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RACHEL LIMA DE ALMEIDA DA MOTTA SANTO COLSERA

O CONTROLE DE CONSTITUCIONALIDADE NA INGLATERRA

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Monografia apresentada como requisito parcial à obtenção do título de Especialista em Direito Constitucional, no Curso de Pós-Graduação Lato Sensu em Direito Constitucional do Instituto Brasiliense de Direito Público – IDP.
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Agradeço a minha mãe, Rita, por ter possibilitado o caminho até aqui sempre com muito amor, otimismo e perseverança.

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RESUMO

COLSERA, Rachel Lima de Almeida da Motta Santo Colsera. O controle de constitucionalidade na Inglaterra. 2010. Monografia (pós-graduação *lato sensu* em direito). Pós-gradução *latu sensu* em Direito Constitucional, Instituto Brasiliense de Direito Público, Brasília, 2010.

Monografia sobre a problemática a respeito do sistema de controle de constitucionalidade na Inglaterra, a partir da estruturação da *common law* e das mudanças com a edição do *Human Rights Act* e *Constitucional Reform Act* 2005. Para desenvolver o tema é necessário realizar estudo das decisões proferidas pela Suprema Corte após sua implementação no ano de 2008 e analisar as mudanças apresentadas a partir da edição do *Human Rights Act* e do *Constitucional Reform Act* 2005. Através de uma pesquisa dogmática-instrumental utilizando a técnica de pesquisa bibliográfica e documental, são utilizadas obras de autores referenciais como J. W.F. Allison, Geoffrey Marshall, Paul Graig bem como as decisões da Suprema Corte inglesa. O objetivo da monografia é investigar o controle de constitucionalidade na Inglaterra, e como a nova Suprema Corte está se posicionando a respeito de temas envolvendo direitos fundamentais. Com a pesquisa foi possível concluir a aparente falta de preocupação da doutrina inglesa a respeito das mudanças introduzidas pelo *Constitucional Reform Act* 2005, uma vez que, para a doutrina a Suprema Corte não irá introduzir qualquer modificação no sistema já existente.

Palavras chaves: direito constitucional inglês, direitos fundamentais, controle de constitucionalidade na Inglaterra.

SUMÁRIO

INTRODUÇÃO

A presente monografia circunscreve-se à temática do Direito Constitucional possuindo como escopo pesquisar e investigar algumas das decisões proferidas pela Suprema Corte Inglesa após a sua instalação em outubro de 2008.

A princípio pode-se indagar qual a importância do estudo do sistema de controle de constitucionalidade inglês no âmbito do direito constitucional brasileiro. Entretanto, é necessário lembrar que o Direito Constitucional Comparado corresponde a conceitos abstratos, criados em conseqüência da Teoria do Estado, e esta, por sua vez, colhe os resultados da comparação, utilizando-a como uma maneira para atualizar conceitos ultrapassados pelas mudanças políticas e sociais.[1]

Diante da crescente importância do controle de constitucionalidade difuso no sistema brasileiro, com as recentes reformas no Recurso Extraordinário, mostra-se necessário investigar como outros países estão resolvendo questões constitucionais, principalmente as que envolvem direitos fundamentais, haja vista o constante diálogo decorrente da globalização.

Destaca-se a preponderância do sistema jurídico inglês quando do surgimento do direito norte-americano, sendo este o primeiro país a organizar um sistema de controle de constitucionalidade influenciado diretamente o ordenamento brasileiro.

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[1] MIRANDA, Jorge. *Manual de Direito Constitucional*. Coimbra: Coimbra Editora, 1997, p. 102.

Assim tendo sido o sistema brasileiro influenciado pelo sistema americano que possui sua origem no sistema inglês, é possível destacar semelhanças entre o ordenamento dos dois países, Inglaterra e Brasil, tais como, a tradição de ambos os sistemas de construir jurisprudencialmente as regras processuais do controle de constitucionalidade.

Nesse sentido ressalta-se a edição, pelo Parlamento inglês, do *Constitutional Reform Act*, no ano de 2005, que prevê a criação de uma Suprema Corte inglesa independente e autônoma do Parlamento. Tal previsão modifica uma cultura constitucional a séculos consagrada no Estado inglês que havia sofrido substanciais mudanças com a edição do *Human Rights Act 1998* que incorporou a Declaração Européia de Direitos Humanos ao ordenamento inglês.

Assim, diante das particularidades do sistema jurídico inglês é possível apresentar a questão central desta pesquisa: a criação de uma Suprema Corte separada do Parlamento modificou a maneira como os ministros ingleses decidem questões constitucionais?

O presente estudo monográfico utilizando-se da pesquisa dogmática-instrumental busca em uma esfera macro pesquisar a existência de uma Corte Constitucional na Inglaterra e como é realizado o controle de constitucionalidade em um sistema jurídico fundamentado em uma constituição flexível.

Dentro da seara acima demonstrada almeja-se investigar o direito constitucional inglês, descrever as decisões proferidas após o início dos trabalhos da Suprema Corte inglesa.

Importante destacar que trata-se o presente trabalho de continuação de pesquisa iniciada no âmbito da gradução quando foram abordadas questões como a evolução e organização do Estado Constitucional inglês; os sistemas de controle de constitucionalidade existentes e os fatores que resultaram na reforma constitucional vivenciada pela sociedade inglesa no ano de 2005. Logo, tais pontos não serão explorados neste momento.

Assim, para concretizar a proposta acima realizada serão utilizadas duas técnicas de pesquisa: o levantamento de dados, bibliográfica – leitura analítica e interpretação dos materiais selecionados; e a documental – análise de documentos no âmbito dos ordenamentos jurídicos.

A pesquisa será desenvolvida através de um estudo monográfico, a partir dos seguintes conceitos operacionais: direito constitucional inglês, controle de constitucionalidade na Inglaterra.

No capítulo 1 será estudada as modificações trazidas pela nova Suprema Corte inglesa através do *Constitucional Reform Act* de 2005 bem como os pontos introduzidos pelo *Human Rights Act* editado em 1998. Neste momento serão utilizados autores, predominantemente ingleses, como Diana Woodhouse, Anthony Bradley além de documentos oficiais editados pelos órgãos de Estado inglês.

Estudar-se-á no capítulo 2 das decisões proferidas pela Suprema Corte Inglesa, após sua instalação em outubro de 2008, tendo sido escolhidas, de forma subjetiva pela pesquisadora, decisões que discutissem questões a respeito de direitos fundamentais. O principal objetivo do presente capítulo é investigar como são tomadas as decisões no âmbito da Suprema Corte inglesa e se, de fato, houveram mudanças com a independência dada ao órgão máximo do Poder Judiciário do Estado inglês.

Ressalta-se ainda que não será realizado no presente trabalho uma análise legislativa em relação aos atos normativos em razão da ausência de acesso a doutrina que estude os diversos institutos processuais. Assim, a presente monografia tem como pretensão relatar a tomada de decisão da Suprema Corte inglesa bem como descrever os fundamentos utilizados pela Suprema Corte em casos semelhantes aos apreciados pelo Supremo Tribunal Federal.

Importante, também, destacar que o presente tema proposto nessa monografia justifica-se pela vinculação anterior ao estudo do direito constitucional através do Núcleo de Estudos Constitucionais e por empatia da própria pesquisadora pela cultura inglesa.

Assim, a pesquisa propõe apresentar de maneira simples e didática as modificações sofridos pelo Estado Constitucional nos últimos e como a Suprema Corte, após sua implementação, está decidindo questões referentes aos direitos fundamentais com fundamento não apenas na legislação interna como também nos instrumentos normativos editados pela União Européia.

1 O SISTEMA DE CONTROLE DE CONSTITUCIONALIDADE NA INGLATERRA

O presente capítulo visa demonstrar as condições e instrumentos que possibilitam o controle de constitucionalidade dos atos normativos editados pelo Parlamento inglês.

1.1 Human Rights Act

No ano de 1998, foi editado pelo Parlamento inglês o *Human Rights Act* visando a incorporação das disposições presentes na Convenção Européia de Direitos do Homem de 1950 bem como se mostrou necessária a inclusão dos direitos assegurados pela Convenção, tendo em vista que no de 1966 a Inglaterra aceitou a jurisdição da Corte Européia de Direitos do Homem.[2]

O *Act* é a primeira tentativa da Inglaterra, desde o *Bill of Rights* em 1689, que em verdade protegia em seu texto o Parlamento contra os atos absolutistas da Monarquia e não propriamente a população, de sistematizar uma carta de direitos fundamentais de acordo com o constitucionalismo moderno.[3]

O *Human Rights Act* apresenta em seu texto a proteção aos direitos fundamentais básicos como: direito a vida, proibição à tortura, escravidão e trabalho forçado, direito a liberdade, ao devido processo legal, privacidade, dentre os outros já conhecidos do direito constitucional atual. [4]

Importante destacar a grande relevância, não apenas jurídica como também política, da edição do *Human Rights Act*. Ao editar e aprovar o

[2] FERREIRA FILHO, Manoel Gonçalves. Inovações na constituição inglesa: o *human rights act*, 1998. In: *Revista brasileira de direito constitucional,* nº 4, pp. 49-55, jul/dez. 2004, p. 52.
[3]MARSHALL, Geoffrey. The Reino Unido Human Rights Act, 1998. In: *Defining the field of comparative constitucional law.* Londres: Praeger, 2002, p nº 107-114 p.107.
[4] FERREIRA FILHO, Manoel Gonçalves. Inovações na constituição inglesa: o *human rights act*, 1998. In: *Revista brasileira de direito constitucional,* nº 4, pp. 49-55, jul/dez. 2004, p. 52.

Act em 1998 o Parlamento inglês deu um importante passo no sentido de contrabalancear a mudança e a continuidade do modelo constitucional histórico então vivenciado pela Inglaterra.[5]

O texto legal prevê que o Poder Judiciário inglês deve interpretar as leis, editadas anterior ou posteriormente a edição do *Act*, em conformidade com as suas normas, entretanto, não pode um juiz inglês declarar a revogação de uma norma anterior à edição do *Human Rights Act* por entender desconformidade entre os dois textos ou mesmo invalidar lei posteriormente editada. [6]

Assim, ao analisar um caso o juiz pode apenas declarar que a norma do *common law* não está em conformidade com o previsto no *Human Rights Act*, ou seja, com o determinado pela Convenção Européia de Direitos do Homem.[7]

Como meio de proteger o ordenamento jurídico, ou para utilizar as palavras de Ferreira Filho – possibilitar o diálogo – o *Human Rights Act* prevê, diante do conflito de normas do *common law* e o texto da Convenção, dois mecanismos para resolução: o primeiro, a declaração de compatibilidade junto ao Parlamento deve ser utilizado durante o processo legislativo ficando o parlamentar responsável por apresentar tema para votação devendo realizar uma declaração de compatibilidade assegurando que o regramento apresentado está em conformidade com as previsões do *Human Rights Act*. O segundo instrumento é a declaração de incompatibilidade pleiteada em juízo que como já acima assinalado ao analisar o caso concreto o juiz pode declarar a incompatibilidade entre a lei inglesa e a norma prevista no *Human Rights Act,*

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[5] ALLISON, J.W.F. *The English Historical Constitution: continuity, change and european effects.* Reino Unido: Cambridge University Press, 2007, p.221.
[6] FERREIRA FILHO, Manoel Gonçalves. Inovações na constituição inglesa: o *human rights act*, 1998. In: *Revista brasileira de direito constitucional,* nº 4, pp. 49-55, jul/dez. 2004, p. 52-53.
[7] ALLISON, J.W.F. *The English Historical Constitution: continuity, change and european effects.* Reino Unido: Cambridge University Press, 2007, p.225.

entretanto, deve aplicar a lei inglesa e comunicar ao Ministro competente a respeito da incompatibilidade existente.[8]

A modernização constitucional imposta pelo *Human Rights Act* que, ao incorporar ao direito interno inglês normas criadas no âmbito de direito comunitário gerou uma consciência em relação aos direitos humanos assegurados pela Convenção direitos estes que na Inglaterra até então apenas haviam sido reconhecidos por interpretação jurisprudencial da Convenção dos Direitos do Homem. A edição do *Act* deixou claro o fenômeno que já há a muito ocorria não apenas no Estado objeto do presente estudo como também nos demais países do Velho Mundo – a europeização do direito interno.[9]

Diante dessa realidade histórica que originou o *Human Rights Act* é necessário realizar um estudo a respeito da norma não apenas do ponto de vista da incorporação ao direito constitucional, mas também, examinar a partir do contexto internacional, uma vez que, implicam em importantes decisões para o direito constitucional inglês.[10]

Diferentemente do que possa parecer diante de uma primeira leitura a respeito do assunto, a Convenção Européia, que originou o *Human Rights Act*, não foi imposta ao governo inglês, muito pelo contrário, ao final da Segunda Guerra Mundial a Inglaterra como um dos países vencedores foi um dos principais articuladores na confecção da Convenção sendo o negociador central diante das peculiaridades do texto que estava sendo escrito. Ao final, com o texto da Convenção aprovado (que também criava a Corte Européia dos Direitos do Homem) a Inglaterra, através de seu Conselho para Relação Exteriores foi o primeiro país, em 1951, a assinar a Convenção.[11]

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[8] FERREIRA FILHO, Manoel Gonçalves. Inovações na constituição inglesa: o *human rights act*, 1998. In: *Revista brasileira de direito constitucional,* nº 4, pp. 49-55, jul/dez. 2004, p. 53.
[9]ALLISON, J.W.F. *The English Historical Constitution: continuity, change and european effects.* Cambridge University Press. Reino Unido, 2007, p.221-222.
[10] MARSHALL, Geoffrey. The Reino Unido Human Rights Act, 1998. In: *Defining the field of comparative constitucional law.* Londres: Praeger, 2002, p nº 107-114. p.107.
[11]ALLISON, J.W.F. *The English Historical Constitution: continuity, change and european effects.* Reino Unido: Cambridge University Press, 2007, p.222.

A Convenção e consequentemente o *Human Rights Act* em muito se assemelha com as previsões da *common law*, apesar de um ato legislativo puramente inglês seria redigido em termos diferentes do consagrado pelo *Human Rights Act* o legislador determinou que a compatibilidade entre o texto da Convenção e o ordenamento inglês será alcançada através da interpretação jurisprudencial.[12]

Em face dessa previsão de compatibilização entre os textos é possível formular o questionamento de que se uma *Bill of Rights*[13] e suas previsões são plenamente justificáveis e aplicáveis em preferência a legislação ordinária presente e futura. Evoluindo a partir dessa primeira suposição indagasse se a *Bill of Rights* gera direitos e obrigações apenas na relação entre o cidadão e Estado ou se aplicasse, também, nas relações privadas. Por último, como forma de concluir os questionamentos a respeito da natureza do *Human Rights Act*, o conteúdo de suas normas podem ser determinados apenas pelo previsto pelo legislador ou poderão ser integrados e interpretados pela interpretação jurisdicional.[14]

O *Act* foi elaborado, apesar de incorporar e de permitir a jurisdição da Corte Européia dos Direitos do Homem, de maneira a preservar a supremacia do Parlamento, fundamento basilar do Estado Constitucional inglês, o que levou ao posicionamento no sentido de declarar que o *Human Rights Act* como um ato de ingenuidade e um compromisso evasivo entre a concepção de supremacia do Parlamento e os direitos fundamentais. Tal posicionamento justifica-se, uma vez que, os fundamentos da Convenção nada mais são que os dois pilares da Constituição inglesa, quais sejam, a supremacia do Parlamento e o Estado de direito garantido primordialmente pela interpretação dos atos do Parlamento e legislação subordinada pelas Cortes da Inglaterra através dos recursos judiciais previstos na seção 8(oito) do

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[12]ALLISON, J.W.F. *The English Historical Constitution: continuity, change and european effects.* Reino Unido: Cambridge University Press, 2007, p.224.

[13]Dentro do ordenamento constitucional inglês a *Bill of Rights* possui natureza de norma constitucional, logo plausível a discussão existente no âmbito do direito constitucional inglês se esta pode ou não ser modificada por legislação ordinária posterior.

[14]MARSHALL, Geoffrey. The Reino Unido Human Rights Act, 1998. In: *Defining the field of comparative constitucional law.* Londres: Praeger, 2002, p nº 107-114. p.107.

Act, mas não através do direito a um efetivo remédio jurisdicional previsto pelo artigo 13 da Convenção.[15]

Em razão do modelo de redação dado ao novo texto normativo, como pontua Marshall, pode-se afirmar que o governo inglês procurou aprovar um *Bill of Rights* que possuísse poucas chances de se sobressair dentro do ordenamento inglês não afrontando, assim, o princípio da supremacia do Parlamento. Tal previsão ganha mais força com o previsto na seção 3 do *Act* que prevê que a interpretação dos preceitos normativos da Convenção "não afetam a validade, operação ou execução de qualquer norma ordinária que seja incompatível"[16], assim, não pode um juiz inglês afastar norma ordinária por entender ser incompatível como o *Human Rights Act.* [17]

Ocorre, entretanto, que apesar das críticas ao *Act* esse é constantemente citado pelos Tribunais ingleses como parâmetro para uma nova interpretação do direito interno, o que torna praticamente impossível negar sua efetividade e importância no tocante à tutela dos direitos humanos.[18]

As críticas e questionamentos a respeito da efetividade do *Human Rights Act* são mais do que justificáveis em face da inovação legislativa que ocorreu no ordenamento constitucional inglês em decorrência da edição do *Act*. Não obstante já é possível identificar resultados positivos decorrentes do novo Bill *of Rights* de 1998, dentre eles, destaca-se o julgamento, pelo *Judicial Commitee* da Câmara dos Lordes que resultou, alguns meses depois da decisão, na alteração do *Anti-Terrorism, Crime and Secutiry Act* de 2001.[19] Vejamos.

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[15] ALLISON, J.W.F. *The English Historical Constitution: continuity, change and european effects.* Reino Unido: Cambridge University Press, 2007, p.225.

[16] *"does not affect the validity, continuing operation or enforcement of any incompatible primary legislation".*[tradução nossa]

[17] MARSHALL, Geoffrey. The Reino Unido Human Rights Act, 1998. In: *Defining the field of comparative constitucional law.* Londres: Praeger, 2002, p nº 107-114. p.108-109.

[18] CYRINO, André Rodrigues. Revolução na Inglaterra? Direitos humanos, corte constitucional e declaração de incompatibilidade das leis. Novel espécie de *judicial review?* In *Revista de Direito do Estado*: Brasília: ano 2, n. 5, p. nº 267-288, jan/mar, 2007., p. 277.

[19] CYRINO, André Rodrigues. Revolução na Inglaterra? Direitos humanos, corte constitucional e declaração de incompatibilidade das leis. Novel espécie de *judicial review?* In *Revista de Direito do Estado*: Brasília: ano 2, n. 5, p. nº 267-288, jan/mar, 2007., p. 279.

No ano de 2004, foi apresentado pedido junto ao Poder Judiciário inglês requerendo a apreciação da licitude da legislação anti-terrorista de 2001, a qual fundamentava a prisão de 09 (nove) mulçumanos em prisão de segurança máxima. A petição sustentava a ilicitude da prisão sob a premissa de que o *Anti-Terrorism, Crime and Security Act* de 2001 que permitia a prisão por tempo indeterminado violava os preceitos assegurados pelo *Human Rights Act*.[20]

Assim, na seara das mudanças sofridas pelo Estado Constitucional inglês desde sua entrada para a Comunidade Européia, o cidadão inglês passou a possuir um número maior de opções legais para proteção de seus direitos. No âmbito do direito interno, como já acima ressaltado, o *Human Rights Act* apresenta previsões, como as das Seções 3 e 4 que dizem respeito a interpretação conforme e da declaração de incompatibilidade e a Seção 6 que estipula quais atos praticados pelo Estado, na figura de qualquer de seus agentes até mesmo um tribunal, podem ser declarados ilegais.[21]

Ocorre, entretanto, que não se pode deixar de destacar que mesmo antes da edição do *Act* as cortes inglesas já estavam interpretando a *common law* de maneira a proteger os direitos fundamentais e interpretá-los em conformidade com as Convenções as quais a Inglaterra está sob jurisdição. Assim, mesmo que um cidadão não seja capaz de pleitear seus direitos com base no *Human Rights Act* poderá optar por fundamentar seu pedido na *common law*, que como demonstrado, possui jurisprudência no mesmo sentido do previsto pelo *Act*.[22]

A interpretação dada pelas Cortes inglesas, buscando a uniformidade entre a norma interna e a Convenção da União Européia, se

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[20] CYRINO, André Rodrigues. Revolução na Inglaterra? Direitos humanos, corte constitucional e declaração de incompatibilidade das leis. Novel espécie de *judicial review?* In *Revista de Direito do Estado*: Brasília: ano 2, n. 5, p. nº 267-288, jan/mar, 2007., p. 279.
[21] CRAIG, Paul. Constitutionalism, regulation and review. In *Constitutional Future: a history of the next ten years.* Editado por Robert Hazell. Oxford University Press, 1999, p. 74-75.
[22] CRAIG, Paul. Constitutionalism, regulation and review. In *Constitutional Future: a history of the next ten years.* Editado por Robert Hazell. Oxford University Press, 1999, p. 75-77.

adequa a posicionamento já consagrado no âmbito da Comunidade Européia anteriormente a entrada da Inglaterra no ano de 1973. A Corte Européia de Justiça já estatui que as normas da União Européia possuem supremacia sob as normas dos Estados membros singularmente. A Corte declarou que os Estados membros limitaram a supremacia de seus direitos e criaram um corpo normativo que une os Estados e seus nacionais sob o princípio de supremacia do direito da União Européia.[23]

Continuando com o objetivo de criar um sistema de regulação e de proteção de direitos pan-europeu[24] o *Human Rights Act* prevê em sua Seção nº 2 que uma Corte quando estiver apreciando uma questão que envolva um direito da Convenção deve levar em consideração nos fundamentos da decisão a ser tomada o posicionamento jurisprudencial da Corte Européia de Direitos Humanos bem como as decisões e opiniões das Comissões e Comitês de Ministros da União Européia.[25]

Pode ocorrer, entretanto, que uma decisão de uma Corte inglesa seja diferente do posicionamento jurisprudencial adotado pela Corte Européia de Direitos Humanos. Essa desarmonia de posicionamentos pode acontecer especialmente em relação as matérias controvertidas no âmbito da própria Corte Européia de Direitos Humanos ou mesmo nos pontos que a Convenção de Direitos Humanos é inespecífica deixando a cargo do Parlamento do Estado membro a regulamentação a respeito da matéria.[26]

Diante dessa divergência de posicionamentos a Convenção prevê, em sua Seção 13, a possibilidade de o litigante pleitear junto a Corte Européia um posicionamento a respeito da suposta violação a seu direito. Surgirá, assim, dentro do ordenamento interno uma obrigação imposta ao Estado pela Corte Européia em sentido oposto ao posicionamento adotado

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[23] ELLIOT, Mark. Reino Unido: Parliament sovereignty under pressure. In *International Journal of Constitutional Law*. Nova Iorque: volume 2, nº 3, p nº 545-554, julho 2004.. p. 547-548.
[24] ELLIOT, Mark. Reino Unido: Parliament sovereignty under pressure. In *International Journal of Constitutional Law*. Nova Iorque: volume 2, nº 3, p nº 545-554, julho 2004. p. 548.
[25] CRAIG, Paul. Constitutionalism, regulation and review. In *Constitutional Future: a history of the next ten years.* Editado por Robert Hazell. Oxford University Press, 1999, p. 77.
[26] CRAIG, Paul. Constitutionalism, regulation and review. In *Constitutional Future: a history of the next ten years.* Editado por Robert Hazell. Oxford University Press, 1999, p. 77.

pela Inglaterra. Não é difícil prever que em casos como estes o Governo sentir-se-á obrigado a modificar o posicionamento anteriormente adotado.[27]

Ao editar o *Human Rights Act,* incorporando as previsões legais existentes na Convenção Européia de Direitos Humanos, a Seção 13 da Convenção foi retirada do projeto inglês. Ou seja, não há no ordenamento interno inglês previsão que embase o pleito, por cidadãos ingleses, de seus direitos junto à Corte Européia de Direitos Humanos. Diante da lacuna no texto do *Act* os legisladores ingleses, ao serem impelidos a justificarem-se, apresentaram o argumento de que toda a lei foi escrita de maneira a efetivar a previsão do artigo 13 da Convenção. Não obstante a ausência, o fato é que os cidadãos ingleses possuem o direito de pleitear a proteção de seus direitos junto a Corte Européia e desde sua criação alguns assim o fizeram.[28]

A idéia que o Parlamento inglês tentou consolidar no sentido de que a edição do *Human Rights Act* não afetaria o princípio da Supremacia do Parlamento mostra-se equivocada. A atuação do Parlamento inglês, após 1998, vem sendo constantemente analisada a partir da possibilidade de seus atos estarem ou não sendo praticados de maneira a proteger os direitos fundamentais assegurados pelo *Human Rights Act*. A obrigação imposta as Cortes inglesas de decidirem em conformidade com o direito da Comunidade Européia em alguns casos fora usada com grande afinco e entusiasmo pelos julgadores. Ademais a prerrogativa que foi resguardada a algumas Cortes inglesas de poderem declarar a incompatibilidade de uma norma interna com uma norma do *Human Rughst Act* demonstra que cada vez mais o direito inglês está buscando maneiras de se adequar ao direito da Comunidade Européia.[29]

É inegável que uma nova realidade política está surgindo na Inglaterra desde as modificações introduzias pelo *Human Rights Act*. Seja

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[27] CRAIG, Paul. Constitutionalism, regulation and review. In *Constitutional Future: a history of the next ten years.* Editado por Robert Hazell. Oxford University Press, 1999, p. 77.
[28] MARSHALL, Geoffrey. The Reino Unido Human Rights Act, 1998. In: *Defining the field of comparative constitucional law.* Londres: Praeger, 2002, p nº 107-114 p.109.
[29] ELLIOT, Mark. Reino Unido: Parliament sovereignty under pressure. In *International Journal of Constitutional Law*. Nova Iorque: volume 2, nº 3, p nº 545-554, julho 2004. p. 553.

consolidando posicionamentos já existentes no âmbito do direito interno inglês seja introduzindo novos parâmetros que devam ser observados pelo Estado e seus entes, o fato é que o princípio da Supremacia do Parlamento em sua concepção pura surgido a partir da Revolução Gloriosa não mais se adequa a realidade constitucional agora vivenciada pelo Estado inglês.[30]

1.2 Constitucional Reform Act 2005

O *Constitutional Reform Act* ao contrário do nome dado não busca modificar a competência jurisdicional das Cortes já existentes no ordenamento jurídico inglês, a partir desse ponto de vista o *Human Rights Act 1998* realizou mudança mais significativa. Sua principal preocupação é regulamentar a relação entre o Poder Judiciário e o Poder Executivo e o Parlamento resultando na modificação das competências do *Lord Chancellor,*[31] e buscando a proteção do princípio da independência do Poder Judiciário através de diversos mecanismos dentre eles a criação de uma Corte Constitucional.

Quando as determinações do *Constitutional Reform Act* estiverem sido completamente aplicadas poderá perceber-se fato interessante no direito constitucional inglês, qual seja, grande parte da constituição não escrita estará agora consagrada em um único ato normativo aprovado pelo Parlamento.[32]

1.2.1 A proteção ao princípio da independência do Poder Judiciário.

A independência do Poder Judiciário sempre foi vista pela Inglaterra como um dos principais fundamentos de seu Estado Constitucional, no entanto, até o ano de 2005 não existia no direito inglês qualquer documento

[30] ELLIOT, Mark. Reino Unido: Parliament sovereignty under pressure. In *International Journal of Constitutional Law*. Nova Iorque: volume 2, nº 3, p nº 545-554, julho 2004. p. 553-554.
[31] BRADLEY, Anthony, The process of constitutional change.In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/Id20056/Idselect/dconst/83/83.pdf- acesso em: 30.08.2008, p. 6.
[32] BRADLEY, Anthony, The process of constitutional change.In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/Id20056/Idselect/dconst/83/83.pdf- acesso em: 30.08.2008, p. 14.

que reconhecesse essa independência e estruturação do Poder Judiciário. Até então os juízes possuíam sua independência em razão de interpretações de convenções, acordos, tradições e na figura do *Lord Chancellor*, que, até o ano de 2005, possuía prerrogativas judiciárias e executivas dentre elas a proteção da Constituição inglesa, que diante da combinação de prerrogativas protegia a independência do Judiciário, entretanto, apenas quando requerido.[33]

Com o advento da Corte Européia de Direitos Humanos, a Inglaterra viu-se pressionada, inclusive diretamente pela Corte através de decisão proferida, que apesar de reconhecer que o sistema inglês não apresentava problemas reais na proteção dos direitos fundamentais, para a criação de uma Corte Constitucional independente do Parlamento a fim de que fosse garantido efetivamente o direito a um julgamento justo. Diante de tal imposição, no ano de 2005, foi editado o *Constitutional Reform Act* reestruturando a jurisdição da Câmara dos Lordes, ou melhor, transferindo-a para um órgão autônomo e independente.[34]

A Comunidade Européia há muito já questionava a real independência do Poder Judiciário inglês tendo, inclusive, no ano de 2003, dois anos antes da edição do Ato de Reforma, o Conselho Europeu editado a Resolução nº 1.342, onde aconselhava a explícita separação de poderes entre o Legislativo e o Judiciário, mais especificadamente da Câmara dos Lordes e do Lorde Chanceler garantindo, assim, a consagração do artigo 6º da Convenção Européia de Direitos Humanos que prevê o direito fundamental a um julgamento justo.[35]

Nos últimos anos, na Inglaterra, a atuação do *Lord Chancellor* demonstrou-se cada vez mais próxima de um posicionamento político do que

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[33]WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007.p. 153-154.

[34] CYRINO, André Rodrigues. Revolução na Inglaterra? Direitos humanos, corte constitucional e declaração de incompatibilidade das leis. Novel espécie de *judicial review?* In *Revista de Direito do Estado*: Brasília: ano 2, n. 5, p. nº 267-288, jan/mar, 2007., p. 281.

[35] CYRINO, André Rodrigues. Revolução na Inglaterra? Direitos humanos, corte constitucional e declaração de incompatibilidade das leis. Novel espécie de *judicial review?* In *Revista de Direito do Estado*: Brasília: ano 2, n. 5, p. nº 267-288, jan/mar, 2007., p. 283.

de uma atuação jurisdicional como protetor dos princípios da Constituição inglesa. Em razão disso o *Constitutional Reform Act* criou uma Suprema Corte que irá assumir o papel jurisdicional até então exercido apenas pelo *Lord Chancellor*, como forma de restabelecer o relacionamento entre o Poder Judiciário e os demais órgãos integrantes da administração estatal. Nesse sentido a reforma constitucional impede, ainda, a nomeção de juízes para ocuparem cadeiras na Câmara dos Lordes bem como prevê que todos os juízes devem atuar de maneira a proteger a Constituição e o *Lord Chancellor* possui responsabilidade exclusiva de buscar a proteção e concretização do princípio da independência do Poder Judiciário.[36]

Dentre as conseqüências que as mudanças implementadas a partir da edição do *Constitutional Reform Act* a que talvez possua o maior impacto em um primeiro momento diz respeito a diminuição de atribuições do *Lord Chancellor*. Tais mudanças mostram-se necessárias para que consiga-se proteger o princípio da independência do Poder Judiciário. Assim, o *Constitutional Reform Act* retira do *Lord Chancellor* e transfere para o *Lord Chief of Justice* aquelas competências que separam sua atuação jurisdicional da sua atuação como membro do Governo. Algumas atribuições foram transferidas exclusivamente para o *Lord Chief of Justice*, outras agora devem ser exercidas conjuntamente pelos dois bem como algumas já haviam sido revogadas do ordenamento jurídico, como por exemplo, a prerrogativa que o *Lord Chancellor* possuía de atuar como juiz foi extinta pelo *Habeas Corpus Act 1679*.[37]

A proteção ao princípio da independência do Poder Judiciário na Inglaterra busca a autonomia dos tribunais, manter legitimidade das regras de direito e proteger os direitos humanos, e preservar a imparcialidade dos juízes quando estiverem analisando em um caso concreto. Assim não podem

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[36] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007.p. 155.

[37] BRADLEY, Anthony, The process of constitutional change .In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/Id20056/Idselect/dconst/83/83.pdf- acesso em: 30.08.2008, p. 9.

os juízes quererem afirmar que a autonomia do judiciário é um direito deles a ser exercido, uma vez que, o princípio em discussão na verdade busca preservar a confiança da sociedade no sistema de justiça e de governo do Estado.[38]

Um questionamento feito em relação ao conteúdo normativo do *Act* diz respeito a falta de especificação sobre o que seria uma ameaça à autonomia judiciária e como os juízes poderão se defender quando se depararem com tentativa de violação ao princípio. Como os demais Estados, a legislação inglesa regulamenta como deve ser a nomeação e remuneração, entretanto, os limites de competência entre os Poderes e como estes devem ser respeitados são confiados a Convenções e interpretações criadas pelos Tribunais do que discriminados em uma legislação propriamente dita.[39]

Assim essas proteções dependem do desenvolvimento de uma cultura e de valores semelhantes compartilhados pelos Poderes Executivo, Legislativo e Judiciário. Nesse diapasão e assumindo que a cultura e os valores comuns existam a consagração e proteção ao princípio em questão pode se consolidar de forma mais rápida do que se forem necessários a criação e implementação de institutos e órgãos com estruturas mais formalizadas do que as já conhecidas e vivenciadas pela sociedade inglesa.[40]

Destaca-se que durante toda a história constitucional inglesa o que resultou na maneira como o Estado inglês está organizado o *Lord Chancellor* sempre ocupou a posição de ponte entre os juízes e a política assumindo o papel de proteger os juízes de decisões e posicionamentos

[38] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007 p. 156-157.
[39] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007.p. 158.
[40] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007.p. 158.

adotados a partir de um pensamento puramente político que pudessem afrontar a independência das Cortes.[41]

Entretanto diante das mudanças governamentais não há como confiar e esperar que tais valores anteriormente compartilhados entre os Poderes, principalmente entre o Judiciário e o Executivo, não tenham mudado. As reformas realizadas impulsionaram as Cortes inglesas a assumirem uma posição mais publicizada o que gerou uma maior expectativa da sociedade em relação aos posicionamentos dos juízes. Um exemplo desse novo modo de ver o Poder Judiciário inglês é o recente posicionamento adotado pelos juízes ao declararem-se contrários as reformas políticas defendidas pelo *Lord Chancellor* na proposta original do *Constitucional Reform Act*. Do outro lado os *Lords Chancellor* demonstraram seu descontentamento com a maneira como as Cortes estavam interpretando as disposições do *Human Rights Act* 1998, deixando, inclusive, de proteger o Poder Judiciário quando a imprensa realizou intensas acusações contra juízes ingleses.[42]

Com a abertura cada vez maior à sociedade dos atos e decisões prolatadas pelas Cortes, a proteção ao seu posicionamento contra questões políticas que anteriormente eram realizadas pelo *Lord Chancellor* na privacidade dos gabinetes dos entes políticos e fora do alcance da opinião pública se mostra não mais eficiente uma vez que sendo os juízes acusados publicamente pela imprensa, a proteção e posicionamento do *Lord Chancellor* deve também ser realizada em público como uma maneira de evitar a descrença da sociedade em relação aos órgãos formadores do Poder Judiciário, o que torna inviável a apresentação a sociedade de um posicionamento único do Estado a respeito de determinado assunto.[43]

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[41] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007 p. 159.

[42] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007p. 158-159.

[43] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007.p. 160

As mudanças introduzidas pelo *Constitucional Reform Act* geram dúvidas a respeito do papel do *Lord Chancellor* como protetor do Poder Judiciário. O Ato prevê que o Chefe do Gabinete não precisa mais ser exclusivamente um juiz ou advogado podendo, inclusive, um político eleito ser nomeado *Lord Chancellor*.O Ato cria ainda a *Judicial Appointments Comission* que irá assumir a competência do *Lord Chancellor* de representar os interesses do Poder Judiciário.[44] Assim, não existirá nada além de antigas tradições que exigam lealdade e empatia da atuação do *Lord Chancellor* com relação aos juízes.[45]

No entanto, importante destacar que o *Constitutional Reform Act* não extingue todas as responsabilidades do *Lord Chancellor* para com o Poder Judiciário. O *Act* é expresso ao determinar em seu artigo 6, da seção 3 que o *Lord Chancellor* deve:

> (6) O *Lord Chancellor* deve observar atentamente:
>
> (a) a necessidade de defender aquela independência;
>
> (b) a necessidade do judiciário de possuir o suporte necessário para execer suas funções;
>
> (c) a necessidade de representar interesse público em matérias que digam respeito ao poder judiciário ou as questões de administração da justiça e as decisões que tratem apropriadamente a respeito do assunto.[46]

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[44] GAY, Oonagh. *The constitutional Reform Act 2005 – the role of the Lord Chancellor.* Biblioteca da Casa dos Comuns, 14.11.2005. Disponível em: www.parliament.uk/commons/lib/research/notes/snpc-03792.pdf -, acessado em 30.08.2008.

[45] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007.p. 160.

[46] *"(6) The Lord Chancellor must have regard to- (a) the need to defend that independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions; (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of the justice to be properly represented in decisions affecting those matters."* In GAY, Oonagh. *The constitutional Reform Act 2005 – the role of the Lord Chancellor.* Biblioteca da Casa dos Comuns, 14.11.2005. Disponível em:

O texto do *Act* silencia-se no que diz respeito como deve o *Lord Chancellor* defender o princípio da independência do Poder Judiciário, entretanto, baseando-se nas discussões que foram travadas durante a passagem do *Constitucional Reform Act* pelo Parlamento é possível concluir que o *Lord Chancellor* possuirá as mesmas responsabilidades que já lhe eram incumbidas antes da reforma, no entanto, agora estarão baseadas em estatutos legais ao invés de apenas serem um ato de tradição. As prerrogativas anteriormente existentes de conselheiro e protetor dos interesses dos juízes e até mesmo de poder puni-los quando cometiam erros no tocante a administração judicial foram transferidos para o *Lord Chief of Justice*. Tanto assim o é que o *Act* determina que o princípio da independência do Poder Judiciário deve ser defendido de violações que podem ser praticadas pelos próprios juízes. Essa vigilância e proteção continua a ser do *Lord Chancellor.*[47]

O texto consolidado pelo *Act* mostra-se ainda mais vago quando determina que o princípio da independência deve inibir que membros do Parlamento pressionem os juízes a decidirem de forma a tornar possível as decisões políticas sob pena de ser aprovado pelo Parlamento ato normativo desfavorável aos membros do Poder Judiciário, ou mesmo, não possibilitar que membros do Poder Legislativo publicamente peçam aos juízes para decidirem de determinada maneira. Ocorre, entretanto, que não há previsão de como poderão ser punidos os que praticarem os atos exemplificados.[48]

O *Act* prevê que não apenas o *Lord Chancellor* deverá atuar de maneira a proteger o princípio da independência do Poder Judiciário. Na Seção 3 (três) o *Act* determina que todos os Ministros, *Lord Chancellor* e aqueles que de alguma maneira possuem responsabilidades relacionadas com o Judiciário ou com a administração da justiça devem proteger a independência dos juízes.

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www.parliament.uk/commons/lib/research/notes/snpc-03792.pdf -, acessado em 30.08.2008., p. 4.

[47] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007.p. 160-161.

[48] BRADLEY, Anthony, The process of constitutional change.In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/ld20056/ldselect/dconst/83/83.pdf- acesso em: 30.08.2008, p.16.

Não obstante essa previsão apenas em relação ao *Lord Chancellor* existe dispositivo estabelecendo expressamente a responsabilidade com a proteção do princípio.[49]

Importante destacar que apesar de o *Constitucional Reform Act* consagrar o princípio da independência do Poder Judiciário e criar a Suprema Corte esta não possuirá autonomia administrativa ficando vinculada ao *Department of Constitutional Affairs* não apenas para a sua formação como no que diz respeito as questões administrativas, como nomeação de servidores civis, pagamento de remunerações, questão imobiliária.[50]

1.2.2 Uma Suprema Corte para a Inglaterra

A Suprema Corte da Inglaterra foi criada por imposição da Comunidade Européia, com a edição da Resolução nº 1.342 pelo Conselho Europeu, e, posteriormente, com a decisão proferida pela Corte Européia de Direitos Humanos, declarando expressamente a necessidade de uma Suprema Corte inglesa autônoma do Parlamento. [51]

No entanto, cabe destacar que no ano de 2003 a Rainha incluiu em seu discurso na abertura dos trabalhos para o Parlamento a necessidade de o Governo assumir o compromisso de estabelecer uma Suprema Corte disvinculada do Poder Legislativo.[52]

A Suprema Corte inglesa tem composição prevista de 12 (doze) juízes, os *Justice of Supreme Court*, incluindo o Presidente e o Deputado Presidente. Os primeiros integrantes da Suprema Corte são os *Laws*

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[49] BRADLEY, Anthony, The process of constitutional change.In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/Id20056/Idselect/dconst/83/83.pdf- acesso em: 30.08.2008, p. 8

[50] WOODHOUSE, Diana. Reino Unido: The Constitutional Reform Act 2005 – defending judicial independence the English away. In*: Internacional Journal of Constitucional Law.* Nova Iorque: volume 5, nº 1, p nº 153-165, janeiro-2007p. 157.

[51] CYRINO, André Rodrigues. Revolução na Inglaterra? Direitos humanos, corte constitucional e declaração de incompatibilidade das leis. Novel espécie de *judicial review?* In *Revista de Direito do Estado*: Brasília: ano 2, n. 5, p. nº 267-288, jan/mar, 2007., p. 281-283.

[52] JUDGE, David. *Political institutions in the Reino Unido*. New York: Oxford University Press Inc, 2009. p. 236.

Lords integrantes do Parlamento que por força do previsto pelo *Constitutional Reform Act* não podem mais ocupar cadeira na Câmara dos Lordes.[53]

Essa determinação realizada pelo *Constitutional Reform Act,* como maneira de consolidar o princípio da independência do Poder Judiciário, gerou diversas críticas. Dentre elas a que parece ser plausível e complexa diz respeito a importância da participação dos *Law Lords* no Parlamento como figuras importantes durante os debates para tomada de decisões.[54]

Ocorre, no entanto, que dos 12 (doze) integrantes da Câmara dos Lordes, nos últimos anos, um número insignificante de 3 (três) ou 4 (quatro) participaram ativamente das deliberações do Parlamento. Assim, de maneira a resolver o impasse apresentado por aqueles contrários a reforma constitucional poder-se-ia convocar para ocuparem cadeira na Câmara dos Lordes os *Law Lords* já aposentados.[55]

A Suprema Corte, em princípio, terá a jurisdição que anteriormente pertencia a Câmara dos Lordes em seu papel jurisdicional, bem como a competência para determinar questões de delegação de poderes entre os entes do Estado. A criação da Corte Constitucional inglesa busca compatibilizar os diferentes ordenamentos jurídicos existentes no Reino Unido.[56]

O estabelecimento da Suprema Corte como órgão separado do Parlamento possibilita uma reestruturação da *Appellate Committee* da Câmara dos Lordes transferindo, como já dito, para a Suprema Corte as atribuições

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[53] BRADLEY, Anthony, The process of constitutional change.In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/Id20056/Idselect/dconst/83/83.pdf- acesso em: 30.08.2008, p. 9-10

[54] BRANDER, Ruth, SMITH, Roger. *A Supreme Court for the Reino Unido.* Londres: *Police Paper , Justice.* 2002. Disponível em: www.justice.org.uk/images/pdfs/supreme.pdf acessado em 30.08.2008 p. 5.

[55] BRANDER, Ruth, SMITH, Roger. *A Supreme Court for the Reino Unido.* Londres: *Police Paper , Justice.* 2002. Disponível em: www.justice.org.uk/images/pdfs/supreme.pdf acessado em 30.08.2008 p. 5.

[56] BRADLEY, Anthony, The process of constitutional change.In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/Id20056/Idselect/dconst/83/83.pdf- acesso em: 30.08.2008, p. 10-11

exercidas conjuntamente pela *Appellate Committee* e pelo *Privy Consuil* quanto a questões de delegação de poderes entre os entes estatais de todos os Estados integrantes do Reino Unido (Inglaterra, Escócia, Irlanda do Norte e País de Gales). Assim, seria possível estabelecer a Suprema Corte de maneira a ser a última instância de apelação e também atue como Corte Constitucional e Administrativa com jurisdição sobre todo o território britânico.[57]

Apesar de o *Constitutional Reform Act* não prever expressamente a estipulação de uma Suprema Corte nesses moldes não existem obstáculos que impeçam a criação de uma Suprema Corte comum ao Reino Unido. A unificação das competências do *Judicial Committee* e da Suprema Corte em apenas uma jurisdição evitaria o problema hoje presente no Estado britânico de um mesmo direito fundamental ser interpretado e aplicado de duas maneiras diferentes pelo simples fato de um caso ter sido avaliado por uma Corte inglesa e o outro ter sido analisado por uma Corte escocesa.[58]

A criação da Suprema Corte, baseando-se no princípio da separação de poderes, mostrava-se necessária na Inglaterra, uma vez que, mesmo a Câmara dos Lordes exercendo distintivamente sua competência jurisdicional e sua competência legislativa a ausência de transparência e publicidade sempre foram latentes. Quanto mais o ordenamento inglês se baseava nos princípios da independência do Judiciário e na supremacia da lei mais inviável e incompatível tornava-se a existência de juízes ocupando cadeiras do Poder Legislativo.[59]

O constante questionamento a respeito da imparcialidade das decisões tomadas pelo *Judicial Committee* é apresentado como o primeiro fator

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[57] BRANDER, Ruth, SMITH, Roger. *A Supreme Court for the Reino Unido.* Londres: *Police Paper , Justice.* 2002. Disponível em: www.justice.org.uk/images/pdfs/supreme.pdf acessado em 30.08.2008.p.6.

[58] BRANDER, Ruth, SMITH, Roger. *A Supreme Court for the Reino Unido.* Londres: *Police Paper , Justice.* 2002. Disponível em: www.justice.org.uk/images/pdfs/supreme.pdf acessado em 30.08.2008 p. 6.

[59] BRADLEY, Anthony, The process of constitutional change.In *Constitutional Reform Act 2005 – report with evidence*. Published by the authority of the House of Lords. Dezembro 2005. Disponível em: www.publications.parliament.uk/pa/Id20056/Idselect/dconst/83/83.pdf- acesso em: 30.08.2008, p.17.

que resultou na propositura pelo próprio Governo do ato que criaria a Suprema Corte inglesa independente do Parlamento.[60]

As Cortes inglesas, com a *Appellate Committee of the House of Lords* ocupavam as mesmas dependências o Parlamento o que não proporcionava uma acessibilidade grande da sociedade as instalações das Cortes. Com a criação de uma Suprema Corte autônoma e independente e instalada em seu próprio prédio, com recursos para pesquisas próprios, por exemplo, biblioteca, possibilita a criação de um sistema jurisdicional mais acessível e transparente para o público geral. As experiências de outras Supremas Cortes que possuem programas de visitação e informações ao público em geral a respeito dos trabalhos da Cortes comprovaram a importância de tais tentativas não apenas como uma forma de exposição, mas também para que a sociedade possa entender o processo decisório da Suprema Corte aumentando, assim, a legitimidade e confiança nas suas decisões.[61]

O *Reform Act* ao estipular a criação da Corte buscava acabar com os conflitos constitucionais e os constantes questionamentos a respeito da legitimidade das decisões proferidas pelos *Law Lords* principalmente em matérias que diretamente atingem a política administrativa do Estado. [62]

Demonstrando ainda uma possível vinculação com a situação vivenciada até o presente momento, a Suprema Corte apesar de ser um novo instituto para o ordenamento constitucional inglês irá em pelo menos três pontos manter a mesma configuração até então existente pelo Câmara dos Lordes ao exercer sua função jurisdicional. Quais sejam: irá continuar possuindo pelo menos metade de seus membros eleitos; seu tamanho continuará sendo pequeno (doze membros) e as demandas continuarão sendo

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[60] JUDGE, David. *Political institutions in the Reino Unido*. New York: Oxford University Press Inc, 2009. p. 236

[61] BRANDER, Ruth, SMITH, Roger. *A Supreme Court for the Reino Unido.* Londres: *Police Paper , Justice.* 2002. Disponível em: www.justice.org.uk/images/pdfs/supreme.pdf acessado em 30.08.2008 p. 5.

[62] BRANDER, Ruth, SMITH, Roger. *A Supreme Court for the Reino Unido.* Londres: *Police Paper , Justice.* 2002. Disponível em: www.justice.org.uk/images/pdfs/supreme.pdf acessado em 30.08.2008 p. 4.

maiores; a Corte poderá nomear antigos membros do Parlamento, entretanto, a resistência para tanto será de tamanho considerável, uma vez que, em razão da função anteriormente exercida possuíram limitações a sua atuação na Corte.[63]

Para evitar a concretização das previsões acima destacadas alguns procedimentos podem ser estabelecidos para racionalizar a atuação da Suprema Corte. O primeiro ponto a ser estabelecido é como será o acesso a Suprema Corte. Como a Corte só poderá analisar por ano um número pequeno de casos mostra-se necessário a estipulação de qual ente terá competência para determinar quais casos serão analisados pela Suprema Corte e quais casos terão seu reexame negado. Se for assegurado, como em diversos países europeus, um direito ilimitado de acesso a Corte pela interposição de recursos a atuação dos juízes integrantes estará inviabilizada uma vez que não conseguirão analisar todas as causas que lhes forem apresentadas.[64]

Os casos que forem submetidos a Suprema Corte devem primeiramente ser analisados se o direito discutido merece ser reexaminado tendo em vista a influência que a decisão dada pela Corte poderá ter em outros casos semelhantes. Para evitar uma incoerência na hora da escolha de quais casos serão analisados pela Suprema Corte parece interessante o método utilizado pela Corte Constitucional americana de que uma cópia da petição encaminhada a Suprema Corte é remetida para cada um dos juízes integrantes para que cada um tenha conhecimento de todos os casos remetidos para possível exame. Entretanto, não parece viável a adoção desse procedimento sendo aconselhável que um Comitê de Apelação formado por 3 (três) juízes faça um juízo de admissibilidade prévio sem que haja a necessidade de

[63] CORNHILL, Lord Bingham. A new Supreme Court for the Reino Unido. In: *The Constitution Unit.- Spring lecture 2002*, The Constitution Unit – School of Public Policy, Londres, Maio 2002, disponível em: www.ucl.ac.uk/constitution-unit/files/90.pdf .- acesso em: 30.08.2008. p, 4.
[64] CORNHILL, Lord Bingham. A new Supreme Court for the Reino Unido. In: *The Constitution Unit.- Spring lecture 2002*, The Constitution Unit – School of Public Policy, Londres, Maio 2002, disponível em: www.ucl.ac.uk/constitution-unit/files/90.pdf .- acesso em: 30.08.2008. p, 10.

pronunciamento de todos os integrantes da Suprema Corte a respeito da admissibilidade ou não de um recurso.[65]

Se adotado o procedimento utilizado pelas Supremas Cortes de outros Estados, como a dos Estados Unidos, o que se veria é uma diminuição considerável no número de processos que teriam sua admissibilidade analisada pela Suprema Corte. Ademais diante da vivência inglesa de que em quase todos os casos as decisões são unânimes não possui embasamento modificar tal posicionamento exigindo a presença de todos os *Law Lords* nos Comitês de Apelação.[66]

Os Comitês de Apelação devem ser formados de acordo com temas e seus integrantes devem ser experientes a respeito do assunto. Assim, quando encaminhado um recurso para Suprema Corte este será repassado aos dois Lordes responsáveis pela administração da Corte (*Judicial Office e Registrar*) que deverão se reunir para analisar cada um dos recursos encaminhados de maneira a distribuí-los para os Comitês de Apelação correspondentes.[67]

A criação e estruturação da Suprema Corte busca consagrar ainda mais os princípios constitucionais basilares do Estado inglês não havendo como se falar assim em violação ao princípio da supremacia do Parlamento, tendo vista, a impossibilidade de sustentar a soberania de um órgão estatal em face de outro, pois, a soberania pertence ao Estado como ente único e não a seus órgãos individualmente. Ademais é a Constituição como Carta Magna que regulamenta o processo legislativo e o processo

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[65] CORNHILL, Lord Bingham. A new Supreme Court for the Reino Unido. In: *The Constitution Unit.- Spring lecture 2002*, The Constitution Unit – School of Public Policy, Londres, Maio 2002, disponível em: www.ucl.ac.uk/constitution-unit/files/90.pdf .- acesso em: 30.08.2008. p, 11.
[66] CORNHILL, Lord Bingham. A new Supreme Court for the Reino Unido. In: *The Constitution Unit.- Spring lecture 2002*, The Constitution Unit – School of Public Policy, Londres, Maio 2002, disponível em: www.ucl.ac.uk/constitution-unit/files/90.pdf .- acesso em: 30.08.2008. p, 12.
[67] CORNHILL, Lord Bingham. A new Supreme Court for the Reino Unido. In: *The Constitution Unit.- Spring lecture 2002*, The Constitution Unit – School of Public Policy, Londres, Maio 2002, disponível em: www.ucl.ac.uk/constitution-unit/files/90.pdf .- acesso em: 30.08.2008. p, 13.

jurisdicional. Logo o Parlamento é subordinado à vontade da Constituição assim como a Suprema Corte também será.[68]

[68] KELSEN, Hans. *Jurisdição Constitucional,* São Paulo: Martins Fontes, 2003. p. 150-151.

2 ANÁLISE DE DECISÕES DA SUPREMA CORTE INGLESA

No presente capítulo serão analisadas as primeiras decisões proferidas pela Suprema Corte Inglesa desde o início de seus trabalhos em outubro de 2009 até o presente momento.

2.1 Quem pode recorrer para a Suprema Corte Inglesa

Como demonstrado no capítulo anterior a Suprema Corte inglesa foi instituída através da edição do *Constitutional Reform Act 2005* adquirindo as funções judiciais da Câmara dos Lordes modificando, assim, a estrutura do Poder Judiciário inglês. A Suprema Corte iniciou seus trabalhos em 01 de outubro de 2009.

No entanto, cabe indagar, quais são os casos que merecem apreciação da Suprema Corte, qualquer decisão é passível de interposição de recurso para o último grau de jurisdição inglesa?

Primeiramente, demonstrasse importante destacar que a cultura jurídica inglesa observa o *judicial review* além de ser vital para a concretização do direito é importante instrumento de contestação dos atos praticados pelos Poderes Executivo e Legislativo quando estes agem abusando ou exorbitando suas competências.[69] Tal característica é possível observar, uma vez que, a grande maioria dos casos apreciados pela Suprema Corte dizem respeito a cidadãos contestando decisões tomadas pelos demais órgãos integrantes do Estado.

A Suprema Corte inglesa possui jurisdição em relação as cortes da Inglaterra e Wales, Escócia e Irlanda do Norte. A possibilidade de recurso limita-se apenas a decisões de determinadas cortes dos países citados, como: *Court of Appeal civil e criminal* da Inglaterra e Wales; *Court of*

[69] JUDGE, David. *Political institutions in the Reino Unido*. New York: Oxford University Press Inc, 2009. p. 226.

Session da Escócia e *Court of Appeal* na Irlanda do Norte.[70] Destaca-se ainda que o procedimento de interposição do recurso irá variar de acordo com a Corte de origem, se da Inglaterra e Wales, ou da Escócia, ou da Irlanda do Norte.[71] No presente tópico apresentaremos o sistema recursal apenas em relação a jurisdição inglesa.

Apenas as partes envolvidas no processo, em especial aquela prejudicada pode apresentar recurso para apreciação da Suprema Corte Inglesa.[72] Impende destacar que o recurso apenas será recebido caso a corte de origem reconheça a relevância social e jurídica da matéria em discussão exceto dos casos de decisão proferida em processo de natureza criminal.[73]

Dentre os atos que determinam as possibilidades para interposição de recurso para a Suprema Corte, mostra-se importante destacar as possibilidades previstas pelo *Human Rights Act 1998*. No entanto, o ato não assegura ao jurisdicionado o direito de recorrer para a Suprema Corte ou qualquer outra corte, a não ser de acordo com as hipóteses previstas por atos normativos vigentes anteriormente a edição do *Human Rights Act.*[74]

Existe ainda a possibilidade de ser interposto o recurso das decisões proferidas pela *High Court* diretamente para a Suprema Corte. Para que isso ocorra é necessária a emissão de uma certidão pela *High Court* apontando que a matéria possui relevância e que tal requisito restou

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[70] SUPREMA CORTE DO REINO UNIDO. *A guide to bringing a case to The Supreme Court.* Disponível em: http://www.supremecourt.gov.uk/docs/31_March_2010_-_A_guide_to_bringing_a_case_to_The_Supreme_Court. . acesso em: 22.04.2010, p. 1.

[71] SUEUR, Andrew Le. *A report on six seminars about the UK Supreme.* Queen Mary University Of London, School of Law. Legal Studies Research Paper nº 1/2008. Reino Unido, Novembro de 2008. Disponível em: http://ssrn.com/abstract=1324749 , acesso em: 29/06/2010, p. 8.

[72] SUPREMA CORTE DO REINO UNIDO. *A guide to bringing a case to The Supreme Court.* Disponível em: http://www.supremecourt.gov.uk/docs/31_March_2010_-_A_guide_to_bringing_a_case_to_The_Supreme_Court. . acesso em: 22.04.2010, p. 1

[73] REINO UNIDO. *Administration of Justice Act 1960. Section 1,(1-5) Administration of Justice Act 1960.* Disponível em: http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1960/cukpga_19600065_en_1. acesso em: 22.04.2010.

[74]SUPREMA CORTE DO REINO UNIDO. *A guide to bringing a case to The Supreme Court.* Disponível em: http://www.supremecourt.gov.uk/docs/31_March_2010_-_A_guide_to_bringing_a_case_to_The_Supreme_Court. . acesso em: 22.04.2010, p. 2.

demonstrado bem como que o caso seja suficiente fundamentado para que haja a aceitação da Suprema Corte em apreciar a matéria.[75]

A situação excepcional descrita acima pode ocorrer em dois momentos. O primeiro deles é chamado pela doutrina inglesa como *leapfrog appeal*, que pode ocorrer apenas na jurisdição civil de acordo com o determinado pelo *Administration of Justice Act 1969.* Essa modalidade de recurso é utilizada quando é necessária uma importante interpretação a respeito de um diploma normativo e é possível saber que a *High Court* irá decidir de acordo com precedente já fixado pela Suprema Corte. Destaca-se que esse recurso é pouco utilizado pelos juristas ingleses.[76]

A segunda possibilidade de interposição do recurso descrito ocorre na esfera da jurisdição criminal, de acordo com o previsto pelo *Administration of Justice Act 1960*. Importante destacar que a *High Court*, normalmente atua apenas em matérias cíveis, no entanto, é possível a sua provocação nos casos de matérias criminais quando o objeto da discussão disser respeito à legalidade das decisões proferidas. Nesses casos a *High Court* irá atuar como uma jurisdição divisora formada por 02 juízes e poderá analisar reclamações contra determinações judiciais e decisões do chefe do Ministério Público, e a impetração de *habeas corpus* em casos específicos determinados pelo diploma legal já citado.[77]

O reconhecimento da relevância ou não da matéria deve ser realizado pela Corte de origem ou pela Suprema Corte observando alguns requisitos, como: se o objeto da discussão é de importância para a construção de um posicionamento a ser adotado posteriormente pela Corte ou se a matéria examinada na lide trata de situação já discutida e decidida pela *Court*

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[75] SUPREMA CORTE DO REINO UNIDO. *A guide to bringing a case to The Supreme Court.* Disponível em: http://www.supremecourt.gov.uk/docs/31_March_2010_-_A_guide_to_bringing_a_case_to_The_Supreme_Court. . acesso em: 22.04.2010, p. 3.

[76] SUEUR, Andrew Le. *A report on six seminars about the UK Supreme.* Queen Mary University Of London, School of Law. Legal Studies Research Paper nº 1/2008. Reino Unido, Novembro de 2008. Disponível em: http://ssrn.com/abstract=1324749 , acesso em: 29/06/2010, p. 9.

[77] SUEUR, Andrew Le. *A report on six seminars about the UK Supreme.* Queen Mary University Of London, School of Law. Legal Studies Research Paper nº 1/2008. Reino Unido, Novembro de 2008. Disponível em: http://ssrn.com/abstract=1324749 , acesso em: 29/06/2010, p. 9.

of Appeal ou pela Suprema Corte. A Corte de origem ao certificar se o objeto dos recursos interpostos possui relevância deve observar ainda se o ponto foi devidamente tratado pela decisão recorrida.[78]

Convém destacar ainda alguns impedimentos em relação a interposição de recurso para a Suprema Corte inglesa. Dentre os previstos, o que nos parece de maior relevância para ser destacado é a impossibilidade de interposição de recurso contra a decisão da *Court of Appeal* ou de Corte inferior que tenha negado a autorização para interposição de recurso para jurisdição superior. Ou seja, negada a interposição do recurso não podem a partes litigantes apresentarem apelo perante a Suprema Corte.[79]

Apresentaremos agora decisões proferidas pela Suprema Corte inglesa a respeito de temas como direito de propriedade, discriminação em decorrência de religião, proteção à criança, direitos trabalhistas, extradição e proteção ao direito à informação. Como já destacamos anteriormente a escolha das decisões foi realizada de maneira subjetiva, optando por casos que de alguma maneira apresentem discussões a respeito de direitos fundamentais.

2.2 Secretary Of State for Environment, Food and Rural Affairs (Respondent) v Méier and a another (FC) (Appellant) and others (FC) (Appellant) and another [2009] UKSC 11

O presente julgado foi apreciado pela Suprema Corte Inglesa em dezembro de 2009 em decorrência de recurso apresentado em face de decisão proferida pela *Court of Appeal* no ano de 2008.

A ação foi proposta em razão de alguns viajantes terem montado acampamento sem a autorização necessária em Hethfelton, área de

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[78] REINO UNIDO. *Administration of Justice Act 1960, Section 12,(3).* Disponível em: http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1969/cukpga_19690058_en_1. Acesso em: 23.04.2010.

[79] SUPREMA CORTE DO REINO UNIDO. *A guide to bringing a case to The Supreme Court.* Disponível em: http://www.supremecourt.gov.uk/docs/31_March_2010_-_A_guide_to_bringing_a_case_to_The_Supreme_Court. . acesso em: 22.04.2010, p 4.

floresta gerenciada pelo *Forestry Commission* e de propriedade da *Secretary of State for Environment, Food and Rural Affairs.*[80]

A Secretaria de Estado propôs ação possessória perante, *Poole county court*, jurisdição competente, em nome da floresta Hethfelton e outras áreas que ainda não haviam sido ocupadas pelos viajantes.[81]

O pedido pleiteava a devolução da posse plena do local ocupado pelos viajantes bem como a proteção da posse referente as áreas que ainda não haviam sido ocupadas mas que também pertencem ao *Forestry Commission.*[82]

Importante destacar também que o pedido formulado buscava a imposição da proibição não apenas em relação às pessoas que haviam ocupado a área como também contra desconhecidos que poderiam vir a agir da mesma maneira.[83]

A decisão proferida reconheceu o direito da Secretaria de Estado apenas em relação à área de Hethfelton que fora efetivamente invadida. Apresentado recurso para a *Court of Appeal* esta reconheceu o direito da Secretaria de Estado em relação não apenas a área de Hethfelton como

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[80] SUPREMA CORTE DO REINO UNIDO. 1 de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-ases/docs/UKSC_2009_0087_PressSummary.pdf.- acesso em: 25.03.2010. Press Summary, p. 1

[81]SUPREMA CORTE DO REINO UNIDO. 1 de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-ases/docs/UKSC_2009_0087_PressSummary.pdf.- acesso em: 25.03.2010. Press Summary. P. 1.

[82]SUPREMA CORTE DO REINO UNIDO. 1 de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0087_Judgment.pdf acesso em: 25.03.2010. Judgment p. 3

[83] SUPREMA CORTE DO REINO UNIDO. 1de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0087_Judgment.pdf acesso em: 25.03.2010. Judgment p. 3

também em relação as demais áreas e a impossibilidade de retorno do grupo réu a floresta bem como em relação as pessoas não identificadas pelo pedido inicial.[84]

O processo foi recebido pela Suprema Corte em decorrência do recurso interposto pelo grupo de viajantes. A decisão final baseou-se em duas questões principais. A primeira questionava se a Corte poderia proferir ordem possessória em relação a terra que ainda não havia sido ocupada. E a segunda questão diz respeito a possibilidade ou não de uma decisão judicial determinar que um indivíduo não possa entrar em um terreno que ainda não ocupa.[85]

Em relação ao primeiro questionamento levantado a Suprema Corte foi unanime ao responder de forma negativa, uma que vez tal determinação seria contrária a própria natureza da ação que consiste em reaver terra ocupada por outro.[86]

Quanto ao segundo ponto a Corte destaca que foi acertada a decisão proferida pela *Court of Appeal* ao determinar a proteção não apenas das terras ocupadas como também de outras propriedades gerenciadas pelo *Forestry Commission*. Os ministros destacam ainda que uma possível

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[84] SUPREMA CORTE DO REINO UNIDO. 1 de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-ases/docs/UKSC_2009_0087_PressSummary.pdf.- acesso em: 25.03.2010. Press Summary p.1

[85] SUPREMA CORTE DO REINO UNIDO. 1 de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-ases/docs/UKSC_2009_0087_PressSummary.pdf.- acesso em: 25.03.2010. Press Summary. P. 1

[86] SUPREMA CORTE DO REINO UNIDO. 1 de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0087_Judgment.pdf acesso em: 25.03.2010. Judgment. P. 5

incapacidade da Comissão em preservar e proteger as terras, como defendido nos autos, não é fator suficiente para negar o pedido possessório.[87]

A respeito do presente caso é importante destacar que a decisão da Suprema Corte não ocorreu de maneira unânime. Apesar de todos os Ministros concordarem com a necessidade de proteção da propriedade, em diversos momentos divergente em relação ao melhor remédio a ser adotado no presente caso. No entanto, é latente a preocupação de proteção da propriedade e a tentativa de evitar, diante da possibilidade de outras terras serem invadidas, que outras lides com o mesmo objeto de discussão fosse proposta perante o Poder Judiciário.

2.3 R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.

Em relação ao caso ora apresentado é necessário pontuar inicialmente que em decorrência da matéria discutida não foram divulgados os nomes da partes, sendo as mesmas tratadas por A, o apelante, e B, o apelado.

A presente ação foi proposta em decorrência de "A" antigo membro do Serviço de Segurança do Estado inglês não ter sido autorizado por "B" Diretor do Serviço de Segurança a publicar obra literária a respeito dos anos de trabalho no Serviço de Segurança. De acordo com a legislação inglesa para que fosse possível a publicação do livro, B deveria conceder autorização em decorrência da natureza confidencial do serviço.[88]

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[87] SUPREMA CORTE DO REINO UNIDO. 1 de dezembro de 2009. Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another UKSC 11 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903.* Disponível em: http://www.supremecourt.gov.uk/decided-ases/docs/UKSC_2009_0087_PressSummary.pdf.- acesso em: 25.03.2010. Press Summary. P. 25-26

[88] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_PressSummary.pdf. Acesso em: 01.06.2010. Press Summary, p 1.

O pleito foi apresentado perante a *High Court* com fundamento no direito de expressão assegurado pelo *Human Rights Act* 1998. A defesa argumentou que por se tratar de matéria referente a segurança do Estado, por força do *Regulation of Investigatory Powers Act 2000*, a *High Court* não seria competente para analisar a lide, mesmo tratando-se de direito protegido pelo *Human Rights Act.* De acordo com a tese da defesa apenas o *Investigatory Powers Tribunal* seria competente para apreciar a matéria.[89]

A *High Court* entendeu ser competente para apreciação do caso, no entanto, após recurso a *Court of Appeal* reformou a decisão determinando que seria competência do *Investigatory Powers Tribunal* para examinar o pleito proposto por A.[90]

Diante da decisão A interpôs recurso para que a lide pudesse ser analisada pela Suprema Corte. Participaram do julgamento, também, organizações protetoras de direitos humanos buscando o recebimento do recurso pela Suprema Corte.[91]

A Suprema Corte, por decisão unânime, não aceitou o recurso interposto por A mantendo, assim, a decisão que determinou que seria do *Investigatory Powers Tribunal* a competência para apreciar a lide proposta por A.[92]

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[89] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_PressSummary.pdf. Acesso em: 01.06.2010. Press Summary, p 1.

[90] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_PressSummary.pdf. Acesso em: 01.06.2010. Press Summary, p 1.

[91] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_PressSummary.pdf. Acesso em: 01.06.2010. Press Summary, p 1.

[92] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-

Dentre os fundamentos utilizados pelos Ministros da Suprema Corte para negar seguimento ao recurso de A destaca-se o argumento de que a norma editada pelo Parlamento inglês é clara ao determinar que mesmo se tratando das questões mais sensíveis cabe ao *Investigatory Powers Tribunal* examinar a matéria. Ressalta-se que a decisão declara a ausência de qualquer possibilidade de que o Parlamento tenha decidido deixar a escolha da jurisdição na mão de terceiros.[93]

Nesse sentido a decisão aponta ainda que para julgar procedente o pedido formulado por A seria necessário interpretar palavras e expressões que simplesmente não existem no texto normativo. Pelo contrário, o instrumento legal apontado por A como fundamento de seu recurso, em verdade, tornavam impossível adotar a tese sustentada pelo recorrente.[94]

A Corte destaca ainda que não existem argumentos que justifiquem que a pretensão apresentada por A seja tratada de maneira diferente dos demais processos que tratem de matérias relativas ao serviço de inteligência, ou seja, mesmo diante da proteção ao princípio da liberdade de expressão as determinaçõe legais impostas devem ser observadas por todos.[95]

A decisão ainda rejeitou o argumento sustentado pelo recorrente de que a manutenção da decisão que reconheceu a competência do *Investigatory Powers Tribunal* para apreciar a matéria seria constitucionalmente censurável.[96] Como já pontuada anteriormente, a Suprema Corte entendeu que

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cases/docs/UKSC_2009_0020_PressSummary.pdf. Acesso em: 01.06.2010. Press Summary. P. 1.

[93] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_Judgment.pdf . Acesso em: 01.06.2010. Judgment. P. 7.

[94] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_Judgment.pdf . Acesso em: 01.06.2010. Judgment. P. 8.

[95] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_Judgment.pdf . Acesso em: 01.06.2010. Judgment. P. 9.

[96] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil*

não seria possível interpretar a legislação de outra forma se não a concretizada na decisão recorrida sob pena de criar texto não editado pelo Parlamento.

Concluindo, merece destaque ainda o argumento utilizado pela decisão de que ao contrário do defendido pela tese recursal a legislação inglesa a respeito da publicidade de atos do serviço de intelegência está em consonância com os atos normativos editados pela Comunidade Européia a respeito da matéria. Dito isso, para que fosse aceita a tese defendida por A seria necessário não apenas uma interpretação restritiva da legislação que determina a jurisdição do *Investigatory Powers Tribunal* mas sim, a modificação de toda a legislação seja a doméstica seja a da Comunidade Européia.[97]

Dito isso, cabe pontuar novamente a preocupação da Suprema Corte inglesa em decidir os casos em consonância com a legislação e jurisprudência da Comunidade Européia, apontando, como já demonstrado anteriormente no presente trabalho, a impossibilidade de interpretação de normas internas de maneira diversa do posicionamento externo da Comunidade.

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

A ação ora exposta foi proposta por E em face da *Jews' Free School* em razão da instituição de ensino ter negado a matrícula de seu filho. A instituição é conhecida por fundamentar-se na filosofia judaíca. Em decorrência disso a escola adotou como critério para a seleção de seus alunos que estes

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Division) [2008] EWCA Civ 24. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_Judgment.pdf . Acesso em: 01.06.2010. Judgment. P. 9.

[97] SUPREMA CORTE DO REINO UNIDO. 9 de dezembro de 2009. R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 *On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24.* Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0020_Judgment.pdf . Acesso em: 01.06.2010. Judgment. P. 11-13.

sejam reconhecidos como judeus pelo *Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth.*[98]

Para que uma pessoa seja reconhecida como judeu é necessário que preencha alguns requisitos impostos pela *United Hebrew Congregation of The Commonwealth*. Quais sejam: a pessoa seja descente, pela família materna, de mulher reconhecida como judia pelo *Office of teh Chief Rabbi of The United Hebrew Congregation of the Commonwealth;* ou a pessoa tenha se submetido ao curso de qualificação de conversão ortodoxa.[99]

Em sua defesa a *Jew's Free School* sustentou que negou a matrícula para o aluno pois, sua mãe, em verdade, possuia origem católica e italiana e ao se converter ao judaísmo o fez através de preceitos não ortodoxos. Ou seja, a conversão não é reconhecida pelo *Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth*, logo, o pedido de matrícula fora negado pela Escola.[100]

"E" propôs ação perante a justiça inglesa alegando que a política admissional da *Jew's Free School* discriminou seu filho ao negar sua matrícula em decorrência de suas origens étnicas. O *High Court* negou o pedido. Interposto recurso para a *Court of Appeal* esta modificou a decisão anterior fundamentando que a instituição educacional agiu de forma discriminatória em relação ao filho de "E". A *Jew's Free School* e *United*

[98] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) [2009] UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0105_PressSummary.pdf. Acesso em: 16.06.2010. Press Summary, p 1.

[99] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) [2009] UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0105_PressSummary.pdf. Acesso em: 16.06.2010. Press Summary, p 1.

[100] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) [2009] UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0105_PressSummary.pdf. Acesso em: 16.06.2010. Press Summary, p 1.

Synagogue interpuseram recurso para a Suprema Corte visando a modificação da decisão.[101]

A Suprema Corte inglesa negou o recurso interposto pela *Jew's Free School* e aceitou parcialmente o recurso interposto pela *United Synagogue.*[102] Destaca-se que o recurso da *Jew's Free School,* apesar de negado, não ocorreu de maneira unânime. Apesar de todos os Ministros concordarem com a manutenção da decisão recorrida, as fundamentações foram divergentes, uma vez que, a maioria aceitou a fundamentação de discriminação direta. No entanto, houveram Ministros que a tese da discriminação indireta.

Importante destacar, como mesmo feito pela própria decisão, que o posicionamento adotado pela Suprema Corte não deve ser interpretado como uma crítica a política admissional da *Jew's Free School* ou mesmo sugerindo que qualquer parte envolvida na lide possa ser considerada como racista. A única questão que foi apreciada pela Suprema Corte é se, diante da negativa de matrícula, "M" foi colocada em situação de desvantagem em decorrência de sua origem étnica.[103]

Em relação ao argumento de que a atuação da *Jew's Free School* no momento da matrícula gerou uma discriminação direta a criança a

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[101] SUPREME COURT OF THE REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) [2009] UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0105_PressSummary.pdf. Acesso em: 16.06.2010. Press Summary, p 1.

[102] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0105_PressSummary.pdf. Acesso em: 16.06.2010. Press Summary, p. 1.

[103] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0105_PressSummary.pdf. Acesso em: 16.06.2010. Press Summary, p. 2.

decisão aponta que seria necessário observar se a origem étnica da vítima foi o fator determinante para a decisão pelo discriminador. [104]

Assim, sendo os critérios para identificar a discriminação inconscientes, subjetivos ou baseados em fatos que não são claros, o julgador deve observar, a partir das evidências disponíveis, o processo mental do discriminador como forma de descobrir quais fatos o levaram a discriminar determinado sujeito. [105]

A decisão apresenta como exemplo para aferir se a conduta adotado é discriminatória ou não a seguinte situação: um homem negro e gordo entra em uma loja para comprar determinado produto. Um funcionário afirma que a loja não atende pessoas como ele. Para identificar se a conduta do funcionário foi discriminatória é preciso identificar qual fato gerou a sua recusa. Se a recusa se deu pelo fato de o homem ser gordo, não se pode afirmar que o funcionário agiu de maneira discriminatória, no entanto, se o fato ocorreu em decorrência de o homem ser negro é possível afirmar que houve uma conduta discriminatória.[106]

Nesse sentido, no presente caso, restou configurada a discriminação direta, uma vez que a conduta fundamentou-se na ausência de determinado requisito de origem étnica, que de acordo com o processo de admissão seria necessário. Não há qualquer distinção lógica entre a criança

[104] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p.6-9.

[105] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p. 9.

[106] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p.9.

que teve sua matrícula aceita e o filho de E apenas porque este possui certa origem étnica.[107]

Para que ocorra a discriminação direta não é necessário que o autor do ato pretenda agir de maneira discriminatória ou tenha conhecimento de que está agindo desta forma.[108]

Ressalta-se que na presente não fora necessário considerar o processo mental do discriminador haja vista que o fator que determinou a discriminação do filho de E é claro: a não descendência de linha maternal de uma mulher reconhecida pelo *Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth.* Assim, a vontade subjetiva dos recorrentes é irrelavente para o caso.[109]

A decisão destaca ainda que é possível uma mulher não nascida judia se converta, como ocorreu no presente caso. No entanto, para a Suprema Corte a simples imposição de que a pessoa se converta ao judaísmo é uma responsabilidade onerosa não aplicável aqueles nascidos com o requisito étnico em questão. Tal fato apenas demonstra a natureza étnica do teste de admissão aplicado pelo recorrente o que é contrário ao determinado pelo *Act of 1976,*[110]que proibe em sentido estrito a discriminação decorrente da descêndencia da pessoa. [111]

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[107] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p. 24.

[108] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p. 20.

[109] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p. 9-10.

[110] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p.16-17.

[111] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and

O *Act of 1976* protege a pessoa como indivíduo não devendo ela ser tratada como apenas um membro de um grupo. Tratar um indivíduo de forma menos favorecida em decorrência de seus ancestrais ignorando suas características únicas desrespeitando, assim, sua autonomia e individualidade. No caso ora apresentado a decisão pontua ainda que a Convenção Européia de Direitos da Criança assegura que em casos como estes envolvendo crianças o melhor interesse do criança deve ser a primeira consideração a ser observada e protegida.[112]

Concluindo, demonstra-se importante destacar que a decisão novamente demonstrou a preocupação e necessidade de respeitar a legislação editada pelo Parlamento evitando realizar interpretações extensivas do diploma legal tendo em vista ainda a existência de legislação da Comunidade Européia protegendo o recorrido. Nesse sentido a Ministra *Lady Hale* destacou ao se posicionar que para que fosse aceito a exceção para que a *Jew's Free School* utilizasse a linha ancestral maternal como requisito para admissão de aluno seria necessária a modificação da legislação e tal ato apenas pode ser realizado pelo Parlamento.[113]

2.5 S-B (Children) [2009] UKSC 17

A ação foi proposta em decorrência da suspeita de uma criança com apenas quatro semanas de vida ter sofrido maus tratados de seus pais.[114] Como acontece no sistema processual brasileiro, os nomes das crianças modificados para preservar suas imagens.

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others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p. 29.

[112] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p. 35.

[113] SUPREMA CORTE DO REINO UNIDO. 16 de dezembro de 2009. R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appelants) UKSC 15. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf. Acesso em: 16.06.2010. Judgment, p. 24-25.

[114] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_Judgment.pdf Acesso em:14.06.2010. Judgment, p. 2.

Na instância inferior restou reconhecido que os sinais de maus tratados encontrados em Jason (nome fictício) foram causados tanto pela mãe quanto pelo pai em decorrência da ausência de razoável cuidado familiar como determinado pelo *Children Act 1989.* Apesar de não apontar diretamente, a decisão recorrida apontou que o pai fora o responsável pelos maiores ferimentos apresentados pela criança.[115]

A corte inferior determinou que Jason e seu irmão, nascido durante o tramite processual, fossem colocados para adoção. A mãe, que manteve contato com os filhos durante o processo, apelou. A Suprema Corte recebeu o recurso e determinou que o caso fosse novamente julgado, na instância anterior, por juiz diferente.[116]

A Suprema Corte fundamentou sua decisão, dentre outros pontos, no fato de que o juízo de primeiro grau se demonstrou parcial em relação ao valor das provas produzidas durante a audiência em que foram ouvidas as partes. Em razão da ausência de razoabilidade, determinou a realização de novo julgamento, ou seja, todo o processo foi declarado nulo pela Suprema Corte.[117]

A decisão ora apresentada aplicou dois precedentes, *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 e *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009], AC 11; que consolidaram a necessidade de observância equilíbrio na análise das possibilidades, talvez semelhante ao nosso princípio da proporcionalidade, ao tentar-se identificar o autor dos sinais de maus tratados presentes na criança. Assim, teria se equivocado a jurisdição de primeira instância ao utilizar-se de

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[115] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_PressSummary.pdf Acesso em:14.06.2010. Press Summary. p 1.

[116] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_PressSummary.pdf Acesso em:14.06.2010. Press Summary. p. 1.

[117] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_Judgment.pdf Acesso em:14.06.2010. Judgment. p.16.

padrões excessivos de diante de circunstâncias peculiares e frágeis como no presente caso.[118]

A Suprema Corte destacou ainda que não há necessidade de que o autor das lesões seja identificado pelo juiz no momento da apreciação da lide. Para a proteção da criança é suficiente apenas que o ferimento seja atribuido a qualquer pessoa responsável pela sua proteção. Quando não é possível identificar o autor dos danos sofridos, e de acordo com a decisão ora analisada a lide em discussão se enquadra em tal situação, o juiz deve apresentar um rol de possíveis autores das lesões.[119]

A decisão ora estudada aponta ainda que, no caso de ser possível identificar o causador dos ferimentos através da utilização da razoabilidade de possibilidades, as evidências utilizadas pelo juiz para fundamentar seu posicionamento são relevantes para determinar se a criança continua em situação de risco e, ressalta a Suprema Corte, qual a maneira de atender o melhor interesse da criança. Ressalta-se que a Corte aponta ainda que diante da natureza do caso o juiz deve aceitar e observar a possibilidade de, posteriormente, sendo possível apontar ao certo que foi o causador das lesões, a decisão anterior ser revista.[120]

A Suprema Corte abrangeu ainda em sua decisão a situação do irmão de Jason, nascido durante a tramitação do processo na corte de origem, determinando que a situação fosse apreciada novamente, uma vez que a criança em questão nunca sofreu qualquer maus tratos. A decisão destaca que o argumento de previsão de fatos futuros, como utilizado pelo

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[118] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_Judgment.pdf Acesso em: 14.06.2010. Judgment p. 3-5; 12.

[119] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_Judgment.pdf Acesso em:14.06.2010. Judgment. p. 12-15.

[120] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_Judgment.pdf Acesso em:14.06.2010. Judgment p. 15-16.

posicionamento recorrido, apenas pode ser utilizado quando seja possível identifica-lo nas provas produzidas.[121]

2.6 British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) [2010] UKSC 16; on appeal from [2009] EWCA Civ 281

O caso ora destacado apresenta discussão que exemplifica ponto já levantado anteriormente pela pesquisa da necessidade, em determinadas situaçoes, de que a Suprema Corte se abstenha e determine que a Corte Européia de Justiça se pronuncie. Vejamos.

Pilotos empregados da empresa British Airways plc propuseram ação contra a empresa argumentando que possuiam direito a receber dois tipos de adicionais devidos aos pilotos juntamente com o salário base como parte do pagamento das férias anuais remuneradas.[122]

De acordo com a legislação inglesa, aos pilotos é assegurado o direito a pelo menos quatro semanas de férias anuais remuneradas. Enquanto estiver de férias o empragado deverá receber apenas o seu salário base. Quando em exercício, ou seja, fora do período de férias, o piloto deve receber, conjuntamente com o salário base, dois adicionais, o *Flying Pay Supplement* e *Time away from Base Allowance*. Tais adicionais devem ser pagos em decorrência das horas em que o piloto permaneceu voando e longe de sua base. Os dois adicionais estão sujeitos a limites impostos pela própria determinação de tempo que os funcionários podem permanecer voando ou em serviço.[123]

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[121] SUPREMA CORTE DO REINO UNIDO. 14 dezembro de 2009. S-B (Children) UKSC 17. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0184_Judgment.pdf Acesso em:14.06.2010. Judgment. p. 16.

[122] SUPREMA CORTE DO REINO UNIDO. 24 de março de 2010. British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) UKSC 16; on appeal from [2009] EWCA Civ 281. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0042_PressSummary.pdf Acesso em: 22/06/2010. Press Summary. p 1.

[123]SUPREMA CORTE DO REINO UNIDO. 24 de março de 2010. British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) UKSC 16; on appeal from [2009] EWCA Civ 281. Disponível em: http://www.supremecourt.gov.uk/decided-

A determinação de que pilotos civis ingleses devam receber as férias anuais remuneradas foi implementada na Inglaterra através do *Civil Aviation (Working Time) Regulations 2004*, que confirmou o posicionamento já anteriormente adotado com a edição *Council Directive 2000/79/EC (the Aviation Directive)*.[124]

As instâncias inferiores reconheceram o direito pleiteado pelos pilotos. A *British Airways*, empresa empregadora, recorreu para a *Court of Appeal* que reformou as decisões anteriores reconhecendo que o pagamento das férias anuais remunerados dizem respeito apenas ao salário base. Interposto recurso para Suprema Corte esta determinou o envio da matéria para apreciação pela Corte Européia de Justiça, conforme já destacado anteriormente.[125]

Dentre os argumentos apresentados a Suprema Corte destaca que a Diretiva editada pela Inglaterra para regularmentar a matéria deriva diretamente do *The Aviation Regulation* que fora introduzido no direito interno por força do *European Communities Act 1972*.[126]

Importante pontuar que a decisão da Suprema Corte é clara ao expor que, como em casos julgados anteriormente, o ordenamento interno inglês deve observar e fazer cumprir as determinações impostas pelo diploma normativo editado no âmbito da comunidade européia. Nesse sentido, destaca que o próprio texto normativo europeu proíbe que Estados membros

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cases/docs/UKSC_2009_0042_PressSummary.pdf Acesso em: 22/06/2010. Press Summary. p. 1.

[124] SUPREMA CORTE DO REINO UNIDO. 24 de março de 2010. British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) UKSC 16; on appeal from [2009] EWCA Civ 281. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0042_PressSummary.pdf Acesso em: 22/06/2010. Press Summary. p. 1.

[125] SUPREMA CORTE DO REINO UNIDO. 24 de março de 2010. British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) UKSC 16; on appeal from [2009] EWCA Civ 281. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0042_PressSummary.pdf Acesso em: 22/06/2010. Press Summary. p. 1.

[126] SUPREMA CORTE DO REINO UNIDO. 24 de março de 2010. British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) UKSC 16; on appeal from [2009] EWCA Civ 281. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0042_PressSummary.pdf Acesso em: 22/06/2010. Judgment, p. 2.

modifiquem a norma para impor qualquer condição prévia para o exercicío do direito ou que exclua a existência de direito garantido ao empregado.[127]

Através do estudo do presente caso é possível perceber que o antigo posicionamento adotado pelo Estado inglês de que suas normas internas prevaleceriam sobre as normas externas, da Comunidade Européia, passou por uma modificação, haja vista, a declaração, pela própria Suprema Corte de que a situação apresentada deve ser analisada pela Corte Européia de Justiça por se tratar de questões principiológicas e referentes ao núcleo básico da norma, que como pontuado acima não pode ser modificado pelos Estados membros.

Concluindo, ao determinar que a solução da lide deveria ser dada pela Corte Européia de Justiça a Suprema Corte inglesa elencou quais questionamentos deveriam ser respondidos pela Comunidade Européia para que não apenas este caso como todos os demais semelhantes possam ser resolvidos de acordo com a legislação da Comunidade. Como fundamento para o envio do processo foram apresentados diversos casos em que o objeto era semelhante ao debatido na lide ora apresentada e que, no entanto, haviam sido decididos de maneira divergente.

2.7 Norris (Appellant) v Government of United States of America (Respondent)[2010] UKSC 9

O último caso que será apresentado trata de pedido de extradição formulado pelos Estados Unidos para que Norris fosse devolvido ao país para que possa ser julgado por obstrução da justiça.[128]

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[127]SUPREMA CORTE DO REINO UNIDO. 24 de março de 2010. British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) UKSC 16; on appeal from [2009] EWCA Civ 281. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_Judgment.pdf Acesso em: 22/06/2010. Judgment. p 9.

[128]SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_PressSummary.pdf Acesso em: 24/06/2010. Press Summary. p. 1.

A decisão aponta que anteriormente o recorrente, Norris, já havia sido acusado da prática de cartel (*price fixing*), no entanto, o pedido de extradição não fora deferido, pois, na época da ocorrência do delito este não era punível pela legislação inglesa. O processo foi enviado novamente para o juízo de primeira instância para que este avaliasse se o processo de extradição poderia ser deferido em decorrência das demais acusações que eram apontadas.[129]

Em seu recurso, Norris sustentou que a extradição resultaria em um dano desproporcional para ele e sua esposa seja na esfera física seja na esfera psicológica, haja vista, o estado de saúde de ambos e a idade avançada. O recurso aponta que a aprovação da extradição resultaria em uma violação aos direitos de privacidade e de vida familiar assegurado pelo artigo 8 da Convenção Européia sobre Direitos Humanos.[130]

O juiz de primeira instância decidiu que não existiam barreiras que impedissem a autorização da extradição do recorrente. A decisão foi mantida pela *High Court* que entendeu para que o Estado inglês não observasse o interesse público e cumprisse os acordos de extradição o Norris deveria ter demonstrado fatos notáveis e incomuns ou um nível mais alto de direitos que deveriam ser protegidos pelo artigo 8º da Convenção Européia de Direitos Humanos.[131]

Diante da manutenção da decisão que determinou sua extradição, Norris interpôs recurso para a Suprema Corte inglesa sustentando que as instâncias inferiores equivocadamente requereram que ele

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[129]SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_PressSummary.pdf Acesso em: 24/06/2010. Press Summary. p 1.

[130]SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_PressSummary.pdf Acesso em: 24/06/2010. Press Summary. p 1.

[131]SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_PressSummary.pdf Acesso em: 24/06/2010. Press Summary. p. 1.

demonstrasse circunstâncias excepcionais que comprovassem a desproporcionalidade no pedido de extradição.[132]

A Suprema Corte ao proferir sua decisão apontou que, em verdade, deveria ser observado não se a extradição interferiria no direito a privacidade e vida em família do recorrente, pois, isso é inegável, mas sim, se essa interferência é necessária para a democracia como forma de prevenir a desordem ou o crime.[133]

Nesse sentido a decisão aponta que não existe regra que determine que para averiguar a proporcionalidade da extradição o réu deva apontar circunstâncias excepcionais, no entanto, no presente caso o interesse público demonstrou-se extremamente forte perante os demais argumentos, uma vez que, como já destacado anteriormente, o processo de extradição é parte importante e necessária para prevenir a desordem.[134]

Em relação à interferência na vida familiar do recorrente, a decisão é clara ao apontar que a expressão circunstâncias excepcionais utilizada pelo juízo recorrido é fraca, não demonstra qual seria a real natureza do fato capaz de impedir a extradição. De acordo com a Suprema Corte a decisão recorrida teria sido mais precisa se tivesse fundamentado seu posicionamento no fato de que a interferência na vida da familiar do recorrido não restaram demonstradas como excepcionalmente graves em relação a extradição. [135]

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[132] SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_PressSummary.pdf Acesso em: 24/06/2010. Press Summary. p. 1.

[133]SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_PressSummary.pdf Acesso em: 24/06/2010. Press Summary. p. 1.

[134] SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_Judgment.pdf Acesso em: 24/06/2010. Judgment, p 24-25.

[135] SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em:

Importante destacar, demonstrando contraponto à legislação brasileira, o posicionamento incisivo adotado pela Suprema Corte inglesa de que não caberia a esta avaliar qual seria a maneira mais conveniente de julgar o extraditando. De acordo com a própria decisão *"Raramente seria relevante considerar se a pessoa resistindo a extradição deveria ser julgada pelo Estado requerente. O processo de extradição não deve se transformar em uma ocasião para debater qual seria a forma adequada para os procedimentos criminais."*[136]

Assim, a determinação da extradição de Norris ocorreu por este não ter conseguindo comprovar como seu direito a privacidade e a vida familiar seriam, através da utilização da proporcionalidade, mais importante do que o interesse público em prevenir a desordem e o crime no âmbito do Estado inglês. Como também ocorre no Brasil a preocupação com o princípio da reciprocidade no caso da extradição foi claramente observado pela Suprema Corte até com certa preocupação em este ser observado como o princípio de maior importância na situação.

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http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_Judgment.pdf Acesso em: 24/06/2010. Judgment, p 26.

[136] Tradução livre de *"It would rarely be relevant to consider whether the person resisting extradition could be prosecuted in the request state. The extradition process should not become an occasion for debate about the most convenient forum for criminal proceedings."* SUPREMA CORTE DO REINO UNIDO. 24 de fevereiro de 2010. Norris (Appellant) v Government of United States of America (Respondent) UKSC 9. Disponível em: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0052_Judgment.pdf Acesso em: 24/06/2010. Judgment, p 29.

CONCLUSÃO

Com a entrada da Inglaterra na Comunidade Européia algumas mudanças mostraram-se necessárias de serem realizadas para que o ordenamento constitucional inglês pudesse se adequar aos ordenamentos constitucionais dos demais Estados membros da Comunidade.

Entretanto as mudanças apresentadas principalmente pelo *Human Rights Act* de 1998 e pelo *Constitutional Reform Act* de 2005 não parecem em muito preocupar a doutrina inglesa, uma vez que, os juristas ingleses vislumbram as modificações constitucionais que estão vivenciando desde o ano de 1998 como um acontecimento natural, que de fato já estava ocorrendo mesmo sem a previsão expressa em atos normativos. Tais mudanças não são consideradas como violações ou afrontas aos princípios constitucionais basilares do Estado inglês.

Importante destacar que o *Constitutional Reform Act* apesar de aparentemente introduzir no ordenamento inglês instituto desconhecido e incompatível com a Constituição inglesa não se preocupou em prever detalhadamente como deve ser instituída a Suprema Corte inglesa, se preocupando apenas em detalhar como deve ser o processo de transferência das competências do *Lord Chancellor* para a Suprema Corte e de deixar expresso em seu texto que o Estado inglês irá proteger o princípio da independência do Poder Judiciário.

Tal previsão parece mais uma resposta às constantes declarações da Comunidade Européia demonstrando desacordo com a

organização do Poder Judiciário inglês vinculado ao Poder Legislativo do que de fato uma preocupação com a consagração e proteção do princípio, uma vez que, apesar de os *Law Lords* anteriormente ocuparem cadeiras na Câmara dos Lordes, estes se preocuparam em separar inquestionavelmente sua função legislativa de sua função jurisdicional.

Assim, as disposições do *Constitutional Reform Act* consagram um posicionamento e uma cultura jurisdicional existente desde o início da história Constitucional consagrada com a edição do *Bill of Rights* em 1689 que quando da sua edição buscava a proteção do Parlamento contra atos arbitrários do Rei e que adequando-se a realidade constitucional ora vivenciada protegia a independência e autonomia do Poder Judiciário em seu poder de decisão mesmo sendo as Cortes superiores parte integrante do Poder Legislativo.

Em face da realidade constitucional inglesa é possível afirmar que sem a intervenção da comunidade européia o Estado Constitucional inglês não caminharia para a criação de uma Suprema Corte nos moldes conhecidos pelos países de *civil law.* Tal fato mostra-se viável, uma vez que, a proteção ao texto constitucional sempre fora realizado por todos os entes integrantes do Estado inglês, tendo em vista que, uns dos princípios basilares do Estado Constitucional inglês é a supremacia da *common law.*

No entanto não se pode negar que a nova Suprema Corte acrescenta ao ordenamento constitucional inglês maior transparência, legitimidade e confiança da sociedade, uma vez que, apesar de para o sistema

brasileiro tal fato demonstrar-se corriqueiro, a implementação de uma Suprema Corte em instalações próprias com funcionários próprios, ainda que administrativamente vinculados a órgão do Parlamento, traz nova dinâmica ao Estado Constitucional inglês.

Os poucos trabalhos existente a respeito da Suprema Corte inglesa afirmam como uma premissa incontestável a sua natureza de Corte Constitucional, tanto que os trabalhos e relatórios realizados pelos próprios órgãos estatais prevêem sua similaridade entre a Suprema Corte inglesa e a Suprema Corte americana.

Ademais é explicável o sentimento de normalidade pela qual o ordenamento jurídico inglês está recepcionando o novo órgão constitucional, tendo em vista que, o *Constitutional Reform Act* em verdade não apresentou grandes novidades ao ordenamento constitucional inglês, tendo as reais e significativas mudanças ocorrido com a edição do *Human Rights Act* que de maneira ainda que impositiva consagrou um processo de mudança constitucional que a sociedade inglesa aos poucos estava vivenciando.

A situação acima descrita pode ser claramente visualizada através das decisões proferidas pela Suprema Corte. Como demonstrado pela análise das decisões escolhidas no presente trabalho, os Ministros da Suprema Corte continuam decidindo seus casos, quando possível, de acordo com precedentes anteriormente apreciados. Não houve no ordenamento constitucional inglês uma quebra de paradigma com a implementação da Suprema Corte. Apesar de agora, em tese, existir um novo ente na

organização do Estado inglês este não gerou modificações, pelo menos por ora, na sociedade inglesa.

Impende destacar também a clara preocupação da Suprema Corte inglesa em observar não apenas as normas constitucionais internas como também os atos normativos editados pela Comunidade Européia consolidando o posicionamento já apontado pela doutrina que diante de situação regulada pela União Européia de maneira contrária ao ordenamento interno inglês caberia apenas ao Parlamento modificar a legislação interna devendo a Corte decidir em conformidade com o posicionamento da Comunidade Européia.

Assim mostra-se possível vislumbrar, a partir da evolução da história constitucional inglesa, a possibilidade de construção de um sistema de controle de constitucionalidade dos atos do Parlamento, sem, entretanto, como demonstrado no presente trabalho extinguir o princípio da Supremacia do Parlamento, tendo em vista que mesmo antes da previsão legal o ordenamento constitucional inglês já possuía seus meios de controle e proteção ao Texto Constitucional, ainda que não escrito.

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ANEXOS

Anexo I – Secretary of State for Environment, Food and Rural Affairs (Respondent) v Méier and a another (FC) (Appellant) and others (FC) (Appellant) and another [2009] UKSC 11

Anexo II – R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 on appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24

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

Anexo IV – S-B (Children) [2009] UKSC 17

Anexo V – British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) [2010] UKSC 16; on appeal from [2009] EWCA Civ 281

Anexo VI – Norris (Appellant) v Government of United States of America (Respondent) [2010] UKSC 9.

1 December 2009

PRESS SUMMARY

Secretary of State for Environment, Food and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another [2009] UKSC 11
On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 903

JUSTICES: Lord Rodger, Lord Walker, Lady Hale, Lord Neuberger and Lord Collins

BACKGROUND TO THE APPEAL

A number of travellers established an unauthorised camp in Hethfelton, one of the woods managed by the Forestry Commission and owned by the Secretary of State for Environment, Food and Rural Affairs.

The Secretary of State sought an order for possession in respect of Hethfelton and other specified woods (also managed by the Commission and owned by the Secretary of State) which had not yet been occupied by the defendants to the claim. The Secretary of State also sought an injunction against the same defendants restraining them from re-entering Hethfelton and from entering the other woods.

The Recorder before whom the claim came decided to grant an order for possession against the defendants in respect of Hethfelton, but not in respect of the other woods. The Recorder also refused to grant the injunction sought. The Court of Appeal allowed the Secretary of State's appeal against the Recorder's refusal to grant the order for possession in relation to the other woods and against his refusal to grant the injunction. The defendants appealed.

JUDGMENT

The Supreme Court unanimously allowed the defendants' appeal to the extent of setting aside the wider possession order made by the Court of Appeal.

REASONS FOR THE JUDGMENT

- Two main questions were before the Supreme Court:

(1) Whether a court could grant an order for possession in respect of distinct land not yet occupied or possessed by a defendant.
(2) Whether a court should grant an injunction restraining a defendant from trespassing on other land not currently occupied by him.

- On the first main question, the Supreme Court unanimously agreed that a court could not make such an order. Lord Rodger considered that such an order would be inconsistent with the fundamental nature of an action for recovering land because there was nothing to recover **(Para 12)**. Lord Neuberger, who agreed with Lord Rodger on this question, thought that it did

not make sense to talk about a defendant being required to deliver up possession of land where the defendant did not occupy such land in any conceivable way, and the claimant enjoyed uninterrupted possession of it **(Paras 64, 74 and 78)**. Lords Rodger, Walker, Neuberger and Collins all thought that the Court of Appeal in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 W.L.R. 1906 had illegitimately extended the circumstances in which an order for possession could be made **(Paras 5, 20, 72 and 96)**. Lady Hale's main objection to extending an order for possession in respect of distinct land which had not actually been intruded upon was one of natural justice. According to Lady Hale, the main problem with the current form of the usual order was that it was not specifically tailored against known individuals who had already intruded upon the claimant's land, were threatening to do so again, and had been given a proper opportunity to contest the order **(Paras 38 and 40)**.

- On the second main question, Lord Rodger, Lady Hale and Lord Neuberger agreed that the majority in the Court of Appeal were right to grant an injunction in this case. Lord Neuberger, with whom Lord Rodger agreed on this question, noted that neither the Recorder nor the Court of Appeal had concluded that an injunction should be refused on the ground that it would not be enforced by imprisonment (because the defendants were vulnerable or had young children) or because it would have no real value (since travellers usually have few assets). The Court of Appeal had not erred in granting the injunction **(Para 84)**. Lord Neuberger was also of the view that the failure by the Commission to comply with the "Guidance on Managing Unauthorised Camping" issued by the Office of the Deputy Prime Minister should not preclude the granting of an injunction to restrain travellers from trespassing on other land **(Paras 87 and 91)**. Lady Hale thought that the more natural remedy to deal with separate land which had not yet been intruded upon was an injunction against that intrusion, and one should not be unduly hesitant in granting that **(Para 39)**.

Further comments

- Observations were made to the effect that there may be a need for reform of the remedies available in this area **(Paras 18, 40 and 94)**.

Michaelmas Term
[2009] UKSC 11
On appeal from: [2008] EWCA Civ 903

JUDGMENT

Secretary of State for Environment, Food, and Rural Affairs (Respondent) *v* Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another

before

Lord Rodger
Lord Walker
Lady Hale
Lord Neuberger
Lord Collins

JUDGMENT GIVEN ON

1 December 2009

Heard on 10 and 11 June 2009

Appellant	*Respondent*
Richard Drabble QC	John Hobson QC
Marc Willers	John Clargo
(Instructed by Community Law Partnership)	(Instructed by Whitehead Vizard)

LORD RODGER

1. If a group of people come on to my land without my permission, I shall want the law to provide a speedy way of dealing with the situation. If they leave but come back repeatedly, depending on the evidence, I shall be able to obtain an interlocutory and final injunction against them returning. But they may come on to my land and set up camp there. Again, depending on the evidence, I shall be able to obtain an injunction (interlocutory and final) against them remaining and also against them coming back again once they leave as required by the injunction. Similarly, if the evidence shows that, once they leave, they are likely to move and set up camp on other land which I own, the court can grant an injunction (interlocutory and final) against them doing that. If authority is needed for all this, it can be found in the judgment of Lord Diplock in the Court of Appeal in *Manchester Corporation v Connolly* [1970] Ch 420.

2. Of course, it is quite likely that I won't know the identities of at least some of the trespassers. If so, Wilson J regarded an injunction as "useless" since "it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application": *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906, 1912, para 19. That may well have been an unduly pessimistic assessment. Certainly, claimants have used injunctions against unnamed defendants. And Sir Andrew Morritt V-C was satisfied that the procedural problems could be overcome. Admittedly, the circumstances in the first of his cases, *Bloomsbury Publishing Group Ltd and J K Rowling v News Group Newspapers Ltd and a Person or Persons Unknown* [2003] EWHC 1205 (Ch), were very different from a situation involving trespassers. But trespassing protesters were the target of the interlocutory injunction which he granted in *Hampshire Waste Services Ltd v Persons Intending to Trespass and/or Trespassing upon Incinerator Sites* [2003] EWHC 1738 (Ch). Similarly, in *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280 the Court of Appeal (Brooke and Clarke LJJ) granted an injunction against persons unknown "causing or permitting hardcore to be deposited, caravans, mobile homes or other forms of residential accommodation to be stationed, or existing caravans or other mobile homes to be occupied on land" adjacent to a gypsy encampment in rural Cambridgeshire. Brooke LJ commented, at para 8: "There was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule." See the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605-624.

3. The present case concerns travellers who set up camp on the Forestry Commission's land at Hethfelton. Lord Neuberger has explained the circumstances. The identities of some, but not all, of those involved were known to the Commission. So the defendants included "persons unknown". Despite this, the Commission sought an injunction against all the defendants, including those described as "All persons currently living on or occupying the claimant's land at Hethfelton." The recorder declined to grant

an injunction on the view that it would be disproportionate. But the Court of Appeal, by a majority, reversed the recorder on this point and granted an order that

> "The respondents, and each of them, be restrained from entering upon, trespassing upon, living on, or occupying the parcels of land set out in the Schedule hereto, and, for the avoidance of doubt, the 4th respondent shall mean 'those people trespassing on, living on, or occupying the land known as Hethfelton Wood on any date between 13th February 2007 and 3rd August 2007 save for those specifically identified as 1st, 2nd, 3rd, 5th and 6th respondents.'"

In my view, for the reasons given by Lord Neuberger, the majority were right to grant the injunction. In any event, Mr Drabble QC, who appeared for the travellers, did not suggest that this injunction had been incompetent or defective for lack of service or in some other respect. Even Wilson LJ, who dissented on the injunction point in the Court of Appeal, did not go so far as to suggest that it was inherently useless: he simply took the view that it added nothing of value to the order for possession and, therefore, the recorder would have been entitled to exercise his discretion to refuse it on that basis: [2008] EWCA Civ 903, para 76.

4. This brings me to the order for possession which lies at the heart of the appeal. If people not only come on to my land but oust me from it, I can bring an action for recovery of the land. That is what the Commission did in the present case: they raised an action in Poole county court for recovery of "land at Hethfelton nr Wool and all that land described on the attached schedule all in the County of Dorset." In effect, the Commission were asking for two things: to be put back into possession of the land on which the defendants were camped at Hethfelton, and to be put into possession of the other specified areas of land which they owned, but on which, they anticipated, the defendants might well set up camp once they left Hethfelton.

5. The Court of Appeal granted an order for possession in respect both of the land at Hethfelton and of the other parcels of land situated some distance away. As regards the competency of granting an extended order of this kind, the court was bound by the decision in *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906. The central issue in the present appeal is whether that case was rightly decided. In my view it was not.

6. Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's

permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport v Dutton* [2000] QB 133, the claimant no longer needs to have an estate in the land. See Megarry & Wade, *The Law of Real Property* (7th edition, 2008), para 4-026. To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: "that the claimant do forthwith recover" the land - or, more fully, "that the said AB do recover against the said CD possession" of the land. See Cole, *The Law and Practice in Ejectment* (1857), p 786, Form 262. The fuller version has the advantage of showing that the court's order is not in rem; it is in personam, directed against, and binding only, the defendant. Of course, if the defendant refuses to leave and the court grants a writ of possession requiring the bailiff to put the claimant into possession, in principle, the bailiff will remove all those who are on the relevant land, irrespective of whether or not they were parties to the action: *R v Wandsworth County Court ex parte Wandsworth LBC* [1975] 1 WLR 1314. So, in that way, non-parties are affected. But, if anyone on the land has a better right than the claimant to possession, he can apply to the court for leave to defend. If he proves his case, then he will be put into possession in preference to the claimant. But the original order for possession will continue to bind the original defendant. See Stamp J's lucid account of the law in *In re Wykeham Terrace* [1971] Ch 204, 209D-210B.

7. *In re Wykeham Terrace* and *Manchester Corporation v Connolly* [1970] Ch 420 showed the need for some reform of the procedures used in actions for recovery of land. The twin problems of unidentifiable defendants and the lack of any facility for granting an interim order for possession were tackled by a new Order 113, the provisions of which, with some alteration of the details, have been incorporated into the current Rule 55 of the CPR. In the present case no issue arises about the wording of Rule 55. But I would certainly not interpret "occupied" in Rule 55.1(b) as preventing the use of the special procedure in a case like *University of Essex v Djemal* [1980] 1 WLR 1301 where some protesters were excluding the university from one part of its campus, but many students and members of staff were legitimately occupying other parts.

8. The intention behind the relevant provisions of Rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified. These important, but limited, changes in the rules cannot have been intended, however, to go further and alter the essential nature of the action itself: it remains an action for recovery of possession of land from people who are in wrongful possession of it. I should add that in the present case the defendants do not dispute that they are – or, at least, were at the relevant time - in possession, rather than mere occupation, of the Commission's land at Hethfelton. Wonnacott, *Possession of Land* (2006), p 27, points out that defendants rarely dispute this. But here, in any event, the defendants' possession is borne out by their offer to co-operate to allow the Commission's ordinary activities on the land not to be disrupted. This is inconsistent with the Commission being in possession. So the preconditions for an action for recovery of land are satisfied.

9. By contrast, the Forestry Commission were at all relevant times in undisturbed possession of the parcels of land listed in the schedule to the Court of Appeal's order. That being so, an action for the recovery of possession of those parcels of land is quite inappropriate. The only authority cited by the Court of Appeal in *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906 for granting such an order was the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1990) 59 P & CR 48. But in that case the defendant trespassers were not represented and so the point was not fully argued.

10. Saville J referred to the decision of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, which I have just mentioned. That decision is clearly distinguishable, however. The defendant students, who had previously taken over, and been removed from, certain administrative offices of the University of Essex, had been occupying another part of the university buildings known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the university - in effect, the whole campus. This was justified because the university's right to possession of its campus was indivisible: "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises": [1980] 1 WLR 1301, 1305C-D, per Shaw LJ. In the *Heyman* case, by contrast, the Ministry's right to possession of its land at Grovely Woods was not violated in any way by the trespassers' adverse possession of its other land two or three miles away at Hare Wood. In my view, *Heyman* was wrongly decided and did not form a legitimate basis for the Court of Appeal's decision in *Drury*.

11. Mummery LJ described Wilson J's approach in *Drury* as "pragmatic": [2004] 1 WLR 1906, 1916, para 35. And, of course, the common law does evolve by making pragmatic incremental developments. But, if they are to work, they must be consistent with basic principle and they must make sense.

12. I would not put undue emphasis on the supposed practical difficulties in providing for adequate service by attaching notices to stakes etc on these remoter areas of land. Doubtless, adequate arrangements could be worked out, if extended orders were otherwise desirable. The real objection is that the Court of Appeal's extended order that "the [Commission] do recover the parcels of land set out in the Schedule hereto" is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land. And the law is harmed rather than improved if a court grants orders which lay defendants, knowing the facts, would rightly find incomprehensible. How, the defendants could well ask, can the Commission "recover" parcels of land which they already possess? How, too, are the defendants supposed to comply with the order? Only a lawyer could understand and explain that the order "really" means that they are not to enter and take over possession of the other parcels of Commission land. This is, of course, what the injunction already says in somewhat old-fashioned, but tolerably clear, language.

13. Doubtless, the wording could in theory be altered, but this would really be to change the nature of the action and turn the order into an injunction, so creating parallel injunctions, one leading to the possible intervention of the bailiff and the other not.

14. The claimed justification for granting an extended order for possession of this kind is indeed that it is the only effective remedy against travellers, such as the present defendants, since it can ultimately lead to them being removed by a bailiff under a warrant for possession. Moreover, unless the Commission can obtain an extended order, they will be forced to come back to court for a new order each time the defendants move to another of their properties. An injunction is said to be a much weaker remedy in a case like the present since, if the defendants fail to comply with it, all that can be done is to seek an order for their sequestration or committal to prison. Sequestration is an empty threat, the argument continues, against people who have few assets, while committal to prison might well be inappropriate in the case of defendants who are women with young children.

15. Plainly, the idea of the Commission having to return to court time and again to obtain a fresh order for possession in respect of a series of new sites is unattractive. But the scenario presupposes that the defendants would, with impunity, disobey the injunction restraining them from entering the other parcels of land. So this point is linked to the contention that the injunction would not work.

16. I note in passing that there is actually no evidence that these defendants would fail to comply with the injunction in respect of the other parcels of land. So there is no particular reason to suppose that the Court of Appeal's injunction will prove an ineffective remedy in this case. On the more general point about the alleged ineffectiveness of injunctions in cases of this kind, *South Buckinghamshire DC v Porter* [2003] 2 AC 558 is of some interest. There the council wanted to obtain an injunction against gypsies living in caravans in breach of planning controls because an injunction was thought to be a potentially more effective weapon than the various enforcement procedures under the planning legislation. This is in line with the thinking behind the application for an injunction in *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280 which I mentioned in para 2.

17. Admittedly, if the present defendants did fail to comply with the injunction, sequestration would not be a real option since they are unlikely to have any substantial assets. And, of course, there are potential difficulties in a court trying to ensure compliance with an injunction by committing to prison defendants who are women with young children. Nevertheless, as Lord Bingham of Cornhill observed in *South Buckinghamshire DC v Porter* [2003] 2 AC 558, 580, para 32, in connexion with a possible injunction against gypsies living in caravans in breach of planning controls:

> "When granting an injunction the court does not contemplate that it will be disobeyed….Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent."

Taking that approach, we should, in my view, be slow to assume that an injunction is a worthless remedy in a case like the present and that only the intervention of a bailiff is likely to be effective. If that is indeed the considered consensus of those with experience in the field, then consideration may have to be given to changing the procedures for enforcing injunctions of this kind.

18. But any such reform would raise far-reaching issues which are not for this court. In particular, travellers are by no means the only people without means whose unlawful activities the courts seek to restrain by injunction and where the assistance of a bailiff might be attractive to claimants. Especially when Parliament has intervened from time to time to regulate the way that the courts should treat travellers, the need for caution in creating new remedies is obvious. At the very least, the matter is one for the Master of the Rolls and the Rules Council who have the leisure and facilities to consider the issues.

19. For these reasons I would allow the defendants' appeal to the extent proposed by Lord Neuberger.

LORD WALKER

20. I agree with all the other members of the Court that this appeal should be allowed to the extent of setting aside the wider possession order. In *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906 the Court of Appeal went too far in trying to achieve a practical solution. The decision cannot be seen as simply an extension of *University of Essex v Djemal* [1980] 1 WLR 1301, in which the facts were very different. I respectfully agree with the observations on injunctive relief made by Lord Rodger at the end of his judgment.

LADY HALE

21. Two questions are before us. First, can the court grant a possession order in respect of land, no part of which is yet occupied by the defendant, because of the fear that she will do so if ejected from land which she currently does occupy? Second, should the court grant an injunction against that feared trespass? The Court of Appeal unanimously answered the first question in the affirmative, following the reasoning of that Court in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906, CA, and the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. The majority also answered the second question in the affirmative; Wilson LJ dissented but only because he thought the wider possession order a sufficient remedy in the circumstances.

22. The approach in *Drury* and *Heyman* was rightly described by Mummery LJ in *Drury* as "pragmatic" (para 35), depending as it did upon the comparative efficacy of possession orders and injunctions. A possession order gives the claimant the right to call upon the bailiffs or the sheriff physically to remove the trespassers from his land, which is what he wants. An injunction can only be enforced by imposing penalties upon those who disobey. Mummery LJ considered it a "legitimate, incremental development" of the ruling of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, that a possession order can cover a greater area of the claimant's land than that actually occupied by the trespassers.

23. The situation in *Djemal* was very like the situation in this and no doubt many other cases. The University of Essex consists (mainly) of some less than beautiful buildings erected in the 1960s upon a beautiful campus at Wivenhoe Park near Colchester. The students had occupied a small part of the University buildings. The University wanted an order covering the whole of the University premises. The judge had given them an order covering only the part actually occupied by the students. The Court of Appeal made the wider order sought by the University, holding that there was jurisdiction to cover "the whole of the owner's property in respect of which *his right of occupation has been interfered with*" (per Buckley LJ at p 1304E, emphasis supplied). Shaw LJ reasoned that the right of the University to possession of the site and buildings was "indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the *right of possession* of the whole of the premises" (p 1305D, emphasis supplied). These were extempore judgments in a case where the students had already decided to call off their direct action, but it will noted that Buckley LJ spoke of interference with a right of occupation, while Shaw LJ spoke of violation of a right of possession.

24. The defendants in this case are occupying only part of Hethfelton Wood. We can, I think, assume that the Forestry Commission are occupying the rest. They are carrying on their forestry work as best they can – indeed, one of their problems is that they are

impeded from doing it because of the risk of harm to the vehicles and their occupants. Yet Mr Drabble, for the defendant appellants, has never resisted an order covering the whole of Hethfelton Wood, nor does he invite us to disagree with *Djemal*. Being a sensible man, he recognises that we would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden.

25. The questions raised by this case and *Djemal* should be seen as questions of principle rather than pragmatism or procedure. Still less should they be answered by reference to the forms of action which were supposedly abolished in 1876. The underlying principle is *ubi ius, ibi remedium*: where there is a right, there should be a remedy to fit the right. The fact that "this has never been done before" is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?

26. If we were approaching this case afresh, without the benefit and burden of history, we might think that the right to be protected is the right to the physical occupation of tangible land. A remedy should be available against anyone who does not have that right and is interfering with it by occupying the land. That remedy should provide for the physical removal of the interlopers if need be. The scope of the remedy actually granted in any individual case should depend upon the scope of the right, the extent of the actual and threatened interference with it, and the adequacy of the procedural safeguards available to those at risk of physical removal.

27. In considering the nature and scope of any judicial remedy, the parallel existence of a right of self help against trespassers must not be forgotten, because the rights protected by self help should mirror the rights that can be protected by judicial order, even if the scope of self help has been curtailed by statute. No civil wrong is done by turning out a trespasser using no more force than is reasonably necessary: see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720. In *Cole on Ejectment* (London, Sweet, 1857), a comprehensive textbook written after the Common Law Procedure Act 1852, there is considerable discussion (in ch VII) of the comparative merits of self help and ejectment. Any person with a right to enter and take possession of the land might choose simply to do that rather than to sue in ejectment. But this was not advised where the right of entry was not clear and beyond doubt, or where resistance was to be expected. The effect of the criminal statutes against forcible entry was "by no means clear": whether no force at all, or only reasonable force, might be used against the trespasser. Cole was not as sanguine as was Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 456. Lord Denning took the view that the statutes against forcible entry did not apply to the use of reasonable force against trespassers. Those statutes have now been replaced by section 6 of the Criminal Law Act 1977. This prohibits the use or threat of violence against person or property for the purpose of securing entry to any premises without

lawful excuse. But it also provides that a right to possession or occupation of the premises is no excuse, although there is now an exception for a "displaced residential occupier" or "protected intending occupier". This does not include the Forestry Commission, although it is not impossible that they would be able to evict the travellers without offending against the criminal law. But in any event, the use of self help, even if it can be lawfully achieved, is not encouraged because of the risk of disorder that it may entail.

28. Lord Denning considered that the statutes of forcible entry did not apply because the trespassing squatters in *McPhail* were not in possession of the land at all. He quoted Pollock on Torts (15th ed 1951, p 292):

> "A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."

A trespasser who merely interferes with the right to possession or occupation of the property may also be ejected with the use of reasonable force: one does not need to go to court, or even call the police, to eject a burglar or a poacher from one's property.

29. Although Cole contemplated that self help might be used against a tenant who had wrongfully continued in occupation after the end of his tenancy, tenants are clearly now in a different position from squatters. Lord Denning thought that the statutes of forcible entry did apply to protect them (although Cole says that the authorities on which he relied had later been overruled). Most, but not all, residential tenants are now protected by statute against eviction otherwise than by court order. This is a complicated area which need not concern us now as we are dealing with people who have never been granted any right to be where they are.

30. However, Lord Denning's basic point is important here. "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary" (*McPhail*, p 457C). It seems clear that the right of self help has never been limited to those who have actually been dispossessed of their land: in fact on one view it is limited to those who have not been so dispossessed. There is no reason in principle why the remedy of physical removal from the land should only be available to those who have been completely dispossessed. It should not depend upon the niceties of whether the person wrongfully present on the land was or was not in "possession" in whatever legal sense the word is being used. Were the students in *Djemal* in possession of the University's premises at all? Lord Denning, supported by Sir Frederick Pollock, would not think so: see *McPhail* at 456F. Were these new travellers in possession of

Hethfelton Wood at all? Again, Lord Denning would not think so. They had parked their vehicles there, but the work of the Forestry Commission was going on around them as best it could.

31. If we accept that the remedy should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like *Djemal* becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it.

32. As is obvious from the above, a great deal of confusion is caused by the different meanings of the word "possession" and its overlap with occupation. As Mark Wonnacott points out in his interesting monograph, *Possession of Land* (Cambridge University Press, 2006), the term "possession" is used in three quite distinct senses in English land law: "first, in its proper, technical sense, as a description of the relationship between a person and an estate in land; secondly, in its vulgar sense of physical occupation of tangible land" (the third sense need not concern us here). Possession, in its first sense, he divides into a relationship of right, the right to the legal estate in question, and a relationship of fact, the actual enjoyment of the legal estate in question; a person might have the one without the other. Possession of a legal estate in fact may often overlap with actual occupation of tangible land, but they are conceptually distinct: a person may be in possession of the head-lease if he collects rents from the sub-tenants, but he will not be in physical occupation of tangible land.

33. The modern action for the possession of land is the successor to the common law action of ejectment (and some statutory remedies developed for use in the county and magistrates' courts in the 19th century). The ejectment in question was not the ejectment sought by the action but the wrongful ejectment of the right holder. Its origins lay in the writ of trespass, an action for compensatory damages rather than recovery of the estate. But the common law action to recover the estate was only available to freeholders and not to term-holders (tenants). So the judges decided that this form of trespass could be used by tenants to recover their terms. Trespass was a more efficient form of action than the medieval real actions, such as novel disseisin, so this put tenants in a better position than freeholders. As is well known, the device of involving real people as notional lessees and ejectors was used to enable freeholders to sue the real ejectors. These were then replaced by the fictional characters John Doe and Richard Roe. Eventually the medieval remedies were (mostly) abolished by the Real Property Limitation Act of 1833; the fictional characters of John Doe and Richard Roe by the Common Law Procedure Act 1852; and the forms of action themselves by the Judicature Acts 1873-75 (see AWB Simpson, *A History of the Land Law,* Oxford, Clarendon Press, 2nd edition 1986, ch VII).

34. The question for us is whether the remedy of a possession action should be limited to deciding disputes about "possession" in the technical sense described by Wonnacott. The discussion in Cole on *Ejectment* concentrates on disputes between two persons, both claiming the right to possession of the land, one in occupation and the other not. Often these are between landlords and tenants who have remained in possession when the landlord thinks that their time is up. But it is clear that in reality what was being protected by the action was the right to physical occupation of the land, not the right to possession of a legal estate in land. The head lessee who was merely collecting the rents would not be able to bring an action which would result in his gaining physical occupation of the land unless he was entitled to it.

35. It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another. The action for possession of land has evolved out of ejectment which itself evolved out of the action for trespass. There is nothing in CPR Part 55 which is inconsistent with this view, far from it. The distinction is drawn between a "possession claim" which is a claim for the recovery of *possession of land* (r 55.1.(a)) and a "possession claim against trespassers" which is a claim for the *recovery of land* which the claimant alleges is "occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land . . . " The object is to distinguish between the procedures to be used where a tenant remains in occupation after the end of his tenancy and the procedures to be used where there are squatters or others who have never been given permission to enter or remain on the land. That, to my mind, is the reason for inserting "only": not to exclude the possibility that the person taking action to enforce his right to occupy is also in occupation of it. There is then provision for taking action against "persons unknown". But the remedy in each case is the same: an order for physical removal from the land.

36. It was held in *R v Wandsworth County Court, ex parte Wandsworth London Borough Council* [1975] 1 WLR 1314, that a bailiff executing a possession warrant is entitled to evict anyone found on the premises whether they were party to the judgment or not. However, there is nothing to prevent the order distinguishing between those who are and those who are not lawfully there, provided that some means is specified of identifying them. No-one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happened to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing rather than the other way around.

37. This does not, however, solve the principal question before us. What is the extent of the premises to which the order may relate? As Mummery LJ suggested in *Drury*, at para 31, the origin was in an action to recover a term of years. The land covered by the term would be defined in the grant. It would not extend to all the land anywhere in the lawful possession of the claimant. Equally, however, as discussed earlier, the remedy can be granted in respect of land to which the claimant is entitled even though the trespasser

is not technically in possession of it. This suggests that the scope may be wider than the actual physical space occupied by the trespasser, who may well move about from time to time. In any event, the usual rule is that possession of part is possession of the whole, thus begging the question of how far the "whole" may extend. It was suggested during argument that it might extend to all the land in the same title at the Land Registry. This could be seen as the modern equivalent of the "estate" from which the claimant had been unlawfully ousted. But this is artificial when a single parcel of land may well be a combination of several different registered titles.

38. The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with "persons unknown". They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of "persons unknown" from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.

39. Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word "recover", I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.

40. However, I would not see these procedural obstacles as necessarily precluding the "incremental development" which was sanctioned in *Drury*. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be helpful if the Rules provided for it, so that the procedures could be properly thought through and the forms of order properly tailored to the facts of the case. The main problem at the moment is the "scatter-gun" form of the usual order (though it is not one prescribed by the Rules).

41. It is for that reason, and that reason alone, that I would allow this appeal to the extent of setting aside the wider possession order made in the Court of Appeal.

LORD NEUBERGER

42. There is an acute shortage of sites in this country to satisfy the needs of travellers, people who prefer a nomadic way of life. Thus, in the county in which the travellers in this case pitched their camp, Dorset, it has been estimated that over 400 additional pitches are required. The inevitable consequence is that travellers establish their camps on land which they are not entitled to occupy, normally as trespassers, and almost always in breach of planning control. Proceedings seeking to prevent their occupation have led to human rights issues being raised before domestic courts (for instance, in the House of Lords, *Doherty v Birmingham City Council* [2008] UKHL 57), and before the European Court of Human Rights (for instance, *Connors v United Kingdom* (2005) 40 EHRR 9). The present appeal, however, raises issues of purely domestic law, namely the permissible physical ambit of any possession order made against trespassing travellers, and the appropriateness of granting an injunction against them.

The facts and procedural history

43. Travellers often set up their camps in wooded areas. Many woods and forests in this country are managed by the Forestry Commission ("the Commission") and owned by the *Secretary of State for the Environment, Food and Rural Affairs*. The functions of the Commission are "promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products …" – section 1 of the Forestry Act 1967. The Commission runs its woods and forests commercially, although it affords members of the public relatively free and unrestricted access to such areas.

44. All undeveloped land in the United Kingdom is susceptible to unauthorised occupation by travellers, and much of such land is vested in public bodies. But land managed by the Commission is particularly vulnerable to incursion by travellers. As the Recorder who heard this case at first instance said, "[g]iven the public access that it affords to its land and its needs for access for forestry vehicles, it is not protected and barricaded in the same way as much of the other land in private and local authority ownership in Dorset is now protected".

45. In 2004, the Office of the Deputy Prime Minister issued "Guidance on Managing Unauthorised Camping" ("the 2004 Guidance"). This suggests that local authorities and other public bodies distinguish between unauthorised encampment locations which are "unacceptable" (for instance, because they involve traffic hazard or public health risks) and those which are "acceptable". It further recommends that the "management of unauthorised camping must be integrated", and states that "each encampment location must be considered on its merits". The 2004 Guidance also indicates that specified welfare enquiries should be undertaken in relation to the travellers and their families in any unauthorised encampment before any decision is made as to whether to bring proceedings to evict them. The Secretary of State has accepted throughout these proceedings that the Commission should comply with the terms of the 2004 Guidelines before possession proceedings are brought against any travellers on land it manages, and that failure to do so may invalidate such proceedings.

46. One of the woods managed by the Commission is Hethfelton Wood ("Hethfelton"), near Wool, where, at the end of January 2007, a number of new travellers established an unauthorised camp. After the Commission had carried out the enquiries recommended by the 2004 Guidance, the Secretary of State issued the current proceedings, a possession claim against trespassers within CPR 55.1(b), and an application for an injunction, in the Poole County Court, on 13 February 2007. The original defendants were Natalie Meier, Robert and Georgie Laidlaw, Sharon Horie and "Persons Names Unknown". Ms Meier travels and lives in a vehicle with her two children, having done so since 2002. Mr Laidlaw sadly died before the hearing, and, unsurprisingly in the circumstances, Mrs Laidlaw appears to have played no part in the proceedings. Ms Horie has pursued a nomadic way of life since about 1982, and lives in vehicles together with her three children. Lesley Rand (who has been a traveller since about 1996, and lives together with her severely disabled nine year old daughter in a specially adapted vehicle) and Kirsty Salter (who was pregnant at the time, and has been a traveller for ten years) were subsequently added as defendants.

47. Two of the defendants had previously been encamped on another area of woodland, some five miles from Hethfelton, called Moreton Plantation ("Moreton"), which was also managed by the Commission. Following the issue of possession proceedings in relation to Moreton, a compromise was agreed on 9 January 2007, which provided that the Secretary of State should recover possession on 29 January 2007. It was on that day that a number of the defendants moved from Moreton to Hethfelton. Some of the other defendants had previously occupied another wood managed by the Commission, Morden Heath ("Morden"), which had also been subject to proceedings brought by the Secretary of State, which had resulted in a possession order which was due to be executed on 5 February 2007. In anticipation of the execution of that order, those other defendants moved from Morden to Hethfelton.

48. In the claim form in the instant proceedings, the Secretary of State sought possession not only of Hethfelton, but also of "all that land described on the attached schedule all in the county of Dorset". That schedule set out more than fifty separate

woods, which were owned by the Secretary of State and managed by the Commission, and which were marked on an attached plan. The number of woods of which possession was sought in addition to Hethfelton was subsequently reduced to thirteen, and the plan showed that those thirteen woods ("the other woods") were spread over an area of Dorset around twenty-five miles east to west and ten miles north to south. In the injunction application, the Secretary of State sought an order against the same defendants (including "Persons Names Unknown") restraining them "from re-entering [Hethfelton] or from entering [the other woods]". Copies of the claim form seeking possession were served on the named defendants and at Hethfelton in accordance with the provisions of CPR 55.6, together with copies of the injunction application.

49. The evidence established that all the occupiers of the camp at Hethfelton were new travellers, living and travelling in motor vehicles, mostly with children and often with animals. The evidence also indicated that the camp was relatively tidy, and did not involve any antisocial conduct on the part of any of the occupants. However, the presence of children and animals caused the Commission to avoid the use of heavy plant or the carrying out of substantial work, which might otherwise have occurred, in the surrounding area. The Commission's evidence showed that other areas in Dorset managed by the Commission, in addition to Hethfelton, including Moreton, and Morden, had been occupied by travellers as unauthorised camps, sometimes by one or more of the named defendants.

50. The claim came before Mr Recorder Norman, who gave a full and careful judgment on 3 August 2007. He had to resolve three issues. The first was whether to grant an order for possession against the defendants in respect of Hethfelton. The second issue was whether to grant an order for possession in respect of any or all of the other woods. The third issue was whether to grant an injunction restraining the defendants from entering on to all or any of the other woods.

51. The Recorder decided to grant an order for possession against the defendants in respect of Hethfelton. However, he refused to make any wider order for possession, or to grant the injunction sought by the Secretary of State. Although he accepted that he had jurisdiction to make such orders, he considered it inappropriate to do so primarily because the Commission had failed to consider the matters suggested by the 2004 Guidance before the current proceedings were begun, and because the Commission was not prepared to assure the Recorder that consideration would be given to that guidance before any wider order for possession or any injunction was enforced. Paragraph 1 of the order drawn up to reflect this decision provided that "[t]he claimant do forthwith recover the land known as Hethfelton Wood".

52. The defendants did not appeal against this order for possession. However, the Secretary of State appealed against the Recorder's refusal to grant an order for possession in relation to the other woods (which I will refer to as a "wider order for possession") and

the injunction, and the Court of Appeal allowed the appeal – [2008] EWCA Civ 903, [2009] 1 WLR 828. The order made by the Court of Appeal ordered that the Secretary of State "do recover" the other woods, and that each of the defendants "be restrained from entering upon, trespassing upon, living on, or occupying" any of the other woods.

53. In her judgment, Arden LJ followed and applied the reasoning of the Court of Appeal in the earlier decision of *Secretary of State v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906, under which it had been held that an order for possession, at least when made pursuant to a possession claim against trespassers, could, in appropriate cases, extend to land not forming part of, or contiguous with, or even near, the land actually occupied by the trespassers. She concluded that the evidence demonstrated that at least some of the defendants had set up unauthorised encampments on woods managed by the Commission in Dorset, and that there was a substantial risk that at least some of the defendants would move onto other such woods once an order for possession was made in relation to Hethfelton.

54. Arden LJ also said, in disagreement with the Recorder, that any failure on the part of the Commission to consider the matters recommended by the 2004 Guidance before issuing the proceedings for possession of the other woods did not justify refusing to make such a wider order. This was essentially on the basis that, if there was any such failure, it could be considered at the time the wider order for possession was sought to be enforced. Pill and Wilson LJJ agreed. Arden LJ also considered that, for the same reasons, the Recorder had been wrong to refuse the injunction sought by the Secretary of State, and again Pill LJ agreed. However, Wilson LJ dissented on this point, on the ground that the Recorder had been entitled to refuse an injunction on the additional ground which he had mentioned, namely that, if he had made a wider order for possession, it would have been disproportionate to grant an injunction as well.

55. The instant appeal is brought by Ms Horie and Ms Rand, and it raises two principal issues. The first is the extent to which an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. The second issue concerns the circumstances in which an injunction restraining future trespass can and should be granted; this raises two points: (a) whether an injunction against travellers is generally appropriate, and (b) the point on which the Court of Appeal differed from the Recorder, namely the effect of the 2004 Guidance. I shall consider these two issues in turn and then briefly review the implications of my conclusions.

An order for possession of land not occupied by the defendants

56. In *Drury* [2004] 1 WLR 1906, the facts were similar to those here, except the Court of Appeal held that there was no evidence establishing that the travellers in that

case had occupied, or threatened to occupy, other property managed by the Commission. Accordingly, the order for possession was in the normal form, limited, like the order made by the Recorder in this case, to the wood occupied by the travellers. However, the Court of Appeal decided that an order for possession could be granted, not merely in respect of land which the defendant occupied, but also in respect of other land which was owned by the claimant, and which the defendant threatened to occupy.

57. The essence of the Court of Appeal's reasoning was that (a) the law recognises that an anticipated trespass can give rise to a right of action, (b) an injunction would be of limited, if any, real use, (c) in those circumstances, the law should provide another remedy, (d) a wider order for possession would be of much more practical value than an injunction, (e) such an order for possession was justified by previous authority and in the light of the court's jurisdiction to grant *quia timet* injunctions; and (f) accordingly, such an order could be made; but (g) it should only be made in relatively exceptional circumstances – see at [2004] 1 WLR 1906, paras 20-24, 34-36, and 42-46, per Wilson J, Mummery LJ and Ward LJ respectively.

58. Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people.

59. Nonetheless, however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited. Judges are not legislators, and there comes a point where, in order to deal with a particular problem, court rules and practice cannot be developed by the courts, but have to be changed by primary or secondary legislation – or, in so far as they can be invoked for that purpose, by Practice Directions. In my view, it is simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in this case, following (as it was, I think, bound to do) the reasoning in *Drury* [2004] 1 WLR 1906.

60. The power of the County Court for present purposes derives from section 21(1) of the County Courts Act 1984, which gives it "jurisdiction to hear and determine any action for the recovery of land". The concept of "recovery" of land was the essence of a possession order both before and after the procedure was recast by sections 168ff of the

Common Law Procedure Act 1852, although, until the Supreme Court of Judicature Act 1875, the action lay in ejectment rather than in recovery of land - see per Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 457-8. Nonetheless, the change of name did not involve a change of substance, and the essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property from the defendant or because the claimant had been wrongly ejected by the defendant. As stated by Wonnacott, in *Possession of Land* (2006), page 22, "an action for recovery of land (ejectment) is an action to be put into possession of an estate of land. The complaint is that the claimant is not currently 'in' possession of it, and … wants … to be put 'in' possession of it." See also Simpson, *A History of the Land Law* (2nd edition), pages 144-5 and *Gledhill v Hunter* (1880) 14 Ch D 492, 496 per Sir George Jessel MR.

61. As Sir George Jessel explained, an action for ejectment and its successor, recovery of land, was normally issued "to recover possession from a tenant" or former tenant. An action against a trespasser, who did not actually dispossess the person entitled to possession, was based on *trespass quare clausum fregit*, physical intrusion onto the land. Nonetheless, where a trespasser exclusively occupies land, so as to oust the person entitled to possession, the cause of action must be for recovery of possession. (Hence, if such an action is not brought within twelve years the ousting trespasser will often have acquired title by "adverse possession".) Accordingly, in cases where a trespasser is actually in possession of land, an action for recovery of land, i.e. for possession, is appropriate, as Lord Denning implicitly accepted in *McPhail* [1973] Ch 447, 457-8.

62. This analysis is substantially reflected in the provisions of the CPR and in the currently prescribed form of order for possession. CPR 55 is concerned with possession claims, and CPR 55.1 provides:

> "(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings);
>
> (b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not; …"

The special features of a possession claim against trespassers are that the defendants to the claim may include "persons unknown", such proceedings should be served on the land as well as on the named defendants, and the minimum period between service and hearing

is 2 days (or 5 days for residential property) rather than the 28 days for other possession claims - see CPR 55.3(4), 55.6, and 55.5(2) and (3).

63. The drafting of CPR 55(1) is rather peculiar in that, unlike that in CPR 55(1)(a), the definition in CPR 55(1)(b) does not include the word "possession". Given that, since 1875, the cause of action has been for recovery of land, the oddity, as Lord Rodger has pointed out, is the inclusion of the word "possession" in the former paragraph, rather than its exclusion in the latter. However, in so far as the point has any significance, the definition of "a possession claim", like the definition of "land", in CPR 55(1)(a) may well be carried into CPR 55(1)(b). In any event, the important point, to my mind, is that a possession claim against trespassers involves the person "entitled to possession" seeking "recovery" of the land. Form N26 is the prescribed form of order in both a simple possession claim and a possession claim against trespassers (see CPR Part 4 PD Table 1). That form orders the defendant to "give the claimant possession" of the land in question. Although the orders at first instance (as drafted by counsel), and in the Court of Appeal, direct that the claimant do "recover" the land in question from the defendants, that is the mirror image of ordering that the defendants "give" the claimant possession.

64. The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.

65. This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty).

66. However, the fact that an order for possession may be made in respect of the whole of a piece of property, when the defendant is only in occupation of part and the remainder is empty, does not appear to me to assist the argument in favour of a wider possession order as made by the Court of Appeal in this case. Self-help is a remedy still available, in principle, to a landowner against trespassers (other than former residential tenants). Where only part of his property is occupied by trespassers, a landowner, exercising that remedy through privately instructed bailiffs, would, no doubt, be entitled to evict the trespassers from the whole of his property. Similarly, it seems to me, bailiffs (or sheriffs), who are required by a warrant (or writ) of possession to evict defendants from part of a property owned by the claimant, would be entitled to remove the

defendants from the whole of that property. But that does not mean that the bailiffs, whether privately instructed or acting pursuant to a warrant, could restrain the trespassers from moving onto another property, perhaps miles away, owned by the claimant.

67. Further, the concept of occupying part of property (the remainder of which is vacant) effectively in the name of the whole is well established - see for example, albeit in a landlord and tenant context, *Henderson v Squire* (1868-69) LR 4 QB 170, 172. However, that concept cannot be extended to apply to land wholly distinct, even miles away, from the occupied land. So, too, the fact that one can treat land as a single entity if it is divided by a road or river (in different ownership from the land) seems to me to be an irrelevance: as a matter of law and fact, the two divisions can sensibly be regarded as a single piece of land. Accordingly, I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton, even though the defendants occupied only a part of it.

68. The position is more problematical where a defendant trespasses on part of land, the rest of which is physically occupied by a third party, or even by the landowner. Particular difficulties in this connection are, to my mind, raised in relation to a wide order for possession in a claim within CPR 55.1(b). Such "a claim" may be brought "for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without … consent …". Given that such a claim is limited to "land … occupied only by" trespassers, it is not immediately easy to see how it could be brought, even in part, in relation to land occupied by persons who are not trespassers. And it is fundamental that the court cannot accord a claimant more relief than he seeks (although it is, of course, possible, in appropriate circumstances, for a claimant to amend to increase the extent of his claim, but that is not relevant here).

69. The Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301 nonetheless decided that a University could be granted a possession order under RSC Order 113 rule 1, which was (in relation to the issue in this case) in similar terms to CPR 55(1)(b), in respect of its whole campus, against trespassers who were squatting in a relatively small part, even though the remainder of the campus was lawfully occupied by academics, other employees, and indeed students. This was a thoroughly practical decision arrived at to deal with a fairly widespread problem at the time, namely student sit-ins. There was an obvious fear that, if an order for possession was limited to the rooms occupied by the student trepassers, they would simply move to another part of the campus.

70. As already mentioned, given that there is the alternative remedy of self-help, the court should ensure that its procedures are as effective as lawfully possible. Nonetheless, there is obviously great force in the argument that the fact that areas of the campus in that case was lawfully and exclusively occupied by academic staff, employees and students

should have precluded a claim and an order for possession in respect of those areas, both in principle and in the light of the wording of RSC Order 113 rule 1.

71. However, this is not the occasion formally to consider the correctness of the decision in *Djemal* [1980] 1 WLR 1301, which was not put in issue by either of the parties, as the Secretary of State (like the Court of Appeal in *Drury* [2004] 1 WLR 1906) relied on it, and the appellants were content to distinguish it. Accordingly, the implications of overruling or explaining the decision, which may be far-reaching in terms of principle and practice, have not been debated or canvassed.

72. The Court of Appeal's conclusion in *Drury* [2004] 1 WLR 1906, that the court could make a wider order for possession such as that in the instant case, rested very much on the reasoning in *Djemal* [1980] 1 WLR 1306, and in the subsequent first instance decision of *Ministry of Agriculture, Fisheries and Food v Heyman* 59 P&CR 48, which represented an "incremental development of the ruling in [*Djemal* [1980] 1 WLR 1306]", as Mummery LJ put it at [2004] 1 WLR 1906, para 35. However, it seems to me that the decision in *Drury* [2004] 1 WLR 1906 was an illegitimate extension of the reasoning and decision in *Djemal* [1980] 1 WLR 1306. The fact that an order for possession can be made in respect of a single piece of land, only part of which is occupied by trespassers, does not justify the conclusion that an order for possession can be made in respect of two entirely separate pieces of land, only one of which is occupied by trespassers, just because both pieces of land happen to be in common ownership. As already mentioned, bailiffs, whether acting on instructions from a landowner exercising the right of self-help to evict a trespasser or acting pursuant to a warrant of possession, can remove the trespasser on part of a piece of property from the whole of that property, but they cannot prevent him from entering a different property, possibly many miles away. Similarly, while it is acceptable, at least in some circumstances, to treat occupation of part of property as amounting to occupation of the whole of that property, one cannot treat occupation of one property as amounting to occupation of another, entirely separate, property, possibly miles away, simply because the two properties are in the same ownership.

73. Having said all that, I accept that the notion of a wider, effectively precautionary, order for possession as made in *Drury* [2004] 1 WLR 1906 has obvious attraction in practice. As the Court of Appeal explained in that case, the alternative to a wider possession order, namely an injunction restraining the defendant from camping in other woods in the area, would be of limited efficacy. An order for possession is normally enforced in the County Court by applying for a warrant of possession under CCR Order 26, which involves the occupiers being removed from the land by the bailiffs. (The equivalent in the High Court is a writ of possession executed by the Sheriff under RSC Order 45 rule 3). This is a procedurally direct and simple method of enforcement. An injunction, however, "may be enforced", and that was treated by the court in *Drury* [2004] 1 WLR 1906 as meaning "may only be enforced", by sequestration or committal – see RSC Order 45 rule 5(1), and, in relation to the County Court, CCR 29 and section 38 of the County Courts Act 1984. Given that the claimant's aim is to evict the travellers, those are unsatisfactory remedies compared with applying for a warrant of possession.

They are not only indirect, but they are normally procedurally unwieldy and time-consuming, and, in any event, they are of questionable value in cases against travellers, as explained in the next section of this opinion.

74. There is also some apparent force as a matter of principle in the notion that the Courts should be able to grant a precautionary wider order for possession. If judges have developed the concept of an injunction which restrains a defendant from doing something he has not yet done, but is threatening to do, why, it might be asked, should they now not develop an order for possession which requires a defendant to deliver up possession of land that he has not yet occupied, but is threatening to occupy? The short answer is that a wider or precautionary order for possession, whether in the form granted in this case or in the prescribed Form N26, requires a defendant to do something he cannot do, namely to deliver up possession of land he does not occupy, and purports to return to the claimant something he has not lost, namely possession of land of which already he has possession.

75. What the claimant is really seeking in the present case is an order that, if the defendant goes onto the other woods, the claimant should be entitled to possession. That is really in the nature of declaratory or injunctive relief: it is not an order for possession. A declaration identifies the parties' rights and obligations. A *quia timet* injunction involves the court forbidding the defendant from doing something which he may do and which he would not entitled to do. Both those types of relief are different from what the Court of Appeal intended to grant here, namely a contingent order requiring the defendant to do something (to deliver up possession) if he does something else (trespassing) which he may do and which he would not be entitled to do. I describe the Court of Appeal as intending to grant such an order, because, as just explained, the actual order is in the form of an immediate order for possession of the other woods, which, as I have mentioned, is also hard to justify, given that the defendants were not in occupation of any part of them.

76. Further, while it would be beneficial to be able to make a wider possession order because of the relative ease with which it could be enforced in the event of the defendants trespassing on other woods, such an order would not be without its disadvantages and limitations. An order for possession only binds those persons who are parties to the proceedings (and their privies), although the bailiffs (and sheriffs) are obliged to execute a warrant (or writ) of possession against all those in occupation – see *In re Wykeham Terrace, Brighton, Sussex* [1971] Ch 204, 209-10, *R v Wandsworth County Court ex p Wandsworth London Borough Council* [1975] 1 WLR 1314, 1317-9, *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 1431-2, and the full discussion in *Wonnacott* op cit at pages 146-52. It would therefore be wrong in principle for the court to make a wider order for possession against trespassers (whether named or not) in one wood with a view to its being executed against other trespassers in other woods. Nonetheless, because the warrant must be executed against anyone on the land, there is either a risk of one or more of the occupiers of another wood being evicted without having the benefit of due process, or room for delay while such an occupier applies to the court and is heard before a warrant is executed against him.

77. Quite apart from this, a warrant of possession to execute an order for possession made in the County Court in a claim for possession against trespassers can only be issued without leave within three months of the order – CCR Order 24 rule 6(2). So, after the expiry of three months, a wider possession order does not obviate the need for the claimant applying to the court before he can obtain possession of any land the subject of the order. Further, as pointed out by Wilson J in *Drury* [2004] 1 WLR 1906, para 22, it seems rather arbitrary that only a person who owns land which is being unlawfully occupied can obtain a wider order for possession protecting all his land in a particular area.

78. In conclusion on this issue, while there is considerable practical attraction in the notion that the court should be able to make the wide type of possession order which the Court of Appeal made in this case, following *Drury* [2004] 1 WLR 1906, I do not consider that the court has such power. It is inconsistent with the nature of a possession order, and with the relevant provisions governing the powers of the court. The reasoning in the case on which it is primarily based, *Djemal* [1980] 1 WLR 1301, cannot sensibly be extended to justify the making of a wider possession order, and there are aspects of such an order which would be unsatisfactory. I should add that I have read what Lord Rodger has to say on this, the main, issue, and I agree with him.

Should an injunction be refused as it will probably not be enforced?

79. That brings me to the question whether an injunction restraining travellers from trespassing on other land should be granted in circumstances such as the present. Obviously, the decision whether or not to grant an order restraining a person from trespassing will turn very much on the precise facts of the case. Nonetheless, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate.

80. However, as Lord Walker said during argument, the court should not normally make orders which it does not intend, or will be unable, to enforce. In a case such as the present, if the defendants had disobeyed an injunction not to trespass on any of the other woods, it seems highly unlikely that the two methods of enforcement prescribed by CCR 29 and section 38 of the County Courts Act 1984 (RSC Order 45 rule 5(1) in the High Court) would be invoked. The defendants presumably have no significant assets apart from their means of transport, which are also their homes, so sequestration would be pointless or oppressive. And many of the defendants are vulnerable, and most of them have young children, so imprisonment may very well be disproportionate. In *South Bucks District Council v Porter* [2003] UKHL 26, [2003] 2 AC 558, local planning authorities were seeking injunctions to restrain gypsies from remaining on land in breach of planning law, and at para 32, Lord Bingham of Cornhill said that "[t]he court should ordinarily be

slow to make an order which it would not … be willing, if need be, to enforce by imprisonment".

81. On the other hand, in the same paragraph of his opinion, Lord Bingham also said that "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate". A court may consider it unlikely that it would make an order for sequestration or imprisonment, if an injunction it was being invited to grant were to be breached, but it may nonetheless properly decide to grant the injunction. Thus, the court may take the view that the defendants are more likely not to trespass on the claimant's land if an injunction is granted, because of their respect for a court order, or because of their fear of the repercussions of breaching such an order. Or the court may think that an order of imprisonment for breach, while unlikely, would nonetheless be a real possibility, or it may think that a suspended order of imprisonment, in the event of breach, may well be a deterrent (although a suspended order should not be made if the court does not anticipate activating the order if the terms of suspension are breached).

82. It was suggested in argument that, if a defendant established an unauthorised camp in a wood which, in earlier proceedings, he had been enjoined from occupying, the court would be likely to be sympathetic to an application by the Commission to abridge even the short time limits in CPR 55.5.2. However, as Lord Rodger observed, if the court were satisfied that a defendant was moving from unauthorised site to unauthorised site on woods managed by the Commission, an abridgement of time limits might be thought to be appropriate anyway. Quite apart from this, if the only reason for granting an injunction restraining a defendant from trespassing in other woods was to assist the Commission in obtaining possession of any of those other woods should the defendant camp in them, it seems to me that this could be catered for by declaratory relief. For instance, the court could grant a declaration that the Commission is in possession of those other woods and the defendant has no right to dispossess it.

83. In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants. If the judge considers that some relief would be appropriate only because it could well assist the claimant in obtaining possession of such land if the defendants commit the threatened trespass, then a declaration would appear to me to be more appropriate than an injunction.

84. In the present case, neither the Recorder nor the Court of Appeal appears to have concluded that an injunction should be refused on the ground that it would not be enforced by imprisonment or because it would have no real value. Although it may well

be that a case could have been (and may well have been) developed along those lines, it was not adopted by the Recorder, and clearly did not impress the Court of Appeal. In those circumstances, it seems to me that it is not appropriate for this Court to set aside the injunction unless satisfied that it was plainly wrong to grant it, or that there was an error of principle in the reasoning which led to its grant. It does not appear to me that either of those points has been established in this case.

The effect of the 2004 Guidance on the grant of an injunction

85. The Recorder considered that it was inappropriate to grant an injunction in favour of the Secretary of State because the Commission had not complied with the 2004 Guidance in relation to the other woods before issuing the proceedings, and would not give an assurance that it would comply with the 2004 Guidance before it enforced the injunction. The Court of Appeal considered that the injunction could nonetheless be granted, as the issue of the Commission's compliance with the 2004 Guidance could be considered before the injunction was enforced.

86. As I have already mentioned, it has been conceded by the Secretary of State throughout these proceedings that the Commission is obliged to comply with the 2004 Guidance, and that failure to do so may vitiate its right to possession against travellers trespassing on land it manages. On that basis, there is some initial attraction in the appellants' argument that, if the 2004 Guidance ought to be complied with before the injunction is enforced, it would be inappropriate to grant the injunction before the Guidance was complied with. After all, now the injunction has been granted, the defendants would be in contempt of court and prone to imprisonment (once the appropriate procedures had been complied with) if they encamped on any of the other woods.

87. However, I am of the opinion that the Court of Appeal was right to conclude that, even in the light of the Secretary of State's concession, the 2004 Guidance did not present an obstacle to the granting of an injunction in this case. The Guidance is concerned with steps to be taken in relation to existing unauthorised encampments: it is not concerned with preventing such encampments from being established in the first place. The recommended procedures in the 2004 Guidance were relevant to the question of whether an order for possession should be made against the defendants in respect of their existing encampment on Hethfelton. However, quite apart from the fact that they are merely aspects of a non-statutory code of guidance, those recommendations are not directly relevant to the issue of whether the defendants should be barred from setting up a camp on other land managed by the Commission. Accordingly, I do not see how it could have justified an attack on the lawfulness of the Secretary of State seeking an injunction to restrain the defendants from setting up such unauthorised camps. At least on the basis of the concession to which I have referred, I incline to the view that the existence and provisions of the 2004 Guidance could be taken into account by the Court when

considering whether to grant an injunction and when fashioning the terms of any injunction. However, I prefer to leave the point open, as it was, understandably, not much discussed in argument before us.

88. Even if the 2004 Guidance was of relevance to the issue of whether the injunction should be granted, it seems to me that it could not be decisive. Otherwise, it would mean that such an injunction could never be granted, because it would not be possible to carry out up-to-date welfare enquiries in relation to defendants who might not move onto a wood which they were enjoined from occupying for several months, or, conceivably, even several years, after the order was made. As Arden LJ held, particularly bearing in mind that it purports to be no more than guidance, the effect and purpose of the 2004 Guidance is simply not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed. Further, the fact that welfare enquiries were made in relation to the defendants' occupation of Hethfelton by social services means that the more significant investigations required by the 2004 Guidance had been carried out anyway.

89. Following questions from Lady Hale, it transpired for the first time in these proceedings that, at the time of the issue of the claim, the Commission had (and has) a detailed procedural code which is intended to apply when there are travellers unlawfully on its land, and that this code substantially followed the 2004 Guidance. It therefore appears that the Commission has considered the 2004 Guidance and promulgated a code which takes its contents into account. On that basis, unless it could be shown in a particular case that the code had been ignored, it appears to me that the Commission's decision to evict travellers could not be unlawful on the ground relied on by the appellants in this case. However, it appears to me that failure to comply with non-statutory guidance would be unlikely to render a decision unlawful, although failure to have regard to the guidance could do so.

90. If the defendants were to trespass onto land covered by the injunction, the Commission would presumably comply with its code before seeking to enforce the injunction. If it did not do so, then, if justified on the facts of a particular case, there may (at least if the Commission's concession is correct) be room for argument that, in seeking to enforce the injunction against travellers who have set up a camp in breach of an injunction, the Secretary of State was acting unlawfully. It is true that this means that, in a case such as this, a defendant who trespasses in breach of an injunction may be at risk of imprisonment before the Commission has complied with the 2004 Guidance. However, where imprisonment is sought and where it would otherwise be a realistic prospect, the defendant could argue at the committal hearing that the injunction should not be enforced, even that it should be discharged, on the ground that the recommendations in the 2004 Guidance have not been followed.

91. Accordingly, on this point, I conclude that, even assuming (in accordance with the Secretary of State's concession) that the Commission's failure to comply with the 2004 Guidance may deter the court from making an order for possession against travellers, it should not preclude the granting of an injunction to restrain travellers from trespassing on other land. However, at least in a case where it could be shown that the claimant should have considered the 2004 Guidance, but did not do so, the Guidance could conceivably be relevant to the question whether an injunction should be granted (and if so on what terms), and, if the injunction is breached, to the question of whether or not it should be enforced (and, if so, how). In the event, therefore, the grant of an injunction was appropriate as Arden and Pill LJ concluded (and the only reason Wilson LJ thought otherwise, namely the existence of the wider possession order, no longer applies).

The implications of this analysis

92. As I have explained, the thinking of the Court of Appeal in *Drury* [2004] 1 WLR 1906 proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or imprisonment. In the light of the terms of RSC Order 45 rule 5(1), this may very well be right. Certainly, in the light of the contrast between the terms of that rule and the terms of RSC Order 45 rule 3(1) and CCR 26 rule 16(1) (which respectively provide for writs and warrants of possession only to enforce orders for possession), it is hard to see how a warrant of possession in the County Court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.

93. However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered onto the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs, such as a writ of possession or a writ of delivery –see for instance RSC Order 46 rule 1. Restitution is normally the means of obtaining possession against a defendant (or his privy) who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside (normally on appeal) – see sc46.3.3 in Civil Procedure, Vol 1, 2009. Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force: see Cole on *Ejectment* (1857) pp 692-4. So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered onto the land after an injunction has been granted restraining him from doing so, or even after a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the County Court to issue a warrant of restitution in such circumstances.

94. Whether a writ or warrant of restitution would be available to support such an injunction or declaration, and whether the present procedural rules governing the enforcement of injunctions against trespass on facts such as those in the present case are satisfactory, seem to me to be questions which are ripe for consideration by the Civil Procedure Rules Committee. The precise ambit of the circumstances in which a writ or warrant of restitution may be sought is somewhat obscure, and could usefully be clarified. Further, if, as I have concluded, it is not open to the court to grant a wider order for possession, as was granted by the Court of Appeal in *Drury* [2004] 1 WLR 1906 and in this case, then it appears likely that there may very well be defects in the procedural powers of the courts of England and Wales. Where a person threatens to trespass on land, an injunction may well be of rather little, if any, real practical value if the person is someone against whom an order for sequestration or imprisonment is unlikely to be made, and an order for possession is not one which is open to the court. In addition, it seems to me that it may be worth considering whether the current court rules satisfactorily deal with circumstances such as those which were considered in *Djemal* [1980] 1WLR 1306.

Disposal of this appeal

95. Accordingly, it follows that, for my part, I would allow the defendants' appeal to the extent of setting aside the wider possession order made by the Court of Appeal, but dismiss their appeal to the extent of upholding the injunction granted by the Court of Appeal.

LORD COLLINS

96. At the end of the argument my inclination was to the conclusion that in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906 the Court of Appeal had legitimately extended *University of Essex v Djemal* [1980] 1 WLR 1301 to fashion an exceptional remedy to deal with cases of the present kind. I was particularly impressed by the point that an injunction might be a remedy which was not capable of being employed effectively in cases such as this. But I am now convinced that there is no legitimate basis for making an order for possession in an action for the recovery of wholly distinct land of which the defendant is not in possession.

97. But in my opinion *University of Essex v Djemal* [1980] 1 WLR 1301 represented a sensible and practical solution to the problem faced by the University, and was correctly decided. I agree, in particular, that it can be justified on the basis that the University's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy

is available to a person whose possession or occupation has been interfered with, as Lady Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises. First, it has been pointed out, rightly, that the courts have used the concept of possession in differing contexts as a functional and relative concept in order to do justice and to effectuate the social purpose of the legal rules in which possession (or, I would add, deprivation of possession) is a necessary element: Harris, *The Concept of Possession in English Law*, *in Oxford Essays in Jurisprudence* (ed Guest, 1961) 69 at 72. Secondly, the procedural powers of the court are subject to incremental change in order to adapt to the new circumstances: see, e.g. in relation to the power to grant injunctions, *Fourie v Le Roux* [2007] UKHK 1 [2007] 1 WLR 320, at [30]; *Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2008] EWCA Civ 303, [2009] 2 WLR 621, at [182].

98. I would therefore allow the appeal to the extent of setting aside the wider possession order.

9 December 2009

PRESS SUMMARY

R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12
On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Brown, Lord Mance, Lord Clarke

BACKGROUND TO THE APPEAL

A is a former member of the Security Service, B its Director of Establishments. A wants to publish a book about his work in the Security Service. A duty of confidentiality binds A and he cannot publish material relating to the Security Service without B's consent. B refused A's application for consent to publish. As a result, A began proceedings in the High Court to challenge B's decision. He claimed, amongst other things, that his right to freedom of expression under article 10 of the European Convention on Human Rights had been breached. B argued that section 65(2)(a) of the Regulation of Investigatory Powers Act 2000 ("RIPA") provided that the Investigatory Powers Tribunal ("the IPT") was "the only appropriate tribunal" in relation to proceedings under section 7(1)(a) of the Human Rights Act 1998 brought against the intelligence services, such that the High Court did not have jurisdiction to entertain A's article 10 claim.

The High Court held that it had jurisdiction to hear A's challenge. The Court of Appeal, by a majority, reversed the High Court's decision, holding that exclusive jurisdiction did lie with the IPT. A appealed to the Supreme Court. Justice (an all-party law reform and human rights organisation) intervened in the appeal in support of A's submissions.

JUDGMENT

The Supreme Court unanimously dismissed A's appeal. Lord Brown, with whom all the members of the Court agreed, gave the leading judgment. Lord Hope gave a concurring opinion.

REASONS FOR THE JUDGMENT

Two alternative arguments were advanced by A:

- Section 65(2)(a) excludes the section 7(1)(a) jurisdiction of any other tribunal but not that of the courts.
- Even if section 65(2)(a) is to be construed as conferring exclusive section 7(1)(a) jurisdiction on the IPT, it does so only in respect of proceedings against the intelligence services arising out of the exercise of one of the investigatory powers regulated by RIPA.

As to the first argument, Lord Brown noted that the language of section 7(2) of the 1998 Act and the use of the word "only" before "appropriate tribunal" in section 65(2)(a) indicated that it was unlikely that Parliament was intending to leave it to a complainant to choose for himself whether to bring proceedings in court or before the IPT (**Para 13**). Whilst the IPT rules made under RIPA were restrictive (e.g. in relation to the limited disclosure of information to a complainant), there were various provisions in RIPA and the IPT rules which were designed to ensure that, even in the most sensitive cases, disputes could be properly determined. None of these provisions would be available in the courts (**Para 14**). A further telling consideration against A's construction was that there were in fact no other tribunals with section 7(1)(a) jurisdiction over the categories of claim listed in section 65(3) of RIPA (**Para 15**).

As to the second argument, Lord Brown considered that A's submission would involve reading into section 65(3)(a) (which contains the phrase "proceedings against any of the intelligence services") words which were simply not there. There were, in addition, other provisions in RIPA which were more obviously directed to complaints of abuse of the intelligence services' regulatory power which made it impossible to adopt A's construction (**Para 18**). It also did not seem right to regard proceedings of the kind intended here as immune from the same requirement for non-disclosure of information as other proceedings against the intelligence services (**Para 19**).

Lord Brown then went on to consider whether there were sufficiently strong arguments available to A which would require the Court to construe section 65 in a way which was contrary to Lord Brown's initial conclusions as to its construction. For the reasons set out below, Lord Brown concluded that there were no such arguments available to A.

Lord Brown rejected A's argument to the effect that to construe section 65 as conferring exclusive jurisdiction on the IPT would constitute an ouster of the jurisdiction of the courts that would be constitutionally objectionable (**Para 21**). RIPA, the 1998 Act and the Civil Procedure Rules all came into force at the same time as part of a single legislative scheme and it could not be said that section 65(2)(a) was ousting some pre-existing right (**Paras 21-22**). Parliament had not ousted judicial scrutiny of the acts of the intelligence services, but had simply allocated that scrutiny (as to section 7(1)(a) proceedings) to the IPT (**Para 23-24**).

Lord Brown also rejected the argument that forcing A's article 10 challenge into the IPT would result in breaches of article 6 of the Convention. Claims against intelligence services inevitably raise special problems that cannot be dealt with in the same way as other claims and this was recognised both domestically and by the European Court of Human Rights (**Para 26**). The Court would be going further than the Strasbourg jurisprudence if it were to hold that the IPT procedures are necessarily incompatible with article 6(1) and it would decline to do so here (**Para 30**). Even if the IPT's rules are in any way incompatible with article 6, the remedy would be to modify them, instead of adopting some artificially limited construction of the IPT's jurisdiction (**Para 31**).

The anomalies which A alleged would arise if the Court of Appeal's construction were to be adopted also did not cast doubt on the correctness of the Court of Appeal's decision (**Paras 32-37**).

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html

Michaelmas Term
[2009] UKSC 12
On appeal from: [2009] EWCA Civ 24

JUDGMENT

R (on the application of A) (Appellant) *v* B (Respondent)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Brown
Lord Mance
Lord Clarke

JUDGMENT GIVEN ON

9 December 2009

Heard on 19 and 20 October 2009

Appellant
Gavin Millar QC
Guy Vassall-Adams
(Instructed by Bindmans LLP)

Respondent
Jonathan Crow QC
Jason Coppel
(Instructed by Treasury Solicitors)

Intervener (Justice)
Lord Pannick QC
Tom Hickman
(Instructed by Freshfields Bruckhaus Deringer LLP

LORD BROWN, (with whom all members of the Court agree)

1. A is a former senior member of the Security Service, B its Director of Establishments. A wants to publish a book about his work in the Security Service. For this he needs B's consent: unsurprisingly, A is bound by strict contractual obligations as well as duties of confidentiality and statutory obligations under the Official Secrets Act 1989. On 14 August 2007, after lengthy top secret correspondence (and following final consideration by the Director General), B refused to authorise publication of parts of the manuscript. The correspondence (and annexures) described in detail the Security Services's national security objections to disclosure. On 13 November 2007 A commenced judicial review proceedings to challenge B's decision. He claims that it was unreasonable, vitiated by bias and contrary to article 10 of the European Convention on Human Rights, the right to freedom of expression. Is such a challenge, however, one that A can bring in the courts or can it be brought only in the Investigatory Powers Tribunal (the IPT)? That is the issue now before the Court and it is one which depends principally upon the true construction of section 65(2)(a) of the Regulation of Investigatory Powers Act 2000 (RIPA):

> "(2) The jurisdiction of the Tribunal shall be –
>
> (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;"

Subsection (3) provides that proceedings fall within this section if –

> "(a) they are proceedings against any of the intelligence services;"

2. Collins J decided that the Administrative Court had jurisdiction to hear A's challenge: [2008] 4 All ER 511 (4 July 2008). The Court of Appeal (Laws and Dyson LJJ, Rix LJ dissenting) reversed that decision, holding that exclusive jurisdiction lies with the IPT: [2009] 3 WLR 717 (18 February 2009).

3. Before turning to the rival contentions it is convenient to set out the legislative provisions most central to the arguments advanced. The Human Rights Act 1998 (HRA) by section 7 provides:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (2) In subsection (1) (a) 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
>
> . . .
>
> (9) In this section 'rules' means –
>
> (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by . . . the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court."

Pursuant to section 7(9), CPR 7.11 (introduced, like HRA, with effect from 2 October 2000) provides:

> "(1) A claim under section 7(1)(a) of the Human Rights Act 1998 in respect of a judicial act may be brought only in the High Court.
>
> (2) Any other claim under section 7(1)(a) of that Act may be brought in any court."

4. The only tribunals upon whom section 7(1)(a) HRA jurisdiction has been conferred by rules made under section 7(9) are the Special Immigration Appeals Commission (SIAC) and the Proscribed Organisations Appeal Commission (POAC) – not, contrary to the Court of Appeal's understanding (see paras 20, 33 and 56 of the judgments below), the Employment Tribunal.

5. I have already set out section 65(2)(a) of RIPA. Section 65(1) made provision for the establishment of the IPT and schedule 3 to the Act provides for its membership. Currently its President is Mummery LJ and its Vice-President, Burton J. Section 67(2) provides:

> "Where the tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review."

Section 67(7) empowers the Tribunal "to make any such award of compensation or other order as they think fit". Section 67(8) provides:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

Section 68(1) provides:

> "Subject to any rules made under section 69, the Tribunal shall be entitled to determine their own procedure in relation to any proceedings, complaint or reference brought before or made to them."

Section 68(4) provides:

> "Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either -
>
> > (a) a statement that they have made a determination in his favour; or
> >
> > (b) a statement that no determination has been made in his favour."

6. Section 69 confers on the Secretary of State the rule-making power pursuant to which were made the Investigatory Powers Tribunal Rules 2000 (SI No 2000/2665) (the Rules). Section 69(6) provides:

> "In making rules under this section the Secretary of State shall have regard, in particular, to -
>
> (a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and
>
> (b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."

7. Rule 13(2) provides that where the Tribunal make a determination in favour of the complainant they shall provide him with a summary of that determination including any findings of fact (to this extent qualifying section 68(4)(a) of the Act). Rule 6(1) gives effect to section 69(6)(b) by providing that the Tribunal shall carry out their functions in such a way as to meet the stipulated need with regard to the non-disclosure of information. The effect of rules 6(2) and (3) is that, save with the consent of those concerned, the Tribunal may not disclose to the complainant or any other person any information or document disclosed or provided to them in the course of any hearing or the identity of any witness at that hearing. Rule 9 provides that the Tribunal are under no duty to hold oral hearings and may hold separate oral hearings for the complainant and the public authority against which the proceedings are brought. Rule 9(6) provides that:

> "The Tribunal's proceedings, including any oral hearings, shall be conducted in private."

8. In *Applications Nos. IPT/01/62* and *IPT/01/77* (23 January 2003) the IPT ruled on various preliminary issues of law regarding the legality of a number of the rules. They held that rule 9(6) was *ultra vires* section 69 of RIPA as being incompatible with article 6 of the Convention but that "in all other respects the Rules are valid and binding on the Tribunal and are compatible with articles 6, 8 and 10 of the Convention" (para 12 of the IPT's 83 page ruling which is itself the subject of a pending application before the European Court of Human Rights

(ECtHR)). Consequent on their ruling on rule 9(b) the IPT published the transcript of the hearing in that case and now hear argument on points of law in open court.

9. A accepts that the legal challenge he is making to B's decision is properly to be characterised as proceedings under section 7(1)(a) of HRA within the meaning of section 65(2)(a) of RIPA (and not, as he had argued before the judge at first instance, that he should be regarded merely as relying on his article 10 rights pursuant to section 7(1)(b) HRA), and that these are proceedings against one of the Intelligence Services within the meaning of section 65(3)(a) (and not, as he had argued before the Court of Appeal, against the Crown). He nevertheless submits that he is not required by section 65(2)(a) to proceed before the IPT. His first and main argument – the argument which prevailed before Collins J and was accepted also by Rix LJ – is that he is entitled to proceed *either* by way of judicial review *or* before the IPT, entirely at his own choice. Section 65(2)(a), he submits, excludes the section 7(1)(a) jurisdiction of any other tribunal but not that of the courts. His second and alternative argument (not advanced in either court below) is that, even if section 65(2)(a) is to be construed as conferring exclusive section 7(1)(a) jurisdiction on the IPT, it does so only in respect of proceedings against the intelligence services arising out of the exercise of one of the investigatory powers regulated by RIPA. This, of course, would involve narrowing the apparent width of the expression "proceedings against any of the intelligence services" in section 65(3)(a) and, if correct, means that A here could not proceed before the IPT even if he wished to do so.

10. Justice have intervened in the appeal in support of A's submissions. Like A, they urge us to adopt as narrow a construction of section 65 as possible, first, so as not to exclude the jurisdiction of the ordinary courts and, secondly, to avoid a construction which they submit will inevitably give rise to breaches of other Convention rights, most notably the article 6 right to a fair hearing.

Argument 1 – Section 65(2)(a) excludes only the jurisdiction of other tribunals

11. This argument focuses principally upon the use of the word "tribunal" in the expression "only appropriate tribunal" in section 65(2)(a). A says it that it means tribunals only and not courts; B says that it encompasses both. A says that if it was intended to exclude courts as well as tribunals it would have used the same expression, "the appropriate forum", as was used in section 65(2)(b), 65(4) and 65(4A) of RIPA. B points out that those three provisions all deal with "complaints", for which provision had originally been made in the Security Service Act 1989 and the Intelligence Services Act 1994 and which are not the same as legal claims, "forum" being, therefore, a more appropriate term to describe the venue for their resolution.

12. Plainly the word "tribunal", depending on the context, can apply either to tribunals in contradistinction to courts or to both tribunals and courts. As B points out, section 195(1) of the Extradition Act 2003 describes "the appropriate judge" (a designated District Judge) as "the only appropriate tribunal" in relation to section 7(1)(a) HRA proceedings. So too section 11 of the Prevention of Terrorism Act 2005 describes "the court" (as thereafter defined) as "the appropriate tribunal for the purposes of section 7 of the Human Rights Act".

13. Section 7(2) of HRA itself appears to require that a court *or* tribunal is designated as *the* "appropriate court or tribunal", not that *both* are designated. Couple with that the use of the word "only" before the phrase "appropriate tribunal" in section 65 and it seems to me distinctly unlikely that Parliament was intending to leave it to the complainant to choose for himself whether to bring his proceedings in court or before the IPT.

14. There are, moreover, powerful other pointers in the same direction. Principal amongst these is the self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the working of the intelligence services. It is to this end, and to protect the "neither confirm nor deny" policy (equally obviously essential to the effective working of the services), that the Rules are as restrictive as they are regarding the closed nature of the IPT's hearings and the limited disclosure of information to the complainant (both before and after the IPT's determination). There are, however, a number of counterbalancing provisions both in RIPA and the Rules to ensure that proceedings before the IPT are (in the words of section 69(6)(a)) "properly heard and considered". Section 68(6) imposes on all who hold office under the Crown and many others too the widest possible duties to provide information and documents to the IPT as they may require. Public interest immunity could never be invoked against such a requirement. So too sections 57(3) and 59(3) impose respectively upon the Interception of Communications Commissioner and the Intelligence Services Commissioner duties to give the IPT "all such assistance" as it may require. Section 18(1)(c) disapplies the otherwise highly restrictive effect of section 17 (regarding the existence and use of intercept material) in the case of IPT proceedings. And rule 11(1) allows the IPT to "receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law." All these provisions in their various ways are designed to ensure that, even in the most sensitive of intelligence cases, disputes can be properly determined. None of them are available in the courts. This was the point that so strongly attracted Dyson LJ in favour of *B's* case in the court below. As he pithily put it at [2009] 3 WLR 717, para 48:

> "It seems to me to be inherently unlikely that Parliament intended to create an elaborate set of rules to govern proceedings against an

> intelligence service under section 7 of the 1998 Act in the IPT and yet contemplated that such proceedings might be brought before the courts without any rules."

15. A further telling consideration against the contention that section 65(2)(a) is intended only to exclude other tribunals with jurisdiction to consider section 7(1)(a) HRA claims is that there are in fact none such with section 7(1)(a) jurisdiction over the categories of claim listed in section 65(3). As stated (at para 4 above), only SIAC and POAC have section 7(1)(a) jurisdiction and in each instance that is with regard to matters outside the scope of section 65. The Court of Appeal were under the misapprehension that the Employment Tribunal too had section 7(1)(a) jurisdiction and were accordingly mistaken in supposing, as Rix LJ put it at para 33, that "[t]herefore, section 65(2)(a) of the 2000 Act has content as referring to the IPT as 'the only appropriate tribunal'".

16. In the light of these various considerations it is hardly surprising that A himself recognises that this construction produces "a slightly unsatisfactory legislative outcome", although he submits that "this is a small price to pay for protecting the article 6 rights of claimants and respecting the principle that access to the courts should not be denied save by clear words", a submission to which I shall come after considering A's alternative contended-for construction.

Argument 2 – Section 65(2)(a) confers exclusive jurisdiction on the IPT but only in respect of proceedings arising out of the exercise of one of the RIPA regulated investigatory powers

17. Although this was not an argument advanced at any stage below, I confess to having been attracted to it for a while. After all, in enacting RIPA, Parliament must have had principally in mind the use and abuse of the particular investigatory powers regulated by the Act and there would not appear to be the same need for secrecy, the withholding of information and the "neither confirm nor deny" policy in the case of an ex-officer as in the case of someone outside the intelligence community.

18. The difficulties of such a construction, however, are obvious and in the end, to my mind, insurmountable. As already observed, it would involve reading into section 65(3)(a) limiting words which are simply not there. This would be difficult enough at the best of times. Given, however, that other paragraphs of section 65(3) are in fact more obviously directed to complaints of abuse of the intelligence services' regulatory powers (see particularly section 65(3)(d) read with sections

65(5)(a) and 65(7), none of which I have thought it necessary to set out), it seems to me quite impossible to construe the section as this argument invites us to do.

19. Nor, indeed, on reflection, does it seem right to regard proceedings of the kind intended here as immune from much the same requirement for non-disclosure of information as other proceedings against the intelligence services. As B points out, it is perfectly possible that the security service will ask the tribunal hearing this dispute to consider additional material of which A may be unaware (and of which the security service is properly concerned that he should remain unaware) which leads it to believe that the publication of A's manuscript would be harmful to national security. On any view, moreover, the proceedings by which any tribunal comes to determine whether the disputed parts of the manuscript can safely be published would have to be heard in secret. Again, therefore, the existence of the IPT Rules designed to provide for just such proceedings and the lack of any equivalent rules available to the courts points strongly against this alternative construction also.

20. Are there, however, sufficiently strong arguments available to A (and Justice) to compel the court, with or without resort to section 3 of HRA, to adopt a contrary construction of section 65? It is convenient to consider these arguments under three broad heads.

i. Ouster

21. A and Justice argue that to construe section 65 as conferring exclusive jurisdiction on the IPT constitutes an ouster of the ordinary jurisdiction of the courts and is constitutionally objectionable on that ground. They pray in aid two decisions of high authority: *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. To my mind, however, the argument is unsustainable. In the first place, it is evident, as the majority of the Court of Appeal pointed out, that the relevant provisions of RIPA, HRA and the CPR all came into force at the same time as part of a single legislative scheme. With effect from 2 October 2000 section 7(1)(a) HRA jurisdiction came into existence (i) in respect of section 65(3) proceedings in the IPT pursuant to section 65(2)(a), and (ii) in respect of any other section 7(1)(a) HRA proceedings in the courts pursuant to section 7(9) and CPR 7.11. True it is, as Rix LJ observed, that CPR 7.11(2) does not explicitly recognise the exception to its apparent width represented by section 65(2)(a). But that is not to say that section 65(2)(a) ousts some pre-existing right.

22. This case, in short, falls within the principle recognised by the House of Lords in *Barraclough v Brown* [1897] AC 615 – where, as Lord Watson said at p 622: "The right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other." - rather than the principle for which *Pyx Granite* stands (p 286):

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

Distinguishing *Barraclough v Brown*, Viscount Simonds pointed out that the statute there in question could be construed as merely providing an alternative means of determining whether or not the company had a pre-existing common law right to develop their land; it did not take away "the inalienable remedy . . . to seek redress in [the courts]". Before 2 October 2000 there was, of course, no pre-existing common law or statutory right to bring a claim based on an asserted breach of the Convention. Section 65(2)(a) takes away no "inalienable remedy".

23. Nor does *Anisminic* assist A. The ouster clause there under consideration purported to remove any judicial supervision of a determination by an inferior tribunal as to its own jurisdiction. Section 65(2)(a) does no such thing. Parliament has not ousted judicial scrutiny of the acts of the intelligence services; it has simply allocated that scrutiny (as to section 7(1)(a) HRA proceedings) to the IPT. Furthermore, as Laws LJ observed at para 22:

> "[S]tatutory measures which confide the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand, may well be constitutionally inoffensive. The IPT . . . offers . . . no cause for concern on this score."

True it is that section 67(8) of RIPA constitutes an ouster (and, indeed, unlike that in *Anisminic*, an unambiguous ouster) of any jurisdiction of the courts over the IPT. But that is not the provision in question here and in any event, as A recognises, there is no constitutional (or article 6) requirement for any right of appeal from an appropriate tribunal.

24. The position here is analogous to that in *Farley v Secretary of State for Work and Pensions (No. 2)* [2006] 1 WLR 1817 where the statutory provision in

question provided that, on an application by the Secretary of State for a liability order in respect of a person liable to pay child support, "the court . . . shall not question the maintenance assesment under which the payments of child support maintenance fall to be made." Lord Nicholls, with whom the other members of the Committee agreed, observed, at para 18:

> "The need for a strict approach to the interpretation of an ouster provision . . . was famously confirmed in the leading case of *Anisminic* . . . This strict approach, however, is not appropriate if an effective means of challenging the validity of a maintenance assessment is provided elsewhere. Then section 33(4) is not an ouster provision. Rather, it is part of a statutory scheme which allocates jurisdiction to determine the validity of an assessment and decide whether the defendant is a 'liable person' to a court other than the magistrates' court."

ii. Convention rights

25. A and Justice submit that to force this article 10 challenge into the IPT would inevitably result in breaches of article 6. In support of this submission they rely principally upon the following features of the IPT's procedures: first, that the entire hearing (save for purely legal argument) will be not only private but secret, indeed claimants may not even be told whether a hearing has been or will be held; secondly, that the submissions and evidence relied on respectively by the claimant and the respondent may be considered at separate hearings; thirdly, that only with the respondent's consent will the claimant be informed of the opposing case or given access to any of the respondent's evidence; fourthly, that no reasons will be given for any adverse determination. All of this, runs the argument, is flatly contrary to the basic principles of open justice: that there should be a public hearing at which the parties have a proper opportunity to challenge the opposing case and after which they will learn the reasons for an adverse determination.

26. As, however, already explained (at para 14), claims against the intelligence services inevitably raise special problems and simply cannot be dealt with in the same way as other claims. This, indeed, has long since been recognised both domestically and in Strasbourg. It is sufficient for present purposes to cite a single paragraph from the speech of Lord Bingham of Cornhill in *R v Shayler* [2003] 1 AC 247, para 26 (another case raising article 10 considerations):

> "The need to preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion has been recognised by the European Commission and the Court in relation to complaints made under article 10 and other articles under the Convention: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, paras 100-103; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214, para 48; *Leander v Sweden* (1987) 9 EHRR 433, para 59; *Hadjianastassiou v Greece* (1992) 16 EHRR 219, paras 45-47; *Esbester v United Kingdom* (1993) 18 EHRR CD 72, 74; *Brind v United Kingdom* (1994) 18 EHRR CD 76, 83-84; *Murray v United Kingdom* (1994) 19 EHRR 193, para 58; *Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189, paras 35, 40. The thrust of these decisions and judgments has not been to discount or disparage the need for strict and enforceable rules but to insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question. The acid test is whether, in all the circumstances, the interference with the individual's Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve. The OSA 1989, as it applies to the appellant, must be considered in that context."

27. In one of the Strasbourg cases there referred to, *Esbester v United Kingdom*, and indeed in a series of other cases brought against the UK at about the same time, the Strasbourg Commission rejected complaints as to the form of proceedings adopted by the Security Service Tribunal and the Interception of Communications Tribunal, not least as to the absence of a reasoned determination.

28. I acknowledge that later in his opinion in *Shayler* (at para 31) Lord Bingham, contemplating the possibility that authority to publish might have been refused without adequate justification (or at any rate where the former member firmly believed that no adequate justification existed), said:

> "In this situation the former member is entitled to seek judicial review of the decision to refuse, a course which the OSA 1989 does not seek to inhibit."

In that case, however, the disclosures had been made before the enactment of RIPA and the creation of the IPT and it is plain that the House had not been referred to section 65(2)(a), still less had had occasion to consider its scope. It cannot sensibly be supposed that the case would have been decided any differently

had it been recognised that after 2 October 2000 such a challenge would have had to be brought before the IPT.

29. Admittedly the *Esbester* line of cases were decided in the context of article 8 (rather than article 10) and, understandably, Strasbourg attaches particular weight to the right to freedom of expression. Neither A nor Justice, however, were able to show us any successful article 10 cases involving national security considerations save only for *Sunday Times v UK (No. 2)* (1991) 14 EHRR 229 (*Spycatcher)* where, of course, the disputed material was already in the public domain.

30. For my part I am wholly unpersuaded that the hearing of A's complaint in the IPT will necessarily involve a breach of article 6. There is some measure of flexibility in the IPT's rules such as allows it to adapt its procedures to provide as much information to the complainant as possible consistently with national security interests. In any event, of course, through his lengthy exchanges with B, A has learned in some detail why objections to publication remain. Article 6 complaints fall to be judged in the light of all the circumstances of the case. We would, it seems to me, be going further than the Strasbourg jurisprudence has yet gone were we to hold in the abstract that the IPT procedures are necessarily incompatible with article 6(1). Consistently with the well known rulings of the House of Lords in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 para 20 and *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 paras 105, 106, I would decline to do so, particularly since, as already mentioned, the IPT's own decision on its rules is shortly to be considered by the ECtHR.

31. Over and above all this is the further and fundamental consideration, that even if the IPT's Rules and procedures *are* in any way incompatible with article 6, the remedy for that lies rather in *their* modification than in some artificially limited construction of the IPT's jurisdiction. It is, indeed, difficult to understand which of the appellant's contended-for constructions is said to be advanced by this submission. On any view the IPT has *some* jurisdiction. Yet the argument involves a root and branch challenge to its procedures in *all* cases.

iii. Anomalies

32. The Court of Appeal's construction of section 65(2)(a) is said to give rise to a number of anomalies. Under this head I shall touch too upon certain other points advanced variously by A and Justice.

33. The first anomaly is said to be that while section 7(1)(a) HRA proceedings have to be brought before the IPT, other causes of action or public law grounds for judicial review need not. This point troubled Rix LJ who asked ([2009] 3WLR 717, para 39): "what is so special about section 7 proceedings under the 1998 Act against the intelligence services . . .?" The answer surely is that such claims are the most likely to require a penetrating examination of the justification for the intelligence services' actions and, therefore, close scrutiny of sensitive material and operational judgment. But it may well be (as, indeed, Rix LJ foresaw) that section 65(2)(d) of RIPA will be brought into force so that the Secretary of State can allocate other proceedings too exclusively to the IPT. Meantime, subject always to the court's abuse of process jurisdiction and the exercise of its discretion in public law cases, proceedings outside section 7(1)(a) can still be brought in the courts so that full effect is given to the preservation of such rights by section 11 of HRA.

34. It is similarly said to be anomalous that whereas A, responsibly seeking prior clearance for the publication of his manuscript, is driven into the IPT, someone in a similar position, although perhaps facing injunctive proceedings for having sought to publish without permission, would be entitled pursuant to section 7(1)(b) HRA to rely in those ordinary court proceedings on their article 10 rights. Whilst I readily see the force of this, the answer to it may be that defences were not sufficiently thought through at the time of this legislation and that more, rather than fewer, proceedings involving the intelligence services should be allocated exclusively to the IPT.

35. A further anomaly is said to be that Special Branch police officers and Ministry of Defence special forces may well carry out work of comparable sensitivity to that undertaken by the intelligence services and yet section 7(1)(a) HRA claims brought against them would proceed in the ordinary courts and not in the IPT. Part of the answer to this is to be found in "the special position of those employed in the security and intelligence services, and the special nature of the work they carry out" (Lord Bingham's opinion in *Shayler* at para 36); the rest in the same response as to the earlier points: perhaps the IPT's exclusive jurisdiction should be widened.

36. Sitting a little uneasily alongside the last suggested anomaly is the contention that section 65(2)(a) vests in the IPT exclusive jurisdiction over various kinds of proceedings against people quite other than the intelligence services which may involve little if anything in the way of sensitive material – for example, pursuant to section 65(3)(c), proceedings under section 55(4) of RIPA with regard to accessing encrypted data. Whatever view one takes about this, however, it is impossible to see how it supports either of the alternative constructions of section 65 for which A contends.

37. In short, none of the suggested anomalies resulting from the Court of Appeal's construction seems to me to cast the least doubt on its correctness let alone to compel some strained alternative construction of the section.

38. I see no reason to doubt that the IPT is well able to give full consideration to this dispute about the publication of A's manuscript and, adjusting the procedures as necessary, to resolve it justly. Quite why A appears more concerned than B about the lack of any subsequent right of appeal is difficult to understand. Either way, Parliament has dictated that the IPT has exclusive and final jurisdiction in the matter. I would dismiss the appeal.

LORD HOPE

39. I agree with Lord Brown's opinion. I wish only to add a few brief footnotes.

The Rules

40. As Lord Brown has explained (see para 14, above), among the factors that reinforce the conclusion that is to be drawn from the terms of the statute that Parliament did not intend to leave it to the complainant to choose for himself whether to bring his proceedings in a court or before the IPT are the provisions that RIPA contains about the rules that may be made under it. In *Hanlon v The Law Society* [1981] AC 124, 193-194 Lord Lowry set out the circumstances in which a regulation made under a statutory power was admissible for the purpose of construing the statute under which it was made. The use of the rules themselves as an aid to construction, in addition to what RIPA itself says about them, needs however to be treated with some care.

41. In *Deposit Protection Board v Dalia* [1994] 2 AC 367 the issue was as to the meaning of the word "depositor", and the regulations that were prayed in aid were made four years after the date of the enactment. At p 397 Lord Browne-Wilkinson said that regulations could only be used an aid to construction where the regulations are roughly contemporaneous with the Act being construed. In *Dimond v Lovell* [2000] QB 216, para 48 Sir Richard Scott VC said that he did not think that the content of regulations which postdated the Consumer Credit Act 1974 by some nine years could be taken to be a guide to what Parliament intended by the language used in the Act. One must also bear in mind, as Lord Lowry said in *Hanlon* at p 193-194, that regulations cannot be said to control the meaning of the Act, as that would be to disregard the role of the court as interpreter.

42. In this case the statute received the Royal Assent on 28 July 2000. The Investigatory Powers Tribunal Rules 2000 (SI 2000/2665) were made on 28 September 2000 and laid before Parliament the next day. The interval was so short that, taken together, they can be regarded as all part of same legislative exercise. But, as Mr Crow QC for B submitted, it is not the content of the rules as such that matters here. Rather it is the fact that the Act itself put a specialist regime in place to ensure that the IPT was properly equipped to deal with sensitive intelligence material. Section 68(4) of RIPA limits the information that the Tribunal may give to a complainant where they determine any complaint brought before them to a statement that a determination either has been or has not been made in the complainant's favour. Section 69(4) states that the Secretary of State's power to make rules under that section includes power to make rules that limit the information that is given to the complainant and the extent of his participation in the proceedings. Section 69(6)(b) states that in making rules under that section the Secretary of State shall have regard in particular to the need to secure that information is not disclosed to an extent that is contrary to the public interest or prejudicial to national security.

43. The fact that this regime was so carefully designed to protect the public interest by the scheme that is set out in the statute is in itself a strong pointer to the conclusion that Parliament did not intend by section 65(2)(a) that the jurisdiction of the IPT in relation to claims of the kind that A seeks to bring in this case was to be optional. I do not think that it is necessary to go further and look at the Rules themselves, as the indication that the statute itself gives is so clear on this point.

Anomalies

44. Although he adopted a different stance before Collins J, as the judge recorded in para 20 of his opinion [2008] EWHC 1512 (Admin), A now accepts that the legal challenge that he is making to B's decision is properly to be characterised as proceedings under section 7(1)(a) of the Human Rights Act 1998 and not under section 7(1)(b) of that Act. Section 7(1)(a) of the 1998 Act provides that a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may "bring proceedings against the authority under this Act in the appropriate court of tribunal". Section 7(1)(b) provides, in the alternative, that he may "rely on the Convention right or rights concerned in any legal proceedings".

45. As Clayton & Tomlinson, *The Law of Human Rights*, 2nd ed (2009), para 22.03, puts it:

> "This section contemplates two ways in which a person may advance a contention that a public authority has acted in a way which is incompatible with his Convention rights: either by making a *free standing* claim based on a Convention right in accordance with section 7(1)(a) or by *relying* on a Convention right in proceedings in accordance with section 7(1)(b)."

In *R v Kansal (No 2)* [2002] 2 AC 69, 105-106 I said that section 7(1)(a) and section 7(1)(b) are designed to provide two quite different remedies. Section 7(1)(a) enables the victim of the unlawful act to bring proceedings under the Act against the authority. It is intended to cater for free-standing claims made under the Act where there are no other proceedings in which the claim can be made. It does not apply where the victim wishes to rely on his Convention rights in existing proceedings which have been brought against him by a public authority. His remedy in those proceedings is that provided by section 7(1)(b), which is not subject to the time limit on proceedings under section 7(1)(a) prescribed by section 7(5); see also *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para 90. The purpose of section 7(1)(b) is to enable persons against whom proceedings have been brought by a public authority to rely on the Convention rights for their protection.

46. The fact that section 65(2)(a) requires proceedings under section 7(1)(a) to be brought before the IPT, while relying on section 7(1)(b) was not subject to this requirement, was said by Mr Millar QC to be anomalous. Why, he said, should a claim be so restricted when a defence relying on Convention rights to injunctive proceedings by a public authority, or a counterclaim, was not? I am reluctant to conclude that the omission of a reference to section 7(1)(b) was due to an oversight, and I do not think that when regard is had to the purpose of these provisions there is any anomaly.

47. I would reject the suggestion that a counterclaim against a public authority on the ground that it has acted (or proposes to act) in a way that is made unlawful under section 6(1) of the 1998 Act should be regarded as having been made under section 7(1)(b). This issue is not to be resolved by reference to the procedural route by which the claim is made but by reference to the substance of the claim. A counterclaim against a public authority for a breach of Convention rights is to be treated as a claim for the purposes of section 7(1)(a): see section 7(2) which states that proceedings against an authority include a counterclaim or similar proceedings. It will be subject to the time limit on proceedings under that provision in section 7(5).

48. As for defences, the scheme of the 1998 Act is that a person who is (or would be) a victim of an act that it is made unlawful by section 6(1) because the public authority has acted (or proposes to act) in that way is entitled to raise that issue as a defence in any legal proceedings that may be brought against him. Section 7(1)(b) contemplates proceedings in which it would be open to the court or tribunal to grant relief against the public authority on grounds relating to a breach of the person's Convention rights, such as those guaranteed by article 6. The scope for inquiry is relatively limited in comparison with that which may be opened up by a claim made under section 7(1)(a).

49. It is possible, however, to envisage a situation in which a defence to an application for injunctive relief by the intelligence services would open up for inquiry issues of the kind that section 65(2)(a) of RIPA reserves for determination by the IPT if they were to be subject of a claim under section 7(1)(a), the disclosure of which would be contrary to the public interest or prejudicial to national security. It is true that the legislation does not address this problem, perhaps because it was thought inappropriate to reserve to the IPT proceedings that were initiated by and in the control of the intelligence services or any other person in respect of conduct on their behalf. But the situation that this reveals is, I think, properly to be regarded as a product of the way the legislative scheme itself was framed. It does not provide a sound reason for thinking that Parliament intended to leave it to the complainant to choose whether to bring *his* proceedings in a court rather than before the IPT.

50. Like Lord Brown, I can find nothing in this alleged anomaly, or in any of the others that have been suggested, that supports the construction of section 65(2)(a) for which A contends.

16 December 2009

PRESS SUMMARY

R (on the application of E) (Respondent) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellants) [2009] UKSC 15
On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 626

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

BACKGROUND TO THE APPEAL

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

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

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

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

JUDGMENT

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

REASONS FOR THE JUDGMENT

The Majority Judgments

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

Direct Discrimination

General Principles

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

Application in This Case

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

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

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

Further Comments

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

Indirect Discrimination

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

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

The Minority Judgments

Direct Discrimination

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

Indirect Discrimination

Lords Hope and Walker

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

Lords Rodger and Brown

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

The United Synagogue Costs Appeal

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

NOTE

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

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

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.

PRESS SUMMARY

S-B (Children) **[2009] UKSC 17**
On appeal from [2009] EWCA Civ 1048

JUSTICES: Lord Hope, Lord Rodger, Lady Hale, Lord Brown, Lord Collins, Lord Kerr, Lord Clarke

BACKGROUND TO THE APPEAL

The case concerns the proper approach to deciding who has been responsible for harming a child in proceedings taken to protect that child, and others in the family, from harm and the consequences of such a decision. At a fact-finding hearing, the judge decided that either the mother or the father had injured their baby boy. He had therefore suffered significant harm attributable to a lack of reasonable parental care, as required by section 31(2) of the Children Act 1989. The judge did not ask herself which parent was responsible, although she expressed the view that it was 60% likely that the father had injured the child and 40% likely that the mother had. The mother and father were separated and the father played no part in the proceedings. At the later welfare hearing, the judge approved the placement of the child for adoption, together with his younger brother, who had been born during the proceedings and placed with foster parents soon after birth. The mother, who had maintained contact and developed a good relationship with the children, appealed.

JUDGMENT

The Supreme Court unanimously allows the appeal and remits the case for a complete rehearing before a different judge. The judgment of the Court was given by Lady Hale. ***[48]-[50]***

REASONS FOR THE JUDGMENT

- It is now settled law that the standard of proof in care proceedings is the balance of probabilities, as set out in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and confirmed in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] AC 11. **[8]-[13]** It is clear from the observations of Lord Hoffman and Lady Hale in *Re B* that the same approach is to be applied to the identification of perpetrators as to any other factual issue in the case. It was incorrect to apply a heightened standard consistent with the gravity of the allegations. **[34]**

- There is no obligation for a judge to decide who has caused the harm to the child, as long as that harm is attributable to someone having care of the child, although he should do so if the evidence warrants this. In a split hearing, there may be particular benefits of making such a finding, mainly because it will promote clarity in identifying the future risks to the child and the strategies necessary to protect him from them. **[35]-[38]** Where a specific perpetrator cannot be identified, a judge should still, where possible, identify a pool of possible perpetrators. The test for doing so is the "likelihood or real possibility" that a particular person was involved. A person does not have to prove their innocence to be left out of account**[40]-[43]**

- Where a judge has been unable to identify a perpetrator, it is positively unhelpful to have the sort of indication of percentages that the judge gave in this case. **[44]**

- If the judge is able to identify a perpetrator on the balance of probabilities, all the evidence accepted by the judge which is relevant to identifying the risks to the child remains relevant to deciding where his

best interests will lie. The court must also be alive to the possibility that the finding who the perpetrator was is wrong and be prepared to revise it in the light of later evidence. **[46]-[47]**

- In the circumstances of this case the judge had misdirected herself on the standard of proof in the fact-finding hearing. In those circumstances the case ought to be remitted in whole to a different judge who can decide the matter on the right basis. **[48]**

- The decision to remove the second child, who had never been harmed, must also be remitted for rehearing. The judge had held that there was a risk of future harm to him because there was a real possibility that the mother had injured the older child. It was held in *Re H* that this is not the correct approach: predictions of future harm must be based on proven findings of fact. **[49]**

Michaelmas Term
[2009] UKSC 17
On appeal from: [2009] EWCA Civ 1048

JUDGMENT

S-B Children

before

Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Brown
Lord Collins
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON

14 December 2009

Heard on 25 and 26 November 2009

Appellant
Anthony Hayden QC
Magdalen Case
(Instructed by Dawson Cornwell)

Respondent
Susan Grocott QC
Sasha Watkinson
(Instructed by Trafford Borough Council Legal and Democratic Services)

2nd Respondent
Frances Judd QC
Alexander Kloss
(Instructed by Rowlands Solicitors)

LADY HALE

1. This is the judgment of the court.

2. This case is about the proper approach to deciding who has been responsible for harming a child in proceedings taken to protect that child, and others in the family, from harm. It raises profound issues: on the one hand, children need to be protected from harm; but on the other hand, both they and their families need to be protected from the injustice and potential damage to their whole futures done by removing children from a parent who is not, in fact, responsible for causing them any harm at all. The facts of this case present us with that dilemma in an unusually stark form.

The facts

3. Because we have decided to allow this appeal and send the case back to be decided afresh, we should say only enough about the facts to explain how the dilemma arises. We shall use pseudonyms for the two children concerned, one who has been harmed and one who has not. Jason was born on 19 May 2007. On 15 June 2007, when he was just four weeks old, he was found to have bruising on his arms and face, which the doctors immediately thought was caused non-accidentally and not, as the mother suggested, by the baby pinching himself or sleeping on his dummy. Jason has not lived with his family since then, although he has had frequent and good quality contact with his mother.

4. Jason was living with his mother and father at the time and described by the doctors as "thriving". Both parents said that it was the father who had got up to attend to the baby when he woke up on the morning when the bruises were noticed. The mother took the baby to the clinic that morning and pointed them out to the health visitor. It was not possible to give precise timing for the bruises but it was not suggested that they were old or of different ages. They could have been inflicted by both parents, but the judge found it more likely that only one of them had inflicted them. The bruises had not been there for so long, nor would they have caused the baby such pain and distress, that the other parent must have known that he was being harmed. This was not, therefore, a case where one parent had failed to protect the child from harm caused by the other. It was, colloquially, a pure "whodunit".

5. The other child is William, born on 12 July 2008, while the proceedings to protect Jason were in train. By then the parents had separated, although they were

still in touch with one another. The father had stopped visiting Jason, had withdrawn from co-operation with the social workers and with his solicitors, and played no further part in the proceedings. He has parental responsibility for Jason but not for William. William was removed from his mother shortly after birth and placed with the same foster carer as his brother. He has never been harmed. The case for removing him from his mother rests on the likelihood of his being harmed in the future if he is returned to her.

The law

6. In this country we take the removal of children from their families extremely seriously. The Children Act 1989 was passed almost a decade before the Human Rights Act 1998, but its provisions were informed by the United Kingdom's obligations under article 8 and article 6 of the European Convention on Human Rights. These affect both the test and the process for intervening in the family lives of children and their parents.

7. As to the test, it is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society. The jurisprudence of the European Court of Human Rights requires that there be a "pressing social need" for intervention and that the intervention be proportionate to that need. Before the court can consider what would be best for the child, therefore, section 31(2) of the 1989 Act requires that it be satisfied of the so-called "threshold conditions":

> "(a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to –
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
>
> (ii) the child's being beyond parental control."

8. The leading case on the interpretation of these conditions is the decision of the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563. Three propositions were established which have not been questioned since. First, it is not enough that the court suspects that a child may have suffered

significant harm or that there was a real possibility that he did. If the case is based on actual harm, the court must be satisfied on the balance of probabilities that the child was actually harmed. Second, if the case is based on the likelihood of future harm, the court must be satisfied on the balance of probabilities that the facts upon which that prediction was based did actually happen. It is not enough that they may have done so or that there was a real possibility that they did. Third, however, if the case is based on the likelihood of future harm, the court does not have to be satisfied that such harm is more likely than not to happen. It is enough that there is "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" (per Lord Nicholls of Birkenhead, at p 585F).

9. Thus the law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school.

10. The House of Lords was invited to revisit the standard of proof of past facts in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] AC 11, where the judge had been unable to decide whether the alleged abuse had taken place. The suggestion that it would be sufficient if there were a "real possibility" that the child had been abused was unanimously rejected. The House also reaffirmed that the standard of proof of past facts was the simple balance of probabilities, no more and no less.

11. The problem had arisen, as Lord Hoffmann explained, because of dicta which suggested that the standard of proof might vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned (para 5). He pointed out that the cases in which such statements were made fell into three categories. In the first were cases which the law classed as civil but in which the criminal standard was appropriate. Into this category came sex offender orders and anti-social behaviour orders: see *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 and *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787. In the second were cases which were not about the standard of proof at all, but about the quality of evidence. If an event is inherently improbable, it may take better evidence to persuade the judge that it has happened than would be required if the event were a commonplace. This was what Lord Nicholls was discussing in *Re H (Minors)*,

above, at p 586. Yet, despite the care that Lord Nicholls had taken to explain that having regard to the inherent probabilities did *not* mean that the standard of proof was higher, others had referred to a "heightened standard of proof" where the allegations were serious. In the third category, therefore, were cases in which the judges were simply confused about whether they were talking about the standard of proof or the role of inherent probabilities in deciding whether it had been discharged. Apart from cases in the first category, therefore, "the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that that the fact in issue more probably occurred than not" (para 13).

12. This did, of course, leave a role for inherent probabilities in considering whether it was more likely than not that an event had taken place. But, as Lord Hoffmann went on to point out at para 15, there was no necessary connection between seriousness and inherent probability:

> "It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

Lady Hale made the same point, at para 73:

> "It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

13. None of the parties in this case has invited the Supreme Court to depart from those observations, nor have they supported the comment made in the Court of Appeal that *Re B* "was a 'sweeping departure' from the earlier authorities in the House of Lords in relation to child abuse, most obviously the case of *Re H*" ([2009] EWCA Civ 1048, para 14). All are agreed that *Re B* reaffirmed the

principles adopted in *Re H* while rejecting the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", which had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said.

14. *Re B* was not a new departure in any context. Lord Hoffmann was merely repeating with emphasis what he had said in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, at para 55. A differently constituted House of Lords applied the same approach in *Re D (Secretary of State for Northern Ireland intervening)* [2008] UKHL 33, [2008] 1 WLR 1499.

15. In *Re B*, the House also declined an invitation to overrule the decision of the Court of Appeal in *Re M and R (Minors) (Sexual Abuse: Expert Evidence)* [1996] 4 All ER 239. This was concerned with the stage after the court is satisfied that the threshold has been crossed. The court has then to decide what order, if any, to make. The welfare of the child is the paramount consideration: 1989 Act, s 1(1). In deciding whether or not to make a care or supervision order, the court must have regard in particular to the so-called "checklist" of factors: 1989 Act, s 1(3), (4). These include "(e) any harm which he has suffered or is at risk of suffering".

16. In *Re M and R*, the Court of Appeal determined that section 1(3)(e) should be interpreted in the same way as section 31(2)(a). The court must reach a decision based on facts, not on suspicion or doubts. Butler-Sloss LJ said this:

> "[Counsel's] point was that if there is a real possibility of harm in the past, then it must follow (if nothing is done) that there is a risk of harm in the future. To our minds, however, this proposition contains a non sequitur. The fact that there might have been harm in the past does not establish the risk of harm in the future. The very highest it can be put is that what might possibly have happened in the past means that there may possibly be a risk of the same thing happening in the future. Section 1(3)(e), however, does not deal with what *might* possibly have happened or what future risk there *may* possibly be. It speaks in terms of what *has* happened or what *is* at risk of happening. Thus, what the court must do (when the matter is in issue) is to decide whether the evidence establishes harm or the risk of harm."

17. In agreeing with this approach in *Re B*, at para 56, Lady Hale commented that in such a case, "as indicated by Butler-Sloss LJ …, the 'risk' is not an actual risk to the child but a risk that the judge has got it wrong. We are all fallible human

beings, very capable of getting things wrong. But until it has been shown that we have, it has not been shown that the child is in fact at any risk at all". *Re M and R* was also approved by Lord Nicholls in *Re O and another (Minors) (Care: Preliminary Hearing)* [2003] UKHL 18, [2004] 1 AC 523, a case to which we shall return.

18. The House in *Re B* also recognised that courts and local authorities have different roles to play in protecting children from harm. It is worth re-emphasising this, given the understandable concerns in the wake of the "Baby P" case that social workers and other professionals were not being sufficiently active in their protective role, and the resulting increase in the numbers of care proceedings. Social workers are the detectives. They amass a great deal of information about a child and his family. They assess risk factors. They devise plans. They put the evidence which they have assembled before a court and ask for an order.

19. Article 6 of the European Convention on Human Rights requires that "In the determination of his civil rights and obligations, . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The court subjects the evidence of the local authority to critical scrutiny, finds what the facts are, makes predictions based upon the facts, and balances a range of considerations in deciding what will be best for the child. We should no more expect every case which a local authority brings to court to result in an order than we should expect every prosecution brought by the CPS to result in a conviction. The standard of proof may be different, but the roles of the social workers and the prosecutors are similar. They bring to court those cases where there is a good case to answer. It is for the court to decide whether the case is made out. If every child protection case were to result in an order, it would mean either that local authorities were not bringing enough cases to court or that the courts were not subjecting those cases to a sufficiently rigorous scrutiny.

The "whodunit" problem

20. So far the position is plain. But the threshold criteria do not in terms require that the person whose parental responsibility for the child is to be interfered with or even taken away by the order be responsible for the harm which the child has suffered or is likely to suffer in the future. It requires simply that "the harm, or likelihood of harm, is attributable to … the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him". Clearly, the object is to limit intervention to certain kinds of harm – harm which should not happen if a child is being looked after properly. But is it also intended to limit intervention to cases where the

person whose rights are to be interfered with bears some responsibility for the harm?

21. It cannot have been intended that a parent whose child has been harmed as a result of a lack of proper care in a hospital or at school should be at risk of losing her child. The problem could be approached through the welfare test, because removal from home would not be in the best interests of such a child. However, because of the risk of social engineering, the threshold criteria were meant to screen out those cases where the family should not be put at any risk of intervention. Hence attention has focussed on the attributability criterion. In the case confusingly reported in the Law Reports as *Lancashire County Council v B* [2000] 2 AC 147, but in the All England Law Reports as *Lancashire County Council v A* [2000] 2 All ER 97, the House of Lords considered what is meant by "the care given to the child". Does it mean only the care given by the parents or primary carers or does it mean the care given by anyone who plays a part in the child's care? Lord Nicholls, with whom Lord Slynn, Lord Nolan and Lord Hoffmann agreed, found that it referred primarily to the former. But if, as in that case, the care of the child was shared between two households and the judge could not decide which was responsible for the harm suffered by the child, the phrase "is apt to embrace not merely the care given by the parents or other primary carers; it is apt to embrace the care given by any of the carers" (p 166). Thus the criteria were satisfied in respect of a child, A, who had been injured, even though this might have been attributable to the care she had received from her childminder rather than from her parents.

22. Lord Clyde put the test in this helpful way, at p 169C, with the same result:

> "That the harm must be attributable to the care given to the child requires that the harm must be attributable to the acts or omissions of someone who has the care of the child and the acts or omissions must occur in the course of the exercise of that care. To have the care of a child comprises more than being in a position where a duty of care towards the child may exist. It involves the undertaking of the task of looking after the child."

23. However, it is worth noting that the Court of Appeal had confirmed that the criteria were not satisfied in respect of the childminder's child, B, because he had not been harmed at all. The only basis for suggesting that there was any likelihood of harm to him was the possibility that his mother had harmed the other child and that had not been proved: *Re H* applied. The local authority did not appeal against this.

24. *Re O and another (Minors)(Care: Preliminary Hearing)* [2003] UKHL 18, [2004] 1 AC 523 was concerned with the more common problem, where the child has been harmed at the hands of one of his parents but the court cannot decide which. The attributability condition was satisfied. Furthermore, when considering the welfare test, the court had to proceed on the basis that the child was at risk. Lord Nicholls, with whom all other members of the Committee agreed, said this, at para 27:

> "Quite simply, it would be grotesque if such a case had to proceed at the welfare stage on the footing that, because neither parent, considered individually, has been proved to be the perpetrator, therefore the child is not at risk from either of them. This would be grotesque because it would mean the court would proceed on the footing that neither parent represents a risk even though one or other of them was the perpetrator of the harm in question."

Lord Nicholls went on, at para 32, to give the following guidance, on the assumption that the hearing would be split into a "fact-finding" and a "disposal" stage and that each might be heard by a different judge:

> ". . . the judge at the disposal hearing will take into account any views expressed by the judge at the preliminary hearing on the likelihood that one carer was or was not the perpetrator, or a perpetrator, of the inflicted injuries. Depending on the circumstances, these views may be of considerable value in deciding the outcome of the application: for instance, whether the child should be rehabilitated with his mother."

25. In *Re B*, Lady Hale commented as follows at para 61:

> "The decisions in *In re H, Lancashire County Council v B* [2000] 2 AC 147, and *In re O* [2004] 1 AC 523 fit together as a coherent whole. The court must first be satisfied that the harm or likelihood of harm exists. Once that is established, . . . ,the court has to decide what outcome will be best for the child. It is very much easier to decide upon a solution if the relative responsibility of the child's carers for the harm which she or another child has suffered can also be established. But the court cannot shut its eyes to the undoubted harm which has been suffered simply because it does not know who was responsible. The real answers to the dilemma posed by those cases lie elsewhere – first, in a proper approach to the standard of

> proof, and second, in ensuring that the same judge hears the whole case. Split hearings are one thing; split judging is quite another."

26. We are told that practice has now changed and that, barring accidents, the same judge does conduct both parts of a split hearing. Nevertheless, the main object of splitting the hearing is to enable facts to be found. If the threshold is not crossed, the case can be dismissed at that stage. If it is crossed, the professionals can base both their assessments and their further work with the family upon the facts found. It is not at all uncommon for parents to become much more open with the professionals when faced with the judge's clear findings based upon what the evidence shows. Hence there should always be a judgment to explain his findings at that stage.

These proceedings

27. It was necessary to give the above account of the development of the law in order to understand what happened in these proceedings. The case was originally identified as suitable for a split hearing; then it was decided to hold a composite hearing; but for regrettable practical reasons, the hearing was split once more. By that stage, the father was playing no part, but for some unknown reason the local authority decided not to issue a witness summons to require his attendance. That is regrettable because the judge might well have found it easier to make clear findings had he given evidence. The mother played a full part in the proceedings and in the assessments, but only accepted that the bruises were non-accidentally caused after the possibility of a blood disorder had effectively been ruled out.

28. The judge heard evidence over three days in January 2008 and three further days in March. She handed down a detailed judgment in note form on 3 April. This was before the House of Lords' decision in *Re B.* At the outset, under the heading 'Test', she directed herself as follows:

> "The test I have applied in relation to these findings is that set out in the House of Lords case of [Re H] of 1996. The standard of proof I apply is on the balance of probability. The allegations in this case are very serious indeed and in many respects are also very unusual. When I apply the appropriate standard of proof, it has to be based on evidence of reliability and cogency equivalent to the gravity of the allegations."

29. She then listed five questions, three of which are relevant to the issue before this Court: first, whether the child had suffered non-accidental injury; second whether the perpetrator could be identified; and third "even if the perpetrator cannot be identified, can either of the parents be excluded as a perpetrator?" However, having concluded that the injuries were non-accidental, she did not in terms ask herself whether she could identify the perpetrator. She simply listed the various factors which she took into account in relation to each parent. She indicated at the outset of her list relating to the father that "there is a high index of suspicion in relation to the father" and concluded that he could not be ruled out. There was no such index in relation to the mother but for a variety of reasons the judge also concluded that the mother could not be ruled out.

30. The final hearing was listed for 5 June but could not proceed. As suggested in *Re O*, the judge was invited to give an indication of the relative likelihood of father or mother being responsible for the injuries, in order to assist with the assessment process. In oral exchanges she indicated that it was more likely that the father was the perpetrator than the mother. In a written "Adjunct to Judgment" she explained that "Invidious though it is to be too specific, but to help further assessments, I am prepared to say that I feel it 60% likely that the father injured the child and 40% likely that it was the mother."

31. The final hearing eventually took place before the same judge in December 2008 with judgment in January 2009. Part of the reason for the delay was that the mother had been unwell following the birth of her second child, William, in July. At the final hearing, the judge was invited to revisit her findings in the light of *Re B*, in which judgment was given on 11 June 2008. She declined to say that her finding meant that the father was the perpetrator of the injuries. She observed that:

> "When one is deciding these issues, a judge frequently reluctantly comes to the conclusion that he cannot decide who is to blame between two parents or among more than two people who have had care of the child over the relevant period. However, although unable to form a definitive decision to the requisite standard, a judge can still have an impression, falling short of a finding, that the propensity of the parties and the surrounding circumstances make it more likely that it was one party than another."

Hence the mother was not "absolved as a really possible or likely perpetrator". This meant that the threshold was crossed, not only in relation to the child who had suffered harm, but also in relation to the child who had not. The fact that there was a real possibility that she had caused the injuries to Jason meant that there was a real possibility that she would injure William.

32. After considering the welfare factors she concluded that the mother's vulnerable personality was such that she would need therapy in order to make the necessary changes so that she could provide a safe and stable upbringing for the children. Their lives could not be put on hold in the meantime. Hence the judge approved the care plan to place them both for adoption and made care and placement orders in respect of both children. She did, however, give the mother permission to appeal but this was not included in the original order drawn up by the court.

33. Lord Justice Wall also gave permission to appeal, observing that the case "provides a useful opportunity for the Court of Appeal to resolve a point which has arisen following the decision of the House of Lords in *Re B*, namely (1) if only parents are 'in the frame' for having injured a child but (2) the judge cannot as between parents identify the perpetrator of the injuries, can that judge (3) apportion likely responsibility between them?" Before the Court of Appeal, however, this was not the main issue. It was argued that, following *Re B*, the test for identifying the perpetrator was the balance of probabilities and that the effect of the "Adjunct to judgment" was that this judge had in fact identified the father. The appeal was dismissed: [2009] EWCA Civ 1048.

Identifying the perpetrator: the standard of proof

34. The first question listed in the statement of facts and issues is whether it is now settled law that the test to be applied to the identification of perpetrators is the balance of probabilities. The parties are agreed that it is and they are right. It is correct, as the Court of Appeal observed, that *Re B* was not directly concerned with the identification of perpetrators but with whether the child had been harmed. However, the observations of Lord Hoffmann and Lady Hale, quoted at paragraph 12 above, make it clear that the same approach is to be applied to the identification of perpetrators as to any other factual issue in the case. This issue shows quite clearly that there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less.

35. Of course, it may be difficult for the judge to decide, even on the balance of probabilities, who has caused the harm to the child. There is no obligation to do so. As we have already seen, unlike a finding of harm, it is not a necessary ingredient of the threshold criteria. As Lord Justice Wall put it in *Re D (Care Proceedings: Preliminary Hearings)* [2009] EWCA Civ 472, [2009] 2 FLR 668, at para 12, judges should not strain to identify the perpetrator as a result of the decision in *Re B*:

> "If an individual perpetrator can be properly identified on the balance of probabilities, then . . . it is the judge's duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification."

36. There are particular benefits in making such a finding in this context, especially where there is a split hearing. Miss Frances Judd QC, on behalf of the children's guardian in this case, has stressed that the guardian would rather have a finding on the balance of probabilities than no finding at all. There are many reasons for this. The main reason is that it will promote clarity in identifying the future risks to the child and the strategies necessary to protect him from them. For example, a different care plan may be indicated if there is a risk that the parent in question will ill-treat or abuse the child from the plan that may be indicated if there is a risk that she will be vulnerable to relationships with men who may ill-treat or abuse the child.

37. Another important reason is that it will enable the professionals to work with the parent and other members of the family on the basis of the judge's findings. As the Court of Appeal said in *Re K (Non-Accidental Injuries: Perpetrator: New Evidence)* [2004] EWCA Civ 1181, [2005] 1 FLR 285, at para 55:

> "It is paradigmatic of such cases that the perpetrator denies responsibility and that those close to or emotionally engaged with the perpetrator likewise deny any knowledge of how the injuries occurred. Any process, which encourages or facilitates frankness, is, accordingly, in our view, to be welcomed in principle."

Often, it is not only the parents, but the grandparents and other members of the family, who may be the best resource to protect the child in the future but who are understandably reluctant to accept that someone close to them could be responsible for injuring a child. Once that fact is brought home to them by a clear finding based upon the evidence, they may be able to work with the professionals to keep the child within the family.

38. *Re K* also suggested, at para 56, that there would be long term benefits for the child, whatever the outcome of the proceedings:

> ". . . we are also of the view that it is in the public interest that children have the right, as they grow into adulthood, to know the truth about who injured them when they were children, and why. Children who are removed from their parents as a result of non-accidental injuries have in due course to come to terms with the fact that one or both of their parents injured them. This is a heavy burden for any child to bear. In principle, children need to know the truth if the truth can be ascertained."

If the judge cannot identify a perpetrator?

39. The second and third questions in the statement of facts and issues ask whether judges should refrain from seeking to identify perpetrators at all if they are unable to do so on the civil standard and whether they should now be discouraged from expressing a view on the comparative likelihood as between possible perpetrators. These appear to be linked but they are distinct.

40. As to the second, if the judge cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the "attributability" criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run.

41. In *North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of a "likelihood or real possibility".

42. Miss Susan Grocott QC, for the local authority, has suggested that this is where confusion has crept in, because in *Re H* this test was adopted in relation to the prediction of the likelihood of future harm for the purpose of the threshold criteria. It was not intended as a test for identification of possible perpetrators.

43. That may be so, but there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible for the harm suffered. This is, as the President indicated, to set the bar far too high. It suggests that parents and other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case.

44. As to the third question, times have changed since *Re O*. Barring unforeseen accidents, the same judge will preside over both parts of the hearing. While it is helpful to have a finding as to who caused the injuries if such a finding can be made, the guardian's view is that it is positively unhelpful to have the sort of indication of percentages that the judge was invited to give in this case. Lord Justice Thorpe suggested, [2009] EWCA Civ 1048, para 17, that judges should be cautious about amplifying a judgment in which they have been unable to identify a perpetrator: "better to leave it thus". We agree.

The unasked question

45. If the judge can identify a perpetrator on the balance of probabilities, what is to be done about the risk that he may be wrong and that some-one else was in fact responsible? We are indeed all fallible human beings. We can make mistakes, however hard we try to pay careful attention to the quality of the evidence before us and reach findings which are rationally based upon it.

46. However, once the court has identified a perpetrator, the risk is not a proven risk to the child but a risk that the judge has got it wrong. Logically and sensibly, although the judge cannot discount that risk while continuing to hear the case, he cannot use it to conclude that there is a proven risk to the child. But all the evidence (if accepted by the judge) relating to all the risk factors that the judge has identified remains relevant in deciding what will be best for the child. And he must remain alive to the possibility of mistake and be prepared to think again if evidence emerges which casts new light on the evidence which led to the earlier findings. It is now well settled that a judge in care proceedings is entitled to revisit an earlier identification of the perpetrator if fresh evidence warrants this (and this Court saw an example of this in the recent case of *Re I (A Child)* [2009] UKSC 10). The guardian also submits that the professionals will find it easier to work with this approach.

47. It is important not to exaggerate the extent of the problem. It only really arises in split hearings, which were not originally envisaged when the Children Act was passed. In a single hearing the judge will know what findings of fact have to be made to support his conclusions both as to the threshold and as to the future welfare of the child. Moreover, cases rarely come as neatly packaged as this one does. In most cases, the injuries are such that, even if one parent was not responsible for causing them, she was undoubtedly responsible for failing to protect the child from the person who did cause them. In many cases, there are other risks to the child besides the risk of physical injury. The evidence which is relevant to identifying the perpetrator will also be relevant to identifying the other risks to the child and to assessing what will be best for him in the future. But clearly the steps needed to protect against some risks will be different from the steps needed to protect against others. And the overall calculus of what will be best for the child in the future will be affected by the nature and extent of the identified risks. There are many, many factors bearing upon the child's best interests and the identification of risks is only one of them.

The conclusion in this case

48. We have every sympathy for the judge, who was only repeating the mantra which many other judges at every level had repeated in the past. But it is clear that she did misdirect herself on the standard of proof at the fact-finding hearing. Because she later said that she had simply been unable to decide, we do not think that we can accept the invitation of Mr Anthony Hayden QC, on behalf of the mother, to treat her "Adjunct to judgment" as a finding that the father was the perpetrator. That was not what she thought she was doing. However, that was an ex post facto rationalisation on her part. We cannot know what finding she would have made had she directed herself correctly in the first place. It is only right, for the sake of these children and their mother, that they should have the whole case put before a different judge who can decide the matter on the right basis.

49. There is a further reason to remit the case. The judge found the threshold crossed in relation to William on the basis that there was a real possibility that the mother had injured Jason. That, as already explained, is not a permissible approach to a finding of likelihood of future harm. It was established in *Re H* and confirmed in *Re O*, that a prediction of future harm has to be based upon findings of actual fact made on the balance of probabilities. It is only once those facts have been found that the degree of likelihood of future events becomes the "real possibility" test adopted in *Re H*. It might have been open to the judge to find the threshold crossed in relation to William on a different basis, but she did not do so.

50. The case may look very different now that the mother's life has moved on and in the mean time, thankfully, the children have been well protected from harm. The appeal is therefore allowed and the case remitted for a complete rehearing before a different judge.

24 March 2010

PRESS SUMMARY

British Airways plc (Respondent) v Ms Sally Williams and others (Appellants) [2010] UKSC 16; *on appeal from [2009] EWCA Civ 281*

JUSTICES: Lord Walker, Lady Hale, Lord Brown, Lord Mance and Lord Clarke

BACKGROUND TO THE APPEAL

Pilots working for British Airways plc are entitled to at least four weeks "paid annual leave". While on leave, a pilot is paid his or her basic fixed pay. A pilot on leave is not paid two types of supplement (the 'Flying Pay Supplement' and the 'Time Away from Base Allowance') which he or she would receive if at work as additional pay for hours spent flying and being away from base. The two types of allowance are subject to limits (because of limits to the permissible hours spent flying or on duty) which limits pilots might already have reached.

The requirement that civil aviation workers receive "paid annual leave" is implemented in the UK by the Civil Aviation (Working Time) Regulations 2004, which enforces domestically the UK's obligations under Council Directive 2000/79/EC of 27 November 2000 (the Aviation Directive). The term "paid annual leave" is found in the Working Time Directive (Council Directive 93/104/EC) as well as the Aviation Directive.

The pilots brought claims against British Airways arguing that they were entitled to both types of supplement, in addition to basic fixed pay, as part of their "paid annual leave". The Employment Tribunal and the Employment Appeal Tribunal both agreed the pilots were entitled to the supplements. The Court of Appeal allowed the appeal of British Airways, finding that "paid annual leave" encompassed basic fixed pay only.

JUDGMENT

*In a judgment delivered by Lord Mance, the Supreme Court unanimously holds that the appeal raises an issue of general principle and that the answer is not obvious. It raises a number of questions relating to the definition of "paid annual leave" under European Union law. Consequently, the Supreme Court is under a duty to refer the questions in issue in the appeal to the European Court of Justice (paras **[18], [30]**).*

REASONS FOR THE JUDGMENT

- The questions referred to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union are:
  (i) Under (a) articles 7 of Council Directives 93/104/EC and 2003/88/EC and (b) clause 3 of the European Agreement annexed to the Council Directive 2000/79/EC: (1) to what, if any, extent does European law define or lay down the any requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave; and (2) to what, if any, extent may Member States determine how such payments are to be calculated?

(ii) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?

(iii) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's "normal" pay?

Further, in the event of an affirmative answer to question (iii)(a) or (b):

(iv) Is the relevant measure or comparison (a) pay that the worker would have earned during the particular leave period if he or she had been working, instead of on leave, or (b) pay which he or she was earning during some other, and if so what, period when he or she was working?

(v) How should "normal" or "comparable" pay be assessed in circumstances where (a) a worker's remuneration while working is supplemented if and to the extent that he or she engages in a particular activity; (b) where there is an annual or other limit on the extent to which, or time during which, the worker may engage in that activity, and that limit has been already exceeded or almost exceeded at the time(s) when annual leave is taken, so that the worker would not in fact have been permitted to engage in that activity had he been working, instead of on leave? (para **[30]**)

- The Court notes that the legal basis of the relevant Directives was to protect health and safety. The present leave arrangements for pilots with British Airways do not pose a risk to health and safety, and pilots do in fact take their leave. It is not clear from the case law of the Court of Justice whether "paid annual leave" has a closely defined autonomous European meaning or whether individual Member States retain a discretion to define the term and its application (paras **[19]-[20], [25]-[26]**).

- Previous cases in which the Court of Justice has considered the term "paid annual leave" were in a different context to the present case. It is not clear to the Court what was intended by previous cases requiring that holiday pay should be "comparable" to the employee's "normal remuneration", or what that would involve in the present circumstances (paras **[27]-[29]**).

Hilary Term
[2010] UKSC 16
On appeal from: A2/2008/0632

JUDGMENT

British Airways plc (Respondents) *v* Williams (Appellant) and others

before

Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Clarke

JUDGMENT GIVEN ON

24 March 2010

Heard on 24 and 25 February 2010

Appellant
Jane McNeill QC
Michael Ford
(Instructed by Thompsons Solicitors)

Respondent
Christopher Jeans QC
Andrew Short
(Instructed by Baker and Mackenzie LLP)

LORD MANCE (delivering the judgment of the court)

The relevant law

1. This appeal concerns the concept of "paid annual leave" for crew members employed in civil aviation appearing in regulation 4 of The Civil Aviation (Working Time) Regulations 2004 (SI 2004 No. 756) ("the Aviation Regulations"). These Regulations were introduced under s.2(2) of the European Communities Act 1972 to comply with the United Kingdom's obligations under Council Directive 2000/79/EC of 27 November 2000 ("the Aviation Directive"), the purpose of which was in turn to implement the European Agreement on the organisation of working time of mobile staff in civil aviation dated 22 March 2000 ("the European Agreement") annexed to the Directive.

2. Clause 3 of the European Agreement reads:

> "1. Mobile staff in civil aviation are entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.
> 2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

3. The Aviation Regulations provide:

> "4.-(1) A crew member is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in
> respect of a period of employment of less than one year.
> (2) Leave to which a crew member is entitled under this regulation-
> (a) may be taken in instalments;
> (b) may not be replaced by a payment in lieu, except where the crew member's employment is terminated."

4. The Aviation Regulations and Directive are part of a wider complex of legislation requiring paid annual leave. Council Directive 93/104/EC of 23 November 1993 ("the Working Time Directive") introduced a general requirement that Member States take measures to ensure that "every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or

practice" (article 7(1)). But it excepted various mobile sectors of activity, viz "air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training" (article 1(3)), and further stated that its provisions should not apply "where other Community instruments contain more specific requirements concerning certain occupations or occupational activities" (article 14).

5. The Working Time Directive was implemented domestically, with exceptions matching those of the Directive, by the Working Time Regulations 1998 (SI 1998 No. 1833) ("the Working Time Regulations"). These Regulations (as amended by the Working Time (Amendment) Regulations 2001 (SI 2001 No. 3256)) provide that a worker is "entitled to four weeks' annual leave in each leave year" (regulation 13) and "entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 at the rate of a week's pay in respect of each week of leave" (regulation 16(1)). Regulations 16(2) and (3) make ss.221 to 224 (and by implication also, it has been held, ss.234-235) of the Employment Rights Act 1996 applicable to the determination of the amount of a week's pay for the purposes of regulation 16. Ss.221 to 224 contain a detailed scheme (originally introduced in the context of redundancy pay) for ascertaining a week's pay in the cases of employments with and without "normal working hours". The scheme includes provisions governing the differing situations of remuneration varying (s.221(3)) and not varying (s.221(2)) with the amount of work done and of remuneration varying according to the times of day or days of the week in which work is required to be done (s.222); as well as provisions governing employments with no normal working hours (s.224). Where the remuneration varies according to the amount, time or hours of work, the computation of weekly pay falls to be derived from an examination of an average position over a defined period of twelve weeks preceding the relevant calculation date, itself defined (ss.221(3), 222 and 224). Under s.234, in the case of an employee who is entitled to overtime pay when employed for more than a fixed number of hours in a week, the employee's "normal working hours" are the number of hours so fixed - unless the contract also fixes a number of hours of overtime which the employer is bound to provide and the worker bound to work, in which case, the employee's "normal working hours" consist in the total number of fixed hours (so excluding any voluntary overtime): *Tarmac Roadstone Holdings Ltd. v Peacock* [1973] ICR 273 (CA); the same interpretation of s.234 has been applied to a claim under Regulation 16 of the Working Time Regulations: *Bamsey v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359; [2004] ICR 1083 (CA).

6. The exceptions from the Working Time Directive were in due course addressed. Council Directive 1999/63/EC of 21 June 1999 gave effect to a European Agreement dated 30 September 1998 entitling non-fishing seafarers to paid annual leave on the same basis as was in 2000 provided for mobile staff in

civil aviation (paragraph 2 above). This was in turn given domestic effect by The Merchant Shipping (Hours of Work) Regulations 2002 (SI 2002 No. 2125) ("the non-fishing Seafarers Regulations"), in language identical as regards paid annual leave to that of the Aviation Regulations (paragraph 3 above), with the substitution of the word "seafarer" for "crew member" (regulation 12).

7. Directive 2000/34/EC of 22 June 2000 extended the application of the Working Time Directive to all sectors of activity, excluding seafarers as defined in Council Directive 1999/63/EC, and gave Member States until 1 August 2003 to achieve this. However, it also replaced article 14 of the Working Time Directive with a provision that that Directive should "not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities". With effect from 2 August 2004, the Working Time Directive as extended and amended has been replaced by a consolidated Working Time Directive 2003/88/EC of 4 November 2003, but article 7 remains in identical terms to article 7 of the original Working Time Directive of 1993.

8. The Aviation Directive of 27 November 2000 was a specific Community instrument within article 14 of the Working Time Directive and was, as stated, implemented domestically in 2004 by the Aviation Regulations. The extension of the Working Time Directive in its original and consolidated form to other mobile workers was further implemented domestically by inter alia The Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 (SI 2003 No. 3049) made 23 December 2003 and The Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 (SI 2004 No. 1713) made 16 August 2004. In these two sets of Regulations, governing inland waterway workers and sea-fishermen, regulation 11(1) entitles such workers "to" (or, in the case of the latter, "to at least") "four weeks' annual leave and to be paid in respect of any such leave at the rate of a week's pay in respect of each week of leave". They go on to apply ss.221 to 224 for the purpose of determining the amount of a week's pay for the purposes of the right to four weeks' paid annual leave, and to define the relevant calculation date for the purposes of the twelve week period as "the first day of the period of leave in question". They also provide specifically for a worker to be able to complain of failure to pay any amount due under regulation 11(1).

9. In contrast, neither the non-fishing Seafarers Regulations of 2002 nor the Aviation Regulations made 13 April 2004 contain any detailed provisions which either define the nature or amount of the payment to be made during annual leave or apply ss.221 to 224 of the 1996 Act for that purpose. Nor do they provide specifically for the consequences of failure to pay for annual leave (though the Aviation Regulations entitle a worker to complain of a refusal "to permit him to exercise any right" to paid annual leave, while the non-fishing Seafarers Regulations make contravention by an employer of regulation 12, entitling

seafarers to paid annual leave of at least four weeks, a criminal offence). These domestic distinctions can only have been deliberate. It is common ground now that ss.221 to 224 cannot apply to aviation crew members. This appeal therefore turns on the meaning of the phrase "paid annual leave", which is all that the United Kingdom legislator has relevantly enacted. The phrase cannot of course be construed in a vacuum. The Aviation Directive is not directly applicable, certainly not against British Airways which is not an emanation of the state. But it is our duty, as far as possible, to construe the phrase in the domestic Regulations consistently with any requirement inherent in the identical phrase used in clause 3(1) of the European Agreement to which Member States are required to give effect by the Aviation Directive: see e.g. *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, paragraph 8; *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397-404/01) [2004] ECR I-8835, paragraphs 111-113 and, most recently, *Seda Kücükdeveci v Swedex GmbH & Co. KG*, (Case C-555/07) (judgment of 19 January 2010) paragraphs 44-48.

10. Strictly, the European Agreement is an agreement between private associations representing airlines on the one hand and aviation workers on the other. As such, its meaning might be capable of being influenced by the circumstances in which it was negotiated, any travaux préparatoires and even statements made during its negotiation. But no evidence of that nature was put before the Employment Tribunal which considered the present case, and all that the Tribunal records (paragraph 37) is that the issue of holiday pay "was not high on the agenda" of those representing the interests of aviation workers when the Agreement was reached. The reality is that clause 3 of the European Agreement adopted identical wording to article 7 of the Working Time Directive. The natural inference is that it was intended to have the same effect in law and there is nothing to suggest the contrary.

The facts

11. The factual context in which the phrase "paid annual leave" has presently to be understood and applied is as follows. The appellants are pilots employed by British Airways plc. In practice the terms of their employment were and are negotiated with British Airways by the pilots' union, British Air Line Pilots Association ("BALPA"). These terms are currently found in a Memorandum of Agreement ("MOA") dated 1 April 2005. The Court understands that, for present purposes, the terms of this MOA mirror those applicable under previous similar agreements going back to before 2000. Under the MOA (and consistently with the Aviation Directive and Regulations) British Airways pilots are required to take 30 days' annual leave and are entitled to take a further two weeks' leave, save for pilots with a Gatwick base who are obliged to take 35 days' holiday and are entitled to a further seven days of leave.

12. Under the MOA, read with collectively agreed "bidline" rules, pilots' remuneration includes three components relevant to this case. The first consists of a fixed annual sum. The second and third consist of supplementary payments varying according to time spent flying (the "Flying Pay Supplement" or "FPS", paid at £10.00 per planned flying hour) and time spent away from base (the "Time Away from Base Allowance" or "TAFB", paid at £2.73 per hour). The whole of the FPS is remuneration and taxable. 82% at the relevant time of the TAFB is treated as having been paid on account of expenses, so that only 18% is treated as remuneration and taxable.

13. There are limits to the FPS and TAFB which a pilot or other crew member can earn. Regulation 9 of the Aviation Regulations requires every employer to ensure that:

> "in any month
> (a) no person employed by him shall act as a crew member during the course of his working time, if during the period of 12 months expiring at the end of month before the month in question the aggregate block flying time of that person exceeds 900 hours; and
> (b) no crew member employed by him shall have a total annual working time of more than 2,000 hours during the period of 12 months expiring at the end of the month before the month in question".

14. The amount of time a pilot spends flying will depend upon his or her route and roster. It could typically be about 15 days a month. The Court has been given a schedule of payments made to the first appellant, Ms Williams. This indicates that, in the calendar year 2006, she took 25 working days leave in periods of between one and eight days in five different months, and received total fixed pay of £96,452.36, total FPS of £8,510 and total taxable TAFB of £1,038.49. Total FPS of £8,510 is indicative (at £10 an hour) of 851 flying hours. If that is so, then, had Ms Williams continued to fly at this rate during leave periods, it appears that she would or might have exceeded the maximum permitted annual number of 900 flying hours. Total taxable TAFB of £1,038.49 gives total TAFB of £5,769.39 (£1,038.49 x 100 ÷ 18: see paragraph 12 above), indicative of 2,113 hours away from base. Again, had Ms Williams continued to fly during leave periods, it appears that she would or might have exceeded the maximum total annual working time of 2,000 hours. However, whether this be so or not in her case in relation to FPS or TAFB, a crew member could clearly be in this position in practice, i.e. in a position where during the 12 month period prior to taking any particular leave, he or she had already completed all or almost all of his or her permitted annual flying or working time.

The issue and submissions

15. It is common ground that, upon a true construction of the MOA and so as a matter of contract, the payment to be made in respect of annual leave is based on the first component of remuneration only, that is the fixed annual sum. The question is whether this was and is permissible under the Aviation Regulations, interpreted in the light of the Aviation Directive. This question was first raised in 2005 following the introduction of the Aviation Regulations on 13 April 2004. The Court understands that it has been raised not merely by British Airways pilots, but also by other airlines' pilots and other aviation crew under contractual arrangements not before the Court. Before the Employment Tribunal and Employment Appeal Tribunal, the appellants argued, successfully, that they were entitled under European and domestic law to payment at a weekly rate based on all three components of remuneration (which both Tribunals said should be calculated by analogy with ss.221-4, despite the inapplicability of these sections). The Court of Appeal accepted British Airways' contrary case under both European and domestic law.

16. British Airways' case operates at various levels:

(i) British Airways' first submission is that (a) the United Kingdom legislator must be taken (when deciding not to enact any detailed provisions to define the nature or amount of the payment to be made during annual leave or to apply ss.221 to 224 of the 1996 Act: see paragraph 9 above) to have intended that the amount of any payment to be made to aviation workers (and non-fishing seafarers) in respect of their annual leave should be determined by collective or individual contractual agreement between the relevant parties; and (b) the domestic legislative intention being in this respect clear, it must prevail, whatever the effect may be of the Aviation Directive.

(ii) Second, however, if and to the extent that, contrary to the first submission, the meaning of the Aviation Regulations can be derived from the Aviation Directive, British Airways submits that the Aviation Directive is to the same effect.

(iii) (a) Third, British Airways qualifies its first two submissions only to the extent that it accepts that the payment for annual leave could not, under domestic or European law, be so low as to prevent or inhibit the taking of leave. Pay during weeks of annual leave at the rate of £96,452 per annum or £1,854.85 per week could hardly be said to fall within this qualification. Accordingly, British Airways contends that the contractual arrangements between them and their pilots are legitimate.

(b) The appellants' contrary submission of law is that the Aviation Directive requires the payment in respect of annual leave of "normal

remuneration" in order to ensure that the worker is on leave in a position which is "comparable" to that when he or she is at work.

(c) There is however disagreement about what this would mean in circumstances such as the present. In particular, on that basis of what "periods" is "normality" or any comparison to be established? And on the basis of what hypotheses? The latter question is relevant where, as may well be the case here, the worker was subject to annual limits which would have precluded him or her from undertaking particular work and receiving particular payments additional to his or her basic salary.

(iv) Fourth, British Airways submits (in response to this submission by the appellants) that, if the phrase "paid annual leave" involves payment of "normal" or "comparable" remuneration, then, in the present case, payment in respect of annual leave based on the fixed annual remuneration to which pilots are entitled satisfies this requirement.

17. The Court is not presently persuaded by British Airways' first submission. Of course, whether domestic legislation is capable of being interpreted consistently with the meaning of the Directive will or may depend upon what that meaning is. But, bearing in mind the possible meanings which appear, the Court's present view is that it is likely to be possible to construe the Regulations so as to comply with whatever meaning the Directive may have, even if the domestic position would otherwise be that for which British Airways contends by its submission at (i)(a) above. This is so, even though the determination of the relevant weekly rate will pose difficulties for the employment tribunals who will have to engage with this exercise, in circumstances where there is no detailed scheme and ss.221 to 224 of the 1996 Act do not apply.

18. British Airways' second and third submissions raise questions regarding (a) the meaning of the phrase "paid annual leave" in the Aviation Directive and (b) the extent of the freedom for national legislation and/or practice to lay down "conditions for entitlement to, and granting of, such leave" [i.e. paid annual leave]. The determination of these questions is in the Supreme Court's view necessary for the resolution of this appeal. There are statements in the Court of Justice's recent case-law (discussed below) which, on their face, are adverse to British Airways' second and third submissions (paragraph 16(ii) and (iii)(a) above) and favour the appellants' case that the Aviation Directive requires payment of "normal" or "comparable" remuneration (paragraph 16(iii)(b) above). But these statements were made in very different contexts to the present, and, further, do not specifically address the point identified in paragraph 16(iii)(c) above. The position in a case such as the present is not in the Supreme Court's view *acte clair* and the Supreme Court therefore makes this reference.

Analysis

19. In case it may assist the Court of Justice, the Supreme Court adds these observations. British Airways submits that the concept of paid annual leave is to be understood in the context in which the Working Time and Aviation Directives were enacted, namely the promotion of the health and safety of workers. That context appears from *United Kingdom v Council of the European Union* (Case C-84/94) [1996] ECR I-5755; [1997] ICR 443. The Court of Justice there upheld (save in one presently immaterial respect relating to Sunday working) the validity of the adoption of the Working Time Directive under article 118a of the European Community Treaty. Article 118a entitled the Council, by qualified majority voting, to "adopt by means of Directives, minimum requirements for gradual implementation" to encourage "improvements, especially in the working environment, as regards the health and safety of workers". (Subsequent to the Treaty of Nice, the relevant article became article 137, entitling the Community to support and complement the activities of Member States in the fields of, inter alia, "improvement in particular of the working environment to protect workers' health and safety". It is, since the Treaty of Lisbon, article 153 in similar terms.) In *R(BECTU) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ECR I-4881; [2001] ICR 1152, the Court of Justice again stressed the importance of "the general principles of protection of the health and safety of workers" and the aim of "ensuring effective protection of … health and safety" (paragraphs 40 and 44), when holding impermissible a provision of the then Working Time Regulations, according to which no entitlement to paid annual leave arose until an employee had been continuously employed for 13 weeks. The entitlement to paid annual leave was "a particularly important principle of Community social law from which there can be no derogations" (paragraph 43) and the Directive did not allow Member States either to make subject to any preconditions or to "exclude the very existence of" a right granted to all workers (paragraphs 53 and 55). Recital (11) to the Aviation Directive of 27 November 2000 confirms (unsurprisingly) that its objectives are precisely the same as those of the Working Time Directive, viz. "to protect workers' health and safety".

20. British Airways submits that paid annual leave therefore requires payment at a level which ensures that annual leave can be taken and enjoyed, that is payment which does not frustrate or undermine the purpose of the relevant Working Time or Aviation Directive. The Supreme Court would agree that the present arrangements with pilots employed by British Airways could not be regarded as posing any such risk to their health or safety. There is no suggestion that they do or could prevent or deter pilots or crew members from taking annual leave (even to the limited extent that they are free not to do so). On the contrary, the Employment Tribunal referred (paragraph 38) to a consensus that British Airways pilots not based at Gatwick do in practice take the extra two weeks' voluntary leave to which they are entitled.

21. British Airways also points out that, in *United Kingdom v Council*, the Court of Justice referred to Member States' freedom to lay down detailed implementing provisions in general terms, when it said in paragraph 47 that:

> "Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States."

22. Recital (12) to the Aviation Directive also indicates that Member States are to be free to define any terms used in the annexed European Agreement in accordance with national law and practice, providing that the definitions are consistent with the Agreement. In British Airways' submission, the freedom to enact detailed implementing provisions and the freedom to leave matters to national practice allow Member States either to introduce detailed provisions along the lines of ss.221 to 224 of the 1996 Act or to leave it to contracting parties to agree on terms as regards pay, so long as these do not frustrate or undermine the taking and enjoyment of annual leave.

23. The appellants, in relation to this latter point, rely upon further statements in *BECTU* as indicating a narrow view of Member States' discretion under clause 3 of the Aviation Directive. In his opinion in that case, Advocate General Tizzano said at paragraph 34:

> "It is not of course my intention to deny that the expression in question means that reference must be made to national legislation and therefore that the Member States enjoy some latitude in defining the arrangements for enjoyment of the right to leave. In particular, as the Commission also points out, the reference is intended to allow the Member States to provide a legislative framework governing the organisational and procedural aspects of the taking of leave, such as planning holiday periods, the possibility that a worker may have to give advance notice to the employer of the period in which he intends to take leave, the requirement of a minimum period of employment before leave can be taken, the criteria for proportional calculation of annual leave entitlement where the employment relationship is of less than one year, and so forth. But these are precisely measures intended to determine the 'conditions for entitlement to, and granting of, leave and as such are allowed by the

> Directive. What, on the other hand, does not seem to be allowed by the Directive is for national legislation and/or practice to operate with absolutely (or almost) no restrictions and to go so far as to prevent that right from even arising in certain cases."

24. The Court of Justice referred to this passage in its judgment (paragraph 53):

> "The expression 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice' must therefore be construed as referring only to the arrangements for paid annual leave adopted in the various Member States. As the Advocate General observed in paragraph 34 of his Opinion, although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, Member States are not entitled to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever."

25. British Airways point out that both these passages were specifically directed to explaining why the Directive did not permit Member States to remove entirely any right to paid annual leave in particular circumstances. They were not concerned with the permissibility of defining "paid annual leave" or of leaving it to parties to define, in a way which does not undermine its taking or its enjoyment.

26. The appellants submit, however, that the Court of Justice's later case-law contains statements establishing that "paid annual leave" must now be regarded as having achieved a closely defined autonomous European meaning: any payment in respect of annual leave must correspond with the employees' "normal" remuneration in order to ensure that the worker is, when on leave, in a position which is "comparable" to that when he or she is at work. They rely on statements to this effect in the Court of Justice's judgments in *Robinson-Steele v RD Retail Services Ltd.* (Cases C-131 and 257/04) [2006] ECR I-2531; [2006] ICR 932, paragraphs 50 and 57 to 59 and in *Stringer v Revenue and Customs Commissioner* (Case C-520/06) [*R (D) v Secretary of State for the Home Department* [2005] EWHC 728 (Admin) 2009] ECR I-179; [2009] ICR 932, paragraphs 57 to 62. In *Robinson-Steele*, the Court of Justice repeated that Member States "must ensure that the detailed national implementing rules take account of the limits flowing from the Directive itself" (paragraph 57) and went on:

> "58 The Directive treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work.
>
> 59 Accordingly, without prejudice to more favourable provisions under article 15 of the Directive, the point at which the payment for annual leave is made must be fixed in such a way that, during that leave, the worker is, as regards remuneration, put in a position comparable to periods of work."

27. This was, however, again said in a very different context from the present. Part payments, ostensibly for holiday pay, were staggered over the corresponding annual period of work and paid together with remuneration for work done, leaving nothing specifically payable in respect of the weeks of leave. Further, the Court allowed such staggered payments, where transparently and comprehensibly attributable to annual leave, to be set off against the claim for holiday pay. An earlier statement (in paragraph 50) that "workers must receive their normal remuneration for that period of rest" was also said in a very different context. There had been agreement to attribute to holiday pay part of a sum which had previously been being paid as remuneration for work; the remuneration paid for work done was in other words being effectively reduced, by an amount attributed to the (staggered) holiday pay.

28. In *Stringer*, paragraphs 57 to 62, the Court of Justice cited *Robinson-Steele* as authority that "the expression 'paid annual leave' means that, for the duration of annual leave …, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest" (paragraphs 58 and 61), and explained this on the basis that the purpose was "to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work" (paragraph 60). Two points however arise. First, once again, the context was quite different from the present. The issue in *Stringer* was whether employees absent on sick leave throughout an entire leave year were entitled to take their leave after the end of that year or, (since their employment had in fact terminated) to receive payment in lieu. In that context, the Court repeated the statements in *BECTU* (paragraphs 53 and 55: see paragraph 19 above) that Member States are not entitled to exclude, or make subject to any preconditions, the very existence of a right deriving from the Directive.

29. Second, the Court of Justice's use of the word "comparable" in *Stringer* is itself to be compared with the Advocate General's suggestion (in paragraphs 90-91 of her opinion) that a worker should receive an allowance in lieu "equivalent" to that of his normal pay. The choice of the wording "comparable" to periods of work

to explain the concept of normal remuneration was no doubt deliberate. On one view, it indicates that the Court of Justice had in mind a relationship between pay while working and pay in respect of annual leave which was or could be more general and looser than the "equivalence" which the Advocate General would have favoured. In a sense, of course, even very different things are usually capable of a comparison, which will highlight the differences. The Court of Justice cannot have meant comparison in this sense. Nonetheless, it may have meant "comparable" in the sense of roughly similar (although this still leaves for consideration whether the right comparison was with pay which the worker could have earned if he or she had been working instead of on leave, or was earning during some other and. if so what, period) – or it may, perhaps, have meant sufficiently similar to achieve the aim of the Directive, that is ensuring that employees could and would take and enjoy a restful - or at all events restorative - annual leave.

The questions referred

30. In these circumstances, the Supreme Court refers to the Court of Justice these questions:

(i) Under (a) articles 7 of Council Directives 93/104/EC and 2003/88/EC and (b) clause 3 of the European Agreement annexed to the Council Directive 2000/79/EC: (1) to what, if any, extent does European law define or lay down any requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave; and (2) to what, if any, extent may Member States determine how such payments are to be calculated?

(ii) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and workers, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?

(iii) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's "normal" pay?

Further, in the event of an affirmative answer to question (iii)(a) or (b):

(iv) Is the relevant measure or comparison (a) pay that the worker would have earned during the particular leave period if he or she had been working, instead of on leave, or (b) pay which he or she was earning during some other, and if so what, period when he or she was working?

(v) How should “normal” or “comparable” pay be assessed in circumstances where (a) a worker’s remuneration while working is supplemented if and to the extent that he or she engages in a particular activity; (b) where there is an annual or other limit on the extent to which, or time during which, the worker may engage in that activity, and that limit has been already exceeded or almost exceeded at the time(s) when annual leave is taken, so that the worker would not in fact have been permitted to engage in that activity had he been working, instead of on leave?

24 February 2010

PRESS SUMMARY

Norris (Appellant) v Government of the United States of America (Respondent)
[2010] UKSC 9
On appeal from the High Court of Justice [2009] EWHC Admin 995

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

BACKGROUND TO THE APPEAL

The United States Government is seeking the extradition of the appellant, Mr Norris, so he may be tried on an indictment charging him with obstruction of justice. He had originally faced a further charge of price fixing. The House of Lords ruled in 2008 ([2008] UKHL 16) that the conduct alleged in relation to the price fixing charge was not capable of amounting to an extradition offence as it was not a crime under English law when it was committed. His case was then sent back to the district judge to decide whether he should be extradited on the remaining charges in the indictment.

Mr Norris submitted that extradition would cause disproportionate damage to his and his wife's physical and psychological wellbeing having regard to their age, their state of health and the likely effect of the separation that extradition would impose upon them. Thus extradition would be incompatible with his right to private and family life under article 8 of the European Convention on Human Rights and he should be discharged pursuant to s 87 Extradition Act 2003.

The district judge found there to be no bars to extradition. His decision was upheld on appeal to the High Court, which found that the public interest in honouring extradition treaties was such as to require Mr Norris to show 'striking and unusual facts' or reach 'a high threshold' if his article 8 rights were to prevail. Mr Norris appealed to the Supreme Court, arguing that the courts below had wrongly required him to demonstrate 'exceptional circumstances' in order to show that his extradition would be disproportionate.

JUDGMENT

The Supreme Court unanimously dismissed the appeal. It held that a test of exceptional circumstances had not been applied. However, in an extradition case, the consequences of any interference with article 8 rights would have to be exceptionally serious before this could outweigh the public importance of extradition. This was not such a case.

REASONS FOR THE JUDGMENT

Lord Phillips (with whom all the members of the court agreed) stated that it was common ground that the extradition of Mr Norris would interfere with the exercise in this country of his right to respect for his private and family life. The critical question was whether this interference was necessary in a democratic society for the prevention of disorder or crime.

On the issue of principle of whether a court could properly require a person resisting extradition on article 8 grounds to demonstrate exceptional circumstances, there was no rule of law that this was the test of disproportionality but the public interest in extradition weighed very heavily indeed [**paragraph 51**]. It was of critical importance in the prevention of disorder and crime that those reasonably suspected of crime were prosecuted and, if found guilty, duly sentenced. Extradition was part of the process for ensuring that this occurred on a basis of international reciprocity [**paragraph 52**]. The reality was that only if some quite exceptionally compelling feature, or combination of features, was present that interference with family life consequent upon extradition would be other than proportionate to the objective that extradition served. 'Exceptional circumstances' was a phrase which said little about the nature of the circumstances: it was more accurate and more helpful to say that the consequences of interference with article 8 rights must be exceptionally serious before this could outweigh the importance of extradition. The courts below were justified in considering how if at all the impact of extradition on family life would differ from the normal consequences of extradition [**paragraph 56**].

Three subsidiary issues arose,, which the court answered as follows:

- The gravity of the offence could be of relevance, especially if it was at the bottom of scale, but it usually would not be [**paragraph 63**];
- The effect of extradition on innocent members of the family of a person resisting extradition was relevant and could be a cogent consideration [**paragraph 64**]; and
- It would rarely be relevant to consider whether the person resisting extradition could be prosecuted in the requested state. The extradition process should not become an occasion for debate about the most convenient forum for criminal proceedings [**paragraph 67**]

On the facts of Mr Norris' case, he was now 67 and had suffered ill health for some years. His wife's psychiatric condition would preclude her from travelling to the United States to support her husband and she would lose his support. The offences of obstructing justice, although subsidiary to the price fixing charge, were however very grave indeed [**paragraph 72**]. The public interest would be seriously damaged if any defendant with family ties and dependencies such as those which bound Mr Norris and his wife was thereby rendered immune from being extradited to be tried for serious wrongdoing [**paragraph 82**].

Hilary Term
[2010] UKSC 9
On appeal from: [2009] EWHC 995 (Admin)

JUDGMENT

Norris (Appellant) *v* Government of United States of America (Respondent)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Brown
Lord Mance
Lord Judge
Lord Collins
Lord Kerr

JUDGMENT GIVEN ON

24 February 2010

Heard on 30 November and 1 December 2009

Appellant
Jonathan Sumption QC
Martin Chamberlain

(Instructed by White & Case LLP)

Respondent
David Perry QC
Louis Mably

(Instructed by Crown Prosecution Service)

Intervener
Richard Hermer QC
Joseph Middleton
Alex Gask
(Instructed by Liberty)

LORD PHILLIPS, with whom all the members of the court agree

Introduction

1. A judge who is holding an extradition hearing pursuant to the Extradition Act 2003 ("the 2003 Act") is required to consider whether the extradition of the person against whom the order is sought would be compatible with that person's human rights under the Human Rights Act 1998. If not, that person must be discharged. The issues of principle raised by this appeal relate to the approach that should be adopted in carrying out this exercise where extradition will interfere with that person's right to respect for his private and family life under article 8 of the European Convention on Human Rights ("the Convention").

2. Once I have identified these principles, I shall apply those that are relevant to the case of the appellant, Mr Norris. His extradition is sought by the respondent, the United States Government ("the Government"), in order that he may be tried on an indictment charging him with obstruction of justice. His case is that when the consequences of extradition to the article 8 rights that he and his wife enjoy in this country are weighed against the public interest in his extradition for what is no more than an ancillary offence, the interference that this would cause with those rights cannot be justified. This case was rejected by District Judge Evans and by the Divisional Court, consisting of Laws LJ and Openshaw J. I shall say no more about the facts until I have dealt with the issues of principle.

The 2003 Act

3. The 2003 Act created a new extradition regime that was intended to simplify the process. Under the new regime considerations that were for the Secretary of State are transferred to the court, and these include the compatibility of extradition with Convention rights. Part 1 of the 2003 Act deals with extradition to "Category 1 territories". These are, in effect, members of the European Union which operate the European Arrest Warrant. Part 2 deals with extradition to Category 2 territories that have been designated by order of the Secretary of State. The United States is a category 2 territory. Under both Part 1 and Part 2 procedures the appropriate judge has to carry out an extradition hearing at which he considers whether there exists any of the prescribed statutory bars to extradition. These include incompatibility with Convention rights. Section 21 in Part 1 and section 87 in Part 2 provide in identical terms that the judge "must decide whether the

person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998". If yes, an order for extradition must follow. If no, the person must be discharged.

4. General provision is made in both Part 1 and Part 2 for circumstances that may well involve interferences with Convention rights. Section 13 in Part 1 and section 81 in Part 2 bar extradition by reason of "extraneous considerations" which might result in discrimination or an unfair trial, in violation of the Convention. Section 14 in Part 1 and section 82 in Part 2 provide that extradition is barred by the passage of time if, but only if, this would make extradition appear unjust or oppressive. Section 91 in Part 2 precludes extradition where it appears to the judge that the physical or mental condition of the person whose extradition is sought is such that it would be unjust or oppressive to extradite him. It is not alleged that any of these provisions applies in the case of Mr Norris.

Extradition treaties

5. Public international law does not impose a general duty upon countries to accede to requests for extradition. Obligations to extradite arise out of bilateral treaties. Nonetheless a number of Conventions have been concluded that impose on states an obligation to extradite or prosecute in respect of certain offences or which limit the grounds upon which a state can refuse to extradite. These reflect increasing international cooperation in the fight against crime.

6. The relevant treaty in the present case is the Extradition Treaty of 1972 between the United Kingdom and the United States, for this applies in the case of any extradition proceedings in which the extradition documents were submitted before 26 April 2007. On that date a new treaty, the Extradition Treaty of 2003 (Cm 5821) came into force. The extradition documents in this case were submitted in January 2005.

7. The 1972 Treaty imposes, subject to specified exceptions, mutual obligations to extradite in respect of offences which carry a sentence of at least 12 months imprisonment in each jurisdiction. Article V (2) of the 1972 Treaty provides that extradition may be refused on any ground which is specified by the law of the requested party. Thus the United Kingdom will not be in breach of its treaty obligations if, by reason of section 87 of the 2003 Act, extradition is refused on human rights grounds.

Common ground

8. Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

9. The following matters are common ground:

i) In this case, as in most extradition cases, extradition of Mr Norris from this country will interfere with his exercise in this country of his right to respect for his private and family life.

ii) This interference will be in accordance with the law.

iii) The critical issue in this case is whether this interference is "necessary in a democratic society…for the prevention of disorder or crime".

iv) Resolving this issue involves a test of proportionality. The interference must fulfil a "pressing social need". It must also be proportionate to the "legitimate aim" relied upon to justify the interference.

10. The Government contends that the legitimate aim, or pressing social need, is the honouring of extradition arrangements (an important aspect of the prevention of crime), that this aim weighs heavily in the scales and that the circumstances in which interference with article 8 rights will not be proportionate to it will be exceptional.

11. Mr Sumption QC for Mr Norris does not challenge this assertion. He accepts that it will only be in exceptional circumstances that extradition will be refused on the ground that it involves a disproportionate interference with article 8 rights. He submits, however, that this fact cannot be translated into a legal principle. The court cannot impose on a person challenging extradition a threshold requirement of demonstrating that his case is exceptional. He submits that this is what the Divisional Court did.

The primary issue of principle

12. The primary issue of principle is whether the court can properly require a person resisting extradition on article 8 grounds to demonstrate exceptional circumstances. Mr Sumption contends that the Divisional Court erred in doing just this. His argument is precisely expressed in the following two paragraphs of his written case:

> "19. [The Divisional Court's] essential error was that they sought to balance the principle of international cooperation in enforcing the criminal law, against the respect due to the private and family life of accused persons. Concluding that the former was the more potent interest, they held as a matter of law that the latter could prevail only on facts which were 'striking or unusual' or which reached a 'high threshold'. Hence the question which they certified as being of general public importance:
>
> > 'Is the public interest in honouring extradition treaties such as to require, in any extradition case, that an appellant must show 'striking and unusual facts' or reach 'a high threshold' if his article 8 claim is to succeed?'
>
> The effect is to create a strong presumption against the application of article 8 in extradition cases, and to require exceptional circumstances before any objection to extradition on article 8 grounds can succeed, a proposition which has been rejected by the House of Lords, following a substantial body of case law in the European Court of Human Rights.

> 20. The correct approach is to balance the public interest in the extradition of this particular accused against the damage which would be done to the private or family life of this particular accused and his family. The court must ask how much damage will really be done to the orderly functioning of the system of extradition, or the prevention of disorder or crime, by declining to extradite Mr. Norris in this case. And whether that damage is so great as to outweigh the devastating impact that extradition would have upon the rest of his and his wife's life together. These questions must, moreover be answered with an eye to the fact that the test imposed by article 8(2) is not whether his extradition is on balance desirable, but whether it is *necessary* in a democratic society."

13. For the Government Mr Perry QC has not sought to challenge the assertion that the court must not replace the test of proportionality with a test of exceptionality. His submission has been that the Divisional Court has not done so. All that it has done is to acknowledge the fact that, in an extradition context, an article 8 challenge will rarely succeed. This is unobjectionable.

Subsidiary issues of principle

14. A number of subsidiary issues of principle in relation to the application of the test of proportionality in an extradition case became apparent in the course of argument. These are as follows:

i) Is the gravity of the crime in respect of which extradition is sought a relevant factor? Mr Sumption submits that it is and that this weighs in favour of Mr Norris for, so he submits, the extradition crime in this case is not a grave one. Mr Perry joins issue with this last contention, but submits that the gravity of the extradition crime is of no relevance. The obligation to extradite only arises in respect of offences which attract at least 12 months' imprisonment. Subject to that it matters not whether the person whose extradition is sought is a thief or a mass murderer.

ii) Do you consider the interference in respect for family rights solely from the viewpoint of the person whose extradition is sought ("the extraditee"), or also from the viewpoint of other members of his family who are affected? Mr Perry submits the former, so that we should consider only the effect of extradition on Mr Norris. Mr

Sumption submits the latter, and places particular emphasis on the effect that Mr Norris' extradition will have upon his wife.

iii) Is it relevant to consider whether it would be possible to prosecute the extraditee in the requested state? It has become common to urge this possibility as a factor that weighs against extradition. It is not suggested that Mr Norris could be prosecuted in this jurisdiction for obstructing justice in the United States, so this issue is of no interest to Mr Sumption. Mr Perry none the less urges us to make it clear that the possibility of prosecution in the requested state is an irrelevance.

Preliminary observations

15. Before embarking on an analysis of the jurisprudence I would make these preliminary observations. The jurisprudence often deals with deportation and extradition without distinguishing between the two. In one context this is understandable. Usually human rights issues relate to the treatment of an individual within the jurisdiction of the State whose conduct is under attack ("domestic cases"). Issues have, however, arisen as to whether, and in what circumstances, the Convention can be infringed by despatching a person to a territory where there is a risk that his human rights will not be respected ("foreign cases"). In considering such issues it may be of no or little relevance whether the individual in question is facing deportation or extradition. It would, however, be a mistake to assume that this question is of no relevance in a case such as the present. This is a domestic case. The family rights that are in issue are rights enjoyed in this country. The issue of proportionality involves weighing the interference with those rights against the relevant public interest. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing from this country an alien who has been convicted of a crime and who has served his sentence for it, or whose presence here is for some other reason not acceptable. This is a matter to which I shall return after considering the relevant jurisprudence.

The Strasbourg jurisprudence

16. I propose to follow the development of the Strasbourg jurisprudence in relation to deportation and extradition with particular reference to the issues raised on this appeal. The starting point is *Soering v United Kingdom* (1989) 11 EHRR 439. This was the first case in which the Strasbourg Court recognised that the Convention could be infringed by sending a person to a country where Convention rights would be violated. It was an extradition case. The issue was whether the

United Kingdom would be in breach of the Convention if it extradited the applicant to Virginia to stand trial for capital murder. The evidence was that, if he was convicted, the applicant would face up to eight years on death row. This, he contended, would be inhuman and degrading treatment.

17. The Court accepted this argument. It first made this observation in relation to the fact that article 1 of the Convention requires each contracting state to secure the Convention rights for those "within their jurisdiction".

> "86. . . . Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of article 3 in particular."

18. The Court went on to conclude, however:

> "88 . . . It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of article 3, would plainly be contrary to the spirit and intendment of the article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that article.

> 91 In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."

19. In paras 110 and 111 the Court considered an argument advanced on behalf of Soering that it was relevant that, instead of extraditing him to Virginia, he could be deported to his own country, Germany, where he could be tried without the risk of the death penalty or death row conditions. The United Kingdom Government urged that no such distinction should be drawn. The Court held, nonetheless:

> "However, sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case.
>
> . . .
>
> A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration." (paras 110, 111)

20. At para 113 the Court dealt with a submission that extradition would also infringe the applicant's article 6 rights because he would not be able to obtain legal assistance in Virginia. The Court held:

> "The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society.

> The Court does not exclude that an issue might *exceptionally* be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk. ” (emphasis added)

21. In *HG v Switzerland* (Application No 24698/94) (unreported) given 6 September 1994 the Commission considered the admissibility of a complaint by a Turkish national that extradition from Switzerland to Turkey to serve a sentence imposed for kidnapping and raping a 14 year old girl would infringe article 3 because of Turkish prison conditions, article 6 because his trial in Turkey had not been fair and article 8 because extradition would interfere with respect for his family life in Switzerland. The Commission held in para 2 that expulsion or extradition might *"in exceptional circumstances"* involve a violation of fundamental rights because of the serious fear of treatment contrary to article 2 or 3 in the requesting country. It further held that an issue might *"exceptionally"* be raised under article 6 where a fugitive had suffered or risked suffering "a flagrant denial of a fair trial" in the requesting state (emphases added). The Commission held that, on the facts, this was not such a case. It went on to reject the admissibility of the article 8 claim on the facts.

22. In *Raidl v Austria* (1995) 20 EHRR CD 114 the Commission once again considered the admissibility of a claim that extradition to Russia on suspicion of murder had infringed the applicant's Convention rights. After finding ill-founded a complaint based on article 3 the Commission went on to consider the applicant's complaint that extradition had interfered with her married life in Austria, thereby violating her article 8 rights. The Commission held at p 123:

> "…the interference with the applicant's family life was proportionate to the legitimate aim pursued, *given the seriousness of the crime, of which the applicant was suspected* even before she contracted marriage in Austria." (emphasis added)

23. In *Launder v United Kingdom* (1997) 25 EHRR CD 67 the Commission considered the admissibility of a complaint that the United Kingdom would violate articles 2, 3, 5, 6 and 8 if it extradited him to the Hong Kong Special Administrative Region. In finding the application manifestly ill-founded the Commission said this in relation to article 8, at para 3:

> "The Commission considers that *it is only in exceptional circumstances* that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life." (emphasis added)

24. In *Chahal v United* Kingdom (1996) 23 EHRR 413 the United Kingdom had detained Mr Chahal for some six years on the ground that they were taking action against him with a view to his deportation, this being a justification for interference with the article 5 Convention right to liberty by virtue of article 5(1)(f). The Government wished to deport him to India because he was suspected of involvement in terrorism. The Court held that, because of the danger of torture or inhuman or degrading treatment that he would face if deported, his deportation would violate article 3. It rejected the contention of the UK Government that the fact that he posed a risk to the security of the United Kingdom had any relevance to the assessment of this question. Mr Chahal and his wife and two children, who joined in his application, also contended that his deportation would violate their article 8 rights to respect for their family life in the United Kingdom. The Court held that it had no need to decide this hypothetical question.

25. The principles to be applied when considering the proportionality of deportation that would interfere with article 8 family rights were first enunciated by the Court in *Boultif v Switzerland* (2001) 33 EHRR 1179. The applicant, an Algerian, had married a Swiss citizen and established a home in Switzerland. He then committed a robbery for which he received a two year prison sentence. After he had come out of prison the Swiss authorities refused to renew his residence permit. This meant that he would have to return to Algeria whither, the Court found, his wife could not reasonably be expected to follow him. The Court laid down the following principles:

> "46. The Court recalls that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim

pursued (see Dalia, cited above, p. 91, § 52, and Mehemi v. France, judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 34).

47. Accordingly, the Court's task consists in ascertaining whether the refusal to renew the applicant's residence permit in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.

48. The Court has only to a limited extent decided cases where the main obstacle to expulsion is the difficulties for the spouses to stay together and in particular for a spouse and/or children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure was necessary in a democratic society.

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple’s family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.”

Applying these principles, the Court found violation of article 8.

26. In *Üner v The Netherlands* (2006) 45 EHRR 421 the Grand Chamber confirmed the principles laid down in *Boultif*, adding to these at para 58:

> "–the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> -the solidity of social, cultural and family ties with the host country and with the country of destination."

27. The Court then went on to say this:

> "59. The Court considered itself called upon to establish 'guiding principles' in the *Boultif* case because it had 'only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin' . . . . It is to be noted, however, that the first three guiding principles do not, as such, relate to family life. This leads the Court to consider whether the '*Boultif* criteria' are sufficiently comprehensive to render them suitable for application in all cases concerning the expulsion and/or exclusion of settled migrants following a criminal conviction. It observes in this context that not all such migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of article 8. However, as article 8 also protects the right to establish and develop relationships with other human beings and the outside world (see *Pretty v the United Kingdom*, no.2346/02, [61], ECHR 2002-III) and can sometimes embrace aspects of an individual's society identity (see *Mikulic v Croatia*, No.53176/99, [53], ECHR 2002-1), it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of article 8. Regardless of the existence or otherwise of a 'family life', therefore, the court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect

for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the 'family life' rather than the 'private life' aspect.

60. In the light of the foregoing, the Court concludes that all the above factors (see [57]-[59]) should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction."

28. Finally I must refer to the decision of the Grand Chamber in *Saadi v Italy* (2008) 24 BHRC 123. The United Kingdom intervened in this case in an attempt to persuade the Grand Chamber to reconsider the principles laid down in *Chahal.* The attempt did not succeed. The Grand Chamber held:

"139. The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of 'risk' and 'dangerousness' in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

140. With regard to the second branch of the United Kingdom Government's arguments, to the effect that where an applicant presents a threat to national security, stronger evidence must be adduced to prove that there is a risk of ill-treatment (see para 122, above), the Court observes that such an approach is not compatible with the absolute nature of the protection afforded by article 3 either. It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The Court therefore sees no

> reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is 'more likely than not'. On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by article 3. . ."

Discussion

29. The Strasbourg cases to which I have referred illustrate three different situations. The first is the foreign case, where the applicant seeks to establish a breach of the Convention because of the treatment that he fears that he will receive in the country to which he is to be sent. Here Strasbourg has not differentiated between extradition and expulsion or deportation. Language has been used suggesting that it will only be in exceptional circumstances that a foreign case will involve an infringement of the Convention and that the Convention will only prove a bar to extradition or deportation where there is a real risk of a *flagrant* breach of the Convention. It is not any anticipated breach that will suffice.

30. The second situation is where, in a domestic case, breach of article 8 rights within the territory of the respondent State is relied upon *as a bar to deportation or expulsion* of an alien. Here the Grand Chamber has made it plain that the question of proportionality is detailed and fact specific. On the one hand the extent to which the removal of the alien is necessary in the public interest has to be considered having regard to the facts of the particular case. On the other hand the extent of the interference with article 8 rights has to receive an equally careful evaluation, having regard to the facts of the particular case. While it is unusual for an applicant to be able to make out a case of breach of the Convention in such circumstances, it is by no means unknown.

31. The third situation is where, in a domestic case, breach of article 8 rights within the territory of the respondent State is advanced *as a bar to extradition*. There is, in fact, no reported case in which such a complaint has succeeded, or even been held admissible where not joined with other allegations of breach.

32. So far as the subsidiary issues are concerned,

i) The reasoning of the Court in *Soering* 11 EHRR 439 and the express reference to "the seriousness of the crime" in *Raidl* 20 EHRR CD 114, 123 suggest that the gravity of the crime in respect of which extradition is sought is capable of being a material factor.

ii) There is no support for the proposition that the Court is solely concerned with the family rights of the applicant, to the exclusion of those of other members of the family. On the contrary, at least in deportation and expulsion cases, the Grand Chamber has made it clear in *Üner* 45 EHRR 421 that the interests of children are particularly material, and there is no reason to conclude that the same is not true in an extradition case, in so far as family rights weigh in the balance at all.

iii) The Court in *Soering* held that the possibility of trying a defendant in a forum where his fundamental rights will not be at risk can be a material factor when considering the proportionality of extradition in the face of a risk to those rights.

The domestic jurisprudence

33. When considering the domestic jurisprudence it is important to distinguish between the three different categories of case that I have identified in paragraphs 29 to 31 above. It is a failure to do so that has led to the primary issue of principle in this appeal.

34. I shall start my survey of the domestic cases with three appeals to the House of Lords that were heard together – *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323; *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368. The appellants in each appeal were unsuccessful asylum applicants who were resisting removal from the United Kingdom. In *Ullah* the applicants complained that in the countries to which they were to be removed their article 9 rights to practise their religions would be infringed. In *Razgar* the applicant complained that in Germany, to which country he was to be removed, he would not receive appropriate treatment for psychiatric illness from which he suffered, with the consequence that there would be interference with his article 8 right to respect for his private life. Thus these were foreign cases; indeed it was on these appeals that Lord Bingham of Cornhill coined the phrases "domestic cases" and "foreign cases" that I have adopted in this judgment: see [2004] 2 AC 323, paras 8-9. The principal issue was whether, in a foreign case, rights other than article 3 could be

engaged. The House of Lords, applying dicta of the Strasbourg Court, held that they could.

35. In paragraphs 17 to 20 of *Razgar* Lord Bingham set out five sequential questions that an immigration adjudicator should consider in cases where removal was resisted in reliance on article 8. The fourth was whether interference with the article 8 right was necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others – these being the criteria of justification under article 8(2). The fifth question, assuming an affirmative answer to the fourth question, was whether such interference was proportionate to the legitimate public end sought to be achieved.

36. Lord Bingham made the following comments on the answers to these questions:

> "19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg jurisprudence (see *Ullah* [2004] 2 AC 323, 339, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.
>
> 20. The answering of question (5), where that question is reached, must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

He subsequently added:

> "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

It is not apparent that these observations were restricted to foreign cases. They appear to have been of general application to cases of immigration control.

37. More generally, so far as there was discussion in these appeals of the approach to foreign cases, no distinction was drawn between expulsion and extradition. Indeed, in *Ullah* at para 13 Lord Bingham held that what he described as the *Soering* principle was potentially applicable in either case. He held that in either case successful invocation of Convention rights in a foreign case required the satisfaction of a stringent test. Where qualified rights, such as those under articles 8 and 9, were concerned, it would be necessary to show that there would be a flagrant denial or gross violation of the right, so that it would be completely denied or nullified in the destination country – see para 24.

38. In *Razgar*, at para 42, Baroness Hale of Richmond, emphasised the distinction between foreign cases and domestic cases. She said:

> "The distinction is vital to the present case. In a domestic case, the state must always act in a way which is compatible with the Convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved. Foreign cases, on the other hand, represent an exception to the general rule that a state is only responsible for what goes on within its own territory or control. The Strasbourg court clearly regards them as exceptional. It has retained the flexibility to consider violations of articles other than articles 2 and 3 but it has not so far encountered another case which was sufficiently serious to justify imposing upon the contracting state the obligation to retain or make alternative provision for a person who would otherwise have no right to remain within its territory. For the same reason, the Strasbourg court has not yet explored the test for imposing this obligation in any detail. But there clearly is some additional threshold test indicating the enormity of the violation to which the person is likely to be exposed if returned."

I doubt whether, in making these comments, Lady Hale had in mind the question of whether a threshold test was appropriate in an extradition case.

39. *Razgar* and *Ullah* were considered by the Divisional Court in *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200; (Admin); [2007] QB 727. Among the many points taken by the applicants, who were resisting extradition to the United States on charges of fraud in relation to the Enron affair, was a contention that their article 8 rights in respect of family life in this jurisdiction would be infringed by their extradition. Further infringements of article 8 rights in the United States were also invoked. Laws LJ, in delivering the sole judgment, referred to the opinion of Baroness Hale, but doubted whether the case's classification as "foreign" or "domestic" would "cast much light on the stringency of the test for violation of Article 8 which the Court should apply" – para 115.

40. At para 118 he said this:

> "If a person's proposed extradition for a serious offence will separate him from his family, article 8(1) is likely to be engaged on the ground that his family life will be interfered with. The question then will be whether the extradition is nevertheless justified pursuant to article 8(2). Assuming compliance with all the relevant requirements of domestic law the issue is likely to be one of proportionality: is the interference with family life proportionate to the legitimate aim of the proposed extradition? Now, there is a strong public interest in 'honouring extradition treaties made with other states' (the *Ullah* case [2004] 2 AC 323, para 24). It rests in the value of international co-operation pursuant to formal agreed arrangements entered into between sovereign states for the promotion of the administration of criminal justice. Where a proposed extradition is properly constituted according to the domestic law of the sending state and the relevant bilateral treaty, and its execution is resisted on article 8 grounds, a wholly exceptional case would in my judgment have to be shown to justify a finding that the extradition would on the particular facts be disproportionate to its legitimate aim."

41. *Bermingham* is also of relevance to one of the subsidiary issues. The applicant sought an order that the Director of the Serious Fraud Office should exercise his statutory powers to investigate the possibility of instituting criminal proceedings in this jurisdiction, having particular regard to the fact that if the prosecution took place here the article 8 rights of the defendants would be protected. The court held that it would not be appropriate to grant such relief.

42. *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 involved the approach that should be adopted by an appellate authority to the invocation of article 8 rights by aliens who wished to be permitted to remain in this country in order to live with members of their families who were already established here. Thus the appeals involved domestic cases. Mr Nicholas Blake QC, for Mrs Huang, appears from p 179 of the law report to have suggested that *Razgar* had laid down a "truly exceptional" threshold test for the successful invocation of article 8 rights in the face of deportation, and to have attacked such a test.

43. In delivering the opinion of the committee Lord Bingham said this about the question of proportionality, at para 20:

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar*, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

The final comment has since been treated as an embargo on the application of a test of exceptionality, not only in domestic immigration cases but in extradition cases.

44. So far as immigration cases are concerned, the decision in *Huang* led to a number of cases being remitted to the Asylum and Immigration Tribunal on the ground that a test of exceptionality had mistakenly been applied by the Tribunal. In *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2008] 2 All ER 28, a domestic immigration case, Sedley LJ said this about *Huang*, at para 25:

> "The effect of their Lordships' decision (and, if we may say so, the intended effect of this court's decision) in *Huang* has thus not been to introduce a new interpretation of article 8 but to clarify and reiterate a well understood one. While its practical effect is likely to be that removal is only exceptionally found to be disproportionate, it sets no formal test of exceptionality and raises no hurdles beyond those contained in the article itself."

At para 31 Sedley LJ found it necessary to reiterate that there was no legal test of exceptionality as a surrogate for the article 8 decision. He said:

> "The fact that in the great majority of cases the demands of immigration control are likely to make removal proportionate and so compatible with article 8 is a consequence, not a precondition, of the statutory exercise. No doubt in this sense successful article 8 claims will be the exception rather than the rule; but to treat exceptionality as the yardstick of success is to confuse effect with cause."

45. The first decision to which we have been referred in which *Huang* was applied in an extradition context is *Jaso v Central Criminal Court No 2 Madrid* [2007] EWHC 2983 (Admin). The Madrid Court had issued European Arrest Warrants against the three appellants on charges of membership of a criminal organisation and terrorism. The appellants had unsuccessfully challenged extradition before the District Judge on a large number of grounds. These included the contention that extradition would violate articles 3, 5, 6 and 8 of the Convention. The factual basis for this contention was an allegation that, if extradited, the appellants would be subject to *incommunicado* police detention for up to 5 days. Thus this was a foreign case. The District Judge had applied an

exceptionality test and this was attacked before the Divisional Court. Dyson LJ, when giving the leading judgment, held, applying *Huang*, that there was no exceptionality test. He added, however, at para 57:

> "It is clear that great weight should be accorded to the legitimate aim of honouring extradition treaties made with other states. Thus, although it is wrong to apply an exceptionality test, in an extradition case there will have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's article 8 rights."

46. *Jaso* was followed by Richards LJ, when giving the leading judgment in the Divisional Court in *Tajik v Director of Public Prosecutions and Government of the United States of America* [2008] EWHC 666 (Admin). He said at para 156:

> "What is said in *Jaso* about the need for 'striking and unusual facts' to lead to the conclusion that extradition would be disproportionate does not constitute a separate legal test but recognises the practical reality that article 8 will rarely provide a ground for refusing extradition"

47. The final decision to which I should refer is *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335. The appellant was resisting extradition to Missouri on charges which included two counts of murder in the first degree. He contended that, if convicted, he would be sentenced to imprisonment for life without eligibility of parole and that this would be inhuman treatment in violation of article 3. The House unanimously dismissed his appeal. A majority of the House held that the desirability of extradition was such that punishment which would be regarded as inhuman and degrading in the domestic context would not necessarily be so regarded when the choice was between either extraditing or allowing a fugitive offender to escape justice altogether. This has proved a controversial finding, but this is not an occasion on which it would be appropriate to review it. The case underlines the weight that the desirability of extradition carries as an essential element in combating public disorder and crime.

The judgment of the Divisional Court.

48. In giving the judgment of the Divisional Court in this case [2009] EWHC 995 (Admin), Laws LJ followed the approach of that court in *Jaso* and *Tajik.* He said:

> "21 … the learning, here and in Strasbourg, shows that the public interest in giving effect to bilateral extradition arrangements possesses especially pressing force because of its potency (a) in the fight against increasingly globalised crime, (b) in the denial of safe havens for criminals, and (c) in the general benefits of concrete co-operation between States in an important common cause. The gravity of the particular extradition crime may affect the weight to be attached to these factors, but because they are of a strategic or overarching nature, the public interest in extradition will always be very substantial. Accordingly the claim of a prospective extraditee to resist his extradition on article 8 grounds must, if it is to succeed, possess still greater force. That is why there must be 'striking and unusual facts' (*Jaso*), and 'in practice a high threshold has to be reached' (*Tajik*).
>
> 22. That is how the balance between the public interest and the individual's right, inherent in the whole of the Convention, is to be struck where an article 8 claim is raised in an extradition case. Their Lordships in *Huang* disapproved the application of a test of 'exceptionality' as the means of striking the balance; though it is perhaps not without interest that the European Commission of Human Rights stated in *Launder v United Kingdom* (1997) 25 EHRR CD 67 that '[I]t is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting State would be held to be an unjustified or disproportionate interference with the right to respect for family life.' The formulations in *Jaso* and *Tajik* show that what was sought, incorrectly, to be gathered in a test of 'exceptionality' is correctly reflected in a recognition of the force of the public interest in giving effect to a properly founded extradition request: a recognition, that is to say, of the relevant article 8(2) considerations (which in my judgment find concrete form in the three public benefits I have set out at paragraph 21)."

49. Mr Sumption submitted in his written case that this reasoning embodied three fundamental errors:

i) Whilst purporting to abjure any test of exceptionality, in effect it applied just such a test.

ii) It subordinated a fact-sensitive assessment of the interest in extradition in the individual case to a categorical assumption about the importance of that interest generally.

iii) It relied upon a sentence from the Commission's decision in *Launder* when this had never been approved or followed by the Strasbourg Court and was inconsistent with the Court's approach in article 8 deportation cases.

Discussion

50. It was a fundamental premise of Mr Sumption's submissions that, when considering the impact of article 8, the Court should adopt a similar approach in an extradition case as that to be adopted in a case of deportation or expulsion. He drew our attention to the fact that in France the Conseil d'Etat certainly does not do this. In a deportation case, the Conseil d'Etat now has regard to the human rights implications – see *Abraham, R. La Convention europeenne des droits de l'homme et les measures d'eloignement d'etrangers"* (1991) Rev fr Droit adm, 497. So far as extradition is concerned, however, the Conseil d'Etat considers that, as a matter of principle extradition justifies any interference with article 8 rights that may be involved – see *De Deus Pinto,* CE, ass, 8 October 1999. Mr Sumption submitted that the latter stance was incompatible with the Strasbourg jurisprudence.

51. I agree that there can be no absolute rule that any interference with article 8 rights as a consequence of extradition will be proportionate. The public interest in extradition nonetheless weighs very heavily indeed. In *Wellington* the majority of the House of Lords held that the public interest in extradition carries special weight where article 3 is engaged in a foreign case. I am in no doubt that the same is true when considering the interference that extradition will cause in a domestic case to article 8 rights enjoyed within the jurisdiction of the requested State. It is certainly not right to equate extradition with expulsion or deportation in this context.

52. It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity. It is instructive to consider the approach of the Convention to dealing with criminals or suspected criminals in the domestic context. Article 5 includes in the exceptions to the right to liberty (i) the arrest of a suspect, (ii) his detention, where necessary, pending trial, and (iii) his detention while serving his sentence if convicted. Such detention will necessarily interfere drastically with family and private life. In theory a question of proportionality could arise under article 8(2). In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment– see *R (P) v Secretary of State of the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002, para 79, for discussion of such circumstances. Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate.

53. *Massey v United Kingdom* (Application No 14399/02) (unreported) given 8 April 2003 illustrates this proposition. The applicant complained, *inter alia*, that criminal proceedings and a sentence of six years imprisonment constituted an unwarranted interference with his family life and his children's right to a father. In ruling the complaint inadmissible, the court held:

> "The Court recalls that article 8.2 permits interference with an individual's right to respect for his private and family life in certain circumstances. The Court considers that the bringing of criminal proceedings and the imposition of a punishment following conviction fall within these exceptions since they are in accordance with the law and pursue . . . legitimate aims, namely, public safety, the prevention of disorder and crime and protection of the rights and freedoms of others. The Court therefore concludes that the prosecution and imprisonment of the applicant does not raise any issues under article 8 of the Convention."

54. There is an analogy between the coercion involved in extradition and the coercion involved in remanding in custody a prisoner reasonably suspected of wishing to abscond. In either case the coercion is necessary to ensure that the suspect stands his trial. Each is likely to involve a serious interference with article 8 rights. The dislocation of family life that will frequently follow extradition will not necessarily be more significant, or even as significant, as the dislocation of family life of the defendant who is remanded in custody. It seems to me that, until

recently, it has also been treated as axiomatic that the dislocation to family life that normally follows extradition as a matter of course is proportionate. This perhaps explains why we have been referred to no reported case, whether at Strasbourg or in this jurisdiction, where extradition has been refused because of the interference that it would cause to family life.

55. I reject Mr Sumption's contention that it is wrong for the court, when approaching proportionality, to apply a "categorical assumption" about the importance of extradition in general. Such an assumption is an essential element in the task of weighing, on the one hand, the public interest in extradition against, on the other hand, its effects on individual human rights. This is not to say that the latter can never prevail. It does mean, however, that the interference with human rights will have to be extremely serious if the public interest is to be outweighed.

56. The reality is that only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves. That, no doubt, is what the Commission had in mind in *Launder* 25 EHRR CD 67, 73 when it stated that it was only in exceptional circumstances that extradition would be an unjustified or disproportionate interference with the right to respect for family life. I can see no reason why the District Judge should not, when considering a challenge to extradition founded on article 8, explain his rejection of such a challenge, where appropriate, by remarking that there was nothing out of the ordinary or exceptional in the consequences that extradition would have for the family life of the person resisting extradition. "Exceptional circumstances" is a phrase that says little about the nature of the circumstances. Instead of saying that interference with article 8 rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition. A judge should not be criticised if, as part of his process of reasoning, he considers how, if at all, the nature and extent of the impact of extradition on family life would differ from the normal consequences of extradition.

57. These considerations are reflected in the judgment of Laws LJ in this case and the attack made on that judgment by Mr Sumption is not justified.

58. What general approach to human rights should the District Judge adopt at the extradition hearing? My comments in relation to this question should not be

treated as laying down a course that the judge is bound to follow. They are no more than advisory.

59. Mr Hermer QC, who appeared for Liberty as intervener, submitted that the judge should not start with consideration of the case for extradition, before turning to ask whether this was outweighed by the impact that extradition would have on article 8 rights. This approach was "the wrong way round". The judge should first consider the effect of the proposed extradition on the article 8 rights, before going on to consider whether such interference could be justified. The decision in each case should turn upon its individual facts.

60. Mr Hermer's submissions did not recognise any difference between extradition and expulsion or deportation. I did not find them either realistic or helpful.

61. The 2003 Act specifies those matters that the extradition judge has to consider. Before considering any objections to extradition, he has to consider whether the statutory requirements for extradition have been satisfied. This requires the judge to consider, among other things, the offence or offences in respect of which extradition is sought. These must carry a minimum sentence of at least 12 months' imprisonment, but this leaves scope for a very wide variation in the seriousness of the offence or offences that are alleged to have been committed.

62. The judge then has to consider a considerable number of possible statutory barriers to extradition. These include the matters that might violate human rights to which I have referred at para 4 above. It is only after he has done this that the judge has to consider whether extradition will be compatible with Convention rights pursuant to section 87 of the 2003 Act. This is a fact-specific exercise, and the judge must have regard to the relevant features of the individual case. It is at this point that it is legitimate for the judge to consider whether there are any relevant features that are unusually or exceptionally compelling. In the absence of such features, the consideration is likely to be relatively brief. If, however, the nature or extent of the interference with article 8 rights is exceptionally serious, careful consideration must be given to whether such interference is justified. In such a situation the gravity, or lack of gravity, of the offence may be material.

63. I do not accept Mr Perry's submission that the gravity of the offence can never be of relevance where an issue of proportionality arises in the human rights

context. The importance of giving effect to extradition arrangements will always be a significant factor, regardless of the details of the particular offence. Usually the nature of the offence will have no bearing on the extradition decision. If, however, the particular offence is at the bottom of the scale of gravity, this is capable of being one of a combination of features that may render extradition a disproportionate interference with human rights. Rejecting an extradition request may mean that a criminal never stands trial for his crime. The significance of this will depend upon the gravity of the offence. This obvious fact has been recognised at Strasbourg (see para 32 above).

64. When considering the impact of extradition on family life, this question does not fall to be considered simply from the viewpoint of the extraditee. On this subsidiary issue also I reject Mr Perry's submission to the contrary. This issue was considered by the House of Lords in the immigration context in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] AC 115. After considering the Strasbourg jurisprudence the House concluded that, when considering interference with article 8, the family unit had to be considered as a whole, and each family member had to be regarded as a victim. I consider that this is equally the position in the context of extradition.

65. Indeed, in trying to envisage a situation in which interference with article 8 might prevent extradition, I have concluded that the effect of extradition on innocent members of the extraditee's family might well be a particularly cogent consideration. If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee under section 87 of the 2003 Act.

66. At this point I will deal with the other subsidiary issue of principle that has been raised – is it of relevance when considering proportionality that a prosecution for the extradition offence might be brought in the requested jurisdiction? As I have pointed out, the Strasbourg Court gave a positive answer to this question in *Soering* 11 EHRR 439. There has recently been a spate of cases in which the extraditee has argued that he ought to be prosecuted in this jurisdiction, of which *Bermingham* [2007] QB 727 was but one. The most recent was *R(Bary) v Secretary of State for the Home Department* [2009] EWHC 2068 (Admin). References to the others can be found at para 72 of the judgment in that case. In each one the argument was rejected.

67. Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country's treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an enquiry as to the possibility of prosecution in this country.

Application of the principles to the facts of this case

68. Human rights are in issue and it is for this court to reach its own decision as to whether Mr Norris' extradition would be compatible with his article 8 rights.

69. This is the second occasion on which this matter has reached the highest court in this jurisdiction. Mr Norris is a British national, born on 15 February 1943. He retired owing to ill-health in 2002. For some four years before he had been Chief Executive Officer of Morgan Crucible plc ("Morgan") and he had worked in the carbon division of that company for 29 years before then. Morgan and its subsidiaries became involved in the United States in price-fixing that was contrary to the law of the United States. Criminal proceedings in the United States resulted in a plea bargain under which Morgan paid a fine of $1 million and one of its subsidiaries paid a fine of $10 million. Most of Morgan's senior personnel were granted immunity from prosecution but these did not include Mr Norris.

70. On 28 September 2004 Mr Norris was indicted by a Grand Jury in Pennsylvania on one charge of price-fixing and three charges of obstructing justice. Extradition proceedings were commenced which he resisted on grounds, among others, that the conduct with which he was charged was not criminal under English law. So far as the price-fixing charge was concerned, this contention succeeded, but only when the matter reached the House of Lords – *Norris v Government of the United States of America* [2008] UKHL 16; [2008] AC 920. The House held, however, that the conduct alleged in relation to the charges of obstructing justice would have been criminal if carried out in this jurisdiction and that, accordingly, those offences were extraditable. The House remitted the matter for reconsideration by the District Judge because:

> " …he exercised his judgment on a basis different from that which now pertains, namely that Mr Norris was to be

> extradited on the main price fixing count, and not merely the subsidiary counts." (Para 110).

Mr Sumption fastened on this passage and submitted in his written case that "the main stuffing of the case against" Mr Norris had been knocked out by the decision of the House.

71. As to that submission I would simply comment that there is plenty of stuffing left. The gravamen of the case of obstructing justice appears in the following passages of the judgment of Auld LJ in the earlier proceedings – *Norris v Government of the United States of America (Goldshield Group plc intervening)* [2007] EWHC 71 (Admin); [2007] 1 WLR 1730 - based on a deposition of Lucy P.McClain, a trial attorney for the antitrust division of the US Department of Justice:

> "12. . . . Mr Norris instructed, through a 'task force' he set up for the purpose, all Morgan entities involved in the price fixing conspiracy to remove, conceal or destroy any documentary material, in particular Morgan's sales files in Europe, evidencing Morgan's involvement in the conspiracy. He also instructed the retention and concealment of certain documents to enable Morgan to continue monitoring the working of the conspiracy.
>
> 13. In about November 1999 Mr Norris met several of the co-conspirators in England to discuss the United States authorities' investigation into their conspiratorial dealings and meetings, and to devise a false explanation, other than price fixing, to be put to the authorities for the meetings. As Ms McClain put it in her affidavit:
>
> 'Norris and his subordinates… discussed ways in which they could conceal the true purpose of the price fixing meetings when asked about them. They decided to falsely characterise their meetings with competitors as discussions of legitimate joint ventures rather than disclose the fact that they were price fixing meetings. Norris expressed his concern that the United States investigators would not believe Morgan's false explanation that the meetings were held to discuss joint ventures, in part because Morgan had no contemporaneous

> notes of the meetings to support its joint venture explanation. Norris then directed his subordinates to create false summaries of the price fixing meetings that they would use as a guide or script in answering any future questions about what had occurred at their meetings.'
>
> 14. To that end, a 'script' was prepared which Mr Norris approved, of false information as to the purpose of the meetings for use in the event of any of the Morgan staff or others involved in the conspiracy being questioned by the authorities or by the federal grand jury. Those provided with the script were rehearsed and questioned about their recollection of the material contained in it. Those who Mr Norris felt would not be able to withstand questioning, he distanced from Morgan by arranging for their retirement or for them to become consultants. In January 2001 false handwritten summaries of potentially incriminating meetings were provided to the United States' authorities' investigators, who made plain they regarded Morgan's accounts of the meetings as false.
>
> 15. At or about the same time, Morgan sought to persuade a German company alleged to be a party to the conspiracy, to support it in its false representations to the United States authorities so as, not only to exculpate Morgan, but also to cast blame on a French company, also alleged to be a party to the conspiracy – a solicitation in which Mr Norris took a prominent and personal role."

72. Laws LJ rightly observed [2009] EWHC 995 (Admin), para 29 that the obstruction of justice charges, taken at their face value, were very grave indeed. The evidence is that, if Mr Norris is convicted, the conduct in question is likely to attract a sentence of between 21 and 27 months imprisonment. There is a possibility that the sentence will be significantly longer in order to reflect the gravity of the conduct that the obstruction of justice was designed to conceal.

73. If Mr Norris is extradited a year or more is likely to elapse before his trial. It is possible that the Department of Justice would oppose the grant of bail before and during the trial. If convicted he might be imprisoned in a low security "Federal Correctional Institution" with dormitory or cubicle accommodation.

74. There is a considerable body of medical evidence before the court, as there was before the Divisional Court, and I shall adapt and adopt the careful summary of that evidence made by Laws LJ.

75. Mr Norris is now 66 years of age. He and his wife were married in 1966. They have two sons and three grandchildren. The US Department of Justice investigation began in 1999. In 2000 Mr Norris was diagnosed as suffering from prostate cancer and underwent surgery in March 2001. He contracted MRSA in the hospital. A benign tumour was removed from his side in June 2002. He was not, however, free of cancer and had to undergo radiotherapy in 2002. He retired from Morgan on health grounds in October of that year. Towards the end of the same year Morgan struck a plea agreement with the Department of Justice, but it did not include the appellant. The extradition process effectively commenced in 2005, with the appellant's arrest on 13 January. In her first witness statement (made on 27 April 2005) Mrs Norris describes with some eloquence the deteriorating quality of life which she and her husband faced as these events crowded around them. In her second statement (30 May 2008) she paints a worsening picture, and also states (paragraph 8) that if the appellant had to spend any length of time in custody in the United States her psychiatric condition would prevent her from re-locating there, where the only people she knows are connected with Morgan, and they are prohibited by the terms of the plea bargain from speaking to her or her husband.

76. In a letter of 20 April 2005 to Mr Norris's solicitors Dr Jones, his general practitioner, reviewed the prostate cancer history, as regards which he could not say there had been a complete recovery, and the onset of other problems: raised blood pressure and shortness of breath. In October 2006 Dr Jones described difficulties relating to the appellant's hearing, left knee, right hip, incontinence and a recently developed hernia. He stated that "[t]he legal problems Mr Norris has been having during the past 2 – 3 years have had a devastating effect upon him and his family". By 7 February 2007, when the GP next wrote, the appellant's mental state had deteriorated. His powers of concentration were poor, he had marked short-term memory loss, was depressed and tended to shut himself away. He was anxious about his wife's psychological state. His physical problems largely persisted although his blood pressure was normal. He and his wife were "at the end of their tether". By 23 May 2008, when the GP next reported, the appellant was registered disabled and had had a total left knee replacement. Dr Jones was anxious as to his mental state and arranged for him and his wife to see a psychologist.

77. There are in fact psychiatric reports on both Mr Norris and his wife which pre-date the GP's May 2008 letter. Professor Tom Fahy provided these on 15

February 2007. In his report on Mr Norris he states that when he interviewed him, he "presented a normal mental state". However,

> "Although Mr Norris' current symptoms fall short of a formal psychiatric diagnosis, it is reasonable to assume that his symptoms would deteriorate in the face of imminent extradition, actual extradition, conviction and/or imprisonment in the US."

78. Professor Fahy reported again on 27 May 2008. He stated that

> "Mr Norris' mental health has deteriorated since I saw him in February 2007. He is now describing more prominent symptoms of low mood, loss of interest and pleasure in his usual activities and feelings of helplessness and pessimism about his life situation."

However,

> "Mr Norris' mood disturbance is not persistent or severe enough to warrant a diagnosis of a depressive illness."

Finally,

> "There is no serious prospect of this situation improving for him until the legal situation is resolved, though if he were to be extradited, it is likely that imprisonment and isolation from his family would lead to a further deterioration in his mental health and the development of more significant depressive symptoms."

79. Mrs Norris' state of health is described in a report dated 19 June 2008 from Michael Kopelman, who is a professor of neuropsychiatry at King's College London and St Thomas's Hospital. He saw both Mr and Mrs Norris on 9 June 2008, and interviewed them separately and together. Mrs Norris told him she had

had suicidal ideas, panic attacks and palpitations. Mr Norris told him there had been a "total change" in his wife's personality. Professor Kopelman opined that Mrs Norris suffered from a "major depression of moderate severity" or a "moderate depressive episode" (depending on which set of criteria was used). Its severity was however difficult to evaluate: she was able to maintain at least some social activities, but was a person who the doctor suspected was "good at hiding her real emotions". He concluded (Opinion, paragraph 6):

> "I have no doubt that the prolonged and more serious nature of Mrs Norris's current depression results from the prolonged extradition proceedings... To this extent, the continuing nature of these extradition proceedings has caused Mrs Norris 'hardship' in the sense of severe psychological suffering and mental deterioration. I have no doubt that this would be greatly worsened, were her husband to be extradited."

80. Mr Sumption submits that Mr and Mrs Norris' poor health, together with the length and closeness of their marriage, has made them highly dependent on each other. This and their advancing years, make them less resilient to the separation that Mr Norris' extradition would involve. It was originally Mrs Norris' intention to accompany her husband to the United States should he be extradited, but in a witness statement that she made last year she says that she cannot now contemplate going to the US to live on her own there without friends and family support. Because Mrs Norris will not accompany her husband to the United States, the interruption to their family life should he be remanded in custody, and during his imprisonment, should he be convicted, will be total. This contrasts with the position that would have prevailed had Mr Norris been imprisoned in this country, where visiting rights enable the family relationship to be preserved.

81. Mr Sumption contends that Mr Norris' extradition in these circumstances cannot be said to represent a proportionate answer to a "pressing social need". Nor, he argues, can it plausibly be said that the prevention of crime or the orderly functioning of extradition are public interests which will suffer substantial damage if someone in the particular position of Mr Norris is not extradited. The Government has argued that not to extradite Mr Norris would damage the principle of automatic, or virtually automatic, extradition, but no such principle exists.

82. In a case such as this it is the exception that proves the rule. One has to consider the effect on the public interest in the prevention of crime if any defendant with family ties and dependencies such as those which bind Mr Norris

and his wife was thereby rendered immune from being extradited to be tried for serious wrongdoing. The answer is that the public interest would be seriously damaged. It is for this reason that only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves. This is not such a case. Unhappily the delay that has been caused by Mr Norris' efforts to avoid extradition to the United States has increased the severity of the consequences of that extradition for his family life. But those consequences do not undo the justification that exists for that interference.

83. For these reasons I would dismiss this appeal.

Postscript

84. On the eve of delivering judgment in this case the court received the report of the admissibility decision in *King v United Kingdom* Application No. 9742 /07. In holding Mr King's application in relation to his extradition to Australia manifestly ill-founded the Court at para 29 followed *Launder* in expressing the view, mindful of the importance of extradition arrangements between States in the fight against crime (and in particular crime with an international or cross-border dimension),

> "…that it will only be in exceptional circumstances that an applicant's private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition"

Referring to the fact that the applicant had a wife, two young children and a mother in the United Kingdom whose ill-health would not allow her to travel to Australia the Court remarked that this was, in its view, not an exceptional circumstance.

85. This decision does not alter my view that it is more helpful, when considering proportionality, to consider whether the consequences of interference with article 8 rights are exceptionally serious rather than simply whether the circumstances are exceptional. Either test is, however, likely to produce the same result and the decision demonstrates the futility of attempting to found an appeal on the basis that there has been inappropriate use of a test of exceptionality.

86. The court also cited *Soering* in support of the proposition that the considerations of whether prosecution exists as an alternative to extradition may have a bearing on whether extradition would be in violation of a Convention right. I remain of the view that rarely, if ever, is this possibility likely in practice to tilt the scales against extradition and it certainly does not do so in this case.

LORD HOPE

87. It would not be right to say that a person's extradition can never be incompatible with his right to respect for his family life under article 8 of the European Convention on Human Rights. But resisting extradition on this ground is not easy. The question in each case is whether it is permitted by article 8(2). Clearly some interference with the right is inevitable in a process of this kind, which by long established practice is seen as necessary in a democratic society for the prevention of disorder or crime. That aim extends across international boundaries, and it is one which this country is bound by its treaty obligations to give effect to. In this case extradition will be in accordance with the law, as the preconditions for Mr Norris's lawful extradition have all been satisfied. So, as Mr Sumption QC made clear in his opening remarks, the issue is entirely one of proportionality. This, as he said, is a fact-specific issue. He submitted that in the circumstances of this case extradition would be a violation of the article 8 right.

88. Mr Sumption challenged the government's assertion that the circumstances in which the interference with article 8 rights would not be proportionate will be exceptional. In para (2) of a closing memorandum on law which he provided to the District Judge and made available to the court on the second day of the argument he said that it was not necessary to show exceptional circumstances in order to make out a case for refusing extradition. He referred to *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 20, where Lord Bingham of Cornhill said that "exceptionality" was not a legal test. Applying that observation to this case, he added that the law recognises that the balance will not necessarily come down in favour of extradition, and that it would not be right to treat the test as a rule of thumb with substantially the same effect. In oral argument he said that there was no such threshold that had to be crossed. As it was put in *Haung*, this may be the expectation but it is not a legal test. The phrase "only in exceptional circumstances" was used by the Commission in *Launder v United Kingdom* (1997) 25 EHRR CD 67, but he said that this was an early decision and it had not been adopted by the Strasbourg Court in its later case law.

89. I agree that exceptionality is not a legal test, and I think that it would be a mistake to use this rather loose expression as setting a threshold which must be surmounted before it can be held in any case that the article 8 right would be violated. As Lord Phillips has observed, the phrase "exceptional circumstances" says little about the nature of the circumstances: para 56, above. It tends to favour maintaining the integrity of the system as the primary consideration rather than focusing on the rights of the individual. It risks diverting attention from a close examination of the circumstances of each case. Although in its admissibility decision in *King v United Kingdom*, Application No 9742/07, 26 January 2010, it followed the Commission's decision in *Launder* in using the phrase "exceptional circumstances", decisions of the Strasbourg court have repeatedly shown that an intense focus on the rights of the individual is necessary when striking the balance that proportionality requires. I do not think that there are any grounds for treating extradition cases as falling into a special category which diminishes the need to examine carefully the way the process will interfere with the individual's right to respect for his family life.

90. *Huang v Secretary of State for the Home Department* was a domestic case where article 8 was relied on as a bar to expulsion, but I think that Lord Bingham's statement that exceptionality is not a legal test can be applied to extradition cases too. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 13, he said that, while there were substantive differences between expulsion and extradition, the Strasbourg court had held the *Soering* principle to be potentially applicable in either situation: *Cruz Varas v Sweden* (1991) 14 EHRR 1, para 70. Lord Steyn said in para 33 that, while the purpose of the two procedures was different, in the context of the possible engagement of fundamental rights under the ECHR the Strasbourg court has not in its case law drawn a distinction between cases in the two categories. I would apply that approach to this case.

91. The fact remains however that the cases in which an argument of the kind that Mr Sumption sought to present will succeed are likely to be very few. I agree with Lord Phillips that the reality is that it is only if some exceptionally compelling feature, or combination of features, is present that the interference with the article 8 right that results from extradition will fail to meet the test of proportionality. The public interest in giving effect to a request for extradition is a constant factor, and it will always be a powerful consideration to which great weight must be attached. The more serious the offence the greater the weight that is to be attached to it. As against that, those aspects of the article 8 right which must necessarily be interfered with in every case where criminal proceedings are brought will carry very little, if any, weight; *Massey v United Kingdom* (Application No 14399/02) (unreported) given 8 April 2003, p 12. Separation by the person from his family life in this country and the distress and disruption that this causes, the extent of which is bound to vary widely from case to case, will be inevitable. The area for

debate is likely to be narrow. What is the extra compelling element that marks the given case out from the generality? Does it carry enough weight to overcome the public interest in giving effect to the request?

92. In the present case extradition is sought on charges of obstructing justice. These are serious charges because of the methods that are said to have been used and the nature of the alleged conduct, and there is a strong public interest in giving effect to the treaty obligation so that they can be properly dealt with. It was submitted that extradition in this case would cause disproportionate damage to Mr and Mrs Norris's physical or psychological integrity, having regard to their state of health, their age and the likely effect of the separation that extradition will impose on them. Added to that is the fact that Mr Norris has had this process hanging over him for three years, much of which has been due to his successful challenge to his extradition on the charges of price-fixing. The effect of the delay is that he and his wife are that much older than they otherwise would have been, and this will make it all the more difficult for them to adapt to the consequences. Mr Sumption invited the court to avoid short cuts and to pay close attention to all the relevant facts in its assessment.

93. The only circumstance which strikes me as not inherent in every extradition process is the delay. Otherwise the issues that are raised in this case are really questions of degree. Distressing the process of separation will undoubtedly be, and I am conscious of the extra element of hardship which will arise because of the state of health of the parties. Due to their age, and especially to Mrs Norris's psychological condition, this is greater than it would normally be, but in my opinion not excessively so. Mr Norris is fit to travel and he is fit to stand trial. His family life must, for the time being, take second place. The delay is unusually long due to the time it took for Mr Norris to assert his legal rights in regard to the charges of price fixing. Its effect has been to increase the element of hardship. Had the remaining charges been less serious this might perhaps have been sufficient to tip the balance in Mr Norris's favour. But allegations of an attempt to obstruct the course of justice must always be taken very seriously, and I see no grounds for making an exception in this case. In view of the strong public interest in giving effect to the respondents' request so that these charges can be brought to trial in the jurisdiction that is best equipped to deal with them, I do not think that it is possible to say that Mr Norris's extradition on these charges would be disproportionate.

94. For these reasons, and those which Lord Phillips has given with which I am in full agreement, I agree that the appeal should be dismissed.

LORD BROWN

95. I agree entirely with the judgment of Lord Phillips on this appeal. For the reasons he gives it will be only in the rarest cases that article 8 will be capable of being successfully invoked under section 87 of the Extradition Act 2003. As Lord Phillips observes (at para 82):

> "[O]nly the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves."

Paragraph 65 of his judgment instances a rare case where the "defence" might succeed. It is difficult to think of many others, particularly where, as here, the charges are plainly serious.

96. It is important to understand the difference between the public interests under consideration by Strasbourg in the *Boultif v Switzerland* (2001) 33 EHRR 1179 and *Üner v The Netherlands* (2006) 45 EHRR 421 line of cases, upon which so much of the appellant's argument rested, and those involved in extradition. True, the ECtHR describes this interest as "the prevention of disorder or crime" but this is always in the specific context of "the expulsion and/or exclusion of settled migrants following a criminal conviction" (*Üner* paras 59 and 61). Those invoking article 8 rights in such cases have already been convicted and punished for their crimes. Decisions to expel or exclude are taken essentially in the interests of a sovereign state's right to regulate the entry and expulsion of aliens, besides, of course, the interests of deterring immigrants generally from crime. The public interests in extradition, however, are altogether more compelling. I fully share Lord Phillips' views expressed at para 52 of his judgment and for my part would also wish to endorse paras 21 and 22 of Laws LJ's judgment in the court below.

97. As to our domestic jurisprudence, *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 was concerned with article 8 in the context, not of extradition, but of immigration control. In this context, of course, the immigration rules and supplementary directions (to which Lord Bingham, giving the opinion of the Committee, referred at para 20) for the most part take account of the immigrant's article 8 rights. But not in all circumstances, so that there remains scope for article 8 to be successfully invoked in some cases. We rejected an exceptionality test since exceptionality as such can never be a helpful touchstone against which to judge whether in any particular case the interests of a lawful

immigration policy are outweighed by the immigrant's (and his family's) rights to private and/or family life. But even in this, non-extradition, context we contemplated article 8 succeeding only in "a very small minority" of cases. The legal test is proportionality, not exceptionality, but in immigration cases the court will seldom find removal disproportionate and, in extradition cases, more rarely still.

98. *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038 was a domestic extradition case concerned not with section 87 but with section 82 of the Extradition Act 2003 (making identical provision to section 14 in Part 1 of the Act). Amongst the issues arising was the correct approach to the question raised by section 82 as to whether the passage of time makes extradition unjust. In giving the judgment of the Committee I said this:

> "[W]e would . . . stress that the test of establishing the likelihood of injustice will not be easily satisfied. The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international co-operation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad. We were told that the section 82 (or section 14) 'defence' is invoked in no fewer than 40% of extradition cases. This seems to us an extraordinarily high proportion and we would be unsurprised were it to fall following the Committee's judgment in the present case." (para 36)

99. Seemingly it is now the section 87 (section 21 in Part 1) "defence" based on the extraditee's article 8 rights which is regularly being invoked. The incidence of this too may be expected to decline in the light of the Court's judgments on the present appeal. The reality is that, once effect is given to sections 82 and 91 of the Act, the very nature of extradition leaves precious little room for a "defence" under section 87 in a "domestic" case. To my mind section 87 is designed essentially to cater to the occasional "foreign" case where (principally although not exclusively) article 2 or 3 rights may be at stake.

100. It follows that I too would dismiss this appeal. In doing so I would register my agreement also with the judgments of Lord Hope, Lord Mance, Lord Collins and Lord Kerr, each of which I understand to be (as I believe and intend my own judgment to be) entirely consistent with everything said by Lord Phillips.

LORD MANCE

101. Central to the issues argued on this appeal is the submission by Mr Jonathan Sumption QC for the appellant, Mr Norris, that the District Judge and Divisional Court, while purporting to apply the decision of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, erred by in effect reintroducing for extradition cases an exceptionality test. *Huang* was a case involving claims by two failed asylum seekers that their removal would infringe their rights under article 8 of the European Convention on Human Rights to enjoy family life with relatives in the United Kingdom. But it is submitted that that difference in subject-matter is immaterial. It is further submitted that, whatever the test, the Divisional Court erred in concluding that the interference with Mr and Mrs Norris's private life that Mr Norris' extradition would entail is "necessary in a democratic society" (that it is proportionate to the legitimate interest served by his extradition) within the meaning of article 8(2) of the Convention.

102. That extradition would interfere with Mr and Mrs Norris's private and family life within article 8(1) is not in doubt. Further, it would do so within the United Kingdom, where such life is currently enjoyed. The case is thus a domestic rather than a foreign one, in the sense in which Lord Bingham drew this distinction in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para. 9. This is relevant when considering whether the interference is justified or excused under article 8(2), as being "in accordance with the law and … necessary in a democratic society" in an interest or for a purpose there specified. In "foreign" cases (like *Ullah* itself and *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368) the person resisting removal to a foreign country on the ground that it would interfere there with rights protected under article 8 must present "a very strong case": see *Ullah* per Lord Bingham at para. 24. In the same case, Lord Steyn at para. 50 spoke of the need to satisfy a "high threshold test", by establishing "at least a real risk of a flagrant violation of the very essence of the right before other articles [of the Convention] become engaged". See also per Lord Carswell at paras. 67-70, as well as the later decisions in *EM (Lebanon) v Secretary of State for the Home Department (AF (A Child)*

intervening) [2008] UKHL 64; [2009] AC 1198 and *MT (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 2 WLR 512.

103. The approach taken in foreign cases cannot be transposed to domestic cases, where the removal of a foreigner from the jurisdiction would interfere with his or her private or family life within the jurisdiction. *Huang* was a domestic case, in which Lord Bingham, giving the opinion of the appellate committee, noted that the questions generally to be asked in deciding whether a measure is proportionate were "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective". However, Lord Bingham at para 19 went on to stress the need in applying this test to balance the interests of society with those of individuals and groups, and to refer, in this connection, to the House's previous statement in *Razgar* [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77 that the judgment on proportionality "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage". Similar reference to the importance of achieving a fair balance between public and private interests is found in Strasbourg case-law, including *Dickson v United Kingdom* (2007) 46 EHRR 927 and *S v United Kingdom* (2008) 48 EHRR 1169 (paras. 109 and 111 below). Addressing a submission by the Secretary of State that it would "only be in an exceptional case" that the removal under the immigration rules would infringe article 8 (p. 173E), Lord Bingham in *Huang* [2007] 2 AC 167, para 20 said that, where the issue of proportionality was reached,

> " ….. the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar*, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very

small minority. That is still his expectation. But he was not purporting to lay down a legal test."

104. In a later domestic case, *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159, Lord Bingham again described the exercise required under article 8:

> "12. …. the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

105. The present case concerns extradition, not immigration control, a distinction which Mr Perry QC for the Government emphasises. The purpose for which Mr Norris's extradition is sought is, in terms of article 8(2), "the prevention of disorder or crime …..". Mr Sumption argues that this restricts the court's focus to the particular risks of disorder or crime which may flow, presumably from Mr Norris himself, if Mr Norris were not extradited. That is in my view unrealistic. The balancing exercise between the public and private interests involves a broader focus. *Ullah* underlines both "the great importance of operating firm and orderly immigration control in an expulsion case" and "the great desirability of honouring extradition treaties made with other states": [2004] 2 AC 323, para 24. The European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439 acknowledged "the beneficial purpose of extradition in preventing fugitive offenders from evading justice" (para. 86) and said that, "as movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice" (para. 89). These statements refer to fugitive offenders, but similar public interests in extradition apply to suspects who have allegedly committed offences in countries other than those where they habitually

reside. In agreement with others of your Lordships, it is clear that the general public interest in extradition is a powerful one. This is so, not only in respect of a person already convicted, but also in respect of a person wanted to face trial. Without affecting the need for a case by case approach, I see it as being, in each of these situations, generally stronger than either the public interest in enforcing immigration control in respect of a failed asylum seeker or an over-stayer who has established family roots within the jurisdiction or even than the public interest in deporting a convicted alien upon the conclusion of his sentence, although this be to avoid the commission of further offences within the jurisdiction of the deporting state.

106. Under article 8, the ultimate question is whether Mr and Mrs Norris's interests in the continuation of their present private and family life in the United Kingdom are outweighed by a necessity, in a democratic society and for the prevention of disorder or crime, for Mr Norris to be extradited in order to face trial in the United States. Whether extradition is necessary depends upon whether it is proportionate to the legitimate interest served by extradition in his case or, as the European Court of Human Rights said in *Dickson* 46 EHRR 927 para 71, "whether a fair balance [is] struck between the competing public and private interests involved". The first step in any such enquiry must, in this context also, be to identify and examine all the relevant facts in the particular case. The nature and seriousness of the alleged offence will be relevant to the strength of the case in favour of extradition: see e.g. *Raidl v Austria* (1995) 20 EHRR CD114 and *King v United Kingdom* (Application No. 9742/07) (both extradition cases) in which complaints were held inadmissible. Laws LJ examined this aspect in the Divisional Court [2009] EWHC 995, paras. 28-29 and concluded that "the obstruction of justice charges, taken at their face value, are very grave indeed". Lord Phillips after re-examining the position in his paras. 69-72 reaches the same conclusion, and so do I. Another relevant factor may sometimes be whether a trial would be possible in the United Kingdom, but I agree with Lord Phillips (paras. 66-67) that, while one should not prejudge the facts of particular cases, this is in practice likely to be relevant (if it can be at all) only in otherwise marginal cases. Mr and Mrs Norris's personal circumstances, the nature of their private and family life and the likely effect of extradition upon it and each of them will all be of primary importance. I need not repeat here the detailed account of these matters contained in the judgment of Laws LJ in the Divisional Court, paras. 30-37 and of Lord Phillips, paras. 73-80. In weighing up such personal factors against other factors, it is of course also relevant that extradition is by its nature very likely to have adverse consequences for the private or family life within the jurisdiction of the person being extradited. The mere existence of some adverse consequences will not be a sufficient counterweight, where there is a strong public interest in extradition.

107. The principal question of law raised by Mr Sumption centres upon the District Judge's and Laws LJ's use of phrases referring to a need for a "high threshold" or for "striking and unusual facts" before the claim of a prospective extraditee to resist extradition under article 8 would in practice succeed. However, Laws LJ prefaced his reference to such phrases with an explanation of the force of the public interest in extradition. This meant, he stated, that any claim to resist extradition on article 8 grounds "must, if it is to succeed, possess still greater force": para. 21. Provided that it is recognised that the force of the public interest in extradition must itself be weighed according to the particular circumstances, I see no objection to this last statement. In a case involving obstruction of justice charges of a gravity such as the present, the public interest in extradition is self-evidently very substantial. It has to be weighed against other relevant factors, including the delay and above all the impact on Mr and Mrs Norris's private and family life. Interference with private and family life is a sad, but justified, consequence of many extradition cases. Exceptionally serious aspects or consequences of such interference may however outweigh the force of the public interest in extradition in a particular case.

108. There is a possible risk about formulations which suggest in general terms that any person seeking to avoid extradition under article 8 must cross a "high threshold" or establish "striking and unusual facts" or "exceptional circumstances". They may be read as suggesting that the public interest in extradition is the same in every case (in other words, involves a threshold of a constant height, whereas in fact it depends on the nature of the alleged offence involved) and also that the person resisting extradition carries some form of legal onus to overcome that threshold, whereas in fact what are in play are two competing interests, the public and the private, which have to be weighed against each other, as required by the case-law under the Convention as well as by s.87 of the Extradition Act 2003. It can be expected that the number of potential extraditees who can successfully invoke article 8 to resist extradition will be a very small minority of all those extradited, but that expectation must not be converted into an *a priori* assumption or into a part of the relevant legal test.

109. A further potential problem about such formulations is that they may tend to divert attention from consideration of the potential impact of extradition on the particular persons involved and their private and family life towards a search for factors (particularly *external* factors) which can be regarded as out of the run of the mill. Different people have different ages, different private and family lives and different susceptibilities. They may react and suffer in different ways to the threat of and stress engendered by potential extradition in respect of the same offence or type of offence. And some of the circumstances which might influence a court to consider that extradition would unduly interfere with private or family life can hardly be described as "exceptional" or "striking and unusual". Take a case of an

offence of relatively low seriousness where the effect of an extradition order would be to sever a genuine and subsisting relationship between parent and baby, or between one elderly spouse and another who was entirely dependant upon the care performed by the former.

110. Strasbourg case law supports the need for caution about the use of such formulations, while also indicating that statements that undue interference with article 8 rights will only occur "in exceptional circumstances" have not either necessarily or always been viewed as problematic. Thus, the Commission in *Launder v United Kingdom* (1997) 25 EHRR CD67, 73, para 3 – after reciting the basic test of necessity (which "implies a pressing social need and requires that the interference at issue be proportionate to the legitimate aim pursued") added:

> "The Commission considers that it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life. The Commission finds that in the present case no such circumstances have been shown to exist".

In *King v United Kingdom* (where Mr King was accused of being a member of a gang engaged in a conspiracy to import large quantities of ecstasy into Australia) the Court returned to this passage, saying:

> "Mindful of the importance of extradition arrangements between States in the fight against crime (and in particular crime with an international or cross-border dimension), the Court considers that it will only be in exceptional circumstances that an applicant's private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition (see *Launder v United Kingdom*, no. 27279/95, Commission decision of 8 December 1997)."

The fact that Mr King had in the United Kingdom two young children and a mother whose health would not allow her to travel to Australia was not an exceptional circumstance, in which connection the Court could not "overlook the very serious charges he faces" and was accordingly satisfied that it would not be disproportionate to extradite him to Australia.

111. In *Dickson v United Kingdom* 46 EHRR 927 the issue was the consistency with article 8 of a policy whereby requests for artificial insemination by prisoners were "carefully considered on individual merit" but "only …. granted in exceptional circumstances" (para. 13). The European Court of Human Rights considered that "the policy set the threshold so high against them [the applicant prisoners] . . . that it did not allow a balancing of the competing individual and public interests and a proportionality test ,,,, as required by the Convention" (para. 82); and that it was not "persuasive to argue …. that the starting-point of exceptionality was reasonable since only a few persons would be affected, implying as it did the possibility of justifying the restriction of the applicants' Convention rights by the minimal number of persons adversely affected" (para. 84).

112. On the other hand, in *McCann v United Kingdom* 47 EHRR 913, the local authority had determined Mr McCann's right to remain in his home by obtaining from his wife a notice to quit, the effect of which upon him she did not understand. The European Court of Human Rights, while holding that Mr McCann should in these circumstances have been given the opportunity to argue the issue of proportionality under article 8, added:

> "54. The court does not accept that the grant of the right to the occupier to raise an issue under article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465 observed …. , it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings."

The minority observation which the European Court approved appears in these terms in Lord Bingham's speech [2006] 2 AC 465, para 29:

> "I do not accept, as the appellants argued, that the public authority must from the outset plead and prove that the possession order sought is justified. That would, in the overwhelming majority of cases, be burdensome and futile. It is enough for the public authority to assert its claim in accordance with domestic property law. If the occupier wishes to raise an article 8 defence to prevent or defer the

> making of a possession order it is for him to do so and the public authority must rebut the claim if, and to the extent that, it is called upon to do so. In the overwhelming majority of cases this will be in no way burdensome. In rare and exceptional cases it will not be futile."

The context in both *Kay* and *McCann* was one of an absolute common law right to possession of property, to enforcement of which the article 8 right to respect for the home might sometimes represent an obstacle. In contrast, as Lord Bingham noted in *Huang* [2007] 2 AC 167, para 17, the statutory scheme governing immigration control itself contemplates that a person may fail to qualify under the immigration rules and yet have a valid claim under article 8. A similar exercise of weighing competing interests is required under s.87 of the Extradition Act 2003.

113. Finally, in *S v United Kingdom* 48 EHRR 1169, the European Court held that the blanket and indiscriminate retention of fingerprints, cellular samples and DNA profiles of persons suspected, but not convicted, of offences, and subject only to a discretion "in exceptional circumstances" to authorise their deletion, failed to strike a fair balance between the competing public and private interests (paras. 35 and 125).

114. The preferable course is, in my view, to approach the exercise required by article 8 by (a) identifying the relevant facts and on that basis assessing the force of, and then weighing against each other, the considerations pointing in the particular case for and against extradition, and (b) when addressing the nature of the considerations which might outweigh the general public interest in extradition to face trial for a serious offence, doing so in terms which relate to the exceptional seriousness of the consequences which would have to flow from the anticipated interference with private and family life in the particular case. But this is very far from saying that any adjudicative exercise which refers to a need in practice for "exceptional circumstances" or "striking and unusual facts" in the context of a particular application for extradition is axiomatically flawed. Still less can it be a ground of objection if the expectation that only a small minority of potential extraditees will in practice be able successfully to rely on article 8 to resist extradition proves statistically to be the case as a result of the decisions reached over a period and over the whole range of such cases.

115. What matters in any event is whether, as a result of whatever formulation has been adopted, the adjudicative exercise has been slanted or distorted in a manner which undermines its outcome in any particular case. In the present case,

on the facts set out by Laws LJ and Lord Phillips and for the reasons given in relation to those facts by Lord Phillips in para 82 and by Lord Hope in para 93, I am left in no doubt that the balance between public and private interests comes down clearly in favour of Mr Norris's extradition, as serving a pressing social need and being proportionate to the legitimate aim pursued, or, in conclusion, as reflecting an appropriate weighing of the public and private interests engaged, despite the grief and interference with his and his wife's private and family life that extradition will undoubtedly cause.

116. I have read Lord Phillips' judgment with its addendum written in the light of *King v United Kingdom*, and find nothing inconsistent with the way in which I see the matter and in which I have expressed my own reasons for reaching the same conclusion as he does.

LORD COLLINS

117. I agree with Lord Phillips that Mr Norris' appeal should be dismissed for the reasons he gives.

118. In 1878 the Report of the Royal Commission on Extradition said:

> "it is the common interest of mankind that offences against person and property, offences which militate against the general well-being of society, should be repressed by punishment … [W]e may reasonably claim from all civilised nations that they shall unite with us in a system which is for the common benefit of all …" (in Parry, *British Digest of International Law*, vol 6 (1965), at 805)

119. Some 75 years ago the commentary to the Harvard draft Convention on extradition pointed out:

> "The suppression of crime is recognized today as a problem of international dimensions and one requiring international co-operation… The State, whose assistance … is requested, should view the request with favor, if for no other reason, because it may soon be in the position of requesting similar assistance … [T]he most effective deterrent to crime is the prompt apprehension and punishment of criminals, wherever they may be found. For the accomplishment of these purposes States cannot act alone; they must adopt some effective concert of action" (*Harvard Research in International Law*, 1935, p 32)

120. This appeal concerns crime of an international character, although with some unusual features. The principal charge in the United States was that of price-fixing contrary to the Sherman Act. The 1972 UK-US Extradition Treaty (by contrast with the 2003 Treaty, Article 2(4) and Extradition Act 2003, section 137(3)) applied only to offences "committed within the jurisdiction of the other Party" (Article I). Much of Mr Norris' alleged conduct was said to have occurred outside the United States (in particular, participation in meetings in Europe, Mexico and Canada to discuss and agree prices), but Morgan Crucible had subsidiaries in the United States which were alleged to be part of the price-fixing cartel, and no point on extra-territoriality was taken. The basis of the decision of the House of Lords in March 2008 was that price-fixing was not a criminal offence in England until the Enterprise Act 2002, and that since it was not a criminal offence when the offence was alleged to have been committed, it was not an extradition offence under the Extradition Act 2003 and therefore there was not the requisite double criminality: *Norris v Government of the United States of America* [2008] UKHL 16, [2008] AC 920.

121. But the obstruction of justice charges brought against Mr Norris were held to satisfy the double criminality test: if Mr Norris had done in England what he was alleged to have done in the United States he would have been guilty in England of offences of conspiring to obstruct justice or of obstructing justice. The obstruction of justice charges involve conduct outside the United States, but also include allegations that Mr Norris directed an alleged co-conspirator to instruct an employee of a United States subsidiary to conceal or destroy incriminating documents, and that he participated in a scheme to prepare false evidence to be given to the United States authorities and to the Grand Jury. The effect of the evidence before the Divisional Court was that, if Mr Norris is convicted on the obstruction of justice charges, it is at the least possible that the judge will have regard to the anti-trust violations in sentencing him for obstruction of justice. The Divisional Court, applying *Welsh v Secretary of State for the Home Department* [2006] EWHC 156 (Admin), [2007] 1 WLR 1281 and *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, held that

this was not contrary to the principle of specialty (also, but less commonly, referred to as speciality): [2009] EWHC 995 (Admin). The principle is reflected in Article XII(1) of the 1972 UK-US Extradition Treaty and section 95 of the Extradition Act 2003. The traditional statement of the principle is that a surrendered person will not be tried or punished for any offence other than that in respect of which he has been extradited: *Oppenheim's International Law*, 9th ed Jennings and Watts (1992), vol 2, para 420; Whiteman, *Digest of International Law*, vol 6 (1968), p 1095 (and at 1100 on non-extraditable offences as aggravation). The Divisional Court refused to certify as a question of law of general public importance the question whether it offended the specialty principles if offences which were not extradition offences could be treated as aggravating factors for sentencing purposes. The Appeal Committee of the House of Lords did not give leave to appeal on this point, and it is therefore not before this court.

122. The sole question before this court is whether Mr Norris' extradition to the United States is "compatible with the Convention rights within the meaning of the Human Rights Act 1998" (Extradition Act 2003, section 87(1)). The same question would have arisen prior to the Extradition Act 2003 as a result of the combined effect of the Human Rights Act 1998, section 6(1), and the discretion of the Home Secretary under the Extradition Act 1989, section 12.

123. The only direct reference to extradition in the Human Rights Convention is the exception to the right to liberty under Article 5(1) for "the lawful arrest or detention … of a person against whom action is being taken with a view to deportation or extradition" (Article 5(1)(f)).

124. But the extradition process may engage other Convention rights, as the leading judgment in *Soering v United Kingdom* (1989) 11 EHRR 439 on the responsibility of the requested State under Article 3 dramatically shows. But "while the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition … it makes it quite clear that successful reliance demands presentation of a very strong case. … [T]he removing state will always have what will usually be strong grounds for justifying its own conduct: … the great desirability of honouring extradition treaties made with other states": *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at [24].

125. In the present case the question is whether, in extraditing Mr Norris to the United States, the United Kingdom would be in breach of its obligation under Article 8 of the Human Rights Convention to respect private and family life.

126. The primary object of Article 8 is to protect the individual against arbitrary action by public authorities, but it is well established that there are, in addition, positive obligations inherent in effective respect for family life. The removal of a person from a country where close members of that person's family are living may amount to an infringement of the right to respect for family life: *Boultif v. Switzerland* (2001) 33 EHRR 1179, and many other decisions including *Y v Russia* [2008] ECHR 1585, at [103]. In determining whether interference by a public authority with the rights guaranteed by Article 8(1) is necessary for the purposes of Article 8(2), regard must be had to the fair balance which has to be struck between the competing interests of the individual and of the community as a whole: *Keegan v. Ireland* (1994) 18 EHRR 342, at [49], and most recently *Eberhard and M v Slovenia* [2009] ECHR 1976, at [126].

127. In this case the balance has to be struck in the context of a bilateral extradition treaty providing for the surrender of persons alleged to have committed extraditable crimes. It hardly needs to be said that there is a strong public interest in international co-operation for the prevention and punishment of crime. Consequently, the public interest in the implementation of extradition treaties is an extremely important factor in the assessment of proportionality: e.g. *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, at [24]; *Wright v Scottish Ministers (No 2)* 2005 1 SC 453, at [77]; *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 AC 335, at [24].

128. As a result, in cases of extradition, interference with family life may easily be justified under Article 8(2) on the basis that it is necessary in a democratic society for the prevention of crime: *HG v Switzerland*, Application 24698/94, September 6, 1994 (Commission). In *Soering v United Kingdom* (1989) 11 EHRR 439 at [89] the Strasbourg Court said:

> "… inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad

> should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition …"

129. More recently the Court, in *Öcalan v Turkey* (2005) 41 EHRR 45, re-affirmed what had been said in *Soering* and added (at [86]):

> "The Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention … "

130. It is inherent in the extradition of a citizen of the requested state that it is almost certain to involve an interference with family life, and that it is why it has been said that it is only in exceptional circumstances that extradition to face trial for serious offences in the requesting state would be an unjustified or disproportionate interference with family life: *Launder v United Kingdom* (1997) 25 EHRR CD67, at [3]; and cf *Raidl v Austria* (1995) 20 EHRR CD114, at 123. See also *R (Warren) v Secretary of State for the Home Department* [2003] EWHC 1177 (Admin), at [40]-[41]. This approach has been confirmed in the recent admissibility decision in *King v United Kingdom*, Applicn 9742/07.

131. The public interest in the prevention and suppression of crime, which includes the public interest in the United Kingdom's compliance with extradition arrangements, is not outweighed by the mutual dependency and the ill-health, both physical and mental, of Mr and Mrs Norris. Lord Phillips has dealt with the question whether it is relevant whether a prosecution for the alleged offences could be brought in the requested State. It was treated as a factor in *Soering v United Kingdom* at para 110. In the admissibility decision in *King v United Kingdom*, Applicn 9742/07, the Court confirmed that considerations as to whether prosecution existed as an alternative to extradition might have a bearing on whether the extradition would be in violation of Convention rights. The point has also arisen in *Ahsan v United Kingdom* [2009] ECHR 362, a case involving a request by the United States for extradition to answer charges for alleged terrorist offences, in which the Strasbourg court has asked the parties for submissions on the relevance, if any, which is to be attached to the applicant's submission that he could and should be tried in the United Kingdom. Although the point does not

arise for decision on this appeal, it will not normally be relevant, for the reasons given by Lord Phillips, that a prosecution could be brought in the United Kingdom.

LORD KERR

132. I agree that this appeal should be dismissed. The centrepiece of the appellant's case is that the importance to be attached to the need for an effective system of extradition should only be assessed by reference to the particular circumstances of an individual case. Thus, the question becomes, would the decision not to extradite this person because of interference with his Article 8 rights cause unacceptable damage to the public interest.

133. I do not accept this argument. The specific details of a particular case must obviously be taken into account but recognition of a wider dimension is also required. In other words, it is necessary to recognise that, at some level of abstraction or generality, the preservation and upholding of a comprehensive charter for extradition must be maintained. The question cannot be confined to an inquiry as to the damage that an individual case would do to the system of extradition. It must be approached on a broader plane. It should also be recognised that the public interest in having an effective extradition system extends beyond deterrence of crime. It also embraces the need for effective prosecution of offenders – see *Soering v United Kingdom* (1989) EHRR 439, para 89.

134. Although the appellant argued that the Divisional Court, while disavowing an exceptionality approach, in fact applied such a test in a somewhat re-cast form, that claim does not survive careful consideration of what the Divisional Court actually said. The Divisional Court did not impose an exceptionality requirement. It merely reflected the significant difficulty involved in displacing the substantial consideration of the need for a coherent and effective system of extradition.

135. Mr Perry QC's principal argument was to the effect that the public interest in preserving a workable and effective system of extradition was unalterable and constant. I would be disposed to accept that argument provided 'constant' is understood in this context to mean that it will always arise. I do not accept that it

will be of unvarying weight in every case. It will always be a highly important factor but there will be some cases where its importance will be properly assessed as overwhelming. Recognition of the fact that this will always be an important consideration does not create an exceptionality requirement, however; it merely reflects the reality that this is an unchanging feature of the extradition landscape. Sedley LJ was therefore right in *AG (Eritrea) v Secretary of state for the Home Department* [2007] EWCA Civ 801; [2008] 2 All ER 28 when he said at para 31 that the circumstance that article 8 claims will rarely be successful is one of result rather than a reflection of an exceptionality requirement.

136. While it will be, as a matter of actual experience, exceptional for article 8 rights to prevail, it seems to me difficult, in light of *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, to revert to an exceptionality test – a test which, at times, Mr Perry appeared to invite us to rehabilitate. But it is entirely possible to recognise that article 8 claims are only likely to overcome the imperative of extradition in the rarest of cases without articulating an exceptionality test. This message does not depend on the adoption of a rubric such as 'striking or unusual' to describe the circumstances in which an article 8 claim might succeed. The essential point is that such is the importance of preserving an effective system of extradition, it will in almost every circumstance outweigh any article 8 argument. This merely reflects the expectation of what *will* happen. It does not erect an exceptionality hurdle.

137. I accept Mr Sumption QC's argument that the starting point must be that article 8 is engaged and that it is then for the state to justify the interference with the appellant's rights. But, because of the inevitable relevance of the need to preserve an effective extradition system, that consideration will always loom large in the debate. It will always be a weighty factor. Following this line, there is no difficulty in applying the approach prescribed in para 12 of *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159. On this analysis the individual facts of each case can be evaluated but that evaluation must perforce be conducted against the background that there are substantial public interest arguments in play in every extradition case. That is not an *a priori* assumption. It is the recognition of a practical reality.

138. There is nothing about the facts of this case that distinguishes it significantly from most cases of extradition, or indeed from most cases of white collar crime. If Mr Norris were prosecuted in this country, no doubt many of the fears, apprehensions and effects on his and his wife's physical and mental health would accrue in any event. The added dimension of having to face trial and possible incarceration in America is, of course, a significant feature but not

substantially more so than in many other cases of extradition. The only matter of moment is the delay that has occurred from the time that extradition was first sought but, as has been pointed out, this was to some extent created by the actions of the appellant himself and is, in any event, not of sufficient significance that it cannot be outweighed by the need to preserve effective extradition.