Neutral Citation Number: [2021] EWHC 2660 (Admin)

Case No: CO/3063/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2021

Before :

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

- -

Between :

THE QUEEN (on the application of THE KHALSA ACADEMIES TRUST LTD.)	**Claimant**
- and -	
SECRETARY OF STATE FOR EDUCATION	**Defendant**

- -
- -

Aileen McColgan QC (instructed by **Browne Jacobsen LLP**) for the **Claimant**
Jonathan Auburn QC and Leon Glenister (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 7 and 8 July 2021

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Approved Judgment

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 5 October 2021.

Gavin Mansfield QC, Sitting as a Deputy High Court Judge:

INTRODUCTION

1. The Claimant ("the Trust") is a multi-academy trust which is responsible for operating three academies. One of those is Khalsa Secondary Academy ("the Academy"), which is in Stoke Poges, Buckinghamshire. The others are Khalsa Academy Wolverhampton and Atam Academy. The Trust is a mainstream Sikh faith trust. The Academy is designated with religious character as a Sikh school.

2. This is an application for judicial review of the Defendant's decision to terminate the Trust's funding agreement for the Academy. The decision was taken on behalf of the Defendant by Baroness Berridge (Parliamentary Under Secretary for the Schools System) on 4 June 2020 ("the 4 June Decision"). The decision was reconsidered and affirmed on 3 July 2020 ("the 3 July Decision"). Those are the decisions under review (together "the Decisions"). The result of the Decisions is that the Academy is to be transferred, or "re-brokered" to another trust. The selected trust is the Sikh Academy Trust.

3. The claim was commenced on 28 August 2020. Permission to apply for judicial review was refused on paper by Murray J on 13 January 2021. Permission was granted by Lang J at a renewal hearing on 18 February 2021.

4. An application for interim relief was made by the Trust when the proceedings were commenced, to prevent the Defendant from implementing the Decisions. The Defendant gave undertakings which have remained in place to maintain the status quo pending determination of this application.

THE GROUNDS OF CHALLENGE

5. There are four grounds of challenge:

    i) **Ground 1**. The Defendant failed to take account of relevant considerations and breached the Trust's legitimate expectations concerning compliance with the principles in the Memoranda of Understanding with Catholic and Church of England bodies.

    ii) **Ground 2**.

        a) The Defendant directly discriminated against the Academy, and/or its pupils, staff and parents by treating the Academy differently, because of its Sikh faith status, than it would have treated a Catholic or Church of England academy, its pupils, staff and/or parents.

        b) The Defendant failed in its duty to pay due regard to the need to eliminate discrimination and advance equality, contrary to s.149 Equality Act 2010 ("EqA").

iii) **Ground 3**. The Defendant acted irrationally by refusing to delay the Decisions to allow consideration of material, alleged to be highly relevant, the availability of which was imminent.

iv) **Ground 4**. The Defendant acted irrationally in the light of all the circumstances, including the impact of Covid-19; the Defendant's own guidance; the strong independent evidence of the Trust's significant progress; the evidence of a concerted campaign against the Trust; and the additional evidence which the Defendant knew or ought to have known would shortly be available.

THE LEGAL AND POLICY FRAMEWORK

The 2010 Act

6. Academies, and the arrangements between the Defendant and academies, are governed by the Academies Act 2010 ("the 2010 Act").

7. Section 2A 2010 Act provides that an academy agreement in respect of an academy school must include provision allowing the Defendant to terminate the agreement if (a) special measures are required to be taken in relation to the academy; or (b) the academy requires significant improvement. By s2A(2) the academy agreement must require the Defendant, before terminating the agreement on one of those grounds, to give the proprietor an opportunity to make representations.

8. "*Special measures*" and "*requires significant improvement*" are terms derived from the Education Act 2005, which governs the regime for Ofsted inspections. Section 2A(3) 2010 Act provides that special measures are required to be taken in relation to an academy, or an academy requires significant improvement, if Ofsted has given notice under s.13(3)(a) Education Act 2005.

The Funding Agreements

9. Arrangements between the Trust and the Defendant are set out in two agreements. First, a master funding agreement made in December 2014 which governs the general relationship between the Trust and the Defendant ("the Master Funding Agreement"). Second, a supplemental funding agreement, also made in December 2014, relating specifically to the Academy ("the Supplemental Funding Agreement"). Both agreements contain provisions for termination. The relevant termination provisions are in the Supplemental Funding Agreement at clause 5.

10. A Termination Warning Notice ("TWN") is a notice sent by the Defendant to the Trust stating its intention to terminate the Supplemental Funding Agreement. A Termination Notice is a notice sent by the Defendant to the Trust terminating the Supplemental Funding Agreement on a date specified in the notice. Clause 5.B to 5.G deal with TWNs and Termination Notices.

    i) By clause 5.B, the Defendant may serve a TWN where it considers that one or more of four conditions are satisfied. These include (c) "*there has been a serious*

breakdown in the way the Academy is managed or governed"; and (d) "*the safety of pupils or staff is threatened, including due to breakdown of discipline*".

ii) By clause 5.C, a TWN will specify the action the Trust must take; the date by which the action must be completed; and the date by which the Trust must make any representations.

iii) By clause 5.D, the Defendant will consider any representations from the Trust received by the date specified in the TWN.

iv) By clause 5.E, if the Trust has not completed the action required in the TWN, the Defendant may serve a Termination Notice.

v) By clause 5.F if the Ofsted Chief Inspector gives notice to the Trust that special measures are required to be taken in relation to the Academy, or the Academy requires significant improvement, the Defendant may serve a TWN specifying the date by which the Trust may make representations.

vi) By clause 5.G, in deciding whether to serve a TWN under clause 5.F the Defendant will have due regard to the overall performance of the Trust.

vii) By clause 5.H, if the Defendant has served a TWN and having considered the representations made by the Trust it remains satisfied that the Supplemental Funding Agreement should be terminated he may serve a Termination Notice.

Regional Schools Commissioners and the Education and Skills Funding Agency

11. Within the Defendant's structure there are two bodies relevant to the exercise of powers under the 2010 Act and the funding agreements.

i) Regional Schools Commissioners ("RSC") have responsibilities which include intervening in academies that Ofsted has judged inadequate and deciding on the transfer of an academy from one trust to another. In this case, the relevant RSC is the RSC for North-West London and South Central England, Dame Kate Dethridge.

ii) The Education and Skills Funding Agency ("ESFA"). ESFA is responsible for the effectiveness of the financial system for academies. It is responsible for taking action where there are instances of governance and financial underperformance.

12. Dame Dethridge explains in her witness statement that ESFA leads on oversight of financial management and the RSC's office leads on oversight of educational performance. Both contribute to oversight of governance.

Relevant Guidance: "Schools Causing Concern"

13. The Defendant has published a guidance document *"Schools Causing Concern – Guidance for local authorities and Regional Schools Commissioners on how to work with schools to support improvements to educational performance and on using their intervention powers"*.

14. Key principles include the following:

> "[RSC]s will only mandate …. Trust transfer of a school in relation to educational standards if Ofsted has judged it inadequate.
> ..
> RSCs will always approach academy trusts, local authorities and in the case of schools with a religious character, the relevant religious body, not individual schools (unless the school is a single academy trust)"

15. The Introduction provides:

> "it is essential that action is taken wherever a school is judged inadequate, or where there is financial mismanagement or a failure of governance… Interventions are about acting swiftly to address underperformance and financial or governance failures, and helping schools to deliver the best outcomes for their pupils."

16. Chapter 4 addresses RSCs' intervention powers in relation to academies. Relevant passages include:

> "The RSC will respond just as swiftly if an academy has been judged inadequate by Ofsted as they would for a maintained school.
>
> …
>
> As set out in the Education and Adoption Act 2016, regardless of the terms in an academy's funding agreement, the RSC (on behalf of the Secretary of State) can terminate the funding agreement of an academy that has been judged inadequate. This is a power rather than a duty, meaning the RSC may decide to implement other measures to improve the school, rather than terminate its funding agreement to bring about a change of trust, for example where a change of academy trust would prevent the consolidation of improvements in a school.
>
> …
>
> Where termination is appropriate, the RSC on behalf of the Secretary of State must first give the academy trust an opportunity to make representations.
>
> ….
>
> When considering the use of intervention powers in Church academies causing concern, the RSC should continue to have regard for the Church memoranda of understanding."

17. Chapter 4 also provides that where ESFA has concerns about financial management and/or governance it may issue a Financial Notice to Improve ("FNtI"). Failure to comply with a FNtI will be deemed a breach of a funding agreement.

The Memoranda of Understanding with Church Bodies

18. Grounds 1 and Grounds 2 raise allegations of differences in treatment between the Trust and the Network of Sikh Organisations ("NSO") on the one hand, and Church of England and Catholic schools on the other. It is therefore necessary to outline the arrangements that are in place between the Defendants and these Church bodies. There are Memoranda of Understanding ("the MOU") between the Defendant and each of the Church of England Education Office and the Catholic Education Service (together "the Church Bodies"). Each MOU deals with both academies and local authority maintained schools.

19. The Memorandum of Understanding between the Catholic Church and the Department for Education, April 2016 ("the Catholic MOU") provides as follows:

> "4. Re-brokerage of underperforming Catholic academies
>
> a) Where a sponsored Catholic academy is underperforming and, in the view of the RSC, requires urgent remedial action, the RSC will engage with the Diocese, through the Diocesan School Commissioner at the earliest opportunity.
>
> b) We would expect to look first to any other Diocesan or strong Catholic school-led MATs with capacity to take on a re-brokered Catholic school. "
>
> 7. Issuing of a termination warning notice to a Catholic academy
>
> a) As soon as any concerns have come to the attention of the RSC which might lead to the issue of a termination or termination warning notice to the governing body of a maintained Catholic school the RSC will engage with and consult the Diocesan Schools Commissioner. This is to allow for action to be taken by the Diocese, as necessary, to avoid the need for any notice to be served.
>
> b) Where the RSC issues a termination notice, or a termination warning notice, to a Catholic academy (in accordance with the process set out in the academy's funding agreement with the Secretary of State and as set out in any Church Supplemental Agreement) the RSC will notify the Diocesan Schools Commissioner of their intention to act, and their reasons for doing so. The RSC will then allow the Diocese a reasonable opportunity to make representations, including any actions the Diocese intends to take to remedy any failings of the academy, which the RSC will have due regard to before finally taking any action."

20. During the hearing I pointed out the anomaly that although the heading of paragraph 7 indicates that it deals with Catholic academies, paragraph 7(a) refers to maintained schools. The parties agreed that there was an error in the drafting, though they disagreed as to what the error was.

i) The Trust submits that the use of the expression "maintained schools" was an error in 7(a), and the paragraph should refer to academies. It would make no sense to refer to maintained schools in paragraph 7(a), as Termination Notices and TWNs are not concepts that apply to such schools. There is separate provision for maintained schools in paragraph 6(a) of the Catholic Schools MOU, which provides for the situation where there are concerns which might lead to the issue of "*a performance standards and safety warning notice*" in language otherwise materially identical to paragraph 7(a).

ii) The Defendant submits that paragraph 7(a) applies to maintained schools, and that the reference to Termination Notice and TWN is in error.

21. In my judgment, the Trust's submission on this point is correct. The error must be in the use of the phrase "*governing body of a maintained Catholic school*". Paragraph 7(a) appears in a section stated to relate to Catholic academies in its heading. The sub-paragraph is concerned with steps to be taken prior to the issue of a termination notice or a TWN – those are steps which can only be taken in respect of an academy, not a maintained school. If the sub-paragraph were read as applying to maintained schools then it would cover the same ground as paragraph 6(a).

22. There is a separate Memorandum of Understanding between the Department for Education and the Church of England Education Office ("the Church of England MOU"):

i) Paragraph 6 is headed "*Re-brokerage of underperforming church academies and/or those where religious character is at risk."* Insofar as relevant, this is in materially the same terms as paras 4(a) and (b) of the Catholic MOU set out above.

ii) Paragraph 9 is headed "*Issuing of a termination warning notice to a church academy*". The content of the paragraph is in materially identical terms to paragraph 7(b) of the Catholic MOU set out above.

23. The Trust puts its case on the basis that the Church of England MOU is in materially identical terms to the Catholic MOU. That is wrong. There is no equivalent to paragraphs 6(a) or 7(a) of the Catholic MOU in the Church of England MOU. So the Church of England MOU does not contain the requirement to engage and consult "*as soon as any concerns have come to the attention of the RSC which might lead to the issue*" of a TWN (in the case of an academy) or the equivalent notice in respect of a maintained school. I will address the significance of this difference between the two MOU when dealing with Ground 1 below.

The position of Sikh Schools and the National Sikh Organisation

24. Lord Singh, in his evidence on behalf of the Trust, explains that the NSO is recognised by the Defendant as the relevant religious authority for most Sikh faith schools. The NSO acts in the capacity of a "Diocesan Board" for the Sikh community and advises and assists Sikh schools. The NSO is also the recognised body for carrying out inspections of the teaching of religious education in Sikh faith schools.

25. On 25 October 2017 the RSC wrote to the Trust's CEO. It is this letter that forms the basis of the legitimate expectation relied on in Ground 1. The CEO had proposed that the Defendant agree a Memorandum of Understanding with the Network of Sikh Schools. The letter explains that the MOU with the Church of England Education Office and the Catholic Education Service provided a framework for how eight RSC and 60 Church Dioceses will engage with each other in relation to the approximately 6,700 state funded Church schools and academies. Given the number of schools, the Defendant and the Churches felt that a formal document was required to provide clarity. The letter goes on to say:

> "The protections that apply to Church schools and the dioceses that support them also apply in the same way as they do for other faith schools and the religious bodies. Given the small number of Sikh schools (11) we do not think a formal document is necessary to ensure we deal with each Sikh state funded schools [*sic*] and their respective trusts in a consistent way. Therefore we do not believe a specific MOU for Sikh schools is necessary at the current time.
>
> I should be clear we are keen to ensure that the department engages with your trust and other Sikh trusts and organisations in as consistent and efficient manner as possible. Colleagues in the Faith Schools Policy team and myself would be happy to meet with you to discuss possible alternatives to an MOU. "

26. Very similar statements were made by the Defendant in an email to Lord Singh on 22 November 2018. There was no further explanation or discussion of the meaning of "*the protections that apply to Church schools and the dioceses that support them*"; nor as to how those protections would apply "*in the same way*". I have explained earlier in this judgment that the two MOU were not identical in their terms. That was not something that was addressed or discussed between the Defendant and the NSO. I return to this issue when dealing with Ground 1.

FACTUAL BACKGROUND

27. The Academy joined the Trust in 2013. Since joining the Trust it has had three full Ofsted inspections. Its overall ratings were "*Requires Improvement*" in June 2015 and "*Good*" in September 2017.

28. In August 2019 the Defendant received whistleblowing allegations relating to safeguarding at the Academy and to other academies operated by the Trust. There were six allegations concerning the Academy.

29. The RSC met with the Trust to discuss the allegations on 29 October 2019. According to the RSC's evidence Mr Kandola, the CEO of the Trust, made flippant remarks about some of the incidents. He appeared to downplay the seriousness of incidents, in particular an allegation concerning use of pornography and an issue concerning an alleged rape.

30. The RSC asked the relevant local authority, Buckinghamshire Council ("Buckinghamshire") to conduct a safeguarding review. Buckinghamshire carried out an investigation and produced a report dated 7 November 2019 ("the Buckinghamshire Report"). The Buckinghamshire Report upheld all six allegations. I summarise the findings as follows:

    i) In June 2019 (during school time) the Trust's CEO took the Trust's Estates Director, the Academy's Caretaker and the Caretaker's wife (who was a teacher at the Academy) on a golfing holiday to Kenya. This left the Academy short of medical cover and cover for staff absence, potentially placing children at risk.

    ii) The Estates Director did not have anything more than basic safeguarding training. His leadership of staff and the site was poor and had compromised health and safety.

    iii) There had been a serious allegation of rape by a female pupil against a male pupil. This occurred in an area which was out bounds to pupils but had not been kept locked.

    iv) Evidence showed that pornographic material had been accessed from the caretaker's computer on several occasions. Buckinghamshire was critical of the Trust's investigation and response. It was said by the Trust that the caretaker was dismissed. He was not: he was allowed to resign. Further, Buckinghamshire noted that after these allegations came to light the caretaker had been taken on the golf trip to Kenya by the CEO.

    v) Serious allegations had been made against the Trust's Sikh chaplain, who had made inappropriate remarks while teaching a year 8 class. The CEO did not support a request for the chaplain to be suspended.

    vi) The CEO had suppressed safeguarding concerns from being reported and reacted negatively to staff who informed school governors about safeguarding.

31. In these proceedings, the Trust claims:

    i) The investigation by Buckinghamshire was prompted by the Defendant, which had received safeguarding allegations made by a former director of Education at the Trust (Ms Shepherd) and by the then Executive Head Teacher of the Academy and Atam Academy (Ms Piesse).

    ii) It is said that those allegations were part of a plan by an ex-Chair of Governors at Atam Academy to remove Atam Academy from the Trust's control by making whistleblowing allegations.

    iii) Ms Piesse, it is alleged, was later found to have deliberately taken steps to sabotage safeguarding at Atam Academy. Ms Piesse sought to influence the RSC against the Trust and Mr Kandola in particular.

    iv) The Buckinghamshire Report's conclusions were later shown to be false by a report by Hackney Learning Trust commissioned in June 2020.

32. The Trust complains that in carrying out its investigation Buckinghamshire did not interview Mr Kandola, nor any other senior managers except the Director of Estates.

33. The Trust also claims that neither the allegations nor the Buckinghamshire Report were shared with the Trust until August 2020 when it was disclosed in these proceedings. Mr Kandola, in his witness statement, goes so far as to say the Buckinghamshire never informed the Trust that it had concluded that the allegations were upheld. He says that he was shocked by the Buckinghamshire Report when it was disclosed in these proceedings and shocked to learn "*only very recently*" that Buckinghamshire had decided to uphold allegations against him.

34. While I accept that the Buckinghamshire Report itself was not disclosed until August 2020, I reject the claim that the Trust was not aware of the allegations nor that the allegations had been upheld.

    i) As I have set out above, Dame Dethbridge's evidence is that the allegations were discussed with the Trust at a meeting on 29 October 2019. Mr Kandola refers to that meeting in his witness statement but does not address the point that the allegations were discussed. Nor does he address the Defendant's concern that his response to the allegations was flippant.

    ii) Buckinghamshire's recommendations for the school made specific recommendations by reference to allegations 1-5. It is plain from the context of those recommendations that the allegations had been upheld. The recommendation in relation to allegation 4 specifically refers to allegations against the caretaker being upheld.

    iii) ESFA wrote to the Trust on 29 November 2019. Annex 1 to the letter, headed "*Summary of Allegations – safeguarding*" referred to the Buckinghamshire Report and explained that Buckinghamshire's safeguarding review had upheld all of the safeguarding concerns raised. Annex 1 set out all six of the safeguarding allegations which had been investigated and upheld.

    iv) On 27 January 2020 a letter from Lord Agnew (Parliamentary Under Secretary of State for the School System) to members of the Trust referred to the fact that Buckinghamshire had upheld six areas of serious concern and had criticised Trust officials for safeguarding failures.

    v) Mr Kandola says (witness statement paragraph 43) that the Trust was unaware until it received Lord Agnew's letter that Buckinghamshire upheld the allegations. That proposition is inconsistent with paragraph 16 of the same statement, where he claims to have learned only very recently that the allegations had been upheld. In any event, both paragraphs 16 and 43 are wrong: the Trust had known since ESFA's 29 November 2019 letter that the six safeguarding allegations had been upheld.

35. ESFA's 29 November 2019 letter addressed a series of anonymous complaints that had been raised with ESFA in addition to the concerns upheld by Buckinghamshire. The further allegations concerned safeguarding issues at the Trust's other schools, governance issues and finance issues. ESFA asked for assurance as to how the issues were being dealt with and how Buckinghamshire's recommendations were being

addressed. Annex 4 raised a series of questions about the six safeguarding allegations and other allegations. There were 130 questions in total. A response was requested within 14 days.

36. On 2 December 2019 the RSC issued a "Minded to Terminate" letter to the Trust. The RSC gave notice that she was concerned:

    i) That the Buckinghamshire Report demonstrated that the Trust had failed on a number of occasions in its duty to promote and safeguard the welfare of pupils.

    ii) There had been a serious breakdown in the way the Academy was managed or governed which had led to an inadequate response or challenge from the Trust when safeguarding concerns had been raised.

    iii) The safety of pupils was threatened.

37. The Minded to Terminate letter asked for a number of pieces of evidence from the Trust, including a response to ESFA's letter of 29 November 2019.

38. On 3 and 4 December 2019 Ofsted conducted an inspection of the Academy. Ofsted's report following the inspection, dated 21 January 2020, is damning. The overall rating of the Academy was "*Inadequate*" and "*requiring special measures*." Under the heading of Safeguarding, Ofsted found that the arrangements for safeguarding were "*not effective*". It set out a series of failings, before concluding "*Leaders, including those at trust and governance level, have not learned from serious safeguarding failures. They have not acted with the urgency required.*" Ofsted also raised concerns regarding SEND provision and curriculum breadth.

39. The Trust responded to ESFA's 29 November letter on 13 December 2019. The Trust recognised that there had been some weaknesses in governance and the monitoring of safeguarding by the Board. It accepted that those failures had resulted in the Academy going into Special Measures. The Trust stated that a number of the allegations were unfounded, but it focussed on the steps that were being taken to make significant improvements in governance, safeguarding and financial leadership. The letter attached a table of answers to the questions raised by ESFA. The table includes the Trust's factual response to the six allegations, and others.

40. On 21 to 23 January 2020 the Academy was visited by ESFA. That visit related to separate whistleblower allegations and concerns over financial management.

41. On 12 February 2020 ESFA issued a Financial Notice to Improve. The FNtI served as written notice to improve financial management, control and governance at the Trust. Annex A set out a series of terms with which the Trust was required to comply. The requirements included, among others, a requirement to commission an independent review of financial management and governance arrangements, and a requirement to prepare an action plan to address the issues in the FNtI.

42. The FNtI process was separate to the process the RSC was engaged in and raised different issues. However, the issues overlapped.

43. On 18 February 2020, the RSC issued a termination warning notice ("TWN"). In the TWN, the RSC referred to Ofsted's report and stated that she was issuing the warning notice because she had concerns that the Trust did not have the capacity to make rapid and sustained improvement, particularly in relation to keeping children safe. The Trust was invited to make representations by 10 March 2020.

44. The Trust commissioned an audit of safeguarding arrangements by Anchored Schools, which was carried out on 6 March 2020. In Anchored Schools' opinion safeguarding was effective at the Academy. Anchored Schools believed that the Academy and the Trust had the capacity to ensure rapid and sustained improvements within all aspects of safeguarding.

45. The Trust made representations to the RSC on 10 March 2020 in a letter from Shaminder Rayatt, the Interim Chair of Trustees. The emphasis in the representations was on changes in personnel to improve Trust capacity, and on steps taken to remedy Ofsted's safeguarding concerns. It is clear that a number of steps had been taken to address the RSC and ESFA's concerns.

46. The submissions proceeded on the basis that there was substance to the findings by Ofsted. For example, Ms Rayatt wrote:

> "We recognise that there have been some weaknesses in governance and the monitoring of safeguarding by the Board. However, we believe that the significant steps taken by the Board since December 2019 should reasonably address your concerns."
>
> "focussed and immediate action has been taken to remedy the safeguarding concerns highlighted within the Ofsted report".

47. A copy of the Anchored Schools report and the Academy's School Improvement Plan were attached to the 10 March letter.

48. The RSC had not contacted the NSO prior to issuing the TWN, nor does she appear to have sent the TWN to the NSO. The Trust informed the NSO of the TWN.

49. The RSC met with Lord and Lady Singh of the NSO on 24 March 2020. That meeting was at the NSO's request. At the meeting on 24 March:

    i) Lord and Lady Singh referred to a sect of Sikhs causing difficulties, though that concern appears to relate to Atam Academy.

    ii) The RSC said that Atam Academy was not likely to be removed from the Trust, but concerns were more with the running of the Trust and the educational provision at the Academy. She raised concerns about the ability of trustees to hold the leadership team to account. She said that since the Academy going into special measures the Trust had solely focussed on trustees and had not done enough to hold the leadership team to account.

    iii) The RSC said that when a school becomes inadequate the RSC needed to consider whether it needed to be put into a new trust, and she was seriously looking at that. Her team had to consider whether the Trust had the capacity to

turn around an underperforming school. They had grave concerns over leadership and were giving consideration to alternative sponsors.

iv) Lord and Lady Singh discussed possible alternative sponsors, and possible provision of strong governors. Lady Singh said that if the RSC provided "lines and issues" the NSO would raise this with the right people.

50. I will consider the interaction between the Defendant and the NSO further under Ground 1 below.

51. Also on 24 March 2020 ESFA wrote the Trust to raise a number of new allegations of a financial nature. ESFA also addressed the report the Trust had provided into Mr Kandola. It characterised that report as dealing only with a grievance raised by Ms Shepherd and not the allegations relating to Mr Kandola contained in the letter dated 29 November 2019.

52. The Trust made further representations on 13 May 2020, signed by Ms Rayatt. The letter sets out *"extensive and carefully considered changes made to the composition of the Board and members as well as changes to senior leadership within the Trust*". The Trust believed that in the light of those changes any immediate concerns about the Trust's capacity to address the issues raised in the Ofsted report should be alleviated. The Trust relied on the independent review that it had commissioned from Anchored Schools as showing that safeguarding was effective and compliant in March 2020. It set out other steps that had been taken which it characterised as "*significant, rapid and sustainable steps at Trust and school level to build capacity and address the Safeguarding concerns that you highlighted in the TWN letter.*" The Trust asked the Defendant not to make a decision until the completion of a governance review by the Confederation of Schools Trusts ("CST"). The CST review had been commissioned as a result of a recommendation by the Defendant. CST's report was expected to be available on 31 May 2020.

53. There was no suggestion in either the 10 March or the 13 May representations by the Trust that the safeguarding concerns were based on false allegations; nor that the Trust had been the victim of a campaign against it. I will deal with what had been said about a campaign under Ground 2(b) below. Nor was there any suggestion that there had been a lack of consultation or engagement with the NSO. Indeed, the NSO is not mentioned at all by the Trust in either set of representations.

54. The RSC produced a Ministerial Submission on 21 May 2020, addressed to Baroness Berridge. The decision whether to issue a Termination Notice had been escalated to a Minister, rather than being taken by the RSC, as the case was sensitive and had drawn a high volume of interest from the local and wider Sikh community. The Ministerial Submission is detailed. In the summary section it said as follows:

> "3 [The Academy], part of [the Trust], was judged inadequate in January 2020 at a [TWN] was issued in February. The inspection raised serious concerns about safeguarding at [the Academy] as well as out the quality of SEND provision and curriculum breadth. Serious safeguarding concerns at the academy had been raises through a whistleblowing allegation. A subsequent investigation by Buckinghamshire Council (BC) substantiated

> those allegations and both OfSTED and BC highlighted a lack of oversight at trust level."
>
> 4 We have now analysed the Trust's representations (including more recent communications received on add date) and whilst it is clear that the trust has taken some action (for example in making some changes at trust board level), the overall improvement plans do not give the RSC confidence that the trust has the capacity to make the necessary rapid and sustained improvements. We are concerned that, given many of the issues raised by OfSTED and Buckinghamshire Council focus on the failings of trust leaders, these have not been prioritised in the trust's improvement plan. We are therefore recommending the Minister agrees we issue a termination notice with the intention of transferring the academy into a trust where it will be able to retain its Sikh ethos. We aim to achieve the transfer as soon as possible and, at the latest, by January 2021."

55. The RSC's overall recommendation was that the Trust's Supplemental Funding Agreement for the Academy should be terminated, and that the process of identifying a new sponsor should begin.

56. Baroness Berridge's decision to terminate the Trust's funding Agreement for the Academy is set out in a letter dated 4 June 2020 (i.e. the 4 June Decision).

57. The Trust made further representations on 6 June 2020. It made a number of complaints as to how the Trust had been treated, and responded to a number of points made in the 4 June Decision. The complaint of discrimination was made: that the Defendant had not acted in accordance with its assurance that it would afford equal rights under the MOU. However, no specific allegation was made explaining how there had been a failure to observe the spirit of the MOU. The Trust asked the Defendant to reconsider its decision, particularly in the light of an interim report produced by the CST dated 29 May 2020 ("the CST Report"). The Trust also asked the Defendant to defer the decision until Ofsted revisited the Academy.

58. CST is a governance advisory service. It was appointed by the Trust to carry out a review to consider governance of the Trust, including how far the Trust Board has addressed the concerns raised in ESFA's FNtI and the Ofsted report and to advise on further actions required. CST produced a report dated 29 May 2020 which ran to 34 pages, including a table of 43 improvement actions. Its headline conclusion was as follows (paragraph 9.1):

> "The Trust Board has made significant progress since the Ofsted report on [the Academy] and [the Trust's] Financial Notice to Improve. The Trust Board has given itself a base on which to build. There are still a number of key issues to address as indicated in this report, some of which can be addressed quickly. The Trustees will need to rely on the support of the CEO and the leadership group to complete much of the detailed work. "

59. CST revised its report on 7 July 2020, though I was not addressed on the differences between the two versions. The conclusions remained the same.

60. There then followed some discussion and correspondence between Baroness Berridge and Lord Singh of the NSO about the Defendant's intentions regarding the Sikh character of the Academy, and of the trust to which the Academy may be transferred.

61. On 22 June 2020 Baroness Berridge wrote to Lord Singh to acknowledge the strength of feeling from the community about the transfer of the Academy, but "*for the reasons I explained when we spoke, my decision remains.*"

62. On 28 June 2020 Lord Singh asked that the transfer be put on hold pending an Ofsted monitoring visit to decide the best way forward. The RSC responded on 29 June 2020 to say "*the Minister's decision to remove [the Academy] has been made and will not be re-opened.*"

63. However, on 3 July 2020 Baroness Berridge wrote to the Trust indicating that she had reviewed the 4 June Decision, and had decided that it ought to be maintained.

64. The Trust challenges the status of the 3 July Decision, describing it as a "fig-leaf". It alleges that the Defendant had not in fact revisited the decision but only purported to do so to assist its position in the event of a challenge. The Trust alleges that the "fig leaf" must have been adopted on the basis of legal advice to the effect that the 4 June Decision was flawed. The Trust relies on the statements made by Baroness Berridge and the RSC; the lack of explanation as to how the 3 July Decision came to be made; and the lack of disclosed documents to support the decision.

65. The Defendant's change of position between the statements that the 4 June Decision would not be reopened and the 3 July Decision is somewhat puzzling. However, it does appear that there was a change of mind. The 3 July Decision is a detailed document which addresses the points that had been raised by the Trust for reconsideration. As the Defendant points out, there is nothing suspicious in the Defendant reconsidering its decision: that is what the Trust has asked it to do. Given the detailed consideration of points in the 3 July 2020 Decision, I am not prepared to infer that the Defendant did not in fact review the matters that were stated in terms to have been reviewed.

66. The 3 July Decision states that the Minister had considered the CST report in detail. It raises some concerns as to the limits of CST's investigation and as to the Trust's failure to complete a thorough investigation into the conduct of the CEO. It also draws attention to a number of concerns that remain, even on the basis of the CST findings. The overall conclusion was to maintain the Termination Notice.

67. On 8 June 2020 the Trust had commissioned Hackney Learning Trust to carry out an investigation into Mr Kandola. Hackney Learning Trust prepared a report on 14 July 2020. The report therefore was created after the Decisions and formed no part of the decision making process. The Trust's Skeleton Argument at paragraph 26 states that the report found that "*the allegations made against the CEO's behaviour are unfounded*". Earlier, at paragraph 10 of the Skeleton, it was submitted "*[Buckinghamshire's] conclusions were later shown by the Hackney Learning Trust report to be false*".

68. I am extremely cautious of the weight, if any, to be attached to the Hackney Learning Trust's report. It did not form part of formal process of investigation conducted by Buckinghamshire or Ofsted. It was not relied on by the Trust in its representations to the Defendant. Nor did the Trust specifically ask the Defendant to postpone a decision pending conclusion of the investigation (contrast the CST review – as I set out above). Hackney Learning Trust's investigation into the facts ultimately was only the investigator's assessment of the available evidence.

69. In any event, the submissions made as to Hackney Learning Trust's conclusions are not a fair reading of its report.

    i) The scope of enquiry was wider than the allegations considered by Buckinghamshire. Further investigation was requested into the allegations against the CEO set out in ESFA's letter of 29 November 2019; allegations made against the CEO set out in a grievance by Ms Shepherd in September/October 2019; and allegations that the CEO acted in a coercive or bullying manner to staff within the trust. Although the first of those sets of allegations covered the ground of the investigation conducted by Buckinghamshire, the issues were approached to an extent from a different angle and addressed specific questions in relation to the subject matter.

    ii) I was not addressed by the parties on the detail of the Hackney Learning Trust's report, which runs to some 32 pages. The report does not state that Buckinghamshire's conclusions were false.

    iii) The full passage in which the words quoted in the Trust's Skeleton Argument paragraph 26 appear is as follows:

> "The evidence suggests that the allegations made against the CEO's behaviour are unfounded as the interviews with the direct reports and the results of the 360 survey confirmed all felt comfortable sharing their views and concerns. The only concerns raised in the interviews with the direct reports, were related to School Governance or School performance management and not to the CEO's behaviour as a line manager. All those who did raise concerns also recognised that positive steps are being taken."

    iv) The allegations Hackney Learning Trust referred to as "unfounded", were those, considered in some length in the report, about the CEO's management style and alleged bullying behaviour. Those allegations were not part of the Defendant's decision to issue the TWN or the Termination Notice, nor were they part of the Buckinghamshire Report.

70. On 12 August 2020 the RSC made a decision, in principle, to transfer the Academy to the Sikh Academies Trust. The transfer has not been implemented, pending the outcome of these proceedings.

71. Ofsted conducted a monitoring inspection of the Academy on 23-24 March 2021. According to a letter dated 10 May 2021, Ofsted's judgment is that safeguarding at the Academy was still not effective. The Trust argues that this later report is irrelevant,

given that it post-dates the Decisions. Further, the Trust has challenged Ofsted's report – it complained on 13 May 2021 but Ofsted rejected that complaint on 14 June 2021. The Trust disagreed with Ofsted's assessment and wrote on 29 June 2021 seeking an internal review of the section 8 inspection. Ofsted's 10 May 2021 assessment is not under review in these proceedings.

SPECIFIC DISCLOSURE APPLICATION

72. The Trust issued an application for specific disclosure on 1 July 2021, asking for it to be heard at the substantive hearing for judicial review. The application was supported by a second witness statement of Victoria Searle, dated 1 July 2021. The application sought disclosure of :

    i) All documents and correspondence between the RSC, her office, the Defendant, the ESFA, Buckinghamshire Council, Ofsted and any third parties (included but not limited to Denise Shepherd, Sulina Piesse, Mankamal Singh Palray, Tasveer Singh Palray, Manmohan Singh, John Docherty, John Ridley and Colin Stewart) concerning the allegations and whistleblowing complaints made against the Academy between 1 July 2019 and the present day.

    ii) All correspondence between the RSC, her office, the ESFA, Buckinghamshire Council and Ofsted regarding the decision to issue the termination notice in respect of the Academy and any concerns about the performance of the Trust or its academies leading up to this decision.

73. I heard the application on the first morning of the hearing before me. I dismissed the application, for reasons I gave in an oral judgment on 6 July 2021.

GROUND 1

74. The Trust argues that it has a legitimate expectation that the Defendant would act in accordance with the MOU. In the alternative, it argues that the Defendant had adopted a policy position which it failed to follow (by departing from the MOU) without reasoned decision. The legitimate expectation, and the stated policy position, derive from the 25 October 2017 letter from the Defendant to Mr Kandola and the email to Lord Singh on 22 November 2018. The material passage is that "*The protections that apply to Church schools and dioceses that support them also apply in the same way as they do for other faith schools and the religious bodies*".

75. The Trust does not argue that the MOU apply verbatim or in all their exact terms. It argues that the legitimate expectation was that the Defendant would comply with the "spirit" of the MOU.

76. The relevant legal principles for Ground 1 are not in dispute. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area the law will require the promise or practice to be honoured unless there is a good reason not to do so, *R (K and AC Jackson & Son) v DEFRA* [2011] EWHC 956

(Admin) paras 43-50. So too, a decision maker must follow its published policy unless there are good reasons for not doing so *R (Lumba) v SSHD* [2011] UKSC 12 para 26 per Lord Dyson.

77. The Defendant does not dispute that its communications to Mr Kandola and Lord Singh are capable of giving rise to a legitimate expectation, nor that failure to respect such an expectation could render a decision susceptible to public law challenge. The issues in this case are (i) what exactly was the content of the legitimate expectation; and (ii) was that expectation complied with as a matter of fact?

78. The Trust's case is that it had an expectation that the spirit of the MOU would be applied. It is necessary therefore to consider what that "spirit" and how the spirit is to be applied in the different contexts of different religious schools and their associated faith bodies.

79. The Trust argues that the spirit of the MOU is to seek to avoid the issue of notices in respect of faith schools by ensuring early and meaningful engagement by the Defendant with the relevant religious authority.

80. Dame Dethbridge, in her first witness statement at paragraph 52, characterises the MOU as providing in substance as follows:

    i) The RSC is to notify the religious authority of their intention to issue a TWN or TN at an early stage, and the reasons for doing so.

    ii) The RSC will allow the religious authority a reasonable opportunity to make representations.

    iii) Representations by the religious authority may include describing any actions it intends to take to remedy any failing of the academy, so as to avoid the need for a notice to be served.

    iv) The RSC will take into account those representations.

81. I accept that characterisation of the effect of the MOU. I do not regard notification at an early stage as necessarily meaning prior to the issue of a TWN.

    i) As I have indicated above, the Church of England MOU and the Catholic MOU are not the same. Paragraph 7(a) of the Catholic MOU does not appear in the Church of England MOU. The requirement (paragraph 7(a) Catholic MOU) to engage with and consult the relevant religious body "*As soon as any concerns have come to attention of the RSC which might lead to the issue of a termination or termination notice*" is not common to both MOU.

    ii) Given that the Trust's claim is that it had an expectation that the Defendant would observe the spirit of the MOU, without distinguishing between them, that spirit is most readily determined by considering the provisions that are common to both MOU. A Church of England school could not complain that the provisions of paragraph 7(a) of the Catholic MOU were not complied with, as that paragraph does not appear in the Church of England MOU. It is not the

Trust's case that it should have been treated better than a Church of England school.

iii) The common parts between the MOU are twofold:

a) First, paragraph 4 Catholic MOU (paragraph 6 of the Church of England MOU) provides that where a sponsored academy is underperforming and requires urgent remedial action, the RSC will engage with the Diocese at the earliest opportunity. However, it is clear that the engagement in this paragraph is in relation to re-brokering. That is clear both from the heading and from the remaining sub-paragraphs of 4, all of which deal with the selection of a new sponsor.

b) Second, paragraph 7(b) Catholic MOU (paragraph 9 Church of England MOU). This provides that "*when the RSC issues*" a termination notice or TWN the RSC will notify the Diocesan Schools Commissioner of their intention to act and their reasons for doing so. The RSC will then allow the Diocese a reasonable opportunity to make representations, including any actions the Diocese intends to take to remedy any failing of the academy, which the RSC will have due regard to before finally taking any actions.

82. The Trust's characterisation of the spirit of the MOU is too broad. I do not read either MOU as containing an aim to avoid the issue of notices. Neither state that purpose; such a purpose is absent from the Key Principles sections of the MOU. The language of 7(a) of the Catholic MOU "*to allow for action to be taken by the Diocese, as necessary, to avoid the need for any notice to be served*" indicates that the Church body will be given the opportunity to take such steps, but that is not the same as to say that the aim of the MOU is to avoid the issue of a notice. In any event, this language does not appear at all in the Church of England MOU. I accept the Defendant's submission that the relevant paragraphs of the MOU are procedural, concerning engagement and consultation, rather than substantive outcome. Further, I accept the Defendant's submission that the MOU set out no requirements as to the form or content of engagement and consultation; what will be required, even in the case of Church schools to which the MOU apply, will depend on the circumstances.

83. There is a significant difference in context between Church schools and academies and Sikh schools and academies. That affects how the spirit of the MOU may be applied in the Sikh school context:

i) There are 6,700 Church schools and academies, and only a small number of schools which the NSO supports.

ii) Both the Catholic Church and the Church of England have extensive departments involved in and advising the large number of Church schools.

iii) The size of each Church's operation suggests some degree of formal process may be appropriate to ensure efficiency and consistency. Further, the Church education departments have expertise and experience in taking remedial action.

iv) In the NSO context, the smaller scale of schools, and of the NSO itself, renders a formal process unnecessary.

v) Further, the Defendant's evidence is that the NSO does not have the expertise and experience in taking remedial action in respect of failing schools (as opposed to advising on matters of religious education and faith ethos). The Trust disputes this. I am not in a position to reach a conclusion on the NSO's expertise, but there is little in the evidence that indicated that it took an active role in remedial action in respect of failing schools in general, or this Academy in particular.

84. The Defendant did not notify the NSO prior to the TWN being issued on 18 February 2020. The NSO was informed of the TWN by the Trust, and a meeting was arranged between the NSO and the RSC on 24 March 2020. At that meeting the NSO had the opportunity to make representations.

85. The NSO wrote to the RSC in an email dated 13 May 2020 outlining the progress made by the Trust since the Ofsted report. In that email the NSO essentially repeat the points made by the Trust in their representations of the same date. Although the NSO was perfectly entitled to advocate for the Trust, no new points were raised that were not raised by the Trust itself. Further, I note that neither the NSO's email nor the Trust's representations made any reference to anything the NSO was doing, or proposed to do, to remedy the issues identified in the TWN.

86. The RSC acknowledged the NSO's update on progress on 19 May 2020.

87. The NSO wrote further to Baroness Berridge on 20 May 2020 and 30 May 2020 indicating concern as to the perceived rush to make a decision without giving the Trust time to improve and seeking a further meeting with the Defendant. On 13 June 2020, after the Termination Notice, the NSO wrote to explain the anger in the Sikh community over the decision, in the light of the improvements made, and the short time given to the Academy to show its improvement. Lord Singh spoke to Baroness Berridge on 15 June 2020 and summarised that discussion in an email dated 17 June 2020. He wrote further on 28 June 2020.

88. On 7 July 2020 (i.e. after the Defendant confirmed the termination notice in the 3 July Decision) Lord Singh met with the RSC to discuss matters and to discuss re-brokering of the school.

89. Having considered the correspondence and the evidence of the Trust and Lord Singh carefully:

i) There is nothing that the NSO proposed that was materially different from the Trust's own representations.

ii) There is no indication that the NSO was unable to make such representations as it wished, nor that any further or different points would have been raised if there had been further consultation.

iii) There is no indication from the NSO or Trust staff that the NSO was engaged in taking steps itself to improve matters at the Academy, nor that it had any specific

role in doing so. Mr Kandola (paras 55-56) complains of the inadequacies of consultation, however, he does not evidence anything that was being done by the NSO to work with the Trust. Ms Rayatt mentions the NSO in paragraph 55 of her statement, when she refers to Lord Singh's first statement; there is nothing to suggest any particular work was being done by the NSO with the Trust.

90. In my judgment, the Defendant did not fail to comply with the "spirit" of the MOU, as that spirit applied to the circumstances of the NSO and Sikh schools. I am satisfied that the NSO was given the opportunity to make representations to the Defendant; that it made the representations it wished to make; and that the Defendant had regard to those representations. I am satisfied that the NSO had the opportunity to take such steps as it wished to take to remedy the problems at the Academy, as found by the Buckinghamshire Report and Ofsted.

91. I accept that the Defendant did not notify the NSO of its concerns before issuing the TWN. I have expressed some doubt above as to whether the "spirit" of the MOU required it to do so. The requirement to do so does not appear in the Church of England MOU. What the spirit required was for the NSO to be informed of concerns in good time to be consulted and make representations before the Defendant finally took action. In my judgment that was done: the Defendant first met the NSO to discuss the issues at the Academy on 24 March 2020 – the Decisions were taken on 4 June 2020 and 3 July 2020. Given the period of time that elapsed, and the content of the discussions that did take place, the failure to notify had no effect on the NSO's ability to engage and consult and to make representations. It was not, in my judgment, a departure from the spirit of the MOU.

92. Alternatively, if it was a departure from the spirit, it is plain to me that it made no difference to the form or content of consultation and no difference to the outcome. The departure does not render the Decisions unlawful. In those circumstances I accept the Defendant's submission that s.31(2A) Senior Courts Act 1981 applies: earlier consultation would have made no difference to the outcome.

93. Accordingly, I reject the challenge to the Decisions on Ground 1.

GROUND 2: DISCRIMINATION

94. There are two separate complaints within Ground 2:

i) Ground 2(a) A claim of direct discrimination on grounds of religious belief, contrary to s.29 EqA.

ii) Ground 2(b) A claim of breach of the public sector equality duty, under s.149 EqA.

GROUND 2(A): DIRECT DISCRIMINATION

95. In this ground the Trust alleges that by failing to comply with the spirit of the MOU the Defendant has discriminated on grounds of religion against the Academy, and/or its

pupils, staff and parents. It is alleged that the Defendant discriminated by treating the Academy differently, because of its Sikh faith status, than it would have treated a Catholic or Church of England academy (or its pupils, staff and parents).

96. By section 29(6) EqA a person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation.

97. Discrimination under EqA may take a number of forms. The Trust alleges direct discrimination, which is defined by s.13(1) EqA as follows: a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

98. The protected characteristic relied on by the Trust is religious belief.

99. The direct discrimination claim, as it is put by the Trust depends upon a finding that the Defendant failed to comply with the spirit of the MOUs. Paragraph 44 of the Trust's Skeleton Argument reads "*it is accepted that if D in fact complied with the spirit of the MoUs, it will not have discriminated contrary to the EqA.*"

100. I have found that the Defendant did comply with the spirit of the MOU. Ground 2(a) therefore necessarily fails along with Ground 1. However, I will address the ground on its own merits.

101. I accept in principle that acts or omissions of the Defendant in applying the spirit of the MOU to the Trust and the Academy may amount to direct discrimination under s.13 EqA. In order for the Defendant's acts or omissions to constitute direct discrimination, s.13 requires that:

    i) The Defendant treats another person (B) less favourably than it treats or would treat others; and

    ii) That less favourable treatment is because of a protected characteristic.

102. Treating a person "differently" is not sufficient to establish a claim of direct discrimination: the treatment must be "less favourable". I am prepared to find that had there been a failure to follow the spirit of the MOU that <u>may</u> have amounted to less favourable treatment. However, on the basis of my findings under Ground 1, none of the Trust, the Academy, its pupils, staff and parents were treated less favourably than the spirit of the MOU required them to be treated. Further, as the Defendant points out, there is no evidence as to how Church schools are in fact treated in relation to TWN and termination notices.

103. Even if there had been less favourable treatment, there remains the question of the reason for that treatment. Was the less favourable treatment because of religion? The Trust's argument appears to assume that such a failure would be because of the Trust's, or the Academy's, Sikh faith status (or the faith of its pupils, staff or parents). That analysis is flawed.

    i) The Trust has shown, and the Defendant accepts, that the Defendant had indicated that it would comply with the spirit of the MOUs in relation to Sikh

schools. The Trust's argument is not therefore that the standard of behaviour the Department set itself was less favourable for Sikh school's than Church schools: the standard set, as least as to spirit, is the same.

ii) Instead, the complaint is that the Defendant departed from the standard that it set itself for the treatment of Sikh schools. Applying s.13 to that complaint, the question is why did the Defendant do so? Did the Defendant fail to apply the spirit of the MOU "because of" the protected characteristic of religion? The central question is why was this Sikh Academy not treated in the way that the Department has indicated that it would treat Sikh academies? It is not at all self-evident that the answer to that question is "because it is Sikh". Instead, an inquiry is needed as to the reason why the Defendant failed to apply the spirit of the MOU.

104. Analysis of the reason for the alleged less favourable treatment was entirely lacking in the Trust's Statement of Facts and Grounds and in the Trust's Skeleton Argument. I raised the point during the hearing. The Trust argued that the Court should find that the less favourable treatment was on grounds of race based upon (a) the reversal of the burden of proof in discrimination cases under s.136 EqA; and (b) the inferences that may be drawn from a number of factual matters upon which she relied, including an absence of any good explanation for the departure from the spirit of the MOU.

105. The problem with this argument is that it had not been advanced at any stage prior to the hearing. A key plank relied on in the argument is the absence of explanation from the Defendant as to the reason why it did not apply the spirit of the MOU. But the Defendant had not been called on specifically to address its explanation, or any inferences arising from it, because the point had not been taken.

106. Further, there is no evidence to indicate that the consultation that took place in this case was "less favourable" in its timing, scope and content than that which would have been conducted in the case of a Church school. To the extent that there may have been differences, they are readily explained by the different role and nature of the NSO in relation to Sikh schools, as compared to the Church school bodies. In those circumstances, I would not be prepared to infer that any failure to apply the spirit of the MOU was because the Academy was Sikh.

107. As I have indicated above, Ground 2(a) necessarily fails because Ground 1 fails, but even had Ground 1 succeeded I would reject Ground 2(a).

GROUND 2(B) PUBLIC SECTOR EQUALITY DUTY

108. The Trust alleges that the Defendant breached the public section equality duty ("PSED") in s.149 EqA by failing to have due regard to the need to eliminate discrimination on grounds of ethnicity and religion and to advance equality between Sikhs and others.

PSED: Legal Principles

109. Section 149 EqA provides:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act."

110. The relevant protected characteristics for current purposes are race and religion or belief.

111. The legal principles in relation to section 149 are not in dispute. The Trust accepted the following principles set out by the Defendant in the Detailed Grounds of Resistance:

i) The weight and extent of the duty are highly fact sensitive and dependent on individual judgment: *Hotak v LB Southwark* [2016] AC 841 at para 74.

ii) When considering matters such as potential deterrent impact, there is no need to have detailed evidence or analysis as to the precise impact. It suffices to acknowledge potential impacts, make a reasonable judgment and keep the position under review *R (Unison) v Lord Chancellor (No.3)* [2015] EWCA Civ 935 at 29(4) and 111-123. Such judgments can only be challenged if *Wednesbury* unreasonable.

iii) There is no requirement for a precise mathematical exercise in relation to particular affected groups. Depending on the circumstances a relatively broad brush may be appropriate: *R (West Berkshire District Council) v Secretary of State for Local Government* [2016] 1 WLR 923 paras 65-88.

iv) Per Elias LJ in *R (Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 at para 87:

> "It is quite hopeless to say that the duty has not been complied with because it is possible to point to one or other piece of evidence which might be considered relevant which was not specifically identified in the EIA."

112. In *R (Bridges) v CC South Wales* [2020] EWCA Civ 1058 at para 175 the Court stated the following principles (derived from *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ):

> "(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
>
> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.
>
> (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-

> maker to decide how much weight should be given to the various factors informing the decision."

113. In the same case at paragraph 181 the Court said:

> "We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex."

114. During the course of the hearing, a dispute emerged as to the standard of review of the decision maker's enquiries. The Trust accepts that once all relevant information has been gathered the assessment of the evidence is a matter for the decision maker, subject to rationality review. However, the question of whether the decision maker armed itself with the relevant evidence is subject to a higher degree of scrutiny than rationality view. The Trust relied on *Bridges*, in particular paragraph 175(5) and paragraph 181. The Trust argues that it can be seen from the judgments in both *Bracking* and *Bridges* that the Court did not simply ask itself whether the enquiries made were rational, but carried out an assessment of their adequacy.

115. In considering the enquiries made, the Defendant submits that the question for the court is whether the steps taken were rational. The Defendant submits that the following principles apply:

i) The obligation is only to make such inquiries or take such steps as are reasonable: *R (Plantagenet Alliance Ltd.) v Secretary of State for Justice* [2015] EWHC 1662 (Admin).

ii) It is for the public body, and not the court, to decide upon the manner and intensity of any inquiry to be undertaken: *R (Khatun) v Newham LBC* [2005] QB 37, *Plantagenet Alliance* para 100(2). It will only be unlawful for a public body not to undertake a particular inquiry if it was irrational not to do so. The court should not intervene merely because it considers that further enquiries would have been sensible or desirable: *Plantagenet Alliance* para 100(3).

iii) The court should establish what material was before the public body at the relevant time, and should only strike down a decision not to make further inquiries if no reasonable public body possessed of that material could suppose that the inquiries they made were sufficient: *Plantagenet Alliance* para 100(4).

116. Neither *Bridges* nor *Bracking* expressly deal with the standard of review where it is alleged that reasonable enquiries or investigations were not made. Two first instances decisions, both dealing with s.149 challenges, do address the issue. In *R (D) v Hackney LBC* [2019] EWHC 943 (Admin) para 84 Supperstone J said:

> "What constitutes "due regard" will depend on the circumstances: *Surrey*, at para 80. Moreover, the "duty of inquiry" is an application of the *Tameside* duty on a public body to take reasonable steps to acquaint itself with the relevant information necessary to enable it properly to

> perform the relevant function: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065. It will only be unlawful for a public body not to undertake a particular inquiry if it was irrational for it not to do so."

117. In *R (Joint Council for the Welfare of Immigrants) v SSHD* [2021] EWHC 638 (Admin) at paragraphs 21-24 Lieven J said the following:

> "21. I turn, then, to my conclusions. Ground 1; I accept that there is a duty of inquiry pursuant to *Tameside*. It seems to me that must be inherent within s.149. But the law is clear that a judicial review can only be brought in respect of an alleged failure to meet the duty of enquiry on *Wednesbury* rationality grounds. To some degree, I accept that *Wednesbury* will be context specific, whilst remaining a necessarily high test for a claimant. However, I do not accept on the case law that the burden is in some way reversed so that the Secretary of State has to prove that what she has done is not irrational or that the scope of the *Wednesbury* test is in some way watered down.
>
> 22. Mr Bowen relies, as I have said, on the case law in *Bridges, R (on the application of) v Chief Constable of South Wales Police*, a decision of the Court of Appeal concerning a facial recognition scheme being run by the police. In my view, *Bridges* is not of very great assistance to the current case because the nature of what data is required and the detail of the data and the scope of the error is necessarily going to be very fact-specific in cases concerning the public sector equality duty, which is a duty that can arise in a wide range of different contexts.
>
> 23. In *Bridges*, on my reading of the Court of Appeal decision, first of all, there was really very limited data that was said to meet the inquiry inherent in the PSED duties; secondly, the potentially discriminatory effect of the facial recognition technology in issue was very obvious and very stark; thirdly, this was, it would be fair to say, novel technology, certainly in the context in which it was being used. Mr Bowen says, "Well, the Settlement Scheme is a novel scheme," and, of course, almost anything is novel when it comes for judicial review. But, in my view, the crucial point is that there is nothing novel about designing a bureaucratic scheme by which you check that people with protected characteristics have access to the scheme. That is a totally different context, in my view, to a facial recognition scheme being used by police. Importantly, as I read *Bridges*, the Court of Appeal is not shifting the legal burden in a PSED case onto the public authority and is not seeking to establish that normal principles of *Wednesbury* rationality do not apply."

118. I accept the Defendant's submissions on this point. I respectfully agree with and adopt the analysis of Supperstone J and Lieven J. There is nothing in *Bracking* nor *Bridges* that requires a different approach. Whether or not there has been a failure of enquiry in

carrying out the PSED analysis is subject to normal principles of *Wednesbury* rationality, though the application of that test is necessarily context specific.

PSED: the Defendant's analysis and the challenge

119. An equalities impact analysis ("EIA") was carried out by the Defendant and included in the Ministerial Submission at paragraphs 77-83. The Ministerial Submission considered it appropriate to ensure that the Sikh ethos of the school was protected. The potential new sponsor for re-brokering was Khalsa Primary School ("KPS"), a Sikh school may of whose pupils tend to feed into the Academy. The PSED was further considered in the Second Decision.

120. The Defendant considered the equality implications of its decision by considering the efforts that would be made to re-broker the Academy to another Sikh Trust.

121. The Trust's argument is that the Defendant overlooked, misunderstood and or ignored serious concerns that the Trust was subject to a concerted campaign, which was connected with issues of religion/ethnicity, to remove the Academy from it. The Trust claims that it was under attack because of its Sikh identity both from "secular forces" and "fundamentalist Sikhs".

122. The evidence of these campaigns presented to the Defendant at the time of the decisions under challenge was very thin. The relevance of the issue to the matters the Defendant had to determine is far from clear. The point did not feature in any prominent way in the representations made to the Defendant. The issue was raised at the time in the following way:

    i) On 17 February 2020 the Chair of the Academy's PTA wrote to the RSC. She raised concerns about messages circulating on social media "*over the last few weeks*" regarding the Academy. She said that the messages were not from parents but "*probably disgruntled governors or ex-employees*". She said that the messages were a personal vendetta against Mr Kandola. She did not attribute that campaign either to a Sikh faction, nor to secular forces. In a further email dated 13 March 2020 the PTA Chair referred to a campaign by a small number of parents. She said "*I believe their motivation may be political, religious and having personal vendettas of their own. Unfortunately, these political games exist in all communities and the Sikh community is no different.*"

    ii) Ms Rayatt wrote to the RSC on 8 March 2020. The letter concerned the transition, pursuant to a new Scheme of Delegation, from boards of governors for the schools in the Trust to new local advisory boards. Ms Rayatt said that governors at the Academy and at the Khalsa Academy Wolverhampton had no concerns about the transition process, but the situation at Atam Academy was different as the governors there had a political agenda. She then explained that some governors were conspiring to sabotage the Trust in order to take control of Atam Academy. That campaign involved the (then suspended Chair of Governors) and about twenty or so of his friends. It was suggested that those involved in the campaign were asking parents to complain to the RSC.

iii) As I have set out above, Lord and Lady Singh had referred to a sect of Sikhs who wished to wrest control of Atam Academy in their meeting with the RSC on 24 March 2020.

iv) Ms Rayatt emailed EFSA and a representative from the RSC's office on 30 March 2020 with a note of a meeting between them that took place on 24 March 2020. Ms Rayatt and Ms Singh of the Trust stated that ex-Atam governors were involved in an organised campaign to bring the Trust down and were working hard to get the support of parents. There were extremist groups who had allied with them. They were garnering support for complaints to be made about the Trust to the Defendant. The Defendant asked the Trust to send the RSC any evidence of this.

v) The Defendant's evidence includes a note of a meeting on 27 March 2020 which covers the same ground. Although neither party addressed me on this, it seems likely that these are notes of the same meeting on 24 March. The Defendant's note records a representative of ESFA saying that if the Trust was concerned about extremist groups infiltrating the Trust it should provide evidence and they would look into it.

vi) On 24 April 2020 a representative of the RSC's office wrote to Ms Rayatt referring to the allegation that individuals who were part of a fundamentalist party with extremist views were using Atam Academy as a lever to pursue political aims and to destabilise the Trust. The RSC had reported the allegations to the counter-extremism team who had asked for evidence in order to carry out an investigation. Ms Rayatt was asked for evidence.

vii) On 30 April 2020 Ms Rayatt replied to the email of 24 April 2020. In her witness statement she characterises her email as raising two concerted campaigns against the Trust. One by the ex-Chair of governors of Atam Academy and one by a sectarian religious fundamentalist group. However, the letter links the two, as the ex-chair is said to have links with the fundamentalist group. The letter raises a concern that ex-governors from Atam Academy are engaged in a campaign to destabilise the Trust in order to wrest control of Atam Academy. She attached some documents showing details of the ex-chair's "*political affiliations*". Ms Rayatt says in this letter "*It is not the role of Trustees and Members to compile evidence about any perceived extremist/fundamentalist threats. The counter-extremism team would be better placed at locating the relevant evidence.*" I take this to be in response to the request for evidence made in the meeting and in the 24 April 2020 email.

viii) In a letter dated 13 May 2020 the Members of the Trust wrote to Baroness Berridge. Among other matters they raised the "*Political Context of the Trust*". They alleged two groups were attempting to destabilise the Trust. First, a campaign from a sectarian, religious fundamentalist group of Sikhs who wish to take over the schools. In relation to that group they referred to Ms Rayatt's letter, which I take to be the 30 April letter I describe above. Second, a campaign from local residents who want the Academy to become a secular school.

123. I make the following observations arising from that narrative:

i) Ground 2(b) is put on the basis that there were a number of warnings of a campaign against the Trust. I find that such warnings as were given were vague and diffuse in terms of what was alleged. Although campaigns against the school are raised a number of times with the Defendant between March and May 2020 on each occasion it is in different terms. At various times there is mention of a fundamentalist religious element, disgruntled governors of Atam, governors of Atam with different political views, a small group of parents disgruntled at the fact that the Academy had been placed into special measures, and a of group wishing to see the Academy become a secular school.

ii) With the possible exception of the disgruntled Atam governors, there was scant, if any, evidence of these matters, nor that that any of these matters caused the allegations that led to the Buckinghamshire Report or the Ofsted report.

iii) More importantly, the Trust did not say, in the documents I have referred to, that the explanation for the allegations about safeguarding at the Academy were a product of this campaign, though this is argued on its behalf now.

iv) None of these issues were raised in the representations in response to the TWN on 10 March or 13 May. Nor was the issue raised in the representations of 6 June 2020 following the Termination Notice. It is telling that although the 6 June 2020 representations complain of direct discrimination on grounds of religion through failing to follow the MOU, there is no mention of the PSED, and no mention of the alleged campaigns against the Trust. Had the Trust thought the issue was significant to the Defendant's decision to terminate, I would have expected the point to feature in those representations.

v) When asked for evidence of the campaigns the Trust referred to, Ms Rayatt said that it was not for the Trust to gather evidence and that this was a matter for the counter-extremism team.

124. Dame Dethridge's evidence is that the Defendant did take such concerns as were raised into account when it issues and upheld the Termination Notice. When these issues were raised she referred the matter to the Defendant's counter-extremism division ("CED"). CED investigated the matter but was unable to identify any extremism links to the individuals mentioned in the evidence.

125. The Trust argues that in referring the matter to CED, who looked at whether the concerns met the threshold for further action, the Defendant applied the wrong lens. The issue was not about whether CED should take further action, but whether there was evidence of a religiously motivated plot against the Trust. I am not persuaded by that argument.

i) There was no evidence of a religiously motivated plot, and no evidence that the problems that led to the TWN and Termination Notice at the Academy were caused by such a plot.

ii) Ms Rayatt had said that it was for CED, not the Trust to provide evidence. CED looked into the matter and did not find any such evidence.

iii) Although Ms Rayatt was told that the extremism allegations were being investigated by the CED, the Trust did not suggest that the Defendant had misunderstood the nature of the extremism allegation, nor that it was carrying out the wrong kind of investigation.

126. I agree with the Defendant's characterisation that there are assertions of campaigns, but no real evidence. The Defendant took steps to look into the issues, but found no evidence. There is no clear case put forward as to what the Defendant ought to have done in order to comply with the PSED. The Trust had the opportunity to put forward evidence of a campaign against it, and to demonstrate how that undermined the findings against it.

127. In my judgment, the Defendant took a rational approach to the enquiries to be made in discharging the PSED. Indeed, even were the Trust to be right that a higher standard of review is required in assessing the gathering of evidence in discharging the PSED, in my judgment the enquiries were reasonable and appropriate.

128. Further, it remains difficult to see how the allegations that were made of campaigns could have affected the Defendant's assessment of the evidence before it which led to the Termination Notice: i.e. the Buckinghamshire Report and the Ofsted Report.

129. Accordingly, I reject the claim that the Defendant failed in its PSED, and reject Ground 2 of the claim.

PSED: the Subsequent EIA and s.31 SCA

130. For completeness, I briefly consider the Defendant's argument that even if there had been a failure of enquiry at the time of the Decisions, a subsequent EIA shows that it is highly likely that the outcome would not have been substantially different if that failure had not occurred, so that relief should be refused under s.31(2A) Senior Courts Act 1981.

131. A further equality impact assessment was carried out by the RSC's team, dated 30 March 2021. That assessment specifically considers maintaining the Termination Notice in the light of the allegations made by the Trust relating to fundamentalist Sikhs and secular forces. The assessment records the allegations that had been made, and the fact that CED were unable to substantiate them. It also records the separate EIA that was carried out in August 2020 into the consideration of KPS as a re-brokered sponsor for the Academy. Allegations were raised by Ms Rayatt concerning KPS and its Trustees. Those allegations were investigated, but could not be confirmed. The report also notes that the NSO (also the relevant religious authority for KPS) did not raise any concerns over individuals at KPS, or the branch of Sikhism practised at that school. In relation to concerns about Sikh fundamentalism, the Defendant concluded:

> "It is considered that [the Trust] has not substantiated their claims to have been the victims of a concerted attack by fundamentalist Sikhs. The evidence submitted to the Defendant was considered and the outcome of the investigation into these claims was reported back to the Trust in advance of the judicial review claim. It is unclear how any such claims relate to the independent reports which led to the TN, namely the

> Buckinghamshire Council safeguarding report and the subsequent Ofsted report."

132. Similarly, the Defendant concluded as follows in relation to the claim that the Trust was the victim of a concerted attack by secular forces:

> "The Trust has failed to evidence that 'secular forces' resulted in [the Academy] being judged inadequate. Indeed, this is considered to be a result of failings at the school and the Trust. Likewise, the Trust have failed to substantiate that the RSC, Minister, or Secretary of State has been unduly influenced by any group i.e. 'secular forces', 'fundamentalist Sikhs' or otherwise. As such it does not affect our decision that it is in the best interests for the school to be issued a TN and for the school to transfer to the Sikh Academies Trust."

133. I bear in mind that this PSED Analysis was carried out long after the decisions under challenge and, indeed, after these proceedings had commenced. However, the Defendant's analysis highlights the points I have addressed above, based on my review of the material that was available at the time of the Decisions.

134. I have considered the wider evidence presented to the Court in assessing whether there is material that is relevant to the question of whether a different view may have been taken if further enquiries were carried out by the Defendant.

i) The Trust's witness evidence presents little more than is apparent from the documents I refer to above. Ms Rayatt's witness evidence explains that she suspended the Atam Chair in February 2020. She says her decision to suspend him resulted in a serious campaign against the Trust by him and his supporters. They instigated a co-ordinated campaign of complaining to the RSC and to the ESFA as well as using social media and WhatsApp to denigrate Mr Kandola. She also says that when the Academy was placed into special measures by Ofsted a small number of parents joined with this opposition. Ultimately, the Atam group began to coordinate with these parents at the Academy, resulting in dozens "possibly hundreds" of complaints and allegations to ESFA and RSC. None of this is shown by her evidence to be religiously motivated. It is telling that Ms Rayatt deals with the additional opposition from a sectarian, religious fundamentalist group in a single sentence, and then refers to the correspondence I set out above.

ii) Mr Kandola says (witness statement para 99) that the Trust has shared its concerns regarding concerted campaigns by ex-governors of Atam Academy, as well as some parents of KPS that has been driven by the Trust behind KPS, which is part of a sect of Sikhism.

iii) Lord Singh does not give evidence as to any fundamentalist or secular campaign against the Trust in his two witness statements.

iv) The Trust commissioned an investigation into allegations surrounding the ex-Chair of governors of Atam Academy by Strictly Education. Strictly Education's report is dated 21 May 2020. The report states that it is impossible

to conclude beyond all reasonable doubt that the ex-Chair had attempted to undermine and sabotage the Trust and its reputation. However, the evidence "*leans towards a likely probability that*" he and others tried to undermine the Trust by a social media campaign, a letter to parents, complaints against the Scheme of Delegation, a meeting of the Atam governing body in February or Easter 2019 where whistleblowing was made, and a further meeting in February 2020 with the aim of establishing how Atam Academy could move away from the Trust. It is clear from this summary that the report was focussed on Atam Academy, not the Academy. The report was based largely upon evidence from Mr Kandola and Ms Rayatt, and the accused ex-Chair refused to participate. Most significantly, as the Defendant points out, the report does not refer to any religious basis for the actions of the ex-Chair.

v) The Trust commissioned a report from Russell HR Consulting, dated 23 March 2021. It was put in evidence by the Trust, though little was said about its status and I was not taken through the document in any detail. The Trust says that it represents the Trust's understanding of the facts, based on an investigation including a series of anonymous emails received in January 2021. The Defendant, correctly in my view, characterises the report as opinion evidence as the makers of the report have no first-hand knowledge of the facts they address. The Defendant makes a number of criticisms of the report, which it claims is a partisan account. I do not need to address those in detail. I find that no weight is to be attached to the report. The factual conclusions represent no more than the opinions of the investigators based on the evidence made available to them. Some of those conclusions are, to say the least, dubious. For instance the report records that the investigations by Hackney Learning Trust and Strictly Education discovered that the whistleblowing complaints in 2019 (i.e. those that led to the Buckinghamshire Report) were "baseless". That is a significant mischaracterisation of both of those investigations. Most significantly, whatever Russell HR's views as to the existence of a campaign against the Trust there is little, if anything, in the report to suggest that it was on religious grounds: either by Sikh factions or secular forces.

135. I accept the Trust's submission that the threshold for a finding under s.31(2A) is a high one. However, in my judgment the Court is entitled to have regard to the March 2021 EIA, and entitled to have regard to the totality of the evidence now available. I have due regard to the risk of an ex post facto attempt to rationalise or support an earlier decision rather. However, there is in my judgment no substance to the PSED challenge, whether looked at now or at the time of the Decisions. If I am wrong in my primary conclusion that there was no breach of the PSED at the time of the Decisions, then the state of the evidence now available to the Court demonstrates clearly to me that if further consideration had been given to the allegations before taking the Decisions, the same conclusion would have been highly likely to be reached by the Defendant in carrying out its PSED duties.

136. Accordingly, I reject Ground 2(b).

GROUND 3: IRRATIONALITY

137. Ground 3 is that the Defendant acted irrationally by refusing to delay the Decisions so as to allow consideration of highly relevant material whose availability was imminent. The Trust also makes a broader point that, in the light of evidence of the progress that was being made by the Trust and the changes that it was making, the Defendant irrationally rushed to issue a Termination Notice.

138. In my judgment, the Defendant cannot be said to have acted irrationally in forming the view that a decision should be made in June and not delayed.

139. The Defendant considered the timing of its action in both the 4 June Decision and the 3 July Decision. Very serious concerns as to safeguarding had been established. The Defendant had to make an assessment of what was in the best interests of pupils, parents and staff. It had regard to the need for clarity on the future of the school. It considered not just the allegations that had been proven, but also the question of whether it had confidence in the Trust's capacity to make the urgent improvements required. It lacked that confidence, and formed the view that it was in the best interests of pupils, parents and staff not to leave them in an inadequate school for longer than necessary. The Defendant's approach was consistent with the "Schools Causing Concern" Guidance which indicates the need for swift intervention where a school is found to be inadequate.

140. The principal evidence that is said to be imminent was the CST Report. That report, as I have explained above, was taken into account in the 3 July Decision and in the Defendant's judgment did not affect the outcome. In any event, it was part of a separate FNtI notice process.

141. The Trust claims that it was irrational to have proceeded when Ofsted monitoring inspections were not being carried out. Mr Kandola's evidence is that the case was not so urgent that the Department needed to press ahead with termination during the height of the pandemic, and should have waited so that Ofsted and Buckinghamshire could reinspect and provide independent evidence of the Trust's progress. I reject that submission. Regardless of the position with Ofsted inspections, the Defendant had a responsibility to the staff, pupils and parents of the Academy and its own Guidance shows the importance of swift action where a school is inadequate. Further, I note that Mr Kandola says that he is "*absolutely confident*" that re-inspection would have proved that the Academy was now "good" and termination was not justified. That is a matter of opinion. The Defendant had to make a judgment, and the fact that Mr Kandola takes a different view does not render the Defendant's decision irrational. In fact however, Mr Kandola's confidence is misplaced: Ofsted's subsequent monitoring inspection on 10 May 2021 found that safeguarding at the Academy is still not effective.

142. Accordingly, I reject Ground 3.

GROUND 4: IRRATIONALITY

143. Ground 4 alleges that the Defendant acted irrationally in terminating the Trust's funding arrangement in the light of all the circumstances including:

i) The impact of Covid 19 and the Defendant's own guidance in relation to this.

ii) The strong independent evidence already available of significant progress made by the Trust.

iii) The evidence of a concerted campaign against the Trust.

iv) The additional evidence which it knew or ought to have known would shortly be available.

144. In its Skeleton Argument and oral submissions the Trust made the following further points:

i) At the time of the 4 June Decision the Defendant had issued no other Termination Notice, TWN or Minded to Terminate letter during the pandemic. This was in recognition, the Trust infers, of the fact that termination would only be appropriate in the most extreme cases.

ii) The Trust was hampered by the withholding of information from it, including the Buckinghamshire Report, and by the fact that neither Buckinghamshire nor Ofsted could reinspect the Academy in the first six months of 2020.

iii) The Defendant's approach was hostile to the CEO, Mr Kandola, and contemptuous of the NSO.

iv) The Defendant has approached evidence of progress provided by the Trust with the greatest of suspicion. The Trust alleges that this suspicion was generated or exacerbated by the interventions of those campaigning against the Trust.

145. I have already addressed a number of these points under Grounds 1 to 3, so this ground can be dealt with briefly.

146. There was some dispute as to the evidence of the number of Termination Notices, TWN or Minded to Terminate letters issued from the start of the pandemic to the time of the Decisions. I do not need to resolve that dispute. I derive no assistance from the comparison with measures taken (or not taken) by the Defendant in the case of other schools. Without a detailed consideration of the facts of individual cases, the Defendant's actions in other cases shed no light on the rationality of the Decisions.

147. I reject the Trust's submission that intervention would only be appropriate in "the most extreme cases". That inference does not arise from the limited known facts about treatment of other schools. More significantly, the Agreements, the Defendant's "Schools Causing Concern" Guidance and the MOU do not state that intervention would only the appropriate in extreme cases.

148. The Trust repeatedly makes the point that the Trust was hampered in its response by the withholding of the Buckinghamshire Report until August 2020 (e.g. Skeleton Argument paragraphs 58 and 59). As I have set out above, the true position is that the allegations and the findings made in relation to them were provided to the Trust in December 2019. There is no substance in this point.

149. It is alleged that the Defendant was hostile to the Trust, and in particular to the CEO, and that the Ministerial Submission was unbalanced and partial – for reasons set out in detail at paragraphs 21-22 of the Skeleton Argument. Accordingly, it is alleged that the Defendant approached all evidence of progress by the Trust with "the greatest of suspicion". The Trust alleges that this suspicion was generated or exacerbated by the interventions of those campaigning against the Trust. I reject that submission.

150. The evidence of a "concerted campaign" was, as I have found above, vague and inconsistent. As I have set out above, the allegations, such as they were, of a concerted campaign did not undermine the findings of Buckinghamshire or Ofsted. Neither the allegations of a campaign, nor the Defendants reasoning in the Ministerial Submissions and Decisions, point to a conclusion that the Defendant's decision was taken because of hostility to the CEO.

151. I find the Trust's position in relation to the safeguarding allegations at the heart of this matter inconsistent and confusing.

    i) On the one hand, the Trust complains strenuously about the investigation of the allegations. It alleges that the allegations were false, were made as part of a conspiracy, and should not have been upheld. It alleges that its own investigations have shown the allegations to be false.

    ii) On the other hand, the Trust's representations in response to the TWN did not make these points; in those representations the Trust accepts that there have been failings, and instead addresses the work done to improve the Academy and the Trust.

152. Mr Kandola challenges the Buckinghamshire Report and says that none of the six allegations should have been upheld (para 16 of his witness statement). However, later in his statement he "*accepts and regrets*" that the Trust failed to meet the required standards in the areas highlighted in the Ofsted Report and that "*we failed to provide the safe environment that our pupils and their parents are entitled to expect.*"

153. Mr Kandola says (paragraph 19) that the Trust's response to ESFA's 29 November letter included confirmation that the allegations were unfounded, and the Trust in addition commissioned an external independent investigation into the grievances raised by the ex-Director of Education. He says (paragraph 20) that the independent investigation concluded that there was no evidence to support the allegations.

154. I do not accept Mr Kandola's characterisation of the evidence. However, the significance is the contrast between his evidence and other evidence given by the Trust. Ms Rayatt, the Chair of Trustees, says (paragraph 11 of her first witness statement): *"The Trust recognises the seriousness of the safeguarding incidents described in the [Buckinghamshire Report] and has taken urgent action to implement the actions recommenced by [Buckinghamshire]"*. She goes on to say (paragraph 12) "*However, without wishing in any way to diminish the seriousness of the incidents that occurred at the Academy, I am of the view that the DfE has consistently attached too much weight to the [Buckinghamshire Report]."* She goes on to criticise the investigation.

155. I find this position incomprehensible. The findings reached by Buckinghamshire and Ofsted were either right or wrong. If the Trust accepts the findings, and does not seek

to diminish the seriousness of the incidents that occurred, then any failings in the investigation that led to those findings are immaterial. Ms Rayatt's acceptance that serious safeguarding incidents occurred is wholly at odds with Mr Kandola's claims that the allegations should not have been upheld and were the product of a conspiracy against the Trust.

156. It is clear from reading the Ministerial Submission and the Decisions that the Defendant took into account the Buckinghamshire Report's findings and the Ofsted report. Both were damning. Despite the arguments of the Trust, I am not at all persuaded that those reports have been shown to be wrong by any subsequent evidence.

157. The Defendant also had regard to the Trust's own written submissions, to which I have referred above. As I have set out, the Trust did not seek to challenge the findings, and its position, even now, as to its failings, has been wholly unclear and inconsistent. The Defendant was plainly entitled to take the view that it took as to the seriousness of the Trust's failings in relation to the Academy.

158. There can be no doubt that on the basis of those findings, the termination provisions of the Supplemental Funding Agreement were engaged, requiring the Defendant to make a decision whether to issue a Termination Notice.

159. Once the grounds for issuing a termination were established, the Defendant had to assess whether the Trust had demonstrated sufficiently rapid and sustained improvement so as to justify leaving it in charge of the Academy, when it had allowed such significant failures to occur. In the Trust's favour, there was evidence that steps had been taken to improve matters, and that progress had been made and was continuing to be made. The Ministerial Submission and the Decisions show that the Defendant had regard to those matters. The weight to be attached to them was a matter of assessment and judgment for the Defendant. Nothing in the Trust's evidence or submissions persuades me that the Defendant's assessment was irrational in the legal sense.

160. Accordingly, I reject Ground 4.

CONCLUSION

161. For the reasons set out in this judgment I reject all four grounds of challenge to the Defendant's Decisions. Accordingly, I dismiss this application for judicial review in its entirety.