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**E - v - Governing Body of JFS and
the Admissions Appeal Panel of JFS and others
[2009] UKSC 15**

BRIEFING NOTES

When was judgment given?

The Judgment of the Supreme Court was handed down this morning at 9.45 by Lord Phillips. Each of the nine Justices has written a separate judgment which together run to over 140 pages.

What did the Court decide?

By a majority of five to four, the closest possible margin, the Court dismissed JFS's appeal and upheld the Court of Appeal's decision that JFS' admission criteria were directly discriminatory on grounds of race.

Lord Phillips, Lady Hale, Lord Mance, Lord Kerr and Lord Clarke held that the criteria were directly discriminatory.

Lord Hope, Lord Rodger, Lord Walker and Lord Brown dissented and held that the admission criteria were not directly discriminatory. Lord Rodger and Lord Brown also indicated that they would have found that there was no indirect discrimination.

On the issue of indirect discrimination, the Court considered whether the admissions criteria were a proportionate means of achieving a legitimate aim. All those Justices who considered the point were satisfied that JFS was able to demonstrate that its admissions criteria pursued a legitimate aim but only two of the Justices were satisfied that JFS had done enough on the facts before them to demonstrate that its admissions policy was a proportionate means of achieving that aim.

The United Synagogue won its costs appeal in part and the costs protection afforded to it in the lower court (before Munby J) was reinstated, though it will still have to pay 20% of M's costs in the Court of Appeal.

Why is the Court interfering in religious matters?

“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.” Lord Hope (para 160)

What view did the Court take of M’s case?

Lord Phillips rightly noted that 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. Lord Rodger commented that “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.” (para 224)

What does the decision mean?

The Court has confirmed the Court of Appeal’s view that the test of who is a Jew (based on descent or conversion) as applied by any Beth Din – whether the London Beth Din or any other rabbinic authority – is an ethnically based test of descent.

No Jewish faith school can apply an admissions criteria based on whether a child is a member of the Jewish religion (however defined), or based on any criteria which would require a child to be a member of the Jewish religion (e.g. synagogue membership). In Lord Rodger’s words, “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.” (para 225)

The decision will also have an impact on other Jewish organisations. If such criteria are used in the context of employment, education or the provision of goods or services, unless the organisation can rely on one of the very limited exemptions to the Race Relations Act 1976, its use will constitute direct race discrimination.

Does the Court consider the religious test of ‘Who is a Jew?’ to be ‘racist’?

No. All the Justices went out of their way to make it clear that there should be no suggestion that JFS or the OCR was acting in a ‘racist’ way, as the term is normally understood. Lady Hale commented that, “Any suggestion or implication that they are “racist” in the popular sense of that term can be dismissed.” (para 54) Lord Clarke added that “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.” (para 156)

Lord Hope agreed and acknowledged that “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.” (para 184)

Did the Court criticise the Chief Rabbi, the United Synagogue, the OCR or JFS?

No. The Court was highly sympathetic to JFS and its religious authority. Lord Kerr made it clear that, “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.” (para 124) This is a view which Lord Clarke (in the majority) specifically endorsed (para 156).

Lord Brown added that, “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.” (para 247)

What now for Jewish faith schools?

Following the Court of Appeal’s judgment most Jewish faith schools adopted a test based on religious practice rather than Jewish status. This will have to continue.

The OCR will consider its temporary guidance issued in the wake of the Court of Appeal’s judgment and will issue revised guidance to the schools for which it is the designated religious authority. Any criteria will now have to be based on the practice of the Jewish religion.

This ruling affects all Jewish faith schools – whether they are state funded or independent.

Lord Rodger dissenting, commented that the majority 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.” (para 226)

Can JFS appeal?

The UK Supreme Court is the highest court in the UK.

JFS has therefore exhausted all remedies in the UK.

To appeal, JFS would need to bring a case to the European Court of Human Rights.

Is there another way forward?

Possibly. A clear majority of the Justices, including Lord Phillips, signalled that the law on discrimination may be flawed because of the result they were forced to reach in this case. Lord Kerr noted that “The breach of the legislation arises because of the breadth of its reach.” (para 124) Lady Hale commented that there may 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. 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.” She suggested that the mechanism for introducing such change might be through the Equality Bill which is currently making its way through the House of Lords.

We will be considering very carefully in the next few weeks whether an amendment to the Equality Bill could be introduced to address this issue.

Did the court have anything to say about the religious practice test?

The majority largely ignored the problems inherent in devising and policing a religious practice test. Lord Mance commented that such considerations cannot be decisive either way.

The minority however understood the problems inherent in a religious practice test.

Lord Rodger noted that “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.” (para 225)

Lord Brown also highlighted the difficulties of such a test, “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..... 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.” (para 253)

What will happen to the religious practice test?

For admissions for the academic year 2010/11, the current test will stand.

For admissions for the academic year 2011/12 Jewish schools will now consider whether any refinements can be made to the religious practice test to enable schools to achieve their aims and preserve their ethos. The OCR will seek to assist with guidance.

How will this affect the activities of other Jewish organisations?

If they use a religious status test in conjunction with the selection of employees, students, customers or beneficiaries, they may be discriminating unless they fall within one of the exemptions.

How will this affect the United Synagogue?

The United Synagogue is a charitable organisation and those activities which it undertakes in furtherance of its charitable objects should be covered by the exemption set out in Section 34 of the Race Relations Act 1976. The United Synagogue will be undertaking a thorough review of its activities to ensure that it is complying with the law.

What about costs?

Costs in the Supreme Court are likely to follow the judgment and so M's lawyers will be entitled to recover their fees at premium rates in the following proportions:

In the High Court:

20% from the Secretary of State
10% from the Schools Adjudicator
70% from JFS

In the Court of Appeal:

50% from JFS
20% from the Secretary of State
10% from the Schools Adjudicator
20% from the United Synagogue

We do not yet know how much they will claim.