Michaelmas Term
[2009] UKSC 15
On appeal from: [2009] EWCA Civ 626

JUDGMENT

R (on the application of E) (Respondent) *v* Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others
R (on the application of E) (Respondent) *v* Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue) (Appellants)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON

16 December 2009

Heard on 27, 28 and 29 October 2009

Appellant (JFS)

Lord Pannick QC
Peter Oldham
Professor Christopher McCrudden
(Instructed by Stone King Sewell LLP)

Appellant (United Synagogue)
Ben Jaffey

(Instructed by Farrer & Co LLP)

Respondent
Dinah Rose QC
Helen Mountfield
(Instructed by Bindmans LLP)

Interveners (First Appeal)

Intervener (The Board of Deputies of British Jews)
David Wolfson QC
Sam Grodzinski
Professor Aileen McColgan
(Instructed by Teacher Stern Selby)

Intervener

Robin Allen QC
Will Dobson

(Instructed by Equality and Human Rights Commission)

Intervener (United Synagogue)

Ben Jaffey

(Instructed by Farrer & Co LLP)

Intervener (The Secretary of State for Children, Schools and Families)
Thomas Linden QC
Dan Squires
(Instructed by Treasury Solicitors)

Intervener (British Humanist Association)
David Wolfe
Adam Sandell
(Instructed by Leigh Day & Co)

Note:

The five judgements which uphold the judgment of the Court of Appeal on the issue of direct discrimination appear first. The most detailed description of the background facts and the relevant statutory provisions is set out in the judgment of Lord Hope.

LORD PHILLIPS, PRESIDENT

Introduction

1. The seventh chapter of Deuteronomy records the following instructions given by Moses to the people of Israel, after delivering the Ten Commandments at Mount Sinai:

> "1. When the Lord thy God shall bring thee into the land whither thou goest to possess it, and hath cast out many nations before thee, the Hittites, and the Girgashites, and the Amorites, and the Canaanites, and the Perizzites, and the Hivites, and the Jebusites, seven nations greater and mightier than thou;"
>
> "2 And when the Lord thy God shall deliver them before thee; thou shalt smite them, and utterly destroy them; thou shalt make no covenant with them, nor show mercy unto them:"
>
> "3. Neither shalt thou make marriages with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son."
>
> "4. For they will turn away thy son from following me, that they may serve other gods: so will the anger of the Lord be kindled against you, and destroy thee suddenly."

2. The third and fourth verses appear to be a clear commandment against intermarriage lest, at least in the case of a Jewish man, the foreign bride persuade her husband to worship false gods. It is a fundamental tenet of Judaism, or the Jewish religion, that the covenant at Sinai was made with all the Jewish people, both those then alive and future generations. It is also a fundamental tenet of the Jewish religion, derived from the third and fourth verses that I have quoted, that the child of a Jewish mother is automatically and inalienably Jewish. I shall describe this as the "matrilineal test". It is the primary test applied by those who practise or believe in the Jewish religion for

deciding whether someone is Jewish. They have always recognised, however, an alternative way in which someone can become Jewish, which is by conversion.

3. Statistics adduced in evidence from the Institute for Jewish Policy Research ("the Institute") show that in the first half of the 20th century over 97% of the Jews who worshipped in this country did so in Orthodox synagogues. Since then there has been a diversification into other denominations, and a minority of Jews now worship in Masorti, Reform and Progressive synagogues. The Institute records a significant decline in the estimated Jewish population in the United Kingdom, which now numbers under 300,000, of which about 70% are formally linked to a synagogue and 30% unaffiliated. Those who convert to Orthodox Judaism in this country number only 30 or 40 a year.

4. The requirements for conversion of the recently formed denominations are less exacting than those of Orthodox Jews. Lord Jonathan Sacks, Chief Rabbi of the United Hebrew Congregation of the Commonwealth and leader of the Orthodox Jews in this country, issued a paper about conversion, through his office ("the OCR") on 8 July 2005. In it he stated that conversion was "irreducibly religious". He commented:

> "Converting to Judaism is a serious undertaking, because Judaism is not a mere creed. It involves a distinctive, detailed way of life. When people ask me why conversion to Judaism takes so long, I ask them to consider other cases of changed identity. How long does it take for a Briton to become an Italian, not just legally but linguistically, culturally, behaviourally? It takes time."

A Jew by conversion is a Jew for all purposes. Thus descent by the maternal line from a woman who has become a Jew by conversion will satisfy the matrilineal test.

5. JFS is an outstanding school. For many years far more children have wished to go there than there have been places in the school. In these circumstances it has been the policy of the school to give preference to those whose status as Jews is recognised by the OCR. That is to children whose mothers satisfy the matrilineal test or who are Jews by conversion by Orthodox standards. The issue raised by this appeal is whether this policy has resulted in an infringement of section 1 of the Race Relations Act 1976 ("the 1976 Act").

6. These proceedings were brought on the application of E in relation to M, his 13 year old son. E wished to send M to JFS and M wished to go there. He was refused

admission because he was not recognised as a Jew by the OCR. His father is recognised as such but the OCR does not regard that as relevant. What matters is whether his mother was a Jew at the time of his birth. She is Italian by birth. As she was not born of a Jewish mother she could only have been recognised by the OCR as a Jew and as capable of conferring Jewish status on M if she had converted to Judaism before M was born. She had undergone a course of conversion to Judaism before M's birth under the auspices of a non-Orthodox Synagogue, not in accordance with the requirements of Orthodox Jews. The result is that, while her conversion is recognised by Masorti, Reform and Progressive Jews, it is not recognised by the OCR.

7. E and his wife are divorced. They practise the Jewish faith and worship at a Masorti synagogue. E failed in these judicial review proceedings in which he challenged the admissions policy of JFS before Munby J, but succeeded on an appeal to the Court of Appeal. The question of M's admission has already been resolved between the parties, but the Governing Body of JFS is concerned at the finding of the Court of Appeal that the school's admissions policy infringes the 1976 Act, as are the United Synagogue and the Secretary of State for Children, Schools and Families. Indeed this case must be of concern to all Jewish faith schools which have admissions policies that give preference to Jews.

8. While the court has appreciated the high standard of the advocacy addressed to it, it has not welcomed being required to resolve this dispute. The dissatisfaction of E and M has not been with the policy of JFS in giving preference in admission to Jews, but with the application of Orthodox standards of conversion which has led to the OCR declining to recognise M as a Jew. Yet this appeal necessarily raises the broader issue of whether, by giving preference to those with Jewish status, JFS is, and for many years has been, in breach of section 1 of the 1976 Act. The implications of that question extend to other Jewish faith schools and the resolution of the bone of contention between the parties risks upsetting a policy of admission to Jewish schools that, over many years, has not been considered to be open to objection.

9. This demonstrates that there may well be a defect in our law of discrimination. In contrast to the law in many countries, where English law forbids direct discrimination it provides no defence of justification. It is not easy to envisage justification for discriminating *against* a minority racial group. Such discrimination is almost inevitably the result of irrational prejudice or ill-will. But it is possible to envisage circumstances where giving preference to a minority racial group will be justified. Giving preference to cater for the special needs of a minority will not normally involve any prejudice or ill-will towards the majority. Yet a policy which directly favours one racial group will be held to constitute racial discrimination against all who are not members of that group – see, for instance, *Orphanos v Queen Mary College* [1985] AC 761 at p. 771. Nothing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy of JFS in particular or the policies of Jewish faith schools in general, let alone as suggesting that these policies are "racist" as that word is generally understood.

Direct discrimination

10. I propose in the first instance to consider whether the admissions policy of the JFS has led it to discriminate directly against M on racial grounds. The relevant provisions of the 1976 Act are as follows.

11. **1. Racial discrimination**

> "(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-
>
> (a) On racial grounds he treats the other less favourably than he treats or would treat other persons…"

3. Meaning of "racial grounds…"

> "(1) In this Act, unless the context otherwise requires –
>
> 'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins;
>
> 'racial group' means a group of persons defined by reference to colour, race, nationality, or ethnic or national origins;
>
> (2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act".

Section 17 deals with educational establishments and provides that it is unlawful for the governors of a maintained school, such as JFS, to discriminate against a person in the terms on which it offers to admit him to the establishment as a pupil.

12. It is common ground that JFS discriminated against M in relation to its terms of admission to the school. The issue of whether this amounted to unlawful direct discrimination on racial grounds depends on the answer to two questions: (1) What are the grounds upon which M was refused entry? (2) Are those grounds racial?

Grounds

13. In the phrase "grounds for discrimination", the word "grounds" is ambiguous. It can mean the motive for taking the decision or the factual criteria applied by the discriminator in reaching his decision. In the context of the 1976 Act "grounds" has the latter meaning. In deciding what were the grounds for discrimination it is necessary to address simply the question of the factual criteria that determined the decision made by the discriminator. This approach has been well established by high authority. In *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 the entry criteria applied by the Council for admission to selective single-sex grammar schools was in issue. More places were available in boys' schools than in girls' schools. The result was that girls had to obtain higher marks in the entry examination than boys. The motive for the disparity was, no doubt, that this was necessary to ensure that entry to the schools was determined on merit. The House of Lords held, none the less, that the disparity constituted unlawful discrimination contrary to the Sex Discrimination Act 1975 which prohibited discrimination against a woman "on the ground of her sex". Lord Goff of Chieveley, with whom the other members of the Committee agreed, said at p. 1194:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned (see section 66(3) of the Act of 1975), is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex. Indeed, as Mr. Lester pointed out in the course of his argument, if the council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975."

14. The difference between the motive for discrimination and the factual criteria applied by the discriminator as the test for discrimination lay at the heart of the division between the majority and the minority of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751, another case where sex discrimination was in issue. The Council discriminated between men and women, aged between 60 and 65, in relation to the terms on which they were admitted to swim in a leisure centre run by the Council.

Women in this age band were admitted free whereas men had to pay an entry charge. The motive for this discrimination could perhaps be inferred by the manner in which this rule was expressed, namely that those of pensionable age were to be admitted free of charge; women became of pensionable age when they were 60, men when they were 65. Counsel for the Council explained at p. 758 that the council's reason for giving free access to those of pensionable age was that their resources were likely to have been reduced by retirement. The Court of Appeal had treated this motive as being the relevant "ground" for discriminating in favour of women and against men rather than the factual criterion for discrimination, which was plainly the sex of the person seeking admission to the centre.

15. Lord Bridge, delivering the first opinion of the majority, held that the reasoning of the Court of Appeal was fallacious and that the Council's policy discriminated on the ground of sex. At p. 764 he said of their judgment:

> "The Court of Appeal's attempt to escape from these conclusions lies in construing the phrase 'on the ground of her sex' in section 1(1)(a) as referring subjectively to the alleged discriminator's 'reason' for doing the act complained of. As already noted, the judgment had earlier identified the council's reason as 'to give benefits to those whose resources would be likely to have been reduced by retirement' and 'to aid the needy, whether male or female.' But to construe the phrase, 'on the ground of her sex' as referring to the alleged discriminator's reason in this sense is directly contrary to a long line of authority confirmed by your Lordships' House in *Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission*."

16. Having cited the passage from Lord Goff's judgment that I have set out at paragraph 12 above, he commented, at p 765:

> "Lord Goff's test, it will be observed, is not subjective, but objective. Adopting it here the question becomes: 'Would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex?' An affirmative answer is inescapable."

This "but for" test was another way of identifying the factual criterion that was applied by the Council as the basis for their discrimination, but it is not one that I find helpful. It is

better simply to ask what were the facts that the discriminator considered to be determinative when making the relevant decision.

17. Lord Ackner, concurring, remarked at pp. 769-770:

> "There might have been many reasons which had persuaded the council to adopt this policy. The Court of Appeal have inferred that 'the council's reason for giving free swimming to those of pensionable age was to give benefits to those whose resources would be likely to have been reduced by retirement': per Sir Nicolas Browne-Wilkinson V.-C. [1990] 1 Q.B. 61, 73D. I am quite prepared to make a similar assumption, but the council's motive for this discrimination is nothing to the point: see the decision of this House in *Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission* [1989] AC 1155."

18. Lord Griffiths, giving the first of the minority opinion, took a different view. He said at p. 768:

> "The question in this case is did the council refuse to give free swimming to the plaintiff because he was a man, to which I would answer, no, they refused because he was not an old age pensioner and therefore could presumably afford to pay 75p to swim."

19. In a lengthy opinion Lord Lowry concurred with Lord Griffiths. The essence of his reasoning appears in the following passage at pp. 775-776:

> "section 1(1)(a) refers to the activities of the discriminator: the words 'on the ground of his sex' provide the link between the alleged discriminator and his less favourable treatment of another. They introduce a subjective element into the analysis and pose here the question 'Was the sex of the appellant a consideration in the council's decision?' Putting it another way, a 'ground' is a reason, in ordinary speech, for which a person takes a certain course. He knows what he is doing and why he has decided to do it. In the context of section 1(1)(a) the discriminator knows that he is

> treating the victim less favourably and he also knows the ground on which he is doing so. In no case are the discriminator's thought processes immaterial."

20. The contrast between the reasoning of the majority and of the minority in this case is, I believe, clear. I find the reasoning of the majority compelling. Whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied as the basis for discrimination. The motive for discriminating according to that criterion is not relevant.

21. The observations of Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and *Chief Constable of West Yorkshire Police v Khan* [2001] 1 WLR 1947, cited by Lord Hope at paragraphs 193 and 194 of his judgment, throw no doubt on these principles. Those observations address the situation where the factual criteria which influenced the discriminator to act as he did are not plain. In those circumstances it is necessary to explore the mental processes of the discriminator in order to discover what facts led him to discriminate. This can be illustrated by a simple example. A fat black man goes into a shop to make a purchase. The shop-keeper says "I do not serve people like you". To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated.

22. In *Nagarajan,* Lord Nicholls approved the reasoning in both the *Birmingham City Council* case and the *Eastleigh Borough Council* case. At p. 511 he identified two separate questions. The first was the question of the factual basis of the discrimination. Was it because of race or was it because of lack of qualification? He then pointed out that there was a second and different question. If the discriminator discriminated on the ground of race, what was his motive for so doing? That question was irrelevant.

23. When, at para 29 in *Khan,* Lord Nicholls spoke of a "subjective test" he was speaking of the exercise of determining the *facts* that operated on the mind of the discriminator, not his motive for discriminating. The subjective test, described by Lord Nicholls, is only necessary as a seminal step where there is doubt as to the factual criteria that have caused the discriminator to discriminate. There is no need for that step in this case, for the factual criteria that governed the refusal to admit M to JFS are clear.

The JFS Admissions Policy

24. The admissions policy published by JFS for the 2007/8 academic year began as follows:

> "1.1 It is JFS ("the School") policy to admit up to the standard admissions number children who are recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR) *or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion to Judaism under the approval of the OCR."*

The passage that I have placed in italics was introduced in the 2007/8 year for the first time. No candidate has yet satisfied that criterion, and for present purposes it can be disregarded.

25. In recent years there have been more applicants for entry to JFS who were recognised as Jewish by the OCR than there were places in the school. The admissions policy, somewhat confusingly, describes this as a situation where the school is "oversubscribed". Further criteria are laid down for establishing priority in this situation. Here also there has recently been a significant change. Children in care and children with a sibling in the school were and are given priority; the change comes at the next stage. Up to the 2007/8 year priority was next given to applicants who had attended a Jewish primary school. This has now been changed so that these are pro-rated with children who have attended a non-Jewish primary school. The former criterion would have been likely to favour Jewish children who were being brought up in the Jewish faith. We were not told the reason for this change, and it has no direct bearing on the issues raised by this appeal.

26. The criteria whose application debarred M from entry to JFS are readily identified. They are the criteria recognised by the OCR as conferring the status of a Jew. The child will be a Jew if at the time of his birth his mother was a Jew. His mother will be a Jew if her mother was a Jew or if she has converted to Judaism in a manner that satisfies the requirements of the Orthodox religion. M does not satisfy those criteria because of his matrilineal descent. His mother was not born of a Jewish mother and had not at the time of his birth complied with the requirements for conversion, as laid down by the OCR. Accordingly M does not satisfy the Orthodox test of Jewish status.

Are the grounds racial?

27. In answering this question it is important to distinguish between two different, albeit not wholly independent, considerations. The first is the reason or motive that leads the OCR to impose these criteria. The second is the question of whether or not the criteria are characteristics of race. The reason why the OCR has imposed the criteria is that the OCR believes that these are the criteria of Jewish status under Jewish religious law, established at and recognised from the time of Moses. This is not the end of the enquiry. The critical question is whether these requirements of Jewish law are racial, as defined by section 3 of the 1976 Act. Do the characteristics define those who have them by reference to "colour, race, nationality or ethnic or national origins?"

The JFS case

28. I shall summarise the case advanced by Lord Pannick QC for JFS in my own words. There exists a Jewish ethnic group. Discrimination on the ground of membership of this group is racial discrimination. The criteria of membership of this group are those identified by Lord Fraser of Tullybelton in *Mandla v Dowell Lee* [1983] 2 AC 548. In that case a declaration was sought that refusing admission to a school of a Sikh wearing a turban was indirect racial discrimination. The critical question was whether Sikhs comprised a "racial group" for the purposes of the 1976 Act. It was common ground that they were not a group defined by reference to colour, race, nationality or national origins. It was contended, however, that they were a group defined by "ethnic origins". In considering the meaning of this phrase, Lord Fraser at pp 561-562 referred to a meaning of "ethnic" given by the Supplement to the Oxford English Dictionary (1972): "pertaining to or having common racial, cultural, religious, or linguistic characteristics, esp. designating a racial or other group within a larger system…". His comments in relation to this definition have been set out in full by Lord Mance at paragraph 83 of his judgment and as Lord Mance remarked they merit reading in full. It suffices, however, to cite the passage at p. 562 where Lord Fraser set out the seven characteristics, some of which he held would be shared by, and would be the touchstone of, members of an ethnic group:

> "The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin,

> or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.
>
> A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member."

29. The Orthodox test of who is a Jew focuses on matrilineal *descent*. Discrimination on the basis of descent *simpliciter* is not necessarily discrimination on racial grounds. To discriminate against someone because he is not the son of a peer, or the son of a member of the SOGAT printing union, is not racial discrimination. Under the Orthodox test the Jewish woman at the head of the maternal line may be a convert of any nationality and from any ethnic background. Furthermore, because the Orthodox test focuses exclusively on the female line, any Jewish national or ethnic blood can become diluted, generation after generation, by the blood of fathers who have no Jewish characteristics of any kind. This is likely to happen if a Jewish woman marries out of and abandons the Jewish faith.

30. It is possible today to identify two different cohorts, one by the *Mandla* criteria and one by the Orthodox criteria. The cohort identified by the *Mandla* criteria forms the Jewish ethnic group. They no longer have a common geographical origin or descent from a small number of common ancestors, but they share what Lord Fraser regarded as the essentials, a long shared history, of which the group is conscious as distinguishing it from other groups and the memory of which it keeps alive and a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. The man in the street would recognise a member of this group as a Jew, and discrimination on the ground of membership of the group as racial discrimination. The *Mandla* group will include many who are in the cohort identified by the Orthodox criteria, for many of them will satisfy the matrilineal test. But there will be some who do not.

31. So far as the cohort identified by the Orthodox test is concerned, many of these will also fall within the *Mandla* group. But there will be some, indeed many, who do not. Most of these will be descendants from Jewish women who married out of and abandoned the Jewish faith. They will not satisfy the two vital criteria identified by Lord Fraser.

Indeed, they may be unaware of the genetic link that renders them Jewish according to the Orthodox test.

32. Thus, in Lord Pannick's submissions the Orthodox test is not one that necessarily identifies members of the Jewish ethnic group. It is a test founded on religious dogma and discrimination on the basis of that test is religious discrimination, not racial discrimination.

Discussion

33. Initially I found Lord Pannick's argument persuasive, but on reflection I have concluded that it is fallacious. The fallacy lies in treating current membership of a *Mandla* ethnic group as the exclusive ground of racial discrimination. It ignores the fact that the definition of "racial grounds" in section 3 of the 1976 Act includes "ethnic or national *origins"* (my emphasis). Origins require one to focus on *descent.* Lord Pannick is correct to submit that descent *simpliciter* is not a ground of racial discrimination. It will only be such a ground if the descent in question is one which traces racial or ethnic origin.

34. This leads me to a further argument advanced on behalf of JFS, which found favour with Munby J and is accepted by Lord Hope. This is that the matrilineal test is a religious test and that discrimination on the basis of that test is religious, not racial. This argument falls into two parts: (i) the matrilineal test is a test laid down by Jewish religious law; (ii) the matrilineal test is not a test of ethnic origin or ethnic status but a test of religious origin and religious status.

35. The first part of this argument focuses, as has Lord Hope, on the reason why the matrilineal test is applied. The reason is that the JFS and the OCR apply the test for determining who is a Jew laid down by Orthodox Jewish religious law. What subjectively motivates them is compliance with religious law, not the ethnicity of the candidates who wish to enter the school. My reaction to this argument will already be clear. It is invalid because it focuses on a matter that is irrelevant – the motive of the discriminator for applying the discriminatory criteria. A person who discriminates on the ground of race, as defined by the Act, cannot pray in aid the fact that the ground of discrimination is one mandated by his religion.

36. The second argument requires more detailed analysis. It is that the criteria applied by the matrilineal test are religious criteria. They identify the religious status of the woman at the head of the maternal line and the religious status of the child at the end of the line. They have nothing to do with ethnicity.

37. Lord Hope suggests that the validity of this argument can be demonstrated by contrasting the position of a person descended from a woman converted a century ago in an Orthodox synagogue with the position of a person descended from a woman converted a century ago in a non-Orthodox synagogue. JFS would recognise the former as having Jewish status, but not the latter but the discrimination would result from the application of religious criteria.

38. This example illustrates the fact that today, although not a century ago, in the very small number of cases where the question of whether someone is Jewish depends upon conversion, there is a possibility that different denominations will, as a result of differences between the criteria that they require for conversion, differentiate between them. If so, identifiable sub-groups of Jews may develop, distinguished by religious criteria. This does not, however, help to determine whether the sub-groups are sub-groups of those who share the Jewish religion or sub-groups of those who share Jewish ethnicity, or indeed both. Conversion has, for millennia, been accepted by all Jews as one of the ways in which a person can become a Jew, and the evidence that we have seen does not suggest that different tests of conversion have been applied until recent times.

39. One of the difficulties in this case lies in distinguishing between religious and ethnic status. One of the criteria of ethnicity identified by Lord Fraser is a shared religion. In the case of Jews, this is the dominant criterion. In their case it is almost impossible to distinguish between ethnic status and religious status. The two are virtually co-extensive. A woman who converts to Judaism thereby acquires both Jewish religious status and Jewish ethnic status. In the Chief Rabbi's paper about conversion that I quoted at the beginning of this judgment he says:

> "What is conversion? People often refer to the case of Ruth the Moabite, whose story is told with such beauty in the book that bears her name. It is from Ruth's reply to her mother –in- law Naomi that the basic principles of conversion are derived. She said: 'Where you go, I will go. Where you stay, I will stay. Your people will be my people, and your God my God.' That last sentence – a mere four words in Hebrew – defines the dual nature of conversion to this day. The first element is an identification with the Jewish people and its fate ('Your people will be my people'). The second is the embrace of a religious destiny, the covenant between Israel and God and its commands ('Your God will be my God')."

40. I also found helpful in this context a passage in the response to a request for information from the Treasury Solicitor by Rabbi Dr Tony Bayfield, the head of the movement for Reform Judaism. It is headed "Background Information" and I do not believe it to be controversial:

> "I believe that you are correct in your understanding of the OCR's criteria for determining whether a child is Jewish.
>
> This definition is, in essence, shared by the entire Jewish world both in Britain and globally. There are nuances – the most significant of which is that the Liberal Movement (Liberal Judaism) in Britain regards as Jewish a child either of whose parents is Jewish (Liberal Judaism represents about 8% of synagogue affiliations; the other 92% of affiliations are to groupings which follow the tradition of the maternal line). However, all Jewish institutions worldwide – as far as I know – would say that Jewish identity is determined by either descent or conversion.
>
> There is a verse in the Book of Deuteronomy (Ch 29 v14) which describes the covenant between God and the Jewish people made at Sinai as being made both with those who stood there [at the foot of Sinai on] that day and also with those who were not there that day. Tradition defines 'those who were not there' as descendants and converts.
>
> Conversion has been a feature of Jewish life for thousands of years. It has been most prolific when Jews have lived in tolerant, open societies and least prolific when Jews have been persecuted and state law has prohibited conversion to Judaism. But it has always taken place and means that Jews exhibit a range of facial features – any visit to Israel will reveal Jews of different skin colours and appearance. Jews are not a race within any accepted or acceptable definition of the word. The phrase 'ethnic group' is sometimes suggested but since ethnic can mean either cultural or racial or a mixture of the two, it is not very helpful. The best definition or description that I know is that Jews are a people bound together by ties of history and culture. Which brings us back to the verse from Deuteronomy.
>
> Jews are a people defined by the Sinai myth (not a pejorative term) of descent, of a continuous chain made up of descendants and converts, the latter becoming parts of the chain, indistinguishable from those who are Jewish by descent, inheriting the history, the culture (at core a religious culture) and at once becoming part of it.

> So, the OCR's definition of Jewish status is, in its essence, universal – descent or conversion."

41. This passage demonstrates a number of matters. First that the test of descent is not restricted to Orthodox Jewry but is a universal test applied by those who consider themselves to be Jews. Secondly that, whatever their racial, national and ethnic background, conversion unquestionably brings the convert within the *Mandla* definition of Jewish ethnicity. She becomes a member of the Jewish people. See also the comparison made by the Chief Rabbi between conversion and changing nationality in my earlier quotation. Thirdly the passage demonstrates that the religious test of matrilineal descent does not apply an idiosyncratic criterion that has no connection to race. It is a test which focuses on the race or ethnicity of the woman from whom the individual is descended. Where a Jew is descended by the maternal line from a woman who has converted to Judaism, the matrilineal link is with an ethnic Jew.

42. There is this further important point. Focusing on conversion ignores the fact that the matrilineal test is not restricted to descent from Jews by conversion. The Jews to whom Moses spoke at Mount Sinai would have shared all seven of the characteristics of ethnic identity itemised by Lord Fraser in *Mandla.* The passage in Deuteronomy to which Jews look as the basis of the matrilineal test plainly focuses on race. Many Jews are highly conscious of their particular geographical and national roots. We had evidence of Cohens who trace their ancestry back to the servants at the Temple and who, for that reason, are prohibited from marrying a convert. For these reasons it is plain that the relevant characteristics of the relative to whom the maternal line leads are not simply religious. The origin to which the line leads can be racial and is, in any event, ethnic.

43. Thus we are not here dealing with descent from a peer, or from a member of SOGAT, but a woman whose race, possibly, and her ethnicity, certainly, as well as her religion, are Jewish. David Frei, the Registrar of the London Beth Din, states in his witness statement that matrilineal descent is "a criterion of Jewish identity", that "being Jewish is a matter of religious status under Jewish religious law" and that "in orthodoxy, Jewish status is solely and irreducibly a religious issue". I take these statements to mean that the test of Jewish status is a test laid down exclusively by religion. It would not be right to read them as meaning that the only thing that matrilineal descent does is to identify religious status, whether of the ancestor at the head of the line or of the descendant at the other. This would not be consistent with the first element of the dual nature of conversion, as described by the Chief Rabbi. Nor would it be consistent with the fact that the matrilineal test embraces racial origin. To the Jew the matrilineal descendant is a member of the Jewish family and a member of the Jewish religion. The two are inextricably intertwined.

44. The descendant will not necessarily be a member of a *Mandla* Jewish ethnic group; that is the group that has the essential criteria identified by Lord Fraser. He may,

indeed, have none of the seven criteria in the list. The gentile in the street would not identify such a person as a Jew. Equally, he would not identify such a person as a member of the Jewish religion. Membership of a religion or faith normally indicates some degree of conscious affiliation with the religion or faith on the part of the member.

45. The question of the "status" of the matrilineal descendant may thus depend upon whether one is applying the subjective viewpoint of a Jew or the objective *Mandla* test. But one thing is clear about the matrilineal test; it is a test of ethnic origin. By definition, discrimination that is based upon that test is discrimination on racial grounds under the Act.

46. Lord Pannick is correct to say that it is possible to identify two different cohorts, or groups, with an overlapping membership, those who are descended by the maternal line from a Jew, and those who are currently members of the Jewish ethnic group. Discrimination against a person on the grounds that he or she is, or is not, a member of either group is racial discrimination. JFS discriminates in its admission requirements on the sole basis of genetic descent by the maternal line from a woman who is Jewish, in the *Mandla* as well as the religious sense. I can see no escape from the conclusion that this is direct racial discrimination.

The consequences of the majority decision.

47. The website of the JFS states that

> "Whilst two thirds or more of our students have attended Jewish primary schools, a significant number of our year 7 intake has not attended Jewish schools and some enter the school with little or no Jewish education. Many come from families who are totally committed to Judaism and Israel; others are unaware of Jewish belief and practice. .. "

Initially this gave me the impression that successful candidates for entry to JFS included a significant number who had no connection with Judaism other than a matrilineal link with a Jewish woman, so that they fell outside the *Mandla* ethnic Jewish group. On reflection I found this an unlikely scenario. Any parents who apply to send their children to JFS relying on matrilineal Jewish descent must, at least, have an awareness of that link with Judaism. Evidence from the JFS suggests rather more than this. The school's information sheet which is sent to prospective teaching staff states:

> "The modern JFS serves almost the whole breadth of the Anglo-Jewish community in Greater London. About 85% of its students come from Barnet, Harrow, Brent and Hertsmere…our students come from the widest possible range of social, economic and religious backgrounds….Our parents represent a very broad range of society. *They all, however, share two things in common; a strong sense of Jewish identity* and, in almost all cases, a keen sense of ambition for their children" (emphasis added).

48. This suggests that those who decide to send their children to JFS satisfy the *Mandla* criteria for belonging to an ethnic group, even though some of them do not attend a synagogue. They live in the same part of London, they are conscious of the wife's Jewish descent, and they have a strong sense of Jewish identity. This is likely to include an appreciation of Jewish history and culture. If this is correct, then the reality is that the JFS, in common with other Jewish faith schools, is in practice discriminating in favour of a sub-group of *Mandla* ethnic Jews, who also satisfy the matrilineal requirement. The fact that the JFS conditions of admission would give precedence to candidates who satisfy the descent requirement but do not satisfy the *Mandla* test of Jewish ethnicity is of no practical significance.

49. This appeal has been concerned with what has, in practice, been only the threshold test for admission to the JFS; matrilineal descent. For at least the last ten years the JFS has been oversubscribed with candidates for admission who satisfy this test. The problem has been how to choose between them. The evidence does not suggest that anyone has challenged the matrilineal test in principle. It is, after all, a test that has general acceptance as the criterion of being a Jew. Apart from M's challenge, evidence has been given of two others, but each of these was a challenge on the ground of a failure to recognise the mother's conversion, not a challenge against the admission criteria themselves.

50. Concern has been expressed that the majority decision will compel Jewish faith schools to admit children whom the Jewish religion does not recognise as being Jewish, that is children who are not descended from Jews by the maternal line. It is not clear that this is so. As a result of the decision of the Court of Appeal the JFS has published a new admission policy for admission in September 2010. This applies a test of religious practice, including "synagogue attendance, Jewish education and/or family communal activity". As matrilineal descent or conversion is the requirement for membership of the Jewish faith according to the law of that faith, those who satisfy a practice test are likely to satisfy this requirement. Thus, instead of applying the matrilineal descent test by way of direct discrimination, the school will be applying a test that will indirectly discriminate in favour of those who satisfy the matrilineal descent test. It is not clear that the school will now be faced with applications from those who do not satisfy the test.

Indirect discrimination

51. Having decided that there has been in this case direct racial discrimination, it would be possible to go on to consider the hypothetical question of whether, if JFS's admissions policy had constituted indirect discrimination, it would have been justifiable. I do not propose to embark on that exercise, which would involve, among other considerations, an analysis of the policy underlying the exception made for faith schools in relation to religious discrimination by section 50 of the Equality Act 2006. I have not found it necessary to consider the provisions of that Act, for they have no bearing on the issue of direct racial discrimination.

52. For the reasons that I have given I would dismiss the substantive appeal.

Costs

53. The United Synagogue has appealed against the order for Costs made by the Court of Appeal. I concur in the basis upon which Lord Hope has held that this appeal should be allowed. Submissions in writing as to the appropriate order in respect of the costs of both appeals to the Supreme Court should be submitted within 14 days.

LADY HALE

54. No-one in this case is accusing JFS (as the Jews' Free School is now named) or the Office of the Chief Rabbi of discrimination on grounds of race as such. Any suggestion or implication that they are "racist" in the popular sense of that term can be dismissed. However, the Race Relations Act 1976 caters also for discrimination on grounds of colour, nationality or ethnic or national origins: see s 3(1). This case is concerned with discrimination on account of "ethnic origins". And the main issue is what that means – specifically, do the criteria used by JFS to select pupils for the school treat people differently because of their "ethnic origins"?

55. My answer to that question is the same as that given by Lord Phillips, Lord Mance, Lord Kerr and Lord Clarke and for the same reasons. That we have each written separate opinions underlines the fact that we have each reached the same conclusion through a process of independent research and reasoning. It is only because the debate before us and between us has called in question some fundamental principles of

discrimination law that I feel it necessary to underline them yet again. First, the Race Relations Act 1976 creates two different statutory torts, direct and indirect discrimination. It also creates two different forms of indirect discrimination, the original form provided for in section 1(1)(b) and the later form derived from the European Directive (2000/43 EC), provided for in section 1(1A). The later form applies to the discrimination prohibited by section 17, in admission to educational establishments, which is the context here: see s 1(1B)(b). If the later form applies, the original form does not: see s 1(1C).

56. The basic difference between direct and indirect discrimination is plain: see Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA 1293, [2006] 1 WLR 3213, para 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.

57. Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in *Elias*, at para 117, "The conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. But it is significant that section 57(3) provides that, in respect of the earlier form of indirect discrimination under section 1(1)(b), "no award of damages shall be made if the respondent proves that the requirement or condition in question was not applied with the intention of treating the claimant unfavourably on racial grounds". We are concerned with the later form of indirect discrimination, under section 1(1A), to which section 57(3) does not apply, but the fact that this exception to the available remedies was made suggests that Parliament did not consider that an intention to discriminate on racial grounds was a necessary component of either direct or indirect discrimination. One can act in a discriminatory manner without meaning to do so or realising that one is. Long-standing authority at the highest level confirms this important principle.

58. The leading case on direct discrimination is *R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] 1 AC 1155. So far as I am aware, it has never previously been suggested that it set the law on the wrong track: quite the reverse. As is well known, there were more grammar school places for boys than for girls in Birmingham with the result that girls had to do better than boys in the entrance examination in order to secure a place. The council did not mean to discriminate. It bore the girls no ill will. It had simply failed to correct a historical imbalance in the places available. It was nevertheless guilty of direct discrimination on grounds of sex. Lord Goff of Chieveley said this, at p 1194A:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, although it may be relevant so far as remedies are concerned . . . is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex. Indeed, …. if the council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975."

He went on to point out that this was well-established in a long line of authority, citing *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] 1 WLR 1485, 1494, per Browne-Wilkinson J; *R v Secretary of State for Education and Science, Ex parte Keating* (1985) 84 LGR 469, 475, per Taylor J; and *Ministry of Defence v Jeremiah* [1980] QB 87, 98, per Lord Denning MR.

59. The "but for" test was endorsed again by the House in the rather more controversial case of *James v Eastleigh Borough Council* [1990] 2 AC 751. Again, the facts are well-known. A husband and wife, both aged 61, went to their local swimming pool. The husband was charged 75 pence and the wife was let in free. Once again the council had the best of motives. People who had reached pensionable age were let in free. But pensionable age directly discriminated between men and women on grounds of their sex. It followed that the swimming pool admission charges did so too. As Lord Bridge of Harwich said, at pp 765-6, "the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex". Lord Ackner was to the same effect, at p 769: "The policy itself was crystal clear – if you were a male you had, vis-à-vis a female, a five-year handicap. . . . The reason why this policy was adopted can in no way affect or alter the fact that the council had decided to implement and had implemented a policy by virtue of which men were to be treated less favourably than women, and were to be so treated on the ground of, i.e. because of, their sex". Lord Goff of Chieveley amplified what he had said in *Birmingham*, at p 774:

> "Whether or not the treatment is less favourable in the relevant sense, i.e. on the ground of sex, may derive either from the application of a gender-based criterion to the complainant, or from selection by the defendant of the complainant because of his or her sex; but, in either event, it is not saved from constituting unlawful discrimination by the fact that the defendant acted from a benign motive. However, in the majority of cases, I doubt if it is necessary to focus upon the intention or motive of the defendant in this way. This is because, as I see it, cases of direct

> discrimination under section 1(1)(a) can be considered by asking the simple question: would the complainant have received the same treatment from the defendant but for his or her sex."

60. Although this decision was clearly on all fours with the *Birmingham* case, it was reached only by a majority. Lord Lowry preferred a subjective rather than an objective approach to "on grounds of sex". Lord Griffiths, interestingly, pointed out that to impose a retirement age of 60 on women and 65 on men was discriminatory on the grounds of sex. It would result in women being less well off than men at 60. "But what I do not accept is that an attempt to redress the result of that unfair act of discrimination by offering free facilities to those disadvantaged by the earlier act of discrimination is, itself, necessarily discriminatory 'on grounds of sex'" (p 768). Lord Griffiths was there challenging the concept of symmetrical formal equality: that it is just as discriminatory to treat a man less favourably than a woman, even though the object is to redress the impact of previous less favourable treatment of a woman. But there can be no doubt that the original sex and race discrimination legislation intended, through the mechanism of direct discrimination, to achieve symmetrical formal equality between men and women, black and white, rather than to redress any historic disadvantage of one against the other. Attempts to do so, for example by quotas or all women shortlists, are still highly controversial.

61. Despite this difference of opinion, the decisions in *Birmingham* and *James* have been applied time and time again. They were affirmed by the House of Lords in the victimisation case of *Nagarajan v London Regional Transport* [2000] 1 AC 501. As Lord Nicholls of Birkenhead said, at p 511: "Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign".

62. However, Lord Nicholls had earlier pointed out that there are in truth two different sorts of "why" question, one relevant and one irrelevant. The irrelevant one is the discriminator's motive, intention, reason or purpose. The relevant one is what caused him to act as he did. In some cases, this is absolutely plain. The facts are not in dispute. The girls in *Birmingham* were denied grammar school places, when the boys with the same marks got them, simply because they were girls. The husband in *James* was charged admission to the pool, when his wife was not, simply because he was a man. This is what Lord Goff was referring to as "the application of a gender-based criterion".

63. But, as Lord Goff pointed out, there are also cases where a choice has been made because of the applicant's sex or race. As Lord Nicholls put it in *Nagarajan*, "in every case it is necessary to inquire why the complainant received less favourable treatment.

This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator" (pp 510-511). In *James*, Lord Bridge was "not to be taken as saying that the discriminator's state of mind is irrelevant when answering the crucial, anterior question: why did the complainant receive less favourable treatment?"

64. The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of "anterior" enquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else – usually, in job applications, that elusive quality known as "merit". But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in *Nagarajan*, "An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did . . . Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(a) " (p 512).

65. This case is not in that category. There is absolutely no doubt about why the school acted as it did. We do not have to ask whether they were consciously or unconsciously treating some people who saw themselves as Jewish less favourably than others. Everything was totally conscious and totally transparent. M was rejected because he was not considered to be Jewish according to the criteria adopted by the Office of the Chief Rabbi. We do not need to look into the mind of the Chief Rabbi to know why he acted as he did. If the criterion he adopted was, as in *Birmingham* or *James*, in reality ethnicity-based, it matters not whether he was adopting it because of a sincerely held religious belief. No-one doubts that he is honestly and sincerely trying to do what he believes that his religion demands of him. But that is his motive for applying the criterion which he applies and that is irrelevant. The question is whether his criterion is ethnically based.

66. So at long last I arrive at what, in my view, is the only question in this case. Is the criterion adopted by the Chief Rabbi, and thus without question by the school, based upon the child's ethnic origins? In my view, it clearly is. M was rejected because of his mother's ethnic origins, which were Italian and Roman Catholic. The fact that the Office of the Chief Rabbi would have over-looked his mother's Italian origins, had she

converted to Judaism in a procedure which they would recognise, makes no difference to this fundamental fact. M was rejected, not because of who he is, but because of who his mother is. That in itself is not enough. If M had been rejected because his mother shopped in Waitrose rather than Marks and Spencer, that would not have been because of her or his ethnicity. But it was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected. This was because of his lack of descent from a particular ethnic group. In this respect, there can be no doubt that his ethnic origins were different from those of the pupils who were admitted. It was not because of *his* religious beliefs. The school was completely indifferent to these. They admit pupils who practise all denominations of Judaism, or none at all, or even other religions entirely, as long as they are halachically Jewish, descended from the original Jewish people in the matrilineal line.

67. There is no doubt that the Jewish people are an ethnic group within the meaning of the Race Relations Act 1976. No Parliament, passing legislation to protect against racial discrimination in the second half of the twentieth century, could possibly have failed to protect the Jewish people, who had suffered so unspeakably before, during and after the Holocaust. If Parliament had adopted a different model of protection, we would not be here today. Parliament might have adopted a model of substantive equality, allowing distinctions which brought historically disadvantaged groups up to the level of historically advantaged groups. But it did not do so. It adopted a model of formal equality, which allows only carefully defined distinctions and otherwise expects symmetry. A man must be treated as favourably as a woman, an Anglo-Saxon as favourably as an African Caribbean, a non-Jew as favourably as a Jew. Any differentiation between them, even if it is to redress historic disadvantage, must be authorised by legislation.

68. This means that it is just as unlawful to treat one person more favourably on the ground of his ethnic origin as it is to treat another person less favourably. There can be no doubt that, if an employer were to take exactly the same criterion as that used by the Office of the Chief Rabbi and refuse to employ a person because the Chief Rabbi would regard him as halachically Jewish, the employer would be treating that person less favourably on grounds of his ethnic origin. As Lord Kerr explains, there can be no logical distinction between treating a person less favourably because he does have a particular ethnic origin and treating him less favourably because he does not.

69. Some may feel that discrimination law should modify its rigid adherence to formal symmetry and recognise a greater range of justified departures than it does at present. There may or may not be a good case for allowing Jewish schools to adopt criteria which they believe to be required by religious law even if these are ethnically based. As far as we know, no other faith schools in this country adopt descent-based criteria for admission. Other religions allow infants to be admitted as a result of their parents' decision. But they do not apply an ethnic criterion to those parents. The Christian Church will admit children regardless of who their parents are. Yet the Jewish law has enabled the Jewish people and the Jewish religion to survive throughout centuries of

discrimination and persecution. The world would undoubtedly be a poorer place if they had not. Perhaps they should be allowed to continue to follow that law.

70. But if such allowance is to be made, it should be made by Parliament and not by the courts' departing from the long-established principles of the anti-discrimination legislation. The vehicle exists in the Equality Bill, which completed its committee stage in the House of Commons in the 2008-09 session and will be carried over into the 2009-10 session. The arguments for and against such a departure from the general principles of the legislation could then be thoroughly debated. The precise scope of any exception could also be explored. We know from the helpful intervention of the Board of Deputies of British Jews that the Masorti, Reform and Liberal denominations of Judaism have welcomed the result, if not the reasoning, of the decision of the Court of Appeal and would not wish for the restoration of the previous admission criteria. That is a debate which should not be resolved in court but by Parliament. We must not allow our reluctance to enter into that debate, or to be seen to be imposing our will upon a well-meaning religious body, to distort the well settled principles of our discrimination law. That is to allow the result to dictate the reasoning.

71. This was, in my view, a clear case of direct discrimination on grounds of ethnic origin. It follows that, however justifiable it might have been, however benign the motives of the people involved, the law admits of no defence. It also follows that it cannot be a case of indirect discrimination. There is indeed some difficulty in fitting this case into the model of indirect discrimination. The discriminator has to apply to the complainant "a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as [the complainant]". But if the criterion we are talking about is being halachically Jewish, then it is not applied equally between those who are and those who are not. And there is no question of those who are not being at a "particular disadvantage when compared with others persons" in the sense that more of the others can comply than they can. None of the non-halachically Jewish can comply, while all of the halachically Jewish can do so. There is an exact correspondence between compliance and the criterion, just as there was in the *Birmingham* and *James* cases. This too suggests, although it does not prove, that the criterion is itself ethnically based. If not, I would agree with Lord Mance on this issue.

72. I have tried only to explain how the long-established principles of discrimination law apply in this case. In agreement with the more ample reasoning of Lord Phillips, Lord Mance, Lord Kerr and Lord Clarke on the facts of the case, I would dismiss the appeal of JFS on the main issue. On the United Synagogue's costs appeal, I agree with the reasoning and conclusions of Lord Hope.

LORD MANCE

Introduction

73. Two issues arise: whether the admissions policy adopted by JFS for 2007/08 involved direct discrimination, and, if not, whether it involved indirect discrimination, in each case against M, represented by his respondent father, E. M applied for admission to year 7 at JFS commencing in September 2007. The school was over-subscribed and by letter dated 13 April 2007 it refused, "because the school has not received evidence of [M's] Jewish status", to consider M for a place "unless and until all those applicants whose Jewish status has been confirmed have been offered places". An appeal to the independent admission appeal panel for JFS failed on 11 June 2007.

74. The school's admissions policy (determined by its governing body pursuant to the School Standards and Framework Act 1998, ss.88 and 88C) treated an applicant in M's position less favourably than other persons. The policy was to admit children "recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR) or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion to Judaism under the approval of the OCR". In the event of oversubscription, only children satisfying this test were to be considered for admission, in the following order: 'looked after' children, those with one or more siblings attending JFS and then other applicants (the last category on a pro rata basis within each ability band according to the numbers of applicants attending respectively Jewish and non-Jewish primary schools). The OCR, applying the Orthodox Jewish test, recognises as Jewish children who can show an Orthodox Jewish mother or ancestress in the matrilineal line. The mother or matrilineal ancestress can be Orthodox Jewish by birth or by conversion prior to the birth of her relevant child. The respondent is unable to show such descent, because his mother was a non-Jewish Italian by birth and converted to Judaism before M's birth not in the Orthodox tradition, but with the assistance of a non-Orthodox Rabbi. The respondent and his father, with whom he now lives, practise Masorti Judaism, and M is recognised as Jewish by Reform and Masorti synagogues. (Before the late eighteenth century, the Court was told, these distinctions in Jewish observance did not exist.)

75. The first question is whether the respondent's less favourable treatment was on the grounds of his ethnic origins within s.1(1)(a) of the Race Relations Act 1976. JFS supported by the United Synagogue and the Secretary of State for Children, Schools and Families as interveners submit that M was treated as he was not on ethnic, but on purely religious grounds, while E and M, supported by the Equality and Human Rights Commission and the British Humanist Association as interveners submit that, although the school's motivation was and is religious, the treatment derived from a test which was, or was substantially, based on inherently ethnic grounds. JFS is a school designated as having a religious ('Jewish') character under the School Standards and Framework Act

1998, s.69(3), and is accordingly exempted by the Equality Act 2006, s.50(1) from the prohibition against discrimination on the grounds of religion or belief which would otherwise apply under ss.45 and 47 of that Act. But this exemption does not affect the pre-existing prohibition of discrimination on the grounds of ethnic origin, under the 1976 Act.

76. The difficulty of the present case is that the word 'Jewish' may refer to a people, race or ethnic group and/or to membership of a religion. In the case of JFS, JFS submits that it refers only to the latter. Munby J found that "common to all Jewish denominations is a belief that being Jewish is a matter of status, defined in terms of descent or conversion, and not a matter of creed or religious observance" (para. 21). However, JFS exists as an Orthodox Jewish institution, and (while Judaism is not a proselytising religion - those who are not Jews can still earn salvation) "Education about the Jewish faith is considered by Orthodox Jews to be a fundamental religious obligation on all Jews …. An understanding and appreciation of the Jewish faith takes many years …. This is one of the primary purposes of schools such as JFS, which seek to help those who are Jewish (or who are undergoing conversion) understand, learn about and follow their faith" (the words come from a statement of Dayan Gelley dated 26 February 2008 approved by the Chief Rabbi, and were quoted by Munby J in para. 13). JFS's Instrument of Government, with which its governing body, when determining its admissions policy, was obliged to comply under Education Act 2002 s.21(4), records the school's ethos as being to "preserve and develop its religious character in accordance with the principles of Orthodox Judaism, under the guidance of the Chief Rabbi of the United Hebrew Congregations …". JFS has further explained in answers dated 17 December 2007 (to questions put by M's solicitors in a letter dated 17 August 2007 written pursuant to the judicial review protocol and s.65(2) of the Race Relations Act) that "JFS's admission criteria seek to maintain the school's religious ethos". In his statement dated 8 February 2008, para. 27, the chair of JFS's admissions committee described the admissions policy as pursuing a legitimate aim "because it is developing the religious character of JFS in accordance with the principles of Orthodox Judaism". The same aim was reflected in para. 14 of a determination dated 27 November 2007, made by an Adjudicator appointed under the School Standards and Framework Act 1998 to consider E's objection to JFS's admissions policy. The Adjudicator added the further explanation that the "legitimate aim being pursued is seeking to ensure that those children who are Jewish (applying Orthodox Jewish principles) are admitted to the school". While many who are eligible for and obtain admission to JFS as Orthodox Jews do not practise and may profess no or a different religious faith, the school's aim is to inculcate the ethos and, so far as possible, encourage the practice and observance of Orthodox Judaism in and by all who attend.

77. In formulating the school's admissions policy, it was also the governing body's duty under s.84(3) of that Act to act in accordance with the relevant provisions of the code for school admissions prepared under s.84(1) by the Secretary of State. The Secretary of State's Schools Admissions Code for 2003 stated that schools like JFS designated as having a religious character might "give preference in their admission arrangements to members of a particular faith or denomination …, providing this does not conflict with other legislation, such as race relations legislation" (para. 3.9), and that,

where they do, their admissions arrangements should make clear whether a statement of religious affiliation or commitment would be sufficient, or whether it is to be tested and if so how and what if any references from a religious leader will be required. The Code for 2007 permits priority in case of over-subscription to "children who are members of, or who practise, their faith or denomination" (para. 2.41) and states that "It is primarily for the relevant faith provider group or religious authority to decide how membership or practice is to be demonstrated" (para 2.43). Quite apart from the fact that they are subject to the application of the Race Relations Act 1976, the references to membership in the Codes do not specifically address descent-based membership which may exist in the eyes of the faith provider or religious authority, while not doing so in the eyes of the child or his or her parents.

Direct discrimination

78. Direct discrimination can arise in one of two ways: because a decision or action was taken on a ground which was, however worthy or benign the motive, inherently racial within the meaning of s.1(1)(a), or because it was taken or undertaken for a reason which was subjectively racial: *R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] AC 1155, 1194C-D per Lord Goff of Chieveley, *James v Eastleigh Borough Council* [1990] 2 AC 751, 772B-G per Lord Goff, and *Nagarajan v London Regional Transport* [2000] 1 AC 501, 511A per Lord Nicholls of Birkenhead and 520H-521B per Lord Steyn. In the *Birmingham City Council* case, girls were required to achieve a higher standard than boys for grammar school entry because of a disparity in the number of grammar school places available for boys and girls. "Whatever may have been the intention or motive of the council, nevertheless it [was] because of their sex that the girls in question receive[d] less favourable treatment than the boys, and so [were] the subject of discrimination": per Lord Goff at p.1194C-D. It was for the council to find some way of avoiding this, e.g. by balancing the places available. In *James* the motive for adopting as the test for free entry to the swimming pool to people who had reached state pension age was no doubt benign (it was probably because they were perceived as more likely to be needy). But being of pensionable age is not to be equated with ceasing to work or being in receipt of a pension, and the difference between the ages (65 and 60 respectively) at which men and women became of pensionable age made the test inherently discriminatory on the ground of sex. In *Nagarajan* at p.511A Lord Nicholls noted that "Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator", while Lord Steyn at pp.520H-521B approved the statements in the *Birmingham City Council* and *James* cases. The allegation in the present case is that a decision or action was taken on inherently ethnic grounds within s.1(1)(a), although the school's subjective motivation was its purely religious convictions. I appreciate that even the first part of this allegation involves what may be described as a subjective element – a "question of fact" in Lord Nicholls' words in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] 1 WLR 1947, para, 29 – in so far as it requires an answer to the question: why in fact was M refused a place? But there is here no room for doubt about the answer. He was refused a place by reason of the application of the admissions policy set out in para 74 above. With that answer, the next, relevant question is simply whether that policy, religiously

motivated as it was, involved grounds for admission or refusal of admission which were in their nature inherently ethnic.

79. Lord Pannick submits that, taking the test of an ethnic group recognised by the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548, Jews constitute an ethnic group, but a group which embraces, on the one hand, a wide spectrum of Jewish observance (including that practised by the respondent) and excludes, on the other hand, many individuals who would, on Orthodox Jewish principles, be regarded as Jewish (e.g. a lapsed Jew who had converted to Catholicism or an atheist with a matrilineal Orthodox Jewish ancestress). There is thus no complete identity between a Jew in the sense suggested by that test and an Orthodox Jew according to Orthodox Jewish principles. He relies upon this as reinforcing his submission that JFS's admissions policy is based, and based solely, on religious grounds. I do not, however, consider that this submission resolves the issue.

80. First, *Mandla* was a case of alleged indirect discrimination under s.1(1)(b) of the Act, which addresses differential treatment between persons of different racial groups. The test under s.1(1)(a) is whether a person has treated another person less favourably "on racial grounds", defined by s.3 as meaning on "any of the following grounds, namely colour, race, nationality or ethnic or national origins". This test is not expressed to be limited by reference to a need to identify a difference in treatment of persons currently members of different ethnic groups. Further, subsequent to the enactment by the European Community of Council Directive 2000/43/EC of 29th June 2000, which addresses both direct and indirect discrimination without using the concept of "racial group" in either connection, and since the consequent introduction of s.1(1A) of the Race Relations Act 1976 which equally omits any such concept, it seems to me inappropriate to read s.1(1)(a) as importing any such concept. All that is required is discrimination on grounds of a person's ethnic origins.

81. A second, point, based on the international legal background and of possible relevance to the construction of s.1(1)(a), derives from the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'), in force since 1969, to which the United Kingdom is party and to which Directive 2000/43/EC recites that it was intended to give effect. Article 1(1) of CERD defines 'racial discrimination' to mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". The reference to descent (although not explicitly repeated after the general prohibition on 'racial discrimination' in article 5) is, on its face, very pertinent in the present case. However, it is suggested that, having been introduced on a proposal by India, the word 'descent' is limited to caste, but India itself disputes this, and it has been forcefully suggested that the background to its introduction indicates that it was not concerned with caste at all: *Caste-based Discrimination in International Human Rights Law*, David Keane (Brunel University, Ashgate Publishing Ltd., 2007, chap. 5). Nevertheless, the Committee

established to monitor implementation of CERD under article 8 has itself treated descent as including caste in its General Recommendation XXIX A/57/18 (2002) 111, where it recommended, in para 1, that states take "steps to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status". Whether or not 'descent' embraces caste, the concepts of inherited status and a descent-based community both appear wide enough to cover the present situation. That in turn tends to argue for a wide understanding of the concept of discrimination on grounds of 'ethnic origins', although the point is a marginal one.

82. Thirdly, and in any event, the *Mandla* test is broad, flexible and judgmental. It was adopted in order to embrace a group such as the Sikhs, of whom it could not be said that they were a different race in any narrow sense. There is some irony in the fact that, prior to the decision of the House in *Mandla*, there would have been little doubt that a narrow test based on birth or descent would have been regarded as *required* in order for there to be discrimination on the ground of ethnic origins. That was the gist of the judgments in the early case of *Ealing London Borough Council v Race Relations Board* [1972] AC 342. Unlike *Mandla*, the *Ealing* case was a case of alleged direct discrimination under s.1(1)(a), and in it statements were made to the effect that discrimination on account of race, or ethnic or national origins involved consideration of a person's antecedents (per Viscount Dilhorne at p.359E), that "'Origin', in its ordinary sense, signifies a source, someone or something from which someone or something has descended" (per Lord Simon of Glaisdale at p.363H) and that "national origins" normally indicated a connection arising "because the parents or one of the parents … are or is identified by descent with the nation in question, but it may also sometimes arise because the parents have made their home among the people in question" (per Lord Cross of Chelsea at p.365E-F). The Court of Appeal in *Mandla* [1983] QB 1 picked up this approach in relation to indirect discrimination. It identified an ethnic group as one with common ancestral origins, however remote (see per Lord Denning MR at p.10A-B and p.11B, expressly instancing Jews as an ethnic group, and per Kerr LJ at p.22B-E), and on that basis excluded Sikhs on the ground that they constituted essentially a religious and cultural group. The House disagreed and developed the wider test, but there may still, in my view, be discrimination on grounds of ethnic origin in the narrower and more traditional sense, even under s.1(1)(b), let alone under the differently worded s.1(1)(a).

83. The following passage in which Lord Fraser of Tullybelton developed the test in *Mandla* [1983] 2 AC 548, 561-563 is also worth quoting in full:

> "I turn, therefore, to the third and wider meaning which is given in the *Supplement to the Oxford English Dictionary* (1972). It is as follows: 'pertaining to or having common racial, cultural, religious, or linguistic characteristics, esp. designating a racial or other group within a larger system . . .' Mr Irvine, for the appellants, while not accepting the third (1972) meaning as directly applicable for the present purpose, relied on it to this extent, that it introduces a reference to cultural and other

characteristics, and is not limited to racial characteristics. The 1972 meaning is, in my opinion, too loose and vague to be accepted as it stands. It is capable of being read as implying that any one of the adjectives, 'racial, cultural, religious or linguistic', would be enough to constitute an ethnic group. That cannot be the sense in which 'ethnic' is used in the Act of 1976, as that Act is not concerned at all with discrimination on religious grounds. Similarly, it cannot have been used to mean simply any 'racial or other group'. If that were the meaning of 'ethnic', it would add nothing to the word group, and would lead to a result which would be unacceptably wide. But in seeking for the true meaning of 'ethnic' in the statute, we are not tied to the precise definition in any dictionary. The value of the 1972 definition is, in my view, that it shows that ethnic has come to be commonly used in a sense appreciably wider than the strictly racial or biological. That appears to me to be consistent with the ordinary experience of those who read newspapers at the present day. In my opinion, the word 'ethnic' still retains a racial flavour but it is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin.

For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member. That appears to be consistent with the words at the end of section 3(1) 'references to a person's racial group refer to any racial group into which he falls.' In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group.

> This view does not involve creating any inconsistency between direct discrimination under paragraph (a) and indirect discrimination under paragraph (b). A person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous."

84. This passage makes clear that Lord Fraser was not excluding the relevance of "descent from a small number of common ancestors". It was one among a number of factors which included, he considered essentially, a long shared history distinguishing a group from other factors and a shared cultural tradition, but which could also include a common geographical origin, language and/or religion and a status as a minority group. The whole passage emphasises the flexibility of the test adopted, and it is consistent with this that its application should depend on the context.

85. A fourth, important point appears from the final sentence in the passage quoted from Lord Fraser's speech: "A person may treat another relatively unfavourably 'on racial grounds' because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous". Lord Fraser probably had in mind a situation such as that where A, who dislikes Sikhs, discriminates against B in the (in fact erroneous) belief that B is a Sikh. Whether the victim actually has the sexual orientation or racial origins on the ground of which he or she is treated less favourably is irrelevant: *English v Thomas Sanderson Blinds Ltd.* [2008] EWCA Civ 1421; [2009] ICR 543 (where the majority also held it to be irrelevant whether the discriminator believed the victim to have, or whether the victim thought that the discriminator believed the victim to have, the relevant sexual orientation on the ground of which he was harassed). If A, applying his own view of the relative significance of the various factors mentioned by the House in *Mandla*, identifies a particular group of people as an ethnic group and discriminates against them on that ground that would, in my view (and as Lord Pannick accepted, with the proviso that there would have to be some basis in the *Mandla* criteria) be embraced by s.1(1)(a) of the Act. Any definition of an ethnic group applying the *Mandla* criteria is on this basis also flexible, whether the definition is undertaken for religious, charitable or educational purposes or, as happened only too terribly in Nazi Europe, for entirely malign purposes.

86. In the present case, many of Lord Fraser's factors could be seen as pointing without more to a conclusion that Orthodox Judaism should be regarded as a separate ethnic group or sub-group - including the sharing of a long history distinguishing themselves from other groups, a shared cultural tradition, a common religion and a separate status within any wider Jewish community. Others, such as a common geographical origin and a common language, they share with that wider community. Munby J's reasons for rejecting any suggestion that Orthodox Jews could be regarded as a separate ethnic group or sub-group were that there was no evidence that they had separate ethnic origins from other, or most other, Jews. That may be said to focus purely on ethnic origins in a way which the *Mandla* test was intended to discourage. But, assuming that

Orthodox Jews are not a separate ethnic group or sub-group for the purposes of indirect discrimination (the relevant subsection for that purpose being now s.1(1A), rather than s.1(1)(b)), I consider that the Orthodox Jewish test of descent in the matrilineal line must still be regarded as a test based on ethnic origins, for the purposes of direct discrimination under s.1(1)(a) of the Act. On the evidence, it is at its core a test by which Orthodox Judaism identifies those to be regarded today as the descendants of a particular people, enlarged from time to time by the assimilation of converts, that is the Jewish people whose ancestor was the patriarch Jacob (Israel) and with whom the covenant of Mount Sinai was made through Moses upon the Exodus from Egypt. That the Jewish people was from its outset also defined by its religion does not lead to a different conclusion. A test of membership of a religion that focuses on descent from a particular people is a test based on ethnic origins. Whether matrilineal descent was originally chosen because it was an easy and secure way of identifying ancestry or because some other special significance was attached to women's role is not relevant. Other tests identifying a people by drawing on descent or ancestry can of course exist, for example, a test based on patrilineal origins, or on the origins of both parents. Some other Jewish denominations, the Court was told, have other tests, e.g. looking, or looking also, at the patrilineal line. But all such tests look, in one way or another, at ethnic origins. They merely take different views as to the form of descent or birth link by reference to which a person's origins in a particular (here biblical) people can be defined. I find instructive in this connection and generally the Background Information provided by Rabbi Dr Tony Bayfield which Lord Phillips quotes in paragraph 40. If a school admissions policy identifying Jews by descent is inadmissible, this will be the case in relation to any denomination of Jewish school applying such a policy, however the relevant descent is identified. This case cannot therefore be viewed as a mere disagreement between different Jewish denominations, for example about the criteria for conversion. It turns, more fundamentally, on whether it is permissible for any school to treat one child less favourably than another because the child does not have whatever ancestry is required, in the school's view, to make the child Jewish.

87. Fifthly, there is, not surprisingly in the circumstances, also material tending positively to confirm that there is in the eyes of JFS no distinction between Jewishness in the religious sense and Jewishness on account of ethnic origins. The Agreed Statement of Facts records that M was refused admission for the year 2007-8, "on the ground that he was not recognised as being Jewish by the Office of the Chief Rabbi …..". The same answer (that "this child cannot be recognised as Jewish") was given by the OCR in relation to the child of the marriage of a *Cohen* (member of the Jewish priestly class) and an English woman who had undertaken conversion with an Orthodox Jewish Beth Din in Israel, on the ground that she had intended to marry her future husband at the time of her conversion, contrary to a prohibition on the marriage of Cohens with converts, with the consequence that her conversion could not have been sincere and was accordingly invalid in the eyes of the OCR. By their letter dated 17 August 2007 M's solicitors asked JFS, with reference to the time when children applied and/or when a decision on admission was taken, "how many children were Jewish on account of their race and/or ethnic origins and how many were not". The school's answer given through its solicitors on 17 December 2007 was that "Those children confirmed as Halakhically Jewish were treated as Jewish by the school and those not so confirmed were treated as not Jewish". M set out this answer in his further response dated 19 December 2007 to the appellants' notice of

acknowledgement of service, in support of a plea that the appellants "now belatedly, but rightly, accept that Halakhical 'Jewish status' is synonymous with membership of a racial group for the purposes of s. 3" of the Act – a plea to which there was no response before the matter came to court. Further, according to a statement quoted in the respondent's case, which JFS has not challenged or controverted, the Chair of JFS's Governors responded to fears about the opening in future of new Jewish schools (including or consisting of non-Orthodox Jewish schools), by saying: "If we are going to be able to maintain the three [existing Orthodox Jewish] schools, … we are going to need to supply children out of thin air. The only way to fill all of those places would be to open the doors to children who are not Jewish by ethnicity – or not at all". The inference is that the school recognises no distinction even today between Jewishness in a religious and in an ethnic sense. The one dictates the other. When Lord Pannick said on behalf of JFS that JFS "does not dispute" that there are "thousands with Jewish ethnic claims" in the *Mandla* sense who fail the test for a religious reason, that may be the effect of the *Mandla* test, applied objectively; if so, it is a conclusion about English law which no-one could sensibly gainsay. But it does not follow that JFS or the Chief Rabbi themselves concur with or take the view of ethnicity which would follow from applying the *Mandla* test and the passages which I have quoted indicate that they do not (quite apart from the fact that the *Mandla* test was not directed to the present issue of less favourable treatment on the ground of ethnic origins).

88. Apart from descent a person may become an Orthodox Jew by conversion. Conversion, in accordance with the principles of Orthodox Judaism, is recognised by Orthodox Judaism as making a person an Orthodox Jew. Some of the greatest figures in Jewish history have been converts, starting with Ruth the Moabite, great-grandmother of King David, and Onkelos, Rabbi Akiva and other sages. From conversion, a convert is treated as an Orthodox Jew, and so too is any child of a female convert born after the completion of the mother's conversion (although some distinction exists between converts and other Orthodox Jews: witness the prohibition on the former marrying a *Cohen*, to which reference is made above). The Chief Rabbi has in 2005 compared conversion with acquiring a changed, foreign identity, while adding that the analogy is imperfect:

> "Converting to Judaism is a serious undertaking, because Judaism is not a mere creed. It involves a distinctive, detailed way of life. When people ask me why conversion to Judaism takes so long, I ask them to consider other cases of changed identity. How long does it take for a Briton to become an Italian, not just legally but linguistically, culturally, behaviourally? It takes time.
>
> The analogy is imperfect, but it helps to explain the most puzzling aspect of conversion today the sometimes different standards between rabbinical courts in Israel and Britain. Several decades ago an Israeli Chief Rabbi argued that Israeli rabbinical courts should be more lenient than their counterparts in the Diaspora. His reasons were technical, but they make sense. It is easier to learn Italian if you are living in Italy. In Israel, many

> aspects of Jewish identity are reinforced by the surrounding culture. Its language is the language of the Bible. Its landscape is saturated by Jewish history. Shabbat is the day of rest. The calendar is Jewish."

89. The reason for M's ineligibility can be said to be that his mother converted to Judaism under a procedure and principles other than those accepted by Orthodox Jews. However, M remains at a disadvantage because of his descent, and, speaking generally, the test for admission of any child to JFS is for practical purposes one of descent. The possibility of a child applying to JFS being him- or herself a convert, or even in the course of converting, appears negligible. JFS in its answers dated 17 December 2007 believed there never to have been any such child in the three years preceding the answers. Further, discrimination may be on an ethnic ground, even though this is not the sole ground for the decision, so long as an ethnic ground was "a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor": *Nagarajan*, per Lord Nicholls at pp.512H-512B. As Miss Rose QC for E pointed out, an organisation which admitted all men but only women graduates would be engaged in direct discrimination on the grounds of sex. Similar reasoning would apply here to any suggestion that the possibility of conversion eliminated any possibility of direct discrimination on ethnic grounds.

90. Finally, I also consider it to be consistent with the underlying policy of s.1(1)(a) of the Act that it should apply in the present circumstances. The policy is that individuals should be treated as individuals, and not assumed to be like other members of a group: *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, paras 82 and 90, per Baroness Hale of Richmond and *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307, paras. 44 and 90 per Lords Hope of Craighead and Brown of Eaton-under-Heywood. To treat individual applicants to a school less favourably than others, because of the happenstance of their respective ancestries, is not to treat them as individuals, but as members in a group defined in a manner unrelated to their individual attributes. JFS, supported on this point by the British Board of Deputies, argue that respect for religious freedom under article 9(1) of the European Convention on Human Rights and the importance attaching to the "autonomous existence of religious communities" (emphasised for example in *Löffelmann v Austria* (Application No. 42967/98, 12 March 2009, para 47) militate in favour of a conclusion upholding JFS's admissions policy. But freedom to manifest one's religion or beliefs is, under article 9(2) of the Convention, subject to such limitations as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others. Under the United Nations Convention on the Rights of the Child 1989, article 3, it is the best interests of the child which the United Kingdom is obliged to treat as a primary consideration. Under Protocol 1, article 2 to the European Convention on Human Rights, it is the right of parents to ensure education and teaching in conformity with their own religions and philosophical convictions that the state must ensure in the exercise of any functions which it assumes in relation to education and to teaching. (I note in parenthesis that this has, since the hearing before the Supreme Court, been emphasised by the second section of the European Court of Human Rights in its judgment in *Affaire Lautsi c. Italie* (Requête no. 30814/06, 3 November 2009, paras. 47(b) and (c)). I express no further view

on the reasoning or decision in that case, which may well go to the Grand Chamber. To treat as determinative the view of others, which an applicant may not share, that a child is not Jewish by reason of his ancestry is to give effect not to the individuality or interests of the applicant, but to the viewpoint, religiously and deeply held though it be, of the school applying the less favourable treatment. That does not seem to me either consistent with the scheme or appropriate in the context of legislation designed to protect individuals from discrimination. I accept that parental responsibility and choice relating to a child can determine the extent to which children are treated as having certain attributes, e.g. membership of a particular religion in the case of Christian baptism. But neither parental birth nor the fact that a mother has not converted to Orthodox Judaism at a time prior to a child's birth can be regarded as within the concept of parental responsibility and choice.

91. Emphasis was put in submissions on difficulties which Orthodox or indeed other Jewish schools face in adopting any admissions policy other than that based on Jewish status. It was not, and could not, be suggested that these present any absolute legal answer to M's case, but rather that they should cause any court to think very hard about whether the legislation can really require the result for which E and M contend and which the Court of Appeal accepted. How far such difficulties exist is contentious. Just before the hearing in the Supreme Court, statements were tendered by two interveners, in the case of the British Board of Deputies a statement dated 15 October 2009 from its chief executive, Mr Jon Benjamin, and in the case of the United Synagogue a statement dated 18 October 2009 from its chief executive, Mr Jeremy Jacobs. These came too late for proper investigation or answer and their contents are in issue, though there is evidence of Orthodox Jewish schools which in addition to a test based on Orthodox Jewish descent also apply tests based on religious observance. What can be said is that, since the Court of Appeal's judgment, JFS and other Orthodox Jewish schools have instituted admissions policies based, in one way or another, on religious observance, but they have done so very reluctantly, and submit that its introduction is inconsistent with such schools' missions to all Orthodox Jews. However, as I have said, such considerations cannot be decisive either way.

92. For the reasons I have given, the Court of Appeal in my view reached the correct conclusion, when it held that as a matter of law the admissions policy followed by JFS was inherently discriminatory, contrary to s.1(1)(a) of the 1976 Act, although the policy was adopted by the school for the most benign, religious motives. On that basis, the issue of indirect discrimination cannot arise. However, I will address some words to it. This must, necessarily, be on the hypothesis that a different answer is given on the issue of direct discrimination to that which I have given.

Indirect discrimination

93. The relevant statutory provision governing indirect discrimination is s.1(1A). This was introduced into the 1976 Act by the Race Relations Act 1976 (Amendment) Regulations (SI 2003/1626), in order to implement in Great Britain Council Directive

2000/43/EC of 29th June 2000 (which contains a number of references showing its intended application to education). Subsequent Regulations (SI 2008/3008) have added the presently immaterial words "or would put" in s.1(1A)(b). The first question arising under s.1(1A) is whether JFS's admissions policy involved "a provision, criterion or practice … which puts … persons of the same race or ethnic … origins … at a particular disadvantage when compared with other persons". Lord Pannick submits not. He accepts that the policy had the effect of putting at a disadvantage applicants with no ethnic link with Judaism. But, in his submission, it did not discriminate against M, because both M and those eligible for admission had the same Jewish ethnic origin, and the distinction drawn between them by the policy was on the basis of their religious, not ethnic status. Here too, the *Mandla* test of ethnicity is relied upon to assimilate M and those eligible for admission. As I have pointed out, *Mandla* was decided under s.1(1)(b) of the Race Relations Act 1976. Since the introduction of s.1(1A) to give effect to Council Directive 2000/43/EC of 29th June 2000, Lord Pannick accepts that any allegation of indirect discrimination falls to be considered primarily (and in reality, despite s.1(1C), almost certainly only) under s.1(1A). Assuming, contrary to my view, that the *Mandla* test of ethnic grouping controls the question whether there has been direct discrimination on ethnic grounds within s.1(1)(a), I do not consider that it can do so under s.1(1A).

94. I see no reason under Community law to suppose that the Directive is limited to discrimination against ethnic groups in the *Mandla* sense, and s.1(1A) should, so far as possible, be construed consistently with the Directive. The language of s.1(1A) is general (although in one respect, the effect if any of which I need not consider, it adopts less exhaustive terminology than s.1(1)(a) and (b), in so far as it omits express reference to colour and nationality). On any ordinary understanding, M's ethnic origins differed from those of most Orthodox Jews, because he had a non-Jewish Italian mother. As Munby J said (para. 34), M is "in E's eyes, and doubtless in the eyes of many who would consider themselves Jews, of mixed Jewish and (through the maternal line) Italian ethnic origins". True, some Orthodox Jews become such by conversion rather than birth, and some children of non-Jewish Italian mothers can be Orthodox Jews by virtue of their mother's conversion according to Orthodox Jewish principles before their birth. But, both in general terms and in the case of M in particular, his mother's non-Jewish Italian birth and so his ethnic origins led to M being at a particular disadvantage when compared with persons recognised as Orthodox Jews by JFS and by Orthodox Jewish authorities.

95. The next question is whether JFS has shown that the disadvantage at which M was put was "a proportionate means of achieving a legitimate end". Munby J in para. 192 of his judgment summarised the "aim or objective" of JFS as spelled out in the materials before him (and indicated out in paragraph 76 above) as being:

> "to educate those who, in the eyes of the [Office of the Chief Rabbi] are Jewish, irrespective of their religious beliefs, practices or observances, in a school whose culture and ethos is that of Orthodox Judaism".

The Court of Appeal's reasoning on indirect discrimination appears to have been influenced by this characterisation. The Court of Appeal thought, with some justification, that the aim or objective as so advanced was circular. Sedley LJ, in paras. 45-47, described the school's admissions criteria as "explicitly related to ethnicity" and as having an "ethnic component in character" and said that "an aim of which the purpose or inevitable effect is to make and enforce distinctions based on race or ethnicity cannot be legitimate". That is no doubt so. But, on the evidence, the truth which Munby J's characterisation can be read as omitting or perhaps obscuring is that, in Orthodox Jewish belief, anyone who is regarded by Orthodox Judaism as a Jew by birth is also regarded as being under a religious duty to educate him- or herself about and to observe the tenets of Orthodox Judaism: see the statement of Dayan Gelley dated 26 February 2008 referred to in paragraph 76 above, and also that of Registrar Frei of the London Beth Din dated 6 February 2008. JFS's mission was to encourage and assist children regarded by Orthodox Judaism as being Jews to do this as far as possible. For that reason, the admission to the school of a range of pupils, who are Orthodox Jewish in the school's eyes, but who do not actually practise Orthodox Judaism or necessarily any religion at all, was and would still be regarded as a very positive feature, even if their or their parents' actual motivation for seeking their admission to the school were to have been its excellent academic record.

96. On the basis of this explanation of the thinking underlying the school's policy, it is possible to identify a legitimate aim, founded in the school's Orthodox Jewish character and the religious convictions of those responsible for its admissions policy; and the circularity which the Court of Appeal thought existed no longer does. The question thus arises, which the Court of Appeal thought it unnecessary to address, whether JFS as the alleged discriminator can show the differential treatment "to be a proportionate means of achieving a legitimate aim": s.1(1A)(c). JFS accepts that its admissions policy treated the school's religious aim as an over-riding absolute. Prior to the Court of Appeal's decision, it had not considered or sought to weigh the practical implications or effect of adopting either it or any alternative policy, though it was aware both that the school included many non-observing pupils and that there were many ineligible pupils who were intensely religious. No information is in these circumstance available as to the extent to which children admitted to the school were or became interested in learning to observe Orthodox Judaism, or to which the school's policy excluded other children who would be deprived of Jewish-based schooling which they were keen for religious reasons to pursue. Munby J recorded (para. 8) that "until the 1940s over 97% of synagogue membership was of Orthodox (United Synagogue) synagogues", but that by 2000, according to a report *A Community of Communities*, published under the auspices of the Institute for Jewish Policy Research, current membership of Jews affiliated to a synagogue consisted of 60.7% Orthodox, 10.5% Strictly Orthodox (Haredi), 27.3% Progressive (Reform and |Liberal), and 1.5% Masorti (Conservative), while 30% of all Jews were not affiliated to any synagogue at all. There has been and is a paucity of available and accessible Jewish schools other than Orthodox Jewish schools – it appears that 29 of the total of 36 Jewish schools in England are Orthodox Jewish and applied a similar admissions policy to JFS's. JFS also regarded as irrelevant when formulating the admissions policy whether it might lead to unhappiness in relations between adherents to different Jewish denominations.

97. The standard set in s.1(1A)(c) is a high one, adopting "the more exacting EC test of proportionality": *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, para. 151, per Mummery LJ. The Directive also provides, in article 2(2)(b) that any indirectly discriminatory provision, criterion or practice is only justifiable if it is "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary", but it refers to the European Convention on Human Rights and the language used equates with the test of proportionality which appears in s.1(1A)(c) of the 1976 Act. An ex post facto justification for a measure which is prima facie indirectly discriminatory can prove difficult to show: *Elias*, para.129 per Mummery LJ. It is for the school to show, in the circumstances, that its aim or objective corresponds to a real need and that the means used are appropriate and necessary to achieving that aim, and any decision on these points must "weigh the need against the seriousness of the detriment to the disadvantaged group": *Elias*, para. 151 per Mummery LJ. The interests of society must also be considered: *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para. 19, per Lord Bingham of Cornhill.

98. In the case of JFS, as an educational establishment maintained by a local education authority, its general duty was supplemented by specific duties under s.71 of the 1976 Act, according to which it was incumbent on its governing body "in carrying out its functions, [to] have due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups". Munby J held that the school had, despite the good intentions and work which had gone into its race equality policy, failed to comply in full with s.71 of the 1976 Act. The school's race equality policy, which indicated that the school would "disregard considerations based upon colour, disability, ethnic or racial origins, gender, marital status, nationality or religion except as provided for in the School's authorised Admissions Policy", showed that it had in a general sense considered matters of racial discrimination. But it had not specifically considered either of the goals mentioned in s.71(1)(a) and (b) or, more particularly, specific ways in which these goals might be achieved (Munby J, para. 213).

99. Nonetheless, Munby J considered that the school's policy satisfied the requirements of s.1(1A)(c), saying at paras. 199-202, first, that JFS's admissions policy was "not, properly analysed, materially different from that which gives preference in admission to a Muslim school to those who were born Muslim or preference in admission to a Catholic school to those who have been baptised" and, secondly, that "some alternative admissions policy based on such factors as adherence or commitment to Judaism (even assuming that such a concept has any meaning for this purpose in Jewish religious law) would not be a means of achieving JFS's aims and objectives; on the contrary it would produce a different school ethos. … JFS exists as a school for Orthodox Jews. If it is to remain a school for Orthodox Jews it must retain its existing admissions policy; if it does not, it will cease to be a school for Orthodox Jews". On that basis, Munby J held that the policy constituted a proportionate means of achieving a legitimate aim, and that the claim of indirect discrimination failed. Munby J also thought it "quite idle to imagine that the fullest and most conscientious compliance with s.71 would have

led to any difference either in the crucial part of JFS's admissions policy or in its application in M's case" (para. 214).

100. On the evidence before the Court, and in the absence of any actual consideration or weighing of "the need [to pursue the school's aim] against the seriousness of the detriment to the disadvantaged group" (see *Elias* [2006] 1 WLR 3213, para 151), I find it impossible to reach the same conclusion. There is, as I have indicated, no information about the extent to which the school succeeds in its stated aim of inculcating Orthodox Judaism in the minds and habits not only of those who already practise it, but also of those pupils who gain admission as Orthodox Jews in the eyes of Orthodox Judaism. The latter may not on entry practise or have any interest in practising Orthodox Judaism. They or their parents may adhere in religious observance to a Jewish denomination other than the Orthodox Jewish and be concerned that their children receive a, rather than no, Jewish education; or they or their parents may be seeking entry for reasons associated with the school's acknowledged educational excellence, and may be themselves agnostic or atheist. The school's policy was formulated without considering the extent to which others professing the Jewish faith, but not in the Orthodox Jewish tradition, were separated by it from friends and from the general Jewish community by the school's admissions policy, or about the extent to which this might cause grief and bitterness in inter- or intra-community relations – matters about which some evidence was tendered before the Court. It would, in parenthesis, also appear difficult to regard a school not considering such matters as complying with the School Admissions Code 2007, para. 2.48, which requires that admission authorities for faith schools "**should** consider how their particular admission arrangements impact on the communities in which they are physically based and those faith communities which they serve".

101. It was submitted that the school would become less "diverse" in a practising religious sense, if it admitted pupils only by reference to a test of Jewish religious observance. This could be so, but no consideration has been given to any possibility of ensuring continuing diversity on a structured basis, rather than simply excluding, by reference essentially to birth link criteria, all those not regarded by Orthodox Judaism as Orthodox Jews. Paragraph 1.4 of the school's existing admissions policy already provides that "The School recruits from the whole range of ability, and this policy has the objective of securing a balanced, comprehensive, co-educational intake". The school's Information Sheet for staff describes "the modern JFS" as serving "almost the whole breadth of the Anglo-Jewish community in Greater London" and its admissions policy (not further detailed in this connection) as "reflect[ing] positive selection to ensure a truly comprehensive ability intake". It continues: "We aim to achieve a balanced intake across four ability bands. In addition to a thoroughly comprehensive spread of ability, our students come from the widest possible range of social, economic and religious backgrounds". On the information available, it is not shown that inability to select on the basis of birth link criteria will prevent the school from serving the wider community and achieving diversity in accordance with these stated aims.

102. I would also not be as confident as Munby J was with regard to s.71. But, in any event, the test is not what the school would have done in the past if it had fully and properly considered its obligations under s.71. The test is whether objectively it can justify its present policy under s.1(1A)(c), once the test set by that subsection is fully and properly addressed. Munby J's comparison in para. 200 with the position of Catholic or Muslim children would, if exact, be no more than another way of stating the issue, but in reality it is not exact, at least if one takes the parental choice to baptise. His other reason echoes the school's case that its policy of giving preference to those regarded as Orthodox Jews by Orthodox Jews must, in case of over-subscription, prevail over all other considerations, with which I have already dealt. It must, furthermore, be an exaggeration to say that the school would cease (or, presumably, with the introduction of its new policy after the Court of Appeal's decision, has ceased) "to be a school for Orthodox Jews" (para. 214). If and when the number of places exceeds the number of those applying who are regarded by the school as Orthodox Jews, the school is anyway obliged under the legislation and paragraph 1.3 of its own admissions policy to admit other pupils. Until the matter came before the Adjudicator, Appendix A to its admissions policy in fact indicated that the remaining places would be filled according to the following criteria in this order: (1) 'looked after' children, (2) children with one Jewish parent, (3) children with one or more Jewish grandparents and, finally, (4) all other applicants. (The Adjudicator by his Determination of 27 November 2007 held that criteria (2) and (3) involved indirect ethnic discrimination by reference to ancestry, which could not be justified by any presumption that children with one Jewish parent or one or more Jewish grandparents were more likely to be receptive or sympathetic to the school's Jewish Orthodox ethos than children of other parentage or grand-parentage, and required the deletion of those two criteria on that basis. He rejected a suggestion that criteria (2) and (3) involved direct discrimination on the ground that they were "based on religious grounds not racial grounds", despite the absence of any apparent basis in Orthodox Judaism for attaching any significance to fatherhood or grand-parentage, except in the matrilineal line. Miss Rose QC for E submits, correctly in my view as I have already indicated, that the Adjudicator should logically have gone further by recognising criteria (2) and (3) as involving direct discrimination).

103. In my view and (I emphasise) on the material before the Court, JFS has not and could not have justified its admissions policy. Accordingly, had the matter arisen for decision, I would have held that its admissions policy discriminated against M in a way which was not justified under s.1(1A), and was invalid accordingly. However, for reasons given earlier, I conclude that the policy was directly discriminatory, because it depended on birth link criteria which led to M being less favourably treated on ethnic grounds within s.1(1)(a) and 3(1) of the 1976 Act, and invalid on that basis. I would therefore dismiss the school's appeal.

Costs

104. On the United Synagogues' appeal in respect of costs, I agree with the reasoning and conclusions of Lord Hope.

LORD KERR

105. This case gives rise to perplexing issues of law. It involves an examination of the interface between religion and legal principle. It requires a close scrutiny of the statutory definition of racial discrimination. At its heart, however, lies the simple issue of a young boy's desire to attend a particular school; his family's earnest wish that he be educated there; and the reasons that he was refused admission.

106. That JFS is the school of choice for very many Jewish families is not in the least surprising. As well as achieving excellent academic results for its pupils, it promotes – indeed embodies – the values that most, if not all, practising Jews regard as central to their faith. It is therefore inevitably and regularly oversubscribed, that is to say, it attracts many more applicants for places than it can accommodate. The criteria for admission to the school are of intense interest to aspiring pupils and their parents. Those who devise and apply those criteria have a formidable, not to say daunting, responsibility.

107. This situation is by no means unique. All over the United Kingdom and, no doubt, in many other parts of the world, every year, conscientious parents, anxious for their children's continuing education at secondary level, pore over the entrance requirements for schools that they hope their sons and daughters will attend and strive to bring their children's circumstances – and in many instances, their own – within the stipulated standards. Where JFS is unique, however, is in its imposition of a criterion that can only be achieved by an accident of birth or by conversion to the Orthodox Jewish faith. Apart from conversion, a child who wishes to be educated at JFS must be born of an Orthodox Jewish mother or have a female antecedent who is recognised as an Orthodox Jew by the Office of the Chief Rabbi (OCR). That condition of Orthodox Jewishness is normally acquired by the female by reason of the circumstances in which she herself was born; less commonly, it arises by her conversion to Judaism before the child's birth. In the latter case the circumstances of her conversion must be such as to satisfy the requirements of the OCR. Common to both situations, however, is the unalterable requirement that, at the moment of birth, the child must be a Jew as the Chief Rabbi, in his application of what he considers to be the requirements of Jewish law, defines that status.

108. Central to the question of direct discrimination in this case is the breadth of meaning to be given to the phrase 'ethnic origins'. The conventional meaning of origin is 'something from which anything arises or is derived'. It also means ancestry, parentage, or extraction. Although 'ethnic' is normally used as pertaining to or characteristic of a people or a group, clearly there can be mixed ethnic origins that do not fall neatly into one group or category. Thus, in this case, it is undeniable that M has mixed ethnic origins. He has derived these, as everyone derives their ethnicity, from his parents. At the moment of birth we are all endowed with characteristics that are as inalienable as they are inevitable. Our DNA is inescapable. Our parentage and the ancestry that it brings are likewise fixed and irreversible. These are part and parcel of our ethnic origins.

109. M is not simply a Jew. His ethnic origins comprehend much more than his Jewishness. He is born of an Italian. He is, in the colloquial, half-Italian. He would be recognised – indeed, no doubt, claimed – as such by his mother's family. He cannot disavow his mother's former Catholicism. That is as much part of his undeniable ethnic make-up as is his father's Masorti Jewishness and Englishness. M is, therefore, half English and half Italian; he is a Masorti Jew with an Italian mother who was once Catholic. All of these are aspects of his ethnic origins. And those origins are defined as much by what they do not contain as they are by what they include.

110. What, of course, M's ethnic origins do not – and can never - include is a matrilineal connection to Orthodox Jewry. That is an unchangeable aspect of his parentage, of his origins and of his ethnicity. He cannot be categorised as and can never claim to be born of an Orthodox Jewish mother as recognised by OCR. That this forms part of his ethnic origins can perhaps best be illustrated by comparing his situation with that of someone whose mother is recognised by OCR as Jewish. An assertion by such a person that this matrilineal feature formed part of his ethnic origins could surely not be challenged. Logically, therefore, the absence of such a feature from M's heritage cannot be denied, and must be accepted, as a defining characteristic of his ethnicity.

Direct discrimination

111. The basic question that arises on the issue of direct discrimination can be simply stated. It is, "Was M treated less favourably on racial grounds?" Racial grounds being defined (in section 3 (1) of the Race Relations Act 1976) as including ethnic origins, and there being no dispute between the parties that he was treated less favourably than those who, by reason of their matrilineal connection to an Orthodox Jewish mother, were admitted to the school, the basic question can be refined to the following formulation, "Was M refused admission to the school on grounds of his ethnic origins?"

112. It has been strongly asserted that the Chief Rabbi was not remotely interested in M's ethnic origins for other than religious reasons. This is no doubt true, but the decision to refuse M entry to the school was unquestionably bound up with those origins. It was because of what was missing from M's ethnic origins; because they did not include the indispensable matrilineal connection to Orthodox Judaism that the less favourable treatment occurred. Does this mean that he was discriminated against on ethnic grounds? Or does the fact that the refusal to admit him to the school was based on a decision on a religious issue remove the case from the sphere of racial discrimination altogether?

113. These questions focus attention on the problematical issue of what is meant by discrimination *on racial grounds.* As Lord Hope has observed, the opinions in cases such as *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155

and *James v Eastleigh Borough Council* [1990] 2 AC 751 tended to dismiss as irrelevant any consideration of the subjective reasons for the alleged discriminator having acted as he did unless it was clear that the racial or sex discrimination was overt. A benign motivation on the part of the person alleged to have been guilty of discrimination did not divest the less favourable treatment of its discriminatory character if he was acting on prohibited grounds.

114. Later cases have recognised that where the reasons for the less favourable treatment are not immediately apparent, an examination of why the discriminator acted as he did may be appropriate. In *Nagarajan v London Transport* [2000] 1 AC 501, 511A, Lord Nicholls of Birkenhead, having identified the crucial question as 'why did the complainant receive less favourable treatment', said this:

> "Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."

115. It is, I believe, important to determine which mental processes Lord Nicholls had in mind in making this statement. It appears to me that he was referring to those mental processes that are engaged when the discriminator decides to treat an individual less favourably for a particular reason or on a particular basis. That reason or the basis for acting may be one that is consciously formed or it may operate on the discriminator's subconscious. In my opinion Lord Nicholls was *not* referring to the mental processes involved in the alleged discriminator deciding to act as he did. This much, I believe, is clear from a later passage of his opinion, at p 511B where he said:

> "The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred."

116. This latter passage points clearly to the need to recognise the distinction between, on the one hand, the grounds for the decision (what was the basis on which it was taken) and on the other, what motivated the decision-maker to make that decision. The need for segregation of these two aspects, vital to a proper identification of the grounds on which the decision was made, is well illustrated, in my view, by the circumstances of this case. The school refused entry to M because an essential part of the required ethnic make-up was missing in his case. The reason that they took the decision on those grounds was a religious one – OCR had said that M was not a Jew. But the reason that he was not a Jew

was because of his ethnic origins, or more pertinently, his lack of the requisite ethnic origins.

117. The basis for the decision, therefore, or the grounds on which it was taken, was M's lack of Jewishness. What motivated the school to approach the question of admission in this way was, no doubt, its desire to attract students who were recognised as Jewish by OCR and that may properly be characterised as a religious aspiration but I am firmly of the view that the basis that underlay it (in other words, the grounds on which it was taken) was that M did not have the necessary matrilineal connection in his ethnic origin. This conclusion appears to me to be inescapable from Lord Nicholls' analysis of the two aspects of decision making and to chime well with a later passage in his speech where he said:

> "Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign."

118. In the present case, the reason why the school refused M admission was, if not benign, at least perfectly understandable in the religious context. But that says nothing to the point. The decision was made on grounds which the 1976 Act has decreed are racial.

The recognition of Jewishness – a religious question?

119. As Lord Brown has pointed out, all Jews define membership of their religion by reference to descent or conversion. It is therefore quite logical to describe the decision, taken as a matter of Jewish law, as to whether one is or is not a Jew, as a religious one. Descent is employed as a means of determining an essentially religious question. But, when the answer to that religious question has consequences in the civil law sphere, its legality falls to be examined. If the decision has consequences that are not permitted under the law, the fact that it was taken for a religious purpose will not save it from the condition of illegality.

120. In this case the OCR decision that M was not a Jew had profound consequences for him since he was denied admission to an educational establishment that he wished to attend. The fact that the decision not to admit him was based on the determination of a religious issue cannot, of itself, insulate it from the charge of discrimination on racial grounds. Once it is recognised that M's ethnic origins underpinned the conclusion on the religious issue, it becomes plain that it cannot be characterised as an exclusively religious

question. The terminus for OCR was a decision on a matter of religion but the route to that terminus was one of ethnic origin.

Ethnic groups

121. It is unquestionably true that Jews, whether they be Orthodox, Masorti, Liberal or Progressive, constitute an ethnic group. It is also undoubtedly the case that M belongs to that ethnic group. He is an ethnic Jew. But, belonging to that group is not comprehensive of his ethnicity. As I have said (at 109 above) M's ethnic origins extend well beyond the fact that he is a Jew. The circumstance that he is an ethnic Jew in the *Mandla* [*Mandla v Dowell Lee* [1983] 2 AC 548] sense does not assist, in my opinion, in determining whether he has been discriminated against on racial grounds.

122. Although those who receive the more favourable treatment (in being admitted to the school) belong to the same racial or ethnic group as M, this does not, of itself, preclude a finding that he has been treated less favourably on account of his ethnic origins. This might be so if his ethnic origins were confined to his Jewishness. They are not. It is because of his lack of the requisite feature of Jewishness that he has received less favourable treatment. That perceived deficiency is as much part of his ethnic make-up as is the fact that he is an ethnic Jew in the *Mandla* sense.

Indirect discrimination

123. Since I have reached the conclusion that this is a case of direct discrimination, it is unnecessary to say anything about the alternative case made on M's behalf on indirect discrimination, particularly in light of Lord Mance's discussion of that subject. I find myself in complete agreement with all that he has had to say on that issue – and, incidentally, with all that he has had to say on the issue of direct discrimination.

Conclusion

124. One can have sympathy with the school authorities in their wish to pursue what must have seemed to them an entirely legitimate religious objective. It is plain that the Chief Rabbi and the governors of JFS are entirely free from any moral blame. That they have fallen foul of the 1976 Act does not involve any reprehensible conduct on their part for it is accepted on all sides that they acted on sincerely and conscientiously held beliefs. Their motives are unimpeachable. The breach of the legislation arises because of the breadth of its reach. The grounds on which the rejection of M was made may well be considered perfectly reasonable in the religious context but it is because they amount to ethnic grounds under the legislation that a finding against the school became, in my opinion, inescapable. I would dismiss the appeal.

LORD CLARKE

125. The division of opinion in this court and in the courts below demonstrates that this appeal raises issues which are difficult to resolve. The issues have been discussed in detail in all the above judgments. I have reached the same conclusion as Lord Phillips, Lady Hale, Lord Mance and Lord Kerr, essentially for the reasons they have given. Rather against my general principle, which is that there should be fewer judgments in the Supreme Court and not more, I add a judgment of my own in order to explain my own reasons for agreeing that the appeal should be dismissed.

Direct discrimination

126. The facts have been fully set out by others. I therefore refer only to those facts which seem to me to be critical. The policy of JFS, when oversubscribed, was to admit children who are recognised as being Jewish by the Office of the Chief Rabbi ('OCR') or who have already enrolled upon or undertaken, with the consent of their parents, to follow a course of conversion to Orthodox Judaism under the approval of the OCR. As I understand it, nobody has ever been enrolled at JFS under the second head. Leaving adopted children on one side, children recognised by the OCR as being Orthodox Jewish are only those with a biological mother who is either Orthodox Jewish by birth or who has converted to Orthodox Judaism before the birth of the child by a process approved by the OCR.

127. As I see it, the sole question for decision is whether those criteria offend section 1(1)(a) of the 1976 Act (as amended) by discriminating against some children (here M) on racial grounds, which, by section 3, include ethnic origin. On the facts of this case I prefer to ask whether the criteria offend against some children on the ground of their ethnic origin. To my mind the answer to that question does not depend upon the subjective state of mind of the Chief Rabbi or anyone else. Moreover, I do not think that the correct question to ask is whether OCR's guidance was given either on grounds of ethnic origin or on grounds of religion. That is because, so formulated, the test suggests that, if the guidance was given on the grounds of religion, it was not given on the grounds of ethnic origin.

128. So formulated, the question could have only one answer because I entirely accept that the guidance was given on grounds of religion. That is clear from the guidance itself and indeed from a wealth of evidence before the court. Moreover, I fully understand that it can in one sense be said that those not recognised by the criteria as Orthodox Jews are, as Lord Brown puts it, being treated less favourably, not because of their ethnic origins, which he says are a matter of total indifference to the OCR, but rather because of their religion because they are not members of the Orthodox Jewish religion. However, again as Lord Brown puts it, the reason they are not members of the Orthodox Jewish religion is

that their forbears in the matrilineal line were not recognised as Jewish by Orthodox Jews and in this sense their less favourable treatment is determined by their descent.

129. Thus the ground upon which the OCR criteria defined those children to be admitted was that their forbears in the matrilineal line must be recognised as Jewish by Orthodox Jews. As I see it, in agreement with Lord Phillips, Lady Hale, Lord Mance and Lord Kerr, that is an ethnic ground, so that the discrimination was on both ethnic grounds and religious grounds. It is, in my opinion, wrong in principle to treat the question as an either/or question because that excludes the possibility that there were two grounds for the decision to exclude M, one religious and the other ethnic. If the religious ground was itself based upon an ethnic ground, then in my opinion the question asked by section 1(1)(a) of the 1976 Act, namely, whether M was discriminated against on ethnic grounds must be answered in the affirmative. It would be too narrow a construction of section 1(1)(a) to hold that that was not to discriminate on ethnic grounds. M was excluded because his mother was not Orthodox Jewish, whether by birth or conversion. That conclusion does not depend upon the state of mind of the OCR, but follows from an examination of the criteria laid down by the OCR.

130. The question is not whether the guidance was given on religious grounds but whether the admitted discrimination was on ethnic grounds. In my opinion the answer is that the discrimination was on both religious and ethnic grounds because the criteria were arrived at on religious grounds but, since those religious grounds involved discrimination on ethnic grounds, it follows that the admissions policy of JFS was contrary to section 1(1)(a) because it discriminated against M and others on racial grounds. To hold that there were two grounds for the discrimination, both religious and ethnic, is not in my opinion to reduce, as Lord Rodger suggests, the religious element to the status of a mere motive. It is to recognise that the ethnic element is an essential feature of the religious ground.

131. If M's mother had been born a Masorti Jew (because someone in her matrilineal line been converted to Masorti Judaism) and had not been converted to Orthodox Judaism before M's birth, M's application would have been rejected because his mother was not, in the relevant sense, Jewish by birth. As I see it, for the reasons given in much more detail by others (and in particular Lord Mance) that would be discrimination on the ground of his ethnicity. To my mind the same is true on the facts of this case since at the time of M's birth his mother was not, in the relevant sense, Jewish because she had not been converted to Orthodox Judaism in the manner accepted by the OCR. In both cases, as Lord Kerr puts it, the problem would be that M does not have the necessary matrilineal connection in his ethnic origin. Again as Lord Kerr puts it, the terminus for the OCR was a decision on a matter of religion but the route to that terminus was one of ethnic origin.

132. In my opinion the state of mind of JFS, the Chief Rabbi and the OCR are all irrelevant to the determination of the critical question under section 1(1)(a). I agree with

Lord Mance that there are two ways in which direct discrimination can be established. The first is where, whatever the motive and whatever the state of mind of the alleged discriminator, the decision or action was taken on a ground that was inherently racial and the second is where the decision or action was taken on a ground that was subjectively racial. Until now this distinction has not perhaps been as clearly identified in the authorities as it should be.

133. The first class of case was established by *R v Birmingham County Council ex p Equal Opportunities Commission* [1989] AC 1155, where (as Lord Mance puts it) girls were required to achieve a higher standard than boys for grammar school entry because of a disparity in the number of grammar school places for boys and girls. Lord Goff, with whom the other members of the appellate committee agreed, made it clear at page 1194B that the question was simply whether there was less favourable treatment on the ground of sex, "in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex". The intention or motive of the council was not a necessary condition of liability. That was a question of fact and it was held by Lord Goff in the passage quoted by Lord Mance from page 1194C-D that "whatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975".

134. In *James v Eastleigh Borough Council* [1990] 2 AC 751, the swimming pool case, it was held that the test for free entry to the swimming pool at pensionable age unlawfully discriminated against men because men did not reach pensionable age until 65 whereas women reached it at 60. It is true that the House of Lords divided three to two but that seems to me to be irrelevant. The simple question was again a question of fact, namely whether men and women were treated differently. It was held that they were, even though, as Lord Mance has suggested, the test was probably adopted because it was thought that those of pensionable age would be more needy. Lord Goff said much the same as he had said in the *Birmingham* case. He put it thus at page 772B-G:

> "I turn to that part of the Vice-Chancellor's reasoning which is based upon the wording of section 1(1)(a). The problem in the present case can be reduced to the simple question - did the defendant council, on the ground of sex, treat the plaintiff less favourably than it treated or would treat a woman? As a matter of impression, it seems to me that, without doing any violence to the words used in the subsection, it can properly be said that, by applying to the plaintiff a gender-based criterion, unfavourable to men, which it has adopted as the basis for a concession of free entry to its swimming pool, it did on the ground of sex treat him less favourably than it treated women of the same age and in particular Mrs. James. In other words, I do not read the words "on the ground of sex" as necessarily referring

> only to the reason why the defendant acted as he did, but as embracing cases in which a gender-based criterion is the basis upon which the complainant has been selected for the relevant treatment. Of course, there may be cases where the defendant's reason for his action may bring the case within the subsection, as when the defendant is motivated by an animus against persons of the complainant's sex, or otherwise selects the complainant for the relevant treatment because of his or her sex. But it does not follow that the words "on the ground of sex" refer only to case where the defendant's reason for his action is the sex of the complainant; and, in my opinion, the application by the defendant to the complainant of a gender-based criterion which favours the opposite sex is just as much a case of unfavourable treatment on the ground of sex. Such a conclusion seems to me to be consistent with the policy of the Act, which is the active promotion of equal treatment of men and women. Indeed, the present case is no different from one in which the defendant adopts a criterion which favours widows as against widowers, on the basis that the former are likely to be less well off; or indeed, as my noble and learned friend, Lord Bridge of Harwich has pointed out, a criterion which favours women between the ages of 60 and 65, as against men between the same ages on the same basis. It is plain to me that, in those cases, a man in either category who was so treated could properly say that he was treated less favourably on the ground of sex, and that the fact that the defendant had so treated him for a benign motive (to help women in the same category, because they are likely to be less well off) was irrelevant."

135. Lord Bridge and Lord Ackner said much the same. For example, Lord Bridge said at page 763H that the use of the statutory criterion for pensionable age, being fixed at 60 for women and 65 for men, was to use a criterion which directly discriminated between men and women. See also per Lord Bridge at page 765G. Lord Ackner said at page 769F-H that the formula used was inherently discriminatory. He noted that no evidence had been given in the county court as to why the council had decided on the policy. He said that such evidence would have been irrelevant because, as he put it, the policy was crystal clear. If you were a woman you could swim at 60 without payment whereas if you were a man you had to wait until you were 65. The reason why the policy was adopted could in no way affect or alter the fact that the council had decided to implement a policy by virtue of which men were to be treated less favourably than women and were to be treated on the ground of, ie by reason of, their sex.

136. In my opinion that analysis applies here. Just as in that case the admissions criteria were gender based and thus discriminatory on the ground of sex contrary to section

1(1)(a) of the Sex Discrimination Act 1975, so here the JFS admissions criteria were based on ethnicity and thus discriminatory on racial grounds as defined in section 1(1)(a) of the 1976 Act.

137. For my part I do not accept that more recent decisions of the House of Lords call for a more nuanced approach than that stated in the *Birmingham* and *Eastleigh* cases. As I read the later cases, they simply accept, as Lord Goff accepted in the passage from his speech in the *Eastleigh* case quoted above, that there may be cases where the defendant's reason for his action may bring the case within the subsection, as when the defendant is motivated by an animus against persons of the complainant's sex, or otherwise selects the complainant for the relevant treatment because of his or her sex or (I am sure he would have added) because of his or her race or ethnicity. As I see it, this is a separate basis on which direct discrimination can be established. It does not involve any alteration to the principle stated by Lord Goff, Lord Bridge and Lord Ackner and set out above.

138. In *Nagarajan v London Regional Transport* [2000] 1 AC 501 the House of Lords was concerned with an allegation of alleged unlawful victimisation under section 2 of the 1976 Act. It applied the same principles as those applicable under section 1(1)(a). The leading speech was given by Lord Nicholls, Lord Steyn made a concurring speech, Lord Hutton and Lord Hobhouse agreed with Lord Nicholls and Lord Steyn, and Lord Browne-Wilkinson dissented. Lord Steyn said at page 520H that the *Birmingham* and *Eastleigh* cases established the principle that conscious motivation is not required for direct discrimination.

139. In these circumstances it is inherently unlikely that there is any distinction between the principles established by those cases and the reasoning in *Nagarajan*. In my opinion there is not. Reliance was placed on part of the speech of Lord Nicholls. Read in context, the relevant passage is in these terms at pages 510H-511E:

> "The first point raised is whether conscious motivation is a prerequisite for victimisation under section 2 of the Act.
>
> Section 2 should be read in the context of section 1. Section 1(1)(*a*) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(*a*) the less favourable treatment must be on racial grounds. *Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator.* Treatment, favourable or unfavourable, is a consequence which

> follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.
>
> The crucial question just mentioned is to be distinguished sharply from a second and different question: *if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant.* Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant's life a misery. If racial grounds were the reason for the less favourable treatment, direct discrimination under section 1(1)(*a*) is established." (My emphasis)

140. Lord Nicholls then added at page 511E-H that "this law, which is well established" was confirmed by the House of Lords in the *Birmingham* and *Eastleigh* cases as described above. He said that in the *Birmingham* case the answer to 'the crucial question' was plain because, as a matter of fact, girls received less favourable treatment than boys. It followed that there was direct sex discrimination and the reason for it was irrelevant. The same was true in *Eastleigh* because the reduction in swimming pool charges was geared to a criterion which was itself gender based. It is true that Lord Nicholls added this:

> "Lord Bridge of Harwich, at p 765, described Lord Goff's test in the *Birmingham* case as objective and not subjective. In stating this he was excluding as irrelevant the (subjective) reason why the council discriminated directly between men and women. He is not to be taken as saying that the discriminator's state of mind is irrelevant when answering the crucial, anterior question: why did the complainant receive less favourable treatment?"

141. The essence of Lord Nicholls' view can be seen in the italicised passages in the quotation at para 139 above. If, viewed objectively, the discriminator discriminated against the claimant on racial grounds the reason why he did so is irrelevant. Thus in *Birmingham* and *Eastleigh* the sex discrimination was objectively plain from the criteria

adopted. Once that was established, the state of mind of the discriminator was, as Lord Nicholls put it, strictly beside the point. That, as I see it, is this case. This is a plain or obvious case of the kind Lord Nicholls had in mind because the position is clear from the OCR's criteria.

142. When he said in the first of the italicised passages that, save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator, he had in mind, not this kind of case, which he would have regarded as obvious, but the kind of case he had just mentioned – namely where the claimant was discriminated against but it was not clear whether that was because of unlawful discrimination on the ground of, say, race or sex, or for some other reason, for instance, because the complainant was not so well qualified for the job. This is not such a case.

143. In this connection I cannot agree with Lord Hope's analysis of the passage quoted at para 194 from page 512 of Lord Nicholls' speech in *Nagarajan*. Lord Nicholls was there considering the question of unconscious motivation. He was doing so because that was not a case of discrimination inherent in the relevant rules such as existed in *Birmingham*, *Eastleigh* and this case. In these circumstances it is not, in my opinion, possible to draw from that passage in Lord Nicholls' speech the proposition that if, after careful and thorough investigation, the tribunal were to conclude that the employer's actions were not racially motivated, in the sense that race was not the reason why he acted as he did, it would be entitled to draw the inference that the complainant was not treated less favourably on racial grounds. It would not be so entitled for the reasons given in *Birmingham* and *Eastleigh*, namely that this is a case of inherent discrimination.

144. Equally, when Lord Nicholls said in *Chief Constable of West Yorkshire Police v Khan* [2001] 1 WLR 1947, para 29 that the question was why the discriminator acted as he did or, put another way, what consciously or unconsciously was his reason, Lord Nicholls was not considering this kind of case. For the same reason I do not think that the decision in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337, is of any assistance in this kind of case.

145. In these circumstances I agree with Lord Hope at para 195 that at the initial stage, when the question is whether or not the discrimination was on racial grounds, the alleged discriminator's motivation *may* not only be relevant but also necessary, in order to reach an informed decision as to whether or not this was a case of racial discrimination. However, I emphasize the word *may* because, for the reasons I have already given, the discriminator's motivation or subjective reasoning is not in my opinion relevant in every case. The authorities, namely *Birmingham*, *Eastleigh* and *Nagarajan* show that it is not relevant where the criteria adopted or (in Lord Ackner's words) the formula used are or is inherently discriminatory on ethnic grounds. Lord Nicholls has however shown that it is relevant in other cases where, without investigating the state of mind of the alleged

discriminator, it is not possible to say whether the discrimination was on ethnic grounds or not.

146. The question arises what considerations are relevant in answering the question whether the criteria were inherently racial. I entirely accept (and there is indeed no dispute) that JFS, the Chief Rabbi and the OCR are, as Lord Hope puts it at para 201, thoughtful, well-intentioned and articulate and that, as Lord Pannick submitted, the Chief Rabbi was not in the least interested in M's ethnicity. It is true that, if the Chief Rabbi were asked why he acted as he did, he would say that his reason was that this was what was required of him by fundamental Orthodox Jewish religious law. Again as Lord Hope puts it, Jewishness based on matrilineal descent from Jewish ancestors has been the Orthodox religious rule for many thousands of years, subject only to the exception for conversion. I agree so far. However, I do not agree that to say that his ground was a racial one is to confuse the effect of the treatment with the ground itself.

147. The reason I disagree with Lord Hope (or perhaps the ground on which I do so) is that his opinion depends upon the state of mind of the Chief Rabbi. Thus in the passage in Lord Nicholls' speech to which Lord Hope refers Lord Nicholls was considering the kind of case in which it is necessary to consider the mental processes of the alleged discriminator. Lord Hope makes it clear at para 201 that to categorise the criteria as based on racial grounds might be justified if there were reasons for doubting the Chief Rabbi's frankness or good faith. However, to my mind it does not follow that the criteria were not based on racial grounds because neither the Chief Rabbi nor the OCR thought that they were. If the religious grounds were themselves based on racial (or ethnic) grounds then one of the grounds upon which there was discrimination based on the criteria was ethnic. This appears from both the *Birmingham* and the *Eastleigh* cases.

148. I have already expressed the view that the principles in those cases apply here. Lord Rodger however says that they do not come into the picture. As I see it, that could only be on the basis that the issue is resolved by the subjective state of mind of the Chief Rabbi, the OCR and the governors of JFS. It is said that the governors were not asked to consider and, did not actually consider, M's ethnic origins and, if they had done so, that they would have regarded them as irrelevant. However, they considered the criteria which Orthodox Judaism had applied for very many years and, although I entirely accept that they did so for religious reasons, I do not accept they were not considering M's ethnic origins or making a decision on ethnic grounds. Such a view would be to take too narrow a view of the concept of ethnic origins or of the meaning of ethnic origin in sections 1(1)(a) and 3 of the 1976 Act. As I see it, once it is accepted (as Lord Brown does) that the reason M is not a member of the Jewish religion is that his forbears in the matrilineal line were not Orthodox Jews and that, in that sense his less favourable treatment is determined by his descent, it follows that he is discriminated against on ethnic grounds. It makes no difference whether the reason M is not acceptable is that neither his mother nor anyone in his matrilineal line was born Jewish or that his mother was not converted to Orthodox Judaism. The question is, in my opinion, not that espoused by Lord Rodger, but whether it is discrimination on ethnic grounds to discriminate against all those who are

not descended from Jewish women. In my opinion it is. Lord Phillips, Lady Hale, Lord Mance and Lord Kerr have explained in detail why in their view the criteria were indeed discriminatory on ethnic and therefore racial grounds. I agree with their reasoning and do not wish further to add to it.

149. In short, it is not in dispute that the decision in M's case was taken on the basis of the criteria laid down by the OCR and followed by JFS. It follows that, if the criteria involved discrimination based on ethnic grounds, the decision was taken on a ground that was inherently racial and there was direct discrimination within section 1(1)(a) of the 1976 Act. If that is so, as I see it, the fact that the discrimination was also on religious grounds is irrelevant, as are both the fact that the religious grounds have been adopted for thousands of years and the fact that the Chief Rabbi and the OCR (and therefore JFS) concentrated wholly on the religious questions.

150. In the Court of Appeal at para 30 Sedley LJ, with whom Smith LJ and Rimer LJ agreed, expressed the view that if that were not so, a person who honestly believed, as the Dutch Reformed Church of South Africa until recently believed, that God had made black people inferior and had destined them to live separately from whites, would be able to discriminate openly against them without breaking the law. I agree. It is to my mind no answer to say that the discrimination invited by the belief, on the grounds of colour, was overtly racist. It is true that such discrimination would be overtly on racial grounds but that is because the criteria were inherently based on racial grounds and not because of the subjective state of mind of the members of the Dutch Reformed Church or because of some principle of public policy. However, the 1976 Act banning direct discrimination is an application of public policy, rather like the decision of the of the United States Supreme Court in *Bob Jones University v United States* 461 US 574 (1983).

151. I would however add that if, contrary to the views I have expressed, the state of mind of the Chief Rabbi and the OCR are relevant they must surely have subjectively intended to discriminate against applicants like M on the grounds set out in the criteria so that, again, if the criteria are based on ethnic grounds contrary to section 1(1)(a), they must surely have subjectively intended that result, however much the reason they did so was, as they saw it, religious.

152. Finally, under the heading of direct discrimination, I would like to identify some of the aspects of the argument that I regard as irrelevant to the resolution of the single question whether the OCR criteria discriminate against applicants who do not meet the criteria on ethnic, and thus racial, grounds contrary to section 1(1)(a) of the 1976 Act. They include the following.

i) It is suggested that the 1976 Act does not outlaw discrimination by an ethnic group against the same ethnic group. However, as I see it, the question is simply whether the discrimination is on ethnic grounds. The discrimination is not in dispute. I do not see that the identity of the discriminator is of any real relevance to the answer to the question. There is certainly nothing in the language or the context of section 1 of the Act or in its statutory purpose to limit the section in that way.

ii) Like any statutory provision, the language of section 1(1)(a) should be construed in its context and having regard to its statutory purpose. Parliament decided to distinguish between direct and indirect discrimination. Adopting that approach, I am not persuaded that it is appropriate to construe section 1(1)(a) narrowly because it is not possible to justify the discrimination outlawed by it. Parliament could, like the European Convention on Human Rights, have permitted justification but, for policy reasons, chose not to.

iii) For whatever reason, the question of construction of section 1(1)(a) has not arisen before. I do not, however, think that it can be relevant to that question that, if the respondent's argument is correct, JFS has been acting unlawfully for more than thirty years. The question is the same now as it would have been if it had been raised thirty years ago. The provisions of the Equality Act 2006 are irrelevant for the same reasons.

iv) I accept that this case is curious in that both M and E are Masorti Jews who, like Orthodox Jews, recognise those whose mothers or others in the matrilineal line were Jews by descent or conversion. The real complaint is that the OCR does not accept conversion as practised by Masorti Jews because otherwise M would have qualified. I take Lord Brown's point at para 248, (a) that E is not really seeking to prevent JFS from adopting oversubscription criteria which give priority to Jews but rather for JFS to define Jews more expansively than Orthodox Jews in fact do, and (b) that on the respondent's argument it is strictly immaterial that E is Jewish or that M's mother converted to Judaism, so that the policy could by struck down by anyone excluded by the application of the criteria. I recognise that there is an irony here but I do not see that that fact is relevant in answering the question posed by the statute, namely whether the discrimination is on ethnic grounds.

v) I do not regard the consequences of the conclusion that the OCR criteria discriminate on ethnic grounds as relevant to the question whether they do or not. I am in any event not persuaded that they are anything like as serious as was suggested in argument.

153. It follows that I too would dismiss the appeal.

Indirect discrimination

154. Like Lord Kerr, I entirely agree with the reasoning and conclusion of Lord Mance on this issue, although if the appeal is dismissed on the direct discrimination issue, the issue of indirect discrimination does not arise.

Costs

155. I agree with Lord Hope's reasoning and conclusions on costs.

Postscript

156. I wish to stress that nothing in the reasoning which has led me (or I believe others) to the conclusion that the criteria adopted by JFS discriminated against applicants on ethnic grounds is based on the view that the Chief Rabbi, the OCR or JFS acted in a racist way. In this regard I entirely agree with Lord Phillips and Lady Hale that any suggestion that they acted in a racist way in the popular sense of that term must be dismissed. Finally I direct the reader to the final paragraph in the judgment of Lord Kerr, at para 124 above, with which I am in complete agreement.

The Minority Judgments

LORD HOPE

157. It has long been understood that it is not the business of the courts to intervene in matters of religion. In *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036, 1042-1043, Simon Brown J observed that the court was hardly in a position to regulate what was essentially a religious function – in that case, the determination whether someone was morally and religiously fit to carry out the spiritual and pastoral duties of his office. As he put it, the court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state. This too is the approach of the legislature, as Hoffmann LJ said in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909, 932: religion is something to be encouraged but it is not the business of government.

158. It is just as well understood, however, that the divide is crossed when the parties to the dispute have deliberately left the sphere of matters spiritual over which the religious body has exclusive jurisdiction and engaged in matters that are regulated by the civil courts. In *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28, for example, the appellant was employed by the Board of Mission under a contract personally to execute work within the meaning of section 82(1) of the Sex Discrimination Act 1975. The articles declaratory of the constitution of the Church of Scotland set forth in the Schedule to the Church of Scotland Act 1921 contain an assertion that the civil authority has no right of interference in the proceedings and judgments of the Church within the sphere of its spiritual government and jurisdiction. But it was held that by entering into a contract binding under the civil law the parties had put themselves within the jurisdiction of the civil courts and that the appellant's claim of sex discrimination could not be regarded as a spiritual matter.

159. The same approach to arguments based on religious doctrine has been adopted by the Supreme Court of Israel. In *No'ar K'halacha v The Ministry of Education*, HCJ 1067/08, 6 August 2009 the Court held that, although religious affiliation as a basis for treating students differently was recognised by Israeli law, it was not an absolute claim and could not prevail over the overarching right to equality. The school in question had established a two tier, ethnically-segregated system by which students of Ashkenazi descent were automatically assigned to one group and those of Sephardi descent were assigned to another. Although this was purportedly on religious grounds, the thinly disguised subtext was that the Ashkenazi group were superior to the Sephardi and that, as they were the elite, their education should be organised accordingly. The Supreme Court rejected the school's argument that this was due to religious considerations, holding that they were a camouflage for discrimination cloaked in cultural disparity. It ordered the school to end all discriminatory practices against students who were of Sephardi ethnic origin.

160. It is accepted on all sides in this case that it is entirely a matter for the Chief Rabbi to adjudicate on the principles of Orthodox Judaism. But the sphere within which those principles are being applied is that of an educational establishment whose activities are regulated by the law that the civil courts must administer. Underlying the case is a fundamental difference of opinion among members of the Jewish community about the propriety of the criteria that the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth ("the OCR") applies to determine whether a person is or is not Jewish. It is not for the court to adjudicate on the merits of that dispute. But the discrimination issue is an entirely different matter. However distasteful or offensive this may appear to be to some, it is an issue in an area regulated by a statute that must be faced up to. It must be resolved by applying the law laid down by Parliament according to the principles that have been developed by the civil courts.

161. By far the most important issue in the appeals which are before this court is whether it is unlawful direct or indirect race discrimination for a faith school to adopt oversubscription criteria which give priority to children who are recognised by the OCR

to be Jewish according to Orthodox Jewish principles. There is also an appeal by the United Synagogue in relation to a costs order made against it by the Court of Appeal, which I shall deal with briefly at the end of this opinion. Almost everything that I wish to say will be devoted to the main issue.

162. I should make it clear at the outset that I agree with everything that Lord Rodger and Lord Brown say on the issue of direct discrimination. With much regret, I differ from them on the indirect discrimination issue. But I differ from them only when I reach the final step in that part of the argument. On both issues I agree entirely with Lord Walker. As for the facts, I have dealt with them more fully than would normally be appropriate in a minority judgment. I hope that, by doing so, I will have made it easier for all other members of the court to concentrate on the issues of law that arise in this case.

The facts

163. JFS, formerly the Jewish Free School, is a voluntary aided comprehensive secondary school which is maintained by the local authority, the London Borough of Brent. It has a long and distinguished history which can be traced back to 1732. It has over 2000 pupils, and for more than the past 10 years it has been over-subscribed. It regularly has twice the number of applicants for the places that are available. Clause 8 of its Instrument of Government dated 18 October 2005 provides:

> "Statement of School Ethos
>
> Recognising its historic foundation, JFS will preserve and develop its religious character in accordance with the principles of orthodox Judaism, under the guidance of the Chief Rabbi of the United Hebrew Congregations of the Commonwealth. The School aims to serve its community by providing education of the highest quality within the context of Jewish belief and practice. It encourages the understanding of the meaning of the significance of faith and promotes Jewish values for the experience of all its pupils."

164. Further information is given by the school on its website, which states:

> "The outlook and practice of the School is Orthodox. One of our aims is to ensure that Jewish values permeate the School. Our students reflect the very wide range of the religious spectrum of British Jewry. Whilst two thirds or more of our students have attended Jewish primary schools, a significant number of our Year 7 intake has not attended Jewish schools and some enter the School with little or no Jewish education. Many come from families who are totally committed to Judaism and Israel; others are unaware of Jewish belief and practice. We welcome this diversity and

> embrace the opportunity to have such a broad range of young people developing Jewish values together."

The culture and ethos of the school is Orthodox Judaism. But there are many children at JFS whose families have no Jewish faith or practice at all.

165. Prior to the decision of the Court of Appeal in this case the principal admissions criterion of JFS was that, unless undersubscribed, it would admit only children who were recognised as being Jewish by the OCR. Its policy for the year 2008/09, which can be taken to be the same as that for the year in question in this case, was as follows:

> "It is JFS ("the School") policy to admit up to the standard admissions number children who are recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR) or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion to Judaism under the approval of the OCR."

The Chief Rabbi is the head of the largest groups of Orthodox synagogues in the United Kingdom. But he does not represent all Orthodox communities, nor does he represent the Masorti, Reform and Progressive Jewish communities. In accordance with Jewish law, the OCR recognises as Jewish any child who is descended from a Jewish mother. The mother herself must be descended from a Jewish mother or must have been converted to Judaism before the birth of the child in a manner recognised as valid by the OCR. Such a child is recognised by the OCR as Jewish regardless of the form of Judaism practised by the family (Orthodox, Masorti, Reform or Progressive). He is so recognised even if the entire family has no Jewish faith or observance at all. A family may be entirely secular in its life and outlook. Its members may be atheists or even be practising Christians or practising Muslims. Yet, if the child was himself born of a Jewish mother, he will be recognised as Jewish by the OCR and eligible for a place at JFS.

166. These proceedings have been brought in relation to a child, M on the application of his father, E. M's father is of Jewish ethnic origin. M's mother is Italian by birth and ethnic origin. Before she married E she converted to Judaism under the auspices of a non-Orthodox synagogue. Her conversion is recognised as valid by the Masorti, Reform and Progressive Synagogues. But it was undertaken in a manner that is not recognised by the OCR. She and E are now divorced and M lives mainly with his father. He and his father practise Judaism, and they are both members of the Masorti New London Synagogue. M practices his own Jewish faith, prays in Hebrew, attends synagogue and is a member of a Jewish Youth Group. But the OCR does not recognise him as of Jewish descent in the maternal line. His mother is not recognised as Jewish by the OCR and he has not undergone, or undertaken to follow, a course of approved Orthodox conversion. Consequently he was unable to meet the school's criterion for admission. In April 2007

he was refused a place at JFS for year 7 in the academic year 2007-2008. The effect of this decision on M and his family was profound and it was distressing. There was no other Jewish secondary school in London to which he could be admitted. So he was denied the opportunity of obtaining a Jewish secondary education in accordance with the family's religious beliefs and preference.

167. On 15 April 2007 E notified JFS's Admission Appeals Panel that he wished to appeal. After a hearing on 5 June 2007, the Appeal Panel dismissed his appeal. In its decision letter of 11 June 2007 the Appeal Panel said that a challenge to the admissions criteria was outside its remit. On 2 July 2007 E referred his objection to the Schools Adjudicator, challenging JFS's admissions criteria for both under-subscription and oversubscription. On 27 November 2007 the Schools Adjudicator upheld his complaint about the under-subscriptions criteria, but he dismissed it in relation to the oversubscription criteria with which this case is concerned. E then raised proceedings for judicial review of JFS's decision to refuse M a place at the school and of the decision of the Appeal Panel to dismiss his appeal. In separate proceedings he sought judicial review of the decision of the Schools Adjudicator.

168. On 3 July 2008 Munby J dismissed both claims for judicial review, except for E's claim that the Governing Body of JFS was in breach of its duty under section 71 of the Race Relations Act 1976 to have due regard to the need to eliminate racial discrimination and to promote equality of opportunity and good race relations: [2008] EWHC 1535 (Admin); [2008] ELR 445. He rejected E's argument that there had been direct discrimination on the grounds of race or ethnic origins, holding that it was based on religion: para 174. He also rejected his argument that there was indirect race discrimination, holding that, as JFS exists as a school for Orthodox Jews, its admissions policy of giving preference to children who were Jewish by reference to Orthodox Jewish principles was a proportionate means of achieving a legitimate aim within the meaning of section 1(1A)(c) of the 1976 Act: paras 201- 202. He made a declaration to the effect that JFS was in breach of section 71. But in para 214 of his judgment he said that even the fullest and most conscientious compliance with that section would not have led to any difference in the crucial part of the admissions policy or its application in M's case.

169. On 25 June 2009 the Court of Appeal (Sedley, Smith and Rimer LJJ) allowed the appeal by E in both sets of proceedings: [2009] EWCA Civ 626; [2009] 4 ALL ER 375. Sedley LJ said that the court's essential difference with Munby J was that what he characterised as religious grounds were, in its judgment, racial grounds notwithstanding their theological motivation: para 48. As that observation indicates, the point at issue in this case is how the grounds are to be characterised. It is, in the end, a very narrow one. But it is by no means a simple one to resolve, as the division of opinion in this court indicates.

The Race Relations Act 1976

170. Section 1 of the Race Relations Act 1976 defines race discrimination. It was amended by the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626) which, implementing Council Directive 2000/43 EC of 29 June 2000, rewrote in European terms the concept of indirect discrimination. So far as material it provides as follows:

> "(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if –
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons …
>
> (1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –
>
> (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
>
> (b) which puts or would put that other at that disadvantage, and
>
> (c) which he cannot show to be a proportionate means of achieving a legitimate aim.
>
> (1B) The provisions mentioned in subsection (1A) are –
>
> …
>
> (b) section …17…;
>
> (c) section 19B…"

171. Section 3 of the 1976 Act provides:

> "(1) In this Act, unless the context otherwise requires –
>
> "racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins;
>
> "racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.

(2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.

…

(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

172. Section 17 makes it unlawful for the governing body of a maintained school to discriminate against a person in the terms that it offers to admit him to the establishment as a pupil, or by refusing or deliberately omitting to accept an application for his admission to the establishment as a pupil. Section 19B(1) provides that it is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination. These provisions make it clear that the sphere within which the OCR was providing guidance to JFS was firmly within the jurisdiction of the civil courts.

The admission arrangements

173. The context in which JFS's admissions criteria must be examined is provided by statute. The functioning of publicly funded schools is governed by the School Standards and Framework Act 1998 ("the 1998 Act"). Schools maintained by local authorities are referred to as maintained schools. They include voluntary aided schools such as JFS: section 20(1)(c). Section 20(1) of the Education Act 2002 provides that for every maintained school there shall be an instrument of government which determines the constitution of the governing body and other matters relating to the school. Section 69 of the 1998 Act imposes duties in regard to the provision of religious education in community, foundation and voluntary schools. Section 69(3) provides that a foundation or voluntary school has a religious character if it is designated as a school having such a character by an order made by the Secretary of State. Section 69(4) requires such an order to state the religion or religious denomination in accordance with whose tenets religious education is, or may be, required to be provided at the school.

174. Under the Religious Character of Schools (Designation Procedure) Regulations 1998 (SI 1998/2535) the Secretary of State is required to designate the religion or religious denomination he considers relevant, following consultation with the school's governing body. By the Designation of Schools Having a Religious Character (England) Order 1999 (SI 1999/2432) the Secretary of State designated JFS as having a religious character which is "Jewish". Some other schools have been designated as "Orthodox Jewish". By the Designation of Schools Having a Religious Character (Independent Schools) (England) (No 2) Order 2003 (SI 2003/3284) two schools were designated under this description.

175. Part 2 of the Equality Act 2006 introduced a prohibition on discrimination on grounds of religion or belief in the provision of goods and services. Section 49 provides that it is unlawful for the responsible body of, among others, a school maintained by a local education authority to discriminate against any person by, among other things, refusing to accept an application to admit him as a pupil. Section 50 contains a list of exceptions to section 49, among which is one in favour of a school designated under 69(3) of the 1998 Act. As Munby J pointed out, this provision does no more than immunise the school from liability for religious discrimination under the 2006 Act: para 137. It does not immunise it from any liability for racial discrimination that it may have under the Race Relations Act 1976.

176. Section 84 of the 1998 Act provides that the Secretary of State shall issue, and may from time to time revise, a code of practice for the discharge of their functions under Chapter 1 of Part III of the Act by, among others, the governing bodies of maintained schools and that the governing bodies must act in accordance with the code. Paragraphs 2.41-2.43 of the School Admissions Code for 2007 deals with faith-based oversubscription criteria. Paragraph 2.41 states that schools designated by the Secretary of State as having a religious character (faith schools) are permitted by section 50 of the Equality Act 2006 to use faith-based oversubscription criteria in order to give priority in admission to children who are members of, or who practise, their faith or denomination. It also states that faith-based criteria must be framed so as not to conflict with other legislation such as equality and race relations legislation.

177. Paragraph 2.43 of the 2007 Code states:

> "It is primarily for the relevant faith provider group or religious authority to decide how membership or practice is to be demonstrated, and, accordingly, in determining faith-based oversubscription criteria, admission authorities for faith schools **should** only use the methods and definitions agreed by their faith provider group or religious authority."

Paragraph 2.47 states:

> "Religious authorities may provide guidance for the admission authorities of schools of their faith that sets out what objective processes and criteria may be used to establish whether a child is a member of, or whether they practise, the faith. The admission authorities of faith schools that propose to give priority on the basis of membership or practice of their faith **should** have regard to such guidance, to the extent that the guidance is consistent with the mandatory provisions and guidelines of this Code."

178. Section 88C(2) and (3) of the 1998 Act provides that Regulations may prescribe who should be consulted by the admission authority about admission arrangements. Regulation 12 of and Schedule 2 to the School Admissions (Admission Arrangements) (England) Regulations 2008 (SI 2008/3089) provide that the person that the governing body of JFS must consult about the admission arrangements for JFS for the academic year 2010-2011 is the Chief Rabbi. The regulations that were in force in 2007 when M was seeking admission to JFS were the Education (Determination of Admission Arrangements) Regulations 1999 (SI 1999/126) as amended which, by Regulation 5ZA and the Schedule, introduced provisions similar to those in the 2008 Regulations. The Chief Rabbi was the person to be consulted at the time when M's application for admission was being considered. Provision has been made under section 88H (formerly section 90) of the 1998 Act for parents of a child of primary school age to refer an objection to a school's admission arrangements to the Schools Adjudicator.

179. The procedure for determining admission arrangements is governed by section 88C of the 1998 Act, formerly (as regards England) section 89. It states that the admission arrangements are to be determined by the admission authority. For a voluntary aided school the governing body is the admission authority: see section 88(1). The governing body of JFS adopted an admissions policy which set out the school's over-subscription criteria. The policy that was in force in 2007 stated:

> "1.1 It is JFS ('the School') policy to admit up to the standard admissions number children who are recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR) or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion to Judaism under the approval of the OCR.
>
> 1.2 In the event that the School is oversubscribed then only children who satisfy the provisions of paragraph 1.1 above will be considered for admission, in accordance with the oversubscription criteria set out in Section 2 below."

180. JFS cannot be criticised for basing its oversubscription criteria on the guidance that it received from the OCR. But this does not excuse it from liability for racial discrimination under the Race Relations Act 1976 if the guidance that it received was itself racially discriminatory.

The OCR's guidance

181. In connection with JFS's admissions for the year 2009 an application form, *Application for Confirmation of Jewish Status,* was issued by the OCR. Parents were required to select from the following options:

> "(a) I confirm that the child's biological mother is Jewish by birth.
>
> (b) I confirm that the child's biological mother has converted to Judaism.
>
> (c) I confirm that the child is adopted [in which case the child's Jewish status must be separately verified]."

The guidance notes to the application form state:

> "Jewish status is not dependent on synagogue affiliation *per se*, though Jewish status will not be confirmed if the child, or any of his/her maternal antecedents, converted to Judaism under non-orthodox auspices.
>
> If the child's parents were not married under orthodox auspices, further investigation will be necessary before confirmation of Jewish status is issued. This usually entails obtaining additional documentary evidence down the maternal line."

If the child's mother was not herself born to a Jewish mother but converted to Judaism before the birth of the child, further inquiries are undertaken by the OCR before it is prepared to recognise the child as Jewish. The OCR does not recognise the validity of conversions carried out by non-Orthodox authorities, as they do not require converts to subscribe fully to the tenets of Orthodox Judaism.

182. The exacting process that is indicated by the wording of the application form is firmly rooted in Orthodox Jewish religious law. Religious status is not dependent on belief, religious practice or on attendance at a synagogue. It is entirely dependent upon descent or conversion. It depends on establishing that the person was born to a Jewish mother or has undergone a valid conversion to Judaism. That is a universal rule that applies throughout all Orthodox Judaism. M's ineligibility for admission to JFS was due to the fact that different standards are applied by the Chief Rabbi from those applied by the Masorti, Reform and Progressive communities in the determining of a person's religious status. Nothing that I say in this opinion is to be taken as calling into question the right of the OCR to define Jewish identity in the way it does. I agree with Lord Brown that no court would ever dictate who, as a matter of Orthodox religious law, is to be regarded as Jewish. Nor is it in doubt that the OCR's guidance as to the effect of

Orthodox Jewish religious law was given in the utmost good faith. The question that must now be faced is a different question. It is whether it discriminates on racial grounds against persons who are not recognised by the OCR as Jewish.

The Jewish race and ethnicity

183. It is common ground that for the purposes of the Race Relations Act 1976 Jews can be regarded as belonging to a group with common ethnic origins. As Lord Brown says (see paras [245] and [250]), it is possible (leaving aside those with no connection with Judiasm at all) to regard those who are being treated less favourably and those being treated more favourably by JFS's admissions policy as being all in the same ethnic group since they are all Jews. Lord Mance says (see paras 79, 80 and 86) that Orthodox Jews according to Orthodox Jewish principles and Jews who are not Orthodox should be regarded as forming separate ethnic groups or subgroups for present purposes. But the evidence in this case shows that it all depends on the context. Out on the shop floor, for example, all Jews are Jews and an employer who discriminates against them because they are Jews will be in breach of the Act. The problem in this case is that the Chief Rabbi does not recognise as a Jew anyone who is not a Jew according to Orthodox Jewish principles. So far as he is concerned – and his concern is only with the Jewish religion – there is no division of Jews into separate ethnic groups. I agree with Lord Brown that the difficulty in this case arises because of the overlap between the concepts of religious and racial discrimination and, in the case of Jews, the overlap between ethnic Jews and Jews recognised as members of the Jewish religion. The case does not fit easily into the legislative pattern. It was designed to deal with obvious cases of discrimination on racial grounds.

184. Of course, as we are dealing in this case with faith schools, the religious test has come under scrutiny in the educational context. But the test that is employed is nevertheless a religious one, as that is what faith schools are expected to do. An approach to this case which assumes that Jews are being divided into separate subgroups on the grounds of ethnicity is an artificial construct which Jewish law, whether Orthodox or otherwise, does not recognise. The Act invites this approach, as it is clear that M was being treated less favourably than other persons and this raises the question whether this was on racial grounds. But it must be handled with very great care. As both Lord Phillips in para 9 and Lady Hale in para 54 have emphasised, no-one in this case is suggesting that the policy that JFS has adopted is "racist". The choice of words is important, and I too would wish to avoid that appalling accusation. The use of the word "racial" is inevitable, however, although the discrimination that is perceived in this case is on grounds of ethnicity. In *DH v Czech Republic* (2007) 47 EHRR 59, para 176, the European Court said:

> "Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of

> discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment."

One has to ask whether, on the facts of this case, we really are in that territory. The problem is that section 1(1) of the 1976 Act which prescribes direct discrimination does not distinguish between discrimination which is invidious and discrimination which is benign. A defence of justification is not available.

185. In *Mandla v Dowell Lee* [1983] 2 AC 548 Lord Fraser of Tullybelton discussed the meaning of the word "ethnic" in the context of the refusal by a private school to admit a Sikh pupil whose religion and culture would not permit him to comply with the school's rules on uniform. At p 562 he said:

> "For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community."

The conditions which appeared to him to be essential were –

> "(1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance."

At p 564 he quoted with approval a passage from the judgment of Richardson J in *King-Ansell v Police* [1979] 2 NZLR 531, 543, where he said:

> "a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguishable from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and

> in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents."

186. It is not disputed that the group or groups to which Jews belong are ethnic according to this analysis. They have a shared history which extends back for over three thousand years. Their traditions and practices are maintained with much devotion and attention to detail, in a manner that is designed to keep the memory of that shared history alive. Less favourable treatment of a person because he is, or is thought to be Jewish may therefore be regarded as discrimination against him on racial grounds: see, for example, *Seide v Gillette Industries Ltd* [1980] IRLR 427, paras 21-22, per Slynn J. In that case the Employment Appeal Tribunal upheld the tribunal's decision that the anti-semitic comments that were made by Mr Seide's fellow-worker were made because he was a member of the Jewish race, not because of his religion. The same would be true if he were to be discriminated against because he is, or is thought to be, of a particular Jewish ethnic origin. In *Mandla v Dowell Lee* at p 562 Lord Fraser said that the 1976 Act is not concerned at all with discrimination on religious grounds. But a finding that a person was treated less favourably on religious grounds does not exclude the possibility that he was treated in that way on racial grounds also. I agree with Lord Clarke that it would be wrong in principle to treat this as an "either/or" question.

Direct discrimination

187. At one level there is no dispute about the reason why M was denied admission to JFS. The school's admissions policy was based on the guidance which it received from the OCR. Thus far the mental processes of the alleged discriminator do not need to be examined to discover why he acted as he did. The dispute between the parties is essentially one of categorisation: was the OCR's guidance given on grounds of race, albeit for a religious reason, or was it solely on religious grounds? For JFS, Lord Pannick QC submits that M failed only because JFS was giving priority to members of the Jewish faith as defined by the religious authority of that faith, which was a religious criterion. That was the ground of the decision. The Court of Appeal was wrong to hold that the ground was that M was not regarded as of Jewish ethnic origin, and that the theological reasons for taking this view was the motive for adopting the criterion: para 29. For E, Ms Rose submits that Lord Pannick's submissions confused the ground for the decision with its motive. The ground spoke for itself. It was that M was not regarded according to Orthodox Jewish principles as Jewish. This meant that he was being discriminated against on grounds relating to his ethnicity. This was racial discrimination within the meaning of the statute.

188. These contradictory assertions must now be resolved. I wish to stress again that the issue is not simply whether M is a member of a separate ethnic group from those who are advantaged by JFS's admissions policy. That is not where the argument in this case stops. I agree with Lord Rodger that the decision of the majority which, as it respectfully

seems to me, does indeed stop there leads to extraordinary results. As he puts it in para 226, one cannot help feeling that something has gone wrong. Lord Brown makes the same point when, in para 247 he stresses the importance of not expanding the scope of direct discrimination and thereby placing preferential treatment which could be regarded as no more than indirectly discriminatory beyond the reach of possible justification. The crucial question is whether M was being treated differently on *grounds* of that ethnicity. The phrase "racial grounds" in section 1(1)(a) of the 1976 Act requires us to consider what those words really mean – whether the grounds that are revealed by the facts of this case can properly be described as "racial". Only if we are satisfied that this is so would it be right for this Court to hold that this was discrimination on racial grounds.

189. The development of the case law in this area has not been entirely straightforward. The problem is that, in a new and difficult field, the need for the court to clarify one issue may result in a principle being stated too broadly. This may make it more difficult for it to resolve other different but interlocking issues when they arise at a later date. In *Ealing London Borough Council v Race Relations Board* [1972] AC 342 the House of Lords considered the phrase "on the ground of colour, race or ethnic or national origins" in section 1(1) of the Race Relations Act 1968 in the context of an application for housing by a Polish national It held (Lord Kilbrandon dissenting) that "national origins" meant something different from nationality and that it did not include it since, as Viscount Dilhorne put it at p 358, "the word 'national' in 'national origins' means national in the sense of race and not citizenship." There was no discussion of the meaning of the word "ethnic". Lady Hale has commented that Lord Simon of Glaisdale's speech at p 364 is "an interesting example of stereotyping which might raise judicial eyebrows today": *The Judicial House of Lords* (2009), p 578, fn 32.

190. The House of Lords returned to this topic in *Mandla v Dowell Lee* [1983] 2 AC 548. By then "nationality" had been included in the definition of racial grounds in section 3(1) of the Race Relations Act 1976. There was still no statutory prohibition of discrimination on religious grounds. A Sikh schoolboy had been refused a place at a private school because he would not agree to cut his hair and stop wearing a turban. The question was whether this was discrimination on "grounds of race" as defined in section 3(1). The essential issue was how wide a meaning should be given to "ethnic origins". Lord Fraser, with the agreement of the other members of the Appellate Committee, gave these words a wide meaning: see para 185, above.

191. The next important case, which as this case shows may have sent the law's development off in the wrong direction, was *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155. The council had three grammar schools for girls and five grammar schools for boys. This was a historical fact, and it was not the council's policy to discriminate. But the House held that it was unlawful for it to provide fewer grammar school places for girls than for boys. The decision was plainly right. But the reasons given by Lord Goff of Chieveley, with whom the other members of the Appellate Committee agreed, have led to difficulty in other cases. At p 1194 he said:

> "The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned… is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex."

That decision was applied in *James v Eastleigh Borough Council* [1990] 2 AC 751. This was a case about a municipal swimming pool where there was free swimming for children under three years of age and for persons who had reached the state pension age, which was then 65 for men and 60 for women. Mr James and his wife, who were both aged 61, went swimming and he alone was charged a sum of money for doing so. He complained of sex discrimination. The House of Lords, by a majority of three to two, reversed the Court of Appeal and upheld his complaint. It held that the Court of Appeal had been wrong to treat this as a case of indirect discrimination since the council's policy was, as Lord Ackner put it at p 769, "inherently discriminatory".

192. Lord Goff in *James* deprecated the use, in the present context, of words such as intention, motive, reason and purpose: p 773. He added, at pp 773-774, that:

> "… taking the case of direct discrimination under section 1(1)(a) of the Act, I incline to the opinion that, if it were necessary to identify the requisite intention of the defendant, that intention is simply an intention to perform the relevant act of less favourable treatment. Whether or not the treatment is less favourable in the relevant sense, ie on the ground of sex, may derive either from the application of a gender-based criterion to the complainant, or from selection by the defendant of the complainant because of his or her sex; but in either event, it is not saved from constituting unlawful discrimination by the fact that the defendant acted from a benign motive."

More recent decisions of the House of Lords show, however, that where the facts are not so clear cut a more nuanced approach may be called for. The need to establish an objective link between the conduct of the alleged discriminator and the unequal treatment complained of does not exclude the need to explore *why* the alleged discriminator acted as he did. As the division of Jews into separate subgroups is in itself such an artificial concept (see paras 183 and 184 above), that seems to me to be the real issue in this case.

193. In *Nagarajan v London Regional Transport* [2000] 1 AC 501, 510-511 Lord Nicholls of Birkenhead made an important statement of principle which has often been cited and applied:

> "Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."

Having thus identified the ground of the decision – the reason why – as the crucial question, he went on to deal with the question of motive:

> "The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign."

As for Lord Goff's test in *Birmingham*, which Lord Bridge had described as objective and not subjective, Lord Nicholls said however that:

> "He is not to be taken as saying that the discriminator's state of mind is irrelevant when answering the crucial, *anterior* question: why did the complainant receive less favourable treatment?" [my emphasis]

Developing the same point in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, 1 WLR 1947, para 29, Lord Nicholls said that the question was:

> "…[W]hy did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test."

194. At p 512 in *Nagarajan* Lord Nicholls, considering the question of subconscious motivation, added these words:

> "Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did…. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(a). The employer treated the complainant less favourably on racial grounds."

I would draw from this passage the proposition that if, after careful and thorough investigation, the tribunal were to conclude that the employer's actions were not "racially motivated" – that race was not "the reason why he acted as he did" – it would be entitled to draw the inference that the complainant was *not* treated less favourably on racial grounds.

195. The use of the words "motivated" and "reason" in the passage which I have just quoted appears at first sight not to be in harmony with the passage which I have quoted from p 511 where he said that racial discrimination "is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds". But I do not think that, if these passages taken together are properly analysed, there is any inconsistency. The point that he was making on p 512 was that an examination of the employer's motivation, or the reason why he acted as he did, may be highly relevant to a determination of the crucial question: was this discrimination on racial grounds. On the other hand, once that conclusion has been reached, the fact that there may have been a benign reason for the discrimination is beside the point.

196. In other words, the statutory ground of discrimination, once it has been established, is unaffected by the underlying motive for it. This may be misguided benevolence as in *James*, or passive inertia as in *Birmingham* or racial hatred as in *Seide*. In the *Birmingham* case neither the reason nor the underlying motive left much room for argument. It was enough that the council was responsible for the continuation of the discriminatory system of grammar school education. In *James* there was a worthy underlying motive but, as the sole criterion that had been chosen was the unequal pension ages for men and women, the reason was clearly gender based. But where the complaint is that a black or female employee has not been selected for promotion, or has been taken off some particular duty, there will usually be a disputed issue as to the reason. This will require the tribunal to inquire more closely into the mind of the alleged discriminator.

This is illustrated by *Nagarajan* and also by *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337.

197. I would hold therefore that Lord Goff's rejection of a subjective approach was expressed too broadly. The proposition that the alleged discriminator's motive, or reason, is irrelevant needs therefore to be reformulated. It all depends on the stage of the enquiry at which these words are being used. At the initial stage, when the question is whether or not this was discrimination on racial grounds, an examination of the alleged discriminator's motivation may be not only relevant but also necessary, to reach an informed decision as to whether this was a case of racial discrimination. As the issue is a subjective one, his mental processes will, as Lord Nicholls said at p 511, call for some consideration. Everything that may have passed through his mind that bears on the decision, or on why he acted as he did, will be open to consideration. But once it has been determined that this was a case of racial discrimination, that is an end of the matter. The treatment cannot be excused by looking beyond it to why he decided to act in that way.

198. I regret the fact that Lord Clarke does not agree with this analysis. As I understand his position, he prefers a test which makes the state of mind of the alleged discriminator irrelevant where the criteria he adopts are inherently discriminatory: see paras 127, 132. The question which divides us is whether his approach is supported by Lord Nicholls' statements in *Nagarajan* and later in *Khan*. Lord Clarke's reading of the passage in *Nagarajan* which he has highlighted in para 139 of his opinion is that in the "obvious cases", where discrimination is inherent, there is a prohibition on looking at the motivation of the alleged discriminator: see also his para 142. But Lord Nicholls does not say this. He makes no mention of any such prohibition. It may be that the tribunal will not *need* to look at the alleged discriminator's mental processes in "obvious cases", as his mental state is indeed obvious. But he does not say that the tribunal is precluded from doing so. Lord Steyn said in *Nagarajan* at pp 520H-521A that conscious motivation is not required. But, as he made clear, this does not mean that the alleged discriminator's state of mind is always irrelevant.

199. Confirmation that this is not Lord Nicholls' approach is to be found in the last full paragraph on p 511 of *Nagarajan*, where he explains Lord Bridge's description of the test which Lord Goff adopted in *Birmingham*. Lord Bridge described it as objective. But Lord Nicholls said that he is not to be taken as saying that there is no investigation into the mind of the alleged discriminator. He does not draw any distinctions here between cases like *Birmingham* and *James*, which Lord Clarke describes as cases of inherent discrimination (see para 142, above), and other types of cases. The point that he is making is that even in "obvious cases" such as *Birmingham* the tribunal is not precluded from looking at the state of mind of the discriminator. The passage from his speech in *Khan* to which I refer in para 193 supports this conclusion. He describes the test as a "subjective" one. Here again he does not distinguish between different types of cases. I believe therefore that an accurate reading of what Lord Nicholls actually said, and did not say, supports my analysis.

200. There are few reported cases in which the tribunal has had to decide as between two prohibited reasons, such as race and gender or (since 2006) race and religion or belief. The only authority referred to by the parties was *Seide v Gillette Industries Ltd* [1980] IRLR 427. The appeal turned on the question of causation relating to the aftermath of a series of incidents of anti-Semitic abuse of Mr Seide by a fellow worker. The report does not give any details of the content of the abuse. The only relevant passage in the judgment is at paras 21-22, recording that it was common ground that "Jewish" could refer to a member of an ethnic group or to a member of a religious faith, and that the tribunal's decision, which it was entitled to reach on the facts, was that Mr Seide was subjected to anti-Semitic abuse because of his Jewish origin. It is reasonable to infer that it would have been open to the members of the tribunal to conclude that the abuse was as much on the ground of ethnicity as on the ground of religion and that that was enough to constitute discrimination on a prohibited ground. This would be consistent with the principle that this is not an "either/or" question.

201. As for this case, it is as different from *Seide* as it is possible to imagine. This was not a case of foul-mouthed anti-Semitic abuse. Those who are said to have been responsible for the discrimination, whether at the level of the school authorities, the OCR or the Chief Rabbi himself, are thoughtful, well-intentioned and articulate. I would accept Lord Pannick's submission that the Chief Rabbi was not in the least interested in M's ethnicity. The OCR has left us in no doubt as to why it was acting as it did. If the Chief Rabbi were to be asked the question that was framed by Lord Nicholls, he would say his reason was that this was what was required of him by fundamental Orthodox Jewish religious law. The question whether or not M was Jewish in the secular sense was of no interest to him at all. His advice was based simply and solely on his understanding of Jewish law. Jewishness based on matrilineal descent from Jewish ancestors has been the Orthodox religious rule for many thousands of years, subject only to the exception for conversion. To say that his ground was a racial one is to confuse the effect of the treatment with the ground itself. It does have the effect of putting M into an ethnic Jewish group which is different from that which the Chief Rabbi recognises as Jewish. So he has been discriminated against. But it is a complete misconception, in my opinion, to categorise the ground as a racial one. There is nothing in the way the OCR handled the case or its reasoning that justifies that conclusion. It might have been justified if there were reasons for doubting the Chief Rabbi's frankness or his good faith. But no-one has suggested that he did not mean what he said. As Lord Rodger points out, to reduce the religious element to the status of a mere motive is to misrepresent what he is doing.

202. This case is quite different too from the example of the Dutch Reformed Church that was referred to by Sedley LJ in the Court of Appeal, para 30, and referred to again during the argument in this court. The discrimination that its belief invited, on grounds of colour, was overtly racist. A court would have no difficulty in dismissing the religious belief as providing no justification for it at all; see also *Bob Jones University v United States*, 461 US 574 (1983), where the US Supreme Court upheld the decision of the Inland Revenue Service to revoke the University's tax exempt status because, while permitting unmarried people who were black to enrol as students, it had adopted a racially discriminatory policy of denying admission to applicants engaged in an interracial

marriage or known to advocate interracial marriage or dating although it had been based on sincerely held religious beliefs. Beliefs of that kind are not worthy of respect in a democratic society or compatible with human dignity: *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, para 36.

203. Here the discrimination between those who are, and those who are not, recognised as Jewish was firmly and inextricably rooted in Orthodox Jewish religious law which it is the duty of the Chief Rabbi to interpret and apply. The Chief Rabbi's total concentration on the religious issue, to the exclusion of any consideration of ethnicity, can be illustrated by two contrasting examples. Several similar examples were referred to in the course of argument. A is the child of parents, and the grandchild of grandparents, all of whom led wholly secular lives similar to those of their largely secular neighbours. They never observed Jewish religious law or joined in the social or cultural life of the Jewish communities where they lived, but there is unimpeachable documentary evidence that more than a century ago the mother of A's maternal grandmother was converted in an Orthodox synagogue. To the OCR A is Jewish, despite his complete lack of Jewish ethnicity. By contrast B is the child of parents, and the grandchild of grandparents, all of whom have faithfully observed Jewish religious practices and joined actively in the social and cultural life of the Jewish community, but there is unimpeachable documentary evidence that more than a century ago the mother of B's maternal grandmother was converted in a non-Orthodox synagogue. To the OCR B is not Jewish, despite his obvious Jewish ethnicity. Descent is only necessary because of the need, in these examples, to go back three generations. But having gone back three generations, the OCR applies a wholly religious test to what has been identified as the critical event. For the reasons given by Lord Rodger, the part that conversion plays in this process is crucial to a proper understanding of its true nature. It cannot be disregarded, as Lady Hale suggests in para 66, as making no difference. It shows that the inquiry is about a religious event to be decided according to religious law.

204. For these reasons I would hold that the decision that was taken in M's case was on religious grounds only. This was not a case of direct discrimination on racial grounds. On this issue, in respectful agreement with Lord Rodger, Lord Walker and Lord Brown, I would set aside the decision reached by the Court of Appeal.

Indirect discrimination

205. An examination of the question whether the application of the oversubscription policy to M amounted to indirect discrimination within the meaning of section 1(1A) of the Race Relations Act 1976 falls into two parts: (1) did the policy put persons of the same race or ethnic or national origins as M at a particular disadvantage when compared with other persons: section 1(1A)(a) and (b); and, if so, (2) can JFS show that the policy was a proportionate means of achieving a legitimate aim: section 1(1A)(c). Lord Pannick did not seek to argue that the first question should be answered in the negative. I think

that he was right not to do so, as it is clear that M and all other children who are not of Jewish ethnic origin in the maternal line, together with those whose ethnic origin is entirely non-Jewish, were placed at a disadvantage by the oversubscriptions policy when compared with those who are of Jewish ethnic origin in the maternal line. They may in theory gain entry to the school by undergoing a process of conversion that is approved by the OCR, but this in itself is a severe disadvantage. It appears that no child has ever been admitted to JFS on this basis. The issue on this branch of the case, therefore, is whether JFS can show that the policy had a legitimate aim and whether the way it was applied was a proportionate way of achieving it. The burden is on JFS to prove that this was so: *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, per Mummery LJ at paras 131-132.

206. The Court of Appeal accepted the submission that the admission criteria were explicitly related to ethnicity and so incapable of constituting or forming part of a legitimate aim and that it was not possible to justify indirect discrimination by reliance on the very thing that made the test discriminatory: para 45. But I think that is to misapply the test that the Act lays down. I agree with Lord Brown that there was a failure by the Court to address the questions of legitimate aim and proportionality on the assumption that the admissions policy was not directly discriminatory. For E, Ms Rose submitted that if the aim pursued was itself related to the ethnic origins of the pupils it was not capable of being a legitimate aim. This was how Lord Fraser put it in *Mandla v Dowell Lee* [1983] 2 AC 548, 566; see also *Orphanos v Queen Mary College* [1985] AC 761, 772. Those were indirect discrimination cases, but they were decided under section 1(1)(b) of the 1976 Act which has now been superseded by section 1(1A): see para [170], above. An aim which is itself discriminatory in character cannot be legitimate for the purposes of sections 1(1A). So the assumption on which the argument about indirect discrimination proceeds is that, for the reasons I have given, JFS's admission criteria did not discriminate on grounds of ethnicity. The question is whether, given that persons of given ethnic origins were at a particular disadvantage when compared with other persons, the school nevertheless had an aim which was legitimate. That is a different question.

207. In the Administrative Court Munby J said that the aim was to educate those who, in the eyes of the OCR, are Jewish, irrespective of their religious beliefs, practices or observances, in a school whose culture and ethos is that of Orthodox Judaism: para 192. Developing this argument, Lord Pannick submitted that it was legitimate for a faith school to give preference to those children who are members of the faith as recognised by the OCR. If children in M's position were admitted to the school there would inevitably be fewer places for those recognised as Jewish by the OCR. The policy of the government was to allow schools to give priority to those of the religion for which they have been designated. It was open to the school, under the 2007 Code, to adopt criteria based on membership or practice. As its ethos was that of Orthodox Judaism, which the Chief Rabbi seeks to promote, membership was a legitimate criterion. If that criterion was not adopted it would open the door to children who were not recognised as Jewish and virtually exclude those who were.

208. As against this, Ms Rose submitted that it was impossible to ignore the close relationship between the criterion of membership and the ethnic origins of the children. This made it impossible for JFS to justify the criterion as legitimate. In my opinion, however, it is necessary to look at all the circumstances to test the issue of legitimacy. The assumption on which section 1(1A)(c) proceeds it that the treatment is open to the objection that it puts a person at a disadvantage in comparison with persons not of his race or ethnic or national origins. The question is whether treatment which has that effect can nevertheless be shown to have a legitimate aim. Questions about the motive and aims of the alleged discriminator come in at this stage. An aim may be held to be legitimate even though it discriminates in the ways referred to in section 1(1A)(a) and (b).

209. In my opinion, for the reasons that Lord Brown gives in paras 252-253, JFS has shown that its aim is a legitimate one. The essential point is that a faith school is entitled to pursue a policy which promotes the religious principles that underpin its faith. It is entitled to formulate its oversubscriptions criteria to give preference to those children whose presence in the school will make it possible for it to pursue that policy. The legitimacy of the policy is reinforced by the statutory background. It has not emerged out of nowhere. It has been developed in accordance with the Code which permits faith schools to define their conditions for admission by reference either to membership of the faith or to practice. The justification for the Code lies exclusively in a belief that those who practise the faith or are members of it will best promote the religious ethos of the school. In *Orphanos v Queen Mary College* [1985] AC 761, 772-773 Lord Fraser said that a typical example of a requirement which could be justified without regard to the nationality or race of the person to whom it was applied was *Panesar v Nestlé Co Ltd (Note)* [1980] ICR 144, where it was held that a rule forbidding the wearing of beards in the respondent's chocolate factory was justifiable on hygienic grounds notwithstanding that the proportion of Sikhs who could conscientiously comply with it was considerably smaller than the proportion of non-Sikhs who could comply with it. It was, he said, purely a matter of public health and nothing whatever to do with racial grounds. I would apply the same reasoning to this case.

210. This leaves, however, the question of proportionality. The Court of Appeal, having concluded that the criterion did not have an aim that was legitimate, did not attempt to examine this issue: para 47. Before Munby J it was submitted by Ms Rose that JFS's admissions policy did not properly balance the impact of the policy on those like M adversely affected by it and the needs of the school: para 199. He rejected this argument for two reasons. One was that the kind of policy that is in question in this case is not materially different from that which gives preference in admission to a Muslim school to those who were born Muslim or preference in admission to a Catholic school to those who have been baptised. The other was that an alternative admissions policy based on such factors as adherence or commitment to Judaism would not be a means of achieving JFS's aims and objectives: paras 200-201. In my opinion these reasons miss the point to which Ms Rose's submission was directed. The question is whether putting M at a disadvantage was a proportionate means of achieving the aim of the policy. It was for JFS to show that they had taken account of the effect of the policy on him and balanced its effects against what was needed to achieve the aim of the policy. As Peter Gibson LJ

noted in *Barry v Midland Bank plc* [1999] ICR 319, 335-336 the means adopted must be appropriate and necessary to achieving the objective.

211. I do not think that JFS have shown that this was so. Lord Pannick submitted that there was no other way of giving effect to the policy. If the school were to admit M, this would be to deny a place to a child who was regarded as Jewish by the OCR. This was inevitable as the school was oversubscribed. But what is missing is any sign that the school's governing body addressed their minds to the impact that applying the policy would have on M and comparing it with the impact on the school. As Ms Rose pointed out, the disparate impact of the policy on children in M's position was very severe. They are wholly excluded from the very significant benefit of state-funded education in accordance with their parents' religious convictions, whereas there are alternatives for children recognised by the OCR although many in the advantaged group do not share the school's faith-based reason for giving them priority. The school claimed to serve the whole community. But the way the policy was applied deprived members of the community such as M, who wished to develop his Jewish identity, of secondary Jewish education in the only school that is available.

212. There is no evidence that the governing body gave thought to the question whether less discriminatory means could be adopted which would not undermine the religious ethos of the school. Consideration might have been given, for example, to the possibility of admitting children recognised as Jewish by any of the branches of Judaism, including those who were Masorti, Reform or Liberal. Consideration might have been given to the relative balance in composition of the school's intake from time to time between those recognised as Jewish by the OCR who were committed to the Jewish religion and those who were not, and as to whether in the light of it there was room for the admission of a limited number of those committed to the Jewish religion who were recognised as Jewish by one of the other branches. Ms Rose said that the adverse impact would be much less if a different criterion were to be adopted. But the same might be true if the criterion were to be applied less rigidly. There may perhaps be reasons, as Lord Brown indicates (see para 258), why solutions of that kind might give rise to difficulty. But, as JFS have not addressed them, it is not entitled to a finding that the means that it adopted were proportionate.

213. There are cases, of which *R(SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 are the best examples, where it can be said in the human rights context that the fact that the public authority had applied its mind to the issue is immaterial. This is because in that context the issue is one of substance, not procedure. Lord Hoffmann in *Governors of Denbigh High School*, para 68, gave this explanation:

> "In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than

> whether he got what the court might think to be the right answer. But article 9 [of the European Convention on Human Rights] is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)?"

214. The problem that JFS faces in this case is a different one, as the context is different. Under section 1(1A)(c) of the Race Relations Act 1976 the onus is on it to show that the way the admissions policy was applied in M's case was proportionate. It is not for the court to search for a justification for it: see Mummery LJ's valuable and instructive judgment in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, paras 131-133. JFS failed to discharge its duty under section 71 of the Act to have regard to the need to eliminate discrimination. It is having to justify something that it did not even consider required justification. The question, as to which there is no obvious answer either way, was simply not addressed. As a result the court does not have the statistical or other evidence that it would need to decide whether or not the application of the policy in M's case was proportionate. It may well be, as Lord Brown indicates, that devising a new oversubscriptions policy that is consistent with the school's legitimate aim would be fraught with difficulty. But it was for JFS to explore this problem and, having done so, to demonstrate that whatever policy it came up with was proportionate. So, although I do not arrive at this conclusion by the same route as Lord Mance, I agree with him that on the material before the Court the admissions policy cannot be held to have been justified.

215. I would hold that, by applying the oversubscription criteria to M in a way that put him at a particular disadvantage when compared with others not of the same ethnicity by reason of matrilineal descent, JFS discriminated against him in breach of section 1(1A) of the Race Relations Act 1976, and that E is entitled to a declaration to that effect.

The appeals on costs

216. In its order for costs the Court of Appeal directed that the United Synagogue and the Secretary of State must each pay 20% of E's costs in the Court of Appeal and below, and that the Schools Adjudicator must pay 10% of those costs. The United Synagogue and the Secretary of State have both appealed, the United Synagogue formally and the Secretary of State informally, against that order to this court. I did not understand Mr Linden QC, who appeared for the Secretary of State, to press his informal appeal and, as it has no merit, I would dismiss it. But Mr Jaffey for the United Synagogue did make submissions in support of its appeal. His point was that the United Synagogue had intervened in the Administrative Court on the express basis that it would not be found liable in costs which was not challenged by any other party, and that the basis for its intervention had been endorsed by Munby J when he allowed it to intervene. He submitted that his client ought not to have been found liable by the Court of Appeal for

the costs incurred at first instance, nor should it have been found liable for costs in the Court of Appeal as there was no appeal against the basis on which it had been permitted to intervene.

217. The situation is more complicated than that brief summary might suggest. The nature of the United Synagogue's intervention was transformed when the case reached the Court of Appeal. Lord Pannick QC, who had not appeared below, was instructed on its behalf and assumed much responsibility for presenting the case on behalf of JFS – so much so, that when the case reached this court, he appeared for JFS and not for the United Synagogue. In that situation, as it had assumed a role that went well beyond that of an intervener, the Court of Appeal cannot be faulted for finding it liable for a share of the costs in that court. But I do not think that what happened in the Court of Appeal should deprive the United Synagogue of the protection against an order for costs that it sought and was granted in the Administrative Court. So I would recall that part of the Court of Appeal's order. I would replace it by a finding that the United Synagogue must pay 20% of E's costs in the Court of Appeal but not below, and that 20% of E's costs at first instance must be borne by JFS in addition to the 50% that it has already been ordered to pay.

Conclusion

218. I would allow the appeal by JFS against the Court of Appeal's finding that the Chief Rabbi's criteria discriminated directly against M on racial grounds. I would however dismiss its appeal against the Court of Appeal's finding that this was a case of indirect discrimination, although on different grounds. I would allow the appeal by the United Synagogue against the Court of Appeal's order for costs to the extent that I have indicated. I would dismiss the Secretary of State's appeal.

LORD RODGER

219. The claimant, E, is Jewish by matrilineal descent. By conviction, he is a Masorti Jew. Masorti Judaism differs in certain respects from what is generally called Orthodox Judaism. Masorti Jews adhere to a set of beliefs and practices which have their origins in Orthodox Judaism but which are not now the same. In particular, while both Masorti and Orthodox Judaism believe that the written and oral Torah (from which the halakhah is derived) are unchangeable and bind Jews today, they differ in their interpretation of some parts of the halakah.

220. E's wife converted to Judaism in an independent synagogue. At the risk of some slight imprecision, her conversion can be described as having taken place "under non-Orthodox auspices". Since the requirements for Orthodox conversion reflect Orthodox rather than Progressive or Masorti teachings and practices, her conversion is recognised by the Masorti authorities, but is not recognised by the Office of the (Orthodox) Chief Rabbi. Therefore, while the Masorti authorities recognise her son, M, as Jewish, the Office of the Chief Rabbi does not. But, of course, both E and M consider that M is Jewish, on the basis that his mother was Jewish when he was born.

221. JFS is designated by the Secretary of State under the School Standards and Framework Act 1998 as having a "Jewish" religious character. The relevant regulations provide that the School's governing body ("the governors") must consult the Chief Rabbi about its admission arrangements. Having done so, the governors adopted an admissions policy which provided that, if the School were oversubscribed, then only children who were recognised as being Jewish by the Office of the Chief Rabbi would be considered for admission.

222. E wanted to get M into the School. It has an excellent reputation and has been oversubscribed for many years. So, when E applied to have M admitted, hardly surprisingly, his application was rejected because the Office of the Chief Rabbi would not have recognised M as being Jewish. Indeed the point was so clear that E did not apply to the London Beth Din for a determination of M's status in Orthodox Jewish law. In theory, the School would have considered admitting him if he had undertaken to convert under Orthodox auspices. But the process would have taken several years and have involved M adhering to a set of beliefs that are materially different from those of Masorti Judaism. E and M decided not to pursue that option.

223. The purpose of designating schools as having a religious character is not, of course, to ensure that there will be a school where Jewish or Roman Catholic children, for example, can be segregated off to receive good teaching in French or physics. That would be religious discrimination of the worst kind which Parliament would not have authorised. Rather, the whole point of such schools is their religious character. So the whole point of designating the Jewish Free School as having a Jewish character is that it should provide general education within a Jewish religious framework. More particularly, the education is to be provided within an Orthodox religious framework. Hence the oversubscription admission criteria adopted after consulting the Chief Rabbi. The School's policy is to give priority to children whom the Orthodox Chief Rabbi recognises as Jewish. From the standpoint of Orthodoxy, no other policy would make sense. This is because, in its eyes, irrespective of whether they adhere to Orthodox, Masorti, Progressive or Liberal Judaism, or are not in any way believing or observant, these are the children – and the only children - who are bound by the Jewish law and practices which, it is hoped, they will absorb at the School and then observe throughout their lives. Whether they will actually do so is, of course, a different matter.

224. The dispute can be summarised in this way. E, who is himself a Masorti Jew, wants his son, whom he regards as Jewish, to be admitted to the School as a Jewish child. He complains because the School, whose admission criteria provide that only children recognised as Jewish by the Office of the (Orthodox) Chief Rabbi are to be considered for admission, will not consider admitting his son, who is recognised as Jewish by the Masorti authorities but not by the Chief Rabbi. If anything, this looks like a dispute between two rival religious authorities, the Office of the Chief Rabbi and the Masorti authorities, as to who is Jewish. But E claims - and this Court will now declare - that, when the governors refused to consider M for admission, they were actually treating him less favourably than they would have treated a child recognised as Jewish by the Office of the Chief Rabbi "on racial grounds": Race Relations Act 1976, section 1(1)(a).

225. The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief. If the majority are right, expressions of sympathy for the governors of the School seem rather out of place since they are doing exactly what the Race Relations Act exists to forbid: they are refusing to admit children to their school on racial grounds. That is what the Court's decision means. And, if that decision is correct, why should Parliament amend the Race Relations Act to allow them to do so? Instead, Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this secular court but it has no basis whatsoever in 3,500 years of Jewish law and teaching.

226. The majority's decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong.

227. The crux of the matter is whether, as the majority hold, the governors actually treated M less favourably on grounds of his ethnic origins. They say the governors did so, but for a bona fide religious motive. If that is really the position, then, as Lord Pannick QC was the first to accept on their behalf, what the governors did was unlawful and their bona fide religious motive could not make the slightest difference. But to reduce the religious element in the actions of those concerned to the status of a mere motive is to misrepresent what they were doing. The reality is that the Office of the Chief Rabbi, when deciding whether or not to confirm that someone is of Jewish status, gives its ruling on religious grounds. Similarly, so far as the oversubscription criteria are concerned, the governors consider or refuse to consider children for admission on the same religious grounds. The only question is whether, when they do so, they are ipso facto considering or refusing to consider children for admission on racial grounds.

228. Lady Hale says that M was rejected because of his mother's ethnic origins which were Italian and Roman Catholic. I respectfully disagree. His mother could have been as Italian in origin as Sophia Loren and as Roman Catholic as the Pope for all that the

governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices. It was her resulting non-Jewish religious status in the Chief Rabbi's eyes, not the fact that her ethnic origins were Italian and Roman Catholic, which meant that M was not considered for admission. The governors automatically rejected M because he was descended from a woman whose religious status as a Jew was not recognised by the Orthodox Chief Rabbi; they did not reject him because he was descended from a woman whose ethnic origins were Italian and Roman Catholic.

229. As in any complaint of racial discrimination, the point can be tested by reference to the appropriate comparator. The starting point is that both E and M believe M to be Jewish by descent. So E applied to the School to admit M on the basis that he was Jewish because his Italian Catholic mother had converted to Judaism before he was born. The mother's Jewish status as a result of her conversion was accordingly the only issue which the governors were asked to consider or did consider. They refused E's application because her conversion had been under non-Orthodox auspices. Therefore the appropriate comparator is a boy with an Italian Catholic mother whom the governors *would* have considered for admission. He could only be a boy whose mother had converted under Orthodox auspices. The question then is: did the governors treat M, whose mother was an Italian Catholic who had converted under non-Orthodox auspices, less favourably than they would have treated a boy, whose mother was an Italian Catholic who had converted under Orthodox auspices, on grounds of his ethnic origins? Plainly, the answer is: No. The ethnic origins of the two boys are exactly the same, but the stance of the governors varies, depending on the auspices under which the mother's conversion took place.

230. Faced with a boy whose mother had converted under Orthodox auspices, the governors would have considered him for admission without pausing for a single second to enquire whether he or his mother came from Rome, Brooklyn, Siberia or Buenos Aires, whether she had once been a Roman Catholic or a Muslim, or whether he or she came from a close-knit Jewish community or had chosen to assimilate and disappear into secular society. In other words, the "ethnic origins" of the child or his mother in the *Mandla v Dowell Lee* [1983] 2 AC 548 sense would not have played any part in the governors' decision to admit him. All that would have mattered was that his mother had converted under Orthodox auspices. Equally, in M's case, the governors did not refuse to consider admitting him on grounds of his *Mandla* ethnic origins. Even supposing that the governors knew about his origins, they were quite irrelevant and played no part in their decision. The governors were simply asked to consider admitting him as the son of a Jewish mother. They declined to do so because his mother had not converted under Orthodox auspices. It was her non-Orthodox conversion that was crucial. In other words, the only ground for treating M less favourably than the comparator is the difference in their respective mothers' conversions – a religious, not a racial, ground.

231. Since, therefore, when applying the religious test, the governors were not asked to consider, and did not actually consider, M's ethnic origins, *James v Eastleigh Borough Council* [1990] 2 AC 751 and all the other cases to which the majority refer simply do not come into the picture.

232. For these reasons, which are essentially those set out so clearly in the judgment of Munby J, and in agreement with the opinion of Lord Brown, I would hold that the governors did not discriminate against M directly on racial grounds.

233. So far as indirect discrimination is concerned, again I agree with Lord Brown and indeed with Munby J. The aim of the School, to instil Jewish values into children who are Jewish in the eyes of Orthodoxy, is legitimate. And, from the standpoint of an Orthodox school, instilling Jewish values into children whom Orthodoxy does not regard as Jewish, at the expense of children whom Orthodoxy does regard as Jewish, would make no sense. That is plainly why the School's oversubscription policy allows only for the admission of children recognised as Jewish by the Office of the Chief Rabbi. I cannot see how a court could hold that this policy is a disproportionate means of achieving the School's legitimate aim.

234. I would accordingly allow the Governing Body's appeal and restore the order of Munby J. On the United Synagogue's costs appeal, I agree with Lord Hope.

LORD WALKER

235. I respectfully agree with Lord Hope that this was a case of indirect, but not direct discrimination on grounds of ethnic origins contrary to section 1 of the Race Relations Act 1976 as amended. I do not wish to make any addition or qualification to the reasons set out in Lord Hope's judgment.

236. But I do wish to express my respectful agreement with much of Lady Hale's judgment, although we reach different conclusions. In particular I agree with her references to the conspicuously clear and thoughtful judgment of Mummery LJ in *R (Elias) v. Secretary of State for Defence* [2006] 1 WLR 3213. Lord Hope has rightly referred to Mummery LJ's treatment (at paras 128 to 133, in the context of justification of indirect discrimination) of the significance of a failure to address the issue of potential discrimination, especially when section 71 of the Race Relations Act 1976 applies. But the whole of Mummery LJ's discussion of the boundary between direct and indirect discrimination (paras 60 to 123) merits close attention.

237. The division of opinion in this Court illustrates that the separateness and mutual exclusivity of direct and indirect discrimination, although immovably established as part

of the law (for all the reasons given by Mummery LJ at paras 114 to 122), is sometimes elusive in practice. In consequence the sharp distinction between the impossibility of justifying direct discrimination in any circumstances, and the possibility of justifying indirect discrimination, sometimes seems a little arbitrary.

LORD BROWN

238. Jews of all denominations define membership of the Jewish religion by reference to descent or conversion. The question is one of status: you are a Jew if, whether by descent or conversion, your mother (or anyone else up the matrilineal line) was a Jew or if you yourself convert to Judaism. Orthodox Jews require that the conversion be recognised by the Office of the Chief Rabbi (OCR). Other denominations of Jewry (Masorti, Reform and Liberal) apply less exacting criteria for conversion. It is that which has given rise to the underlying dispute between the parties in this case. JFS's oversubscription admissions policy gives priority to those recognised by the OCR as Jewish. M, because his mother converted to Judaism under the auspices of a non-Orthodox rabbi and not an orthodox rabbi, is not so recognised.

239. There is much debate within the Jewish community about the proper standards to apply to conversion and many would like JFS to include within their admissions policy anyone recognised as Jewish by any of the denominations. M's real complaint here is that in deciding who is a Jew the OCR's approach to conversion is misguided. That, however, is not an issue which is, or ever could be, before the Court. No court would ever intervene on such a question or dictate who, as a matter of orthodox religious law, is to be regarded as Jewish.

240. Thus it is that this legal challenge has nothing to do with the standards of conversion to Judaism and who shall be recognised under religious law as Jews but instead, somewhat surprisingly at first blush, invites the Court to decide questions of racial discrimination. Is JFS's policy of giving priority in admissions to those recognised by the OCR as Jewish to be characterised and outlawed as direct racial discrimination contrary to section 1(1)(a) of the Race Relations Act 1976? Is the school "on racial grounds" (defined by section 3 of the Act to include the ground of "ethnic origins") treating others less favourably? That is the central issue before the Court.

241. M's father (E), supported by the Equality and Human Rights Commission and the British Humanist Society, submits that those not recognised by JFS as Jews are being treated less favourably than those recognised as Jews (so much is obvious) on the ground of the ethnic origins of those not recognised i.e. because no one in their matrilineal line is recognised as Jewish. Integral to the argument is that any definition of Jewish status based on descent is necessarily dependent on ethnic origin and therefore to be regarded as racially discriminatory. In this case the argument arises in the context of an orthodox

Jewish school and at the suit of a child who would be regarded as Jewish according to all other Jewish denominations. But the same argument could arise equally in the context of schools giving priority to children recognised as Jews by any other Jewish denomination. I repeat, all Jews define membership of their religion by reference to descent (or conversion).

242. The contrary argument, advanced by JFS, United Synagogue, the Secretary of State for Children, Schools and Families, and the Board of Deputies of British Jews, is that those not recognised by the school as Jews are being treated less favourably not because of their ethnic origins – a matter of total indifference to the OCR – but rather because of their religion: they are not members of the Jewish religion whereas those preferred are. Of course, the reason they are not members of the Jewish religion is that their forebears in the matrilineal line (or, in the case of Liberal Jews, either ancestral line) were not Jews and in this sense their less favourable treatment is determined by their descent. The *ground* for their less favourable treatment, however, is religion, not race.

243. Both arguments are to my mind entirely coherent and entirely respectable. Only one, however, can be correct. The difficulty in the case arises because of the obvious overlap here between the concepts respectively of religious and racial discrimination. If the ground for discrimination is racial, it is unlawful. If however the ground (and not merely the motive) is religious, that is lawful. The Equality Act 2006 for the first time outlawed religious discrimination *inter alia* with regard to school admissions but not in the case of oversubscribed designated faith schools like JFS. Plainly the 2006 Act cannot operate to legitimise what would otherwise be racial discrimination under the 1976 Act. One may note, however, that if M's argument is correct, JFS (and all other Jewish schools, whether maintained or independent, whose admissions criteria similarly depend upon the child being recognised under religious law as Jewish) have been operating an unlawful directly racially discriminatory policy for upwards of 30 years.

244. There can be no doubt that Jews, including those who have converted to Judaism, are an ethnic group. That, since the decision of the House of Lords in *Mandla v Dowell-Lee* [1983] 2 AC 548, is indisputable. And it is plain too why the courts have given a wide definition to the phrase "ethnic origins" so as to provide comprehensive protection to those suffering discrimination on racial grounds. Manifestly Jews and those perceived by discriminators to be Jews have welcomed such an approach and benefit from it. It by no means follows, however, that "to discriminate against a person on the ground that he or someone else either is or is not Jewish is therefore to discriminate against him on racial grounds" (as the Court of Appeal concluded at paragraph 32 of its judgment). That to my mind is a considerable over-simplification of an altogether more difficult problem. This is perhaps best illustrated by reference to M's position relative to those benefited under JFS's admissions policy. True, M was refused admission because his mother, and therefore he himself, although plainly both ethnically Jewish in the Mandla sense, were not recognised by the OCR as Jewish. But those granted admission under the policy were admitted for the very reason that they *were* recognised as Jewish. Does the 1976 Act really outlaw discrimination in favour of the self- same racial group as are said to be being discriminated against? I can find no suggestion of that in any of the many authorities put before us.

245. Nor can I see a parallel between the present case and the example apparently thought indistinguishable by the Court of Appeal of the Dutch Reformed Church of South Africa who until recently honestly believed that God had made black people inferior and had destined them to live separately from whites. The discrimination there was plainly against blacks and in favour of whites - self-evidently, therefore, on the ground of race and irredeemable by reference to the Church's underlying religious motive. Ethnic Jews and Jews recognised as members of the religion, distinguishable as groups though they are, clearly overlap. Not so blacks and whites. What I am suggesting here is that it is quite unrealistic, given that those being treated less favourably and those being treated more favourably by JFS's policy are all (save, of course, for those who have no connection with Judaism whatsoever) in the same ethnic group, to regard the policy as discriminatory on racial rather than religious grounds. I recognise, of course, that under section 3(2) of the 1976 Act a particular racial group within a wider racial group still enjoys protection under the Act. The point I am making, however, is that the differential treatment between Jews recognised by the OCR and those not so recognised within the wider group of ethnic Jews (no less obviously than the differential treatment between the former and those with no connection whatever to Judaism) is plainly on the ground of religion rather than race.

246. Still less does it seem to me that this case is covered by the House of Lords decision in *James v Eastleigh Borough Council* [1990] 2 AC 751. Once it was recognised that the Council there might just as well have said that entry to its swimming pools was free to women, but not men, in the 60-65 age group, the direct discrimination against men became indisputable. The condition of pensionability was itself patently gender-based. The position would surely have been different had the policy been instead to admit free, say, those who were in fact retired. That would not have involved direct discrimination and, if challenged as indirect discrimination, would surely have been capable of justification, certainly if free admittance was granted not only to those retired but also if the applicant could otherwise establish that he or she was of limited means. Mandatory retirement age and sex were there precisely coterminous. Even then, the case was decided only by the narrowest majority of the House overturning a unanimous Court of Appeal.

247. The 1976 Act, unlike, for example, article 14 of the European Convention on Human Rights, draws a distinction between direct and indirect discrimination, only the latter being capable of justification. It therefore seems to me of the greatest importance not to expand the scope of direct discrimination and thereby place preferential treatment which could well be regarded as no more than indirectly discriminatory beyond the reach of possible justification. This is especially so where, as here, no one doubts the Chief Rabbi's utmost good faith and that the manifest purpose of his policy is to give effect to the principles of Orthodox Judaism as universally recognised for millennia past. There is not the same exact correlation between membership of the Jewish religion and membership of the group regarded on the *Mandla* approach as being of Jewish ethnicity as there was between retirement age and sex in *James v Eastleigh* and I for my part would regard the Court of Appeal's judgment as going further than that decision and as impermissibly expanding the scope of direct discrimination beyond its proper limits.

248. As I have already indicated, E is not really seeking to prevent JFS from adopting oversubscription criteria which give priority to Jews but rather is asking for JFS to define

Jews more expansively than Orthodox Jews in fact do. But it is, of course, the logic of his argument that JFS's policy must be regarded as racially discriminatory not merely because it rules out ethnic Jews like M who are not recognised as Jews by the OCR but also because it rules out all other racial groups whether or not they have any connection with Judaism at all. On this argument, it is strictly immaterial that E is Jewish or that M's mother converted to Judaism. This policy could as well have been struck down at the suit of anyone desiring admission to the school. If the argument succeeds it follows that Jewish religious law as to who is a Jew (and as to what forms of conversion should be recognised) must henceforth be treated as irrelevant. Jewish schools in future, if oversubscribed, must decide on preference by reference only to outward manifestations of religious practice. The Court of Appeal's judgment insists on a non-Jewish definition of who is Jewish. Jewish schools, designated as such by the Minister and intended to foster a religion which for over 3000 years has defined membership largely by reference to descent, will be unable henceforth even to inquire whether one or both of the applicant child's parents are Jewish. (Yet is that so very different from a Catholic school asking if the child has been baptised? It is hardly likely to have been unless one at least of its parents was a Christian).

249. The root question for the Court is simply this: can a Jewish faith school ever give preference to those who are members of the Jewish religion under Jewish law. I would answer: yes, it can. To hold the contrary would be to stigmatise Judaism as a directly racially discriminating religion. I would respectfully disagree with that conclusion. Indeed I would greatly regret it. On this issue of direct discrimination my views coincide entirely with those of Lord Rodger.

250. I turn to the question of indirect discrimination. As already noted, it is obvious that JFS's policy involves those not recognised by the OCR as Jews being treated less favourably than those who are so recognised. It is rather less obvious, however, that this policy puts "persons of the same race or ethnic or national origins as [M] at a particular disadvantage when compared with other persons" and that it "puts [M] at that disadvantage" (section 1(1A)(a) and (b) of the 1976 Act). After all, as already observed, M is himself, although personally disadvantaged by the policy, a member of the very same ethnic group as the policy advantages. The view could, therefore, be taken that M is disadvantaged not by his ethnic origins but by his inability to satisfy the Orthodox religious test.

251. Put that aside, however, and suppose that section 1(1A) *is* here engaged and that JFS must establish that its policy is "a proportionate means of achieving a legitimate aim" pursuant to section 1(1A)(c) – as certainly they would need to do were this challenge brought, as theoretically it could have been, at the suit of a child in no way of Jewish ethnic origin.

252. The legitimacy of JFS's aim is surely clear. Here is a designated faith school, understandably concerned to give preference to those children it recognises to be members of its religion, but so oversubscribed as to be unable to admit even all of these. The School Admissions Code expressly allows admission criteria based either on

membership of a religion or on practice. JFS have chosen the former. Orthodox Jews regard education about the Jewish faith as a fundamental religious obligation. Unlike proselytising faiths, however, they believe that the duty to teach and learn applies only to members of the religion, because the obligations in question bind only them.

253. JFS's purpose is to develop in those recognised by the OCR as Jewish an understanding and practice of the faith. The fact that many of those admitted do not practise the Jewish faith on their admission is intended and, indeed, welcomed. Such children are admitted and taught alongside children already committed to the Orthodox Jewish faith so as to enhance their level of religious knowledge and observance and in the hope and expectation that they may come to practise it. In short, to impose a religious practice test, besides being felt by many to be invasive, difficult to measure and open to abuse, would be contrary to the positive desire of schools like JFS to admit non-observant as well as observant Jewish children. Ironically, moreover, to impose such a test would narrow, rather than widen, the character of the school's intake so as to make it appear more, rather than less, discriminatory. As the Court of Appeal itself noted (at para 44), those presently admitted come from a "wide disparity of religious and cultural family backgrounds . . . even . . . from atheist or Catholic or Moslem families". Inevitably too, it would require the school to educate those not recognised as Jewish by Orthodox Jewish law at the expense of those who are.

254. The Court of Appeal's conclusion that the aim of JFS's admissions policy is illegitimate was based on its view that its "purpose or inevitable effect is to make and enforce distinctions based on race or ethnicity" (para 46), essentially a repetition of its earlier finding of direct race discrimination. In truth the Court of Appeal never addressed the questions of legitimate aim and proportionality on the assumption (the only basis on which indirect discrimination would fall to be considered) that the policy is *not* directly discriminatory.

255. I turn finally, then, to the question of proportionality. Given JFS's legitimate aim of educating children recognised to be Jewish, is their policy of invariably giving preference to these children over those not so recognised a proportionate means of achieving that aim? Answering that question in the affirmative, Munby J, in the course of a lengthy, impressive and to my mind convincing judgment, said this:

> "200. Two quite separate considerations drive me to this conclusion. In the first place, the kind of admissions policy in question here is not, properly analysed, materially different from that which gives preference in admission to a Moslem school to those who were born Moslem or preference in admission to a Catholic school to those who have been baptised. But no-one suggests that such policies, whatever their differential impact on different applicants, are other than a proportionate and lawful means of achieving a legitimate end. Why, [counsel] asks rhetorically, should it be any different in the case of Orthodox Jews? . . . I agree. Indeed, the point goes even wider than the two examples I have given for, as [counsel] submits, if E's case on this point is successful then it will

> probably render unlawful the admission arrangements in a very large number of faith schools of many different faiths and denominations.
>
> 201. The other point is that made both by the Schools Adjudicator and by [counsel for JFS]. Adopting some alternative admissions policy based on such factors as adherence or commitment to Judaism (even assuming that such a concept has any meaning for this purpose in Jewish religious law) would not be a means of achieving JFS's aims and objectives; on the contrary it would produce a different school ethos. If JFS's existing aims and objectives are legitimate, as they are, then a policy of giving preference to children who are Jewish applying Orthodox Jewish principles is, they say, necessary and proportionate – indeed, as it seems to me, essential – to achieve those aims . . . JFS exists as a school for Orthodox Jews. If it is to remain a school for Orthodox Jews it must retain its existing admissions policy; if it does not, it will cease to be a school for Orthodox Jews. Precisely. To this argument there is, and can be, no satisfactory answer."

256. I find myself in full agreement with all of that. To ask why JFS should give preference to a Jewish child with little or no interest in Judaism whilst rejecting a committed child like M is to misunderstand the essential aim of an Orthodox Jewish school. This, as I have explained, is to fulfil its core religious duty: the education of members of its religion in the Orthodox faith, whether or not they practise it or will ever come to do so. It can no more be disproportionate to give priority to a Jewish child over that of a child, however sincere and committed, not recognised as Jewish than it would be to refuse to admit a boy to an oversubscribed all-girls school.

257. Whilst I respectfully agree with Lord Hope's judgment on the direct discrimination issue, I regretfully find myself differing from his conclusion on indirect discrimination. For my part I would have allowed JFS's appeal in its entirety.

258. I understand Lord Hope to conclude that JFS have never addressed the question of proportionality and must now do so and devise a fresh policy allowing applications for admission by those not recognised as Jewish to be considered on an individual basis. Quite apart from the fact that this approach to my mind runs counter to the school's central aim, it seems to me fraught with difficulty. Quite how such a policy will be formulated and applied on a consistent basis is not easy to discern. That said, I regard it as altogether preferable to the new policy presently dictated by the Court of Appeal's judgment: the imposition of a test for admission to an Orthodox Jewish school which is not Judaism's own test and which requires a focus (as Christianity does) on outward acts of religious practice and declarations of faith, ignoring whether the child is or is not Jewish as defined by Orthodox Jewish law. That outcome I could not contemplate with equanimity.

259. On the United Synagogue's costs appeal I agree entirely with Lord Hope.

MICHAELMAS TERM
[2009] UKSC 1
On appeal from: [2009] EWCA Civ 626
[2009] EWCA Civ 681

JUDGMENT

R (on the application of E) (Respondent) *v* Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others

R (on the application of E) (Respondent) *v* Governing Body of JFS and the Admissions Appeal Panel of JFS (United Synagogue) and others (Appellants)

before

LORD HOPE, Deputy President
LADY HALE
LORD BROWN

JUDGMENT GIVEN ON

14th October 2009

Heard on 1st October 2009

Appellant (United Synagogue)
Ben Jaffey
Christopher McCrudden
(Instructed by Farrer & Co)

Respondent (E)
Dinah Rose QC
Helen Mountfield
(Instructed by Bindmans LLP)

Appellant (Governing Body of JFS and Admissions)
Lord Pannick QC
Peter Oldham
(Instructed by Stone King Sewell LLP)

Appellant (Legal Services Commission)
David Hart QC
Sarah Lambert
(Instructed by Legal Services Commission)

R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others

R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue) (Appellants)

[2009] UKSC 1

LORD HOPE, DEPUTY PRESIDENT

1. This is a procedural application under rule 30 of the Supreme Court Rules 2009 (SI 2009/1603). The respondent (E) seeks an order that, whatever the outcome of the appeal, the appellants (JFS and the United Synagogue) shall not be entitled to seek the payment of any costs from himself or from the Legal Services Commission. Having heard argument at its first sitting on 1 October 2009, the Court decided to refuse E's application for a protective costs order for reasons to be given later. The following are our reasons for this decision.

Background

2. JFS is a voluntary aided maintained comprehensive school in the London Borough of Brent. The first and second appellants are the Governing Body of JFS ("the Governing Body") and its independent admission appeal panel ("the Panel"). The third appellant, the United Synagogue, is an association of Orthodox synagogues and the foundation body of JFS. E is the father of M, who is now aged 13. E is Jewish by descent and M's mother, who is of Italian national and ethnic origin, has converted to Judaism. But her conversion is not recognised by the Orthodox Jewish community. M was refused admission to JFS for the year 2007/2008 on the grounds that he was not recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregations of the Commonwealth and that its admission criteria gave priority, in the event of oversubscription, to Orthodox Jewish children. E sought judicial review of the Governing Body's refusal to offer M a place at the school, of the Panel's decision to uphold the refusal and against them both for failing to comply with the duty imposed on public authorities under section 71 of the Race Relations Act 1976 and against the rejection of his objection by the Schools Adjudicator. On 3 July 2008 Munby J found the school to have been in breach of its duty under section 71 of the 1976 Act, but otherwise rejected the claims: [2008] EWHC 1535/1536 (Admin). The finding of a breach of

section 71 was not the subject of any appeal, but Munby J granted leave to appeal on the substantive discrimination issues.

3. On 25 June 2009 the Court of Appeal allowed E's appeal, finding that JFS's oversubscription criteria were unlawful as they amounted to direct, or alternatively indirect, discrimination as defined in section 1 of the Race Relations Act 1976: [2009] EWCA Civ 626; [2009] PTSR 1442. The Governing Body's refusal to admit M and the dismissal of his appeal by the Panel were both quashed. JFS was directed to reconsider M's admission in accordance with its admissions policy but without regard to the criteria held by the judgment of the court to be unlawful. Other issues arising in the appeal were adjourned and have yet to be determined. That part of the order directing JFS to reconsider M's admission was stayed for 14 days and, if a petition for leave to appeal were to be lodged, until the determination of that petition. As to costs, the Court of Appeal ordered that E's costs in that court and before Munby J be paid in the following proportions: 50% from JFS, 20% from the United Synagogue, which had participated in the case as an intervener in support of JFS, and as to the remaining 30% from other parties who are not concerned with this procedural application. Permission to appeal to the House of Lords was refused.

4. On 28 July 2008 an appeal committee of the House of Lords gave leave to the Governing Body and the Panel to appeal to the Supreme Court on the substantive discrimination issues and to the United Synagogue to appeal against the costs order that was made against it. On 31 July 2009 the House of Lords refused an application by the Governing Body and the Panel for a continuation of the stay of that part of the order of the Court of Appeal directing JFS to reconsider M's admission, with the result that the decision originally challenged in this claim has effectively been superseded.

5. E has had the benefit in the proceedings below, and in the proceedings to date both in the House of Lords and this Court, of funding from the Legal Services Commission. He seeks the benefit of public funding for the substantive hearing of the appeal. But the Legal Services Commission was minded not to provide him with this benefit unless he takes steps to protect it against an order in the appellants' favour for the costs of the appeal. On 18 September 2009 Mr David Reddin, a Senior Case Manager in the Legal Services Commission, wrote to his solicitors in these terms:

> "I refer to your letter dated 15 September our telephone conversation of yesterday evening and your email of today's date. For the avoidance of doubt it is correct to say that I am minded to refuse your application for funding [E] as a respondent in the Supreme Court unless the other side is prepared to:

(a) Allow the cost [sic] order made in the Court of Appeal to stand in any event

(b) Agree an undertaking that there will be no costs order in the Supreme Court with both sides bearing their own costs.

If that is not acceptable we would expect an application to be made to the Court to seek an order along those lines failing which funding would not be provided.

Our reasoning behind this decision stems from the Funding Code which in the circumstances of this case allows the refusal of funding unless the likely costs are proportionate to the likely benefits of proceedings having regard to the prospects of success and all other circumstances."

6. Mr Reddin then set out a series of factors which he said were clearly relevant to the determination of proportionality. In summary, they were as follows: (1) that E had effectively succeeded in the primary purpose of the litigation and his situation would not change whatever the outcome of the proceedings, (2) the likely consequences for the Community Legal Service Fund if costs were to be awarded to the other side on an inter partes basis in the Court of Appeal and in this Court, (3) that it was not unreasonable to expect the appellants to pay for the case, as the real interest in overturning the decision of the Court of Appeal lay with them and (4) that, although the case was of some public interest, the number of people who were likely to benefit as being in a similar position to M was relatively small.

7. The terms proposed by Mr Reddin on the Legal Services Commission's behalf were not acceptable to the other parties. E wishes to maintain his opposition to the appeals, but he is not in a position to fund the legal representation that he requires himself. The result of the predicament in which he finds himself is that he has been left with no alternative but to apply to the Court for a protective costs order. JFS and the United Synagogue have opposed his application.

The issues

8. The order that E seeks is "that the Appellants shall not be entitled to seek the payment of any costs from the Legal Services Commission or the Respondent." As Ms Dinah Rose QC in her carefully worded submissions

made clear, the real purpose of this application is to ensure that E continues to have the benefit of public funding in this Court. Taking her application at its face value, however, it raises the question whether E and the Legal Services Commission should be protected against orders for costs in three distinct respects: (1) an order in favour of JFS for the costs of its appeal to this Court on the discrimination issues; (2) an order in favour of the United Synagogue for the costs of its appeal on the costs issue; and (3) an order in favour of either or both of these parties for their costs in the Court of Appeal, should they be successful in their appeals to this Court. Mr Reddin also asked in his letter of 18 September 2009 that an order should be sought that both sides should bear their own costs in any event. But Ms Rose did not seek an order in these terms. She said that it would have serious implications for access to justice and that it would be wrong in principle. We will comment briefly below on her reasons for not doing so.

9. Mr Hart QC for the Legal Services Commission very properly conceded at the outset of his submissions that the Commission would not insist as a condition of extending funding to E on his obtaining protection against an order in favour of the United Synagogue for the costs of its appeal to this Court on the costs issue. Nor would it insist on his obtaining protection against an award in favour of JFS or the United Synagogue of their costs in the Court of Appeal in the event of either or both of them being successful in their appeals to this court. Had he not made these concessions we would have had no hesitation in refusing to make orders to either effect. In both cases E's exposure to the risk of these awards is a direct result of the fact that the Legal Services Commission provided funding to E in the Court of Appeal. Having decided to do so, it must be taken to have assumed the risk that any orders as to costs that were made in E's favour in that court would be reversed on appeal by the Supreme Court. E had a legitimate expectation that the funding that was afforded to him in the Court of Appeal would extend to the consequences of any such order. Furthermore, as Mr Jaffey for the United Synagogue pointed out, an order protecting E and the Legal Services Commission against the payment to the United Synagogue of "any costs" would render its appeal on the costs issue pointless. It does not appear from Mr Reddin's letter of 18 September 2009 that he had applied his mind to the issue that the United Synagogue wishes to pursue. It is entirely separate from the discrimination issues raised by JFS. The costs issue raises no question of general public interest. A protective costs order in E's favour in regard to these costs would be entirely inappropriate.

10. The sole remaining issue relates to the costs that will be incurred by JFS in this court. The question is whether the Legal Services Commission is entitled to insist as a condition of extending funding to E to enable him to oppose JFS's appeal that he must obtain a protective order in his favour against these costs. Mr Hart confirmed that funding for this purpose would not be extended to E if an order was not made in his favour to this effect. He submitted that the relevant principles were identified by the Court of Appeal in

R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 1 WLR 2600, para 74, and that they applied by analogy to this case: (1) the issues raised by JFS are of general public importance, (2) the public interest requires that those issues should be resolved, (3) E does not have a private interest in the outcome, (4) having regard to the financial resources of the parties and to the amount of costs that are likely to be involved it is fair and just to make the order and (5) if the order is not made, E will probably discontinue the proceedings and will act reasonably in so doing. That was a case where the party who was seeking the order would discontinue the proceedings if it was not made. In this case, as in *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235, it is the other party who is in control of the appeal. But it was held in *Weaver* that it was nevertheless appropriate for a protective costs order to be made in the respondent's favour to ensure that there was proper representation for both sides before the court: para 7.

11. Funding services as part of the Community Legal Service is available only to individuals: Access to Justice Act 1999, s 7. So the principles that were identified in *R (Corner House Research) v Secretary of State for Trade and Industry*, where the claimant was a non-governmental organisation of limited means and not eligible for public funding, do not provide a complete answer to the question which has been raised by this application. As in *Weaver v London Quadrant Housing Trust*, the prime mover behind the application in this case is the Legal Services Commission. It is not willing to fund E's legal representation except on its own terms. The question is whether the attitude which it has taken in this case is compatible with the scheme which has been laid down by the statute and in particular with the Code that has been prepared under section 8 of the 1999 Act. Ms Rose said that Mr Reddin's letter was hard to reconcile with the Code. Lord Pannick QC for JFS, whose arguments Ms Rose said she was content to follow, went further. He submitted that in the circumstances of this case to withdraw public funding from E at this stage would be unlawful.

The statutory framework

12. The basic rule that provides protection for individuals against an award of costs against them personally in cases that are publicly funded is set out in section 11(1) of the 1999 Act, which provides that, except in prescribed circumstances, costs ordered against an individual in relation to any proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the financial resources of all the parties to the proceedings, and their conduct in connection with the dispute to which the proceedings relate. Section 11(3) provides that regulations may make provision about costs in relation to proceedings in which services are funded by the Legal Services Commission for any of the parties as part of the Community Legal Service. Section 11(4)

sets out various matters with regard to which such regulations may make provision. Regulation 5 of the Community Legal Service (Cost Protection) Regulations 2000 (SI 2000/824) provides cost protection for the Legal Services Commission in cases where funded services are provided to a client in relation to proceedings, those proceedings are finally decided in favour of a non-funded party and the limit on costs set out in section 11(1) of the Act applies. In such cases the court may only make an order for payment by the Legal Services Commission to the non-funded party of the whole or part of the costs incurred by him in the proceedings in an appellate court if it is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds: regulation 5(3)(d). The Governing Body is a charity supported by limited funds. Lord Pannick said that the Legal Services Commission was, in effect, seeking to deny it the benefit of this regulation. Mr Hart did not suggest that anything else was to be found in the Community Legal Service (Cost Protection) Regulations 2000 that bears on the issue that has been raised in this case.

13. Section 8(1) of the 1999 Act provides that the Legal Services Commission shall prepare a code setting out the criteria according to which it is to decide whether to fund (or continue to fund) services as part of the Community Legal Service for an individual for whom they may be so funded and, if so, what services are to be funded for him. As E was funded in the courts below his case can be taken then to have met all the relevant criteria, including those relating to financial eligibility. Our attention was drawn to a number of provisions in the Funding Code which might be relevant to the consideration of his case at this stage, faced as he is with an appeal by a party who seeks to reverse orders that were made in his favour in the court below. Part A of the Code sets out the general criteria for funding. Section 7 of this Part sets out the criteria for judicial review. Para 7.5.2 provides:

> "**7.5.2 The Presumption of Funding**
>
> If the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues, then, provided the standard criteria in Section 4 and Section 5.4 are satisfied, funding shall be granted save where, in light of information which was not before the court at the permission stage or has subsequently come to light, it appears unreasonable for Legal Representation to be granted."

There has been no change to E's financial position or to the merits of the discrimination issues which are the subject of the appeal to this Court. The only change is that, as a result of the lifting of the stay, the decision originally challenged has been superseded.

14. Part C of the Funding Code provides guidance about decision making. Para 13.5 of this Part provides:

> "**13.5 Discharge on the Merits**
>
> …
>
> 3. The importance of a case to the client must always be considered in decisions to discharge, especially if discharge is being considered at a very late stage in the proceedings. The client's rights under ECHR Article 6 must be considered in such circumstances…."

Para 13.7 provides:

> "**13.7 Claims Not Subject to cost Benefit Ratios**
>
> 1. This guidance applies to:
>
> ...
>
> (c) certificates for Full Representation or Litigation Support in proceedings which have a significant wider public interest.
>
> 2. The starting point in deciding whether such a certificate should continue or should be discharged is to reapply the relevant Criteria for the Level of Service in question, taking into account the latest available information….
>
> …
>
> 3. If, when prospects of success and cost benefit Criteria are applied to the certificate as interpreted in the way described above, those Criteria are satisfied, funding will continue and the certificate will not be discharged. If those Criteria are not satisfied, the certificate will normally be discharged, but the Commission will retain a discretion to continue funding. This discretion will generally be approached in the following way:
>
> (a) funding will be continued if there is a significant wider public interest in doing so…
>
> …
>
> (d) if proceedings are at a late stage the client's Article 6 rights must be considered.
>
> (e) otherwise the issue for the Commission is whether it is in the interests of the Community Legal Service Fund for funding to

> continue. The certificate should be continued if it is in the Fund's interest to do so, but discharged if it is not…"

15. The guidance that is given in Part C of the Funding Code appears to be directed primarily to the decisions that need to be taken at the outset of proceedings and about the discharge of certificates while proceedings are still at first instance. Mr Hart admitted that this was the first occasion that the Legal Services Commission had insisted upon a protective costs order as a condition of providing funding for an appeal against orders made in its client's favour by the court below for which the House of Lords had given leave. He was unable point to anything in the Code that provided direct support for the reasons that the Legal Services Commission has given in this case for refusing funding in these circumstances. So far as it goes, however, Part C of the Code suggests that the following considerations are relevant at this stage of the proceedings: (a) the Commission is entitled to consider whether it is in the interests of the Community Legal Service Fund for funding to be continued: para 13.7.3(e); but (b) where the case is of significant wider public interest, the presumption is that funding that has been granted under Part A, para 7.5.2 should continue: para 13.7.3(a); (c) the client's interests must also be considered: para 13.5.3; and (d) especially if proceedings are at a late stage, his Article 6 rights must be considered too: paras 13.5.3 and 13.7.3(d).

Discussion

16. It is clear that E would not have made this application had he not been forced to do so by the Legal Services Commission. It is also clear that without the support of public funding he will not be able, as he wishes to do, to continue to resist this appeal. As in *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235, it is essential that there should be representation for both sides before the Court. The case raises issues of considerable public importance, and it is plainly in the public interest that both sides of the argument should be properly presented. The date for the hearing of the appeal, which in view of the importance of the issues has been expedited, has already been fixed. The hearing is to take place at the end of this month. Time is now too short for effective alternative arrangements to be made for the Court to be provided with an *amicus* to argue the case in E's place. So the real issue that must be addressed is not whether the case is suitable for a protective costs order under the *Corner House Research* case principles, but whether the decision of the Legal Services Commission to refuse funding in this case unless it has the benefit of a protective costs order is compatible with the Funding Code and open to attack on traditional *Wednesbury* grounds.

17. The Legal Services Commission seeks protection from the ordinary consequences of the statutory scheme under which public funding is provided. It wishes to eliminate the risk of an order being made against it in favour of JFS under regulation 5(3)(d) of the 2000 Regulations. In *Weaver v London*

Quadrant Housing Trust [2009] EWCA Civ 235, where the applicant was publicly funded, an order was made that the Trust could not recover its costs against the applicant or the Legal Services Commission. That case shows that it cannot be said that an order in such terms will never be appropriate where the applicant is publicly funded. But, as Toulson LJ said in para 16, the background to the application in that case was highly unusual. The appeal had been brought by the Trust, which was a registered social landlord. It was brought to establish a point of general importance, namely whether a registered social landlord was to be regarded as a "public authority" for the purposes of section 6(3)(b) of the Human Rights Act 1998. The applicant no longer had any interest in the proceedings. The court had dismissed her challenge to the possession order that was made against her on the facts. So, as Elias LJ pointed out in para 12, the possession order against her would stand come what may. Any personal interest that she might derive – and it hard to see what this could have been – was no greater than that which would accrue to the benefit of all tenants in the same position that she had been before the order was made against her.

18. This case is significantly different, in various respects. In the first place, in *Weaver* it was inconceivable that, had the Legal Services Commission withdrawn their support and the Trust then succeed in their appeal, any costs order would have been made against the tenant. Here, by contrast, were his certificate to be discharged and the appeal to succeed, there is a real risk that E would be saddled with a very substantial liability for future costs. Furthermore, E maintains that he still has a personal interest in the outcome of this appeal. As he has made clear throughout, he feels strongly that other children should not be denied a school place on the same racially discriminatory basis as the Court of Appeal has held happened in M's case. The private law claim by M on whose behalf the application for judicial review was brought is still unresolved, and its outcome is dependent upon the result of these proceedings. Moreover the public interest in the substantive discrimination issues which JFS wishes to argue is much greater than Mr Reddin appears to have envisaged. Far from the number of people who are likely to benefit as being in a similar position to M being relatively small, as he said in his letter of 18 September 2009, those who are likely to benefit extend across the widest possible spectrum of children who are exposed to discrimination on racial grounds. The issue is not confined to the Jewish community or even to children who wish to be educated in religious schools. So the case for insisting that JFS should be denied the benefit of regulation 5(3)(d) of the 2000 Regulations by the making of a protective costs order against it is much weaker than it was in *Weaver's* case.

19. Then there is the stage at which this issue has been raised. Leave to appeal was given on 28 July 2009. On 31 July 2009 the House of Lords refused to make a protective costs order in E's favour. He was invited to renew his application if his financial circumstances changed so that his eligibility for

public funding came into question. There has been no change in his financial position or in the circumstances that affect the merits of the discrimination issues. All that has changed is the removal of the stay and M's admission to the school. The prospects of success remain the same as they were in the courts below. It was in these circumstances that immediately after the hearing on 31 July 2009 E's solicitors contacted the Legal Services Commission about the funding for the appeal to this Court. Having attempted without success to obtain funding from another source, they made an application for further funding from the Legal Services Commission on 8 September 2009. Mr Reddin's letter of 18 September 2009 was the result.

20. Mr Reddin cannot be criticised for delay. But his refusal to provide funding to enable E to resist JFS's appeal without a protective costs order ignores the consequences of that refusal for access to justice. As Ms Rose pointed out, it would mean that publicly funded litigants would have to be warned that they might be exposed to personal liability for the other side's costs on appeal even if they were entirely successful in the courts below. Many litigants would be unable to face that risk, with the result that they would be shut out of court. In consequence of JFS's appeal against the decision in his favour by the Court of Appeal, for which he was publicly funded, E would be exposed to the risk of having to pay costs incurred after public funding has been withdrawn from him even if he takes no further part in these proceedings. Conversely, the case has only reached this court because E had the benefit of public funding in the Court of Appeal. He had a legitimate expectation that, as he was provided with public funding in the Court of Appeal he would be provided with public funding to enable him to resist this appeal.

21. We take full account of the points made by Mr Reddin in his witness statement of 29 September 2009, and in particular the risk to the Legal Services Commission of an adverse costs order if JFS is successful in its appeal. We take account too of the fact that JFS would not be entitled to recover costs against an amicus were one to be appointed: see *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235, para 7. But the position which Mr Reddin has adopted on the Commission's behalf cannot be reconciled with the statutory scheme. In his letter of 18 September 2009 he said that the Funding Code in the circumstances of this case allows the refusal of funding unless the likely costs are proportionate to the likely benefits of the proceedings and all other circumstances. This takes no account of the stage in the proceedings at which the client is in need of funding. Compelling reasons would have to be shown for withdrawing public funding from a litigant who was publicly funded in the court below, was successful in that court and wished to resist an appeal to a higher court by the unsuccessful party. No such reasons have been demonstrated in this case.

22. It should be understood, as a principle of general application, that if the Legal Services Commission decide to fund a litigant whether by way of claim

or a defence who is successful in his cause, that decision must ordinarily be seen to carry with it something close to an assurance that the Commission will continue to support him in any subsequent appeal by the unsuccessful party whilst he remains financially eligible. This will particularly be so where (a) the withdrawal of support would expose the publicly funded litigant to a substantial risk for future costs, (b) he retains a significant interest, quite apart from his interest in resisting any future costs liability, in maintaining his success in the litigation and (c) the issues raised on the appeal are of general public importance which it is in the public interest to resolve and his case on these issues is unlikely to be properly argued unless he continues to be funded by the Legal Services Commission. All three of these circumstances prevail in this case. It should be noted too that in *Weaver* the Court of Appeal, in making the protective costs order, expressly recognised that, were funding to be withdrawn, the necessary representation would have to be provided either by the Equality and Human Rights Commission or by appointing an *amicus*, against whom the Trust would not be able to recover its costs: [2009] EWCA Civ 235, paras 7 and 17. Those alternatives are not available here. Although the Equality and Human Rights Commission are intervening in the appeal, they propose to advance different arguments from those which E wishes to advance. As we have said, it is too late for the effective appointment of an *amicus*. The decision to refuse public funding at this stage appeared to us in all the circumstances to be so unreasonable as to be unlawful.

23. It was suggested that, if the Legal Services Commission adhered to this position despite a finding to that effect, the matter could be taken to judicial review. But time is short. No advantage is to be gained by going through that procedure, and the delay and expense of doing so is best avoided. We concluded that E is entitled to an immediate declaration in these proceedings that the only reasonable decision open to the Legal Services Commission is to continue to provide him with public funding for this appeal.

No costs orders

24. As has already been noted, Ms Rose declined to seek an order that each side should be liable for its own costs in any event on the ground that to do so would be wrong in principle. As Scott Baker J observed in *R (Boxall) v Waltham Forest London Borough Council* (2001) 4 CCLR 258, para 12, the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This disadvantage is all the greater in a case such as this. It is a high costs case, for which lawyers representing publicly funded parties are required to enter a high costs case plan with the Legal Services Commission. It is a common feature of these plans that they limit the number of hours to an artificially low level and the rates at which solicitors and counsel are paid to rates that are markedly lower than those that are usual in the

public sector. Mr Reddin has indicated that, as they are defending a win, E's solicitors would not be expected to be paid at risk rates. Nevertheless the rate of remuneration that is likely to be agreed for this appeal will be considerably lower than that which would be reasonable if costs were to be determined inter partes.

25. It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In *R (Boxall) v Waltham Forest London Borough Council* Scott Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded. Had such an order been asked for in this case we would have refused to make it.

Conclusion

26. For these reasons we refused E's application for a protective costs order. We declared that the only reasonable decision open to the Legal Services Commission in the circumstances was to continue public funding without a protective costs order. The Legal Services Commission must pay to E, JFS and the United Synagogue the costs of this application. Nothing is to be published which may tend to identify the child who is concerned in these appeals.