Neutral Citation Number: [2017] EWCA Civ 2164

Case No: B4/2017/0571

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
Sitting at Manchester
Mr JUSTICE PETER JACKSON
[2017] EWFC 4

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2017

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE ARDEN
and
LORD JUSTICE SINGH

- -

In the matter of M (Children)

- -
- -

Ms Alison Ball QC and Mr Hassan Khan (instructed by Dawson Cornwell) for the appellant father
Mr Peter Buckley (instructed by Steinbergs Solicitors) for the respondent mother
Ms Frances Heaton QC and Ms Jane Walker (instructed by Alfred Newton Solicitors) for the children's guardian
Ms Karon Monaghan QC and Ms Sarah Hannett (instructed by Baker & McKenzie LLP) filed written submissions on behalf of the first intervener Stonewall Equality Limited
Ms Jane Rayson and Mr Andrew Powell (instructed by A City Law Firm) filed written submissions on behalf of the second intervener Keshet Diversity UK

Hearing date : 15 November 2017

- -

Approved Judgment

Sir James Munby, President of the Family Division :

1. This is the judgment of the court to which we have each made significant contribution.

2. This is an appeal from a judgment and order of Peter Jackson J, as he then was, made in private law proceedings between the father and the mother of five children, whose ages now range from 13 to 3 years old. His judgment was handed down on 30 January 2017: *J v B (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4, [2017] WLR(D) 142. The judgment, which was necessarily lengthy, is freely available to all on the BAILII website, so we can be more limited in quoting from it than might otherwise be appropriate. We do, however, urge anyone who has occasion to read our judgment to read Peter Jackson J's judgment first.

3. The order was made on 2 February 2017. It was expressed as being a final order. The judge dismissed the father's application for direct contact (the children live with the mother). The order contained a child arrangements order providing for limited indirect contact, a specific issue order directing that the children were to be provided with "staged narratives" in age-appropriate terms, and a family assistance order under section 16 of the Children Act 1989, naming the children's guardian as the relevant officer, to remain in force until 1 February 2018. The father sought permission to appeal; the perfected grounds of appeal are dated 17 March 2017. Permission to appeal was given by King LJ on 16 June 2017. On 27 October 2017, McFarlane LJ gave both Stonewall Equality Limited ("Stonewall") and Keshet Diversity UK ("KeshetUK") permission to intervene in the appeal, limited to making written submissions. On 10 November 2017, the father applied for permission to admit further evidence, which we admitted *de bene esse*.

4. The appeal came on for hearing before us on 15 November 2017. Ms Alison Ball QC and Mr Hassan Khan appeared for the father, Mr Peter Buckley for the mother, and Ms Frances Heaton QC and Ms Jane Walker for the children's guardian. Ms Karon Monaghan QC and Ms Sarah Hannett filed written submissions on behalf of Stonewall and Ms Jane Rayson and Mr Andrew Powell filed written submissions on behalf of KeshetUK. At the end of the hearing we reserved judgment, which we now hand down.

<u>The case in outline</u>

5. The outcome of this appeal is of very great importance to the father, to the mother and the children, and to the ultra-orthodox North Manchester Charedi Jewish community in which the children have always been brought up. But in its potential implications this appeal is of profound significance for the law in general and family law in particular. For on one view it raises the question of how, in evaluating a child's welfare, the court is to respond to the impact on the child of behaviour, or the fear of behaviour, which is or may be unlawfully discriminatory as involving breaches of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or of the Equality Act 2010.

6. The facts of the present case are stark, deeply saddening and extremely disturbing. In due course we shall need to explore the judge's reasoning in more detail, but at this stage we can summarise the essence very shortly.

7. The father is transgender and left the family home in June 2015 to live as a transgender person. She now lives as a woman. Because she is transgender – and for that reason alone – the father is shunned by the North Manchester Charedi Jewish community (the community), and because she is transgender – and for that reason alone – the children face ostracism by the community if they have direct contact with her. Peter Jackson J (judgment, para 178(7)) characterised the practices within the community as amounting to:

> "*unlawful discrimination against and victimisation of the father and the children because of the father's transgender status* (emphasis added)."

8. Peter Jackson J identified (judgment, para 166) fifteen arguments in favour of direct contact which he described as "formidable". He could identify (para 168) only two factors that spoke against direct contact. Of the first, relating to the father's "dependability", he found (para 172) that "if it were the only obstacle to direct contact, it could probably be overcome." That left only one factor, which he described (para 173) as "the central question", namely "the reaction of the community if the children were to have direct contact with the father."

9. On this, his findings were as clear as they were bleak. He found (para 156) that:

> "The children will suffer serious harm if they are deprived of a relationship with their father."

10. Nonetheless he decided, as we have seen, that there should be no direct contact. He explained why. First (para 177):

> "Having considered all the evidence, I am driven to the conclusion that there is a real risk, amounting to a probability, that these children and their mother would be rejected by their community if the children were to have face-to-face contact with their father."

Then (para 181):

> "I … reject the bald proposition that seeing the father would be too much for the children. Children are goodhearted and adaptable and, given sensitive support, I am sure that these children could adapt considerably to the changes in their father. The truth is that for the children to see their father would be too much for the adults."

And then this (para 187):

> "So, weighing up the profound consequences for the children's welfare of ordering or not ordering direct contact with their father, I have reached the unwelcome conclusion that *the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community is so real, and the consequences so great, that this one factor, despite its many*

> *disadvantages, must prevail over the many advantages of contact* (emphasis added)."

11. We suspect that many reading this will find the outcome both surprising and disturbing, thinking to themselves, and we can understand why, how can this be so, how can this be right?

The judgment

12. Having thus introduced the issues which confront us, we turn to a more detailed analysis of Peter Jackson J's judgment. After an Introduction (judgment, paras 1-11) and a section dealing with Terminology (paras 12-16), he set out a Narrative of events (paras 17-36), to which we refer the reader. For present purposes, there are only two matters we need to refer to. The first, (para 33) relates to the minutes of a "Team around the children meeting" held within the community in April 2016. Of these minutes, the judge made this observation (para 34):

> "These Minutes are of interest. Not having been prepared with these proceedings in mind, they illustrate the prevailing mindset. There is at least as much concern for the community as for the children. The father was entirely ignored."

The other matter relates to something which the judge referred to (para 36) as an example of the high level of tension surrounding the proceedings:

> "In November [2016], on the first morning of the hearing, an unidentified member of the community posted this WhatsApp message:
>
> "*HELP! SAVE!*
>
> *Family [name]'s (A Mother & her 5 Children) fate is in court this morning (for the next 10 days). Please Daven [pray] for them. We can't afford to lose this case. The Rabbonim [rabbis] have asked for this message to be sent. The family know and want it to be sent. Pls forward this message. The koach of tefilloh [power of prayer] can achieve everything.*""

13. The judge then turned to the law (paras 37-56). There has been no challenge to his analysis.

14. Then in a long section (paras 57-142) the judge rehearsed the evidence. For present purposes we can be selective. In the course of setting out the mother's evidence (paras 69-77), the judge said this (paras 73-74):

> "73 The mother described the father as having been "severely ostracised" by the community. She had no other experience of the reaction of the community to transgender or homosexual people, but described the problems for a neighbour's children when their mother wanted to leave the religion and the consequences when one of her female cousins began to deviate in her style of dress. She said that she was very

> aware that the schools must uphold British values, but that "the parent body are the school". Respect must be shown for people, no matter who they are, but at the same time the ethos of the school must be upheld, no matter what. Transgender is extremely alien to the community and against religious law. As for homosexuality, young children are not faced with it. As she put it: "I uphold the British law within our faith." If there is a conflict between law and faith, she would follow her faith, though she would not commit a crime. The present circumstances put her in a very difficult position.
>
> 74 The mother said that there is no way that direct contact will work out for the children, for their identity, for their culture and for their whole environment. She said this, even though she knew that she and the children are entitled to legal protection against victimization. The schools would probably not throw out the children, but the environment would become hostile. The parent body would not allow their children to play with the children, and no one can tell others how to bring up their own children. "They will protect their children from contact. They wouldn't want my children to suffer and will have every sympathy, but their own children will come first." The children's next schools would not have to take them, and could just say they were full. "Are we going to get the whole community to tell them off?" The mother can see the children being rarely invited to family events and festivities because people would be nervous about what they would say. There would be extreme supervision and the children's participation would be kept at a very basic level. Already, A is being asked questions and is reluctant to commit himself fully within his peer group. This, said the mother, is "the reality – it's who we are"."

15. Particularly striking in this context, was the evidence of Mrs S, a very experienced foster carer who identifies herself as an observant modern Orthodox Jew, of whom the judge said this (paras 108-111):

> "108 Mrs S, who clearly has a close knowledge of the workings of the community, described its unhappiness at children being fostered outside the community, though it acknowledged that she was a preferable carer to any of the available alternatives.
>
> 109 Mrs S provided two striking instances of the way in which children exposed to 'outside influences' will be ostracised. In 2015 Child A, a 15-year-old girl who had been sexually abused in the community was placed in her care. The girl was not invited to Hanukkah gatherings by her classmates. When Mrs S challenged the mother of one of the girl's close friends about this, she explained that she could not risk her daughter hearing about "things" as children in the community were kept innocent and sheltered. When Mrs S described the

> distress that these actions were causing, the mother did invite the girl to her house, but only under strict supervision. The child lost her best friend and all her childhood friends. She now attends a different school and has absolutely no association with her former social circle.
>
> 110 Mrs S spoke of Child B, whom she had fostered from another ultra-Orthodox community. The child, aged 14, had been sexually and emotionally abused within her family and the wider community since the age of 11. She had made statements to her school about her abuse. The response had been to put her on a plane out of the country and invent a story to explain her absence. When she was returned to the country and placed in foster care, "all hell broke loose". Mrs S said that she personally had a broad set of shoulders but that it had been a struggle to protect the child at the beginning. She was rejected by her family and no longer allowed to talk to friends. As Mrs S put it, "It's the knowledge that is the issue."
>
> 111 Mrs S freely described these as "awful case studies", which she related to assist the court to understand that this response was the norm where religious culture, identity and laws are breached. She said that they were not "standout cases". At the beginning of her fostering career, they would have had her "up in arms", but she now saw this behaviour as being unchangeable – by local authorities, foster carers, courts and the law. "They will find a way around it.""

Of the cases described by Mrs S, the judge said this (para 178(3)-(4)):

> "The cases of Child A and Child B, described by their foster carer Mrs S, show the lengths to which the community is prepared to go, regardless of the justice of the matter or the welfare of the young people … *They are clear examples of discrimination and victimisation* (there is no other apt description) in cases that did not raise anything like as problematic a challenge to community attitudes as the present case (emphasis added)."

16. Also of importance, as we shall see, in influencing the judge's thinking, was the evidence of Rabbi Andrew Oppenheimer (paras 90-102). This part of the judgment requires to be read in full. Here we merely quote the salient passages. First (paras 91-92):

> "91 Rabbi Oppenheimer describes Charedi communities as *"warm, close-knit and supportive communities for which the teachings of Torah Judaism guide all aspects of their lives … The teachings of the Torah also highlight integrity, respect for others, peace and justice (including respect for the law of the country) and place the family and its welfare at the heart of life … Allegiance to the lifestyle … means of necessity that members*

have traditional values and seek to guard their children and themselves against what they regard as the dangers and excesses of modern open society."

92 Rabbi Oppenheimer was clear that transgender and procedures to achieve sex change violate a number of basic principles in Torah Law, including the prohibition against castration (Leviticus 22.24) and the prohibition against wearing garments of the opposite sex (Deuteronomy 22.5)."

17. Next (paras 95-96):

"95 In regard to the attitude of the community, Rabbi Oppenheimer writes:

"Where a person decides to take action likely to be irreversible to transgender, Ultra-Orthodox community members will invariably take the view that, by embarking on that course, the transgender person has breached the contract which they entered into when they married their wife to observe the Torah and to establish and bring up a family in accordance with its laws. Furthermore, members of the community will naturally wish to protect themselves and their families from any discussion of the painful issues involved, especially bearing in mind the sheltered position of the community from the standpoint of open society. Knowledge of transgender amongst children in the Ultra-Orthodox Jewish community is almost non-existent, for the reasons mentioned above concerning their lack of access to Internet and the media. There is no known precedent in the UK of a transgender person being accepted living in an Ultra-Orthodox community.

The result will be that community members will expect the family of the transgender person to limit their contact with him or her as far as possible. If the family of the transgender person nevertheless seeks, or indeed is forced, to maintain contact with that person, they will open themselves up to very serious consequences indeed. The families around them will effectively ostracise them by not allowing their children to have more than the most limited contact with that family's children. The impact on the family in such circumstances in terms of social isolation will be devastating.

In considering the best interests of the children the obvious conclusion from the discussion above is that the children of an Ultra-Orthodox union cannot and should not be expected to have any direct contact with the father in such circumstances. It will no doubt be argued against this approach that it is cruel, lacking in tolerance, unnecessary and denies the rights of the father. But Torah law (Halacha) has the same approach to English Family Law in this type of situation, regarding issues of residence and

> *contact, that the interests of the children are paramount. In other words the father is expected to give precedence to the needs of the children over his own needs."*
>
> 96 In his oral evidence, Rabbi Oppenheimer remarked that "ostracise" was perhaps not the best word to use for a process that would not be organised but more subtle and inevitable – *"it would be so much more"*."

18. Then this (para 97):

> "He … asserted that under the Torah and in reality a person is considered to have a choice, albeit a difficult one, as to whether they become transgender. If they do, they choose to place themselves outside the embrace of the community. In Torah law, to be gay or transgender is to be a sinner. Even though it may be looked on with compassion, and some people may extend the hand of friendship, that does not alter its unacceptability. The mother could not remain married to a person who made that decision. She should still seek in a constrained way to promote respect for the father but at the same time to protect the children from the consequences until they are old enough to deal with them. Young people cannot deal with these issues without undermining their faith. There is too much of a conflict to understand. There is therefore an obligation to protect the children from finding things out that are likely to damage them and cause them pain and suffering, likely to damage their growth and spiritual well-being. By educating children in the way of the Torah, they are brought up as upright people."

19. And then, finally for present purposes, this (paras 99-101):

> "99 Rabbi Oppenheimer explained that excluding ideas that might damage the development of children is *"the price we pay – we limit ordinary social contact so that we transmit our spiritual ethos to the next generation"*.
>
> 100 When pressed about the impact of ultra-Orthodox custom and practice in a case such as the present, Rabbi Oppenheimer replied with some warmth that this had nothing to do with emotions or feelings – it was contrary to Torah law for the children to be exposed to transgender. Further pressed as to the basis for this assertion, the Rabbi fell back upon the overriding consideration in Leviticus to be holy and to separate oneself from anything contrary to the Torah.
>
> 101 Indirect contact, on the other hand, would not, he thought, give rise to such a risk of ostracism, as it would not enable the children to have *"a living relationship"*."

20. Pausing at this point there are two points which require emphasis.

21. The first is the community's determination – what Rabbi Oppenheimer described as its "obligation to protect the children from finding things out that are likely to damage … their growth and spiritual well-being" – to shield its children from knowledge of and exposure to such matters as sexual abuse, homosexuality and transgenderism and, more generally, what Rabbi Oppenheimer called the "excesses of modern open society"; and to restrict its children from coming into contact with children who have such knowledge or have been so exposed.

22. The second is Rabbi Oppenheimer's chilling explanation as to why indirect contact would not give rise to a risk of ostracism: "it would not enable the children to have *"a living relationship"*."

23. Peter Jackson J's response to this was brisk (paras 179-180):

> "179 In balancing the advantages and disadvantages of the children being allowed to see their father, I apply the law of the land. Some witnesses in these proceedings assert that gay or transgender persons have made a lifestyle choice and must take the consequences. The law, however, recognises the reality that one's true sexuality and gender are no more matters of choice than the colour of one's eyes or skin.
>
> 180 It has also been said that transgenderism is a sin. Sin is not valid legal currency. The currency of the law is the recognition, protection and balancing out of legal rights and obligations. In this case, to be recognised and respected as a transgender person is a right, as is the right to follow one's religion. Likewise, each individual is under an obligation to respect the rights of others, and above all the rights of the children."

24. In striking contrast with Rabbi Oppenheimer's evidence was that of Rabbi Ariel Abel (paras 78-83), who described himself as mainstream Orthodox and falling under the authority of the Chief Rabbi. He grew up in the North Manchester Charedi community and has experience of communities in London, Liverpool and Manchester at various levels of orthodoxy. The judgment (paras 80-81) summarised his evidence:

> "Rabbi Abel emphasised the central importance of honouring one's parents within Jewish law and tradition. He said that there is scarcely any circumstance in which the obligation to honour one's father does not apply. Even if the father is an outright sinner, which is not in his view a consideration in this case, the obligation persists. He considered this aspect of the matter to have been left untreated by Rabbi Oppenheimer.
>
> In relation to transgender, Rabbi Abel considered that there is a plurality of opinion and that the biblical position may be qualified. He contends that there is no valid reason why any person should plead ultra-Orthodox faith as a reason to disenfranchise a person in the position of the father. "There is no legitimate reason to maintain that children who are transgender-

> parented cannot experience in the ultra-Orthodox community a full and satisfying Orthodox Jewish life, physically, spiritually, emotionally and communally." On the contrary, there is every reason to reunite parent and child as it is the well-being of the nuclear family and not the social preferences of the wider community that truly matter. He points to commentary by the noted encyclopaedist, the late Rabbi Waldenberg, in support of his contention that Orthodox Judaism, correctly understood, recognises the existence of, and to a certain extent accommodates, a number of non-binary identities, including transgender. He argues that the transgender issue cannot be ignored and that parents' relationships with their children are inalienable."

25. The judgment continues (paras 82-83):

> "Rabbi Abel objected to the concept (introduced by Rabbi Oppenheimer) of the faith as a club from which people could be ejected, though he observed that this evidently happens. An approach of this kind, practically amounting to a belief, raises itself to the surface, usually in worst-case scenarios. This is a social cultural reality, not a valid Orthodox reason for separating children from parents. There is a lamentable habit of censoring. Children of divorced parents can be seated separately from other children and he had experience of this, something he described as beggaring belief. In his view, this should not be accommodated or excused in Jewish or English law. On the other hand, he had never heard of total ostracism in practice, provided the contentious matter was treated privately within the family, and not paraded before the community. However, he accepted that ostracism for these children could very possibly happen if the situation was not managed correctly with professional help. What was needed was psychological support: religious teachers should be kept out of it.
>
> The Rabbi accepted that the present circumstances would be a challenge to the insular North Manchester community. He argued that when it comes to matters of life and death, you have to break free and seek to work with the unfamiliar problem. He gave as an example creative arrangements that might be made to allow the father to participate in A's bar mitzvah. There are ways, and it can happen if there is a will. The issues are significant, but not insurmountable. The community is not monolithic, but multifarious. It will step back if proper arrangements are made by both parents. If the situation is unregulated, the community will take matters into its own hands. If direct contact was ordered, and the law laid down, he did not think that the community would "go to the wire" fighting an unwinnable battle."

26. We have set this important evidence out in full because it seems to us to hold out hope of a change. Rabbi Abel demonstrates that there exists what we imagine is a lively debate, perhaps within this thoughtful, law-abiding and intellectual community and probably Orthodox Judaism generally, of the issues to which transgenderism gives rise. Does it not provide some support for a conclusion in this case that the views which drove the judge are not universally inflexible?

27. The judge had the benefit of a substantial report from the Anna Freud Centre, whose recommendations he summarised as follows (para 114):

> "Their recommendation is that the younger children are provided with a narrative in age-appropriate stages to help them to understand their father's departure and transgender identity. They recommend that children have an exchange of letterbox contact with their father three times a year. They do not recommend any direct contact."

He added this (paras 116-117):

> "In their report, Dr Morris and Ms Henry write: *"In our opinion, it is essential that the cultural context in which they live is taken into account when thinking about children's emotional, development, social and educational needs. If the children run the risk of being denied places at good schools and Yeshivas and are being shunned and ostracised by their peers and other members of the community, this will have a negative impact on how they function in the widest possible sense both now and in the future."*
>
> 117 They emphasised that they had found this a very difficult recommendation to make, and that they had reached it on a very narrow balance. In this binary (contact/no contact) situation, there is no good solution, and they have chosen the outcome that brings least harm to the children. This conclusion is substantially based on the premise that the children would be ostracised by the community if they had direct contact. If the premise is found to be incorrect, their recommendation would probably be different."

28. The judge also had the benefit of two reports from the guardian. He said (paras 130-133):

> "130 The Guardian identifies the risks to the children's well-being arising from the loss of such a significant person, but considers that the greater risk arises from their potential exclusion from their way of life. *"These children had no choice [about] what community they were born into, and what faith they should follow. These were choices made by their parents. They are enveloped into the Orthodox Jewish way of life, and the loss of such could cause such instability that I am unable to identify any interventions that could be offered to promote resilience."*

> 131 In her second report, noting the conclusions of the Anna Freud Centre, the Guardian maintained the same position. She recommended a Family Assistance Order to accompany the delivery of the narrative to the younger children, which should be communicated within 12 months, and the commencement of indirect contact.
>
> 132 In her oral evidence, the Guardian said that her recommendation had never felt satisfactory for children of this age. She had desperately searched for a different solution and had continued to question herself about it up to the moment of giving evidence. Her two reasons for maintaining her view were (1) the risk that the children would be ostracised and placed in conflict with their identity as members of the community; and (2) some continuing concerns about the father's insight and ability to prioritise the emotional needs of the children and engage in the advice that would be offered. Both of these are significant factors for her.
>
> 133 Looking at life through the children's eyes, exclusion from the community would change everything beyond recognition. This would not be compensated for by the benefits of contact, and they may instead feel resentment towards their father. Denial of contact is not, the Guardian said, a good outcome, but it is the least harmful option in an extreme and very finely balanced situation."

29. The judge concluded this part of his judgment with a description (paras 137-142) of the visit to court of the eldest child, A.

30. The judge then turned (paras 143-161) to consider the welfare checklist. For present purposes, we need refer only to this (paras 156-157), which really encapsulates the dilemma confronting him:

> "156 The children will suffer serious harm if they are deprived of a relationship with their father.
>
> 157 The children would suffer serious harm if they were excluded from the normal life of the community."

31. Finally (paras 162-191) the judge set out his Assessment and conclusion. He began as follows (paras 162-165):

> "162 I find this a very troubling case. These children are caught between two apparently incompatible ways of living, led by tiny minorities within society at large. Both minorities enjoy the protection of the law: on the one hand the right of religious freedom, and on the other the right to equal treatment. It is painful to find these vulnerable groups in conflict.

> 163 A great deal of time has been spent at this hearing on consideration of the laws and customs of the ultra-Orthodox community. This is natural, given that it is the community within which the children live. However, Ms Ball QC and Ms Mann for the father argue that one must not look only through an ultra-Orthodox lens. I agree. Despite its antiquity, Jewish law is no more than 3,500 years old, while gender dysphoria will doubtless have existed throughout the 120,000 years that Homo sapiens has been on earth. Both sides of the question must therefore receive careful attention.
>
> 164 Faced with this intractable problem, it is not for the court to judge the way of life of the ultra-Orthodox Jew or of the transgender person. The court applies the law, and in this case its task is to identify the outcome that best upholds the children's welfare while minimising so far as possible the degree of interference with the rights of all family members.
>
> 165 Here, the best possible outcome would be for the children to live with their mother, grow up in the community, and enjoy a full relationship with their father by regular contact. The worst outcome, I find, would be for the mother and children to be excluded from the community. The question is whether, in striving for the best outcome, the court would instead bring about the worst."

32. He then (para 166) listed the fifteen "formidable" arguments in favour of direct contact to which we have already referred. In relation to the second factor identified by the guardian (see paragraph 28 above) he said this (para 172):

> "… the father's approach to contact would not be a reliable, static factor. It would be a variable amongst other variables. I share the view of the Anna Freud Centre and the Guardian that this must be taken into account when considering children's welfare. It speaks for caution, but no more than that, and if it were the only obstacle to direct contact, it could probably be overcome."

33. Turning to the "the central question of the reaction of the community if the children were to have direct contact with their father," the judge (paras 174-176) summarised counsel's competing submissions before expressing his conclusion as follows (para 177):

> "Having considered all the evidence, I am driven to the conclusion that there is a real risk, amounting to a probability, that these children and their mother would be rejected by their community if the children were to have face-to-face contact with their father. I say "driven" because I began the hearing with a strong disposition to find that a community described by Rabbi Oppenheimer as *"warm, close and supportive"* and living under a religious law that *"highlights integrity, respect for others,*

> *justice and peace"* could tolerate (albeit without approval) these children's right to and need for a relationship with their father. The evidence that was available before the hearing contained dire predictions, but no actual examples of ostracism. I pointed this out, and this led to a number of new statements being gathered, including significant evidence from the foster carer, Mrs S."

34. He explained his conclusion (para 178) in twelve sub-paragraphs of which we quote the following:

> "(1) It does not depend upon any view of what Jewish law is in relation to transgender, but upon what the community is likely to think it is and act upon. It may be that the humane and progressive views of Rabbi Abel and Mr Bernard will one day gain acceptance in the ultra-Orthodox communities, but I consider that in the present day the community in which the children live and go to school will, rightly or wrongly, defer to the stance described by Rabbi Oppenheimer and the authorities he cites.
>
> …
>
> (3) *The cases of Child A and Child B, described by their foster carer Mrs S, show the lengths to which the community is prepared to go, regardless of the justice of the matter or the welfare of the young people* (emphasis added).
>
> (4) I cannot distinguish these cases in the way suggested by Ms Ball. *They are clear examples of discrimination and victimisation (there is no other apt description) in cases that did not raise anything like as problematic a challenge to community attitudes as the present case* (emphasis added).
>
> (5) There is a consistent account from all those within the community of how it will behave …
>
> (6) The father [and his witnesses] all accept to a substantial degree that this is what the community is like. Their thesis is that it can be managed or made to change.
>
> (7) *There is, to say the least, evidence that the practices within the community, and in particular its schools, amount to unlawful discrimination against and victimisation of the father and the children because of the father's transgender status* (emphasis added). However, the fact that the practices may be unlawful does not mean that they do not exist.
>
> (8) I was particularly impressed by the evidence of Mrs S, an informed outsider, who compellingly described the reaction of the community to situations of which it disapproves.

> (9) I was also struck by Rabbi Oppenheimer's unyielding defence of the religious and social position as illustrating the stance that can be taken by educated persons.
>
> …
>
> (11) There is no evidence that any person in a position of authority or influence within the community wishes to challenge the behaviour of its members, still less that significant change could be expected within these children's timescale.
>
> (12) In these circumstances, I do not consider that there is any real prospect of a court order bringing about a beneficial alteration in the attitude of the community towards this family, even to the extent of some relatively limited normalisation of approach. This must be a subject for regret, not only for this family, but also for others facing these issues in fundamentalist communities, for whom this will be a bleak conclusion. However, these considerations cannot deflect the court's focus from the welfare of these five children."

35. He continued (paras 182-183):

> "182 And here we come to the sad reality. I can see no way in which the children could escape the adult reaction to them enjoying anything like an ordinary relationship with their father. In the final analysis, the gulf between these parents – the mother within the ultra-Orthodox community and the father as a transgender person – is too wide for the children to bridge. They would be taught one thing in their daily lives and asked to do the opposite on repeated, conspicuous forays into the outside world, which they would have to keep quiet about afterwards. The mother, a religiously observant person, would be required to sustain something that she has been taught is religiously wrong. A, aged only 12, is already extremely anxious about contact and now feels protective towards his mother and younger siblings. Embarking on contact would place him under extreme pressure, which would inevitably have a detrimental effect on his development.
>
> 183 The children, and the mother on whom they depend, would have no effective support to deal with any of this: on the contrary, they would face suspicion or outright opposition from every quarter. The likely result is that their individual and collective well-being would be undermined to the point where their ability to remain in the community would be put at risk, or at the very least placed under permanent and severe strain, with … *"a negative impact on how they function in the widest possible sense both now and in the future"*."

36. He added (para 185):

> "These parents decided to bring up their children according to the narrow ways of the community, and they continue to agree about this. That being the case, the priority must be to sustain the children in the chosen way of life, preserving their existing family and social networks and their education. It is not to be forgotten that children have the right to preserve their identity (UNCRC Art.8), something that is a matter of particular pride to these children. Contact carries the clear risk that the children and their mother will become the next casualties in a collision between two unconnecting worlds. The father has already experienced the consequences of that collision, and no one knows better than she does how very painful they can be."

37. He made clear (para 186) that:

> "I have (as required by *Re C* [*Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, [2011] 2 FLR 912, para 47]) grappled with all the available alternatives, viewing deprivation of contact as a last resort that can only be contemplated when it is clear that the children will not benefit from it."

38. He concluded with this (paras 187-189):

> "187 So, weighing up the profound consequences for the children's welfare of ordering or not ordering direct contact with their father, I have reached the unwelcome conclusion that the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community is so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact.
>
> 188 I therefore conclude with real regret, knowing the pain that it must cause, that the father's application for direct contact must be refused. I will instead make an order for indirect contact. I see no reason why this should not take place four times a year for each child, perhaps coinciding with their birthdays, and with Pesach, Sukkot and Hanukkah: I invite submissions on the detail. I will make a Family Assistance Order for 12 months, addressed to Cafcass so that [the guardian] can support the introduction of indirect contact and oversee the process of creating the narrative. The Anna Freud Centre has offered to advise on the terms of the narrative …
>
> 189 This outcome is not a failure to uphold transgender rights, still less a "win" for the community, but the upholding of the rights of the children to have the least harmful outcome in a situation not of their making."

39. Following the handing down of this judgment, the judge made the final order to which we have already referred. It included a direction under section 16(6) of the Children

Act 1989 that the relevant officer was to report to the court by 2 November 2017. In the event, and because of the difficulties she had encountered, she returned the matter to court on 15 September 2017, when Peter Jackson J made a further order: subject to any different directions we might make, he allocated the case to Hayden J and directed that her application was to be heard by Hayden J on a date after 15 December 2017. In relation to this, we note that Ms Heaton, in her skeleton argument on behalf of the guardian, says that:

> "In light of the issues which have arisen since the 2nd February, it seems inevitable that a further substantive hearing is required, whatever the outcome of this appeal. Therefore the [guardian] questions the proportionality of this appeal at this stage."

Whilst readily accepting the premise we do question the conclusion. If the order made by the judge has already so broken down, that might be thought to raise at least a question as to whether his order was right.

The grounds of appeal

40. The perfected grounds of appeal are commendably brief and to the point. There are three grounds, which we quote verbatim:

i) In his careful survey of the wide constellation of cultural and religious concerns, the judge ultimately lost sight of the paramountcy principle.

ii) The judge failed to evaluate why indirect contact and the giving of narratives to the children about their father's transgender status was in the children's best interests and direct contact was not.

iii) The judge failed to exhaust the court's powers to attempt to make direct contact work.

The mother disputed each of these propositions and submitted, in substance, that Peter Jackson J, having directed himself correctly, had come to a conclusion which was open to him on the totality of the evidence and with which this court could not properly interfere. The children's guardian adopted essentially the same stance as the mother.

The law: family law

41. By way of introduction we note that in recent years there have been a number of private law family cases involving ultra-orthodox Jewish communities. Listing them chronologically, they are the decision of this court in *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677 (the Chareidi or Haredi community), the three judgments of Her Honour Judge Rowe QC in *Re X (Number 1: Religious Differences: Schools)* [2014] EWFC B230, *Re X (Number 2: Orthodox Schools)* [2015] EWFC B237, and *Re X (Number 3: Division of Religious Festivals)* [2016] EWFC B91 (the Satmar community), and the judgment of Her Honour Judge Harris in *Re C (Prohibited Steps Order)* [2016] EWFC B97 (the Haredi community). We will return to them in due course.

42. It is important at the outset to be clear as to why the court – the State – is involved in the present case. It is because the parents have been unable to resolve their family

difficulties themselves, whether with or without the assistance, formal or informal, of the community, and because one of the parents, in this case the father, has sought the assistance of the court. The court cannot decline jurisdiction. And, as judges sitting in a secular court, we must necessarily determine the case according to law, in this instance the law as laid down by Parliament in section 1(1)(a) of the Children Act 1989: see *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, paras 92-93.

43. So far as material for present purposes, section 1(1)(a) provides that:

> "When a court determines any question with respect to … the upbringing of a child … the child's welfare shall be the court's paramount consideration."

That the ultimate question for the court is the child's *welfare* is a principle with its roots deep in the nineteenth century: see *J and Another v C and Others* [1970] AC 668. That the child's welfare is *paramount* is a principle established early in the twentieth century. The first reported usage of the word is to be found in the judgment of Farwell J in *F v F* [1902] 1 Ch 688, 689:[1]

> "The Court in considering the question of guardianship has regard before all things to the infant's welfare; it has regard, of course, to the rights of the father and the mother, but the essential requirements of the infant are paramount."

By 1924 the principle was treated as well established: *Ward v Laverty* [1925] AC 101. Since 1925 it has been enshrined in statute: see, successively, section I of the Guardianship of Infants Act 1925, section 1 of the Guardianship of Minors Act 1971 and, now, section 1(1)(a) of the Children Act 1989.

44. As Lord Upjohn explained in *J and Another v C and Others* [1970] AC 668, 722, welfare is to be judged by reference to "the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children"; and the task of the judge is to "act as the judicial reasonable parent." Section 1 of the 1989 Act is an 'always speaking' statute: see Lord Steyn in *R v Ireland, R v Burstow* [1998] AC 147, 158. What this means is that a child's welfare is to be judged today by the standards of reasonable men and women in 2017, not by the standards of their parents, grandparents or great-grand parents in 1989, 1971, 1925 or 1902. And fundamental to this is the need to have regard to the ever changing nature of our world: changes in our understanding of the natural world, technological changes, changes in social standards and, crucially for present purposes, *changes in social attitudes*: see *Re G*, paras 32-33.

---

[1] The case, as it happened, involved religion. A testator, who died in 1896, by his will appointed his sister guardian of his daughter, then aged eleven. The testator was a Protestant, and the infant was brought up in that faith. In 1900 the sister became a Roman Catholic. Holding that, under the circumstances, it was for the benefit of the infant that the testator's sister should be removed from her guardianship, Farwell J commented, 691, that "the disturbing influence arising from the sight of the guardian worshipping in a different church and consulting the priests of another faith may well be prejudicial to the ward's peace of mind and secure confidence in her own religious belief."

45. This last point is particularly significant when one bears in mind the remarkable changes in our society in recent years. Society has changed, is changing and will no doubt continue to change at a quite remarkable rate, and it is essential that our law – our family law in particular – keeps pace, as it does, with these societal realities.

46. In their skeleton argument on behalf of Stonewall, Ms Monaghan and Ms Hannett make the point by referring to the language in relation to gay people and their supposedly negative impact on children used by Lord Wilberforce in *In re D (An Infant) (Adoption: Parent's Consent)* [1977] AC 602, 629, and by this court in *S v S (Custody of Children)* (1980) 1 FLR 143, *Re P (A Minor) (Custody)* (1983) 4 FLR 401 and *C v C (A Minor) (Custody: Appeal)* [1991] 1 FLR 223. As they rightly say, these decisions make uncomfortable – we would say very uncomfortable – reading today. They are, to adopt a phrase used by Thorpe LJ in *Re G (Residence: Same-Sex Partner)* [2006] EWCA Civ 372, [2006] 2 FLR 614, para 40, decisions given "in an earlier age." As he went on (para 43): "we have moved into a world where norms that seemed safe 20 or more years ago no longer run."[2]

47. The fact is, as the daily business of the Family Division so vividly demonstrates, that we live today in a world where the family takes many forms and where surrogacy, IVF, same-sex relationships, same-sex marriage and transgenderism, for example, are no longer treated as they were in even the quite recent past.

48. What are the characteristics of the reasonable man or woman in contemporary British society? The answer for present purposes is provided by *Re G*, para 34:

> "If the reasonable man or woman is receptive to change he or she is also broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority. Equality under the law, human rights and the protection of minorities, particularly small minorities, have to be more than what Brennan J in the High Court of Australia once memorably described as 'the incantations of legal rhetoric'."[3]

49. What is meant by welfare and how is it to be assessed? Again, *Re G* provides the answers. We start with this (*Re G*, paras 26, 27):

> "26 'Welfare'… extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. The judge will bear in mind the observation of Sir Thomas Bingham MR in

---

2 None of this is affected in our judgment because the decision in the case was reversed by the House of Lords: *In re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305.

3 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 277.

Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124 at 129, that:

> '… the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems.'

That was said in the context of contact but it surely has a wider resonance …

> 27 … Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach …"

50. We continue (*Re G*, paras 79-80):

> "79 … What in our society today, looking to the approach of parents generally in 201[7], is the task of the ordinary reasonable parent? What is the task of a judge, acting as a 'judicial reasonable parent' and approaching things by reference to the views of reasonable parents on the proper treatment and methods of bringing up children? What are their aims and objectives? …
>
> 80 In the conditions of current society there are, as it seems to me, three answers to this question. First, we must recognise that equality of opportunity is a fundamental value of our society: equality as between different communities, social groupings and creeds, and equality as between men and women, boys and girls. Secondly, we foster, encourage and facilitate aspiration: both aspiration as a virtue in itself and, to the extent that it is practical and reasonable, the child's own aspirations … Thirdly, our objective must be to bring the child to adulthood in such a way that the child is best equipped both to decide what kind of life they want to lead – what kind of person they want to be – and to give effect so far as practicable to their aspirations. Put shortly, our objective must be to maximise the child's opportunities in every sphere of life as they enter adulthood. And the corollary of this, where the decision has been devolved to a 'judicial parent', is that the judge must be cautious about approving a regime which may have the effect of foreclosing or unduly limiting the child's ability to make such decisions in future."

51. How is the court to approach the welfare evaluation in a case where, as here, religion is a dominant feature? This, as *F v F* [1902] 1 Ch 688 and, indeed, *Ward v Laverty* [1925] AC 101 illustrate, is a matter which the courts have long had to grapple with. But for present purposes the common law can be taken as having been settled by a trilogy of cases which, although now a generation old, are still definitive: *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239 (Jehovah's Witnesses), *Re B and G (Minors) (Custody)* [1985] FLR 134 (Scientology) and *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163 (Exclusive Brethren).

52. We return again to *Re G*, paras 35-36:

> "35 Religion – whatever the particular believer's faith – is not the business of government or of the secular courts, though the courts will, of course, pay every respect to the individual's or family's religious principles … The starting point of the common law is thus respect for an individual's religious principles, coupled with an essentially neutral view of religious beliefs and a benevolent tolerance of cultural and religious diversity.
>
> 36 It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect, so long as they are 'legally and socially acceptable' (Purchas LJ in *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163 at 171) and not 'immoral or socially obnoxious' (Scarman LJ in *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239 at 244) or 'pernicious' (Latey J in *Re B and G (Minors) (Custody)* [1985] FLR 134 at 157, referring to scientology)."

53. How does this apply in a family court? We continue with *Re G*, paras 39, 43:

> "39 Within limits the law – our family law – will tolerate things which society as a whole may find undesirable. A child's best interests have to be assessed by reference to general community standards, making due allowance for the entitlement of people, within the limits of what is permissible in accordance with those standards, to entertain very divergent views about the religious, moral, social and secular objectives they wish to pursue for themselves and for their children …
>
> 43 Some manifestations of religious practice may be regulated if contrary to a child's welfare. Although a parent's views and wishes as to the child's religious upbringing are of great importance, and will always be seriously regarded by the court, just as the court will always pay great attention to the wishes of a child old enough to be able to express sensible views on the subject of religion, even if not old enough to take a mature decision, they will be given effect to by the court only if and so

> far as and in such manner as is in accordance with the child's best interests. In matters of religion, as in all other aspects of a child's upbringing, the interests of the child are the paramount consideration."

54. It is important in this context to bear always in mind the words of that great judge, Scarman LJ in *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239, 245:

> "… there is a great risk, merely because we are dealing with an unpopular minority sect, in overplaying the dangers to the welfare of these children inherent in the possibility that they may follow their mother and become Jehovah's Witnesses. Of course, most of us like to play games on Saturdays, to go out to children's parties and to have a quiet Sunday – some of us will go to church, and some of us will not. This appears to be the normal and happy, even though somewhat materialistic, way of life, accepted by the majority of people in our society. It does not follow, however, that it is wrong, or contrary to the welfare of children, that life should be in a narrower sphere, subject to a stricter religious discipline …"

55. Thus far, the common law. We shall have to return in due course to the provisions of the Equality Act 2010 and to Articles 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but note here that the Strasbourg jurisprudence in relation to Article 9 is to similar effect as the common law explained above.

56. So much for the general principles by reference to which we have to determine the three grounds of appeal. In relation to ground (iii), there was common ground between the parties as to the governing principles. After a detailed analysis of both the Strasbourg and domestic jurisprudence, this court in *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, [2011] 2 FLR 912, para 47, summarised matters as follows:

> "• Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
>
> • Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
>
> • There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.

> • The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
>
> • The key question, which requires 'stricter scrutiny', is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
>
> • All that said, at the end of the day the welfare of the child is paramount; 'the child's interest must have precedence over any other consideration.'"

57. To that summary, which has been followed both in *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494, and *Re Q (Implacable Contact Dispute)* [2015] EWCA Civ 991, [2016] 2 FR 287, we only add a reference to what Balcombe LJ said in *Re J (A Minor) (Contact)* [1994] 1 FLR 729, 736:

> "… judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the residential parent (usually the mother) to frustrate the court's decision is too obvious to require repetition on my part."

Discussion: family law

58. We have deliberately set out these matters in detail and at some length. It is very important that the mother, and the community, of which she is part, and, indeed, society generally, should be left in no doubt as to *why* the court is involved or as to *how* it is required to approach cases such as this.

59. At the risk of repetition, we draw attention to and emphasise two principles which, in our judgment, are central to the issues before us.

60. The first is the core principle that the function of the judge in a case like this is to act as the "judicial reasonable parent," judging the child's welfare by the standards of reasonable men and women today, 2017, having regard to the ever changing nature of our world including, crucially for present purposes, *changes in social attitudes*, and always remembering that the reasonable man or woman is receptive to change, broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and where their human rights are respected. We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory.

61. The second, which goes to the heart of the issue in relation to ground (iii), is the principle that the judge has a *positive* duty to attempt to promote contact; that the judge must grapple with all the available alternatives before abandoning hope of achieving some contact; that the judge must be careful not to come to a premature decision; and

that "contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt" (see paragraph 56 above). We add that the duty of the judge is not circumscribed by the way in which the parties choose to identify the issues or to argue the case. The judge has a free hand. Thus, for example, section 10(1)(b) of the Children Act 1989 provides that:

> "In any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 8 order with respect to the child if … the court considers that the order should be made even though no such application has been made."

62. The attentive reader of Peter Jackson J's judgment might well question how it is, if he was indeed acting as the "judicial reasonable parent" and adopting the reasonable parent's broadminded and tolerant approach, that he was nonetheless driven to a conclusion dictated by the practices of a community which he characterised as involving discrimination and victimisation.

63. The careful reader of Peter Jackson J's judgment might be forgiven for identifying the implication as being that the more enmeshed a child is in a narrow and constricting way of life, and the more intransigent the adults are in seeking to protect the child from what the adults see as the undesirable aspects of any other way of life, the more hamstrung the court will be, the less it will feel able to intervene to further what would otherwise be seen as plainly required in the child's best interests.

64. That is not the approach of courts where religion is not in play. Where an intransigent parent is fostering in their child a damaging view of the other parent, and thereby alienating the child from the other parent and denying contact between them, the court does not hesitate to invoke robust methods where that is required in the child's interests. Thus, the court may make an order transferring the living arrangements (residence) from one parent to the other, either to take immediate effect or (see *Re D (Children)* [2009] EWCA Civ 1551 and *Re D (Children)* [2010] EWCA Civ 496) suspended so long as the defaulting parent complies with the court's order for contact. The court can make the child a ward of court. The court can make an order under section 37 of the Children Act 1989 for a report from the local authority with a view to the commencement of proceedings for taking the child into public care.

65. One can see a similar approach being articulated in a rather different family law context in *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1, where a local authority was pursuing care proceedings against a father. Among the matters relied upon by the local authority (paras 64, 70) was that, because of the father's membership of an extremist organisation, he had been the target of serious threats to his person and home, including threats to burn it down. The judicial response was this (para 72):

> "If it really were the case that the father was at risk of serious threats to his person and home, that might be a very different matter, though it is not easy to see why the appropriate remedy for such threats should be the adoption of A rather than the provision of suitable security arrangements."

66. Is the approach, should the approach be, any different merely because religious belief, practice or observance is in play? The answer in essence must be: No.

67. The attitude of the courts a century or more ago is well illustrated by the words of Farwell J in *F v F* [1902] 1 Ch 688 which we have already quoted. With that one may contrast the withering words of Lord Upjohn in *J and Another v C and Others* [1970] AC 668, 721, denouncing *Re Agar-Ellis; Agar-Ellis v Lascelles* (1883) 24 ChD 317 as the "dreadful [case] where the Court of Appeal permitted a monstrously unreasonable father to impose upon his daughter of 17 much unnecessary hardship in the name of his religious faith."

68. Nowadays, it is well recognised that, as it was put in *Re G*, paras 42-43:

> "42 Some aspects of even mainstream religious belief may fall foul of public policy …[4]
>
> 43 Some manifestations of religious practice may be regulated if contrary to a child's welfare … In matters of religion, as in all other aspects of a child's upbringing, the interests of the child are the paramount consideration."

Thus, para 44:

> "The tenets and faith of Jehovah's Witnesses will not prevent the court ordering a child to receive a blood transfusion, even though both the parents and the child vehemently object: see, for example, *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386."

Relevance of the religious views of the Charedi community in which the children live

69. By way of elaboration of what we have already said, we need at this point to summarise our approach to the religious views of the community.

70. As already stated, this court in *Re G*, para 35, held that:

> "The starting point of the common law is thus respect for an individual's religious principles, coupled with an essentially neutral view of religious beliefs and a benevolent tolerance of cultural and religious diversity."

In *Re G*, this court had to consider the impact on the child of the parents' differing religious beliefs, practices or observances. By contrast, in this case, there is the added dimension that the children are, as both parents wish, living in a community of those adhering to the beliefs of a particular section of the Orthodox Jewish faith in circumstances where the father has, in the view of the community, broken the religious laws to which the community adheres. This court expresses no view on whether those religious laws have been broken. It is merely concerned with the impact on the children.

---

[4] *Westminster City Council v C and Others* [2008] EWCA Civ 198, [2009] Fam 11, was cited as a striking example.

This is a matter within the proper sphere of the State, whose functions are performed on this appeal by this court as the judicial reasonable parent.

71. The judge found that the acts of the community would result in harm to the children. He was not of course referring to physical harm. These children are lovingly cared for by their mother. He was referring to the psychological harm that might be caused by their being denied access to schools or to events involving their peers (see, for example, paragraphs 14, 15 and 30 above). The judge clearly found also that the complete exclusion of the children from the community would also be seriously injurious to them.

72. It will come as no surprise that there is a limit to freedom of religion where it involves significant physical harm to any person. In the light of our increased understanding in the twenty-first century about the psychological effects of others' behaviour, it ought equally to come as no surprise that there may equally be limits where that behaviour results in psychological harm to children.

73. In the passage cited in paragraph 70 above, *Re G* states that the position which it describes is the "starting point". It was dealing with the usual case, where there is no potential conflict between the religious beliefs in question and those of the democratic society in which a religious belief is rooted. But the jurisprudence on which *Re G* is based recognises that there are limits to which the law recognises religious difference which the law must respect. As we shall explain – and this is an important point – there are limits which define the right to manifest one's religion in absolute terms, and not only when the interests of children are at stake, though the latter may of course reinforce and fortify those limits.

74. The discussion of these issues is brought to the fore in this case because of the very special feature brought about by the judge's finding that the community is likely to ostracise the children if direct contact to the father is given. Moreover, he found that the community would do that in pursuit of their religious beliefs. As we shall explain, that discriminatory conduct by individual members of the community is likely to be outside the Equality Act 2010. That is why we have to consider the extent to which this conduct is also outside the right to freedom of belief conferred by the Convention. If there is to be any advance on the indirect contact ordered by the judge, the position of the community will need to be considered further. In particular, consideration may well need to be given as to how far any such order might violate the rights of the community under the Convention.

75. We shall return to this below (paragraphs 116 and following). At this stage, we can do no more than indicate where the limits of the right to manifest one's religion may lie. (Indeed, it may never be necessary in this case to go any further if the community were able itself to accept fully within it children who have contact with a transgender person who is now outside the community. Such acceptance may involve no adjustment of its own teaching or liturgy.) We emphasise that the content of this right is developing, as one would expect, in response to the challenges posed by religious difference of many kinds as a result of the increasing pluralisation of modern society. We express no view on whether any further relevant limits to the right to freedom of religion lie under the general law, since we have had no separate submissions on the common law.

Our reasons for disagreeing with the analysis of the judge

76. In our judgment, Peter Jackson J's judgment is vulnerable on a number of grounds, all interlinked but which, for purposes of clarity and analysis, it is appropriate to keep distinct.

77. First, the judge, having arrived at his conclusion (judgment, paras 182-188), did not at that point step back and ask himself what, we think, were a number of highly pertinent questions. We have already touched on much of this, but it bears further elaboration. For example, he should, we respectfully suggest, have asked himself: how do I, indeed, how can I, properly accommodate this conclusion with my role as the judicial reasonable parent applying the standards of reasonable men and women today? Can I properly come to a conclusion dictated, as I have found (judgment, paras 34, 178, 181), by the practices of a community which involve discrimination and victimisation and where the community's focus is as much on itself and the adults as on concern for the children or child welfare? Is it enough simply to proceed on the basis (para 185) that "These parents decided to bring up their children according to the narrow ways of the community, *and they continue to agree about this* (emphasis added)"? Should I not directly and explicitly challenge the parents and the community with the possibility that, absent a real change of attitude on their part, the court may have to consider drastic steps such as removing the children from the mother's care, making the children wards of court or even removing the children into public care? Should I not directly and explicitly confront the mother and the community, which professes to be law abiding, with the fact that its behaviour is or may be unlawfully discriminatory? And, not least, how can this outcome meet even the medium let alone the long-term needs and interests of the children? How can this order give proper effect to the reality, whether the community likes it or not, that the father, whether transgender or not, is and always will be the children's father and, as such, inescapably part of their lives, now, tomorrow and as long as they live? The judge's omission to address these questions seriously undermines, indeed, in our judgment vitiates, his ultimate conclusion.

78. Secondly, and in saying this we are very conscious of the forensic reality that this part of the case was not much explored before him, and he did not, of course, have the benefit of the submissions we have had from Stonewall and KeshetUK, we are bound to say it is very unfortunate that the judge did not address head on the human rights issues and issues of discrimination which plainly arose. His judgment recites though largely without analysing (judgment, paras 44-51, 53-56) various Convention and statutory provisions to which the father in particular had referred. But apart from the passages we have already set out, the judgment says virtually nothing else about these vitally important issues – no doubt, in this respect, reflecting the limitations of the arguments that had been addressed to the judge. This is a matter we return to below.

79. Thirdly, there is much force in the argument that the judge did not sufficiently explain why, given the basis of the mother's and the community's objection to *direct* contact, it was nonetheless feasible to contemplate *indirect* contact. Indeed, there is little discussion of the issue in the judgment. The judge recorded the mother's position as being (judgment, para 9):

> "The mother had been opposed to any contact but, having seen the professional advice, now accepts that the children should have indirect contact with their father three times a year. She opposes direct contact of any kind during their childhoods as that, she claims, will lead to the children and herself being

> ostracised by the community to the extent that they may have to leave it."

We have already recorded (paragraph 22 above) Rabbi Oppenheimer's views on the subject. The judge was pressed in argument (judgment, para 174) with what we think was the well-founded point, "It is not clear why indirect contact is said to be acceptable, while direct contact is not." After all, as we have observed (paragraph 21 above), the concern of the community is to shield its children from knowledge of and exposure to such matters as transgender, and to restrict its children from coming into contact with children who have such knowledge or have been so exposed. Surely, from that point of view, indirect contact must carry with it precisely the same kinds of risk as direct contact. The judge did not address the point, merely saying (judgment, para 188) that, having refused an order for direct contact, "I will instead make an order for indirect contact. I see no reason why this should not take place four times a year." We emphasise that this is not an argument against indirect contact; on the contrary, it is, it might be thought, an argument in favour of direct contact.

80. Fourthly, we think there is considerable substance in the complaint that, as Ms Ball puts it, the judge "gave up too easily" and decided the question of direct contact then and there and without directing even a single attempt to try and make it work. The judge recognised, by making the specific issue order directing preparation of "staged narratives", that there was further work to be done by the guardian and the Anna Freud Centre. As Ms Ball asks rhetorically, and in our judgment there is substance in the point, why not defer a final decision on direct contact pending the outcome of that, and perhaps further, work, including work by the GesherEU Support Network about which the judge (judgment, paras 84-89) had heard evidence? Moreover, as we have already observed, why not first directly and explicitly challenge the parents and the community with the possibility that, absent a real change of attitude on their part, the court might have to consider the drastic steps we have referred to? Why not directly and explicitly confront the mother and the community with the fact that its behaviour is or may be unlawfully discriminatory? And why not attempt, even if the prospects may have seemed forlorn, the kind of step by step process adopted by Her Honour Judge Rowe QC in *Re X (Number 1: Religious Differences: Schools)* [2014] EWFC B230, *Re X (Number 2: Orthodox Schools)* [2015] EWFC B237, and *Re X (Number 3: Division of Religious Festivals)* [2016] EWFC B91. In our judgment, the decision which judge came to was indeed premature.

81. It follows that, in substance, the father makes good all three grounds of appeal.

82. The parties were rightly agreed that if this was our decision it would not be appropriate for us to determine what the outcome should be. The matter will have to go back for a further hearing which, in the circumstances, will be before Hayden J. Precisely what the scope of that hearing should be will be a matter for the judge. We do not anticipate a rehearing of the very full evidence on the religious views which Peter Jackson J heard but otherwise leave the scope of the evidence at the rehearing to the judge. That said, we need to make explicit what ought to be clear enough already. What we say about the community is based on the evidence adduced by the parties to these proceedings and on the findings of the judge. The community are not parties and have had no opportunity to make representations. Our observations about the community should be read on that basis.

83. In view of the fact that, for the reasons set out earlier, we propose to allow this appeal and remit the case to the family court for reconsideration, it is unnecessary for us to address at length either the issues of equality law which may arise or the issues under Article 9 of the Convention. However, we hope that it will assist the family court in its reconsideration of the case if we set out some of the issues that may have to be addressed, dealing first with equality law and then with Article 9.

Equality law

84. We will address, first, the Equality Act 2010 and, secondly, Article 14 of the Convention, one of the provisions in the Convention set out in Schedule 1 to the Human Rights Act 1998 ("HRA").

Equality law: the Equality Act 2010

85. As we have seen, in his judgment (para 178(4)) the judge referred to certain other cases about which he had heard evidence from the foster carer, Mrs S, which he regarded as being "clear examples of discrimination and victimisation (there is no other apt description)". He continued (para 178(7)):

> "There is, to say the least, evidence that the practices within the community, and in particular its schools, amount to unlawful discrimination against and victimisation of the father and the children because of the father's transgender status. However, the fact that the practices may be unlawful does not mean that they do not exist."

86. The judge appears to have had in mind that there may be breaches of the Equality Act 2010. However, with respect to the judge, it is important to be careful to distinguish between activities which may (in a lay sense) be regarded as discriminatory, and activities which are made unlawful by the Equality Act: concepts such as "discrimination" and "victimisation" have a specific legal meaning and are not to be confused with how they may be understood by lay people. For example, the Equality Act does not apply to such a nebulous entity as "the community."

87. No one in the present case has suggested that any individual or organisation would be in breach of the Equality Act other than possibly the school or schools which the children in this case attend. As we have mentioned, this court has received helpful written submissions by Ms Monaghan and Ms Hannett on behalf of Stonewall, which explain the scope and application of the Equality Act to a case such as this. They do not suggest that anybody other than possibly the school or schools concerned could as a matter of law be in breach of that Act. Quite properly Stonewall has made submissions on the law in the abstract and has not commented on the facts of the present case, which are, in any event, not fully known to that organisation for reasons of confidentiality. It is therefore on the legal position of schools that we also focus our attention.

88. As we have mentioned, the Equality Act does not make all kinds of discrimination unlawful in all circumstances. The scheme of the Act consists of defining its scope by reference, in particular, to certain persons, on whom obligations are imposed; conferring rights on certain persons by reference to various "protected characteristics";

and by reference to the kind of activity concerned, in particular, for present purposes, education.

89. Part 2 of the Act sets out certain key concepts. Section 4 defines the relevant "protected characteristics". They include "gender reassignment." Section 7 defines "gender reassignment" as follows:

> "(1) … If the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing the physiological or other attributes of sex.
>
> (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment."

90. Section 13(1), which is also to be found in Part 2 of the Act, defines the concept of "direct discrimination" as follows:

> "A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

91. As the written submissions on behalf of Stonewall make clear (paras 9 and 45), it is well-established that, for this purpose, the protected characteristic does not have to be a characteristic of person B but may be of a third person C. This concept is sometimes known as "associative discrimination." This will be so, for example, if a child is subjected to less favourable treatment because of a protected characteristic of that child's father.

92. Part 6 of the Act concerns education. Chapter 1 of that Part deals with schools. Of particular relevance is section 85. The relevant provisions apply whether a school is a state school or an independent school. Section 85(7) provides that, in relation to England and Wales, section 85 applies to:

> "(a) a school maintained by a local authority;
>
> (b) an independent educational institution …
>
> (ba) an alternative provision Academy that is not an independent educational institution;
>
> (c) a special school (not maintained by a local authority)."

93. There are certain duties not to discriminate which are imposed by section 85 on the "responsible body of a school." Those duties include the arrangements it makes for deciding who is offered admission as a pupil; the terms on which it offers to admit the person as a pupil; and not admitting the person as a pupil: see subsection (1)(a), (b) and (c). Furthermore, subsection (2) provides that the responsible body of such a school must not discriminate against a pupil:

> "(a) in the way it provides education for the pupil;

(b) in the way it affords the pupil access to a benefit, facility or service;

(c) by not providing education for the pupil;

(d) by not affording the pupil access to a benefit, facility or service;

(e) by excluding the pupil from school;

(f) by subjecting the pupil to any other detriment."

94. As a matter of principle, it would seem to us that, if a school were to ostracise a pupil because of his or her father's transgender status, that would amount at the very least to "any other detriment" within the meaning of section 85(2)(f). That would constitute direct discrimination, within the meaning of section 13(1) of the Act, and would be unlawful under section 85.

95. It is well-established on authority that discrimination which is motivated by a religious belief (however sincerely held and even if the discrimination is mandated by that religious belief) does not make discrimination under the Equality Act lawful: see *Regina (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15, [2010] 2 AC 728, para 35 (Lord Phillips of Worth Matravers PSC) and para 65 (Lady Hale JSC). See also *Regina (Williamson and Others) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, para 58, where Lord Walker of Gestingthorpe cited with approval what had been said by Mason ACJ and Brennan J in the High Court of Australia in *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120, at 136:

"Religious conviction is not a solvent of legal obligation."

96. In the present case we are anxious that no assumption should wrongly or unfairly be made that any school attended by the children concerned has acted unlawfully or will do so in the future. As we have already mentioned, if a school were to ostracise a pupil on the ground of his or her father's transgender status, that would be likely to amount at least to the imposition of a "detriment" on that child which is unlawful under the Equality Act. The courts of this country expect schools to comply with their legal duties under that Act as well as generally.

97. Nevertheless, we are equally concerned that, should there be action by a school which is unlawful under the Equality Act, the courts of this country should not, as a matter of public policy, simply treat it as a factor to be weighed against permitting direct contact between the father and children. To do so would, in our view, be contrary to the rule of law.

98. Accordingly, when this case returns to the family court, we would expect the judge to consider very carefully:

i) whether there would in fact be unlawful conduct even in the face of an order of the court granting the father direct contact with her children; and

ii) to what extent such unlawful conduct should be given weight in the balance to be conducted in assessing what are the best interests of those children.

Equality law: Article 14

99. In the present case the judge correctly reminded himself (judgment, paras 54, 55) of two fundamental points of law. First, the court itself is a "public authority" within the meaning of the HRA: see section 6(3)(a). Accordingly, the court itself is under a duty to act in a way which is compatible with the Convention rights: see section 6(1). Secondly, one of the Convention rights for this purpose is the right to enjoy Convention rights without discrimination in Article 14.

100. However, the judge never returned to these points later in his judgment. No doubt this was due to the way in which the case was presented before him. That said, the duty to act in a way which is compatible with the Convention rights is one that falls upon courts and tribunals, as the result of the will of Parliament in enacting the HRA in the way that it did, and is not one that should be overlooked however the parties present a case. Nor can it be a sufficient response to the human rights arguments in this case to say that both the mother and the father agreed that the children should be raised within their community and continue to agree that should be so even after the father has embarked upon the process of gender re-assignment. Such parental agreement cannot absolve a court of its own duty to comply with the HRA.

101. Article 14 provides as follows:

> "Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

102. The following three propositions are uncontroversial and are well-established in the authorities:

i) First, Article 14 is not a freestanding provision. It does not provide for equal treatment by the State in all circumstances, only in the enjoyment of the other Convention rights.

ii) Secondly, Article 14 does not require there to be a breach of another Convention right before there can be a breach of it. It requires merely that the subject-matter of the case falls within the "ambit" of another Convention right. In the present case it is common ground that the subject-matter does fall within the ambit of Article 8 and, in particular, the right to respect for family life. That right belongs not only to the father but also to the children and their mother.

iii) Thirdly, the list of express grounds on which discrimination is prohibited by Article 14 is not exhaustive. The text of Article 14 makes it clear that discrimination is prohibited on "any ground such as …" Furthermore, the list of grounds ends with a generic one: "or other status." Thus, the jurisprudence of

> the Strasbourg court, which has been followed by the courts of this country, has recognised that discrimination on the ground of sexual orientation is in principle prohibited by Article 14 even though it is not one of the express grounds listed there: see, for example, *Salgueiro Da Silva Mouta v Portugal* (2001) 31 EHRR 1055. The Strasbourg court has also held that discrimination on the ground of transgender status falls within Article 14: see *PV v Spain (App. No. 35159/09)* final judgment 11 April 2011, para 30.

103. In the domestic case law under the HRA, the approach which was initially favoured by this court was that set out in *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617, para 20 (Brooke LJ). It was suggested that, in an Article 14 case, four questions should be asked:

i) Do the facts fall within the ambit of one or more of the Convention rights?

ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?

iii) Were those others in an analogous situation?

iv) Was the difference in treatment objectively justifiable? In other words, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

104. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 134, Baroness Hale of Richmond approved the *Michalak* approach but said that there is an additional question which needs to be asked: whether the difference in treatment is based on one or more of the grounds proscribed – whether expressly or by inference – in Article 14. Baroness Hale also said that the *Michalak* approach was subject to the important caveat that a "rigidly formulaic approach is to be avoided." She said:

> "… In my view, the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."

105. In *AL (Serbia) v Secretary of State for the Home Department, Regina (Rudi) v Same* [2008] UKHL 42, [2008] 1 WLR 1434, para 38, Baroness Hale recalled what Lord Bingham of Cornhill had said in *A and Others v Secretary of State for the Home Department, X and Another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (sometimes called "the *Belmarsh* case" after the name of the prison where the appellants were detained), para 68, that, in a discrimination case, it is the discriminatory effect of a measure which must be justified and not only the underlying measure itself.

106. In that case Parliament had enacted emergency legislation in the light of the terrorist attacks in the USA on 9 September 2001, which permitted the Secretary of State to certify that certain suspected international terrorists should be detained without charge because there was a legal impediment to their deportation: see Part 4 of the Anti-terrorism, Crime and Security Act 2001. Such legislation would ordinarily be incompatible with the right to personal liberty in Article 5 of the Convention and so the United Kingdom derogated from that provision under Article 15, which permits derogation from many of the Convention rights in time of war or other public emergency threatening the life of the nation, but such derogation must be strictly required by the exigencies of the situation. There was no derogation from Article 14. The House of Lords held that Part 4 of the 2001 Act was discriminatory on grounds of nationality, as it applied only to foreign nationals, and that discrimination was not objectively justified.

107. Further, the fact that a measure is unjustifiably discriminatory may feed back into the question of whether the underlying measure is in truth justified. It may be difficult for the State to argue with any persuasion that a measure is objectively necessary if it has chosen to enact it in a discriminatory way. That is what happened in *A v Secretary of State for the Home Department* itself. In that case the House of Lords held not only that there was a breach of Article 14 but that the discrimination involved meant that the government was unable to justify the decision to derogate from Article 5 of the Convention either. In the result the House of Lords granted a declaration of incompatibility under section 4 of the HRA in respect of Part 4 of the 2001 Act. Parliament responded by repealing the incompatible legislation.

108. The point that, in an Article 14 case, what must be justified is the discrimination and not only the underlying measure is very important and sight must never be lost of it. Too often it is assumed that, if a measure is justified under the substantive Convention right in issue, it will also be justified under Article 14. That may be so in some cases but it will not always be so.

109. In assessing whether an apparently discriminatory measure or decision is objectively justified it will be important to scrutinise the evidence that is proffered by way of justification, in particular to see whether it amounts to any more than the merely subjective negative attitudes of other people. This can be illustrated by reference to the well known litigation which concerned the policy, which this country at one time adopted, of barring all gay men and lesbians from the armed forces. Serving personnel were discharged on that ground alone, irrespective of their conduct or impeccable record of service, if their sexual orientation was discovered.

110. That policy was challenged in the domestic courts by way of judicial review at a time when Parliament had not yet enacted the HRA. The application for judicial review failed in the domestic courts, albeit that this court dismissed the appeal before it with a heavy heart: see *Regina v Ministry of Defence ex p Smith* [1996] QB 517. The applicants then brought an application in the Strasbourg court. The court held that there was a breach of Article 8 (the right to respect for private life): see *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 and *Lustig-Prean v United Kingdom* (2000) 29 EHRR 548. Although, in those cases, the court did not deal separately with Article 14, because it had already decided that there was a breach of Article 8, we consider that its reasoning in rejecting the suggested justification under Article 8(2) is illuminating and would doubtless be followed under Article 14 too.

111. First, the Strasbourg court reiterated what it has frequently said from its earliest case law, that, to be proportionate under, for example, Article 8(2), a measure must not simply be "necessary" but must be "necessary in a democratic society"; and that a democratic society is one that is characterised by "pluralism, tolerance and broad-mindedness": see *Smith and Grady* at para 87 and *Lustig-Prean* at para 80.

112. Secondly, the court scrutinised with care the justification which was put forward by the government and found it to be wanting. In the domestic judicial review proceedings it had been accepted by the courts that the evidence filed on behalf of the Secretary of State showed that there was a rational justification for the absolute ban on all gay men and lesbians in the armed forces on the ground of the "operational effectiveness" of those forces: see *ex p. Smith*, at 557-8 (Sir Thomas Bingham MR).

113. However, the Strasbourg court was not impressed with the evidence for that suggested justification because, on analysis, it turned out to turn not on objective factors at all but on the subjective, negative attitudes of other personnel in the armed forces: see eg *Lustig-Prean*, para 89. The court said (para 90):

> "The question for the Court is whether the above-noted negative attitudes constitute sufficient justification or the interferences at issue.
>
> The Court observes from the HPAT [Homosexuality Policy Assessment Team] report that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interference with the applicants' rights … any more than similar negative attitudes towards those of a different race, origin or colour."

114. It can be seen from the facts of *PV v Spain* that there may be circumstances in which the alleged discrimination will not be made out despite the fact that an applicant happens to be a transgender person. In that case the Spanish courts had restricted the initial system of visits with the applicant's child but the Strasbourg court held (para 32) that this was not on the ground of the applicant's transgender status but rather because of her temporary emotional instability. Furthermore, the court noted (para 34) that in that case the applicant had not been deprived of all contact but there was to be a system of supervised visits between father and son. The court also noted (para 37) that the system of visits had then been expanded. In all the circumstances, therefore, the court concluded (para 36) that the case was distinguishable from *Salgueiro Da Mouta*, "in which the sexual orientation of the applicant was a determining factor in the decision to deprive him of the exercise of parental authority."

115. When the present case returns to the family court we anticipate that the court will wish to scrutinise with care the suggested justification for the apparent discrimination which

the father faces on the ground of her transgender status, not least to ensure that the court itself does not breach its duty under section 6 of the HRA.

Article 9: the right to manifest one's religion

116. We turn to consider some basic principles relating to religious difference in a plural democratic society subject to the rule of law. Article 9 of the Convention provides:

> "Freedom of thought, conscience and religion
>
> Article 9
>
> 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."

Article 9 therefore distinguishes between having an internal belief and manifesting a belief. The latter can be restricted by Article 9(2). We are concerned only with "manifestation" of a belief.

117. What constitutes the manifestation of a belief? Again, the Convention takes an inclusive approach to this. Manifestations of religious belief may take the form of "worship, teaching, practice and observance". It is not now necessary to show that the observance is mandated by the belief. Thus, it may be that Muslim women wearing a full-face veil are manifesting their religion (*SAS v France* (2014) 36 EHRR 617). In some cases, a practice may be a manifestation of a religious belief for some groups but not in others (*Eweida v UK (App nos 48420/10, 59842/10, 51671/10 and 36516/10)* (2013) 57 EHRR 8).

118. Article 9(2) makes it plain that freedom to manifest one's religion can be subjected to limitations prescribed by law and necessary in a democratic society or for the protection of the rights and freedoms of others. Any restriction must also promote a legitimate aim and be proportionate.

119. The next question is: what beliefs are protected by Article 9? Convention jurisprudence takes a wide view as to the beliefs protected by Article 9. However, even the wide view which the Strasbourg court takes can be exceeded. The jurisprudence of the Strasbourg court takes the view that, to be worthy of respect, a belief must obtain a certain level of cogency, seriousness, cohesion and importance (*SAS v France (App no. 43835/11*); see also *R (Williamson) v Secretary of State for Education* [2005] 2 AC 246, especially paras 56-60 per Lord Walker, who points out the difficulties that this limitation could have for a secular court and how they might be alternatively approached). The precise

nature of this qualification has been elucidated in the recent case law of the Strasbourg court. The basic point is, as the Strasbourg court put it in *SAS v France*:

> "Article 9 does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one's religion or beliefs (see, for example, *Arrowsmith v UK* (1978) 19 DR 5; *Kalac v Turkey* [1997] ECHR 20704/92 at para 27; and *Sahin v Turkey* (2005) 19 BHRC 590 at paras 105 and 121)."

120. Once the required level of cogency, seriousness, cohesion and importance is obtained, it is not the function of a court to consider the legitimacy of any belief or the way in which it is manifested (*Eweida v UK*). The Convention forbids the State to determine the validity of religious beliefs and, in that respect, imposes on the State a duty of what the Strasbourg court has called neutrality and impartiality: see *Moscow Branch of the Salvation Army v Russia (Application No 72881/01)* (2006) 44 EHRR 912, para 58.

121. An argument consistent with the Article 9 jurisprudence might well be available in the present case to the effect that, in the light of the protected characteristics identified by the Equality Act 2010, a religious belief, practice or observance that was inconsistent with the principle of non-discrimination under that legislation is not compatible with the requirements of our society. If that was so, the belief, practice or observance in question might not achieve the level required for Article 9 protection.

122. In any event, as stated, under Article 9(2) the State can impose a restriction on a religious belief, observance or practice where the restriction is necessary in a democratic society (or for the other purposes set out in Article 9(2)). As pointed out in paragraphs 60 and 111 above, a democratic society is characterised by "pluralism, tolerance and broad-mindedness." In directing contact with children, it would be open to a court to make an order, even if its implementation does not fully respect the religious beliefs, practices and observances of the community of which the children are members, if those beliefs, practices and observance were found not to be consistent with the values of the democratic society in this jurisdiction.

123. A democratic society for the purposes of the Convention is also a society subject to the rule of law. Even secluded religious communities within a society are not above the law of the land, and it has not been suggested otherwise.

124. In a democratic society, the majority opinion will often carry the day but the rights of minorities must be fairly balanced against those of the majority. For this purpose, it is implicit that there will from time to time need to be a compromise between different belief systems in a society. In *Welfare Party v Turkey* (2003) 14 BHRC 1, pages 26 to 27, the Strasbourg court explained the relationship between democracy and religion under the Convention and the need for compromise in these terms:

> "Democracy and religion in the Convention system
>
> 90 For the purposes of the present case, the court also refers to its case law concerning the place of religion in a democratic society and a democratic state. It reiterates that, as protected by

art 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v Greece* (1993) 17 EHRR 397 at para 31 and *Buscarini v San Marino* (1999) 6 BHRC 638 at para 34).

91 Moreover, in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see *Kokkinakis v Greece* (1993) 17 EHRR 397 at para 33). The court has frequently emphasised the state's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs (see, mutatis mutandis, *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 BHRC 27 at para 84) and that it requires the state to ensure mutual tolerance between opposing groups (see, mutatis mutandis, *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306 at para 123).

92 The court's established case law confirms this function of the state. It has held that in a democratic society the state may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety (see *Dahlab v Switzerland (App no 42393/98)* (admissibility decision, 15 February 2001)).

While freedom of religion is in the first place a matter of individual conscience, it also implies freedom to manifest one's religion alone and in private or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of a religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, it does not protect every act motivated or influenced by a religion or belief (see *Kalac v Turkey* (1997) 27 EHRR 552 at para 27).

> The obligation for a teacher to observe normal working hours which, he asserts, clash with his attendance at prayers, may be compatible with the freedom of religion (see *X v UK* (1981) 22 DR 27), as may the obligation requiring a motorcyclist to wear a crash helmet, which in his view is incompatible with his religious duties (see *X v UK* (1978) 14 DR 234).

125. A willingness to compromise may be seen as important in the present case.

126. As Stonewall points out, another example of a restriction being imposed on religious beliefs is provided by *R (Williamson) v Secretary of State for Education*, where parents with particular Christian beliefs could not rely on their rights under Article 9 as a reason for having schools which did not comply with a statutory prohibition on corporal punishment.

Article 9: submissions by the father (community not motivated by religious beliefs within Article 9)

127. Ms Ball emphasises that the children have a right under Article 8 of the Convention (the right to private and family life) to have contact with their father. She particularly relies on *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, [2011] 2 FLR 912, in which the President explicated the importance of this right.

128. Ms Ball submits that it is doubtful whether the community has any right under Article 9 in the circumstances of this case. She submits that in any event the beliefs of the community which lead to the children being ostracised does not constitute the manifestation of any religious belief that would be recognised as such under the Convention. She relies on the fact that the judge made no finding that this was a religious belief of the community.

Article 9: submissions by the mother and guardian (harm is the reality)

129. Both Mr Buckley and Ms Heaton basically agree with Ms Ball's submissions on Article 8, but they contend that the mother and children all have rights under Article 9. They emphasise, as is the case, that the parents in this case have chosen that the children should continue to continue being members of the Charedi community. Both Mr Buckley and Ms Heaton emphasise that, in the light of the community's attitude, the judge had no option but to make the order that he did. He described the situation as a "sad reality".

Conclusions on religious difference

130. In the absence of any further finding by the judge about the nature of the debate on transgender in the Charedi community, we must proceed on the basis that the views which Rabbi Oppenheimer attributed to the Charedi community are the community's views and that their actions to exclude the children would be an expression of those beliefs. That approach then puts their religious beliefs at their highest.

131. If the matter has in due course to be determined by the court, we would take the view that in the light of developments in Strasbourg jurisprudence there would be force in Ms Ball's submissions that the community's beliefs, which resulted in the ready

exclusion of young children from the rest of the community, did not meet the criteria set by the Strasbourg court for a religious belief that was entitled to protection under Article 9 (see paragraphs 119 and following above). In that situation, we would expect the leaders of the community to help the community to adopt a more flexible attitude to their beliefs as they might affect the children.

132. The mother and children also have their rights under Article 9, but they are outside the discussion in these paragraphs. Clearly, the courts must likewise not restrict their rights to any greater extent than that permitted by Article 9(2). The courts have a statutory obligation under section 6 of the HRA to act compatibly with the Convention.

133. We can, therefore, return to the question whether, if this court were ultimately to make an order for direct contact, that would violate the rights of the community under Article 9.

134. It is not appropriate for us to give any final view in answer to this question as that stage has not yet been reached. Provisionally, however, it seems to us that, if a court were to make an order granting the father some form of direct contact to the children, it would have to have concluded, after the most careful consideration with the parties, that that course was in the best interests of the children. If this involves any interference with any rights of the community to manifest their religious beliefs, we doubt that there would be any violation of the community's rights under Article 9. This is because the court, as an organ of the State, will on this basis have decided that a restriction that may be involved of their right to express their religious beliefs serves the legitimate aim of protecting the children's rights to have contact with their father and thus to enjoy family life with him, which rights are vital to their well-being. As the President held in *Re G*, para 43:

> "In matters of religion, as in all other aspects of a child's upbringing, the interests of the child are the paramount consideration."

135. In making that decision, the restriction under consideration would meet the requirements of being prescribed by law. It is part of the court's jurisdiction to make orders regulating parents' access to their children. It would be proportionate because it would not be made immediately on the father's application, but only after a period of further reflection in which the court has had time to consider further evidence if it wished so to do.

Concluding observations

136. It may very well be when the matter has been further considered that there is room for some compromise position. As we have made clear, we consider that, under Strasbourg jurisprudence, each side has to be prepared to compromise. That means that it must be ready to make some concession, and the compromise must be one which is appropriate in a plural, democratic society governed by the rule of law.

137. Moreover, by the time any direct contact takes place, subject to the further directions given in these proceedings, these children are likely (as mentioned) to have had assistance of the highest standard in coming to terms with their father's decision. We envisage that the assistance will make them aware of the need to be sensitive to the

views of others, including (as at present) their own community, which is unable as we understand it to accommodate changes of identity within their own interpretation of their religious laws. These are difficult areas for the holders of faith, which underscores the need for broadmindedness and tolerance in our diverse society.

138. In our judgment, the best interests of these children seen in the medium to longer term is in more contact with their father if that can be achieved. So strong are the interests of the children in the eyes of the law that the courts must, with respect to the learned judge, persevere. As the law says in other contexts, "never say never". To repeat, the doors should not be closed at this early stage in their lives.