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 imprisonment and, in the case of Iran, by the death penalty, for accepting adults to engage in homosexual acts.

The Convention relating to the Status of Refugees, as applied by the 1967 Protocol ("the Convention"), says that members of a particular social group, which can include groups defined by sexual orientation, are entitled to asylum in States which acknowledge the Convention. Members of these social groups need to establish that they would face a well-founded fear of persecution if returned to their home country.

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.

Therefore, neither party had a 'well-founded fear of persecution' that entitled him to protection under the Convention: it was acceptable 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 to exceed this, that would mean that the applicant is entitled to protection under the Convention.

The Appellant appealed to the Supreme Court, contending that the 'reasonable tolerability' test promoted 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 sent 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.

- To force a homosexual person to pretend that their sexuality does not exist, or suppress their sexuality, 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.

- The Convention discusses 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.

- 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.

- One of the fundamental purposes of the Convention was to counteract discrimination and the Convention does not permit, or indeed foresee, 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.

- The 'reasonable tolerability' test applied by the Court of Appeal must therefore be rejected.

- 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 hostile 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.

- Lord Rodger (with whom Lords Walker and Collins and Sir John Dyson SCJ expressly agreed), 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:
https://www.supremecourt.uk/cases/docs/uksc-2009-0054-judgment.pdf

Reported responses to the judgment

Home Secretary Theresa May (May 2010- July 2016) 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 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 (from the mother) 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 supports 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, disapproving, 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)

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 whether the victim's ethnic origins are the factual criterion that determined the decision made by the discriminator. If so, the motive for the discrimination and/or the reason why the discriminator considered the victim's ethnic origins significant is irrelevant.

- 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. It is only necessary to consider the mental processes of the discriminator where the factual criteria underpinning the discrimination are unclear.

- 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 founded upon the fact that an individual *does* possess certain ethnic origins.

- Direct discrimination does not require that the discriminator intends to behave in a discriminatory manner or that he realises that he is doing so.

- 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.

- The crucial question to be determined is whether this requirement is properly characterised as referring to M's ethnic origins.

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) **(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 (**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 (**Lord Phillips**).

- The reason that M was denied admission to JFS was because of his mother's ethnic origins, which were not halachically (religious laws written in the Torah) 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 (**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]. 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 (**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 (**Lord Mance**).

- This conclusion is supported 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 (**Lord Mance**).

- The reason for the refusal to admit M to JFS was his lack of the necessary ethnic origins: the absence of a matrilineal connection to Orthodox Judaism (**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 (**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 principle that such a criterion was dictated by Jewish religious law. The fact that the rule adopted was of a religious character cannot alter the fact that the content of the rule itself applies a test of ethnicity (**Lord Clarke**).

- The fact that a decision to discriminate on racial grounds is based upon a devout, respected and sincerely held religious belief or conviction cannot excuse such conduct from accountability under the 1976 Act.

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 (**Lord Phillips**).
- It may be arguable that an exception should be provided from the provisions of the 1976 Act in order to allow Jewish faith schools to grant priority in admissions based on matrilineal descent; if so, formulating such an exception is unquestionably a matter for Parliament (**Lady Hale**).

Indirect Discrimination

- As the case is one of impermissible direct discrimination it is unnecessary to address the claim of indirect discrimination (**Lord Phillips**).
- Direct and indirect discrimination are mutually exclusive; both concepts cannot apply to a single case simultaneously. As this case is one of direct discrimination it could not be one of indirect discrimination (**Lady Hale**).
- *Ex hypothesi,* if the case was not direct discrimination, then the policy was indirectly discriminatory. The policy pursued the legitimate aim of forcing the obligation imposed by Jewish religious law to educate those regarded by the OCR as Jewish. 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.

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 (**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 (**Lord Hope**).
- The availability of conversion demonstrates that the test applied is inherently of a religious rather than racial character (**Lord Hope**).
- It is inappropriate to describe the religious dimension of the test being applied by JFS as a mere motive (**Lord Hope; Lord Rodger**).
- The appropriate comparator for M in this case is a child whose mother had converted under Orthodox Jewish backings. 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 (**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 necessary ethnic origins.
- 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
- 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.
- 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.

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. (**Lord Rodger; 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 paid 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:
https://www.supremecourt.uk/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 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 (June 2007-May 2010) 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 many 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 endeavored 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**

5) **Reflect on 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.

UKSC QUIZ

1) How many Justices are there?

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

3) Name our 2 female Justices.

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?

ANSWERS
UKSC quiz

1) How many Justices are there?

The precise number can vary due to retirements/vacancies, but the usual number is 12

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

Lords of Appeal in Ordinary or Law Lords

3) Name our 2 female Justices.

Lady Black and Lady Arden.

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

They are not retrying the facts of the case, just clarifying the correct interpretation of the law.

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

9 (normally) Miller case (Brexit case) 11 justices sat.

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

The appellant and the respondent

7) How many UKSC cases are heard a year?

Around 90

8) Who can wear wigs in the Supreme Court?

Barristers/Advocates/Solicitors (often called Counsel). They can dispense with traditional court dress, by agreement.

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

Scotland

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

Separating the judicial, executive and legislative branches of government to prevent abuse of power by one branch of government.

11) What does JCPC stand for?

Judicial Committee of the Privy Council

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

Anguilla, Antigua and Barbuda, Bahamas, Bermuda, British Virgin Island, Brunei, Cayman Islands, Cook Islands and Niue, Falkland Islands, Gibraltar, Grenada, Guernsey, Isle of Man, Jamaica, Jersey, Kiribati, Mauritius, Montserrat, Pitcairn Islands, St Christopher and Nevis, St Helena, Saint Lucia, Saint Vincent and the Grenadines, the Republic of Trinidad and Tobago, Turks and Caicos Islands, Tuvalu.