

Care Standards

The Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

Heard 16-17 June 2016
Pocock Street, London SE1 0BW

Determination 5 August 2016

BEFORE

**Laurence Bennett (Tribunal Judge)
Linda Redford (Specialist Member)
Heather Reid (Specialist Member)**

BETWEEN:

Cityside Primary Trust

Appellant

v

Secretary of State for Education

Respondent

[2016] 2600.INS

DECISION

Appeal

1. Cityside Primary Trust (Cityside), Proprietor of Ayasofia Primary School (Ayasofia) appeals under Section 124(1)(d) of the Education and Schools Act 2008 (the Act) against the decision by the Secretary of State made 30 December 2015 to remove the School from the Register of Independent Educational Institutions in England.

Attendance

2. Mr Pavlos Eleftheriadis, a Barrister operating under the Bar Pro Bono Unit represented the Appellant. Its witnesses were Mr Mohammed Umair, Ayasofia's Headteacher at the relevant times and a Cityside Trustee, Mr Benjamin Elvidge, Management Consultant and Governor of Ayasofia since 10 February 2016, Mr Jahid Ahmed, Chair of Governors and School Improvement Officer. Mr Dawood Khan, another witness notified was not called at the hearing.
3. Ms Claire Darwin, a Barrister instructed the Government Legal Department represented the Respondent, Secretary of State. Its witnesses were Mr Peter Swift, Department for Education (DfE) Deputy Director and Head of Independent Education and School Safeguarding Division and Ms Gaynor Roberts, Her Majesty's Inspector.

4. The parties named individuals who would attend the hearing but were not called to give evidence.

Preliminary

5. The decision made by the Secretary of State which is the subject of the appeal is dated 30 December 2015.
6. The appeal was registered on 29 January 2016.
7. In compliance with case management directions the Respondent prepared the hearing bundle comprising 599 pages.
8. At the hearing Mr Eleftheriadis accepted that witness statements and parental letters from P.582 onwards with the exception of Mr Elvidge's statement should be disregarded as these witnesses would not be called.
9. The Appellant subsequently submitted additional written legal argument and authorities. This was subject to further case management and was admitted at the hearing.
10. At the conclusion of the hearing the Tribunal directed submission of specified additional information by the Appellant.
11. Both parties provided written closing submissions which took into account the Appellant's additional information.
12. In this decision page references relate to the paginated hearing bundle.

The hearing

13. All oral evidence was taken on oath or affirmation. The Appellant presented its evidence first.

Background

14. Cityside, the Appellant was created by Declaration of Trust made 28 January 2007 and is a charity with objects to advance the Islamic Faith, advance the education of pupils, to educate and assist young persons through leisure time activities and encourage other charitable activities.
15. Ayasofia was established by the Trust within the London Borough of Tower Hamlets in April 2009 and registered to accept pupils between ages 4 and 11.
16. Ofsted, commissioned by the DfE carried out an inspection of the school on 10 March 2015 following which on 6 May 2015 the Secretary of State required the Appellant to submit an Action Plan under Section 114(3) of the Act.
17. A further inspection took place on 9 July 2015 following which the Secretary of State rejected the Action Plan.

18. A further Ofsted inspection took place on 29/30 September 2015 without notice and a report was published in December 2015.
19. Ofsted undertook a further inspection focussed upon admission and attendance registers on 14 December 2015.
20. On 30 December 2015 the Secretary of State advised Cityside of her decision to remove the school from the Register.
21. As a consequence of the appeal Ayasofia continues in operation although at the time of the hearing the summer break was imminent. It has around 80 children on its register, a reduction from the previous number on roll which was around 100 children.

The Law

22. Section 115 of the Act gives the Secretary of State power to take enforcement action against a registered independent educational institution if satisfied that one of more of the independent educational institutions standards is or are not being met in relation to the institution. Subsections 3 and 4 of that Section impose requirements in relation to submission and approval of an Action Plan.
23. Section 114 of the Act sets out the relevant evidence that can be taken into account by the Secretary of State and the Secretary of State's powers where an Action Plan has been submitted, to approve the Plan with or without modifications or reject the Plan.
24. Section 116 of the Act gives power to the Secretary of State when entitled to take enforcement action to impose a relevant restriction or remove the institution from the Register.
25. Section 124 of the Act gives a right of appeal against a decision of the Secretary of State under Section 116. The Tribunal's powers under the appeal are to confirm the decision, direct it has no effect or make an order imposing a relevant restriction.
26. The Independent Schools Standards are to be found in the Education (Independent Schools Standards) Regulations 2014.

Evidence

27. In reaching its conclusions relating to the salient facts the Tribunal took into account the written and oral evidence. It is noted that there is little dispute about the underlying events which are set out in chronological form in the Respondent's response to the appeal. There is no dispute that Ofsted inspections took place and Action Plans were prepared.
28. Whilst the Appellant criticised and commented on the nature and interpretation of individual standards by Ofsted, submitting by reference to the Regulations some are layered or complex, it was accepted during the hearing that standards were not met. To the contrary, it is the Appellant's submission that further time and facility should have been given to allow Action Plans to be developed and improvements take place.

29. In accordance with directions at the conclusion of the oral hearing the Appellant submitted a list of disputed findings in the March 2015 and April 2016 inspection reports. Oral evidence was not so detailed and evidence was not submitted to substantiate claims that some standards were met. It is noted that even taking this into account the Respondent has calculated that arising from the March 2015 inspection, the school accepted its failure to meet a significant number of the standards. The September 2015 inspection findings contained in the report dated December 2015 were undisputed; this specified failures in 54 standards, 11 failings specified in the April 2016 report are not disputed.

Tribunal's findings

30. In the absence of specific evidence and dispute by the Appellant to show that it is meeting all of the standards we are satisfied there was a continuing significant and material failure to meet standards sufficient for enforcement action to take place.
31. We are further reinforced in this view by the acceptance of this position in the evidence given on oath by the Appellant's witnesses. We found each of the witnesses credible. Any lack of clarity in respect of points such as numbers of teachers in employment, trustees and governors appeared to us as genuine confusion or poor recollection and not in our opinion an attempt to be evasive or mislead the Tribunal. This, however, reflects on the competence and approach of the school's management.
32. There are few disputed issues of fact in this appeal, the detailed legal submissions prepared by Mr Eleftheriadis on behalf of the Appellant seek to establish that the Secretary of State did not have power to terminate registration and should have taken enforcement action by way of requiring a further Action Plan. This clearly indicates acceptance that there were continuing failures to meet standards that were appropriate for enforcement.
33. It follows that it is not necessary save as set out below to reach further findings of fact as there are limited points upon which this is appropriate; where necessary we have applied the civil standard of proof taking into account the burden of proof which we determine requires the Appellant trust to satisfy the Tribunal it is meeting the standard concern as analogous to the Tribunal's approach in *Marshall v CSCI* [2009] WHC 1286. Although this authority was disputed by the Appellant because it did not concern school regulation, we find sufficient nexus between the status of the parties and regulatory framework for this to be the case.

Submissions

34. We are grateful for the close attention by Mr Eleftheriadis and the Bar Pro Bono Unit, instructed at a late stage who set out the Appellant's submissions in great detail both prior to the hearing and at its close. This has enabled full participation of the Appellant.
35. In that the Respondent considers these submissions contain new grounds of appeal not originally stated within the appeal submission, we are satisfied that it is appropriate they are heard, taking into account the Tribunal's own overriding objective and in the interests of justice. It is clear the Respondent was not

prejudiced by the late detailed submission and was in a position to consider and answer the points made and has done so in its own submissions.

36. For ease of reference our findings below follow the sequence of the Appellant's written closing submissions and take into account the factual background. The submissions address the grounds of appeal set out in original appeal and as enlarged within the Appellant's legal argument. It is noted that the Respondent's written closing submissions incorporate by reference Ms Darwin's speaking note dated 15 June 2016. In following this format there is inevitably some duplication of our findings.

Tribunal's consideration

Enforcement action

37. The Appellant has highlighted the powers of the Tribunal particularly that given under Section 124(3)(c) of the Act and on that basis submits the Tribunal should not confine itself to considering whether one or more standards is not being met. This was a matter of fact which was not in question at the Tribunal. No evidence of meeting the majority of the standards judged by Ofsted inspectors not to have been met was given.
38. The Appellant comments on the burden of proof. In essence the Appellant does not accept that it is required to show that standards are met. As noted above, there is little evidence challenging Ofsted's inspection findings and implicit admission of failures by way of acknowledgement of action necessary to comply. We find it is not necessary to consider this point further.
39. Mr Umair gave in his evidence details of some action taken but successive inspectors found different standards were not met. Overall, we find compelling evidence that unmet standards in the April 2016 inspection report were correctly identified and are accurate. Mr Umair admitted so in his evidence at the hearing. Mr Elvidge confirmed areas requiring attention.
40. The burden of proof has little practical application in the circumstances because of the admission by the school's Headteacher and Senior Manager at the Tribunal. We, however, did not hear persuasive evidence that standards were met. We conclude it was appropriate for the Secretary of State to rely on the inspection reports. Inspection is a regulatory tool designed to reveal information about compliance with prescribed standards and in cases such as this when an Action Plan has been submitted whether the steps have been taken and if so have they addressed and remedied the failures.
41. The Appellant submits that the Secretary of State should not have decided upon deregistration as alternative enforcement process was available; that of requiring a further Action Plan. While the Secretary of State has wide powers under Section 114 of the Act to require an Action Plan, Sections 115 and 116 of the Act do not limit the Secretary of State to a continual cycle of requesting further Action Plans deferring indefinitely the exercise of other enforcement powers including deregistration.
42. We are satisfied having noted the inspection evidence that the failings in regard to unmet standards were serious and significant. It is clear to us that the failings had a

significant effect upon the quality of the education of pupils. Successive inspections illustrated a lack of capacity to respond to inspection findings, sustain improvement and consistently meet required minimum standards. Mr Swift described the school as having a long way to go to meet the standards and rectify the serious and significant failings. We conclude it entirely open to the Secretary of State to take enforcement action including deregistration as provided by the Act.

Religious character of the school

43. There is little doubt that Ayasofia was created for the purpose of providing education for Muslim pupils. The evidence shows that its curriculum is centred around its faith. It was not, however, registered or designated as a faith school. It has been referred to as such by others and we consider it an independent school whose pupils are Muslim and that the school exclusively catered for its pupil population.
44. Mr Umair detailed Ayasofia's religious ethos and individual approach to a religious curriculum in a co-educational setting. He pointed to some novel arrangements, for instance in relation to the girls' religious curriculum. It is appropriate to mention that Mr Umair's evidence gave an understanding of the fine balance of the requirements of parents seeking a very conservative and traditional Islamic education with the need to introduce a wider modern context. It is clear to us that the school's success in finding pupils in no small part relates to Mr Umair's own standing and reputation within the local community.
45. Mr Eleftheriadis addressed at some length the human right to religion and belief and in that context the right to education. For this and other reasons he submitted that the proportionality of the Secretary of State's decision should be considered. This is further examined below.
46. Mr Umair stated that Ayasofia followed a curriculum with particular characteristics, however, the evidence does not lead us to conclude that its religious instruction or ethos was outside the range of provision that would be available in a school with Islamic faith characteristics. Evidence was provided that the London Borough in which Ayasofia is situated has many maintained schools for primary aged pupils which, on balance of probabilities, will have a high proportion of Muslim pupils. Further, there are a number of independent Islamic primary schools. We do not consider the rights highlighted by Mr Eleftheriadis irrespective of other considerations require a different approach by the Secretary of State to regulation of Ayasofia. Whilst closure might inconvenience its pupils it does not deny their or their parent's rights to the exercise of their religion and education. The effect of enforcement action relates to a particular school in this case for failure to meet National minimum standards. Whilst it was asserted the school matches the needs of a particular section of the religious community, we find the maintenance of National minimum standards by deregistration within the proportionate powers of the Secretary of State.
47. The suggestion that home schooling, possibly unregistered with the Local Education Authority is the likely alternative to pupils' attendance at Ayasofia is not accepted as alternative schools are available. Even so, whilst risk factors were put forward in evidence and attention drawn to research, we observe as stated by the Secretary of State that home schooling is not unlawful and is an option open to parents. It was not purported that attendance at Ayasofia is a requirement of

religious observance or belief that could not otherwise be satisfied. We note the contrary in that Ayasofia has introduced elements that might not usually be found within a conservative religious curriculum, such as girls learning the Koran and visits to non-Islamic places of worship. On that basis we consider home schooling to be a less likely option for this subset of parents notwithstanding their previous background.

The fairness of the decision

48. To an extent this duplicates or is an amalgam of other avenues of argument by the Appellant. The Tribunal notes the submission that action by Ofsted and the Secretary of State was either motivated by or was part of a larger agenda pursued with other agencies. It is further suggested that Ofsted acted in cooperation with those agencies. We note Ofsted participated in a meeting with Police and Local Authority officials. Mr Swift (P.78, para 16) stated that the relevant case conference in July 2015 considered safeguarding issues. We find this within the range of appropriate Ofsted involvement. It followed an inspection and production of an Action Plan by Ayasofia which was not approved. The inspection revealed safeguarding issues particularly around attendance and registration. The sequence of events can be found in the chronology (P.40-44).
49. We have not identified unfairness or an undisclosed aim to reduce the risk of radicalisation influenced inspection judgements. The Appellant has itself raised the issue of radicalisation to the opposite effect as a reason to consider deregistration disproportionate. We conclude Ofsted was not complicit in a process to review the school other than on the basis of educational standards including safeguarding nor do we find that the Secretary of State's actions were based on findings other than a continuing failure to comply with National minimum standards for education.
50. We have concluded earlier that it was open to the Secretary of State to consider deregistration as an enforcement action. We have also concluded that it must be open to the Secretary of State to decide on deregistration and that it would not be disproportionate in respect of Ayasofia to take that course and not request a further Action Plan. Earlier Action Plans were put in place and subsequent inspections found both continuing and different failures to meet National minimum standards.
51. We find Ofsted's reasons for participating in a conference with other agencies for safeguarding reasons within its remit. We also do not accept the submission that rejection of an Action Plan is unusual. Mr Swift said at the hearing that 6 other independent schools in Tower Hamlets had Action Plans rejected. This contention seems to gainsay the Appellant's earlier submissions that the Regulatory framework is still untested and undeveloped.
52. We observe that the briefing note prepared by Ofsted for the Secretary of State (P.125, para 5) refers to the multiagency case conference. Having noted the contents of the March, July and September 2015 inspection reports we do not consider that the comments of other agencies even if taken into account would have been determinative or added to the gravity of the situation. There were clear educational reasons to reject the Action Plan and support removal from the Register.
53. The July 2015 inspection focussed on attendance, admission and registration; September 2015 was a full inspection. There was sufficient time for improvements

to have been made between the March and September 2015 inspections. We conclude that it was neither unfair, disproportionate nor inappropriate for an enforcement decision to be taken by the Secretary of State with the full range of actions available on 30 December 2015.

Wrong and inaccurate evidence

54. Reference is made to totals of the numbers failings set out within briefing notes for the Secretary of State particularly 13 May 2016 (P.131). It is not however submitted that Ayasofia had improved to an acceptable standard. Submissions question whether the numerical presentation gives an accurate impression and presumably masks improvements. We find the Appellant's arguments inconsistent in that it is submitted a further Action Plan should have been required. This shows acknowledgement of continuing failures to meet standards. We do not believe that the Secretary of State would have been misled. The qualitative issue was "Is this school meeting the National Minimum Standards?" The question of relative deterioration is not determinative.
55. The advice for the Secretary of State (P.133) refers to the length of time since the original inspection and highlights that some improvements have been made and that positive signs are emerging "Wider subject range, better treatment of girls and a more coherent leadership" This advice shows deterioration is not the key but the severity of the failings and the continued failure of school to make substantial improvement were the summary of the concerns. Mr Swift emphasised the position in his evidence, he described the school as very poor and not having addressed the inspection findings with sufficient urgency.

Erroneous and understanding of standards

56. It is submitted that Ofsted inspectors were insufficiently versed in the independent school standards. Reference was made to single standards having a number of requirements which are not separate standards themselves. To misunderstand this would affect the judgements reached and would lead to a quantitative assessment not a qualitative assessment.
57. We find this point similar to the immediately preceding submissions. We are satisfied from examination of the briefing notes produced by Ofsted for the SOS that advice was based on the professional and qualitative judgements of the inspectors and evaluation of the inspection reports which were available to the Secretary of State. Mr Swift confirmed this in evidence. We do not consider the Secretary of State was misled or unable to understand either the advice or the basis upon which it was given.

Evidence of improvement

58. Extracts of the briefing notes (P.133) are set out above. We have commented on the availability of the underlying inspection reports. We are satisfied that despite acknowledgement of some improvement that the continuing failings were significant and are sufficient to lead to enforcement action.
59. It is suggested that in effect this was work in progress. Mr Umair and Mr Elvidge's evidence clearly stated that change is needed and will take time. This is reinforced by the information given in accordance with the directions made at the conclusion of the hearing which raises questions about the observance of the school's trust deed requirements and exact awareness of which teachers remain in post.

60. In essence, the Appellant considers that further long dated Action Plans should have been requested. For the reasons above we are satisfied the Secretary of State can take a view based on the history of inspection and enforcement, the circumstances at the date of the decision and in this case a conclusion about the prospects of timely change. We find the Secretary of State's decision understandable and noting the inspection reports and evidence given at the hearing, an appropriate course of action.

Proportionality

61. In that it is not clear in the above and in response to the Appellant's repeated submissions we find the Secretary of State's decision proportionate and consistent with the maintenance of educational standards for all children and to the interests of and avoidance of detriment to the particular children attending Ayasofia and their parents.

62. We are not persuaded that there is a binary consequence, that is attendance at Ayasofia a school judged to have significant failings or home schooling with attendant risks. The Borough has many schools and evidence was given of alternative independent faith schools.

Tribunal's conclusions

63. For the reasons above we do not consider that proportionality requires a school to continue in circumstances where failings as identified during the Ofsted inspection process have been identified. Many failings are continuing and the totality of the evidence does not give confidence that there is sufficient understanding on the part of the Senior Leadership Team or Trustees or the necessary resources to make changes within a reasonable period.

64. Whilst it is suggested Ayasofia has taken important decisions, there was a lack of specificity of fresh arrangements and we are not confident the school has either appropriate management and staffing in place. Information now available such as changes in staffing and premises is not satisfactory. We conclude it unrealistic to request a further Action Plan nor do we have confidence that it could be relied upon.

65. We are satisfied that Mr Umair was committed to the development of education of a particular nature for the Islamic community and have no reason to doubt his good intentions. It is disappointing there was a sustained failure to observe if not an active disregard of the Regulatory requirements for provision of independent education.

66. It is implicit in the Appellant's submissions that they consider Ofsted should have taken a management consultancy approach and perhaps advised Ayasofia beyond the comments contained in inspection reports. This was voiced by Mr Umair at the hearing. We do not consider this is Ofsted's role, it is an organisation charged with inspection of schools. Whilst incidental advice may be given, not least by identification of failings and requirements, it is not Ofsted's role to take active part in management of individual schools.

67. Although references and comments within statements included by the Appellant in the bundle were not put forward in evidence, we have not identified a complaint by a parent. Whether or not parents would wish to engage with the Authorities, we find it unlikely they would have been aware of the relevant minimum standards nor what they could reasonably expect from a registered independent school. The position remains that significant failings continued and in our findings these outweigh the positive educational practices available for pupils including the religious approach.
68. We find the language of trauma to pupils within the oral evidence and submissions exaggerated and mendacious. No clinical evidence was provided and we consider this a gloss. Parents' religious views cannot override fundamental requirements appropriate for the safe and effective delivery of education to their children whilst attending school. The issues relate to provision of minimum educational standards.
69. Taking into account the written and oral evidence provided we conclude in accordance with Section 124(4) of the Act that the Secretary of State's decision is confirmed and the Secretary of State must remove Ayasofia from the Register of Independent Schools on 5 September 2016 or the day before its new school term whichever is the earliest.

Order:

70. The appeal fails.
71. Ayasofia Primary School shall be removed from the Register of Independent Schools on 5 September 2016 or the day before its new school term whichever is the earliest.

Laurence J Bennett
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date: 22 August 2016