Human rights: Some definitions and quotations

"(**Human rights** provide)…an ethical language we can all recognise and sign up to…a language which doesn't belong to any particular group or creed but to all of us. One that is based on the principles of common humanity"
Jack Straw MP, as Justice Secretary, 1999

Human rights: Rights and freedom to which every human being is entitled. Protection against breaches of these rights by a state (including the state of which the victim is a national) may in some cases be enforced in international law. It is sometimes suggested that human rights (or some of them) are so fundamental that they form part of natural law, but most of them are best regarded as forming part of treaty law.
Oxford Dictionary of Law, 2009, Oxford University Press

The rule of law requires that the law afford adequate protection of fundamental **human rights**. It is a good start for public authorities to observe the letter of the law, but not enough if the law within a particular country does not protect what are there regarded as the basic entitlements of a human being.
Lord Bingham (former Senior Law Lord), The Rule of Law, 2010, Penguin

The basic rights and freedoms that all humans should be guaranteed, such as the right to life and liberty, freedom of thought and expression, and equality before the law.
Wikitionary, a wiki –based open content dictionary
en.wiktionary.org/wiki/human_rights, accessed 30/12/10

The term **human rights** contains a multitude of meanings…To the philosopher it is about the essential qualities of the human that lead us to an understanding of our duties towards others; to the specialist in international relations, it connotes a force in the management of relations between states; while to the political scientists, human rights are a tool in the construction of a liberal community.
The New Oxford Companion to Law, 2008, Oxford University Press

The Human Rights Act

The Human Rights Act came into force in the UK on 2nd October 2000.

The Act places all public authorities in the UK (including the NHS and central and local government) under a duty to respect the rights contained in the European Convention of Human Rights in respect of all public functions.

The Human Rights Act protects everyone in the UK without exception.

There are 16 rights contained in the Human Rights Act:

- The right to life
- The right not to be tortured or treated in an inhuman or degrading way
- The right to be free from slavery or forced labour
- The right to liberty
- The right to a fair trial
- The right to not to be punished except in accordance with law
- The right to respect for private and family life, home and correspondence
- The right to freedom of thought, conscience and religion
- The right to freedom of expression
- The right to freedom of assembly and association
- The right to marry and found a family
- The right not to be discriminated against in relation to any of the rights contained in the European Convention on Human Rights
- The right to peaceful enjoyment of possessions
- The right to education
- The right to free elections
- Abolition of the death penalty (abolished in the UK in the 1960s).

The Supreme Court and the European Convention on Human Rights

European Court of Human Rights, Strasbourg

Before the Human Rights Act was passed by Parliament in 1998, it was not possible for an individual in the UK to challenge a decision of a public authority on the ground that it violated his or her rights under the European Convention of Human Rights (ECHR), within the courts of the UK. Individuals instead had to take their complaint directly to the European Court of Human Rights in Strasbourg (ECtHR).

The Human Rights Bill (before it was passed by Parliament) was strongly promoted by the then Prime Minister, Tony Blair:

> "The Bill... will give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights Commission and Court in Strasbourg. It will enhance the awareness of human rights in our society. And it stands alongside our decision to put the promotion of human rights at the forefront of our foreign policy."
> (Tony Blair in preface to *Rights Brought Home*; the White Paper that accompanied the introduction of the Human Rights Bill).

Once the Act came into force 2 October 2000, individuals could claim a remedy for breaches of their Convention rights in the UK courts. An individual who thinks that his or her Convention rights have not been respected by a decision of a UK court may still bring a claim before the ECtHR, but they must first try their appeal in the UK courts.

Compatibility of legislation and government action with ECHR

The Supreme Court, London

It is the duty of all such courts, including the UK Supreme Court, to interpret all existing legislation so that it is compatible with the ECHR so far as it is possible to do so. If the court decides it is not possible to interpret legislation so that it is compatible with the Convention it will issue what is known as a 'declaration of incompatibility'.

Although a declaration of incompatibility does not place any legal obligation on the government to amend or repeal legislation, it sends a clear message to legislators that they should change the law to make it compatible with the human rights set out in that Convention.

Precedent and relationship between the courts

In giving effect to rights contained in the ECHR, the Court must take account of any decision of the ECtHR in Strasbourg. Lord Bingham, when sitting as a Law Lord, ruled that no national court should "without strong reason dilute or weaken the effect of the Strasbourg case law" (*R (Ullah) v Special Adjudicator* [2004] UKHL 26). The UKSC looks at ECtHR decisions and precedents on human rights law rather than just UK precedents.

It is therefore somewhat inevitable that there is an ongoing debate about the precise extent to which the UK Supreme Court (and other courts in the UK) should "take account" of such rulings when reaching the own judgments.

In rare circumstances, the Supreme Court effectively invited the Strasbourg court to 'think again'. For example, in 2009 the Court declined to follow the decision of the lower chamber of the ECtHR in *Al-Khawaja v United Kingdom*, in a similar case called *R v Horncastle*. Both cases raised the question whether there could be a fair trial when a defendant was prosecuted based on evidence given by witnesses who subsequently did not attend the trial in person and therefore were not available to be cross-examined (questioned) by the defendant.

In his judgment in *Horncastle*, Lord Phillips, President of the Supreme Court, said that although the requirement to "take into account" the Strasbourg jurisprudence would "normally result" in the domestic court applying principles that are clearly established by the ECtHR, "There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances, it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course".

Meanwhile, the UK Government had appealed the lower chamber's decision in *Al-Khawaja*, and in December 2011, the Grand Chamber of the ECtHR gave its judgment. This time, the Strasbourg court adopted a more flexible position, reiterating that hearsay evidence should not be permitted where it would be the "sole or decisive evidence" in a prosecution, but noting the need for a careful case-by-case assessment. Commentators noted how the Strasbourg court had evidently taken into consideration the UK Supreme Court's 2009 judgment in *Horncastle*, demonstrating the concept of 'dialogue' between the two courts.

Why is it important we have a Supreme Court?

There are a number of reasons why any civilised country needs an independent judiciary, and why at the top of the court system there needs to be a final point of appeal – essentially an ultimate point where 'the buck stops' in determining questionable points of law and interpretation of legislation.

The Court's judgments are regularly shown by news broadcasters. The precedent they set for lower courts can have a considerable impact upon society

The Supreme Court's duty is to adjudicate upon points of law of great public importance, such as those arising out of the implementation of the Human Rights Act. Once the UKSC has decided a particular point of law, it sets a *precedent*. This means that all 'lower' courts beneath The Supreme Court have to follow what the UKSC has decided in their future judgments.

The Supreme Court is made up of some of the most experienced and talented judges (who were formerly very experienced lawyers in one form or other) from across the UK. The Supreme Court's judgments in matters of *common law* (where there is no statute, or parliament-defined legislation, to guide the courts) are widely respected around the world, and cited by judges from all sorts of other countries that follow the common law tradition (these tend to be countries within which the UK has previously been closely involved in governing).

The Court has a vital role in maintaining a healthy, balanced relationship between the different branches of government – the elected parliament who debate and pass legislation, the executive of government ministers who direct national policy, and the judiciary, who uphold the rule of law, safeguard civil liberties and help resolve disputes. Without a Supreme Court, or similar 'top court', there is a danger that the other two branches of government may become too powerful, and start to impede on the fundamental rights of citizens.

Having moved the highest court of appeal in the United Kingdom from a committee of the House of Lords to the Supreme Court in a separate, user-friendly building, it is now much easier for the members of the general public to see the court in operation and understand its work. As you will learn from your visit, public accessibility was one of the most important reasons for the creation of the UKSC.

Cases heard by the highest court in the land:
Identifying significant 'points of law'

Using the list on *Sheet S1*, can you work out **which specific human rights were raised as points of law** in the following recent cases heard at The Supreme Court, or its predecessor, the Appellate Committee of the House of Lords ("The Law Lords")?

1) Naomi Campbell sued *The Mirror* newspaper, which had printed photographs of her without permission, coming out of a drugs rehabilitation centre. Her lawyers took the case all the way to the Appellate Committee of the House of Lords after *The Mirror* won its case in the (lower) Court of Appeal. The newspaper argued that publishing the story was in the public interest.

2) A man from Iran and a man from Cameroon, who were asylum seekers, wished to appeal against the decision which denied them asylum in the UK. They appealed on the grounds that they were both homosexual and would face persecution in their home countries if sent back to their home countries. Iran imposes the death penalty for homosexual practices and Cameroon punishes such practices with imprisonment.

3) A student took her case to the Appellate Committee of the House of Lords as she was denied the right to attend her school wearing a religious form of clothing known as a *Jilbab*. She wished to wear this form of clothing because she found the school uniform was too revealing and therefore went against her religious beliefs.

4) The 'Countryside Alliance', a pro-hunting group, wanted to challenge the legality of the Hunting Bill 2005 which sought to outlaw hunting with dogs (particularly fox hunting, but also the hunting of deer, hares and mink and organised hare coursing) in England and Wales.

Interpreting Judgments

After a hearing has taken place at the UKSC the Justices spend some time together deliberating the arguments they have heard. They will then go away and separately write their own judgment, though in some cases one Justice is nominated to write a single judgment of the Court. Judgments can take between 6-12 weeks to be finalised and "handed down".

For each judgment, a Press Summary is drafted by the Judicial Assistants (trained lawyers who work for a year as researchers for the Justices) and agreed with the lead Justice, summarising the case and the Court's decision. On the day that a judgment is handed down, a shortened version of the summary is read aloud in court by the Justice who has written the main judgment. This is recorded and often broadcast by national television channels, and is streamed live on the Sky News website.

Below you will find examples of two press summaries and additional literature and responses relating to the cases. Read the material and then answer the questions below.

7 July 2010
PRESS SUMMARY

HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31
On Appeal from: [2009] EWCA Civ 172

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lord Collins, Sir John Dyson SCJ

BACKGROUND TO THE APPLICATION

HJ and HT are homosexual men – from Iran and Cameroon, respectively – who seek asylum in the United Kingdom on the basis that they would face the risk of persecution on grounds of sexual orientation if returned to their home countries.

In both Iran and Cameroon it is a criminal offence punishable by, *inter alia*, imprisonment and, in the case of Iran, by the death penalty, for consenting adults to engage in homosexual acts.

The Convention relating to the Status of Refugees, as applied by the 1967 Protocol ("the Convention"), provides that members of a particular social group, which can include groups defined by common sexual orientation, are entitled to asylum in States that are

The Court of Appeal found that, if returned to their respective home countries, HJ and HT would conceal their sexual orientation in order to avoid the risk of being persecuted. As HJ and HT would hide their sexuality they would not come to the attention of the State authorities and so would not be at risk of persecution. Accordingly, neither party had a 'well-founded fear of persecution' that entitled him to protection under the Convention: it was permissible for a State party to the Convention to refuse asylum to a homosexual person who, if returned to their home country, would deny their identity and conceal their sexuality in order to avoid being persecuted, provided that the homosexual person's situation could be regarded as 'reasonably tolerable'. Only if the hardship which would be suffered was deemed to exceed this threshold would the applicant be entitled to protection under the Convention.

The Appellant appealed to the Supreme Court, contending that the 'reasonable tolerability' test espoused by the Court of Appeal was incompatible with the Convention.

JUDGMENT

The Supreme Court unanimously allows the appeal, holding that the 'reasonable tolerability' test applied by the Court of Appeal is contrary to the Convention and should not be followed in the future. HJ and HT's cases are remitted for reconsideration in light of the detailed guidance provided by the Supreme Court.

REASONS FOR THE JUDGMENT

- There is no dispute that homosexuals are protected by the Convention, membership of the relevant social group being defined by the immutable characteristic of its members' sexuality [paras [6] and [10] per Lord Hope and para [42] per Lord Rodger].
- To compel a homosexual person to pretend that their sexuality does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny him his fundamental right to be who he is. Homosexuals are as much entitled to freedom of association with others of the same sexual orientation, and to freedom of self-expression in matters that affect their sexuality, as people who are straight [paras [11] and [14] per Lord Hope and para [78] per Lord Rodger].
- The Convention confers the right to asylum in order to prevent an individual suffering persecution, which has been interpreted to mean treatment such as death, torture or imprisonment. Persecution must be either sponsored or condoned by the home country in order to implicate the Convention [paras [12] and [13] per Lord Hope].
- Simple discriminatory treatment on grounds of sexual orientation does not give rise to protection under the Convention. Nor does the risk of family or societal disapproval, even trenchantly expressed [paras [13], [15] and [22] per Lord Hope and para [61] per Lord Rodger].
- One of the fundamental purposes of the Convention was to counteract discrimination and the Convention does not permit, or indeed envisage, applicants being returned to their home country 'on condition' that they take steps to avoid offending their persecutors. Persecution does not cease to be persecution for the purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action [paras [14] and [26] per Lord Hope and paras [52]-[53] and [65] per Lord Rodger].

- The 'reasonable tolerability' test applied by the Court of Appeal must accordingly be rejected [para [29] per Lord Hope and paras [50], [75] and [81] per Lord Rodger].
- There may be cases where the fear of persecution is not the only reason that an applicant would hide his sexual orientation, for instance, he may also be concerned about the adverse reaction of family, friends or colleagues. In such cases, the applicant will be entitled to protection if the fear of persecution can be said to be a material reason for the concealment [paras [62], [67] and [82] per Lord Rodger].
- Lord Rodger (with whom Lords Walker and Collins and Sir John Dyson SCJ expressly agreed), at para [82] and Lord Hope, at para [35], provided detailed guidance in respect of the test to be applied by the lower tribunals and courts in determining claims for asylum protection based on sexual orientation.

You can read the full judgment at: http://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0054_Judgment.pdf

Reported responses to the judgment

Home Secretary Theresa May said: "We have already promised to stop the removal of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution…I do not believe it is acceptable to send people home and expect them to hide."

Sir Andrew Green, chairman of Migrationwatch, said: "This could lead to a potentially massive expansion of asylum claims as it could apply to literally millions of people around the world. An applicant has now only to show that he - or she - is homosexual and intends to return and live openly in one of the many countries where it is illegal to be granted asylum in the UK…The judges are no doubt interpreting the letter of the international convention correctly but the consequences are potentially huge…The principle of asylum is, rightly, widely supported but it should be a matter of domestic law."

Donna Covey, chief executive of the Refugee Council, said: "It is about time refugees fleeing their countries because of persecution over their sexuality are acknowledged as being legitimately in need of safety here, in line with those fleeing other human rights abuses."

Ben Summerskill, the head of the campaign group Stonewall, said demanding that lesbian or gay people conceal their sexuality bore "no resemblance to the reality of gay life in many countries."

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]**).

You can read the full judgment at: http://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0136_Judgment.pdf

Reported responses to the judgment

The Board of Deputies of British Jews issued the following statement:

We are extremely disappointed by this decision, which was reached by the narrowest possible margin. The judgment makes it abundantly clear that there is no suggestion that the criteria used by JFS or the Office of the Chief Rabbi (OCR) were racist in any conventional sense. However, the sheer breadth of the Race Relations Act 1976 meant that JFS's admissions criteria, based on millennia of Jewish practice, fell foul of the civil law despite the "unimpeachable motives" and the "sincerely and conscientiously held beliefs" of the school and of the OCR.

As Lord Rodger noted with particular clarity in his dissenting speech, "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. … Jewish schools will be forced to apply a concocted test for deciding who is to be admitted [that] has no basis whatsoever in 3,500 years of Jewish law and teaching. … 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."

In order to correct that wrong, we will be exploring, as a matter of urgency and after consultation across the community, the possibility of a legislative change to restore the right of Jewish schools of all denominations to determine for themselves who qualifies for admission on the basis of their Jewish status, which we consider to be a fundamental right for our community and one with which the members of the Supreme Court had great sympathy.

In the meantime, schools will no doubt once again confer with their governors and professional and religious advisers as to how to adapt to their admissions procedures accordingly, whether this involves continuing with a process of collecting points for a Certificate of Religious Practice, or otherwise. These are obviously matters for individual schools to determine, but the Board will continue to provide as much assistance and guidance as we can.

Schools Secretary Ed Balls said: "All faith schools must follow admission procedures that are non-discriminatory, and consistent with the admissions code and the law. This is the case in the vast majority of faith schools and I understand that the JFS has amended its admissions policy in light of updated guidance from the Office of the Chief Rabbi."

M's father, who cannot be named for legal reasons, said: "I believe it's important for people to know that the same Race Relations Act that provides such valued protection for Jews, as well as others, from ill-judged or misguided prejudices also provides for the fair and equal treatment of all children within our education system. It is very important to see that this essential protection was not mistakenly discarded by divisive views which can naturally occur from time to time within all communities. The Jewish community, which has long endeavoured to enshrine fairness and care for others, will be relieved at heart that this minor discord will be put aside and that we, like all God's children and people of true feeling, can pull together again and work to make a better and fairer world for all."

The United Synagogue, which represents Orthodox Jews in the UK, said it was "extremely disappointed" with the ruling. **Simon Hochhauser, the Synagogue's president**, said the decision "interfered with the Torah-based imperative on us to educate Jewish children, regardless of their background. Essentially, we must now apply a non-Jewish definition of who is Jewish."

Andrew Copson, the British Humanist Association's director of education and public affairs, said: "There's absolutely no reason why what is essentially a public service should be denied to any children, whatever their beliefs or the beliefs of their parents."

Questions and activity

1) **Why do you think it is important for the UKSC to produce press summaries of judgments?**

2) **Why might these cases be seen to be controversial?**

3) **Can you identify human rights points of law in both cases? If so, what are they?**

4) **Imagine you are a journalist; write a 400-600 word article for a newspaper of your choice about one of the cases. Make clear in the tone of your article whether you think your readers will consider that the decision will have positive or negative implications.** You may wish to look up actual newspaper reports from the day after the judgments were issued to help you.

How much do you remember?!
Post-visit UKSC quiz

1) How many Justices are there?

2) What was their official title in the House of Lords?

3) What is the name of our only female Justice, currently?

4) Why is there no jury at the Supreme Court (UKSC)?

5) What is the maximum number of Justices that can sit on a case?

6) The 'parties' in UKSC cases are not called the prosecution and defence, what are they called?

7) How many UKSC cases are heard a year?

8) Who can wear wigs in the Supreme Court?

9) What UK country does not have its criminal cases heard at the UKSC?

10) What is meant by a 'separation of powers?'

11) What does JCPC stand for?

12) Name 5 countries which retain the right of appeal to the JCPC?