



16 December 2009

PRESS SUMMARY

R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellants) [2009] UKSC 15

On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 626

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lady Hale, Lord Brown, Lord Mance, Lord Kerr, Lord Clarke

BACKGROUND TO THE APPEAL

E challenged JFS's (formerly the Jews' Free School) refusal to admit his son, M, to the school. JFS is designated as a Jewish faith school. It is over-subscribed and has adopted as its oversubscription policy an approach of giving precedence in admission to those children recognised as Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth ("the OCR").

The OCR only recognises a person as Jewish if: (i) that person is descended in the matrilineal line from a woman whom the OCR would recognise as Jewish; or (ii) he or she has undertaken a qualifying course of Orthodox conversion. E and M are both practising Masorti Jews. E is recognised as Jewish by the OCR but M's mother is of Italian and Catholic origin and converted to Judaism under the auspices of a non-Orthodox synagogue. Her conversion is not recognised by the OCR. M's application for admission to JFS was therefore rejected as he did not satisfy the OCR requirement of matrilineal descent.

E challenged the admissions policy of JFS as directly discriminating against M on grounds of his ethnic origins contrary to section 1(1)(a) of the Race Relations Act 1976 ("the 1976 Act"). Alternatively, E claimed that the policy was indirectly discriminatory.

The High Court rejected both principal claims. The Court of Appeal unanimously reversed the High Court, holding that JFS directly discriminated against M on the ground of his ethnic origins. JFS appealed to the Supreme Court. The United Synagogue also appealed a costs order made against it by the Court of Appeal.

JUDGMENT

The Supreme Court has dismissed the appeal by The Governing Body of JFS. On the direct discrimination issue, the decision was by a majority of five (Lord Phillips, Lady Hale, Lord Mance, Lord Kerr and Lord Clarke) to four (Lord Hope, Lord Rodger, Lord Walker and Lord Brown). The Majority held that JFS had directly discriminated against M on grounds of his ethnic origins. Lords Hope and Walker in the minority would have dismissed the appeal on the ground that JFS had indirectly discriminated against M as it had failed to demonstrate that its policy was proportionate. Lords Rodger and Brown would have allowed JFS's appeal in its entirety. The Supreme Court unanimously allowed in part the United Synagogue's appeal on costs.

REASONS FOR THE JUDGMENT

The Majority Judgments

- The judgments of the Court should not be read as criticising the admissions policy of JFS on moral grounds or suggesting that any party to the case could be considered ‘racist’ in the commonly understood, pejorative, sense. The simple legal question to be determined by the Court was whether in being denied admission to JFS, M was disadvantaged on grounds of his ethnic origins (or his lack thereof) (paras [9], [54], [124] and [156]).

Direct Discrimination

General Principles

- In determining whether there is direct discrimination on grounds of ethnic origins for the purposes of the 1976 Act, the court must determine, as a question of fact, whether the victim’s ethnic origins are the factual criterion that determined the decision made by the discriminator (paras [13], [16], [20] and [62]). If so, the motive for the discrimination and/or the reason why the discriminator considered the victim’s ethnic origins significant is irrelevant (paras [20], [22], [62] and [142]).
- Where the factual criteria upon which discriminatory treatment is based are unclear, unconscious or subject to dispute the court will consider the mental processes of the discriminator in order to infer - as a question of fact from the available evidence - whether there is discrimination on a prohibited ground (paras [21], [64], [115] and [133]). It is only necessary to consider the mental processes of the discriminator where the factual criteria underpinning the discrimination are unclear (para [114]).
- To treat an individual less favourably on the ground that he *lacks* certain prescribed ethnic origins constitutes direct discrimination. There is no logical distinction between such a case and less favourable treatment predicated upon the fact that an individual *does* possess certain ethnic origins (paras [9] and [68]).
- Direct discrimination does not require that the discriminator intends to behave in a discriminatory manner or that he realises that he is doing so (para [57]).
- There is no need for any consideration of mental processes in this case as the factual criterion that determined the refusal to admit M to JFS is clear: the fact that he is not descended in the matrilineal line from a woman recognised by the OCR as Jewish. The subjective state of mind of JFS, the OCR and/or the Chief Rabbi is therefore irrelevant (paras [23], [26], [65], [78], [127], [132], [136], [141] and [147]-[148]). The crucial question to be determined is whether this requirement is properly characterised as referring to M’s ethnic origins (paras [27], [55] and [65]).

Application in This Case

- The test applied by JFS focuses upon the ethnicity of the women from whom M is descended. Whether such women were themselves born as Jews or converted in a manner recognised by the OCR, the only basis upon which M would be deemed to satisfy the test for admission to JFS would be that he was descended in the matrilineal line from a woman recognised by the OCR as Jewish (para [41] **per Lord Phillips**). It must also be noted that while it is possible for women to convert to Judaism in a manner recognised by the OCR and thus confer Orthodox Jewish status upon their offspring, the requirement of undergoing such conversion itself constitutes a significant and onerous burden that is not applicable to those born with the requisite ethnic origins – this further illustrates the essentially ethnic nature of the OCR’s test (para [42] **per Lord Phillips**). The test of matrilineal descent adopted by JFS and the OCR is one of ethnic origins. To discriminate against a person on this basis is contrary to the 1976 Act (para [46] **per Lord Phillips**).
- The reason that M was denied admission to JFS was because of his mother’s ethnic origins, which were not halachically Jewish. She was not descended in the matrilineal line from the original Jewish people. There can be no doubt that the Jewish people are an ethnic group within the meaning of the 1976 Act. While JFS and the OCR would have overlooked this fact

if M's mother had herself undergone an approved course of Orthodox conversion, this could not alter the fundamental nature of the test being applied. If M's mother herself was of the requisite ethnic origins in her matrilineal line no conversion requirement would be imposed. It could not be said that M was adversely treated because of *his* religious beliefs. JFS and the OCR were indifferent to these and focussed solely upon whether M satisfied the test of matrilineal descent (paras [66] and [67] per Lady Hale).

- Direct discrimination on grounds of ethnic origins under the 1976 Act does not only encompass adverse treatment based upon membership of an ethnic group defined in the terms elucidated by the House of Lords in *Mandla v Dowell-Lee* [1983] 2 AC 548. The 1976 Act also prohibits discrimination by reference to ethnic origins in a narrower sense, where reference is made to a person's lineage or descent (paras [80]-[84] per Lord Mance). The test applied by JFS and the OCR focuses on genealogical descent from a particular people, enlarged from time to time by the assimilation of converts. Such a test is one that is based upon ethnic origins (para [86] per Lord Mance). This conclusion is buttressed by the underlying policy of the 1976 Act, which is that people must be treated as individuals and not be assumed to be like other members of a group: treating an individual less favourably because of his ancestry ignores his unique characteristics and attributes and fails to respect his autonomy and individuality. The UN Convention on the Rights of the Child requires that in cases involving children the best interests of the child are the primary consideration (para [90] per Lord Mance).
- The reason for the refusal to admit M to JFS was his lack of the requisite ethnic origins: the absence of a matrilineal connection to Orthodox Judaism (para [112] per Lord Kerr). M's ethnic origins encompass, amongst other things, his paternal Jewish lineage and his descent from an Italian Roman Catholic mother. In denying M admission on the basis that he lacks a matrilineal Orthodox Jewish antecedent, JFS discriminated against him on grounds of his ethnic origins (paras [121]-[122] per Lord Kerr).
- It might be said that the policy adopted by JFS and the OCR was based on both ethnic grounds and grounds of religion, in that the reason for the application of a test based upon ethnic origins was the conviction that such a criterion was dictated by Jewish religious law. The fact that the rule adopted was of a religious character cannot obscure or alter the fact that the content of the rule itself applies a test of ethnicity (paras [129]-[131] per Lord Clarke).
- The fact that a decision to discriminate on racial grounds is based upon a devout, venerable and sincerely held religious belief or conviction cannot inoculate or excuse such conduct from liability under the 1976 Act (paras [35], [92], [113] and [119]-[120]).

Further Comments

- It is not clear that the practice-based test adopted by JFS following the Court of Appeal's judgment will result in JFS being required to admit children who are not regarded by Jewish by one or more of the established Jewish movements (para [50] per Lord Phillips).
- It may be arguable that an explicit exemption should be provided from the provisions of the 1976 Act in order to allow Jewish faith schools to grant priority in admissions on the basis of matrilineal descent; if so, formulating such an exemption is unquestionably a matter for Parliament (paras [69]-[70] per Lady Hale).

Indirect Discrimination

- As the case is one of impermissible direct discrimination it is unnecessary to address the claim of indirect discrimination (para [51] per Lord Phillips).
- Direct and indirect discrimination are mutually exclusive; both concepts cannot apply to a single case concurrently. As this case is one of direct discrimination it could not be one of indirect discrimination (para [57] per Lady Hale).
- *Ex hypothesi*, if the case was not direct discrimination, then the policy was indirectly discriminatory (para [103]). The policy pursued the legitimate aim of effectuating the obligation imposed by Jewish religious law to educate those regarded by the OCR as Jewish (paras [95]-[96]). However, JFS had not, and on the basis of the evidence before the court could not, demonstrate that the measures it adopted, given the gravity of their adverse effect upon

individuals such as M, were a proportionate means of pursuing this aim (paras [100]-[103], [123] and [154]).

The Minority Judgments

Direct Discrimination

- In identifying the ground on which JFS refused to admit M to the school the Court should adopt a subjective approach which takes account of the motive and intention of JFS, the OCR and the Chief Rabbi (para [195]-[197] **per Lord Hope**).
- In the instant case JFS, the OCR and the Chief Rabbi were subjectively concerned solely with M's *religious* status, as determined by Jewish religious law. There is no cause to doubt the Chief Rabbi's frankness or good faith on this matter (para [201] **per Lord Hope**).
- The availability of conversion demonstrates that the test applied is inherently of a religious rather than racial character (para [203] **per Lord Hope**).
- It is inapt to describe the religious dimension of the test being applied by JFS as a mere motive (paras [201] **per Lord Hope**; [227] **per Lord Rodger**).
- The appropriate comparator for M in this case is a child whose mother had converted under Orthodox Jewish auspices. The ground of difference in treatment between M and such a child would be that the latter's mother had completed an approved course of Orthodox conversion (paras [229]-[230] **per Lord Rodger**).

Indirect Discrimination

Lords Hope and Walker

- Clearly, children who were not of Jewish ethnic origin in the matrilineal line were placed at a disadvantage by JFS's admission policy relative to those who did possess the requisite ethnic origins (para [205]).
- JFS's policy pursued the legitimate aim of educating those regarded as Jewish by the OCR within an educational environment espousing and practising the tenets of Orthodox Judaism (para [209]).
- The 1976 Act placed the onus on JFS to demonstrate that in formulating its policy it had carefully considered the adverse effect of its policy on M and other children in his position and balanced this against what was required to give effect to the legitimate aim which it sought to further (para [210]). There is no evidence that JFS considered whether less discriminatory means might be adopted which would not undermine its religious ethos: the failure to consider alternate, potentially less discriminatory, admission policies means that JFS is not entitled to a finding that the means which it has employed are proportionate (paras [212] and [214]).

Lords Rodger and Brown

- The objective pursued by JFS's admission policy – educating those children recognised by the OCR as Jewish – was irreconcilable with any approach that would give precedence to children not recognised as Jewish by the OCR in preference to children who were so recognised. JFS's policy was therefore a rational way of giving effect to the legitimate aim pursued and could not be said to be disproportionate. (para [233] **per Lord Rodger**; para [256] **per Lord Brown**).

The United Synagogue Costs Appeal

- The United Synagogue must pay 20 per cent. of E's costs from the Court of Appeal but not those incurred in the High Court. The 20 per cent. of E's costs in the High Court previously allocated to the United Synagogue must be borne by JFS in addition to the 50 per cent. that it has already been ordered to pay (para [217]).

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative

document. Judgments are public documents and are available at:
www.supremecourt.gov.uk/decided-cases/index.html