  - Wider implications for e.g. single sex schools

## Procedural fairness: complaints procedure

### **R (Durand Academy Trusts) v Office for Standards in Education, Children's Services and Skills [2017] EWHC 2097 (Admin)**

- Judged “inadequate” and recommended to be put into special measures.
- Main ground was on complaints mechanism:
  - Stage 1 informal resolution; Stage 2 formal procedure; Stage 3 review of complaint handling.
  - Where serious weaknesses/special measures, stage 2 is skipped. So most serious findings have no formal complaints mechanism.

## Procedural fairness: complaints procedure

### **R (Durand Academy Trusts) v Office for Standards in Education, Children's Services and Skills [2017] EWHC 2097 (Admin)**

- OFSTED justification:
  - Extended quality assurance procedures prior to authorisation of the judgment by Chief Inspector
  - School contributes to process by commenting on draft report
  - Public interest in schools judged to have serious weaknesses not being able to delay publication of the outcome

## Procedural fairness: complaints procedure

### R (Durand Academy Trusts) v Office for Standards in Education, Children's Services and Skills [2017] EWHC 2097 (Admin)

- Court rejected justifications. Rejected a justification on the infallibility of the initial process, particularly where there is recent example of irrational conclusion – **Old Co-Operative Day Nursery**.
- OFSTED applied for permission to appeal, and instructed James Eadie QC.
- What about decisions in the interim?

## Procedural fairness: complaints procedure



### **'LA LAW IT AIN'T'** Twitter slams 'boring' coverage of Brexit showdown as users pray Christmas TV is better

One user fumed that the major hearing was "disappointingly unlike a TV courtroom drama"



## Procedural fairness: manner of inspection

### Old Co-operative Day Nursery:

“61 In addition, complaints were made in Mr de Mello's skeleton that Ms Gray was demeaning to staff and to the Deputy Manager after Ms Harris had been taken away by ambulance; that she behaved autocratically and unreasonably; and that she failed to put her concerns to Ms Harris before reaching conclusions. None of these allegations was supported by the evidence. Even if they had been, I consider that they go nowhere: it will very often be the case that teachers at a school being inspected will regard the inspectors in a less than favourable light. But the issue is whether the inspector's conduct led to any particular unfairness, and none has been established on the evidence.”

## Irrationality: matters of judgment

### Cambridge Associates in Management v OSFTED [2013] EWHC 1157

- Inspection following a complaint about an incident where children alleged to be inadequately supervised; OFSTED gave “notice to improve”
- Argument notice was irrational was rejected, as to judgment:  
“44 It was based on the recommendation of an experienced Inspector. In her judgment, concurred in by others within Ofsted, the incident warranted such action, in particular because it presented a risk to child safety and left children vulnerable”



## Irrationality: relevant considerations

### Old Co-operative Day Nursery

- OFSTED Guidance to the effect that history of inspections should be taken into account (now in Early Years Handbook). Important to ensure inspection is not a lottery.
- School had been graded outstanding in September 2013, inadequate on 6 May 2014 (following incident) then outstanding again on 6 August 2014.
- No evidence inspector looked at full content of previous reports, and this was irrational.

## Irrationality: relevant considerations

### Durand

- “52 That said, I do have significant concerns as to whether, on a fair analysis of the evidence base in general and the Final Summary Evaluation in particular, the material does really lead to a conclusion that the School was inadequate and in need of being placed into special measures rather than the lesser category of requires improvement. Perhaps, as counsel for the School sought to persuade me, the undoubted weaknesses in the boarding school in Midhurst have permeated the whole assessment. However, in the light of my conclusions on the first ground there is no need for me to, and I do not, express a concluded view on the rationality of the Report.”

## Damages

- No general right to damages in public law
- Not clear whether company can claim for reputation damage under article 8. See **Old Co-Operative Day Nursery**, but general issues with damages claim:
  - Evidence
  - No expectation of damages – section 151 of the Education and Inspections Act 2006
  - Attack on reputation must meet minimum level of seriousness