WHO IS A JEW? JEWISH FAITH SCHOOLS AND THE RACE RELATIONS ACT 1976

Paper presented to the Interfaith Legal Advisers Network, 1 March 2010[1]

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The history of the *JFS* dispute

JFS (formerly the Jews' Free School) is publicly-funded and designated as a Jewish faith school. It is oversubscribed; and part of its oversubscription policy has been to give precedence to children recognised as Jewish by the Office of the Chief Rabbi (OCR). The OCR only recognises someone as Jewish if it recognises that person's mother as Jewish ('matrilineal descent') or if he or she has undertaken a qualifying course of Orthodox conversion. That said, however, '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'.[2]

E and his son M are practising Masorti Jews. Masortis describe their faith as 'traditional Judaism practised in a spirit of open-minded enquiry and tolerance. Masorti Judaism accepts the binding force of Jewish law, and understands that it has developed throughout history'.[3] Like Liberal and Reform Judaism, Masorti is not part of the Orthodox Jewish structure headed by the United Synagogue and the OCR. E is recognised as Jewish by the OCR; but his wife, originally a Roman Catholic, converted to Judaism under the auspices of a non-Orthodox synagogue and her conversion is not recognised by the OCR. Therefore, the OCR does not regard M as Jewish because it does not regard his mother as Jewish and, accordingly, JFS refused to admit M to the school.

Initially, E appealed to the Schools Adjudicator,[4] who upheld his complaint in relation to the school's *undersubscription* criteria (on the basis that it discriminated indirectly on racial grounds) but not in relation to the *oversubscription* criteria – which was the real point at issue, because in recent years the school has been continuously oversubscribed. E then appealed unsuccessfully to the Administrative Court on various grounds,[5] the most important of which were that JFS's admissions policy did not reflect JFS's designated religious character, discriminated on racial grounds against children whose mothers were not ethnically Jewish, and unlawfully fettered the Governing Body's discretion. E argued that this discriminated against M directly on grounds of his ethnic origin contrary to section 1(1)(a) Race Relations Act 1976 ('the 1976 Act'). Alternatively, the policy was indirectly discriminatory and disproportionate. The High Court rejected both principal claims but was unanimously reversed by the Court of Appeal, which held that JFS had discriminated against M directly on ground of ethnic origin.[6] JFS then appealed to the Supreme Court.[7]

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[1] I should like to thank Jonathan Arkush, of 11 Stone Buildings, for his helpful comments on this paper after it was delivered and David Frei, Registrar to the London *Beth Din*, for confirming the accuracy of my summary, below, of the points made in his presentation to the CLAS meeting on 24 February 2010.

[2] *E, R (on the application of)* v *Governing Body of JFS & Anor* [2009] UKSC 15 (16 December 2009) *per* Lord Hope at 164.

[3] See Assembly of Masorti Synagogues: 'What is Masorti?'

[4] [2007] Determination by the Schools Adjudicator under the School Standards and Framework Act 1998 (Case Reference ada/001187).

[5] *E v Governing Body of JFS & Anor* [2008] EWHC 1535/1536 (Admin) (3 July 2008).

[6] *E, R (on the application of) v JFS Governing Body & Anor* [2009] EWCA Civ 626 (25 June 2009).

The Supreme Court judgments

Nine judges heard the appeal. Overall, the appeal was dismissed by seven to two:[8]

- Lords Phillips, Mance, Kerr and Clarke and Lady Hale held that there had been *direct* discrimination against M on grounds of his ethnic origins.
- Lord Hope and Lord Walker held that there had been no direct discrimination but that there had been unjustifiable and disproportionate *indirect* discrimination.[9]
- Lord Rodger and Lord Brown would have allowed JFS's appeal in its entirety.

Lord Phillips suggested at the outset 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.*[10]

Lord Phillips quoted with approval the membership criteria for an ethnic group set out by Lord Fraser of Tullybelton in *Mandla v Dowell Lee*:[11] principally:

- a long shared history and cultural tradition, often (but not necessarily) associated with religion, together with either a common geographical origin or descent from a small number of common ancestors;
- a common language not necessarily peculiar to the group;
- a common literature peculiar to the group;
- a common religion different from those of neighbouring groups or from the general community; or
- being a minority or an oppressed or dominant group within a larger community.[12]

Because all strands of Judaism traditionally focused on matrilineal descent, a child whose father was Jewish but whose mother was not would not be considered as Jewish according to Orthodox and most non-Orthodox criteria. It was therefore possible to identify two different cohorts: one by the *Mandla* criteria and the other by Orthodox Jewish criteria. In Lord Phillips's view, it was the *Mandla* cohort that formed the Jewish ethnic group with what Lord Fraser regarded as the essentials of a long shared history and a common cultural tradition of its own.

> 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.[13]

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[7] The United Synagogue also appealed against an order for costs, but that need not concern us here.

[8] *Not*, as some commentators have suggested, by five to four.

[9] Lady Hale pointed out at para 57 that '[d]irect 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': see *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293.

[10] At 9: emphasis added.

[11] [1982] UKHL 7: [1983] 2 AC 548, which involved the refusal by a school to allow a Sikh boy to wear a turban.

[12] [1982] UKHL 7 at 4. As to the last criterion, Lord Fraser pointed out that, for example, both the native English shortly after the Norman Conquest and the Norman conquerors themselves might *each* be regarded as ethnic groups.

[13] At 29.

Many of the Orthodox cohort would also fall within the *Mandla* group but many, mostly descended from Jewish women who had married out and abandoned Judaism, would not. They would not satisfy Lord Fraser's two main criteria and might even be unaware that they were Jewish according to the Orthodox test.[14] However, to treat current membership of a *Mandla* ethnic group as the exclusive ground of racial discrimination ignored the fact that the definition of 'racial grounds' in s 3 of the 1976 Act included 'ethnic or national origins'. It was clear that the matrilineal test was a test of ethnic origin; therefore,

> 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.[15]

In the circumstances Lord Phillips came to no conclusion on the issue of indirect discrimination.

Lady Hale drew attention to the 'but for' test in *R v Birmingham City Council, ex parte Equal Opportunities Commission*[16] and quoted with approval Lord Nicholls of Birkenhead's *dictum* in *Nagarajan v London Regional Transport*[17] that racial discrimination was not negatived by the discriminator's motive, intention, reason or purpose in treating another person less favourably on racial grounds.[18] M was rejected because he was not considered to be Jewish according to the criteria adopted by the OCR and

> [w]e do not need to look into the mind of the Chief Rabbi to know why he acted as he did. If the criterion… adopted was… in reality ethnicity-based, it matters not whether he was adopting it because of a sincerely held religious belief.[19]

Moreover:

> there can be no doubt that [M's] 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.[20]

In Lady Hale's view, there was no doubt that Jewish people were an ethnic group within the meaning of the 1976 Act and it was just as unlawful to treat one person *more* favourably on the ground of ethnic origin as to treat another person *less* favourably.[21]

Lord Mance drew attention to the reference to the best interests of the child in the UN Convention on the Rights of the Child 1989, Article 3 and to the right of parents under Protocol 1 Article 2 ECHR to ensure education and teaching in conformity with their own religions and philosophical convictions. His conclusion was that

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[14] At 30–31.

[15] At 46.

[16] [1989] 1 AC 1155.

[17] Cited in BAILII as *Swiggs & Ors v Nagarajan* [1999] UKHL 36.

[18] At 511.

[19] At 65.

[20] At 66.

[21] At 67 and 68.

> [t]o 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… 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.[22]

As to *indirect* discrimination, Lord Hope held that the school had refused to admit M solely on religious grounds and there had therefore been no direct discrimination on racial grounds, because the OCR applied a purely religious test to what constituted Jewishness.[23] However, the admissions policy was disproportionate because it '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'[24] and there had therefore been indirect discrimination.

Lord Rodger, with whom Lord Brown concurred, would have dismissed the appeal in its entirety. His view was that the matter was about religion rather than race: moreover,

> [t]he 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.[25]

In Lord Rodger's view, because the Governors of JFS had not been asked when applying the religious test to consider M's ethnic origins and had not in fact done so, they had not discriminated against him directly on racial grounds.[26] As to the possibility of indirect discrimination:

> [t]he 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.[27]

Comment

At a conference of the Churches' Legislation Advisory Service on 24 February 2010, David Frei, Registrar to the London *Beth Din* and Director of External and Legal Services at the United Synagogue, suggested that though *JFS* had begun with a Liberal convert seeking entry to an Orthodox school, its outcome was that *all* Jewish denominations were affected and had had to amend their admissions criteria – so, in one sense, everyone was in a worse position than at the outset. The OCR was now looking at religious *practice* as the entry criterion, as ultra-Orthodox schools had done for a long time. The problem, however, was that Jews have never defined themselves by practice: and what would happen in those circumstances to non-observant halachically-Jewish children?

[22] At 90.

[23] At 203 and 204.

[24] At 211.

[25] At 226.

[26] At 231–2.

[27] At 233.

The Chief Rabbi's guidance now contained three elements:

- prayer (which, in effect, was translated as synagogue attendance even though it is perfectly possible for an observant Jew to pray anywhere);
- voluntary work; and
- study and education.

This last criterion was the easiest since, for example, attendance at a Jewish primary school would fulfil that requirement. But a wider question remained about the effect on other services provided for Jews and other religious groups. Part V of the 1976 Act currently provides an exemption for charities – but, asked Frei, for how long might that continue? In the event of the repeal of that exemption it is not difficult to see how the change might begin to impact on other religious charities whose beneficiaries are members of specific faith-communities.

It has already been suggested in some quarters that, as well as creating acute problems for Jewish schools, the judgment could also have an impact on admissions policies for faith-schools generally. The *Daily Telegraph* reported on 17 December 2009 that lawyers acting for Ed Balls, the Secretary of State for Children, Schools and Families, had warned that the judgment 'potentially impacts on other schools that give preference to members of particular faiths' because religion was 'closely related' to ethnic origin. Mr Balls was quoted as saying that he was considering action to allow faith schools in England (of which there are some 7,000) to continue selecting along religious lines.

> We are going to need to look carefully at the implications of this, and all faith organisations will as well. We must make sure that the role of faith schools is properly protected in our state education system. Any further steps which have to be taken should only be taken once we have studied the judgment.[28]

It is not clear to what extent the judgment will, in fact, impact on faith schools other than those operated by the Jewish and Sikh communities, given that they are the only faith-communities that are currently regarded as ethnic groups for the purposes of *Mandla* – but its implications for faith-schools generally are by no means clear-cut.

The root of the problem seems to be that there is a conflict between two versions of what each side would regard as 'common sense'. The first version is that of Sedley LJ delivering judgment on behalf of the Court of Appeal. He concluded that Jews constituted a racial group defined principally by ethnic origin and additionally by conversion; therefore, following *Mandla*, to discriminate against a person on the ground that he or someone else was or was not Jewish was to discriminate against that person on racial grounds. Moreover:

> [i]f for theological reasons a fully subscribed Christian faith school refused to admit a child on the ground that, albeit practising Christians, the child's family were of Jewish origin, it is hard to see what answer there could be to a claim for race discrimination.[29]

But that ducks the question, 'Who is a Jew?' by equating it, at least by implication, with the question 'Who is a Christian?' However arresting a rhetorical device it might be to stand the problem on its head in this way, from a theological perspective it confuses two issues that should be kept quite separate. The overwhelming majority of Christians hold that one becomes a Christian not by inheritance but by *baptism*; and a baptised person of Jewish parents is as much a Christian as

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[28] Graeme Paton: 'Faith school admissions in doubt after ruling' *Daily Telegraph* 16 December 2009.

[29] [2009] EWCA Civ 626 at 32.

someone whose family has been Christian since New Testament times.[30] The whole point of the JFS/OCR argument, on the other hand, is *precisely* that Jewishness is acquired not by general racial origins, nor even by religious practice, but specifically by matrilineal descent in accordance with very strict criteria.

The second version is Lord Rodger's: that the 1976 Act was being used for a purpose that had never been contemplated and that 'something has gone wrong'. This may possibly be going too far in the opposite direction. If a child of Jewish parents (even if its mother, in the eyes of some Jews, has been improperly converted) practises Judaism as he or she understands it and self-identifies as Jewish, it is difficult to see how a claim by the child to be ethnically-Jewish *for the purposes of the Race Relations Act 1976* can be lightly set aside – whatever view the religious authorities might take about his or her Jewishness for the purposes of *halacha*. That said however, it is inconceivable that when it passed the Act Parliament could have predicted, still less intended, the outcome in the *JFS* appeal.

As to the rights of parents under Protocol 1 Article 2 ECHR, in spite of Lord Mance's remarks it is not clear that those rights necessarily extend to the situation that arose in *JFS*. Recent Strasbourg jurisprudence certainly upholds parents' rights to ensure education and teaching in conformity with their own religious and philosophical convictions, as well as their right to withdraw their children from compulsory religious and moral education that does not accord with those convictions.[31] But does Protocol 1 Article 2 oblige the Government to provide, for example, education in accordance with Quaker principles for a single Quaker child living in a village in mid-Wales? Surely the remedy in such a case is for the parents to send the child to a Quaker boarding-school – which, under the present law, they are perfectly entitled to do. Purely in terms of Protocol 1 Article 2, E's remedy could well have been to send his son to a school run by the Liberal or Reform movements that would have recognised his Jewishness.

A concluding speculation. Nowhere in any of the judgments was the eponymous case mentioned: but might it possibly be that the seven judges who dismissed the appeal in whole or in part felt, unconsciously at least, that to deny the Jewishness of someone who practised Judaism and who together with his parents was recognised as Jewish in his own religious community was simply *Wednesbury* unreasonable?[32]

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[30] Galatians 3:26–28: 'You are all sons of God through faith in Christ Jesus, for all of you who were baptised into Christ have clothed yourselves with Christ. There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus'. The only exception to this rule that comes to mind is the Church of Sweden. Under the *Religionsfrihetslag* 1951:680 [Freedom of Religion Act 1951] which was repealed in 1996, a child automatically became a member of the Church if either of its parents was a member. From 1951 to 1996, therefore, baptism was not a necessary precondition of membership.

[31] See *Hasan and Eylem Zengin v Turkey* [2007] ECtHR (No. 1448/04) (9 October 2007) and *Folgerø & Ors v Norway* [2007] ECtHR [GC] (No. 15472/02) (29 June 2007).

[32] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1 (10 November 1947).