

DISCRIMINATION ON THE GROUNDS OF RELIGION OR BELIEF

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The European Background

1. The European Union Council Directive 2000/78EC established a general framework for equal treatment in employment and occupation. Paragraphs 1 and 4 of the recital to that Directive cite the fundamental rights guaranteed by the European Convention of Human Rights and the universal right recognised by the Universal Declaration of Human Rights as informing the Directive. The purposes of the Directive are to protect the fundamental rights set out in the EC Treaty (paragraph 1) and equality before the law (paragraph 4). Paragraphs 11 and 12 state that discrimination based on religion may undermine the objectives of the EC Treaty, in particular the attainment of a high level of social protection economic and social cohesion and solidarity; and, to that end, any direct or indirect discrimination based on religion or belief should be prohibited throughout the community. Paragraphs 23 and 24 recognise that, in very limited circumstances, a characteristic related to religion can constitute a genuine and determining occupational requirement where the objective is legitimate and the requirement is proportionate.
2. The provisions of the Directive which are relevant are as follows:

“Article 1 Purpose

The purpose of the Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief... as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 Concept of discrimination

1. For the purposes of this Directive, the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1 –
 - (a) direct discrimination shall be taken to occur when one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.

(b) indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular religion or belief... at a particular disadvantage compared with other persons unless –

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary...

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 4 Occupational requirements

1. Notwithstanding article 2(1)and(2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of the adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall not thus prejudice the right of

churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

Article 9 provides that

'persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection'.

3. Article 9 of the ECHR provides that

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others

4. The Employment Equality (Religion or Belief) Regulations 2003 were the United Kingdom's attempt to pass domestic legislation giving effect to the general Framework for Equal Treatment Directive in the sphere of religion or belief. The Regulations have now been replaced by the Equality Act ("the EQA") as from 1 October 2010 which consolidates the prohibition against protected characteristics previously contained in the legacy equality legislation, including religion and belief. Religion and belief has the same definition under section 10 of the EQA as it did under the Regulations.

(1) religion means any religion and a reference to religion includes a reference to lack of religion

(2) belief means any religious or philosophical belief and a reference to belief includes a reference to lack of belief.

5. The new definition of direct discrimination provides that discrimination occurs where, because of a protected characteristic, A treats B less favourably than he treats or would treat others.

6. Note the change from “on the grounds of” to “because of”. Direct discrimination is now wide enough to include associative discrimination. This follows the decision of the ECJ in *Coleman v Attridge*¹. Paragraphs 59 and 63 of the Explanatory Notes emphasise that the words “because of” remove the former specific requirement that the claimant must have the protected characteristic.
7. There were concerns expressed at the replacement of “on the grounds of” with “because of”. It was feared that the effect would be to destroy the caselaw which has succeeded in widening the application of discrimination legislation. The Labour Government justified it by asserting that the words would make the legislation “more accessible to non-specialists”. Whether this is an appropriate reason to alter the wording is open to debate. The prohibition extends to associative discrimination and to discrimination based upon a wrongly-held belief that a person has a protected characteristic. At the Bill stage, an attempt was made to introduce an amendment expressly to cover discrimination by perception and association. The Solicitor-General, Vera Baird, opposed it, arguing that to introduce the specific protection of association and perception “would run the risk of excluding other cases which the courts have held are covered by the words ‘on grounds of’...and future cases which the Government would want the equally broad and flexible formulation ‘because of’ to extend to”. The Parliamentary Joint Committee on Human Rights disagreed with this explanation, but no further amendment was made.
8. Section 14 EQA provides for a prohibition on direct discrimination because of a combination of two relevant characteristics. This has yet to be brought into force. However in the recent and widely-reported decision in *O’Reilly v. BBC*² the employment tribunal appeared to accept that combined discrimination complaints might be brought even under the legacy equality legislation (paragraphs 238–249 of the judgment), although, on the facts, the Claimant failed to establish combined or dual discrimination. An appeal is unlikely given the BBC’s grovelling apology to the claimant.
9. Section 19 prohibits indirect discrimination in a manner identical in substance to that under the legacy equality legislation.
10. Section 24 provides that it is no defence that the claimant shares the same protected characteristic as the discriminator. This repeats the provision in the 2003 Regulations but now applies to all protected characteristics.

¹ [2008] IRLR 722, and see also [2010] IRLR 10

² 10 January 2011

11. Section 26 prohibits harassment, namely unwanted conduct “**related to a relevant protected characteristic**” which has the negative purpose or effects familiar from the legacy equality legislation. This, therefore, can extend to “**associative discrimination**” – *Saini v All Saints Haque Centre*³
12. The s. 27 definition of victimisation is unchanged in substance from the original Regulations.

What constitutes a religion or belief?

13. Religion or belief includes Christians, Jews, Moslems, Hindus, Buddhists Sikhism, Rastafarianism, Baha'is, Zoroastrians and Jains are clearly covered, and this is confirmed in paragraph 53 of the Explanatory Notes.
14. A belief has to be one which the claimant actually does believe – *McLintock v DCA*⁴.
15. Given that the Regulations make a distinction between religion and religious belief, sects are presumably to be included, but how many can they be? In *McFeeley v UK*⁵, the Commission held that “**belief**” means more than just mere opinions or deeply held feelings. There must be “**a holding of spiritual or philosophical convictions which have an identifiable formal content**”. In *Campbell and Cosans v UK*⁶, (a case on corporal punishment), the European Court of Human Rights held that a “**philosophical belief**” was a belief that attained a certain level of cogency, seriousness, cohesion and importance that was worthy of respect in a democratic society and not incompatible with human dignity.
16. *Omoruyi v Secretary of State for the Home Department*⁷ was a case on asylum. A Nigerian claimed that he had fallen foul of a secret society in Nigeria because of his Christian beliefs, and that its members had killed his brother (in mistake for him) and his young son. Simon Brown LJ described the cult in question as akin to a devil cult and rejected the notion that it was a religious belief. He said @ paragraph 12

The notion of a “devil cult” practising pagan rituals of the sort here described is in any sense a religion I find deeply offensive. Assume opposition to any practices on the part of a secular state; is that to be regarded as a religious difference? I hardly think so. It seems to me

³ [2009] IRLR 74

⁴ [2008] IRLR 29

⁵ [1981] 3 EHRR 161

⁶ 4 EHRR 293 at 304

⁷ 4 EHRR 293 at 304

rather that these rights and rituals of the Ogboni are merely the trappings of what can only be realistically recognised as an intrinsically criminal organisation - akin perhaps to the voodoo element of the Ton-Ton Macoute in Papa Doc Duvalier's Haiti."

17. Devil-worship, witchcraft and voodoo would not fall within the EQA. It also does not extend to promiscuity, sexual practices and sexual preferences, for example, sadomasochism or paedophilia
18. Atheists, agnostics and humanists are covered- see **Glasgow City Council v McNab**⁸ where an Atheist teacher was held to have been the victimisation of discrimination and paragraph 53 of the Explanatory Notes.
19. In a more recent decision, **Greater Manchester Police Authority v Power**⁹ Judge Peter Clark held that spiritualism was capable of being a religion or belief under the Regulations. The claimant had stated

**"My Religion = Love
My Beliefs are those of Spirituality = i.e. the "Spirit" or
"motivating energy" that animates living things survives
physical death."**

The case was remitted to the tribunal on the merits where it failed on the facts.

20. A philosophical belief must be genuinely and seriously held and coherent. Under the original 2003 Regulations, belief was defined as "**any religious or similar belief**" [emphasis added] but by amendment, the word **similar** was removed. In **Grainger plc v Nicolson**¹⁰ the EAT held that the amended wording covered a belief in the effects of climate change. The employee argued that his belief affected the way in which he lived his life including what he ate, how he disposed of his waste etc. Burton J held that in order to qualify as a philosophical belief under the Regulations (i) the belief must be genuinely held; (ii) it must be a belief and not an opinion or viewpoint based on the present state of information available; (iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour; (iv) it must attain a certain level of cogency, seriousness, cohesion and importance; and (v) it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others. It did not have to be shared by others or to constitute a fully fledged system of thought as long as it

⁸ UKEAT/0037/06

⁹ [UKEAT/0434/09]

¹⁰ [2010] IRLR 4

satisfied the tests set out above. He therefore took the view that it was possible for vegetarianism or pacifism to be a philosophical belief. Burton J also expressed the view that there was distinction between a pure political belief and belief in political philosophy.

Direct discrimination and manifestation

21. Is religion or religious belief the same as manifestation of religion or religious belief – i.e. the right to wear clothing or hair or a symbol of one’s religion like a cross? There is one difference of course between the hijab and the crucifix or Star of David – there is no express provision in the Bible that this is should be worn. On the other hand, the Koran says this

"O Prophet, tell your wives and daughters and the believing women that they should cast their outer garments over their bodies [when abroad] so that they should be known and not molested".

The extent to which this means covering all the body or the hair or the whole face remains hotly debated in Muslim law. Hence some women wear a niqab and others the hijab. In Cairo, women students are banned from wearing the niqab in university for security reasons. In France, all forms of religious manifestation are banned in schools. Turkey goes further and prohibits the wearing of all religious attire save at religious ceremonies and in places of worship. This was challenged in the ECHR in the case of **Leila Sahin v Turkey**¹¹. Ms. Sahin wanted to wear her hijab at Istanbul University, but was disciplined for doing so in the face of a prohibition on religious attire. The Court upheld the right of the State to protect the principle of secularism enshrined in its Constitution and said **"Article 9 does not protect every act motivated or inspired by a religion or belief and does not in all cases guarantee the right to behave in the public sphere in a way which is dictated by a belief"**.

22. The Courts’ thinking on Article 9 and manifestation shows that Judges are divided.

23. In **Copsey v WWB Devon Clays**¹², a case before the Regulations, Mr. Copsey and 3 others had previously been exempt from Sunday working but following a large order, the employer changed its rotas to require all employees to work on Sundays. Mr. Copsey resigned and claimed unfair dismissal, arguing that Article 9 should be applied when assessing the provisions of the ERA 1996. The employment tribunal found that there AS SOSR so that the dismissal was fair under section 98. It also found that Article 9 was not engaged. Both the EAT and the Court of Appeal upheld the dismissal, even though Mummery and Rix LJJ held that the

¹¹ 44774/98

¹² [2005] IRLR 811

employment tribunal was wrong to find that Article 9 was not relevant. However, Mummery LJ thought that Article 9 has no application where an employee is free to work elsewhere; and Rix LJ thought that where an employer reasonably and made every effort to find suitable alternatives, no action lay involving Article 9. Neuberger LJ thought Article 9 did not take the unfair dismissal claim any further. Of course, since the employer was a private company and not an emanation of the State, Article 9 had no direct application. Had the case been brought under the Regulations or the EQA, the employer would have had to have shown objective justification, namely that its actions were required to satisfy its genuine business needs and that the response was proportionate.

24. In **R (on the application of Begum) v Headmaster and Governors of Denbigh School**¹³, the school had devised an appropriate uniform for its Muslim pupils in consultation with the Mosque; 79% of the pupils were Muslim. The girl's sister had gone through the school wearing the uniform and the girl herself had worn it for 2 years before her brothers informed the Deputy Head that she would sue the school if not allowed to do wear the jilbab, a shapeless garment hiding all the contours of her body. The House of Lords held that the school had **"taken immense pains to devise a uniform policy which respected Muslim beliefs"** and that it had done so **"in an inclusive, unthreatening and uncompetitive way"** and that there had been a proper balance between the girl's freedom of expression and the school's right to decide its own policies. Three of their Lordships, (Bingham, Hoffman and Scott) held that Article 9 did not require that someone was allowed to manifest their religion all the time everywhere; the right was qualified. Lord Nicholls and Lady Hale thought that Article 9 rights had been interfered with, but that such interference was justified because it protected the freedom of others; in this case, the freedom of other Muslim girls who were worried that they might be pressurised into wearing the jilbab or the niqab or ostracised for not doing so or seen by some as being less devout. However, their Lordships also pointed out that interference with an Article 9 right is judged severely and whilst not exactly making the exercise of that right impossible, there has to be a substantial interference. The majority was particularly influenced by the fact that other schools allowed girls to wear the jilbab so Shabina's right to education whilst wearing one was not impeded; indeed, since her application was first refused at first instance, she was attending such a school.

25. In **Azmi v Kirklees MBC**¹⁴, Ms. Azmi, a supply teacher in a Local Authority primary school, contended that she should be allowed to wear a veil in the presence of male teachers because Moslem law forbade women to reveal their face to males outside their immediate family. She argued that the

¹³ [2006] 2AllER 487

¹⁴ UKEAT/0009/07

correct comparator was a Moslem woman who did not cover her face. Wilkie J upheld the employment tribunal which dismissed this contention. The employment tribunal had held that the correct comparator was, somewhat bizarrely, a woman who covered her face with a balaclava, doubtless a common practice in Local Authority schools. He said

The purpose of the comparison is to illuminate the answer to the question whether there has been less favourable treatment on grounds of religion or belief. The less favourable treatment in question was suspension for refusing to accept an instruction. Looking one step back in the process, it could have been said that less favourable treatment was receiving the instruction. In our judgment, for the comparison to be such that the relevant circumstances in the one case are the same and not materially different from the other, save for the element of religious belief identified by the ET, must involve a person to whom such an instruction has been given (the earlier stage), or a person who has refused to accept such an instruction (the trigger of the less favourable treatment complained of in this case). Of necessity, that must involve, in our judgment, a woman who, whether Muslim or not, for a reason other than religious belief wears a face covering. In our judgment it would be unrealistic, and would not comply with the requirements of the law, to pose a comparator who does not cover her face and who would not receive such an instruction or be exposed to risk of suspension for refusing it. Such a comparison would not illuminate the answer to the question.

26. The claim for direct discrimination in *Azmi* failed because there was no less favourable treatment. Any woman of any religion would have been treated the same and so less favourable treatment was not on the grounds of her religion or belief – a teacher was required to allow his or her face to be seen by the pupils to aid their learning.
27. The last year has seen a number of significant decisions on the balance between the right to religious belief and the manifestation of that belief where it impinges on the rights and beliefs of others, which dovetailed each other through the Courts.
28. In *Eweida v British Airways plc*¹⁵ the claimant was a devout Christian who wanted to wear her plain silver cross in manifestation of her faith. BA had a policy forbidding any jewellery being displayed although it was permissible to wear it under the uniform. However, female Muslim

¹⁵ [2010] IRLR 322

employees were allowed to wear hijabs and Sikhs allowed wearing turbans in BA colours. The claimant alleged that this amounted to indirect discrimination.

29. In *Ladele v L B Islington*¹⁶ the claimant was a practising Christian who worked as a registrar. She declined to conduct civil partnerships and was herself the subject of a complaint by fellow gay employees who took the view that her refusal breached the Dignity at Work policy. She claimed direct and indirect discrimination as well as harassment.

30. In the EAT, Elias J¹⁷ held that that Ms. Eweida had not established indirect discrimination. In order to do that,

it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate impact on the group....that if someone holds subjective personal religious views, he or she is protected only by direct and not indirect discrimination.

31. In Ms. Eweida's case, her desire to wear a cross was not part of the practice of her religion, nor could she establish that a significant number of fellow Christians were disadvantaged by BA's PCP of banning jewellery. She herself accepted that it was a choice rather than a mandatory element of Christianity. The Court of Appeal dismissed the appeal, noting that some of Ms. Eweida's more extreme allegations against Barker had been dismissed by the employment tribunal. The Supreme Court refused permission to appeal¹⁸ is being appealed to the ECHR.

32. Ms. Ladele's succeeded before the employment tribunal but the EAT allowed the Council's appeal. The Council had established a legitimate aim, namely providing a service for marriages and civil partnerships on a non-discriminatory basis. Given that aim, the Council was

entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff

¹⁶ [2010] IRLR 211

¹⁷ [2009] IRLR 78

¹⁸ [2010] ICR 999

and the wider community. It would necessarily undermine the council's clear commitment to that objective if it were to connive in allowing the claimant to manifest her belief by refusing to do civil partnership duties."

In other words, Ms. Ladele could not herself discriminate against gay couples pursuing their civil rights because of her own religious views. There was a difference between her being permitted to pray, preach or teach and her manifestation of her views in preventing someone else doing something of which she disapproved as a result of her religion. In the Court of Appeal, Lord Neuberger M.R. said:

"It appears to me that, however much sympathy one may have with someone such as Ms. Ladele, who is faced with choosing between giving up a post she plainly appreciates or officiating at events which she considers to be contrary to her religious beliefs, the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions."

33. In **MacFarlane v Relate (Avon) Ltd**¹⁹ the claimant was a practising Christian, working as a counsellor for Relate. He also found homosexuality inimical to his religious views. He was happy to counsel same sex couples about non sexual matters, but he refused to become involved in psycho-sexual therapy (PST). He was dismissed.
34. Mr. MacFarlane claimed both direct and indirect discrimination. On the direct discrimination claim, Underhill P drew a distinction between holding a religious belief and manifesting that belief.

The fact that the employee's motivation for the conduct in question may be found in his wish to manifest his religious belief does not mean that that belief is the ground of the employer's action

35. This was a further restatement of the reason why test – why did Relate act as it did? It was not because Mr. MacFarlane was a practising Christian. It was because he was refusing to carry out one of the duties inherent in the post. In this case, the tribunal had made a clear finding that the reason for dismissal was the failure to offer PST and any other group would be treated the same.

¹⁹ [2010] IRLR 196

36. Mr. MacFarlane sought permission to appeal from the Court of Appeal, and the permission hearing came on in April 2010 and produced a letter from the former Archbishop of Canterbury calling for a special court to hear such cases with judges who have **“a proven sensibility to religious issues”**. Laws LJ rejected the suggestion in the most scathing terms **“I am sorry that he finds it possible to suggest a procedure that would, in my judgment, be deeply inimical to the public interest”**. He also said

“In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society”.

He explained the second limb of that sentence as meaning

“... the conferment of any legal protection or preference upon a substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be *true*; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claims. The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion - any belief system - cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in

the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the state, if its people are to be free, has the burdensome duty of thinking for itself.

IS IT A CLAIM FOR RELIGIOUS DISCRIMINATION OR RACE DISCRIMINATION?

37. In *R v Governing Body of JFS School & others*²⁰ concerned the rules for admission to JFS. This was a school for Jews only and it recognised the rules enforced by the Office of Chief Rabbi, the Orthodox branch of Judaism. Its constitution provided that **"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."** Amongst other things, this provided that a Jew was someone either born to a Jewish mother or who had converted (through the OCR) to Judaism. If the mother had herself converted to Judaism, again this had to be through the OCR and not Progressive Judaism, a less Orthodox branch. The claimant's ex wife and mother of his son had not followed the Orthodox route to Judaism but had converted through the Progressive Reform synagogue; as a result, and so her son was not recognised by the OCR as a Jew and he was therefore refused admission to JFS. In terms of religious discrimination, the discrimination would have been justifiable; however the parents argued that the rule was direct race discrimination. Mumby J found for the school, and held that the school had acted on the grounds of faith and not race. The Court of Appeal disagreed. The **"but for"** test in *James v Eastleigh Borough Council*²¹ did not answer this situation. More apposite was the test postulated in *Nagarajan v London Regional Transport*²² and *Chief Constable of West Yorkshire v Khan*²³- why did the discriminator act as he did? Sedley LJ said that the School's motives in adopting its admission policy were irrelevant. The ground of the refusal to admit the child was that he was not regarded as a Jew by the school because his mother was not Jewish. This was direct race discrimination. He found support in the

²⁰ [2010] IRLR 136

²¹ [1990] 2 AC 751

²² [2000] 1 AC 501

²³ [2001] ICR 1065

judgment of Lord Fraser in **Mandla v Dowell-Lee**²⁴ where he had defined membership of a racial group as either by birth or adherence.

38. The appeal (the first to be heard by the Supreme Court with a panel of nine judges) was dismissed by a majority of 5 judges (Lord Phillips, President, Lady Hale and Lords Kerr, Mance and Clarke) to 4 (Lords Hope, Walker, Rodger and Brown). Lord Phillips said that he did not find the “**but for**” test helpful. **“It is better simply to ask what were the facts that the discriminator considered to be determinative, when making the relevant decision”**. He gave the example of a fat black man going into a shop to be told **“I don’t serve people like you”**. Was the reason for the refusal to serve him because he was fat or because he was black? One is unlawful, the other is not. But the **motive** for the refusal is irrelevant. He rejected the submission that discrimination on grounds of descent is not racial discrimination as **“fallacious”** because it ignores the definition of **racial grounds** as including **origins**. A racial group is not restricted to its immediate membership. He also rejected the submission that the discrimination was on religious rather than racial grounds for several reasons. First, Judaism by matrilineal descent is accepted by the majority of Jews themselves. Second, it is clear that a convert to Judaism is a Jew and therefore a member of the Jewish race. Third, Judaism by matrilineal descent is not restricted to converts but applies to children of Jews. Therefore this was a question of race and not of religion. Lady Hale noted that there was only one issue in the case, namely whether the OCR’s criterion accepted by the School was based upon M’s ethnic origins. Clearly it was because his mother was of Italian Catholic descent; he was rejected **“because of who his mother was”**. The School’s motives were open and transparent but that was irrelevant. Lord Clarke identified aspects of the arguments which were irrelevant which included (i) the fact that Jews were discriminating against Jews - the identity of the discriminator was not a relevant factor (ii) the fact that the School had applied the same policy for 30 years (iii) any consequences of the argument. He also agreed with Lord Mance that there were two types of direct discrimination. In one type, the discriminator is acting on grounds which are inherently racial. In the second type, the discriminator is acting on grounds which are subjectively racial. The determining point was that the religious motive in applying religious criteria did not mean that discrimination was on grounds of religious belief because the criteria depended upon ethnic origins.
39. The dissenting judges all took the view that the discrimination was on religious grounds because it involved interpretation of Jewish law; there was a distinction between the ground for the treatment and the effect. Lords Hope and Rodger, however, took the view that the School had indirectly discriminated against M and that it had not shown objective

²⁴ [1983] 2 AC 543

justification for its PCP. Lords Walker and Brown held that it was neither direct nor indirect discrimination. The appropriate comparator was a boy with an Italian Catholic mother who had converted through the OCR – her ethnic origins would not have mattered to the School or the OCR. They also took the view that the School had shown objective justification in that the means taken to secure its legitimate aim were proportionate.

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