Neutral Citation Number: [2020] EWCA Civ 594

Case No: C1/2020/0146

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MR JUSTICE JULIAN KNOWLES
[2020] EWHC 69 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 May 2020

Before:

The Chancellor of the High Court
Lord Justice Lindblom
and
Lord Justice Henderson

- -

Between:

R. (on the application of the Governing Body of X) **Appellant**

- and -

(1) Office for Standards in Education, Children's Services and Skills
(2) Department for Education **Respondents**

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Mr Mark Cawson Q.C. and Mr Tom Longstaff (instructed by **Stephensons Solicitors**) for the **Appellant**
Sir James Eadie Q.C. and Mr Brynmor Adams (instructed by **Ofsted Legal Services**) for the **First Respondent**
The Second Respondent did not appear and was not represented.

Hearing dates: 17 and 18 March 2020

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Judgment Approved by the court
for handing down
(subject to editorial corrections)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 1630 on Thursday, 7 May 2020.

Lord Justice Lindblom:

Introduction

1. This case came before us as an appeal against the refusal of an application by a school for an interim injunction to prevent the publication of an inspection report prepared by the Office for Standards in Education, Children's Services and Skills ("Ofsted") until the determination of judicial review proceedings challenging that report. At the hearing, it was agreed at our suggestion that we should not only decide that appeal but also, sitting as the Divisional Court, the application for permission to apply for judicial review, which had not been determined in the court below.

2. The appeal is against an order made by Julian Knowles J. on 23 January 2020, refusing an application for interim relief in the form of an injunction. The school is a state-funded secondary school in the north of England. The appellant is its governing body. The first respondent is Ofsted, which is a non-ministerial department of the Government, responsible for inspecting various educational institutions, including state-funded secondary schools. The second respondent is the Department for Education. On 10 December 2019, the school made a claim for judicial review of a report prepared by Ofsted under section 5 of the Education Act 2005, following an inspection of the school in October 2019. The report, which was sent to the school in final form on 5 December 2019, graded the school as "Inadequate". The school strongly disagrees with that assessment. In its claim it seeks an order to quash the report, on the grounds of irrationality and procedural unfairness. It also applied for an interim injunction under section 37 of the Senior Courts Act 1981 and CPR r.25(1)(a) to restrain Ofsted from publishing the report, or any similar report, before the determination of the claim. This was the application that Julian Knowles J. refused.

3. With the "overriding objective" in mind, it seemed sensible that we should not merely decide the appeal against the refusal of interim relief, but also re-constitute this court as the Divisional Court, under sections 9 and 66 of the 1981 Act, to determine the application for permission to apply for judicial review. This avoids the possibility of the school being denied an appeal to the Court of Appeal against a refusal of permission (see *R. (on the application of MD (Afghanistan)) v Secretary of State for the Home Department* [2012] EWCA Civ 194; [2012] 1 W.L.R. 2422, at paragraph 20). If we sit as the Divisional Court on the application for permission, the school can seek to appeal a decision to refuse permission to the Court of Appeal in the usual way (section 16(1) of the 1981 Act, and CPR r.52.8). Nor do we then have to resolve whether a decision to grant or refuse permission to apply for judicial review can properly be said to be either "incidental to" an appeal against the refusal of interim relief (section 15(3) of the 1981 Act) or "[in] relation to" that appeal (CPR r.52.20(1)).

The basic facts

4. The school last underwent a full inspection by Ofsted under section 5 of the 2005 Act in 2010, when it was graded overall as "Good". An inspection under section 8 was carried out on 23 February 2016. The report on that inspection, published on 16 March 2016, also graded the school as "Good".

5. On 9 and 10 October 2019, Ofsted carried out the inspection with which these proceedings are concerned. The inspection began as an inspection under section 8, but was converted after the first day into a full section 5 inspection in the light of concerns raised about safeguarding. On 23 October 2019, the school sent Ofsted a formal letter of complaint setting out a number of concerns regarding the conduct of the inspection team. A draft report of the inspection, which graded the school as "Inadequate", was sent to the school on 4 November 2019. The school submitted comments on the draft report to Ofsted on 11 November 2019, complaining that the inspection process had been unsatisfactory and contesting the "Inadequate" grade. On 26 November 2019, the lead inspector responded to the school's comments on the draft report. On 3 December 2019, having considered those comments, Ofsted wrote to the school, saying it was exhibiting serious weaknesses, and adhering to the grade of "Inadequate". On the same day, the school responded to the comments of the lead inspector. On 5 December 2019, the final version of the report was issued. The "Inadequate" grade remained.

6. At a hearing on 11 December 2019, the day after the claim for judicial review had been issued, Julian Knowles J. ordered that the application for interim relief be listed for hearing on 18 December 2019. On 13 December 2019, the school's solicitors wrote to Ofsted asking it to disclose all draft reports and communications relating to the inspection. On the same day, Ofsted's legal department declined that request, saying that no further documents were necessary to resolve the issues in the application for interim relief.

7. At the hearing on 18 December 2019, Julian Knowles J. reserved judgment on the application. He granted an interim anonymity order under CPR r.39.2(4), to protect the school's identity until further order.

8. On the same day, the school received a letter from the Regional Schools Commissioner on behalf of the Department for Education, which noted Ofsted's conclusion in its report and pointed out that the school was therefore eligible for intervention under sections 61 and 62 of the Education and Inspections Act 2006. With the letter, the Regional Schools Commissioner sent an academy order, under section 4 of the Academies Act 2010.

9. Julian Knowles J.'s decision, on 23 January 2020, to dismiss the application for an interim injunction was on the basis that the school's claim for judicial review did not disclose a strong enough case, and that the matters on which it relied in seeking an order to prevent the publication of the report did not, exceptionally, justify the granting of relief. He refused the school's application for permission to appeal.

10. On 24 January 2020, Nicola Davies L.J. made an order prohibiting publication of the report and preserving the anonymity of the school in the proceedings until determination of this appeal, or further order.

11. On 13 February 2020, permission to appeal against the judge's order was granted by Asplin L.J. She directed an expedited hearing of the appeal, and ordered that the interim relief should continue until the appeal had been determined. She also made a direction that the Department for Education be added as a party. However, in a letter to the court dated 3 March 2020, the Department for Education said it would not take part in the proceedings and would take no further action on the academy order until this appeal had been determined.

The issues

12. The application for permission to apply for judicial review comes first. We must decide whether the school has a properly arguable case that Ofsted's report was irrational because there was no reliable evidence to support the findings on which its conclusions were based (ground 1); and that the inspection was procedurally unfair because it did not involve an independent, "merits-based" evaluation (ground 2).

13. The appeal against the judge's refusal of interim relief comes second. Two issues arise from the appellant's notice, and another from the respondent's notice – for which we gave permission out of time at the hearing. These are: first, whether the judge erred in concluding that the school's claim for judicial review does not disclose "a strong prima facie case"; second, whether he was wrong to find the matters relied on by the school do not pass the threshold for interim relief; and third, whether section 12(3) of the Human Rights Act 1998 applies in this case, so that the judge's decision can be upheld on the additional basis that the grant of interim relief would affect the rights of members of the public – specifically pupils and parents – to receive information which Ofsted is under a statutory duty to publish.

The statutory provisions

14. School inspections by Ofsted take place within the statutory regime created by the 2005 Act. Section 5 provides the duty to inspect schools and produce a report in writing. It states:

> "Duty to inspect certain schools at prescribed intervals
>
> (1) It is the duty of the Chief Inspector –
>
> (a) to inspect under this section every school in England to which this section applies, at such intervals as may be prescribed, and
> (b) when the inspection has been completed, to make a report of the inspection in writing."

15. In undertaking an inspection under section 5, the Chief Inspector is required by section 7 to have regard to any views expressed to him by the head teacher, the governing body or proprietor of the school, members of the staff, registered pupils, and the registered parents of registered pupils. Section 8 provides the power for an inspection to be conducted in circumstances where the Secretary of State requests one, or in circumstances outside section 5.

16. Section 11 provides:

> "Publication of inspection reports"
>
> (1) The Chief Inspector may arrange for any report of an inspection carried out by him under any provision of this Chapter (whether the report is required by any such provision or is otherwise made in pursuance of his functions under that provision) to be published in such manner as he considers appropriate."

17. Section 13 provides that if, following the inspection, the Chief Inspector is of the opinion that "special measures are required to be taken in relation to the school" or that "the school requires significant improvement", he is under a duty to send a draft of the report to the governing body, and consider any comments on the draft that are made to him within the prescribed period (section 13(1) and (2)). Having done this, if he is still of the opinion that the school falls into either of those categories, he is under a duty to state his opinion in the report of the inspection and give notice of his decision in writing, "without delay", to the Secretary of State and the local authority (section 13(3)).

18. The Chief Inspector is also under a duty to ensure a copy of the final report is sent "without delay" to the appropriate authority for the school, namely the headteacher and the governing body (section 14(1) and (2)). A duty then falls on the appropriate authority to act. Section 14(4) provides:

> "(4) The appropriate authority must –
>
> (a) make a copy of any report sent to the authority under subsection (1) available for inspection by members of the public at such times and at such place as may be reasonable,
> (b) provide a copy of the report, free of charge or in prescribed cases on payment of such fee as they think fit (not exceeding the cost of supply), to any person who asks for one, and
> (c) take such steps as are reasonably practicable to secure that every registered parent of a registered pupil at the school receives a copy of the report within such period following receipt of the report by the authority as may be prescribed."

The period prescribed under subsection (4)(c) is five working days (regulation 6 of the Education (School Inspection) (England) Regulations 2005).

19. Section 61 of the 2006 Act provides that if a Chief Inspector gives notice under section 13(3)(a) of the 2005 Act in a case falling within section 13(1)(b) of that Act – a school "requiring significant improvement" – the school is eligible for intervention. Section 4(A1) of the 2010 Act requires the Secretary of State to make an academy order for a school eligible for intervention under section 61 of the 2006 Act.

Ofsted's School inspection handbook and safeguarding guidance

20. Ofsted's School inspection handbook, first published in May 2019 and revised in November 2019, contains guidance on inspections of schools in England under the 2005 Act. It explains that inspectors use a four-point scale to grade schools: "outstanding", "good", "requires improvement", and "inadequate" (paragraph 159). In deciding how to grade a school, inspectors "take a range of evidence … into account", including "official national data, discussions with leaders, staff and pupils, questionnaire responses and work in pupils' books" (paragraph 44). Inspectors "will ensure that they talk to and observe pupils in a range of situations outside normal lessons to evaluate other aspects of personal development, behaviour and attitudes" (paragraph 105) and "take advantage of opportunities to gather evidence from a wide range of pupils" (paragraph 106). The lead

inspector will meet the headteacher "throughout" the inspection to provide updates and alert him or her to any concerns, and allow him or her to raise any concerns (paragraph 112). The inspection team should meet "briefly in the middle of day 1", at "the end of day 1" to discuss any concerns in the presence of the headteacher, and "at the end of day 2" to "finalise judgements and identify areas for improvement" (paragraph 113). The lead inspector will invite the headteacher to the meeting at the end of day 2 (paragraph 114). If by the end of day 1 or during day 2, there is "evidence that the school might be judged as inadequate or requires improvement, the lead inspector will alert the headteacher to this possibility" (paragraph 116).

21. Inspectors should evaluate, among other things, "behaviour and attitudes" (paragraphs 201 to 215), "personal development" (paragraphs 216 to 218) and "safeguarding" (paragraphs 262 to 272). Factors said to contribute to good behaviour and attitudes include "a calm and orderly environment … in which pupils feel safe, and in which bullying, discrimination and peer-on-peer abuse … are not accepted and are dealt with quickly, consistently and effectively whenever they occur" (paragraph 202). On "personal development", the inspection handbook says that "[the] curriculum provided by schools should extend beyond the academic, technical or vocational", and that inspectors should evaluate the school's "intent" to provide for personal development (paragraph 216).

22. Under the heading "Safeguarding", the inspection handbook defines "ineffective" safeguarding as "serious or widespread failures in the school's … safeguarding arrangements that give cause for concern" (paragraph 270), such as safeguarding allegations not being handled appropriately, pupils not feeling safe, pupils having little confidence that their concerns will be addressed, and repeated incidents of bullying or prejudiced and discriminatory behaviour (paragraph 271). A finding of ineffective safeguarding "is likely to lead to an inadequate leadership and management judgement" (paragraph 272). Ofsted published guidance on safeguarding, "Inspecting safeguarding in early years, education and skills settings", in May 2019, which it updated in September 2019.

The Ofsted inspection and report

23. The inspection on 9 and 10 October 2019 was undertaken by a team of inspectors, under the lead inspector, Steve Shaw. The inspection report says that, throughout the inspection, the team met the headteacher and deputy headteacher, representatives of the local authority, a group of governors, and senior leaders at the school with responsibilities for behaviour, attendance and pupils' personal development (p.7). The team carried out a detailed review of four subjects, which involved meeting subject leaders to discuss the curriculum, visiting lessons, and meeting teachers and pupils. It also looked at various records such as case files on vulnerable pupils, parent questionnaires and pupil and staff surveys (ibid.).

24. The report grades the school in this way (on p.1):

> "Overall effectiveness – Inadequate
> The quality of education – Good
> Behaviour and attitudes – Inadequate
> Personal development – Requires improvement
> Leadership and management – Inadequate

> Sixth-form provision – Good
> Overall effectiveness at previous inspection – Good".

25. Under the heading "What is it like to attend this school?", the report describes the school as one of "contrasts". It states (on p.2):

> "… Classrooms are usually calm and orderly. Behaviour in lessons is usually good. Expectations of what pupils can achieve are high. This includes for pupils with special educational needs and/or disabilities (SEND). There is an effective curriculum which helps pupils to do well by the end of key stage 4. Staff are proud to work at the school.
>
> However, elsewhere, a different picture emerges. A large minority of pupils do not feel safe in school. They do not feel protected from bullying. They do not believe that there is an adult they could talk to if they were worried about anything. They are fearful of, and are fed up with, the behaviour of a small group of pupils. Some pupils do not believe that the school site is secure. They feel threatened on school transport. They hear abusive language regularly, which is not routinely challenged by staff. They are not confident that leaders will sort any of this out. Some pupils have come to accept that this is how it is."

26. The report goes on to identify what the school does well and what it needs to do better. As for what is done well, it says this (ibid.):

> "The school provides a good quality of education. Leaders have made sure that an effective curriculum is in place. Subject leaders have thought about what pupils need to learn and when. They have organised their schemes of learning so that pupils build up their knowledge and skills in a logical way. Due to the ambitious and well-planned curriculum, pupils achieve well by the end of key stage 4. The school is effective in meeting the needs of pupils with SEND and those who are disadvantaged. They are appropriately supported."

It goes on to acknowledge that "[pupils'] behaviour in lessons and on corridors is mostly good" (ibid.), and, later, that "leaders act in the best interests of pupils", that "[staff] feel well supported", and that "provision for students in the sixth form is good" (p.3). It states (ibid.):

> "Pupils access a wide range of opportunities outside their lessons. This includes residential visits abroad. Leaders have put in place a programme to support pupils in their understanding of the world beyond the school gates. For instance, pupils visited a mosque last year. However, pupils' knowledge of faiths and cultures beyond Christianity is variable."

27. But the report also identifies what the school needs to do better. It says (on pp.2 and 3):

> "[Pupils] told inspectors that there is regular disruption by a small 'hard core' of pupils. … Leaders have put lots of actions in place to try to break this cycle, yet pupils are not confident that things will change.

> Pupils told inspectors that behaviour on one of the school buses is poor. Pupils feel threatened by the conduct of some pupils.
>
> Pupils do not feel safe on the school field because of the behaviour of some pupils. …
>
> Pupils are concerned about the regular use of homophobic and racist language around school. They said that when staff hear such language, it is not always challenged.
>
> A large minority of pupils have little confidence in the school's ability to deal with bullying. … Some parents and carers share pupils' views about the ineffective management of bullying.
>
> …
>
> … [Leaders] and governors are not doing enough to tackle the weaknesses in the school. This is partly because they do not know that the weaknesses exist. When presented with the evidence of weaknesses, leaders do not accept it to be the case."

28. The report then goes on to address "Safeguarding". The main conclusion is that the "arrangements for safeguarding are not effective". The relevant findings are these (on p.3):

> "A large minority of pupils do not feel safe in school. They are concerned that leaders do not tackle issues such as bullying well enough. … [Pupils] and parents also worry about the security of the school site. Leaders' actions have not reassured a large minority of parents and pupils that the site is safe. Leaders' attitude towards site safety is complacent. They believe that because there have been no security incidents in the past, there will be none in the future.
>
> Governors have a limited understanding of how to hold leaders to account for safeguarding pupils. Governors do not know what to look for or ask about. They do not know what leaders do to check that safeguarding arrangements are working as they should."

29. The approach taken by the inspection team is explained (on p.7):

> "To inspect the safeguarding arrangements in school, we looked at the records of staff employed at the school and the checks made on them. We met with the staff with responsibility for safeguarding. We sampled a case file to look at how the school identifies, helps and manages vulnerable pupils. We spoke with numerous pupils, staff and governors about safeguarding. We scrutinised the school's records of accidents, bullying incidents and behavioural incidents. We considered the school's records of homophobic and racists incidents. Information relating to site security was considered."

The report also states that the inspection team "spoke with pupils in several meetings and around the school site" and "spoke with a range of staff, including teachers and support staff" (ibid.).

30. Under the heading "What does the school need to do to improve?" the report makes five main recommendations, including that leaders should "review the ways in which the views of pupils and parents are gathered, analysed and evaluated"; should "review and evaluate the ways in which they manage bullying"; and "need to act to ensure that no pupil is disadvantaged by the poorly behaved minority". The other two recommendations are these (on p.4):

> "Some pupils and parents are not confident that the school site is safe. However, leaders do not think that pupils or parents should be worried about site safety. Leaders should take action to listen to these anxieties and to understand them. They should take appropriate and reasonable steps to reassure pupils and parents about site safety.
>
> Pupils reported widespread use of homophobic and racist language. Some pupils do not report this because they do not expect staff or leaders to act. Some pupils have become hardened to such abusive language. Leaders should act to address the school culture in which such language is endemic and considered normal."

31. Finally, it is stated that a complaint can be made about the inspection or report (ibid.).

The application for permission

32. On ground 1, which contends that the inspection report is irrational, Mr Mark Cawson Q.C., on behalf of the school, submitted that for it to have declined from a "Good" grading in the 2016 report to an "Inadequate" grading in three years cannot be justified on any rational basis.

33. Against that background, Mr Cawson submitted, the "contrasts" to which the 2019 report refers, under the heading "What is it like to attend this school?", are so great as to be irreconcilable. For example, the comments made about pupils' behaviour in the classroom and the effectiveness of the curriculum and pupils' academic success are incompatible with the suggestion that a "large minority" of pupils do not feel safe, are bullied or fear bullying, that the leadership team does not effectively address bullying, and that racist and homophobic language is part of the school's "culture". The school takes issue in particular with the findings of a failure effectively to deal with "racist and homophobic language" – very serious allegations, for which, it is said, there was no proper support in evidence.

34. Mr Cawson emphasized several other conclusions in the report. He pointed to the grading of "Behaviour and attitudes" at the school as "Inadequate", which, he submitted, contrasts sharply with the finding that pupils' behaviour in lessons is "mostly good", and cannot be reconciled with the guidance in the inspection handbook requiring certain shortcomings to be present if this grading is to be made. He pointed to the grading of "Personal development" as "[requiring] improvement", despite the finding that pupils "access a wide range of opportunities outside their lessons". He pointed to the grading of "Leadership and management" as "Inadequate", submitting that the finding that leaders' attitude to "site safety" was "complacent" could not be justified in the absence of any prescribed "specific steps with regard to site security" in the inspection handbook (paragraph 47).

35. These unexplained inconsistencies and unjustified comments in the report, Mr Cawson submitted, can be attributed to the inspection team's reliance on the unsubstantiated views of a minority of pupils, first expressed at a meeting with a small number of children, and strikingly different from what had been said at two earlier meetings. The reliance placed on those views was not rational. The lead inspector treated them as incapable of belief where they concerned pupils' conduct in class, but not as being unreliable more generally. Other relevant evidence – which the inspection team should have considered under the guidance in the inspection handbook, but did not – was firmly to the contrary. The views of this minority of pupils put into the inspectors' minds a state of affairs that they subconsciously sought to justify – effectively, confirmation bias. In any event, the resulting conclusions were irrational.

36. This argument is reinforced, Mr Cawson contended, by the fact that Ofsted's views plainly lacked conviction – as is shown, for example, by its decision to amend the statement in the draft report that "behaviour in lessons can be good" to "behaviour in lessons is usually good". It had done this after the school had complained that the wording in the draft report did not reflect the evidence, and despite the lead inspector's written response to the complaint, in which he had said that the original wording did "accurately reflect the evidence". This, submitted Mr Cawson, shows how the evidence on which Ofsted had relied could be used to support two entirely contrasting conclusions.

37. On ground 2, Mr Cawson submitted that Ofsted did not adopt a fair procedure, in particular by failing to maintain a dialogue with the leadership team at the school.

38. Mr Cawson referred to the witness statement of the headteacher, dated 10 December 2019, in which he states that the lead inspector "failed to attend" a meeting that had been arranged to discuss safeguarding; and that "at no time during a KIT meeting on Day 2 were Leaders ever given any indication that the Inspection team were forming the view that safeguarding was not effective" (paragraphs 23 and 24). We were told during the hearing that when the school asked if it would be possible to re-arrange the meeting, it was told by a member of the inspection team that there was no time for this to be done.

39. Mr Cawson also submitted that the requirements of the inspection handbook and the safeguarding guidance were not followed. For example, when assessing "Personal development" in the report, the inspection team failed to take into account the range of extracurricular activities available, and, contrary to the guidance in the inspection handbook (at paragraphs 216 and 217), concentrated on the school's work with individual pupils. When considering "Safeguarding", it failed to focus on the proper concept of "safeguarding" and to apply the criteria for making a finding of "Inadequate" in the safeguarding guidance (at paragraphs 12 to 17 and 31 to 35). It also failed to consider other relevant evidence, such as the year 7 surveys and a "Behaviour Healthcheck Report" undertaken in October 2019 by a private consultancy, Pivotal Education. Mr Cawson also referred to the "Growing up in [the county]" survey undertaken by the Schools Health Education Unit in 2018, which showed that 57% of pupils said they "feel safe" in the county's secondary schools, lower than the proportion of pupils at the school – 59% – who said they "feel safe".

40. A report prepared by the local authority following visits to the school in November and December 2019 to review safeguarding in the light of the findings of the Ofsted inspection, said that "[findings] indicated that students feel safe and happy at school most of the time";

that "[discussions] with students in the focus group and with students out and about round school at break and lunchtime confirmed this"; and that "[this] visit found that most students are aware of who to go to if they have a worry or concern – this was generally either the pastoral support team or their tutors" (p.1). This, Mr Cawson submitted, presents a very different perspective on safeguarding at the school from the Ofsted report. Ofsted was asked by the school to speak to the local authority and the police. But it refused, and so deprived itself of the opportunity to make a balanced and fair assessment of the school's safeguarding performance.

41. For Ofsted, Sir James Eadie Q.C. submitted that the real thrust of the claim for judicial review is irrationality. He argued that none of the submissions advanced by the school succeeds in making good that challenge.

42. I agree. The two grounds of the claim, properly analysed, are not readily divisible. To a large extent they seem to merge. But in any event, the school has not, in my view, shown it is arguable that the conclusions in the inspection report are irrational or that the inspection itself was procedurally unfair.

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. A central theme in these proceedings, reiterated in different forms with different examples, is the grievance that the inspectors placed too much or too little weight on certain evidence. That grievance, without more, has no traction in a claim for judicial review. The weight attached to a particular document – if available and relevant – was a matter for the inspectors, subject only to the traditional principles of public law. Disagreement on the appropriate weight is never, on its own, a proper basis for a public law challenge. And it must be remembered here that the inspectors who conduct a school inspection for Ofsted are entrusted with the task of assessing the evidence before them with the benefit of their own experience and expertise, and judging what weight should be given to evidence of a particular kind or from a particular source. The court will not second guess the judgments they make. As the lead inspector said in his response of 26 November 2019 to the complaint made by the school after it received the draft report on 4 November 2019:

> "I have reviewed the evidence base. Evidence is drawn from a wide range of sources and from across the team. Inspectors took a balanced and proportionate view when analysing and evaluating this evidence, exercising their professional judgement to reach a corporate decision."

45. I reject the submissions made by Mr Cawson to the effect that the inspection report is, in various respects, internally inconsistent to the point of being perverse. That argument is unrealistic. To describe the school as exhibiting "contrasts", as the inspectors did, is only to recognize that it was by no means failing against all the measures of adequate performance. The reality here is that the inspection report is not universally disapproving or censorious of the school's performance, but sets out a number of specific conclusions across the range of relevant issues in the inspection. Such differences are, in this case at least, merely the expression of different judgments on different questions. They do not involve self-contradiction, or even inconsistency. In my opinion, they do not come close to irrationality.

46. Before it was put in final form, the inspection report was the subject of a "moderation" and "quality assurance" process, in which its conclusions were verified against the available evidence. I do not accept Mr Cawson's suggestion that this process took place at a stage of the whole exercise when irrationality in the emerging conclusions was likely to survive into the final report. As Sir James pointed out, the school's complaint was submitted during the "moderation" process, on 23 October 2019. It is therefore impossible to suggest that Ofsted was unaware of the school's concerns at a time when the report could still have been changed. Indeed, it is confirmed by Emma Ing, Ofsted's Regional Director for the region, in her witness statement dated 17 December 2019 (at paragraph 19), that the school's complaint was considered in the "moderation" process. The complaint and also the school's comments on the draft report were then, on 26 November 2019, considered by the lead inspector, who provided a detailed response, in which he referred to evidence that he saw as supporting his conclusions, and also by Claire Brown, a Senior Inspector, who independently reviewed the lead inspector's response.

47. Nor can I accept the contention that the report is vulnerable to legal challenge on the grounds that Ofsted did not pay sufficient attention to relevant independent evidence, in particular the report prepared by Pivotal Education, the "Growing up in [the county]" report and the pupil and parent surveys. The complaint here, once again, goes no further than a disagreement on weight. As Sir James told us, the "Growing up in [the county]" report was taken into account in the "moderation" process. But in any case it lends no support to the proposition that the inspectors were not entitled to rely on the concerns about inadequate "safeguarding" and bullying that were expressed to them during the inspection. The Pivotal Education report was produced after the inspection had been carried out. The inspectors cannot realistically be criticized for not having considered it. The inspection report refers (on p.7) to the consideration given to "Ofsted's online questionnaires", including a "pupil survey", a "staff survey", a survey called "Parent View", and "free-text responses to Parent View". It also records the fact that the inspection team "met with representatives of the local authority".

48. There is, in my view, nothing in the school's contention that undue weight was attached to the inspectors' discussions with pupils. The importance of such discussions is referred to in the inspection handbook (in paragraphs 44 and 87). Our attention was drawn to evidence that was, on the face of it, consistent with, and provided some corroboration for, the views and concerns expressed by pupils to the inspectors, in particular a parent survey undertaken on 15 October 2019, in which the lack of confidence about the school's ability to deal with bullying was a notable feature. The inspectors had to balance the various relevant material, and, in the light of their experience, attribute appropriate weight to each piece of evidence in coming to a sensible conclusion. They were entitled to give significant weight to the views and concerns of the pupils they met. And they evidently did.

49. Sir James submitted, and I agree, that the inspection report does not betray an unlawful over-reliance on pupils' views, but rather demonstrates an appropriate balancing of all the relevant material, including the views of staff, pupils and parents, and the making of the necessary evaluative judgments.

50. It was in undertaking this exercise that the inspectors made a finding of complacency on the part of the school's leadership team. The lead inspector's response to the school's comments on the draft report illustrates the basis for that finding. It refers to an event about which we were told during Mr Cawson's submissions at the hearing. This was a "lockdown" at the school, which had occurred two weeks before the inspection in October 2019, apparently as a result of a pupil's behaviour becoming so disruptive that children had to be held in classrooms while the police were called. It emerged that evidence of this "lockdown" had been before the inspectors, and was part of the evidential picture before them when they were considering whether "safeguarding" was effective.

51. The lead inspector's response states:

> "It is accurate to say that leaders' attitude toward site safety is complacent. When first asked about the security and safety of the site with regard to parents' and pupils' views, and whether there was a formal risk assessment, the DHT said, 'We've never had a problem'. In a subsequent meeting, when asked for his response to the concerns expressed by parents and pupils about the site following the 'lockdown', the HT said that, 'The lockdown did not cause grief. They [parents and pupils] have got themselves in a tizzy'. When I raised the matter again in a third meeting, my record states that 'Leaders' response is that they've never had any problem so assume there won't be any problems in the future'. More widely, when I gave the HT and DHT the evidence which had led to the decision to convert [from a section 8 to a section 5 inspection], including worries about feeling safe, the HT said that I had based the decision on the views of 'a gaggle of girls'. This evidence supports the view that leaders' attitude to site safety is complacent.
>
> At no point did inspectors suggest that the solution to the concerns of parents and pupils was to build a fence around the site and lock every door. However, inspectors did expect that a serious issue such as site security, particularly given the concerns expressed by parents and pupils, would have been formally risk-assessed."

52. Those observations of the lead inspector also reinforce Sir James's response to the school's criticism of the comments in the report on the question of site safety. The report does not prescribe steps to be taken to improve site safety. The general comment that "appropriate and reasonable steps" should be taken was a temperate conclusion, and not at odds with the guidance in the inspection handbook.

53. The complaint that the grading of "Behaviour and attitudes" as "Inadequate" was irrational because of a failure to meet the necessary criteria in the inspection handbook is mistaken. The relevant section of the handbook says that "[behaviour] and attitudes are likely to be inadequate if any one of the following applies …". The specified circumstances include pupils having little confidence in "the school's ability to tackle harassment, bullying, violence and/or discriminatory behaviour successfully". It seems to me that the inspectors' finding that the school had failed to tackle racist and homophobic language effectively,

underpinned by the survey evidence and what pupils had told them about bullying, was enough, within the bounds of rationality, to substantiate the conclusion that a finding of "Inadequate" was a fair assessment of the school's performance in "Behaviour and attitudes". And this conclusion is not undone by the school's assertion that the pupils who expressed their views to the inspectors were an "unreliable minority", or by the fact, if it is a fact, that the inspectors did not speak specifically to "LGBTQ+" or "BAME" pupils.

54. The inspection report does contain a specific finding to inform the conclusion that "safeguarding" at the school was ineffective. It states (at p.3) that "[a] large minority of pupils do not feel safe in the school". This reflects the relevant guidance in the inspection handbook, which cites, as an example of what ineffective safeguarding might include, that "[children], pupils and students or particular groups of children, pupils and students do not feel safe in school …". Though a safeguarding review was subsequently undertaken by the local authority in November and December 2019, which found that "safeguarding arrangements" at the school were by then "effective", that pupils felt safe "most of the time", and that many recommended "improvements" were "already underway", this took place about two months after Ofsted's inspection. It is possible that this was enough time for the safeguarding arrangements in the school to have been improved following the inspection. Encouraging as it may be that the local authority's report concluded as it did, the conclusions it reached do not render the inspection report, whose findings were based on the evidence available to the inspection team at the time, irrational. As Sir James said, if the Ofsted report is published, the school could seek permission to publish the local authority's report alongside it, with a view to showing that improvements had been made to "safeguarding" since the inspection.

55. I see no force in the criticism of the grading for "Personal development" as "Requires Improvement". The inspection report acknowledges the extra-curricular activities provided by the school, noting that "[pupils] access a wide range of opportunities outside their lessons" (p.3). And the inspectors were entitled to conclude that "pupils' knowledge of faiths and cultures beyond Christianity is variable" (ibid.). As the inspection handbook says (in paragraph 226) "pupils' understanding of protected characteristics" is a relevant evidential consideration for assessing "personal development".

56. No proper basis has been shown for the submission that the inspection team failed to maintain a proper dialogue with the school during the inspection. Apart from the school's disappointment with the adverse conclusions of the report itself – which it believes would have been different had the inspectors preferred the account it gave of its own performance – this submission comes down to its complaint about the lead inspector's failure to attend a meeting with its leadership team.

57. That the lead inspector did miss the meeting is not in dispute. His explanation, given in his response of 26 November 2019 to the school's complaint, is this:

> "It is correct to say that I did not attend a scheduled meeting. This was because I extended the pupil meeting which preceded it, to further explore the safeguarding matters which had arisen at the end of the [section] 8 [inspection]. I explained to the HT and DHT in the KIT meeting shortly afterwards, why I had missed the meeting. The meeting had a specific focus … to review a case file as evidence of leaders' safeguarding practices … . I told leaders that I would check a case file later in the day. I also told them that should they, or the DSL, wish to share any other

> information, they could do so and I would find the time. In any case, I apologised for missing the meeting and hoped that leaders understood why and accepted the new arrangement. Leaders said yes. I received no subsequent requests for a meeting with the DSL or to discuss safeguarding."

58. What is in dispute is the school's recollection that it did ask for the meeting to be re-arranged, but was told there would be no time for this. We cannot establish what happened. But even if the school's version of events is correct, I agree with Sir James's submission that the missed meeting does not undermine the lawfulness of any of the report's conclusions or the fairness of the entire inspection procedure.

59. There is no evidence of a general failure to maintain a worthwhile dialogue with the school's leadership team throughout, and after the inspection, or of the unfair conduct of an inherently fair procedure.

60. I would therefore refuse the application for permission. Despite the tenacity with which Mr Cawson presented it, none of his submissions persuades me that the school has an arguable claim for judicial review.

Interim relief – the appeal against Julian Knowles J.'s order

61. Given my conclusion on the application for permission, if my Lords agree, the appeal against the order of Julian Knowles J. refusing interim relief may be academic. But because the relevant law may require some clarification from the Court of Appeal, I shall offer some conclusions on that, before briefly addressing the merits.

62. In the context of civil litigation, the well-known principles deriving from Lord Diplock's speech in *American Cyanamid Co. v Ethicon Ltd.* [1975] A.C. 396 (at p.407) were summarized by Christopher Clarke J., as he then was, in *Sabmiller Africa B.V. v East African Breweries Ltd.* [2009] EWHC 2140 (Comm) (at paragraphs 47 and 48). As he explained, the "general approach" is for the court to ask itself "[whether] there is a serious question to be tried", and, if there is, "whether the claimant would be adequately compensated in damages and whether the defendant would be in a financial position to pay them". If so, "no injunction should normally be granted". If not, the court must then consider "whether the defendant would be adequately compensated under the [claimant's] undertaking as to damages in the event of his succeeding at trial". If that is so, "the fact that the defendant may succeed at trial is no bar to the grant of an injunction". But where there is "doubt as to the adequacy of damages for both parties the court must determine where the balance of convenience lies". If matters are "evenly balanced", it may be appropriate to take "such measures as are calculated to preserve the status quo" (paragraph 47). But as Christopher Clarke J. went on to say, these are only "guidelines" and "not a fetter on the Court's jurisdiction under section 37 [of the 1981 Act] to grant an injunction where it is just to do so" (paragraph 48).

63. In public law proceedings, the *American Cyanamid* principles have been applied in a modified way. The court's approach to the granting of injunctive relief in public law cases was considered in *R. v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)* [1991] 1 A.C. 603 (at pp.671 to 674), where Lord Goff of Chieveley said (at p.673B-E):

> "Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed:" see *Smith v. Inner London Education Authority* [1978] 1 All E.R. 411, 422, per Browne L.J., and see also *Sierben v. Westminster City Council* (1987) 86 L.G.R. 431. Like Browne L.J., I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech [in *American Cyanamid*] which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being enforcing the law. … ."

64. Lord Goff went on to say (at p.674A-D):

> "I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken."

65. Those principles informed the decision of the Privy Council in *Belize Alliance v Department of the Environment of Belize* [2003] UKPC 63; [2003] 1 W.L.R. 2839). In that case Lord Walker of Gestingthorpe said (at paragraph 39):

> "39. Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result). … ."

66. 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 (see, for example, the judgment of Warby J. in *R. (on the application of Easybus Ltd.) v Stansted Airport Ltd.* [2015] EWHC 3833 (Admin), at paragraph 107; and the judgment of Farbey J. in *R. (on the application of Remus White Ltd., t/a Heathside Preparatory School) v Ofsted* [2018] EWHC 3324 (Admin), at paragraph 21). 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.

67. There is also support for the proposition that the court will require a powerful justification for restraining the publication of a report of a public body under a duty to prepare it, including reports prepared by Ofsted (see, for example, the judgment of Nicklin J. in *Taveta Investments Ltd. v Financial Reporting Council* [2018] EWHC 1662 (Admin), at paragraphs 95 and 96; the judgment of Farbey J. in *Remus White Ltd.*, at paragraph 25; and the judgment of Chamberlain J. in *R. (on the application of Barking and Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin), at paragraphs 32 to 39).

68. There will of course be cases in which the court is prepared to grant interim relief. One such case was *R. (on the application of the Interim Executive Board of X) v Ofsted* [2016] EWHC 2004 (Admin); [2017] E.M.L.R. 5, where an injunction was granted to restrain publication of an Ofsted report on a school whose teaching arrangements were said to give rise to unlawful sex discrimination. Between that report and others recently prepared by Ofsted there was a discrepancy described by Stuart-Smith J. as "extraordinary". The challenged report was "frankly inconsistent" with the previous ones (paragraph 40 of the judgment). There was also "clear evidence of antagonistic behaviour" by inspectors during the inspection, about which complaints had been made at the time (paragraph 41). The judge saw an arguable case that the process from which the report had emerged 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" (paragraph 45). There was "compelling evidence" that the effect of publication could be "extremely adverse and irreparable". The "immediately foreseeable effect" of publishing the report "would be to raise the spectre that the [school] will be placed back into special measures". But the "adverse effects" went "much wider". It was "entirely plausible that, at the present time and in the febrile atmosphere that has prevailed since the Trojan Horse school problem arose, publication of the report has the capacity to affect social and community cohesion", and also "the capacity to be seen as an unwarranted attack on aspects of the [school's] Islamic religious ethos which have in the very recent past been acceptable to Ofsted, because the nature and effect of the [school's] segregation policy have not changed since the previous reports" (paragraph 46). The school could not effectively mitigate the damage by communicating the fact that the report was being challenged – because the report was due to be published on the last day before the summer holiday (paragraph 49).

69. In different circumstances, in *R. (on the application of the Governors of St Stephen's Church of England First School) v Ofsted* 16 February 2018 (unreported), Dove J. refused an injunction to restrain publication of an Ofsted report, where the claimant was concerned "about the impact of the report on the reputation of [its] school and staff who are employed there"; that "there is a risk staff [may] leave the school and … there may be an impact on staff morale as a consequence of the report being published"; that "parents may remove

children from the school", which would have "an impact on the financial wellbeing of the school …"; that "children may lose respect for the staff at the school as a consequence of the report being placed in the public domain"; that there would be "an impact on admissions to the school were the public to become aware of the report [when] published …"; and that there would be "a forced academisation of the school …" (paragraph 26). Dove J. was not persuaded that those considerations amounted to "the kind of exceptional circumstances that are required in a case of this kind so as to enable the court to grant relief in the form which effectively overrides the statutory responsibilities of [Ofsted] to not only undertake these inspections but also provide the fruits of those inspections to the public at large" (paragraph 28). Dove J. described the situation in *Interim Executive Board of X* as "particular if not unique circumstances which plainly amounted to the kind of exceptional circumstances which could justify overriding the statutory responsibilities of Ofsted" (at paragraph 29).

70. In *Remus White Ltd.*, Farbey J. held that only on "exceptional grounds" will the court restrain the expression of an opinion or the conveyance of information by a public body; and that the court should generally not restrain the publication of a report that was part of the ordinary process of regulation (see the judgment of Sullivan J., as he then was, in *R. (on the application of Debt Free Direct Ltd.) v Advertising Standards Authority Ltd.* [2007] EWHC 1337 (Admin), at paragraph 23, and also the cases cited by Burton J. in *R. (on the application of City College Birmingham) v Ofsted* [2009] EWHC 2373 (Admin); [2009] E.L.R. 500, at paragraphs 25 to 27). Farbey J. said she "[did] not understand these principles to be in dispute" (paragraph 25). She emphasized that "[public] confidence in the inspection regime is an important public interest, such that parents should be informed promptly of Ofsted's concerns even if those concerns may later fall away through further inspections or by a successful claim for judicial review". She added that "[the] orderly and rigorous regulation of schools is an important public interest". Both "the welfare of the children in [the] school and the public's confidence in the regulator [meant] that the report should be published without awaiting the outcome of [the] proceedings" (paragraph 26). She "weighed in the balance the potentially serious consequences for the head teacher … who [had] an established reputation and who [stood] … to lose a business that she has evidently worked so hard to build up", but the school "must be taken to have assumed the risks of regulation and to have been willing to submit to the scheme of [the Education and Skills Act 2008] …" (paragraph 29). She "also weighed the prospects that the school will be forced to close because parents may remove their children so that [it] becomes unviable". But "closure [was] not a foregone conclusion" (paragraph 30).

71. In *Taveta Investments Ltd.*, Nicklin J. acknowledged (at paragraph 95) that "the test for the grant of injunctions in public law cases is higher than that applied in private law proceedings". He referred (ibid.) to the "relevant principles" from the sometimes "incongruent" case law, which had been drawn together by Stuart-Smith J. in *Interim Executive Board of X*, namely:

> "i) there is a significant public interest in publication of reports by public bodies, particularly when they are under a duty to publish ([*Interim Executive Board of X*] [32]; *Cambridge Associates in Management v Ofsted* [2013] EWHC 1157 (Admin) [60]; and [*City College Birmingham)*] [28];
>
> 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": [*Debt Free Direct Ltd.*] [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: [*Interim Executive Board of X*] [34]; and *R v Advertising Standards Authority, ex parte Vernons Organisation Ltd* [1992] 1 WLR 1289, 1293E-1294B."

These, said Nicklin J. (at paragraph 96), are "powerful and clear authorities".

72. The passage in Laws J.'s judgment in *ex parte Vernons* to which Nicklin J. referred includes these observations (at pp.1293 and 1294):

> "… 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.
>
> I do not know of an instance in which a public body of that kind would fall to be restrained from carrying out what is no more nor less than its ordinary, but important, everyday duties simply upon the grounds that the intended publication contains material which is subject to legal challenge as being vitiated by some error of law. If the application for judicial review here is successful I cannot think but that there are ample means at the applicant's disposal to correct any adverse impression which what, ex hypothesi, would be an unlawful report may have given to the public. Indeed, though it has not been canvassed in argument, I know of no reason why the fact that they have obtained leave should not itself be disseminated if they wish to take any steps in that direction since this is an attempt to prevent the public and indeed, in fairness to the applicant, its fellow advertisers and others in the trade to which it belongs from seeing that the authority has reached those conclusions. I do not consider that the effects of that publication are damaging to the applicant in a manner which would be so irreparable, so past recall as to amount to a pressing ground, in the language of Strasbourg, a pressing social need, to restrain this public body from carrying out its function in the ordinary way."

73. Nicklin J. noted that this analysis had led to "the threshold for injunctions restraining publication of reports of public authorities to be set very high indeed". He expressed "serious reservations" about whether this could still be justified, in view of the "presumptive priority" he thought it gave to the right of freedom of expression, protected by article 10 of the European Convention on Human Rights, over the right to respect for private life, including reputation, protected by article 8 – a priority that had not been seen as justified in subsequent decisions at the highest level: for example, *Campbell v MGN Ltd.*

[2004] 2 A.C. 457, approving *Douglas v Hello! Ltd.* [2001] Q.B. 967; and *In re S (A Child)* [2005] 1 A.C. 593 (paragraph 97). But he accepted that Laws J.'s decision had been "repeatedly applied in public law cases since", and he did not feel able to depart from it (paragraph 98).

74. In *Barking and Dagenham College,* Chamberlain J. had no such misgivings. He referred (in paragraph 30 of his judgment) to the speech of Lord Nicholls in *Cream Holdings Ltd. v Banerjee* [2005] 1 A.C. 253 (at p.261):

> "30. … 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 Ofsted wishes to communicate to them in the exercise of its statutory functions. For that reason, I consider that s.12(3) [of the Human Rights Act 1988] 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* … , [22] (Lord Nicholls)."

75. And he went on to say (in paragraphs 35 to 37):

> "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 … 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'."

76. Chamberlain J. referred to the circumstances in *Interim Executive Board of X* as "a constellation of unusual factors" (paragraph 38). In *Barking and Dagenham College*, it was submitted on behalf of the college that the "reputational damage" caused by publication would be "widespread and irreparable", and that publication would "lead students, employers and partners to lose confidence in the [college]", which would be "damaging not just to the [college] itself but also to the local community", given that the college was "deeply embedded within the wider strategy of the [council] for regeneration of an area of very substantial deprivation" (paragraph 43). Chamberlain J. concluded, however, that these matters "fall far short of the 'compelling grounds', 'most compelling reasons' or 'exceptional circumstances' required to justify interim relief to restrain [the Office for Students] from publishing its decision" (paragraph 47).

77. I would endorse Chamberlain J.'s admirably clear statement of relevant principle in his judgment in *Barking and Dagenham College* (at paragraphs 35 to 37). I think it provides an accurate summary of the law applicable to the granting of interim relief in public law cases where a public authority exercises a statutory function in preparing and publishing a report. The true analysis here does not point to an artificial application of the staged approach to the granting of interim injunctions in civil litigation, as indicated in *American Cyanamid*. The essential principles in the public law context also stem from authority at the highest level, in *ex parte Factortame (No. 2)* and *Belize Alliance* (see paragraphs 63 to 65 above). And as Chamberlain J. recognized, they align with the jurisprudence, also at the highest level, on the approach required where the rights under articles 10 and 8 of the European Convention on Human Rights are counterposed.

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.

80. If that, in substance, is the approach taken by the court at first instance when faced, in a claim for judicial review, with an application for an interim injunction to prevent an Ofsted report being published, this court will not lightly interfere. Only if the lower court's conclusions are irrational or otherwise plainly incorrect in law will its decision be reversed. As Sir James rightly reminded us, the grant of interim relief is discretionary and the exercise of discretion by a judge should be afforded appropriate deference by the appellate court.

81. In this case, Julian Knowles J. said that he readily understood how dismayed the school and its leaders must have been when they received the report in both its draft and final forms. But, he went on to say, "the mere fact that they disagree – even profoundly disagree – with the [report's] findings does not mean that it is flawed in public law terms". And he was "unable to say that they have established a strong *prima facie* case that the [report] is unlawful on the grounds advanced in the [claim form]" (paragraph 70). Having referred to "the number of different people involved in the inspection and production of the [report], and the quality control process that it went through" (paragraph 71), described by Ms Ing in her "impressive" evidence (paragraph 72), he went on to conclude (in paragraphs 86 and 87):

> "86. … [A] rationality challenge to evidence-based conclusions reached by expert inspectors whose work has been checked and assessed does not provide the firmest basis for arguing the case is one of those rare ones where the merits are so strong that that factor weighs in favour of interim injunctive relief to prevent publication of an Ofsted inspection report.
>
> 87. For this reason, and the other reasons advanced orally and in writing by [counsel], I am not persuaded that the merits of the Claimant's case are sufficiently strong to weigh in favour of granting the relief sought."

82. The judge went on to find that, even if the school's case had been strong, there were no other factors that enabled it to overcome the "high hurdle" of demonstrating "pressing grounds", "the most compelling reasons" or "exceptional circumstances" to grant interim relief (paragraph 88). He readily accepted that publication of the inspection report would cause the school "reputational damage", which could have knock-on effects upon recruitment of staff and parents sending their children to the school; and that the findings of toleration of homophobic and racist language were "serious" and would likely attract "considerable publicity" (paragraph 89). But he concluded that "taken separately or together, none of these factors amounts to the sort of compelling reasons that are capable of justifying [restraining] publication in the present context" (paragraph 90). This case was, in his view, similar to *St Stephen's Church of England First School* (ibid.), and he agreed with the approach of Dove J. in that case (paragraph 92). He refused the application for interim relief essentially because, "[whatever] the strength of [the school's] case, taking a step back and looking at matters in the round, there are not here any sufficiently compelling reasons to restrain publication by Ofsted of the [report]" (ibid.).

83. Mr Cawson attacked those conclusions. Pointing to Lord Goff's observations in *ex parte Factortame (No. 2)* (at pp.673 and 674) and Lord Walker's in *Belize Alliance* (at p.39), he argued that the approach taken by the judge was wrong. The judge should have asked himself whether the merits of the case were sufficiently strong to warrant the grant of the relief sought, taking into account any countervailing public policy considerations and the consequences of not granting it. Neither a "strong prima facie case" nor the existence of "exceptional circumstances" is a "gateway" to interim relief. These are matters to be considered in the "balance of convenience". The court has a wide discretion in each case to balance the relevant considerations with a view to producing a just result. But in any event, Mr Cawson submitted, the judge was wrong to conclude that the school's claim did not have a strong prospect of success. His submissions here were effectively the same as on the application for permission.

84. Ultimately, Mr Cawson argued, the judge was wrong to conclude that the "balance of convenience" lay in favour of the report being published. In cases of this kind the "threshold" for interim relief should not be set too high. Nicklin J. was right in *Taveta Investments Ltd.* to entertain reservations about "presumptive priority" being given to article 10 of the Convention over article 8. The public interest in the publication of Ofsted reports was only one factor in the balance. Also relevant were the merits of the claim, and the damage likely to result if an interim injunction were not granted. The judge had accepted that the report, if published, would cause the school "reputational damage" (paragraph 89 of the judgment). He should have found that this case fell into the category identified by Laws J. in *ex parte Vernons* (at p.1294) – cases where the effects of publication "are damaging to the applicant in a manner which would be so irreparable, so past recall as to amount to a pressing ground". This was particularly so, Mr Cawson submitted, because of the serious, and unfounded, comments in the report about a failure to confront the "widespread" and "endemic" use of "racist and homophobic language", and because the findings of the inspection report on "safeguarding" were not replicated in the subsequent local authority report. Publication of a flawed inspection report could weaken confidence in the Ofsted inspection process if the claim for judicial review claim were to succeed. This would not be in the public interest.

85. I cannot accept that argument. In my view, Julian Knowles J.'s approach to the application for interim relief in this case was, in substance, fully consistent with the principles acknowledged by Chamberlain J. in *Barking and Dagenham College,* and was correct.

86. In my view, the judge was clearly entitled, for the reasons he gave, to conclude that in this case the considerations supporting the grant of an injunction to restrain publication of the inspection report did not outbalance the very strong factors against.

87. My conclusions on the application for permission (in paragraphs 42 to 60 above) are also relevant here. There is no need to set them out again. They are wholly consistent with the judge's view of the merits.

88. In determining the application for interim relief, the judge took into account the strength of the claim, not as a "gateway" test, but as a factor legitimately to be weighed in the balance of considerations. This is plain from his statement (in paragraph 87 of his judgment) that he had not been persuaded that "the merits of [the school's] case" were "sufficiently strong to weigh in favour of granting the relief sought". His conclusion overall was clearly one of balance. In his view, however strong the school's case might be, there were "not … any

sufficiently compelling reasons to restrain publication" of the report (paragraph 92). That conclusion was, I think, amply well founded.

89. I reject the suggestion that the judge concentrated unduly on Ofsted's "moderation" and "quality assurance" process, and ignored the specific allegations of its failure to take into account relevant evidence, as the inspection handbook requires. He was entitled to recognize Ofsted's institutional competence. He did not, however, neglect the school's allegations of unlawfulness in the conduct of the inspection and in the inspection report itself. He had those allegations well in mind, as is clear from his judgment (in paragraphs 77 to 81). But looking at the inspection as a whole, including the "moderation" and "quality assurance" process, he did not regard them as sufficiently cogent, taken with the other factors relied on by the school, to outweigh the considerations telling against the granting of an interim injunction. He was, I think, entitled to take that view. Indeed, I would say he was undoubtedly right to do so.

90. In my view, as the judge said, the circumstances of this case bear some similarity to those of *St Stephen's Church of England First School*. In that case, despite it being argued that the report would damage the school's reputation, cause a loss of pupils and staff, diminish staff morale, harm the school financially, and possibly lead to its becoming an academy, the court was not satisfied that any of those factors, or all of them, amounted to the kind of circumstances that would justify granting an interim injunction. Equally, he was right to regard *Interim Executive Board of X* as materially different from this case on its facts, noting that in that case there was clear evidence of a "febrile" media atmosphere, the prospect of damage to "social and community cohesion", and a risk of the report being seen as an "unwarranted attack on … the [school's] Islamic religious ethos" (paragraphs 46 and 47 of the judgment).

91. 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.

93. Criticism of the judge for failing to take account of the risk of "academisation" is mistaken. The granting of an interim injunction would have no effect on the school's eligibility for intervention under section 61 of the 2006 Act and section 4 of the 2010 Act. Only an order quashing the report would remove that risk.

94. In my view therefore, the judge did not fall into error in refusing to grant an interim injunction in this case, and we would be wrong to overturn his decision.

Conclusion

95. For the reasons I have given, I would refuse permission to apply for judicial review.

96. I would also dismiss the appeal against the judge's refusal of interim relief.

Lord Justice Henderson

97. I agree.

The Chancellor

98. I also agree.