Neutral Citation Number: [2021] EWHC 2084 (Admin)

Case No: CO/930/21

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2021

Before :

GAVIN MANSFIELD QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

THE QUEEN (on the application of THE GOVERNING BODY OF YEW TREE PRIMARY SCHOOL) — **Claimant**

- and -

SECRETARY OF STATE FOR EDUCATION — **Defendant**

-and-

SANDWELL METROPOLITAN BOROUGH COUNCIL — **Interested Party**

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Joanne Clement and Leo Davidson (instructed by **Browne Jacobson LLP**) for the **Claimant**
Galina Ward and Yaaser Vanderman (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 15 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 23rd July 2021.

Gavin Mansfield QC :

INTRODUCTION

1. The Claimant is the governing body of Yew Tree Primary School ("the School"). The School is located in Walsall, in the borough of Sandwell. It is maintained by the Sandwell Metropolitan Borough Council, which is an Interested Party in these proceedings ("the Local Authority").

2. In January 2019 the School was subject to an inspection by Ofsted which graded the school "Inadequate". As a result of that inspection the Defendant, the Secretary of State for Education, made an Academy order under section 4(A1) of the Academies Act 2010 ("the 2010 Act") on 9 April 2019 ("the Academy Order").

3. The Defendant was obliged, in the circumstances, to make the Academy Order. However, the Defendant has a discretion to revoke such an order under s.5D 2010 Act. The Claimant asked the Defendant to do so. The Defendant refused, setting out his decision in a letter dated 15 December 2020 (respectively "the Decision" and "the Decision Letter"). The Claimant seeks judicial review of that decision on two grounds. First, that the Defendant's decision to refuse to revoke the Academy Order was irrational. Second, that in making the decision the Defendant had unlawfully fettered his discretion.

4. These proceedings were commenced on 12 March 2021. Permission was granted to apply for judicial review by HHJ Walden-Smith on 20 May 2021.

5. The Claimant made an application for interim relief to prevent the Defendant from implementing the Academy Order. Orders have been made, in various forms, limiting the steps the Defendant can take to convert the School to academy status before determination of these proceedings: by Mostyn J (19 March 2021), Mr David Pittaway QC (21 April 2021) and HHJ Walden-Smith (20 May 2021). HHJ Walden-Smith's order remains in force. It prohibits the Defendant from taking any irrevocable decisions or steps to prepare the Claimant school for conversion to an academy, which could render this claim academic, before determination of the claim.

6. The Defendant proposes, subject to the outcome of this claim, to enter into academy arrangements with its chosen sponsor, Shine Academies, in August 2021.

7. The application is supported by witness statements from Mr Jamie Barry (the School's Headmaster) and Mr Mark Cadwallader (the Local Authority's School Improvement Adviser). The Defendant has filed a statement from Mr Andrew Warren, the Regional Schools Commissioner ("RSC") for the West Midlands.

8. Pursuant to directions made by HHJ Walden-Smith, the Claimant filed further evidence in reply on 28 June 2021: the second statements of Mr Barry and Mr Cadwallader. At the same time, the Claimant asked the Defendant to revoke the Academy Order in the light of the up to date evidence as to the School's progress. On 8 July 2021 the Claimant applied to amend its claim to allege the Defendant had breached an ongoing duty to exercise discretion to revoke in the light of the evidence filed on 28 June 2021. I heard the amendment application at the beginning of the

substantive hearing. I refused the application to amend, indicating that I would give my reasons in this reserved judgment: see paragraphs 47-56 below.

THE LEGISLATIVE FRAMEWORK

The 2010 Act

9. The 2010 Act makes provision for the establishment of academies, and for the conversion of maintained schools into academies. An academy order in respect of a school is an order for the purpose of enabling the school to be converted into an academy (s.4(2)). A maintained school is converted into an academy if "academy arrangements" are entered into in relation to the school. "Academy arrangements" are defined in s.1, but for present purposes the term means an agreement between the Defendant and a third party in which the third party receives payments in consideration for establishing and maintaining an academy school in accordance with the requirements of the 2010 Act. The relevant local authority must cease to maintain the school from the conversion date (s.6(2)).

10. Section 4 2010 Act sets out the circumstances in which an Academy Order can be made. In some of those circumstances the Defendant has a discretion whether to make an Academy Order; in others an order is mandatory. This case concerns a mandatory order. Section 4(A1) provides:

> "*The Secretary of State must make an Academy Order in respect of a maintained school in England that is eligible for intervention by virtue of section 61 or 62 of EIA 2006 (schools requiring significant improvement or schools requiring special measures).*"

11. "EIA 2006" is the Education and Inspections Act 2006. Where s.4(A1) is satisfied the Defendant <u>must</u> make an Academy order, but the Defendant has a discretion to revoke such an order under s.5D 2010 Act.

12. This case involves a challenge to the Defendant's refusal to revoke an Academy order under s.5D. Before turning to the circumstances in which the power under s.5D may be exercised, I turn to the prior question of the circumstances in which an Academy order under s.4(A1) must be made.

School inspection and schools eligible for intervention

13. As I have set out above, s.4(A1) 2010 Act is engaged where a maintained school is "eligible for intervention" by virtue of ss.61 or 62 EIA 2006. Section 61 deals with schools requiring significant improvement and is the relevant section for this claim. By s.61, a maintained school is eligible for intervention if:

i) Following an inspection of the school under Education Act 2005 the Chief Inspector of Schools has given notice that the school requires significant improvement; and

ii) Where any subsequent inspection of the school has been made, the notice has not been superseded by the person making the subsequent inspection making a report stating that in his opinion the school no longer requires significant improvement.

14. "Requires significant improvement" is a term defined by s.44(2) Education Act 2005 ("the 2005 Act"). It describes a school which, although not in need of special measures, is "*performing significantly less well than it might in all the circumstances reasonably be expected to perform.*"

15. The 2005 Act provides for a regime of inspection of schools by Ofsted. For the purposes of these proceedings, inspections can be divided into inspections at prescribed intervals under s.5 2005 Act (a "Section 5 Inspection") and other inspections under s.8 (a "Section 8 Inspection"). Ofsted inspections were carried out under a Common Inspection Framework until May 2019. From May 2019 a new Education Inspection Framework applied. Ofsted make judgments on overall effectiveness and on a number of criteria using a four point grading scale: "Outstanding", "Good", "Requires Improvement" and "Inadequate".

16. I was taken at some length, by the Claimant's counsel, through Ofsted's approach to inspections, both in the versions that applied before May 2019 and in the version that applied after that date. It is unnecessary for the purposes of this judgment to set out that material.

The power to revoke: the Defendant's Guidance

17. The Defendant has a policy about how to exercise the discretion under s.5D 2010 Act. It is contained in a guidance document "*Schools Causing Concern: guidance for local authorities and RSCs*", the most recent version of which was published on 2 October 2020 ("the Guidance"). According to the "*Key Principles*" the Guidance aims to provide school leaders with greater clarity and transparency on (amongst other things) the circumstances in which the Defendant will intervene in schools. The Key Principles go on to state:

> "*[RSCs] will only mandate academy conversion, leadership change or trust transfer of a school in relation to educational standards if Ofsted has judged it inadequate*."
>
> "*The department remains committed to academy conversion as a positive choice for schools and will continue to aid conversion as it has done previously.*"

18. The section headed "*Power of the Secretary of State to revoke an academy order*" is central to the claim. The material passage is as follows:

> "*Section 5D of the Academies Act 2010 enables the Secretary of State to revoke an academy order that was made because a maintained school is eligible for intervention. This power can be used at the discretion of the Secretary of State and it will only be used in exceptional circumstances and not just because a school's Ofsted rating has improved. It is the Secretary of State's view that schools in general should benefit from being part of an academy trust. In the Secretary of State's view, transferring underperforming maintained schools to academy trusts is the most effective means of securing their rapid improvement. Ministers will make decisions on any revocations of academy orders.*
>
> *Examples of "exceptional circumstances" include where:*
>
> *1. The Secretary of State considers that the school would not be viable as an academy (in these cases, we would expect the local authority to close the school and the Secretary of State can direct them to do so if necessary)*
>
> *2. The school has been re-inspected by Ofsted and judged **Good** or **Outstanding**, and the Secretary of State is satisfied that the improvement can be sustained without the support of a strong sponsor. Ofsted's findings will be one of a number of sources of information the Secretary of State will consider when deciding whether improvement can be sustained without the support of a strong sponsor*
>
> *3. The school was rated inadequate by Ofsted solely on **safeguarding** grounds having previously been judged Good or Outstanding, the school has reverted to its previous Ofsted rating and the Secretary of State is satisfied that the safeguarding concerns have been addressed and can be sustained without the support of a strong sponsor or Multi-Academy Trust. These examples above are not exhaustive and the Secretary of State will consider each case on its individual merits taking account of any reasons put forward by the governing body as to why revocation is in the best interests of the pupils served by the school.*"

19. The first example of exceptional circumstances is not relevant to the claim.

20. The second example has two components. First, a grading as "Outstanding" or "Good" on re-inspection by Ofsted. Second, an assessment by the Defendant that "*improvement can be sustained without the support of a strong sponsor*".

21. The third example has four components. First, the "Inadequate" rating by Ofsted was solely on safeguarding grounds and the school was previously rated Good or Outstanding. Second, the school has reverted to its previous Ofsted rating – i.e. on a subsequent inspection. Third, the Defendant is satisfied that the safeguarding concerns

have been addressed. Fourth, the Defendant is satisfied that the school's improvement can be sustained without the support of a strong academy trust.

22. As the paragraph following the three examples makes clear, the examples are not exhaustive, and there may be other exceptional cases where revocation is appropriate.

FACTUAL BACKGROUND

23. Prior to 2019, the School's overall effectiveness had been graded "Good" by Ofsted in inspections carried out in June 2007, October 2009 and December 2014. In the December 2014 inspection the school was "Good" in all areas, save Early Years provision, which was rated "Outstanding".

24. The School was inspected by Ofsted in January 2019. Ofsted's report rated the overall effectiveness of the School as "Inadequate". Using the then applicable gradings, Ofsted rated the School "Inadequate" for "Effectiveness of Leadership and Management", "Personal Development, behaviour and welfare" and "Early years provision". Ofsted rated the School "Requires Improvement" for "Quality of teaching, learning and assessment" and "Outcomes for pupils". The opinion of the Chief Inspector was that the School required significant improvement, within the meaning of s.44(2) 2005 Act.

25. Ms Clement, for the Claimant, sought to demonstrate that (a) because of the safeguarding issues at the School, the overall grading could only be "Inadequate"; and (b), but for the safeguarding issues the School would have been rated "Requires Improvement". I accept the first proposition, but not the second. It is clear that safeguarding was an issue that featured in a number of findings and recommendations. However, it is clear from the detailed report that Ofsted also had other concerns. I am in no position to judge what the Ofsted inspectors would have concluded on the various criteria in the absence of the safeguarding issues.

26. Applying the statutory framework I have described above, the Defendant was obliged to make an Academy Order, which it did on 9 April 2019. Shine Academies was approved as the sponsor of the school in July 2019. However, the Defendant did not proceed to enter into academy arrangements at that time, and the School continued to be operated by the Claimant as a maintained School.

27. An Ofsted monitoring inspection took place in October 2019. This was a Section 8 Inspection, but it was converted into a Section 5 Inspection by the inspectors. The inspectors considered the School had improved, and the School's grading was changed from "Inadequate" overall to "Requires Improvement" overall. The Ofsted framework had been revised since the January 2019 report. Using the new criteria, Ofsted's ratings were as follows. For the criteria "Personal development" and "Early years provision" the School was rated "Good". For "Quality of education", "Behaviour and attitudes" and "Leadership and management" the School was graded "Requires Improvement".

28. The October 2019 report contained much that was positive, both for the improvements the School had made by October 2019, and for anticipated improvements in future.

    i) The section headed "*What is it like to attend this school?*" begins "*This is an exciting time to be at Yew Tree Primary School. Things are improving quickly.*" The following five paragraphs of the section are all positive.

    ii) The section headed "*What does the school do well and what does it need to do better?*" begins "*Leaders and governors are taking the right action to improve the school. They work together well and make use of regular support from the local authority. Together, they are beginning to develop a single overall plan because there are too many plans currently used. Leaders know there is still work to do to secure a good quality of education across the school.*" The remainder of the section records improvements that have been made while noting that there is still more to do in several areas.

    iii) The section on "*Safeguarding*" records that arrangements for safeguarding are effective, and that the School had quickly addressed the failings identified at the last inspection.

    iv) The section headed "*What does the school need to do to improve?*" has four points:

        a) Leaders had used a series of action plans to urgently address key failings. They had been used effectively to make the necessary improvements. "*Leaders should now consider the actions needed for the future development of the school in order for it to be good or better at the next inspection.*" A single long-term plan was needed, and the report gives advice as to the plan.

        b) The curriculum was broad and balanced. However, not all subjects were planned carefully, and leaders should continue their work to develop the curriculum.

        c) Leaders should continue to support teachers to plan sequences of learning which help pupils remember more.

        d) Attendance remained too low. The new attendance officer was beginning to tackle attendance more effectively. Leaders needed to continue to work with parents so that their children attend more regularly.

29. The October 2019 report also states that the School no longer required significant improvement within the meaning of s.44 2005 Act.

30. Had the Academy Order not been in place at the time of the October 2019 report an Academy Order could not have been made on the basis of that report. However, the Academy Order was already in place. Revocation of that order depended on establishing exceptional circumstances, in line with the Guidance set out above.

31. Mr Barry's evidence is that the Ofsted inspectors said that the School was close to "Good" and would have been "Good" under the inspection framework that applied up to May 2019. However, the Defendant cannot be expected to have attached weight to those reported oral remarks. Ofsted's findings were set out in the October 2019 report, not in any oral remarks that may have been made during the inspection.

32. According to the Claimant's evidence, the School addressed the areas identified in the October 2019 Ofsted report, and continued to make rapid improvement. Mr Barry was recruited as the new Headteacher. He was appointed in July 2019 and in post full time from January 2020. He was involved before that in the October 2019 inspection. Mr Barry's evidence sets out in detail the steps that were taken to address the failings set out by Ofsted in the January 2019 report, and the points for improvement set out in the October 2019 report. Mr Barry describes evidence of continued improvement by the School in the areas identified by Ofsted. He describes how that improvement has been sustained despite the challenges of the pandemic from spring 2020 onwards. Mr Barry's evidence is that the School is meeting the "Good" judgment descriptors in the areas identified by Ofsted. He is confident that the School is operating at a good standard and would be rated "Good" if Ofsted were to inspect. I do not understand the facts of the steps taken by the Claimant to be in issue. Mr Barry's assessment of the quality and result of those steps is, of course, a matter of his opinion.

33. The School has been supported by the Local Authority's School Improvement Advisor, Mr Cadwallader, since 2016. He has made two witness statements in this claim. He is an experienced teacher and head teacher, and also carries out inspections on behalf of Ofsted. He sets out his own assessment of the improvements made at the School. He also agrees with the evidence in Mr Barry's witness statement. He says that the School has seen significant and continuous improvement since the January 2019 Ofsted inspection. He explains that the pandemic has limited his opportunities to consider the first-hand evidence that he would normally evaluate in judging a school's overall performance, but where he has seen evidence there are continued improvements and the School's provision to pupils has been very strong and effective.

34. In the light of progress made at the time, the Claimant asked the Defendant to revoke the Academy Order on 12 November 2019. Mr Warren, on behalf of the Defendant, refused revocation on 17 January 2020.

35. A further request for revocation was refused by the National Schools Commissioner on 28 February 2020. A pre-action protocol letter was served by the Claimant's solicitors on 20 March 2020, challenging the decision not to revoke the Academy Order.

36. On 17 April 2020 the refusals to revoke were both withdrawn by the Defendant. The reason was that the Defendant was in the process of reviewing its approach to decision-making on requests to revoke. The Claimant was told that its request for revocation remained extant and a new decision would be taken once the wider approach had been reviewed.

37. Meanwhile, on 17 March 2020, the Defendant wrote to HM Chief Inspector to direct her to suspend routine Ofsted inspections. Section 5 Inspections were suspended by notices issued under the Coronavirus Act 2020 from 28 April 2020. Notices continued

to suspend those inspections until 27 April 2021. A full programme of graded inspections will not resume until September 2021.

38. Section 8 Inspections restarted from 27 April 2021. Mr Barry has requested an inspection, but none has taken place. Mr Barry points out that Ofsted's priority on resuming Section 8 Inspections is schools graded "Inadequate" and schools graded "requires improvement" on their last two consecutive full inspections. The School does not satisfy those criteria: its performance has not been sufficiently poor.

39. The Defendant's review of its wider approach to revocation resulted in the revised Guidance, published on 2 October 2020, to which I have referred above. The Defendant invited the Claimant to make further submissions as to why the Academy Order should be revoked.

40. The Claimant made representations in a letter from its solicitors dated 16 October 2020. The Claimant recognised that the power to revoke may only be used in exceptional circumstances. It submitted that the School met the second and third example of exceptional circumstances, but also that in the wider context was able to satisfy the Defendant that this was a case where exceptional circumstances justified revocation. It made detailed representations explaining the steps that it had taken since the two Ofsted inspections in 2019.

41. Following the Claimant's submission the Defendant asked the Local Authority questions in four areas. The Local Authority's answers can be summarised as follows:

    i) The Local Authority was positive about the Claimant's School Improvement Plan. The new headteacher showed good capacity to improve, and the Local Authority was confident the plan would provide the appropriate direction of travel for the School to achieve "Good" in every Ofsted category at the next inspection.

    ii) The Local Authority described the external monitoring it had provided. There were termly core visits. After the January 2019 Ofsted report the School had received four additional support visits per term. However "*Currently due to the strong performance of the School, especially the new Headteacher, the additional support visits have been reduced to two a term, in addition to the termly core visit*."

    iii) A Local Authority task group had been monitoring the School. "*The Local Authority task force stood down due to the continued improvements by the school. This is in addition to the swift improvements recognised by OFSTED in October 2019. Three monitoring visits per term continue to review the school improvements.*" The Local Authority set out eight improvements that it had identified as taking place.

    iv) The Local Authority reported on its safeguarding audit for 2019/2020. The results of that audit were positive, as summarised in detail in the Local Authority's answers. One area for further development was noted: "*The school has identified some areas where the curriculum could be developed further e.g. gangs and youth violence, to support children's understanding of these*

issues. However, they are able to evidence training that has been put in place for staff to demonstrate progress in these areas."

42. As the Local Authority made clear in its answers, it had been supporting the School through a range of visits and inspections. Those included Task Group meetings on 23 October 2019, and 31 January 2020 and improvement visits in March 2020, June 2020 and November 2020. The improvement visits were conducted by Mr Cadwallader.

43. Following these submissions the Defendant's decision, taken on his behalf by the Parliamentary Under Secretary of State for the School System and set out in the Decision Letter on 15 December 2020, was to refuse to revoke the Academy Order. That is the decision under challenge.

44. The Decision Letter was informed by a Ministerial Submission dated 10 December 2020, prepared by the RSC with assistance from officers in the Defendant's West Midlands Regional Delivery Directorate ("the Submission"). Attached to the Submission were: a draft decision letter (in materially the same form as the Decision Letter). The recommendation of the Submission was to refuse the request to revoke. I will return to the detail of the Submission and the Decision Letter in the discussion below.

45. Since the Decision there have been two further improvement visits by the Local Authority: on 18 March 2021 and 19 May 2021.

46. Since the proceedings, on the Claimant's evidence (the second statements of Mr Barry and Mr Cadwallader) the school has continued to improve. On 28 June 2021 the Claimant served those statements on the Defendant as evidence in reply in these proceedings. At the same time, it made a fresh request for revocation in the light of that evidence. The Defendant has not yet evaluated that evidence or made a further decision.

THE AMENDMENT APPLICATION

47. On 8 July 2021 the Claimant issued an application to amend the Claim Form and Statement of Facts and Grounds. As requested by the Claimant, I heard the application on the day of the substantive hearing. The Claimant proposed that I should, in effect, roll up the application into the substantive hearing. I decided that it would be appropriate to hear the amendment application before the substantive hearing, so that the Defendant's counsel properly knew the case she had to meet. Having heard both counsel on the application I decided to dismiss the application and refused permission to amend. Given that the application had used up part of the time for the substantive hearing, and to avoid losing more time, I informed the parties of my decision, but indicated that my reasons would be included in this reserved judgment.

48. A draft amendment to the Claim Form described the date of decision challenged as 15 December 2020 "and ongoing". Draft amendments to the Statement of Facts and Grounds can be summarised as follows:

i) Paragraph 1 sought to challenge the Defendant's "*ongoing refusal to revoke the Academy Order*".

ii) A new section at paragraphs 60-62, headed "*Ongoing refusal to revoke*", claimed that since December 2020 the School has gone from strength to strength, as detailed in the second witness statements of Mr Barry and Mr Cadwallader, and as was apparent from Local Authority visits in March and May 2021.

iii) Paragraph 100 alleges that the Defendant's irrationality is "even more obvious" in the light of the evidence filed on 28 June 2021.

49. The application to amend was supported by the evidence set out in the application notice, with a statement of truth signed by Ms Hoffman, solicitor for the Claimant. The Claimant had filed reply evidence in accordance with HHJ Walden-Smith's directions. At the same time, it asked the Defendant to revoke the Academy Order in the light of that evidence. The Defendant had not done so, despite being given what was alleged to be a reasonable time to do so. Given the Defendant's desire to enter into academy arrangements regarding the School in August 2021, it was in the interests of the School to resolve all issues now, and to allow amendment so that all issues were before the Court.

50. Some of the material in the draft amendment is already pleaded, and no amendment is needed to rely on it. For example, the complaint that it was irrational for the Defendant not to have asked the Local Authority about the continuing support it would provide (paragraph 100(2) of the draft Amended Statement of Facts and Grounds) appears in paragraph 7 of the Reply to the Summary Grounds of Resistance.

51. A substantial part of the draft amendment amounts to a new challenge to the Defendant's "ongoing" refusal to revoke the Decision. More particularly, the amendment complains of the failure of the Defendant to accede to an application to revoke made on 28 June 2021, in the light of evidence filed on that day.

52. The Defendant argues that it has had no time to consider and evaluate the new evidence. Having done so, a recommendation will need to be made to the Minister who is the person required to make a decision. The Defendant submits that it would be inappropriate to conduct a "rolling review" and to assess the evidence even before the Defendant has made a decision.

53. I was referred by the Defendant to authorities which caution against rolling review: **R (Tesfay) v SSHD** [2016] EWCA Civ 415 at para 78 per Lloyd-Jones LJ; and **R (Spahiu) v SSHD** Practice Note [2018] EWCA Civ 2604 at para 62 per Coulson LJ.

54. The Claimant referred to the more recent decision of Fordham J on **R (Raja) v Redbridge LBC** [2020] EWHC 1456 (Admin), which indicates that a rolling review can in some cases be appropriate if approached with care and discipline. The Court should proceed with sufficient flexibility to ensure the interests of justice are secured. The touchstone is fairness.

55. In my judgment, it is clear that it is not in the interests of justice, nor fair to all parties, for the amendment to be allowed.

i) The application to amend is made very late, less than a week before the hearing. That causes the Defendant difficulty in responding to the amended claim.

ii) The renewed revocation request was also made late in the day. Although HHJ Walden-Smith directed reply evidence by 28 June 2021, I have no doubt that she had in mind the filing of evidence relevant to the challenge to the 15 December 2020 decision. She would not have had in mind that she was opening the door to a fresh challenge based on a new request for revocation. The request is a separate matter, outside the litigation. It should have been made at an earlier date. The new request for revocation depends in large part upon Local Authority inspections on 18 March 2021 and 19 May 2021. If the Claimant thought there were fresh grounds to revoke, it should have taken steps to seek a revocation more promptly.

iii) The upshot is that the Defendant has not had time to evaluate the evidence, nor to make a decision on revocation. I reject the submission that it has delayed in doing so, or that it has been given reasonable time to do so since 28 June 2021.

iv) In consequence, I am being asked to decide, on grounds of irrationality or fettered discretion, that it is unlawful of the Defendant not to have revoked the Academy Order when the Defendant has not made a decision and has not had reasonable time to do so. Any challenge can only be made on the basis of the Court's evaluation of the Defendant's evidence as to (a) the current performance of the School and (b) the sustainability of its progress without the support of a strong trust. It would be neither possible nor fair to the Defendant to embark on this exercise without the Defendant's decision.

56. Accordingly, I refused permission to amend. However:

i) As I have noted above, some of the material in the draft amendment is already "live" on the existing pleadings.

ii) I have not excluded the reply evidence, nor was I asked to do so. I have read it and had regard to it.

iii) During the course of the hearing I encouraged the Defendant to take prompt steps to reach a decision on the new revocation application. The Claimant is entitled to have a decision made based on up to date evidence, it now being some two and half years since the Ofsted inspection that led to the Academy Order. I told the parties that, if I were to dismiss the challenge to the 15 December 2020 decision, it would be highly unfortunate if the Defendant's tight timetable for entering into academy arrangements were to mean that there was not proper consideration given to the revocation request.

SUBMISSIONS AND DISCUSSION

Ground 1: Irrationality

Outline of Ground 1

57. The Claimant's case is that it was irrational of the Defendant to conclude that this case did not amount to exceptional circumstances warranting revocation of the Academy Order. The Claimant says the Defendant's decision was irrational because, in summary:

    i) The Defendant prevented the Claimant from coming within the example exceptions by suspending Ofsted inspections.

    ii) The Defendant acted irrationally in rejecting the only available independent evidence of the School's significant and sustained improvement – i.e. the evidence of the Local Authority.

    iii) It was irrational for the Defendant to make a decision on the basis that it was not clear what assistance the Local Authority would provide and that any further Local Authority support was unlikely to be sustainable in the medium to long term.

58. The Defendant's case in summary is that it considered the representations made by the Claimant and the Local Authority and evaluated them. It reached a decision that it was entitled to reach, applying its expertise. It argues that the Decision cannot be said to be irrational.

The test

59. To succeed on this ground, the Claimant needs to prove that the Decision was unreasonable in the public law sense: irrational or outside the range of reasonable decisions open to the Defendant.

60. Irrationality always presents a high hurdle. In this case, the parties disagree as to the intensity of review.

61. The Defendant relies on **R (Moyse) v SSE** [2012] EWHC 2758. The case concerned the exercise of a different discretionary power under the 2010 Act, under which the Defendant had to determine whether the school should be converted to an academy and needed to consider the alternative scenario of the school remaining under local authority maintenance. Both parties agree that the facts of that case were somewhat different to the current case. On the particular facts, the Defendant had no confidence that the school would substantially improve under local authority maintenance. The Defendant's assessment was that conversion to an academy would substantially improve performance, for the reasons stated in his decision. The essence of the Claimant's case appears (from paragraph 77 of the judgment) to have been that things had improved and prospects were much better than the Defendant regarded them as

being. In refusing permission for judicial review, Kenneth Parker J said this (at paragraph 78):

> "However, these are quintessentially matters of judgment and appreciation for the Secretary of State to resolve. In the light of the egregious past failures over a very substantial period, the Secretary of State was not convinced that the future would be materially different. This court would interfere with such an assessment only if it had no rational basis."

62. I was taken to another decision concerning a challenge to conversion of an inadequate school: **R (Warren Comprehensive School and others) v SSE** [2014] EWHC 2252. That case states no general principle, and is no more than an example of the application of familiar principles to the particular facts of the case.

63. I accept that the exercise of the discretion under s.5D in the light of the Guidance is a matter of judgment and appreciation for the Defendant. However, as the last sentence of the passage from **Moyse** quoted above makes clear, the Defendant's judgment is open to an irrationality challenge. I also accept, as submitted by the Defendant, that the Court should be cautious in a challenge to an exercise of judgment informed by expert officials on a technical subject. The fact that the decision under challenge involves expert judgment does not however rule out the possibility of irrationality review in an appropriate case.

64. The Defendant further submits that the Claimant has a higher hurdle to pass because the discretion is only to be exercised in exceptional circumstances. In a sense that is true. The Defendant has not only to evaluate the evidence and material before him, but also to make a judgment as to whether the evidence amounts to "exceptional circumstances". Each part of that exercise can only be challenged on irrationality grounds. It may, in practice, be harder to show that it was irrational for the Defendant not to regard a particular set of circumstances as exceptional. But the test and intensity of review remain the same: was the decision outside the range of reasonable decisions open to the Defendant?

The Defendant's policy

65. The challenge to the exercise of the Defendant's discretion has to be seen in the light of the Defendant's policy position, as set out in the Guidance. The Defendant's policy is that academisation is more likely to result in higher standards being achieved and sustained by schools. Academisation is a means of supporting schools to provide the best learning experiences for their pupils. It is not a penalty that the Claimant must be given every opportunity to avoid. On the other hand, it is clear that the policy is not to convert to academy status wherever possible: the relevant policy in this case is addressed to improving schools that are a cause of concern.

66. The Claimant does not dispute that the Defendant is entitled to have a policy. Nor does it challenge the lawfulness of the policy set out in the Guidance. The Defendant is entitled to hold his policy view as to the benefits of academies. The Defendant is

entitled to take the approach that he will only revoke an Academy Order in exceptional circumstances. However, the Defendant must exercise his discretion lawfully.

67. It appears to be accepted that if the Claimant had satisfied one or more of the examples of exceptions in the Guidance the Academy Order would have been revoked. If the Claimant does not fall within one or more of those examples, then there remains the question of whether the particulars circumstances are exceptional so that, consistent with the aims of the policy, the Academy Order should be revoked.

68. The Claimant relies on the second and third examples. In my judgment, the third example is not relevant. I accept that safeguarding concerns were an important part of the reason for Ofsted's overall "Inadequate" rating in January 2019. But I reject the Claimant's submission that the School was rated "Inadequate" solely on safeguarding grounds.

69. The second example exception and the residual category are relevant. As I set out above, the second example requires:

    i) The School has been reinspected by Ofsted and judged "Good" or "Outstanding";

    ii) The Defendant is satisfied that the improvement can be sustained without the support of a strong sponsor.

70. The Claimant accepts that it cannot strictly come within the second example: it has not been rated "Good" on an Ofsted inspection. Its evidence is that it is performing at a "Good" standard and the only reason it does not fall within the example is because it is unable to obtain an Ofsted inspection due to the Defendant's suspension of inspections. The question is whether the circumstances were sufficiently similar to the second example, or otherwise so exceptional, that it was irrational to decide that there were not exceptional circumstances justifying revocation.

The relevance of the Covid Pandemic

71. The Defendant cannot be blamed for suspending Ofsted inspections during the pandemic. His decision to do so is not challenged in these proceedings, and in any event I have no doubt that there were good reasons to do so in the light of the unprecedented challenges facing the school system. In a sense, the Defendant has prevented the Claimant from obtaining the Ofsted grading required to come within the example exceptions in the Guidance; but he cannot be blamed for doing so.

72. The fact that there has been a suspension of Ofsted inspections does not in itself amount to exceptional circumstances justifying revocation of an Academy order.

73. The Claimant's case is that it has made such improvements that it is now functioning at a "Good" level, but it is unable to obtain an Ofsted grading to prove it. The Claimant's position is that (a) in the absence of an Ofsted inspection, the Defendant should have regard to other evidence showing the performance of the School and (b)

if the school is performing at a "Good" standard, and can show the requisite sustainable improvement, that should amount to exceptional circumstances.

74. I accept the Claimant's position. The Defendant has to consider whether there are exceptional circumstances. If a school has done everything necessary to satisfy the second example, but fails only because it cannot get an Ofsted grading, it is easy to see why that ought to amount to exceptional circumstances. The Defendant's concern must, reasonably, be with the substance of the performance of the school, not with whether there has been a formal grading by Ofsted. I accept that other forms of evidence of performance may not be as reliable as an Ofsted inspection, but it would be wrong to disregard alternative forms of evidence. The reliability of the evidence is a matter of evaluation by the Defendant (subject to irrationality review).

75. In fairness to the Defendant, Mr Warren states (statement paragraph 50) that a new Ofsted report is not required to meet the threshold of exceptional circumstances – i.e. the Defendant does consider other forms of evidence.

76. The relevance of the cessation of inspections during the pandemic, in my judgment, is as follows. First, it would be wrong to take a simplistic approach that if there has been no Ofsted reinspection, exceptional circumstances cannot be made out. Second, where no reinspection can be carried out and therefore no regrading can be achieved, it is incumbent on the Defendant to carry out a close evaluation of the available evidence as to whether the School is performing at a level that is "Good" or above. Revocation is not an indulgence, but a power to be exercised in the best interest of students at the school in question. If the Defendant fails closely to evaluate the available evidence, then he risks failing to revoke an order where it would have been in the interests of students for him to do so.

77. The Claimant was entitled to say that it had done everything that it could do to prove its improvement, absent an Ofsted inspection. Equally, the Defendant was entitled, indeed obliged, to evaluate and scrutinise the evidence. He was entitled to hold the view that other evidence may be less robust and comprehensive than an Ofsted inspection report; but he needed to evaluate the evidence in each case, rather than assuming any evidence is unreliable in comparison to an Ofsted report.

78. The Submission addresses the question of the pandemic at paragraph 19. That reads *"We also do not deem the COVID-19 crisis to count as "exceptional circumstances" as [the Academy Order] precedes the pandemic.*" That point is misconceived. It is true that the Academy Order preceded the pandemic, but that is irrelevant. The Claimant was not saying that the pandemic was the reason for the failings at the school that led to the "Inadequate" grading. The relevance of the pandemic was that the suspension of inspections meant that the School could not be reinspected and therefore had to rely on other forms of evidence as to its improvement. The Defendant misconstrued the Claimant's point, and therefore failed to have regard to it.

The effect of the passage of time

79. The Defendant argues (Skeleton para 29, Mr Warren's witness statement paragraphs 10-14) that the Guidance supports the Defendant's position that underperforming schools must be swiftly addressed, so that rapid improvement can be secured and sustained for the benefit of those students who study there. The Defendant takes the policy view that academisation is more likely to achieve improvement of this nature and deliver success in raising standards of education.

80. However, it is clear from this case that the position of the School was not "swiftly addressed". For reasons unclear to me, academy arrangements were not entered into swiftly after the Academy Order in 2019. By the time of the Decision, in December 2020, some 23 months had passed since the January 2019 Ofsted inspection, and 20 months since the Academy Order. I make no criticism of the Defendant for allowing that time to pass. But what it meant was that by the time of the Decision the Defendant had nearly two years of progress at the School to evaluate in deciding whether to revoke the Academy Order. The assessment of the rapid improvement that could be made by an academy sponsor needed to be determined on the basis of the facts as they were in December 2020, not has they had been in January 2019, nor even October 2019. The Claimant's (and the Local Authority's) response to the January 2019 report was relevant to (a) the evaluation of the School's performance as of December 2020; and (b) the evaluation of the sustainability and pace of further improvement. The Claimant's case is that the events since January 2019 showed that the Claimant had made the necessary improvement and that it had the ability to make rapid and sustained improvement.

The Defendant's assessment: *the Submission and the Decision Letter*

81. The Defendant is quite right in saying that the Defendant was not bound to accept the School's view of its own progress, nor its assertions that Ofsted's concerns had all been addressed. The Defendant is also right to say it was not bound to accept the Local Authority's view on these matters. The Defendant was bound to consider the improvements made and consider whether they, alongside other factors in play, amounted to exceptional circumstances. The Defendant had to make his own judgment on these matters. The Defendant's view was that the School still had "a way to go" and that progress could be quickened and sustained more effectively by a strong multi-academy trust.

82. The Defendant points out that this a matter of expert judgment for the Defendant. I accept that, but the exercise of that judgment is subject to review on public law grounds: it must not be irrational. The Court is entitled to measure the rationality of the Defendant's exercise of judgment, weighing the Defendant's reasons set out in the Decision Letter and the Submission. Mr Warren describes these documents (paragraph 36 of this statement) as providing a comprehensive account of the reasons for the decision and how the Claimant's detailed representations were considered but, ultimately, rejected. Taking those documents together, there are several aspects of the Decision that cause me grave concern.

83. First, I have the strong impression that the Defendant had not engaged with the representations and evidence showing the progress that the School had made since January 2019, and in particular in the 14 months since October 2019.

i) Paragraphs 9 and 10 of the Submission summarise the key reasons for recommending that the request to revoke should be refused. Paragraph 9 begins "*We recommend [refusal] as the School's position has not substantially changed since the previous request for revocation and the School's position does not give rise to exceptional circumstances under the Policy*". Having considered the evidence and submissions carefully, I find it impossible to understand that sentence. There was clear evidence before the Defendant, from the School and the Local Authority, of both continued efforts to improve and success in achieving those improvements. The Defendant was entitled to assess that evidence. There is no indication in what follows that it rejected the factual account of what had been done. The things that had been done by the Claimant showed the position had changed substantially. To suggest that the position had not substantially changed is, in my judgment, to disregard the evidence before it and is irrational.

ii) In paragraph 10, the view is expressed that the School would progress further and improve quicker with the support of a DfE approved sponsor. The paragraph goes on to state that the approved trust (i.e. Shine Academies) has experience of supporting schools to improve from "requires improvement" to "good" and in supporting the particular key priorities for the School set by Ofsted. Those points go to the issue of whether the sponsor would achieve more and quicker progress in improving the School from the position it was in in October 2019. However, 14 months had passed since the October 2019 report. The relevant progress was from the position the School was in in December 2020. Whether a sponsor would have made more rapid and sustained progress than the Claimant in improving the School further from its December 2020 performance is not a question the Defendant appears to have considered.

iii) Paragraph 21 of the Submission begins "*Despite Ofsted's positive comments [in the October 2019 report], the School did not return to "Good" following their reinspection in October 2019. There is still some progress to be made before it can be judged a "Good" school. The School accepts that this was the position at the time however the representations note that the school is now 12 months further into their journey and that, despite the disruption caused by Covid-19, if inspected now, they would be rated "Good" by Ofsted.*" Paragraph 22 goes on to refer to improvement in outcomes demonstrating that the School was on an upward trajectory, but states that due to the pandemic it is difficult to assess current performance or progress made.

iv) The evidence provided by the Claimant is evaluated in a table at paragraph 23 of the Submission. Although paragraph 21 had identified the Claimant's case that it was now performing at a "Good" standard, the focus in the comments by the drafters appears to be the October 2019 Ofsted inspection. The first comment is "*School only achieved RI and does not meet the criteria of good or better*". There is repeated reference to the October 2019 report. There is little

engagement with the evidence provided which showed progress and little, if any, attempt, to assess the performance of the School as of December 2020.

84. Second, a related point, the Submission appears focussed on the outcome of the formal 2019 Ofsted inspection, rather than on the other available sources of evidence as to the School's performance.

    i) I have set out above that the Defendant is not to be blamed for the absence of inspections during the pandemic. However, in circumstances where a school could not obtain the necessary inspection in order to achieve the "Good" rating necessary to fall within the second or third examples of exceptions, it was incumbent on the Defendant to pay careful attention to whether this was a school that was performing at a "Good" standard even though it did not have an Ofsted inspection to prove it.

    ii) I accept that the Defendant did not have to accept the School's self-assessment, nor the assessment of the Local Authority. But he had to give those matters careful consideration. Mr Warren's evidence is that the evidence was considered. I am not satisfied, from a reading of the Decision Letter and the Submission, that it was. It does not appear to me that the Defendant carried out an assessment of whether the performance of the School, in December 2020, was such that it was performing to a "Good" standard. Nor am I satisfied that he carried out any meaningful evaluation of the evidence.

    iii) Although the Submission states, at paragraph 21 "*There is still some progress to be made before it can be judged as a "Good" School*" it is entirely unclear what evidence that judgment is based on. That is not the effect of the School's evidence, nor that of the Local Authority. No other evidence was available to the Defendant. It is not clear what progress remained to be made.

85. Third, the treatment of the Local Authority's evidence is, in my judgment, highly unsatisfactory.

    i) The Local Authority's evidence was relevant both to the question of the performance of the School in December 2020 and to the question of the sustainability of progress.

    ii) The Claimant had represented that the Local Authority could corroborate the improvements that the Claimant described. The Submission (at paras 24-25) addressed the Local Authority's evidence, which was in the form of answers to specific questions asked by the Defendant.

    iii) Apart from the question about safeguarding, the treatment of this evidence does not focus on corroboration of improvements to date. Rather it focusses on ongoing Local Authority support and the sustainability of progress.

    iv) On the question of corroboration, it is clear that the Local Authority was supportive of the School. It was positive about the work that it had done, and was continuing to do, to improve. It is unclear whether the Defendant accepted the Local Authority's view or not on progress to date.

v) On the question of sustainability, the Submission states that it is not clear whether the Local Authority will have the resources or commitment to continue the same level of support that it had provided to date. It records that the Local Authority task group had been stood down due to continued improvements at the School, but three monitoring visits a term would continue. That evidence could only be regarded as positive: the School had improved to such an extent that it no longer needed task group support, but regular monitoring support would continue.

vi) However, paragraph 25 of the Submission states "*While the school has made progress, it is not clear what support the LA will continue to provide. Any further LA support for the School's ongoing priorities is unlikely to be sustainable in the medium to longer term.*" Based on the information the Defendant had before it, that conclusion is irrational:

a) The Local Authority had set out the support that it proposed to provide. It had made clear that it was supportive of the School.

b) The only reason that support had been reduced was because the continued improvement in the School rendered task group support unnecessary. That gave no reason to doubt the Local Authority's commitment to supporting the School.

c) In any event, if the Defendant felt there was a lack of clarity in the Local Authority's position it could, and should, have asked the Local Authority. It did not do so.

d) Mr Cadwallader, in his second witness statement at paragraphs 12-19, confirms the Local Authority's support. He says that had the Defendant asked about what support would be available in future, he would have confirmed that monitoring support would continue and "*whatever support was required would be provided when required*". That would include resuming the task group if appropriate or any other bespoke support as the need arose.

86. Fourth, and also related to the Local Authority, the remainder of paragraph 25 of the Submission is more troubling still. It reads as follows – with bold in the original, for emphasis. "***The LA's support to the School to date, and the additional information provided, have been offered within a wider context of the LA overall not being supportive of academisation.*** *In our analysis of the evidence, we have therefore applied less weight to this additional information in comparison to the other evidence available*."

i) The drafters of the Submission clearly regarded this point as important. It is one of very few passages in the 10 page document which appears in bold.

ii) No evidence was provided at the time in support of the proposition that the Local Authority was not supportive of academisation. No evidence has been provided now. Mr Warren (who relies on the Submission and the Decision Letter as a "comprehensive account of the reasons for the decision") makes no attempt to explain this passage. At paragraph 70 he says merely that the Local

Authority's view was not considered to be "*sufficiently robust or objective*". Paragraph 70 makes clear that robustness was assessed in contrast to an Ofsted inspection but here is no explanation given as to the alleged lack of objectivity. There is no attempt to explain the stated perception that the Local Authority did not support academisation. Ms Ward, on behalf of the Defendant made a somewhat speculative attempt to explain that it would have been based on the experience of DfE officials in dealing with the Local Authority. I have no evidence that that is the case. Even if that were the case, I have no evidence to assess the reliability of the view of such officials.

iii) Mr Cadwallader, in his second witness statement paragraphs 5-7, disputes the proposition. I have no reason to doubt his evidence. I am driven to the conclusion that the Defendant's view of the Local Authority's opposition to academisation is entirely without evidential basis. It was wrong of the Defendant to treat it as a fact to which he had regard.

iv) Further, it was wholly unreasonable of the Defendant to rely on the perceived attitude of the Local Authority. The Submission records that because of the Local Authority's attitude less weight is applied to the information it provided. The Local Authority provided information supportive of the steps the Claimant had taken to improve the School, and setting out its own support both to date and going forward. The information was a mixture of fact and stated intention put forward by experienced professionals within the Local Authority. Even if the Local Authority were not supportive of academisation, that would not in itself undermine the truthfulness of the information provided by the Local Authority's experts, nor their stated intentions as to future support. To suggest that the Local Authority's lack of support for academisation undermines its evidence is tantamount to a suggestion of bad faith or bias on the part of those dealing with the matter within the Local Authority. There is no basis in the evidence for such a suggestion.

v) I note further that paragraph 25 states that less weight is attached to the Local Authority's additional information "*in comparison to the other evidence available".* Apart from the Claimant's representations and the 2019 Ofsted reports there was no other evidence. The Ofsted reports dealt with a position that had become historic. The Claimant's evidence was consistent with that of the Local Authority. It is entirely unclear what "other evidence" the Defendant attached more weight to than that of the Local Authority.

vi) The Defendant was entitled to make its own assessment of the Local Authority's evidence, but to attach weight to it because of a perceived lack of support for academisation is irrational.

87. As I have indicated, irrationality is a high hurdle in any case. However, on the basis of the flaws in the Defendant's reasoning I have set out above, I am driven to the conclusion that in the particular circumstances of this case the Defendant's evaluation of the evidence of the School's improvement, and of its focussed and sustained efforts to make further improvement was irrational. The refusal to revoke the Academy Order on 15 December 2020 was irrational.

Ground 2 – Fettered Discretion

88. The second ground is that the Defendant unlawfully fettered his discretion under s.5D 2010 Act. The Claimant accepts that the Defendant's policy, as set out in the Guidance, is not over-rigid on its face. The Claimant submits that the policy is applied rigidly in practice, so as to amount to an unlawful fetter. In practice, it is submitted, the example exceptions in the Guidance are treated as exhaustive. It is alleged that the Defendant will not revoke an Academy order unless an applicant provides externally validated evidence provided by Ofsted reports.

89. I am not persuaded that this ground is made out, though in the light of my decision on Ground 1 that does not affect the outcome of the claim.

    i) The Defendant does not state that he will only revoke if an applicant produces evidence from an Ofsted report. Mr Warren says the contrary in terms in paragraph 36 of his statement. In paragraph 70 he says the DfE's decision making is "*primarily based on the externally validated evidence provided by Ofsted reports.*" (my emphasis). The Defendant is entitled to the view that Ofsted evidence is likely to be more robust than other evidence. The Defendant's stated position is that it will consider other evidence, with its limitations borne in mind. On its face, that does not amount to a fettering of discretion. I have no reason to reject that evidence, and am not prepared to go behind it.

    ii) It would be possible, in an appropriate case, to challenge the Defendant's stated position by reference to the evidence of how the discretion has been exercised in practice in cases as a whole. The Claimant sought to do so here. The evidence shows a sample size so small, and the 2020 Guidance is so recent, that no meaningful conclusion can be drawn from it. Certainly, there is insufficient data to demonstrate that the Defendant has applied his policy in an overly rigid way.

    iii) The Claimant also seeks to argue that the Defendant's Decision in this case shows that he has fettered his discretion. I have set out above the deficiencies in the Decision. Deficiencies which, in my judgment, render the Decision irrational. It is difficult to extrapolate from that irrational decision that the Defendant has taken an overly rigid approach to his discretion, as opposed to exercising it in an irrational way. Part of my conclusion on Ground 1 was that the Defendant had acted irrationally in his assessment of the evidence, particularly the evidence following the 2019 Ofsted report. Given my findings on Ground 1, this formulation of Ground 2 adds nothing to the claim.

CONCLUSION

90. For the reasons stated above, I have decided that the Defendant's decision, on 15 December 2020, to refuse to revoke the Academy Order was irrational. I will make an order quashing that decision. I will deal with argument as to the appropriate form of order, and any consequential matters, at the hearing for hand down of judgment.