WHO IS A JEW? AN ANALYTICAL EXAMINATION OF THE SUPREME COURT OF THE UNITED KINGDOM'S JFS CASE: WHY THE MATRILINEAL TEST FOR JEWISH IDENTITY IS NOT IN VIOLATION OF THE RACE RELATIONS ACT OF 1976

Jason Ordene

I. OVERVIEW

This note will examine the controversial United Kingdom Supreme Court decision involving a young man who was refused admission into the JFS (formerly the Jews' Free School).[1] The JFS is a voluntarily aided and partially State funded Jewish Orthodox School, considered to be one of the better schools in the United Kingdom.[2] The school maintained a procedure that when it became oversubscribed, an admissions policy would be enacted to give preference to Jewish applicants.[3] The school identified a child as Jewish according to the United Kingdom Office of the Chief Rabbi's interpretation of Orthodox Jewish tradition.[4] This interpretation holds that a child is Jewish if they were born to a Jewish mother, if the mother converted to Judaism through the Orthodox tradition before the child was born, or if the child was converted through the Orthodox tradition.[5] In accordance with the Orthodox tradition and customary and historical Jewish practice, this policy does not recognize conversions that are not conducted under Orthodox supervision.[6] Consequently, a woman who has a non-Orthodox conversion is not considered Jewish under the Orthodox view of Jewish law, and therefore any child born to them will not be considered Jewish for the purposes of the JFS's oversubscription admissions policy.

The primary controversy in this case stems from the school's refusal to admit a boy whose father was Jewish, but whose mother converted to Judaism under the auspices of a non-Orthodox syna-

1. Regina (E) v. Governing Body of JFS, [2009] UKSC 15, [2010] 2 A.C. 728 (appeal taken from Eng.).
2. Ofsted Inspection Report, JFS School, 8 March 2006 - 9 March 2006.
3. *Regina (E),* [2010] 2 A.C. at 744.
4. *Id.*
5. *Id.*
6. *Id.*

gogue.[7] As a result of converting through a non-Orthodox process, the mother, who was from Italian and Roman Catholic descent, was not considered to be Jewish according to the Office of the Chief Rabbi of the United Kingdom, and therefore, her son was also not considered Jewish.[8] The boy's father was discontented with this decision and sued the school to have his son admitted.[9] Although the administrative court held the JFS was not in violation of the Race Relations Act of 1976 ["RRA"] due to the religious nature of the decision, the Court of Appeals held for the boy and proclaimed that the school was in violation of the RRA.[10] While the school settled the issue of admission with the family of the boy separately, they appealed the decision of the appellate court on principle.[11]

In a close decision, the United Kingdom Supreme Court affirmed the lower decision and held by majority that the matrilineal test for determining who is Jewish, as applied by the school, was a violation of the RRA.[12] The Court noted that its decision was not a condemnation of Jewish law or the Jewish people, but rather an effect of the application of secular law on an otherwise religious matter.[13] However, its conclusions create a negative impact on the operation of Jewish faith schools throughout the UK because they are now forced to use the secular definition of Jewish identity instead of the religious one in admitting students to their religious schools.[14]

The first part of this note will examine the historical background of the Jewish people.[15] This will include a discussion on Jewish conversion practices and how they have evolved throughout history. Additionally, this note will focus on how in modern times, assimilation has changed the Jewish people and altered the

---

7. *Id.*
8. *Id.*
9. *Id.*
10. R(E) v. Governing Body of JFS, [2008] EWHC 1535, [2008] ELR 445; Regina (E) v. Governing Body of JFS, [2009] EWCA Civ 626, [2009] 4 ALL ER 375.
11. *Regina (E)*, [2010] 2 A.C. at 744.
12. *Id.* at 754.
13. *Id.* at 745.
14. *Id.* at 744.
15. I feel it is important to emphasize that I am not an expert on Jewish history, law or culture. The explanations and determinations regarding Jewish law and history are provided to give the reader a better understanding of Jewish identity and not to make conclusions on the intricacies of Judaism.

traditional notions of Jewish identity. This will encompass a discussion on how Judaism has been divided into denominational subgroups, and focus on the differing ideologies of the two most pertinent to this case, Orthodox Judaism and Masorti Judaism.

Most importantly, this note will examine the Supreme Court decision in *Regina (E) v. Governing Body of JFS* and further explore the determination of whether the school's use of the matrilineal lineage test as admissions criteria was a case of direct or indirect discrimination under the RRA. For the purposes of direct discrimination, I will first examine on what grounds the JFS discriminated against M and how those grounds are determined. I will then analyze the Supreme Court's decision and argue why the majority was incorrect in its determination that the matrilineal test used a racial criterion in violation of the RRA. I then argue that the matrilineal test of the admissions policy was a case of religious discrimination and not racial.[16] Finally, I will explore why the admissions policy is not a form of indirect discrimination in violation of the RRA.

II. JEWISH IDENTITY

As explained by Rabbi Hayim Halevy Donin, "Jews have never quite been able to fit into the convenient categories used by historians or sociologists to define nations, races, religions, and other social groupings."[17] While a common understanding of Judaism is that it is a religion or faith, this assumption is problematic because even Jews who rebel against the faith and discard its religious beliefs and practices are still regarded as Jews.[18] Although there is certainly a Jewish faith, this cannot be the sole indicator of Jewish identity. Jews also cannot be classified as a race—defined as "a category of humankind that shares certain distinctive physical traits"— because Jews include people with a variety of different physical traits, even those as fundamental as skin

16. Religious discrimination does not fall within the purview of the Race Relations Act. Religious discrimination is in violation of the Equality Act of 2006. However, under §59 of the Act, Faith Schools, such as the JFS are provided with an exemption from religious discrimination in that they are allowed to restrict membership to the school to Jews. *See* Equality Act, 2006 c.3, §59(1).

17. RABBI HAYIM HALEVY DONIN, TO BE A JEW 9 (1972).

18. *Id.*

color.[19] However, even while not a race, membership in Judaism derives solely from the mother, thus lending a physical aspect to the process.[20] Conversely, even while Jewish identity is derived from the mother, becoming Jewish is not limited by birth. Judaism is open to all and those who convert, join the Jewish people and are considered part of the Jewish family.[21] Accordingly, there must be something beyond the physical that identifies a Jew. Rabbi Hayim Halevy Donin defines this connection as a "mystical experience" and the connection to the spiritual mission of the future and the tying of oneself to the collective past.[22] Consequently, for the purposes of this note, Jewish identity can be defined as a race tied together not by physical characteristics, but rather by the spiritual or mystical connection with G-d and the Jewish people, which, while ethereal itself, physically passes down from mother to child or is gained through conversion.

A. Religious Identity

While the Jewish tradition has existed for thousands of years, throughout this time, much of Jewish belief, culture, and practice have experienced significant change. With the fall of the Second Temple, around 70 CE and the Diaspora, Judaism began a fundamental shift in order to cope with the loss.[23] The most significant change was the emergence of Rabbinic Judaism, which relied on the Oral Torah, later codified as the Talmud, as the primary means of interpreting Jewish scripture.[24] Even though Rabbinic Judaism may differ from Judaism as it was practiced in the Temple times, it has become the predominant and surviving system of

---

19. *Race Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/race (last visited Apr. 9, 2012); DONIN, *supra* note 17, at 8.

20. DONIN, *supra* note 17, at 8.

21. *Id.*

22. *Id.* at 8-9.

23. *See* LAWRENCE H. SCHIFFMAN, FROM TEXT TO TRADITION 104,119 (Ktav Publishing House, Inc. 1991).

24. JOSEPH R. ROSENBLOOM, CONVERSION TO JUDAISM: FROM THE BIBLICAL PERIOD TO THE PRESENT 35 (Hebrew Union College Press 1978) (The Rabbinic period may have originated much earlier in the second century BCE); DONIN, *supra* note 17. The Torah consists of the 5 books of Moses, given to Moses and the children of Israel at Mount Sinai. The Oral Torah/Oral Tradition also originated at Mount Sinai. It clarifies and provides the details for many of the commandments contained in the written Torah. The Oral Torah was the cornerstone upon which the Talmud was built.

Judaism in the modern age.[25] Consequently, or at least for the purposes of this note, any modern interpretation of a question on Jewish identity must be interpreted under the modern system of Rabbinic Judaism and its basis in both the written and oral Torah.

Throughout the Diaspora, Jews held closely onto their traditions and practices, which often led to the alienation of gentiles and the general population.[26] While sometimes accepted by other nations, Jews were often considered a pariah or guest people, segregated by their unique rituals and beliefs.[27] As a result, Jews maintained close-knit communities, but still actively participated in missionary activities.[28] However, with the rise of Christianity and the increasing hostility toward the Jewish people, the pressures of society gradually forced the Jewish community in upon itself, making it more introspective and isolated.[29] With the increasing persecution and the competing for proselytes, Jews were forced to change their missionary practices in order to survive.[30] It was often the case that when Jews attempted to convert Christians or competed with Christian missionaries, there would be severe consequences for the Jewish community.[31] While still accepting of converts, in order to protect their communities, Jews began altering their conversion practices, becoming more selective and isolationist.[32] To justify this departure from their old conversion practices, several Jewish scholars created philosophies arguing against the need for conversion. For example, Maimonides argued against seeking the conversions of Christians and Muslims because they were already practicing monotheists and therefore did not need to convert to Judaism to worship the one G-d.[33] Judah HaLevi argued that Jews were the chosen people, both physically

25. *See generally* SCHIFFMAN, *supra* note 23.

26. JOSEPH R. ROSENBLOOM, CONVERSION TO JUDAISM: FROM THE BIBLICAL PERIOD TO THE PRESENT 58-89 (1978).

27. *Id.* at 84.

28. *Id.* at 61-89.

29. *Id.* at 67.

30. *Id.* at 61-89.

31. *Id.* at 74-75.

32. *Id.* at 40-41,74 While modern Judaism is considered a non-proselytizing religion that is often seen as hostile to winning converts, this attitude grew out of the many hardships and restrictions in the Christian and Islamic milieus and was only later read back into Jewish history. Rather, historically, Jews were eager to convert as many as they could and bring men "under the wing of Shechinah."

33. *Id.* at 74. Maimonides did contend, however, that the sincere convert would still be accepted after careful screening.

and spiritually, and that while a proselyte might be pious, they would not receive the gift of prophecy, the highest level of religious attainment, which was reserved for born Jews.[34] As a result of these new protective measures and philosophies, the old missionary practices of Jews ended and conversion became more restrictive and selective.[35]

A shift occurred, however, with the coming of Renaissance ideologies and the conclusion of the French Revolution, as Jews were given citizenship into larger nations and were freed from many of the special legal restrictions that isolated them in the past.[36] Following this period, Jews who had previously been considered only guest peoples were allowed to incorporate into modern states.[37] It is during this time that groups of Jews, most notably in Germany, began to assimilate into the countries where they gained citizenship, and for the first time a Jew could be classified not as a just a Jew, but also as a German, or a Frenchman.[38] However, with these newfound freedoms, the formerly close-knit communities of Jews began to cast off many of the old traditions that protected them during the exile and embrace the modern culture now open to them.[39] It was in response to these conditions that liberal and progressive forms of Judaism emerged in an effort to more easily cope with the assimilation to a modern world.[40]

1. Masorti and Orthodox Judaism

At its core, "[t]he very essence of Judaism rests upon the acceptance of a spiritual-historical event in which [Jewish] ancestors participated as a group, as well as upon acceptance of subsequent

---

34. *Id.*

35. *Id.* at 77. Systems such as those promulgated by Rabbi Gershon ben Jacob Ha-Gozer—that a candidate for conversion be rejected three times before being accepted because he might be a cause of danger—were created at this time, even though such a rule is not repeated in any code or comment of the other tosafists.

36. *Id.* at 121.

37. *Id.* at 122.

38. *Id*. *See also* Samuel S. Cohon, *The Mission of Reform Judaism*, 2 J. REL. 30, 31 (1922).

39. Cohon, *supra* note 38, at 33. "Without the strength of conviction that impelled the Jews of former ages to martyrdom for their faith, these men readily consented to be sprinkled with the waters of the baptismal font to gain admittance into society or political life. Under these conditions a veritable conversionist epidemic broke out amongst German Jews."

40. *Id.* at 33-35.

spiritual revelations to the Prophets of Israel."[41] This event is the promulgation of the Ten Commandments at Mount Sinai and the subsequent transference of the written Torah, written down by Moses under divine prophecy during the forty-year period after the exodus.[42] Jews believe that G-d's will was manifest in the oral tradition/oral Torah at Sinai to Moses and orally taught by Moses to the religious heads of Israel. This oral Torah, when later recorded, would become the cornerstone of the Talmud.[43] Consequently, it is this literature, the combination of the written and oral Torahs that has become the foundation for all Jewish law. While interpretation of these laws has been debated throughout Jewish history, it is the method of adherence and interpretation that has led to the modern denominational split in Judaism. Many denominations and sects of Judaism have emerged throughout history as a result of these differences and without delving into the bitter complexities, the basic ideologies behind them are liberal, progressive, and traditional.[44]

The strictest and most traditional form of modern Judaism is the Orthodox movement, which strictly adheres to halacha, or Jewish religious law as defined by the Torah and the Talmud. While Orthodox Judaism accepts modernity, it is unique in that it has not altered its interpretation and adherence to the traditional beliefs and understandings of Jewish law.[45] Philosopher Joseph Schechter, noted, "Jewish law has brought the people to the present era, in spite of the tenacious discrimination and poverty which they met everywhere."[46] He surmised that while "[m]odernity has brought humanity near to total destruction[,]" the Jewish people who have held onto their traditional beliefs, have survived.[47]

While the Jewish Orthodox community maintains strict adherence to halacha and its traditional interpretations, other denominations have taken more progressive approaches. Masorti Juda-

41. DONIN, *supra* note 17, at 24.
42. *Id.*
43. *Id.* at 24-25.
44. For the purposes of this note only Masorti/Conservative and Orthodox Judaism will be explored.
45. Ben Zion Bokser, 45 JEWISH Q. REV. 46, 50 (1955).
46. Eliezer Ben-Rafael, *Quasi-Sectarian Religiousity, Cultural Ethnicity and National Identity: Convergence and Divergence among Hahamei, in* JEWISH SURVIVAL: THE IDENTITY PROBLEM AT THE CLOSE OF THE TWENTIETH CENTURY 51 (Ernest Krausz & Gitta Tulea, eds., 1998) [hereinafter JEWISH SURVIVAL].
47. *Id.*

ism (Conservative Judaism in the United States and Canada) is founded on the idea of embracing traditional observances and accepting the authority of halacha, yet with more openness to change than Orthodox Judaism allows.[48] "Conservative Judaism has emphasized the role of history in the development of Jewish tradition."[49] It operates with the understanding that there is a correlation between social forces and the development of custom, ritual, ceremony, and doctrine.[50] Though fundamentally accepting halacha as binding, Conservative Judaism operates on the premise that "[t]radition could be asked to give way and adjust to the demands of life."[51] This is distinct from the Orthodox interpretation—where life must adjust to tradition. The adaptation of Jewish Law to better fit with the realities of the modern world is the key concept within Masorti ideology. Masorti Judaism views Jewish law as flexible and believes that it can be modified to better suit the needs of the present day.[52] However, it is this flexibility and internal alteration of Jewish law that places the Orthodox and Masorti ideologies at odds.

2. Views on Conversion

Orthodox communities view a proselyte's duty as not only performing the religious rituals of conversion, but also understanding the fundamental laws and their traditional interpretations as viewed by the Orthodox community.[53] The more flexible interpretations of the Masorti movement do not satisfy the Orthodox requirements of halachic understanding of Jewish law.[54] Consequently, the Orthodox community does not recognize Masorti conversions that emphasize these modernity-adapting interpretations.

Conversion is a customary and historically accepted practice within Judaism, yet it has elicited great controversy surrounding religious sincerity. With the high rates of intermarriage between Jews and non-Jews, it sets a dangerous precedent if non-sincere

48. Rabbi Louis Jacobs, *The Emergence of Modern Denominationalism II: The development of Orthodox, Conservative, and Reconstructionist Judaism*, *in* THE JEWISH RELIGION: A COMPANION 93-94 (1995).

49. Bokser, *supra* note 45, at 52.

50. *Id.*

51. *Id.* at 57.

52. *Id.*

53. R.(E.) v. Governing Body of JFS, [2008] E.W.H.C. 1535, 2008 WL2697039, at *3-4 (Q.B.D. 2008).

54. *Id.*

conversions are occurring solely so non-Jews can marry Jews.[55] Such conversions for the sake of marriage are generally frowned upon, as they are often performed for "convenience rather than from conviction."[56] Even though such reasoning may not reflect the majority, it provides insight as to why Orthodox communities have maintained such strict measures regarding conversion practices.

3. Jewish Conversion – The Matrilineal Test

The matrilineal lineage test is the ruling that Jewish identity is passed down from the Jewish mother to the child.[57] While this concept is ingrained in modern Jewish law, according to Professor

---

55. ROSENBLOOM, *supra* note 24, at 136.

56. *Id.*

57. The Biblical reference to the matrilineal lineage test stems from the seventh chapter of Deuteronomy and 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, 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."

Deuteronomy 7:1 - 4 cited in *Regina (E),* [2010] 2 A.C. at 743.

In an interpretation of the phrase, "You shall not intermarry with them," the explanation is that "This prohibition applies to all non-Jews. The reference to 'marriage' is not meant literally, since a marriage between a Jew and a gentile has no halachic validity; the verse bans a marriage-like arrangement -- regardless of whether it is recognized as valid by the secular authorities -- with a gentile partner."[57] Similarly, in Rashi's interpretation of the phrase "For he will cause your child to turn away from after Me," he wrote, "'He' refers to the gentile mate of the Jewish woman, and the 'child' is the child who will be born of such a marriage. Since the mother is Jewish, the child is Jewish, but his gentile father will raise him as a non-Jew, turning him away from his faith. Pointedly, the Torah does not say she will turn your child away, because if a Jew lives with a gentile woman, their issue is not Jewish. [my emphasis added]"

Rambam, Hil. Issurel Biah 12:1; Kiddushin 68b as understood by Rashi; *see* Tos. The Chumash, The Stone Edition, 977-78.

Shaye Cohen, it may not have been a biblical principle, but rather a construct of the exile and Rabbinic Judaism.[58] He argues that in biblical times, many Jewish men married non-Jews, and their children's status was determined by the father's religion.[59] The matrilineal principle traces its roots back to the time of Ezra, sometime around the fifth century BCE. It was only around the second century CE that this principle became common practice.[60] Consequently, the modern matrilineal principles may not accurately portray the correct picture of Jewish ancestry. Despite the inexact origin of the matrilineal test, it is firmly rooted in modern Jewish doctrine and accepted as law by both the Masorti and Orthodox traditions.[61]

4. Observations on Christianity and Judaism

Christianity's origins are founded in Judaism, though its fundamental ideology operates to escape the complex legal regime of Jewish law and embrace the underlying spirit of the laws' meaning. "Jesus and his followers sought to decrease the overall importance and density of the Torah's legal regime, a view most succinctly expressed in Paul's assertion that "for the letter kills, but the spirit gives life."[62] Chaim Saiman contends that Jesus and his followers focused more on a policy-oriented version of the Torah that eliminated much of the dense legal rules of the Jewish tradition.[63] In a compelling argument against the concept of modernizing Judaism, Tsvi Wolfson of Harvard University noted, "[t]here is no notion of Jewish identity independent of religious identity . . . Jews cannot go back to Paul's position among the first Christians that ritual circumcision and the religious commandments have become obsolete."[64] These fundamental differences emphasize the dichotomy between the Christian or secular understanding, and the Jewish understanding of religious identity. Christian identity requires a focus on outward acts of religious practice and declara-

58. Shaye J.D. Cohen, *The Origins of the Matrilineal Principle in Rabbinic Law*, 10 AJS REV. 1, 21 (1985).

59. *Id.*

60. *Id.* at 23-25, 29.

61. For a more complete explanation of the matrilineal lineage test, its historical and religious foundations see Cohen, *supra* note 58.

62. Chaim Saiman, *Jesus' Legal Theory -- A Rabbinic Reading*, 23 J.L. & REL. 97, 100 (2007-08).

63. *Id.*

64. Ben-Rafael, *in* JEWISH SURVIVAL, *supra* note 46, at 44.

tions of faith, while Judaism is fully defined by its meticulous observance of the Torah and its Commandments.[65] Thus, a court employing a Christian understanding of religious identity may have trouble applying the Jewish conception.

B. Jewish Schooling

Around the mid Seventeenth century in the United Kingdom, only a small portion of the general population received any formal education.[66] While the Church of England was active in providing schools, its curriculum included the basic assumptions of Anglican Christianity, effectively excluding nonconformist minority groups such as Catholics and Jews, who began to provide schools for their own young people.[67]

After their re-admittance to England in 1656, Jews began to create Jewish schools and in 1732, the Jews Free School was established.[68] More recently, the Secretary of State of the United Kingdom created a designation for religious schools as long as one of the following three requirements is satisfied:

> (a) that at least one governor represents the interests of the religion(s) concerned;
>
> (b) that the school premises would be for the benefit of the religious denomination; and
>
> (c) that the school is provided in accordance with the tenets of the religious denomination (DfEE, 1999).[69]

The JFS follows the tenets of the Office of the Chief Rabbi, which in turn adheres to the Orthodox denomination of Judaism.[70] As such, in adherence to section (c), the school must be provided for in accordance with the tenets of Orthodox Judaism, which inevitably includes its doctrines regarding conversion and Jewish identity.

The JFS is a voluntarily aided school under the Schools Standards and Framework Act of 1998, as described above. It is pub-

---

65. *Regina (E),* [2010] 2 AC at 735, 823; Saiman, *supra* note 62, at 100.

66. Helena Miller, *Meeting the Challenge: Jewish Schooling Phenomenon in the UK*, 27 OXFORD REV. OF EDUC. 501, 502 (2001).

67. *Id.*

68. *Id.*

69. *Id.* at 509.

70. *Regina (E),* [2010] 2 A.C. at 744.

licly funded and has been designated by the Secretary of State, under the Act, as a Jewish faith school. As a faith school, it is exempt from the prohibition of discrimination on grounds of religion or belief contained in section 50(1)(a) of the Equality Act of 2006. However, faith schools are not exempt from the prohibitions of the Race Relations Act of 1976.

III. THE CASE OF REGINA (E) V. GOVERNING BODY OF JFS

A. Facts

The JFS is a popular Jewish secondary school in northern London that has received outstanding marks from the Office for Standards in Education.[71] As a result, more children wished to attend the school than there were places available.[72] Consequently, the School created an admissions policy for the 2007/2008 term, asserting that when the school was oversubscribed, preference would be given to those whose status as Jews was recognized by the Office of the Chief Rabbi of the Hebrew Congregation of the Commonwealth ("OCR").[73]

The OCR follows the Jewish Orthodox tradition in defining Jewish identity.[74] Under this institution, there are only two methods of Jewish identification: (1) to be born to a Jewish mother or; (2) to be converted to Judaism under Orthodox standards.[75]

This system created a significant problem for the school when E ("father") wished to send his son M ("son") to the JFS, which was then oversubscribed.[76] While E was considered Jewish by birth, his wife was born of Italian and Catholic lineage.[77] However, prior to M's birth, the mother converted to Judaism under the auspices of a non-Orthodox Synagogue.[78] Nevertheless, the JFS determined that the mother was not Jewish because her Masorti conversion

---

71. Ofsted Inspection Report, JFS School, 8 March 2006 - 9 March 2006.
72. *Regina (E),* [2010] 2 A.C. at 744.
73. The relevant portion of the JFS admission policy for the 2007/2008 academic year began 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') . . ." *Id.* at 748-49.
74. *Id.* at 744.
75. *Id.*
76. *Id.*
77. *Id.* at 816.
78. *Id.* at 744.

did not meet the standards for conversion as set by the OCR.[79] Since M's mother was not recognized as Jewish, he was also not considered Jewish, and the Board of Governors of the JFS denied his application to the JFS.[80]

The father brought suit on behalf of his son in order to challenge the ruling of the JFS, but failed in his judicial review proceedings.[81] The Court held the JFS's refusal to admit the son was religious rather than racial.[82] However, the father succeeded on appeal where the Court of Appeals held the JFS was in violation of the Race Relations Act of 1976.[83] While the question of M's admission had already been resolved between the parties, the governing body of the JFS appealed the ruling.[84] The Supreme Court of the United Kingdom dismissed the appeal and held in a 5 to 4 majority ruling that the Orthodox matrilineal lineage test utilized by the school was in violation of the Race Relations Act of 1976.[85] Five Judges determined direct discrimination took place (Lord Phillips, Lady Hale, Lord Mance, Lord Kerr and Lord Clarke), two Judges held that there was indirect discrimination (Lord Hope and Lord Walker), and two Judges found no discrimination and would have reversed the Court of Appeal's decision (Lord Rodger and Lord Brown).[86]

1. Race Relations Act of 1976

The RRA was passed by Parliament in 1976 for the purpose of preventing discrimination on the grounds of colour, race, nationality or ethnic or national origins in the fields of employment, the provision of goods and services, education, and public functions.

The relevant portion of the Race Relations Act as it pertains to this case is:

---

79. *Id*.
80. Id.
81. *Id.* at 728; *see also* R(E) v. Governing Body of JFS, [2008] EWHC 1535, [2008] ELR 445; Regina (E) v. Governing Body of JFS, [2009] EWCA Civ 626, [2009] 4 ALL ER 375.
82. *Regina (E),* [2010] 2 A.C. at 728.
83. *Id*.
84. *Id*. at 744.
85. *Id.* at 754.
86. *Id.* at 728-823.

§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 . . .

(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.

§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.[87]

In determining whether the JFS violated the RRA, the Supreme Court looked to two different provisions: §1(1)(a) to determine whether there was direct discrimination; and §1(1A) parts (a), (b), and (c) to determine whether there was indirect discrimination.

B. Grounds Upon Which M was Refused Admission

In determining upon what grounds M was refused entry into the JFS, the Court noted that "grounds," for the purposes of this

87. Race Relations Act, 1976 c. 74.

case, is an ambiguous term.[88] According to the RRA, the grounds upon which M was refused entry had to fall within colour, race, nationality or ethnic or national origins. The majority determined that the grounds upon which M was refused entry were that of ethnic origins.[89]

1. What is an Ethnic Group?

In the JFS case, the Court utilized two different methods in defining ethnicity. First, the court set forth the plain meaning, which according to the Supplement to the Oxford English Dictionary (1972) means, "pertaining to or having common racial, cultural, religious, or linguistic characteristics, especially designating a racial or other group within a larger system . . . ."[90]

The second—and ultimately controlling—method of defining ethnicity is an objective standard derived from the case of *Mandla (Sewa Singh) v Dowell Lee*.[91] In this case, the headmaster of a private school refused to admit a boy who was an orthodox Sikh because the boy had long hair and wore a turban in violation of school rules.[92] The headmaster would have admitted the boy had he removed the turban and cut his hair.[93] The motivation behind the headmaster's refusal to admit the boy was that the wearing of a turban, would accentuate religious and social distinctions in the school and that long hair on a boy was in violation of school rules.[94] Since the school was multiracial and based on the Christian faith, the headmaster desired to minimize these distinctions as much as possible.[95]

The boy's father sought a declaratory judgment in the county court, arguing that the school's refusal to admit his son unless he removed his turban and cut his hair was unlawful discrimination under §1(1)(b) of the RRA against a member of a "racial group" as

88. *Regina (E),* [2010] 2 A.C. at 745-46.
89. *Id.* at 754.
90. *Id.* at 750.
91. *Regina (E),* [2010] 2 A.C. at 801 citing *Mandla (Sewa Singh) v. Dowell Lee,* [1983] 2 A.C. 548, 562 (H.L.) (appeal from Eng.) ("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).
92. *Mandla (Sewa Singh)*, [1983] 2 A.C. at 559, 569.
93. *Id.* at 568-69.
94. *Id.* at 557-58, 569.
95. *Id.* at 566.

defined in §3(1) of that Act.[96] The county court dismissed the boy's claim on the ground that Sikhs were not a "racial group" within the definition of that term in §3(1) of the 1976 Act.[97] The boy appealed, contending that the term "ethnic" embraced more than merely a racial concept and should embrace a broad cultural view.[98] It was common belief that Sikhism was primarily a religion, and that the adherents of a religion were not as such a "racial group" within the 1976 Act.[99] Subsequently, the Court of Appeals dismissed the boy's appeal on the grounds that a group could be defined by reference to its ethnic origins within §3(1) of the 1976 Act only if the group could be distinguished from other groups by definable racial characteristics with which members of the group were born, and that there were no such characteristics peculiar to Sikhs.[100]

Consequently, on appeal, the House of Lords had to determine whether a group such as the Sikhs constituted a group of unique ethnic origin even though they were racially indistinguishable from other Punjabs. The Court noted that while Sikhs were originally a religious community founded around the end of the fifteenth century in the Punjab area of India, they are no longer a purely religious group, but rather a separate community with distinctive customs, such as the wearing of long hair and a turban; although racially, they are indistinguishable from other Punjabs, with whom they shared a common language.[101] Subsequently, the Court held that the school's conduct was in violation of the RRA and enumerated a new set of factors for determining a unique ethnic group. Lord Fraser of Tullybelton noted:

> 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.[102]

---

96. *Id.* at 549.
97. *Id.* at 549-50.
98. *Id.* at 550.
99. *Id*. at 555.
100. *Id.* at 549.
101. *Id.* at *565.*
102. *Id.* at 562.

The court identified several of these characteristics for determining whether a group is considered an ethnic group. These characteristics have become known as the *Mandla* test:

> (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 . . . (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.[103]

C. The Decision of the Supreme Court in the JFS Case

1. Direct Discrimination

The law prohibiting direct discrimination "aims to achieve formal equality of treatment: there must be no less favorable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins."[104] Five judges of the Supreme Court held that the matrilineal test used by the JFS was a case of direct discrimination because M was treated less favorably on the grounds of his ethnic origins, his maternal descent of Italian and Roman Catholic. Otherwise stated, the majority held that it was because of M's lack of ethnic descent from the Jewish ethnic group that he was treated less favorably.[105]

---

103. *Id.*
104. *Regina (E),* [2010] 2 A.C. at 757.
105. *Id.* at 760-61.

The JFS argued that any discrimination resulting from the matrilineal test was religious and not racial, specifically: "(1) the matrilineal test is a test laid down by Jewish religious law; and (2) the matrilineal test is not a test of ethnic origin or ethnic status but a test of religious origin and religious status."[106]

2. The Matrilineal Lineage Test: Religious or Racial

The majority dismissed the argument by the JFS, that the matrilineal test is a purely religious determination, by indicating that a discriminator's motive when applying discriminatory criteria is irrelevant.[107] The majority held that UK case precedent interpreting the RRA and other similar law demonstrated that motivations behind discrimination-based criteria such as race, sex, or ethnic origin are irrelevant to the legal conclusions.[108] The majority relied upon two cases: *R. v. Birmingham City Council* and *James v. Eastleigh Borough Council*.[109]

In *Birmingham,* decided in 1989, there were eight selective single sex schools operated by the Birmingham City Council, most of which were voluntarily aided.[110] At the age of 12, there were an equal number of places available for boys and girls.[111] However, at the age of eleven, 390 places were available for boys, but only 210 places existed for the girls.[112] The Equal Opportunities Commission (EOC) alleged that the Birmingham City Council's selection policies were in breach of section 23 of the Sex Discrimination Act 1975 as they were discriminating against girls.[113] This policy led to the necessity of requiring girls to have better test scores and credentials than boys in order to gain entry into the school.[114] The reason for the unequal selection numbers was one of historical precedent for the school, meaning that the policy was not motivated by a drive to discriminate against girls as a gender; the

106. *Id.* at 751.
107. *Id.* at 751-52. ("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.").
108. *Id.* at 748.
109. R. v. Birmingham City Council, [1989] 1 A.C. 1155; James v. Eastleigh Borough Council, [1990] 2 A.C. 751.
110. *Birmingham City Council,* [1989] 1 A.C. at 1190.
111. *Id.*
112. *Id.*
113. *Id.* at 1159, 1190-91.
114. *Id*. at 1159, 1191.

amount of places offered to each gender was simply an inherited situation.[115] Regardless of the underlying motivations, the Court held that there was direct discrimination because the girls received less favorable treatment than boys solely because of their gender.[116] The Court explained:

> 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. 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.[117]

In the second case, *James v Eastleigh Borough Council*, decided in 1990, the plaintiff and his wife, both 61 years old, decided to go to Fleming Park Leisure Centre where there is a public swimming pool operated by the Eastleigh Borough Council.[118] The Council had set up a policy so that those people who had reached pensionable age[119] were allowed free admission into the pool; however, those that had not reached pensionable age had to pay a fee of 75 pence in order to gain admission.[120] The pensionable age was set by the state and was 65 for men and only 60 for women.[121] Being of pensionable age, the plaintiff 's wife was admitted free; not being of pensionable age the plaintiff had to pay 75p for admission.[122] The plaintiff brought proceedings against the council,

115. *Id.*
116. *Id.* at 1194. The ultimate criterion considered was the fewer placements for girls than boys, and the motivation was irrelevant.
117. *Id.* at 1194.
118. *James*, [1990] 2 A.C. at 760.
119. *Id.* (Pensionable age is the age "at which persons can first qualify for their state pensions, but is also used as the basis on which men and women qualify for a variety of concessions to the elderly such as free or reduced travel and free prescriptions under the National Health Service").
120. *Id.*
121. *Id.*
122. *Id.*

claiming that they had unlawfully discriminated against him on the ground of his sex, contrary to section 1(1)(a) and 29 of the Sex Discrimination Act 1975.[123] The motivation of the Eastleigh Borough Council for the admissions policy was that those of pensionable age were let in free because they were more likely to have reduced income and therefore needed a discount.[124] However, since the pensionable age set by the State, for women is 60 and for men 65, the Court held by a majority of three to two, that it was direct discrimination because but for James being a man, he would not have had to pay the admission fee.[125] The Court noted that while the motivation behind the policy was not discriminatory, the policy itself treated people differently solely because of their gender and was therefore direct discrimination.[126]

The core concept pulled from both of these cases by the JFS majority is that regardless of the discriminator's motivations, intentions, reasons, or purpose—however innocent or unintentional in their results—if the rule or policy discriminates against an individual or group on the grounds of their colour, race, nationality, ethnic or national origins, then it violates the RRA and is a form of direct discrimination. In *Birmingham*, it did not matter that the motivations behind the Council's policy held no sexist intention; the fact that girls had to perform better than similarly situated boys because there were more admissions places available to boys than girls, was the only necessary factor in finding direct discrimination. Similarly in *James*, it did not matter that the motivations behind the Council's decision were based on economics and state policy; the fact that similarly situated men were forced to pay while women were not, was gender discrimination, no matter how benign the motive behind it.

It was these same criteria that the majority used in dismissing the JFS's contention that the matrilineal test was a purely religious criterion. The majority in the JFS case held, in a strict interpretation of *Birmingham* and *James*, that the religious motivations behind the matrilineal test were irrelevant and the fact that

123. *Id.* at 753.
124. *Id.* at 767.
125. *Id*. at 765-67.
126. *Id.* at 765.

the test was grounded on ethnic descent/origin was the only relevant factor.[127]

However, in his minority opinion, Lord Hope of Craighead DPSC submitted:

> 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.[128]

Lord Hope argued that to make the factual determination of whether the alleged discrimination was on racial grounds, the subjective motivations of the discriminator are not irrelevant.[129] He held that "Lord Goff's rejection of a subjective approach [in *Birmingham*] 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 inquiry at which these words are being used."[130] He contends that this inquiry is split into two distinct questions. The first is the factual question of "whether or not this was discrimination on racial grounds?"[131] He argues that at this stage, "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."[132] However, once this question is answered and it is determined that the grounds on which the discrimination occurred were racial, all subjective interpretation must end, and the unfavorable treatment on those grounds "cannot be excused by looking beyond it to why [the discriminator] decided to act in that way."[133] The second question is then a purely objective determination of whether discrimination occurred on those racial grounds.

---

127. *Regina (E)*, [2010] 2 A.C. at 748, 751-52 ("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.").
128. *Id.* at 804.
129. *Id.* at 806.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

In support of this view, Lord Hope cited the 1999 case *Nagarajan v. London Regional Transport*.[134] In *Nagarajan*, the appellant ("Nagarajan"), a man of Indian origin, applied for a position at London Regional Transport (LRT) where he had previously alleged various claims of discrimination under the Race Relations Act of 1976.[135] While interviewing for the new position, the interviews were aware of his prior RRA claims.[136] When he was not hired, he alleged he was treated less favorably than other applicants because of his prior allegations of racial discrimination against LRT.[137] The Court held that LRT violated the RRA because the interviewers either consciously or subconsciously treated Nagarajan less favorably than other applicants because of his race.[138] Regarding *Nagarajan*, Lord Nicholls of Birkenhead wrote:

> . . . [I]n 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.[139]

In *Nagarajan*, the interviewers' motivations were vital to the Court's determination of whether Nagarajan was not hired because of his race rather than some other non-discriminatory criteria. Had the LRT not hired Nagarajan because of his qualifications, he would not have been able to claim it a violation of the RRA . However, as Lord Nicholls noted, the surrounding circumstances and examination of the interviewers' motivations proved that either consciously or subconsciously, the ground on which Nagarajan was denied under was racial.[140] Without this examination

---

134. Nagarajan v. London Regional Transport, [2000] 1 A.C. 501 (H.L.) (appeal taken from England).
135. *Id.* at 515.
136. *Id.*
137. *Id.*
138. *Id.* at 514.
139. *Nagarajan*, [2000] 1 A.C. at 514.
140. *Id.* at 514.

of subjective motivation, the Court would not have been able to determine the actual reason why Nagarajan was not hired.[141]

Lord Hope contends that once this first question is answered affirmatively, only then does the test become objective in nature, and the reasons why the racial grounds were used in treating the complainant less favorably become irrelevant.[142] This argument is best stated in *Nagarajan* where Lord Birkenhead notes:

> . . . [Why the complainant received less favourable treatment] 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.[143]

Revisiting *Birmingham* and *James* and applying the two-step test from *Nagarajan,* leads to the same conclusions in those cases, but in cases where the criteria of discrimination is not as clear-cut, it can prove to be a distinguishing element. In *Birmingham*, the ground for the discrimination was obviously gender, even when considering the matter subjectively and examining all surrounding circumstances. Regardless of their lack of discriminatory motive, the Council continued the practice of offering fewer admissions places for girls than boys, a criterion based solely on gender. The first question, regarding "the grounds for discrimination revealed that gender was the ground for discrimination. The second ques-

---

141. *See also* Chief Constable of W. Yorkshire Police v. Khan*,* [2001] 1 WLR 1947, 1954 (H.L.) (appeal taken from England). ("The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.").

142. Regina (E) v. Governing Body of JFS, [2009] UKSC 15, [2010] 2 A.C. 728, 751-52 (appeal taken from England).

143. *Nagarajan,* [2000] 1 A.C. at 511.

tion—whether boys were treated more favorably than girls because of that gender—needs no explanation of intent and can be viewed objectively. The court stated, "[t]he reason why the girls were discriminated against on grounds of sex was irrelevant. Whatever may have been the motive or intention of the council, . . . it was because of their sex that the girls received less favourable treatment, and so were the subject of discrimination."[144] Similarly, in *James*, after examining all surrounding circumstances and motivations, the ground for discrimination was obviously gender. While the motivations of the Council were not discriminatory themselves, the only criterion considered in the admissions policy was the gender of the individual; men paid more at age 61 than women of the same age. "The reduction in swimming pool admission charges was geared to a criterion which was itself gender-based. Men and women attained pensionable age at different ages."[145]

3. Application of Direct Discrimination to the JFS

Prior to addressing whether the JFS discriminated against M based on his ethnicity or race, it must first be determined exactly what his ethnic and racial origins were. The Court utilized the *Mandla* test to establish which ethnic groups are the basis of the matrilineal test and M's denial of admission. The majority argued that on its face, the matrilineal test seems to be one purely of descent, as the genetic and ethnic descent of M's mother were the criteria by which M was judged.[146] Lord Phillips contended that the matrilineal test identifies not only a religious criterion, but also a racial one, and that these two are "inextricably intertwined."[147] However, it is this racial aspect that places the JFS in contention with the RRA. Moreover, he argued that, under the *Mandla* test, it is possible for ethnic subgroups within Judaism to exist and for these groups to discriminate against each other. Expanding upon this notion, he wrote, "it is possible to identify two different cohorts, or groups, with an overlapping membership," in this case, "those who are descended by the maternal line from a Jew, and those who are currently members of the Jewish ethnic

144. *Id.*
145. *Id.*
146. *Regina (E)*, [2010] 2 A.C. at 754.
147. *Id.*

group."[148] He identified M as being ethnically Jewish and being discriminated against by the subgroup of ethnic Jews with matrilineal descent.[149] While there is no argument against the existence of a *Mandla* ethnic group of Jews, or even that M is included in the Jewish ethnic group as defined under secular criteria, contrary to Lord Phillips assertion, a *Mandla* subgroup of Jews differentiated from the primary group by matrilineal descent, does not exist.

For such a subgroup to exist, it must be validated as a distinct ethnic group from the primary ethnic group of Jews using the *Mandla* test. The only categories proposed by the Court in *Mandla* that could account for Lord Phillips classification are: "(3) either a common geographical origin, or descent from a small number of common ancestors or (7) being a minority or being an oppressed or a dominant group within a larger community."[150] His rationalization that the "maternal" ethnic or racial group exists is as follows:

> 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.[151]

This rationalization is flawed because it invariably attempts to define Jews as a race, which denotes a classification of physical characteristics. However, there is a great diversity in the physical characteristics shared by Jewish people. As a result of conversion, Jews are made up of people with varying skin tones, in addition to a broad range of other cultural and physical distinctions.[152] While Lord Phillip is correct that there exist a small number of Jews who can trace their lineage back to the Temple Priests, by no means are these Jews, who can trace their paternal lineage, indicative of a racial aspect that defines the entire Jewish people.

---

148. *Id.*
149. *Id.*
150. *See* Mandla (Sewa Singh) v. Dowell Lee, [1983] 2 A.C. 548, 562 (H.L) (appeal from England).
151. *Regina (E)*, [2010] 2 A.C. at 753-54.
152. DONIN, *supra* note 17, at 8.

Moreover, under the *Mandla* test, no apparent differentiation can be made between an ethnic Jew of matrilineal descent and an ethnic Jew. The conversion practices, persecutions, and tragedies of the Jewish people have filtered out the vast majority of Jews that otherwise may have been able to trace their matrilineal lineage back to the small number of common Jewish ancestors. Consequently, if a racial aspect ever existed 3000 years ago, it has long since been blurred or even vanished. To subdivide the Jewish people into those that can trace their lineage back to a small number of common ancestors or even a common geographical origin is folly and cannot be used as an indicator of a separate *Mandla* ethnic group. Moreover, under the seventh prong of the *Mandla* test, the implication that the Jews who can trace their matrilineal descent are oppressing the group of Jews who cannot, oversimplifies the issue. While there is different treatment of certain *Mandla* Jews who are not considered halachicly Jewish, this treatment cannot be considered oppressive; and even if it is, the fulfillment of this single characteristic does not by itself create a separate ethnic group, but rather defines subtle differences within a single *Mandla* ethnic group.

Since there is no *Mandla* subgroup of Jewish ethnic origin defined specifically by matrilineal lineage, only two alternate *Mandla* ethnic groups exist that can form the basis of the majority's decision. The first is the Jewish ethnic group as defined by *Mandla*, of which M is included. However, this cannot be the ethnic group by which the JFS's test is focused because other students that were admitted were also within the same *Mandla* Jewish ethnic group. It cannot be the case that the JFS discriminated against M by admitting some members of the *Mandla* Jewish ethnic group, but not others. The JFS did not treat M less favorably on account of his membership in the *Mandla* Jewish ethnic group, but rather because of his lack of religious Jewish identity. Lord Brown of Eaton-under-Heywood JSC emphasizes this point in his dissent, where he points out:

> 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.[153]

Consequently, the ethnic grounds by which the majority must base their decision are M's ethnic origins of Italian and Roman Catholic as inherited from his mother. This argument is best described by Baroness Hale of Richmond JSC who writes, "M was rejected because of his mother's ethnic origins, which were Italian and Roman Catholic . . . . M was rejected, not because of who he is, but because of who his mother is . . . . [I]t was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected."[154]

From here, the *Nagarajan* two-part test must be applied. Was, as the majority argues, M discriminated against because of his Catholic and Italian maternal origins? Or, as the JFS contends, was M rejected due to the purely religious criterion of his mother's conversion and his resulting Jewish religious identity? The circumstances surrounding the OCR's determination of M's Jewish identity are very clear. Under the Orthodox view of Jewish law, only conversions performed under the supervision of an Orthodox Rabbi are valid. Conversions performed by the Masorti community are therefore not recognized as valid by the Orthodox community, due to the more flexible interpretations of Jewish law in Masorti Judaism. Since M's mother did not convert under the Orthodox tradition, her conversion was not recognized; because M's mother was not Jewish, neither was M according to Orthodox Jewish law. The question is whether in their determination of M's religious identity, did the OCR or JFS consider his Catholic and Italian ethnic origins? The answer to this question is best explained by Lord Rodger of Earlsferry, who argued in his dissent:

His mother could have been 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.[155]

---

153. *Regina (E)*, [2010] 2 A.C. at 819.
154. *Id.* at 760.
155. *Id.* at 816.

In order to fully determine whether it was the religious and not the racial ground that the JFS used in rejecting M's admission, we must test the point by reference to an appropriate comparator: a child with the same ethnic and national origins as M, but a mother who had a valid Orthodox conversion. Lord Rodger explores this and writes:

> . . . [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.[156]

As Lord Rodger so clearly articulated in the above passage, the only ground by which the JFS discriminated was a purely religious one and therefore not in violation of the RRA. A child of any ethnic or national origin may be accepted for admission into the JFS. It is clear that the only grounds considered by the school was whether the mother's conversion was halachicly valid and consequently, whether that child was Jewish, a fact determined on religious grounds alone. Therefore, the majority is mistaken in their characterization of the JFS's use of the matrilineal test for Jewish identity as a form of direct discrimination.

4. Indirect Discrimination

The law opposing indirect discrimination does not focus on treatment, but rather on whether the results of a rule, which may appear neutral on its face, "have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."[157] In determining whether there exists indirect discrimination in the JFS case, a two part question must be asked: "(1) did the policy put persons of the same race or ethnic or

156. *Id.*
157. *Id.* at 757.

national origins as M at a particular disadvantage when compared with other persons: section 1(1A)(a)(b); and, if so, (2) can JFS show that the policy was a proportionate means of achieving a legitimate aim: section 1(1A)(c)."[158]

The answer to the first question is tricky because as Lord Brown notes,

> 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)(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.[159]

Regardless, under the operative assumption that the matrilineal test is disadvantageous to all children who are not considered Jewish under that standard, the controlling question is whether the JFS can prove that this test was a "proportionate means of achieving a legitimate aim."[160] Regarding the "legitimate aim" of the JFS, Lord Brown put forth:

> JFS's purpose is to develop in those recognized 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.[161]

That some of these children may not practice or observe the Jewish religion is irrelevant. The aim or objective of the JFS was "to educate those who, in the eyes of the [Office of the Chief Rabbi] are Jewish, irrespective of their religious beliefs, practices or ob-

158. *Id.* at 809; *see also Id.* at 757 (explaining that the concepts of direct and indirect discrimination are mutually exclusive; both cannot exist simultaneously because direct discrimination is never proportional)*; See* Race Relations Act, 1976, c. 74, §1(1A)(a)-(c) (Eng.).

159. *Regina (E)*, [2010] 2 A.C. at 821.

160. Race Relations Act, §1(1A)(c).

161. *Regina (E),* [2010] 2 A.C. at 821.

servances, in a school whose culture and ethos is that of Orthodox Judaism."[162] If even one Jewish child that entered the JFS with no Jewish religious beliefs grasps the Orthodox tradition and it takes hold, the purpose of the JFS's program is fulfilled. This concept is explained by Dayan Gelley, Senior (religious judge) of the London Beth Din:

> Education about the Jewish faith is considered by Orthodox Jews to be a fundamental religious obligation on all Jews. A person may be Jewish, but the Jewish faith is complex and often demanding. An understanding and appreciation of the Jewish faith takes many years to cultivate, through learning, debate and thinking. 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.[163]

As a designated faith school, the notion of teaching Jewish principles according to the tenets of the Jewish Orthodoxy and the OCR is not only necessary, but also required under the school's charter.[164]

Since the aim of the JFS is seemingly legitimate in its purpose to teach Jews about the Jewish faith, the question turns to one of proportionality. The test for proportionality is that it be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[165] Moreover, the "objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."[166]

Beyond the religious matrilineal test for Jewish identity, there is no other indicator of Jewish identity in the Orthodox tradition. If the school were to adopt a *Mandla* style test or even a test founded in religious belief/practice or attendance in synagogue, that test would ultimately create a situation where those children that are not considered Jewish by Orthodox standards, would gain

---

162. *Id.* at 774.
163. R.(E.) v. Governing Body of JFS, [2008] E.W.H.C. 1535, 2008 WL2697039, at *3.
164. *Regina (E),* [2010] 2 A.C. at 744.
165. *Regina (E),* [2010] 2 A.C. at 776.
166. Regina (Elias) v. Sec'y. of State for Defense, [2006] 1 W.L.R. 3213, 3249.

admission into the school.[167] To force the school to adopt the secular or Christian understanding of religion would be to discriminate against Judaism itself. While in Christianity the notions that religious belief and Church attendance may form the basis of Christian identity, such concepts hold no place in Jewish dogma. Although children such as M may be disadvantaged, the State, in forcing the acceptance of a religious determination of Jewish identity not in line with the religious standards of the Jewish faith, sets an even more dangerous precedent. As the Court noted in *R. v. Disciplinary Committee of the Jockey Club*, "religion is something to be encouraged but it is not the business of government."[168] Consequently, the necessity of the admissions policy of the JFS is proportional to the detrimental effects the policy may have on M and others in his situation. Therefore, there is no indirect discrimination.

IV. CONCLUSION

The Supreme Court of the United Kingdom wrongly decided the JFS case as discrimination in violation of the RRA. In the case of direct discrimination, the sole criterion used by the JFS, the religious legitimacy of the mother's conversion, was a purely religious criterion and was within the purview of the Rabbinate to decide. Moreover, the application of the matrilineal lineage test to

---

167. *See* R.(E.) v. Governing Body of JFS, [2008] E.W.H.C. 1535, 2008 WL 2697039, at *35 (Q.B.D. 2008):

> [S]ome 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. *Id.*

168. Regina v. Disciplinary Comm. of the Jockey Club, [1993] 1 W.L.R. 909, 932; *see also* In *R. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth*, 1 W.L.R. 1036, 1042-43. Judge Simon Brown observed:

> [The] court is hardly in a position to regulate what is essentially a religious function - the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognized divide between church and state. *Id.*

determine Jewish identity is a legitimate aim for a faith school that is attempting to keep its membership in line with the tenets of its charter. M was not turned away because he was Italian or because he was Catholic, but because he was not Jewish. Furthermore, the matrilineal test was not a case of indirect discrimination. The legitimate aim of a Jewish faith school in using a purely religious test to determine Jewish identity is proportionate in its application. While there may be those disadvantaged by such a test, to impose a test using non-Jewish, secular or Christian ideologies in defining religious Jewish identity would be a greater harm. In its attempt to provide a secular definition to what is clearly a religious determination, the Court sets a dangerous precedent for all faith schools. Consequently, where a faith school applies its faith in good faith, it is purely a religious matter and the Court should not intervene.