

## **PRESS SUMMARY**

### **Re M (Children) [2017] EWCA Civ 2164 (on appeal from [2017] EWFC 4)**

1. The Court of Appeal has today given judgment in this case, allowing the father's appeal. The judgment is a judgment of the court to which each member (Sir James Munby, President of the Family Division, Lady Justice Arden and Lord Justice Singh) made significant contribution.
2. The appeal was 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.
3. The background can be summarised briefly as follows. 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. The community would act in that way for religious reasons. Both parents are agreed that the children should continue to live within the community.
4. 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.

5. In its judgment, after an introductory section (at paras 1-4) the Court of Appeal set out the background in more detail at paras 5-11 and set out the main parts of the judgment of the family court at paras 12-39.
6. There were three grounds of appeal (set out at para 40):
  - 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.
7. Having set out the relevant principles of family law (at paras 41-75), the Court of Appeal accepted all of those of grounds of appeal for a number of related reasons (at paras 76-82).
8. First, the judge, having arrived at his conclusion, did not at that point step back and ask himself what were a number of highly pertinent questions. For example, he should 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?

9. Secondly, it is unfortunate that the judge did not address head on the human rights issues and issues of discrimination which arose.
10. Thirdly, there was 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.
11. Fourthly, the Court was of the view that there was considerable substance in the complaint that 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.
12. The parties were agreed that if this was the Court's decision it would not be appropriate for it 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.
13. In the light of its conclusion, it was unnecessary for the Court to give a final view on either the issues of equality law which may arise, whether under the Equality Act 2010 or under Article 14 of the European Convention on Human Rights (ECHR), or the issues about freedom of religion under Article 9 of the ECHR. However, the Court set out some of the issues that may have to be dealt with in order to assist the family court in its reconsideration of the case (paras 84-115 on equality law and paras 116-135 on Article 9).

**NOTE:** This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. The judgment is available free of charge on the BAILII website.