

CASE COMMENTARY

OFSTED V AL-HIJRAH, THE CASE OF SEGREGATED SCHOOLS AND SEX DISCRIMINATION

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1 CASE SUMMARY

This case of *HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah School*¹ was the unfortunate outcome of an Office for Standards in Education, Children's Services and Skills (Ofsted) inspection which resulted in a cataclysmic breakdown in trust between the government agency and the Birmingham city based Al-Hijrah school. Following an Ofsted inspection carried out under section 5 of the Education Act 2005, the subsequent Report stated that the full segregation of female and male pupils in a mixed-sex school amounted to sex discrimination under the Equality Act 2010. *Al-Hijrah School* applied to the High Court for a judicial review of the report prior to its official publication. The High Court Justice considered a range of evidences including facts related to Ofsted procedure, and ruled that the segregation did not amount to a breach of the 2010 Act, as when taken as a group, the treatment of the boys and the girls was the same and so there was an absence of "less favourable treatment".

This decision was reversed by the Court of Appeal who stated that the High Court's approach to the question was incorrect and it was individual claimants' rights which were to be construed, not that of the entire group of girls and the entire group of boys. Thus, the court must have regard to each individual pupil as separate from the group and comparator. So the question becomes whether the individual girl pupil was treated less favourably than a boy pupil as the boy pupil had the benefit of engaging with his boy peers while the girl pupil did not. Similarly, the boy pupil did not have the benefit of engaging with other girl pupils in the same way as

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¹ [2017] EWCA Civ 1426, on appeal from [2016] EWHC 2813. Herein after referred to as *Ofsted v Al-Hijrah*.

a girl pupil did. This discrimination was based on the protected characteristic of sex and was held to breach section 85(2) of the Equality Act 2010.

Ofsted stated that the segregation impacted on the children's education and development as both boys and girls lost the opportunity to socialise, interact and learn from engagement with the opposite sex. Ofsted further cited "British values" and the preparedness of these children for life in modern Britain. Ofsted additionally argued that the female students faced particular disadvantage as a result of the segregation, but this was rejected. A final appeal by the Association of Muslim Schools to be added to the action following the appeal judgment was rejected, thereby preventing an appeal to the Supreme Court.

Keywords: Direct discrimination; Gender; Less favourable treatment; OFSTED; Protected characteristics; Segregation; Sex discrimination

2 CASE HISTORY

Ofsted carried out a section 5 inspection in 2016 and reported *Al-Hijrah* school to be inadequate on three specific grounds: (i) Effectiveness of leadership and management, (ii) The personal development, behaviour and welfare of pupils, and (iii) Early years provision.²

The lack of "effectiveness of leadership and management" was due to a number of issues including "the failure to have due regard to the duty to achieve equality of opportunity as required by s.149 of the 2010 Act; and ineffective arrangements for safeguarding."³ The issue of segregation of pupils was raised as a core concern, with the Ofsted report stating that segregation "limits pupils' social development, and the extent to which they are prepared for interaction with the opposite sex when they leave school."⁴ In response to the School's claims of religious motivation, Ofsted was of the view that the school had no policies to actively mitigate the "potentially negative impact of this practice on pupils' chances to develop into socially confident individuals with peers from the opposite gender."⁵

Al-Hijrah school applied for Judicial Review of Ofsted's inspection report, and the High Court ruled that strict gender segregation between

² *Ofsted v Al-Hijrah* [18].

³ *Ibid* [19].

⁴ *Ibid* [20].

⁵ *Ibid*.

boys and girls aged 9-16 did not amount to unlawful discrimination contrary to the provisions of the Equalities Act 2010. The key issues for Judicial Review related to the following: whether the denial to both sexes of the opportunity to interact, socialise and learn with, or from, the opposite sex amounted to “less favourable treatment” for the purposes of the Equality Act 2010 s.13(1) read in conjunction with s.23(1); and secondly, whether the segregation was because girls were regarded as inferior to boys.⁶

Mr Justice Jay’s judicial review treated the boys and girls at the school as two distinct groups, and in applying the provisions of the Equalities Act 2010, the treatment of both of these groups was compared. The Justice concluded that it could not be said that one group was being treated less favourably than the other giving rise to unfair advantage and therefore discrimination. In fact, both groups were being treated the same.

Further, on the issue of a particular detriment to girls, the High Court rejected Ofsted’s argument that there was a particular and greater detriment suffered by girls due to the women being a group with “a minority of power” in society and the idea that segregation of girls “cannot be separated from deep-seated cultural and historical perspectives as to the inferiority of the female sex.”⁷ These were rejected on the basis that there is no evidence to support the assertion that segregation in a mixed school in fact has a greater impact on female pupils.⁸ This raises an interesting issue which underlies the entire premise of the arguments being put forward by Ofsted – the question of evidence of the detriment being suffered. “Ofsted’s view was that this restriction on freedom of a girl pupil to mix or socialise with boy pupils and on a boy pupil to mix and socialise with girl pupils was detrimental to their education.”⁹ Yet this detriment was probed by the High Court, but not a focus for the Court of Appeal. The Court of Appeal stated that Ofsted is entitled to reach a finding that segregation has an adverse impact on the quality and effectiveness of the girls’ and boys’ education.¹⁰

Ofsted appealed the High Court’s judgment on five grounds, namely the loss of opportunity for girls and boys to choose to learn and socialise with each other, the loss of opportunity of both boys and girls to socialise

⁶ *Interim Executive Board of X School v Her Majesty’s Chief Inspector of Education, Children’s Services and Skills* [2016] EWHC 2813 (Admin).

⁷ *Ofsted v Al-Hijrah* [36].

⁸ *Ibid* [37].

⁹ *Ibid* [45].

¹⁰ *Ibid* [67].

with each other in preparation for work and other contexts upon leaving school, a perceived particular detriment to girls which outweigh that to boys because of a perceived “minority of power” for women, and finally that segregation implies girls are inferior.¹¹

The Court of Appeal held unanimously that segregation of girl and boy pupils constituted direct discrimination and therefore breached s.13 or s.85 of the Equality Act 2010. In this case, both the girl and boy pupils *lost out on the opportunity* to socialise, interact and learn from members of the opposite sex.

The approach to ascertaining less favourable treatment involved consideration of the individual pupil and each individual pupil faced less favourable treatment when compared to a pupil of the opposite sex. Thus, a girl pupil was held to be treated less favourably than the boy pupil and the boy pupil was treated less favourably than the girl pupil; both on the basis of their sex which is a protected characteristic under s.4 of the Equality Act. Thus, this breached s.85(2) of the Equality Act. Ofsted was therefore right to conclude that strict gender segregation resulted in a breach of all of the pupils’ rights.

In overruling the High Court, the Justices held that the starting point for ascertaining direct discrimination under s.13 of the Equality Act is a “person” not a group. An individual girl pupil could not socialise and engage with a boy pupil because, and only because, of her sex, and vice versa for an individual boy pupil. Thus, each would be treated differently if they were of the opposite sex. Thus, a girl pupil would have the benefit of engaging with boy pupils if she were a boy and the only reason she could not in this case was because she was a girl. Therefore, even if both the girls and the boys were treated the same, it could still give rise to unlawful discrimination. Consequently, separate but equal treatment can still be discriminatory.¹² The detriment suffered was deemed to diminish the quality of the pupils’ education.¹³

Ofsted’s arguments that the segregation in some way reinforced ideas of female inferiority and male superiority in social and employment contexts were held to be unfounded, 2 to 1, with Gloster LJ dissenting.¹⁴

¹¹ Ibid [39].

¹² Ibid [50]-[58].

¹³ Ibid [78]-[80].

¹⁴ Ibid [107]-[110], [114]-[116].

3 *AL-HIJRAH* SCHOOL'S SEGREGATION POLICY

The Birmingham based *Al-Hijrah* school is a mixed-sex school operating an Islamic ethos and voluntary aided by the Local Authority. Its pupils are aged 4 -16, and in line with particular religious beliefs, it operated a complete segregation policy between its female and male pupils aged 9-16. The segregation remained in place for the entirety of the school day including lessons, breaks, clubs and trips. The underlying reasons given for the segregation were religious values. The Court of Appeal rejected this as an adequate defence or justification. The reason for the segregation was held to be irrelevant.¹⁵

4 APPLYING THE EQUALITY ACT 2010

This case raises some significant questions regarding the application of the provisions of section 13 and section 85 of the Equality Act 2010 to the charge of sex discrimination at segregated schools. The case centred on the question of whether there is direct discrimination where a mixed-sex school completely segregates boys and girls over a certain age, for all school related activities,¹⁶ on the basis that this policy produces “adverse educational consequences.”¹⁷ Another key feature of this case is the Court of Appeal’s judgment that ascertaining discrimination from the perspective of each potential individual claimant was said to be the correct approach to interpreting the legislative provisions.

The Equality Act protects individuals from discrimination where the discrimination is because of a protected characteristic. S.4 lists the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. The focus of these proceedings was discrimination on the grounds of sex.

Section 11 describes the characteristic of sex as either a man or a woman. Section 212(1) further clarifies that the individuals can be of any age, thereby including children. The use of the term sex instead of gender specifies the biological nature of distinction.¹⁸

¹⁵ Ibid [81].

¹⁶ Ibid [1].

¹⁷ Ibid [2].

¹⁸ Bob Hepple, *Equality, the Legal Framework* (2nd ed, Hart Publishing, Oxford and Portland, Oregon 2014) 57.

S.85 governs non-discrimination in the admission and treatment of pupils to schools. This includes a responsibility under S.85(2) to refrain from discrimination in the way it provides education for pupils, and in the way it affords access to benefits, facilities or services. The Equality Act operates to cover “four civil wrongs” – direct discrimination, indirect discrimination, harassment and victimisation.¹⁹ The present case concerned direct discrimination claims due to less favourable treatment because of a protected characteristic leading to a detriment.

Section 13 (1) sets out that “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.” This is the test for direct discrimination. S.23(1) provides for a comparator, thus, the treatment of the claimant is to be compared with a comparator who does not share the claimant’s characteristic. However, “like must be compared with like”²⁰ and the material circumstances of the claimant and the comparator must be similar.²¹ The outcome of the treatment need not be a tangible loss.²² A key issue for *Ofsted v Al-Hijrah* was the fact that the mere deprivation of choice can result in a finding of less favourable treatment,²³ with a “detriment” being attributed to this.

The freedom of parents to choose how their children are educated, as provided for under section 9 of the Education Act 1996 and the School Standards and Framework Act 1998, was brought into question. The Court of Appeal held that this right does not override the rights of the children to be educated in a manner that does not breach the Equality Act 2010,²⁴ and the rights enshrined therein cannot be negated by parental acquiescence.

5 [SEGREGATION] IS “DUMB”

During the inspection, Ofsted interviewed two randomly selected female pupils in Year 10, and asked the pupils for their opinion on the

¹⁹ Hepple (2014) 67.

²⁰ Hepple (2014) 68.

²¹ Anna Beale, ‘Core Rights and Duties’ in John Wadham, Anthony Robinson, David Ruebain and Susie Uppal (eds) *Blackstone’s Guide to the Equality Act 2010* (3 edn, Oxford University Press 2016) 31-54, 32-33.

²² *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, paras 52-35.

²³ *R v Birmingham City Council ex parte Equal Opportunities Commission* [1989] AC 1155.

²⁴ *Ofsted v Al-Hijrah* [82].

school's segregation policy. The response from these pupils seems to be an underpinning factor in the case. The inspector reported:

“thinks [segregation] is ‘dumb’ because when girls go to college they will mix with boys, and at the moment she doesn’t know how to have any relationship/friendship with boys. Finds that school isn’t helping her get ready. Says some benefits as boys don’t always behave well.”²⁵

Ofsted further cited the opinions of Year 10 boys as concurring on this point, and also highlighted the apparent unease displayed by Year 7 pupils, particularly that:

“students clearly felt very uncomfortable about being with opposite sex... found it difficult to answer questions.”²⁶

This feeling of being unable to engage with the opposite sex raised concerns about how well these children were being socially prepared for “life in modern Britain”. The concern about the lack of engagement with each other and the resultant disadvantage were key, although not the sole, issues giving rise to questions about the overall standard of education provided by *Al-Hijrah*.²⁷

The Court of Appeal Justices demonstrated a willingness to depart from the usually narrow confines of less favourable treatment within the 2010 Act to take a “wide and purposive interpretation”²⁸ of the anti-discrimination legislation. The Justices expanded on the definition of discrimination as envisaged in the Act and concluded that both “separate but equal” as well as “separate but different” treatment can constitute unlawful discrimination, and this broader definition enabled a finding of discrimination in this case.²⁹ While this is to be welcomed as a general development in the application of the legislation, the interesting point to note is that the case involves a Muslim faith school which practices gender segregation, during a political time period where Muslim children and questions of integration and radicalisation are at the forefront of government policies. Further to this, Ofsted’s current Chief Inspector has

²⁵ Ibid [15].

²⁶ Ibid [16].

²⁷ Ibid [17].

²⁸ Ibid [56].

²⁹ Ibid [62]-[70].

openly spoken of the idea of a “muscular liberalism” to be assumed by school leaders to overcome ideologies which “close minds or narrow opportunity”.³⁰ These ideological issues cannot be overlooked when assessing this case.

The Court of Appeal noted that a key concern of Ofsted was “how well leaders were preparing pupils for life in modern Britain”,³¹ and Ofsted’s Report stated that “[The school’s segregation policy] does not accord with fundamental British values and amounts to unlawful discrimination.”³² In particular, they stated that girls and boys cannot develop confident relationships with each other. Such schools are to be distinguished, according to Ofsted’s arguments and the Court of Appeal’s decision, from single sex schools which benefit from a variety of exceptions under Schedule 11 of the Equalities Act.³³ Thus, for the former, the Equality Act is being utilised to challenge and end the practice of segregation due to gender, while for the latter, the Equality Act protects against claims of discrimination where there is selected entry based on gender. It can undoubtedly be argued that both types of school can in fact produce the same outcome for the pupils where gender segregation is concerned, with the only distinguishing aspect being the religious nature of the normative influence underlying the practice. Interestingly, the Equality Act does refer to segregation as evidencing less favourable treatment, but only in the context of race under section 13(5). This is unsurprising given the history of South African Apartheid and North American race segregation. No other protected characteristic has such a specific special provision, although Beale³⁴ states that segregation on other grounds “could amount to less favourable treatment”, however this has not been confirmed by case law.

The difference in treatment of this segregated faith school from many schools across Britain which are single-sex, is problematic. The Court of Appeal failed in this case to adequately scrutinise Ofsted’s claim that “British values” were being undermined. The non-statutory School Inspection Handbook describes the promotion of British values as:

³⁰ Frank Cranmer, ‘Out-of-School Education, Social Cohesion and Ofsted’, (3 February 2018), Law and Religion UK
<<http://www.lawandreligionuk.com/2018/02/03/out-of-school-education-social-cohesion-and-ofsted/>>accessed 20 April 2018

³¹ *Ofsted v Al-Hijrah* [16].

³² *Ibid* [24].

³³ Further, there are General Exceptions under Schedule 3.

³⁴ Beale (n 21) 33.

“acceptance and engagement with the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs; they develop and demonstrate skills and attitudes that will allow them to participate fully in and contribute positively to life in modern Britain.”³⁵

While it can be argued that sex-segregation can undermine expected “attitudes” here, this is equally the case for single-sex schools with protected status. So once again, the question arises of why these two school types are being treated differently. Furthermore, Ofsted conceded a number of points in their report, including that the segregation of the pupils did not impact on the standard of teaching the children received nor the range of subjects available to them. The thrust of the argument was the perceived detriment suffered by the children from not engaging and interacting with members of the opposite sex. Further to this, concerns were raised about pupils awareness of safeguarding issues such as forced marriages.³⁶ However, the argument that this undermines British values seems particularly punitive.

Ofsted has indicated that the outcome of this case will impact on its policy towards all state funded faith schools which operate gender segregation, which means a definite impact on a number of Muslim and Jewish faith schools,³⁷ as well as some Christian ones.³⁸

6 SEX-SEGREGATION, SINGLE-SEX SCHOOLS AND DETRIMENT

The question of the detriment being suffered by the segregation was not scrutinised further by the Court of Appeal, although the issue was raised during the High Court hearing.³⁹ As stated above, the arguments for distinguishing segregated mixed schools from single gender schools,

³⁵ School Inspection Handbook 2018, 40.

³⁶ *Ofsted v Al-Hijrah* [21].

³⁷ A BBC News report suggested that approximately a total of 20 Jewish, Muslim and Christian schools are thought to have similar policies. This appears to be an extremely low number, however, it only includes state funded schools, not those privately funded. <http://www.bbc.co.uk/news/uk-england-birmingham-41609861> (Last visited 22 January 2018).

³⁸ *Interim Executive Board of X School v Her Majesty's Chief Inspector of Education, Children's Services and Skills* [2016] EWHC 2813 (Admin) [11].

³⁹ *Ibid* [95].

which benefit from special exemptions under Schedule 11 of the Equality Act, are weak. Clearly, children at the latter schools suffer similar disadvantages from the lack of socialisation with members of the opposite sex. The decision in this case upheld Ofsted's argument that the deprivation of choice in mixed schools was key. But is this a mere technicality, as the outcome in both settings is the same – a lack of engagement with members of the opposite sex? The answer to this lies in what is meant by “British values” and “life in modern Britain”. It is difficult not to question why Ofsted would take such issue with *Al-Hijrah* when Britain has a centuries old historic tradition of single-sex schools, which continue to exist in Modern Britain and in fact produce our political and judicial leaders to this day; a fact that Lady Justice Gloster makes mention of in her judgment.⁴⁰ Indeed, all three of the esteemed Court of Appeal judges in this case were all educated at single-sex schools.

The need to ensure boys and girls can respectfully and comfortably engage with each other is no doubt a pivotal concern in modern British society. However, this case leaps forward and establishes that removing the choice of such engagement breaches the Equality Act, presenting arguments which tie the highly politicised language of “British values” and “modern Britain” to the issue of sex discrimination, and arguably away from the remit intended within the School Inspection Handbook.

It is highly likely that an inspection of any number of single-sex schools would reveal boys and girls equally keen to cross the fence and engage with the other, and who believe a single sex school is “dumb” as they do not get the chance to engage with the other half of the human race. However, it is equally likely that Ofsted or any school inspectorate would not ask those questions for understanding the values and traditions being upheld by these schools, and protected by the Schedule 11 exemptions from section 85 provisions. It is clear that what makes *Al-Hijrah* different is the religious underpinnings of the decision to segregate, and as a result it is difficult to separate some of the highly political language used in the Report from the faith based nature of the school.

The Court of Appeal did not test the assumption put forward by Ofsted that the pupils are suffering a detriment, nor did they deal with the question of how much engagement would be required to overcome this detriment. Would shared trips or breaks be enough, or will nothing short of full co-education suffice? This seems to be a major oversight. There exist myriad of contradictory evidences testing the impact of gender

⁴⁰ *Ofsted v Al-Hijrah* [126].

segregated education, reflecting an overall unclear outcome. On the one hand, arguments can be made that single gender schools offset gendered roles and norms where education is concerned and undermine gender stereotypes. Girls, in the absence of boys, are not expected to behave “like girls”, and vice versa. A discussion on the potential benefits of single sex education follows, to question the assumption made by Ofsted that there is necessarily a detriment. There are equally evidences which support so-education. However, the purpose here is not to prove which is more convincing, but rather to question the premise of the assumption that single-sex is detrimental which Ofsted argues, and which the Court of Appeal upheld in this case.

Global research on single sex schools suggests differences in achievement are multi-layered and dependent on a multitude of other factors. Firstly, young children below the age of 6 and particularly between ages 4–6 tend to self-segregate when it comes to play, showing a preference to their own gender.⁴¹ This suggests that boys and girls do experience different peer cultures even at a young age,⁴² and this reinforces gendered norms (boys being physically playful and girls being more intellectually engaged). Fabes et al concluded that the gender of playmates had a crucial impact on early school competence.⁴³ The self-segregation at this age is a natural phenomenon.

Where single sex schools are concerned, a number of studies have revealed an array of possible outcomes. For example, research suggests that women from all girls’ schools/colleges tend to be less inhibited about entering traditionally male dominated fields such as the sciences. In a study of 1700 female college students in the US, 40-75% from single sex colleges shifted into neutral or male dominated fields as compared with 25% of women in co-educational schools.⁴⁴ Another study found that the number of female students pursuing maths and sciences dropped when the school became co-educational.⁴⁵ As pointed out by Billger, the source of

⁴¹ Richard A Fabes et al, ‘Early School Competence: The Roles of Sex-Segregated Play and Effortful Control’ (2003) 39(5) *Developmental Psychology*, 848–858, 848.

⁴² Fabes (2003) 849.

⁴³ Fabes (2003) 857.

⁴⁴ Solnick, S J, ‘Changes in Women’s Majors from Entrance to Graduation at Women’s and Coeducational Colleges’ (1995) 48(3) *Industrial and Labor Relations Review*, 505–514.

⁴⁵ Sherrilyn M Billger, ‘Admitting Men into a Women’s College: A Natural Experiment’ (2002) 9 *Applied Economics Letters*, 479–483.

these differences can be highly personal to the individual students,⁴⁶ however they also seem to reflect a negative impact of sharing the learning environment with boys.

Billger's longitudinal study of single sex schooling in the US also revealed that "relative to co-ed schools, the gains from single-sex schooling may be greater for women than men, with 11% higher starting salaries but virtually identical salaries for men."⁴⁷ Thus, the single sex schools are empowering women and raising their economic expectations and/or achievements. On the whole, Billger found that there was a marginal detriment from single-sex education, but concluded that "some positive prospects do nonetheless arise. In some cases, African-American students experience unique gains, and single-sex education may therefore provide an important opportunity to continued improvements in educational quality."⁴⁸ In the UK, another longitudinal study by Sullivan, Joshi and Leonard⁴⁹ into a cohort of single sex educated men and women found that at the age of 42, there was no net detrimental impact on the chances of being employed. Where women were concerned, there was however a "positive premium" of 5% on their wages as compared with women who were co-educated. However, this did not undermine occupational segregation of these women in the labour force, concluding that the "gendered nature of the labour market (and other) institutions is the dominant feature of adult experience rather than any legacy of single sex schooling."⁵⁰ Pertinent for the case under commentary here, Sullivan et al note that "It is an irony that, while the argument against single-sex schooling is that single-sex environments are 'unnatural' for young people, gender segregated environments are seen as quite normal in adult life."⁵¹ Thus, Ofsted's arguments of British values and modern Britain perhaps bely a lack of contextual awareness, and perhaps a utopian vision of sex-equality in modern Britain being imposed on a school, while failing to take account of the reality of norms in modern Britain.

⁴⁶ Sherrilyn M Billger, 'On Reconstructing School Segregation: The Efficacy and Equity of Single-sex Schooling' (2009) 28 *Economics of Education Review*, 393-402, 393-394.

⁴⁷ Billger (2009) 395, 400.

⁴⁸ Billger (2009) 402.

⁴⁹ Alice Sullivan, Heather Joshi and Diana Leonard, 'Single-sex Schooling and Labour Market Outcomes' (June 2011) 37(3) *Oxford Review of Education*, 311-332.

⁵⁰ *Ibid* 329.

⁵¹ Sullivan et al (n 49) 329.

It is interesting that where male students are concerned, Billger found that those who had attended single-sex schools were less likely to pursue science and computers. Perhaps an indication of the lack of expectations imposed on “masculine” subjects in the absence of female students. On the other hand, the male students pursued “business, philosophy/religion, engineering and secretarial skills.”⁵² This outcome of single-sex education should perhaps be a coercive factor where gender equality is concerned. Burton argues that the one main reason why gender inequality persists despite the 2010 Act, and its predecessor legislations, is the issue of occupational segregation which is the tendency for men and women to be employed in different occupations.⁵³ If single-sex schooling breaks down gendered norms where career choices are concerned, the overall impact for gender equality is, surely, positive. Thus, even in the case where short term disadvantage may be identified through the removal of a choice to engage with members of the opposite sex, perhaps the long term gain outweighs any detriment?

Sex discrimination and stereotypes go hand in hand. Kelsey argues that in the US context, sex segregated schools are unconstitutional as the 14th amendment guarantees against sex discrimination, and he argued that segregated schools perpetuate stereotypes about how each gender should behave.⁵⁴ He breaks down this argument at the physiological and biological levels. On the other hand, he cites programmes which seek to enhance the performance of female students in subjects where boys traditionally outperform them such as Mathematics. These “single-sex programs seek to bolster girls’ confidence and interest in math by providing an environment where boys are unable to dominate.”⁵⁵ While Kelsey critiques the positive exam results as possibly influenced by the selection programme for female students undertaking the course, it is clear that the environment to some extent plays a part in increasing the students’ achievements. In the US, single-sex education is a highly political issue.⁵⁶ Elsewhere, Edstrom and Brunila studied gender equality work in Sweden and Finland, and discovered an alliance between

⁵² Billger (n 45) 398.

⁵³ Becci Burton, ‘Neoliberalism and the Equality Act 2010: A Missed Opportunity for Gender Justice?’ (July 2014) 43(2) *Industrial Law Journal* 122, 132.

⁵⁴ Chapple Kelsey, ‘Sports for Boys, Wedding Cakes for Girls: The Inevitability of Stereotyping in Schools Segregated by Sex’ (2016) 9 *Texas Law Review* 537.

⁵⁵ *Ibid* 544.

⁵⁶ Nancy Chi Cantalupo, ‘Comparing Single-Sex and Reformed Coeducation: A Constitutional Analysis’ (2012) 49 *San Diego Law Review* 725.

projectisation and heteronormativity.⁵⁷ A binary construction of boys and girls was identified and the focus on school children revealed the existence of gender stereotypes in co-educational settings, before gender equality awareness is raised. At the point of awareness, “the girls’ group is encouraged to be stronger, braver, more independent and to take more space, while the boys’ group is encouraged to be more socially and linguistically competent.”⁵⁸ They found that the girls’ group is required to change its behavior more than the boys group, placing more pressure on girls. Other factors which have impact for girls of a certain age may be female role models.⁵⁹

This analysis weaves a complex picture of the possible outcomes of sex-segregated schooling. In *Ofsted v Al-Hijrah*, the Court of Appeal held that a harm was suffered by each individual girl and boy pupil. But this decision was reached without adequately testing that harm. Only a small number of pupils are cited in the Ofsted report, raising the question of disparate impact. Zatz’s “disparate impact liability” theory may be of interest here.⁶⁰ While the focus is on employment discrimination law in the US, the 2010 Act provides comparable anti-discrimination provisions for England and Wales. Here, group outcomes are viewed collectively and not all members of the group are expected to suffer. Similarly, in the case of the pregnant women, “the fact that some women who are pregnant or on maternity leave have not been treated unfavourably does not mean that this particular woman’s unfavourable treatment is not because of her pregnancy or maternity leave.”⁶¹ The matter must be viewed from the perspective of the individual claimant. In the *Case of Al-Hijrah* students, the court of Appeal did not require a single claimant pupil to be identified. However, perhaps identifying such a pupil, even anonymously, would have strengthened Ofsted’s arguments of a detriment being suffered.

⁵⁷ Charlotta Edstrom and Khristina Brunila, ‘Troubling Gender Equality: Revisiting Gender Equality Work in the Famous Nordic Model Countries’ (2016) 20(1) *Education as Change* 10.

⁵⁸ Edstrom and Brunila (n 59) 20.

⁵⁹ Ronald G Ehrenberg, Danial D Goldhaber and Dominic J Brewer, ‘Do Teachers’ Race, Gender, and Ethnicity Matter? Evidence from the National Educational Longitudinal Study of 1988’ (1995) 48(3) *Industrial and Labor Relations Review* 547.

⁶⁰ Noah D Zatz, ‘Disparate Impact and the Unity of Equality Law’ (2017) 97 *Boston University Law Review* 1357.

⁶¹ Sally Robertson, ‘Employment Discrimination: Pregnancy and Maternity’ [2017] *Westlaw Insight*.UK.

7 APPEAL

In November 2017, the Association of Muslim Schools (AMS) made an application for addition of a party after the conclusion of an appeal,⁶² in the hope of appealing the decision to the Supreme Court. AMS' concerns were focussed around their 133 membership schools, 10 of whom implemented the same segregation policies as *Al-Hijrah*, and others segregated girls and boys for certain activities. AMS submitted that the Court of Appeal ruling had created uncertainty on what was expected of the schools, and they wished to appeal the decision to the Supreme Court. AMS can be classed as the relevant diocesan authority for any state funded Muslim school in accordance with the Education Act and therefore should be consulted in any change to admissions criteria for Muslim schools. Further to this, AMS also conducts its own inspections of its membership schools pursuant to s 48 of the Education Act 2005. This application to the Court was made pursuant to these interests and clarification from the Supreme Court was being sought on the basis that the Appeal Court ruling had created uncertainty on the standard to which these schools would be held upon inspection, and AMS's own statutory obligations when inspecting schools. In particular, they cited the "lack of guidance from Ofsted or the Department for Education on the question of segregation. There has been no public consultation and no official statement that educating girls and boys separately is fundamentally wrong."⁶³

In rejecting the appeal, the court cited a lack of detail in the witness statement provided by AMS, including names of the schools potentially affected and the segregation policies which they adopt. An issue which comes down to a badly drafted application rather than a legitimate lack of concern. It seems clear that the question of wider applicability of this decision which was purported to only be relevant to the particular Ofsted report relating to *Al-Hijrah School*, is a legitimate one. The Appeal Court admitted their "judgments touch on matters of general application"⁶⁴ and also noted that the decision reached in this case will lead Ofsted to

⁶² *HM Chief Inspector of Education, Children's Services and Skills v The Interim Executive Board of Al-Hijrah School v The Secretary of State for Education, The Equality and Human Rights Commission, Southall Black Sisters and Inspire, In the Matter of An Application for Joinder By the Association of Muslim Schools* [2017] EWCA Civ 1787.

⁶³ *Al-Hijrah* (n 65) 12.

⁶⁴ *Al-Hijrah* (n 65) 16.

applying a “consistent approach to all similarly organised schools.”⁶⁵ The Justices cited the acceptance of the decision by Al-Hijrah School and Birmingham City Council and moves to implement the decision as an indication that the matter was resolved. This seems clearly erroneous in light of AMS’s appeal that several other schools operate the same policy and will no doubt be held to the same standard. For this to be clarified, and for this potentially divisive ruling to be legitimately employed by Ofsted at other schools, there seems to be a clear need for a Supreme Court judgment which may confirm the Appeal Court’s decision, but place clear parameters of expected engagement between the pupils to overcome any detriment suffered. While *Al-Hijrah* did not wish to appeal, neither did they oppose AMS’s endeavours to appeal.⁶⁶

8 CONCLUSION

The decision reached by the Court of Appeal in *Ofsted v Al-Hijrah* was criticised by Colin Diamond, corporate director of children and young people at Birmingham City Council, on the basis that Al-Hijrah School were purportedly being held to a higher standard by Ofsted, while other schools with similar policies were being allowed to continue as usual.⁶⁷ During a BBC Radio 4 interview, he questioned Ofsted’s logic in allowing a boys’ school and a girls’ school to operate adjacent to each other, with a fence between them, without difficulties; while simultaneously taking particular issue with boys and girls in the same school, questioning the logic and equity being applied. These are valid points.

Where sex discrimination, in the context of single-sex education, this case raises many questions about the application of the 2010 Act. *Al-Hijrah* purported to be a co-educational school which segregated boys and girls, thereby removing from the pupils the choice of engaging with members of the opposite sex and thereby resulting in a detriment being suffered. However, the Ofsted report following a s 5 inspection of *Al-Hijrah* made reference to politicised terms such as “British values” and “life in modern Britain”, without adequate scrutiny. When the present legal treatment of segregated co-educational schooling is contrasted with

⁶⁵ *Al-Hijrah* (n 65) 96.

⁶⁶ *Al-Hijrah* (n 65) 12.

⁶⁷ BBC, ‘Birmingham Islamic Faith School Guilty of Sex Discrimination’ (*BBC*, 13 October 2017) <<http://www.bbc.co.uk/news/uk-england-birmingham-41609861>> accessed 22 January 2018.

the long established British tradition of single-sex schools, there is a glaring disparity. The latter is protected from discrimination claims by the very same Act seemingly being breached by the segregated school. Despite the technical distinction between the two types of schools, which mean one has the possibility of engagement with the opposite sex, while the other does not, claims of detriment are also inadequately scrutinised by the Appeal Court and evidence abound of the lack of clarity in outcome for those educated in single-sex schools contrasted with co-educational settings.

Finally, the grounds on which AMS was precluded from joining the action and appealing the case to the Supreme Court are unpersuasive, and the resultant position is that faith schools exercising gender segregation can now all expect a visit from Ofsted. How these schools reorganise themselves is yet to be determined, but it is clear that the only way they can continue with single-sex education, if they so wish, is to operate two separate schools, one for boys and one for girls.