



Neutral Citation Number: [2009] EWCA Civ 626

Case No: No.1 C1/2008/2187 & No.2 C1/2008/2188

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**THE HON. MR JUSTICE MUNBY**  
**No.1 CO/7896/2007**  
**No .2 CO/11587/2007**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/06/2009

**Before :**

**LORD JUSTICE SEDLEY**  
**LADY JUSTICE SMITH**  
and  
**LORD JUSTICE RIMER**

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**Between :**

<b>No.1 THE QUEEN ON THE APPLICATION OF E</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>(i) THE GOVERNING BODY OF JFS</b>	
<b>(ii) THE ADMISSIONS APPEAL PANEL OF JFS</b>	<b><u>Respondents</u></b>
<b>- and -</b>	
<b>(i) THE SECRETARY OF STATE FOR EDUCATION</b>	
<b>(ii) THE LONDON BOROUGH OF BRENT</b>	<b><u>Interested</u></b>
<b>(iii) THE OFFICE OF THE SCHOOLS ADJUDICATOR</b>	<b><u>Parties</u></b>
<b>- and -</b>	
<b>THE UNITED SYNAGOGUE</b>	<b><u>Intervener</u></b>
<b>AND BETWEEN</b>	
<b>No.2 THE QUEEN ON THE APPLICATION OF E</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>THE OFFICE OF THE SCHOOLS ADJUDICATOR</b>	<b><u>Respondent</u></b>
<b>- and -</b>	
<b>(iv) THE GOVERNING BODY OF JFS</b>	
<b>(v) THE LONDON BOROUGH OF BRENT</b>	
<b>(vi) DAVID LIGHTMAN</b>	<b><u>Interested</u></b>
<b>(vii) KATE LIGHTMAN</b>	<b><u>Parties</u></b>
<b>- and -</b>	

(viii) **THE BRITISH HUMANIST ASSOCIATION**  
**THE UNITED SYNAGOGUE**

**Interveners**

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**Ms Dinah Rose QC and Ms Helen Mountfield** (instructed by Messrs Bindmans ) for the  
**Appellant in both cases**  
**Mr Peter Oldham** (instructed by Messrs Stone King Sewell) for the first **Respondents No.(i)**  
**& (ii)**  
**Mr Tom Lindon QC and Mr Dan Squires** (instructed by Treasury Solicitor) for **Interested**  
**Party (i)**  
**Interested Party (ii)** did not appear and were not represented  
**Mr Clive Lewis QC** (instructed by the Treasury Solicitor) for **Interested Party (iii)**  
**Lord Pannick QC and Mr Ben Jaffey** (instructed by Farrer & Co LLP) for the **Intervener**  
**both cases**

**Mr Clive Lewis QC** (instructed by Treasury Solicitor) for the second **Respondent**  
**Mr Peter Oldham** (instructed by Messrs Stone King Sewell) for the **Interested Party (iv)**  
**Interested Party (v)** did not appear and were not represented  
**Interested Parties (vi) and (vii)** did not appear and were not represented  
**Mr David Wolfe** (instructed by Messrs Leigh Day & Co) for the **Intervener (viii)**

Hearing dates: Tuesday 12 – Thursday 14 May 2009

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**Approved Judgment**

## **Lord Justice Sedley :**

This is the judgment of the court.

### *The appeal in summary*

1. M is the child of a father, E, who is Jewish by birth and of a mother who is Jewish by conversion. He would like to be admitted as a pupil to JFS (formerly the Jews' Free School) in the London Borough of Brent. The school is oversubscribed and is therefore entitled to select pupils according to its admissions policy, provided the policy is lawful. The present policy is to give priority to children who are recognised as Jewish by the Office of the Chief Rabbi (the OCR) or are following a course of conversion approved by the OCR.
2. The OCR does not recognise the validity of M's mother's conversion to Judaism because it was conducted in a Progressive and not an Orthodox synagogue. M, who is not following a course of conversion, is accordingly not eligible for admission to JFS. Since a child is regarded by the OCR (and others) as Jewish only if his or her mother is Jewish, M has been refused admission to the school.
3. It is E's case that being a Jew, whether by descent or by conversion, is a question of ethnicity, with the result that to refuse a child admission to a school because his mother is not Jewish constitutes direct race discrimination against him, on the ground both of his own and of his mother's ethnicity. If, however, the criterion is applied in such a way that the discrimination is indirect, it is E's alternative case that it has no legitimate aim, since the purpose is to make a purely ethnic distinction, and so is equally unlawful. In either case it is argued that the religious motive for such discrimination makes it no less unlawful.
4. JFS as respondent, the Secretary of State for Children, Schools and Families as an interested party and the United Synagogue as an intervener contest both claims. They say that the criterion itself is a purely religious, not a racial, one and that its admittedly disparate racial impact is justified by the lawful designation and ethos of the school as Jewish.
5. For the reasons set out in this judgment, the conclusion of the court is that the requirement that if a pupil is to qualify for admission his mother must be Jewish, whether by descent or by conversion, is a test of ethnicity which contravenes the Race Relations Act 1976. If the discrimination is direct, as we consider it is, it cannot be justified. If, contrary to this finding, the discrimination is indirect, we consider its purpose to be selection on the basis of ethnicity and therefore not to constitute a legitimate aim.

### *The procedural background*

6. Two claims for judicial review have been brought on M's behalf. The principal one is against the school governors for failing to offer him a place, against the school's appeals panel for upholding the refusal, and against both for failing to comply with the "due regard" duty imposed by s.71 of the Race Relations Act. The essential ground of the first two challenges is that both refusals were acts of racial discrimination.
7. The second claim is against the Schools Adjudicator for rejecting E's objection to JFS's admission arrangements for 2008/2009 when, it is contended, he should have found the exclusionary aspect of the admissions policy to be unlawful. Of the other defendants to this claim, the London Borough of Brent, which was a defendant in the first judicial review and an interested party in the second, supported the claim in writing in the Administrative Court but did not participate any further in the proceedings. The claim is supported by Mr and Mrs L, who were named as an interested party in the second judicial review, and whose daughter had been refused admission to JFS because, although Mrs L is a convert to orthodox Judaism, her conversion is not recognised by the OCR because her husband is a cohen, a member of the priestly caste.
8. In a careful and detailed judgment [2008] EWHC 1535/1536 (Admin), which should be read together with this one, Munby J rejected both sets of claims, save that he found the school to have been in breach of its "due regard" duty under s.71. The wealth of relevant information in his judgment enables us to make this one much shorter than it would otherwise be.
9. In this court the parties, by agreement and with the court's approval, have confined themselves to the generic question whether the school's oversubscription admission criteria are unlawfully discriminatory. A number of consequential issues raised by the proceedings described above will fall to be canvassed and if necessary decided in the light of our judgment on this fundamental question.

*The law*

10. The law today forbids both racial and religious discrimination. But faith schools are exempted from the prohibition of religious discrimination because their purpose is to educate children in what are generally the religious beliefs of their parents, a right recognised by article 2 of the First Protocol to the European Convention on Human Rights. Where a faith school is a voluntary aided school, as JFS is, and so maintained by public funding, its religious character has to be designated by the Secretary of State (School Standards and Framework Act 1998, s.69). The official designation of JFS's religious character is "Jewish".
11. The school's governing body, which is responsible for admissions, is required to act in accordance with the school's instrument of government (Education Act 2002, s.21(4)). JFS's instrument of government contains no express admission criteria but includes this statement of the school's ethos:

“Recognising its historic foundation, JFS will preserve and develop its religious character in accordance with the principles of Orthodox Judaism, under the guidance of the Chief Rabbi of the United Hebrew Congregations of the Commonwealth. The school aims to serve its community by providing education of the highest quality within the context of Jewish belief and practice. It encourages the understanding of the meaning of the significance of faith and promotes Jewish values for the experience of all its pupils.”

12. So long as a maintained faith school is undersubscribed, it cannot use religious criteria to allocate places. But once it is oversubscribed, it can lawfully restrict entry to children whom, or whose parents, it regards as sharing the school’s faith. This is not by reason of an affirmative enactment, but because such schools are exempted from the prohibition of discrimination on grounds of religion or belief contained in Part 2 of the Equality Act 2006 (see s.50(1)(a)).
13. No school, however, is permitted to discriminate in its admissions policy on racial grounds. Such discrimination is forbidden by the Race Relations Act 1976 as amended. It is necessary to set out the exact terms in which this is done.

**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 that other less favourably than he treats or would treat other persons; or .....

(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 that other at that disadvantage, and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.

S.1(1B) itemises s.17, which makes it unlawful for a school to discriminate on racial grounds in relation to admissions. There is a special needs exemption in s.35, but this is designed to protect religious seminaries and the like, not maintained schools in the public education system.

14. S.3 provides:

**3. Meaning of “racial grounds”, “racial group” etc.**

(1) In this Act, unless the context otherwise requires—

“racial grounds” means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

“racial group” means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person’s racial group refer to any racial group into which he falls.

(2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.

....

(4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

*JFS*

15. The school’s admissions policy, for which the governing body is answerable, until 2006 (the year in which M’s parents applied for his admission to the school), contained the following provision

1.1 It is JFS (“the School”) policy to admit up to the standard admissions number the children who are recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR).

1.2 In the event that the School is oversubscribed then only children who satisfy the provisions of paragraph 1.1 above will be considered for admission, in accordance with the oversubscription criteria set out in Section 2, below.

Nothing turns in the present case on those criteria, which set out an order of priority.

16. Nor, in our judgment, does anything turn on the following words, which were added to §1.1 of the policy for the year to which M's application related:

“or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion to Judaism under the approval of the OCR.”

The reason why this further criterion does not affect the critical question is not so much that, at least if the appellant's evidence is accepted, such a course of conversion is likely to outlast most of the child's secondary schooling. It is that affording a special path to a benefit to which others have access without discrimination (for example a club which admits any men but only women with degrees) is in principle not an answer to the initial act of discrimination. The very fact that one gender or racial group will find it harder than another to qualify makes it discriminatory.

17. JFS readily acknowledges that the effect of its admission criteria will be that, in contrast to other faith schools, even when oversubscribed it admits children whose own families do not share the Jewish faith. It is content with this: its aim is to draw such children towards Judaism in the course of their education. All that it requires, once it is in a position to choose, is that its pupils should be Jewish by the tenets of Orthodox Judaism. Thus *Munby J* at §192, in agreement with the Schools Adjudicator, found the school's aim to be

“to educate those who, in the eyes of the OCR, are Jewish, irrespective of their religious beliefs, practices or observances, in a school whose culture and ethos is that of Orthodox Judaism”

*Who is Jewish?*

18. Self-evidently, the criterion seeks to discriminate between Jewish and non-Jewish children. This is a choice which is permissible if made on religious grounds but unlawful if made on racial grounds. What is therefore of central importance is the meaning and effect of a policy of admitting only children whom the OCR recognises as being Jewish.
19. The OCR considers that there are two essential ways in which a person may be or become a Jew. One is descent from parents whose own identity as Jews can be established or inferred. The other is by conversion in accordance with the tenets of Orthodox Judaism. We are in no way concerned with the beliefs which underpin these categories except to recognise that – as article 9 of the ECHR reiterates – those who hold them have every right to do so. Nor therefore are we concerned with the merits of the non-recognition by the school of the validity of the conversion of M's mother. For our purposes it is simply a fact. But we are very much concerned with what kind of fact it is.

*Direct discrimination*

20. By choosing, when oversubscribed, to admit only children whom the OCR recognises as Jewish, JFS avowedly discriminates – that is to say makes choices – in its allocation of places. Refusal of admission is plainly less favourable treatment within the meaning of s.1(1)(a). The question then is whether it is being done, in a case such as M’s, on racial grounds.
21. For the United Synagogue, Lord Pannick QC, whose argument the school and in large part the Secretary of State adopt, submits that the criterion of choice is a religious and not a racial one. The Chief Rabbi is concerned only to elaborate and apply the law of the Torah, and only those whom the Torah does not recognise as Jews are excluded. This was the argument which Munby J accepted (§167-8).
22. For M’s father, Ms Dinah Rose QC contends that this approach elides the grounds of an act with its motive, whereas what the legislation is concerned with is not its motive but its causation. A religious motive will not excuse discrimination on racial grounds.
23. We entirely accept the theological origin and character of the OCR’s definition of Jewishness. But we also accept that, as Ms Rose submits, this is the beginning and not the end of the court’s inquiry. What remains to be decided is whether a school whose admissions policy is based explicitly on it is discriminating on racial grounds.
24. As to this, we do not think the argument is assisted by the distinction Ms Rose has sought to draw between the designation of the school as simply “Jewish” and the application of an admission criterion which is peculiar to Orthodox Judaism. If a school is entitled to limit its intake to Jewish children, it ought in principle to be able to adopt its own working definition of what makes a child Jewish, so long – and this brings us back to the central issue – as it does not use a racial criterion of selection.
25. It is here, as it seems to us, that the respondents’ argument encounters a major problem. One of the great evils against which the successive Race Relations Acts have been directed is the evil of anti-Semitism. None of the parties to these proceedings wants or can afford to put up a case which would result in discrimination against Jews not being discrimination on racial grounds. There would have to be something wrong with such an argument. So Lord Pannick accepts, indeed insists, not only that Jews are an ethnic or racial group and not simply a theological construct, but that for all purposes except those of the OCR and the school, M is a Jew. This is not an easy position to maintain, but its corollary, if it can be maintained, is that what excludes M is not his race or ethnicity but his eligibility to be regarded in Orthodox eyes as a Jew, a matter of pure theology.
26. Ms Rose does not contest the source of the doctrine but she asks what the test, whatever its motivation, actually requires. What it requires is that the boy’s mother must be regarded by the OCR as Jewish if he is to secure admission to the school; and being Jewish, however it is ascertained, means being a member of an ethnic group. The reason why M’s mother is not regarded as Jewish does not matter. It might be because she was neither born Jewish nor converted to Judaism; it might be – as here – because her conversion was not recognised by the OCR. But whether she is avowedly

not Jewish or is merely not regarded in Orthodox eyes as Jewish, it is the fact of her being, or being perceived as, not Jewish that excludes M from the school. That, Ms Rose submits, is discrimination against M on the ground of ethnicity – in the first instance the ethnicity of his mother, which is enough to bring the case home; and by extension the ethnicity of the child.

27. There is no challenge to the proposition that this, if established, is as much discrimination as where the ground is the claimant's own ethnicity (see *Zarczyńska v Levy* [1978] IRLR 532). Nor has there been any challenge to the proposition that it is the perception rather than the fact of a particular ethnicity which constitutes racial grounds for an act of discrimination (see *English v Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421).
28. It is also common ground that, if an act of discrimination is done on racial grounds, its motive does not matter. But the distinction between the ground of an act and the motive for it, though subtle, is critical. The “but for” theory adopted by the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751 offers a straightforward litmus test (but for his, and his mother's, not being regarded as Jewish, E would have been admitted); but the House has in two succeeding cases made it clear that it is not uniformly applicable to s.1 of the Race Relations Act. In *Nagarajan v London Regional Transport* [2000] 1 AC 501 Lord Nicholls, having paraphrased the key question as “why the complainant received less favourable treatment”, said that answering it

“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.”

In *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 Lord Nicholls reiterated this and put the material question this way:

“... [W]hy 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.”

29. Answering this question in the light of the facts we have outlined, only one answer is in our judgment possible. M was refused admission to JFS because his mother, and therefore he, was not regarded as Jewish. The school has been perfectly open in giving this as the ground of non-admission. There are of course theological reasons why M is not regarded as Jewish, but they are not the ground of non-admission: they are the motive for adopting it.
30. If it were otherwise, a person who honestly believed, as the Dutch Reformed Church of South Africa until recently believed, that God had made black people inferior and had destined them to live separately from whites, would be able to discriminate openly without breaking the law. The reason why it is not so is that the ground of any

such discrimination would be that the victim was black; its religious motive would be immaterial. In *Seide v Gillette Industries* [1980] IRLR 427 the Employment Appeal Tribunal recognised that discrimination against a Jew might be directed at his religion rather than his race; but this is of no assistance in a case where the religious belief in question is that of the alleged discriminator, not of the victim.

31. The reason why the refusal to admit M because he is not regarded as matrilineally Jewish constitutes discrimination on racial grounds emerges clearly from the decision of the House of Lords in *Mandla v Dowell-Lee* [1983] 2 AC 548. That case, as is well known, concerned the refusal of 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. Indirect discrimination alone was alleged, making it necessary first to decide what was encompassed in the statutory concept of a racial group in the 1976 Act; but the reasoning of the House is equally relevant to the statutory concept of racial grounds. Rejecting the argument that Sikhs were a religious group and so outwith the protection of the Act, Lord Fraser said:

“My Lords, I recognise that " ethnic " conveys a flavour of race but it cannot, in my opinion, have been used in the 1976 Act in a strictly racial or biological sense. For one thing, it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend upon scientific proof that a person possessed the relevant distinctive biological characteristics (assuming that such characteristics exist). The practical difficulties of such proof would be prohibitive, and it is clear that Parliament must have used the word in some more popular sense. For another thing, the briefest glance at the evidence in this case is enough to show that, within the human race, there are very few, if any, distinctions which are scientifically recognised as racial” (p.561).

“For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: — (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of

neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.

A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member. That appears to be consistent with the words at the end of subsection (1) of section 3: "references to a person's racial group refer to any racial group into which he falls." In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the 1976 Act is concerned, by which route he finds his way into the group. This view does not involve creating any inconsistency between direct discrimination under paragraph (a) and indirect discrimination under paragraph (b). A person may treat another relatively unfavourably on racial grounds "because he regards that other as being of a particular race, or belonging to a particular racial group, even if his belief is, from a scientific point of view, completely erroneous" (p.562-3).

32. Applying this reasoning to the present case, it appears to us clear (a) that Jews constitute a racial group defined principally by ethnic origin and additionally by conversion, and (b) that to discriminate against a person on the ground that he or someone else either is or is not Jewish is therefore to discriminate against him on racial grounds. The motive for the discrimination, whether benign or malign, theological or supremacist, makes it no less and no more unlawful. Nor does the factuality of the ground. If for theological reasons a fully subscribed Christian faith school refused to admit a child on the ground that, albeit practising Christians, the child's family were of Jewish origin, it is hard to see what answer there could be to a claim for race discrimination.
33. The refusal of JFS to admit M was accordingly, in our judgment, less favourable treatment of him on racial grounds. This does not mean, as Lord Pannick suggested it would mean, that no Jewish faith school can ever give preference to Jewish children. It means that, as one would expect, eligibility must depend on faith, however defined, and not on ethnicity.

*Direct or indirect?*

34. Neither the instrument of government nor the admissions policy says anything in terms about what makes a prospective pupil Jewish. For this one has to go to the rulings of the Chief Rabbi. Although the point has been only faintly argued, we have considered whether the OCR's criterion can therefore be properly said to be the ground on which the school has treated M less favourably than other applicants for admission, or whether, because the criterion is adopted only by reference and not expressly, the claim can only be for indirect discrimination.

35. Before we turn to Ms Rose's answer to this suggestion, it is relevant to see where it leads. Its effect would be that the claimant's case fell back upon the now unchallenged formulation adopted by Munby J (§179) of the disparate impact on which the alternative claim for indirect discrimination is founded:

“Those who are not of Jewish racial or ethnic origins are less likely to be regarded as Jewish according to Jewish law and therefore less likely to be admitted to JFS.”

36. There is, with respect, something unreal about a debate in which this proposition is accepted by respondents, interested party and intervener alike, and yet direct discrimination is contested. We are unable to accept Lord Pannick's explanation that the concession reflects only the fact that some ethnic non-Jews (in the *Mandla* sense, not the OCR's) will be placed at a disadvantage by the criterion. It is plain that a number of ethnic Jews (in the *Mandla* sense, M and his mother among them) will also be placed at a disadvantage by the criterion.

37. But we are in any event satisfied that where a ground of discrimination is explicitly defined by its author as incorporating a test from an outside source, that test is part of the ground. This proposition formed the basis of the decision of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751. Mr and Mrs James were both 61, but while Mrs James could get into the local leisure centre free of charge, Mr James could not. The council's ground was that she but not he had reached pensionable age, a ground which made no mention of gender. It was only when one ascertained the legal meaning of pensionable age that the gender differential appeared.

38. In this court Sir Nicolas Browne-Wilkinson V-C had held that the Sex Discrimination Act 1975 drew

“a clear distinction between, on the one hand, those cases where the defendant expressly or covertly acts by reference to the sex of the plaintiff and, on the other, those cases where the defendant acted on grounds not expressly or covertly related to sex but his actions have caused a disparate impact as between the sexes.”

In their Lordships' House, Lord Bridge, with whom Lord Ackner and Lord Goff agreed, said:

“The fallacy, with all respect, which underlies and vitiates this reasoning is a failure to recognise that the statutory pensionable age, being fixed at 60 for women and 65 for men, is itself a criterion which directly discriminates between men and women in that it treats women more favourably than men ‘on the ground of their sex’.... It follows inevitably that any other differential treatment of men and women which adopts the same criterion must equally involve discrimination ‘on the ground of sex’.”

39. In our judgment the same is the case here. By expressly adopting the Chief Rabbi’s criteria in its admission policy, the school made them part of the policy. If, as we consider to be the case, those criteria discriminated on racial grounds, the school is answerable.

*Indirect discrimination*

40. The fallback case on indirect discrimination is based on the formulation contained in s.1(1A) of the Race Relations Act 1976, which was introduced by SI 2003/1626 in order to give effect to the Equal Treatment Directive 2000/43/EC. It affords a defence that the indirectly discriminatory provision is a proportionate means of achieving a legitimate aim. If, however, the aim itself is racially discriminatory, it is accepted by all parties that it cannot be legitimate.
41. In spite of the use of the word “also” in s.1(1A), it is generally accepted that direct and indirect discrimination are mutually exclusive. We need therefore to consider whether, if we are mistaken in our conclusion that this is a case of direct race discrimination, indirect discrimination is established.
42. We have cited in §35 above the now uncontested disparate impact of the requirement that a child, to be admitted, must be “recognised as being Jewish by the OCR”. We reject as casuistic Lord Pannick’s submission that E is not disadvantaged by this test because, on any view except the OCR’s, his mother is Jewish and so is he. It is the OCR’s view, not that of the rest of the world, which has led to M’s non-admission.
43. Taking it, then, that the OCR’s criterion is even-handedly applied, its disparate and adverse impact on any child who is accordingly not regarded as Jewish is manifest: such children, of whom M is one, cannot gain admission to the school. The facts therefore satisfy s.1(1A)(a) and (b). So the question is whether the school can show it to be a proportionate means of achieving a legitimate aim.
44. What then is the school’s aim in adopting this criterion? Stress has been laid upon the ethos described in its instrument of government and mentioned earlier in this judgment. But this, as can readily be seen, relates to how children are to be educated once admitted to the school. It has no direct bearing on who those children should be. Indeed, given the wide disparity of religious and cultural family backgrounds of those admitted, who may even come from atheist or Catholic or Muslim families, it has

little appreciable indirect bearing either. It is a gatekeeping provision which operates entirely by asking whether a child is Jewish.

45. It appears to us in this situation that there is no answer to Ms Rose's submission that this element of the admission criteria is explicitly related to ethnicity and so incapable of constituting or forming part of a legitimate aim. For the United Synagogue, Lord Pannick has candidly accepted that the criterion is linked to ethnicity. For the Secretary of State, Mr Tom Linden QC initially sought, surprisingly if we may say so, to argue that it was possible under s. 1(1A) for a criterion related to ethnicity to be a proportionate means of achieving a legitimate aim. But he did not persist in the submission, and we limit ourselves to saying that it would be remarkable if an amendment designed to strengthen the Act had weakened it by making it possible for the first time to justify indirect discrimination by reliance on the very thing that made the test discriminatory.
46. In our judgment an aim of which the purpose or inevitable effect is to make and enforce distinctions based on race or ethnicity cannot be legitimate. We do not intend this to be an exhaustive account of what "legitimate" means in s.1(1A)(c), but we consider that it bears at least this meaning.
47. Ms Rose goes on to contend that, should the criterion not fall at the first hurdle because it is itself an ethnic test, it either has no other legitimate aim or, if it has, is not a proportionate means of achieving it. These are important and heavily debated issues, but they are contingent, first, on the case not being one of direct discrimination and, in the alternative, on the material test itself having no ethnic component or character. Since, for the reasons we have now given, neither contingency arises, it would be an impossibly artificial exercise to examine the residual legitimacy and the proportionality of a policy which would for this purpose have to be presumed to be what we have concluded it is not – that is to say, neither directly discriminatory on racial grounds nor, if indirectly discriminatory, based on ethnicity. We think it not only unnecessary but unhelpful for us to attempt this.

### *Conclusions*

48. We thus differ on both limbs of the case from Munby J. Our essential difference with him is that what he characterised as religious grounds are, in our judgment, racial grounds notwithstanding their theological motivation.
49. It also appears to us, with respect, that the judge has at a number of points allowed himself to be distracted by wider considerations than the law warrants. For example, in several places he makes comparisons with the admission criteria and practices adopted by schools of other faiths. Underlying this is an apparent assumption that, since these are legitimate, JFS must be entitled to adopt such criteria as are required by the faith *it* espouses if it is not itself to be differently treated by the law. This is not in our respectful view the right approach. No faith school is immune from the prohibition on race discrimination, and race discrimination is what the Race Relations Act 1976 says it is. An oversubscribed faith school which admitted only children whose parents came from a country where the school's faith was the official religion would, we would think, have a case to answer by virtue of the nationality limb of s.3.

50. The appeals accordingly succeed to the extent that we have indicated. We shall welcome the help of counsel in formulating an appropriate order and in providing for the disposal of the outstanding issues.