giving precedence to the UK's duty under Article 25 of the UN Charter to carry out UNSC Resolutions. His approach would have meant that, in the presence of a clear UN mandate, the principles governing the separation of powers and the protection of human rights would have had to bend before the need to fulfil UN Charter obligations: a conclusion which chimes with the reasoning of the EU's Court of First Instance, but not that of its Court of Justice, in *Kadi* (Case T-315/01, [2005] E.C.R. II-3353 and Joined Cases C-402 and 415/05 P, [2008] E.C.R. I-6351: see, respectively, Garde [2006] C.L.J. 281 and Johnston [2009] C.L.J. 1). The majority rejected such a conclusion: restrictions upon individual rights always need Parliament's express consent. While Parliament can choose to legislate contrary to fundamental rights, it can also decide that certain measures required by a UNSC Resolution are too onerous to be given effect in the UK. Thus, both dualism with regard to international law and domestic judicial scrutiny of the executive remain strong.

The Treasury reacted to the Supreme Court's judgment by publishing the Draft Terrorist Asset-Freezing Bill 2010 and by securing the rapid passage of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010. The latter deems all of the impugned Orders in Council under the 1946 Act to have been validly adopted (section 1(2)) and thus retains in force all directions made under those Orders (section 1(3)(a)); the Act will expire on 31 December 2010. The Bill, meanwhile, provides a statutory basis for the UK's asset freezing regime. Particularly noteworthy in the Bill are clauses 2 (making the threshold for designation "reasonable grounds for suspecting that a person is or has been involved in terrorist activity") and 22 (providing for judicial review of *any* Treasury decision under the Act). The victory of the successful applicants in *Ahmed*'s case has proved extremely short-lived (see also section 2(2) of the 2010 Act): a further challenge on a ground other than the validity of those Orders must be brought to challenge their designation (section 2(4)). As a constitutional matter, Parliament's authority has, formally, been vindicated, although deeper analysis of the Bill will be required before it can be concluded that this vindication has secured significantly improved protection for individuals' fundamental rights.

ANGUS JOHNSTON AND EVA NANOPOULOS

A QUESTION OF FAITH

WHEN is it impermissible for a faith school to discriminate in its admissions policy? That is the question raised in the decision of the Supreme Court in *R (E)* v. *Governing Body of JFS* [2009] UKSC 15

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[2010] 2 W.L.R. 153. The decision should lead to an inspection of the rights protected by anti-discrimination law in the education field and to an inquiry whether the rights of all students are sufficiently protected from discrimination under the law.

A claim for judicial review was brought against the governing body of the Jewish Free School for failure to offer M a place. Under the rules of the Office of the Chief Rabbi of the UK (and indeed Jewish doctrine as interpreted by Orthodox Judaism) only a child of a Jewish mother (by birth or Orthodox conversion) is deemed Jewish, and therefore will be given priority in admission. M's mother was not born Jewish and her conversion was not Orthodox (but Masorti, a non-orthodox stream of Judaism) and therefore he was denied admission.

The Jewish Free School is a voluntary aided school under the Schools Standards and Framework Act 1998. It is publicly funded and has been designated by the Secretary of State, under the Act, as a Jewish faith school. As a faith school it is exempt from the prohibition of discrimination on grounds of religion or belief contained in section 50(1)(a) of the Equality Act 2006. However, faith schools are not exempt from prohibitions of race discrimination under the Race Relations Act 1976. Racial grounds include, under that Act, ethnic and national origins.

The Court of Appeal [2009] EWCA Civ 626, [2009] 4 All E.R. 375, allowing an appeal on this matter, had decided that the school's requirement that the mother of the student be Jewish by birth or Orthodox conversion, is impermissible discrimination on the grounds of ethnicity. The Court of Appeal determined that as Jews are an ethnic group (this was undisputed by all parties), a criterion which excluded M based on the fact that his mother was not Jewish is exclusion based on a racial criterion. The policy therefore constitutes direct discrimination contrary to the Act, as it treats M less favourably based on a prohibited criterion. Alternatively, the Court decided, there was indirect discrimination, as there is no saving legitimate justification which is not the prohibited ground itself.

The Supreme Court dismissed the appeal by a majority. Five judges determined that direct discrimination had taken place (Lord Phillips, Lady Hale, Lord Mance, Lord Kerr and Lord Clarke). Two judges found indirect discrimination (Lord Hope and Lord Walker). Two judges (Lords Rodger and Brown) saw no discrimination and would have reversed the Court of Appeal's decision.

The majority judges, in separate opinions, follow essentially the same approach. M was discriminated against because his mother was of Italian and Roman Catholic origin, that is, based on the ethnicity of his mother. That he would not have been so treated had his mother converted through an Orthodox conversion made no difference to this legal conclusion.

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Lord Hope (with whom Lord Walker agreed) viewed the discrimination as religious, not racial, as it was based on a criterion of Jewish law. This might still constitute indirect racial discrimination because the religious criterion results in disparate racial impact. Lord Hope determined that there was a legitimate aim for the religious criteria, upholding education according to the tenets of the Orthodox Jewish faith. However, it was not proportional as the school did not consider less discriminatory means, such as taking in some children recognized as Jewish by non-Orthodox branches of Judaism. Therefore there was indirect racial discrimination.

Lord Rodger, with whom Lord Brown agreed, determined that the criterion for admission was not one of ethnicity. It did not matter to the school what M's mother's ethnicity was, it mattered whether she converted in an Orthodox conversion to Judaism or not. Lord Rodger also dismissed the indirect discrimination claim. He determined that the criterion of admission is proportionate to achieving a legitimate aim (education according to the tenets of Orthodox Judaism).

The majority decision that the admission criterion constitutes racial discrimination seems convincing. The admission criterion is ethnic, it does not matter that it also a religious criterion. It also does not matter that it is open to anyone of a non-Jewish ethnicity to convert to Judaism. That is a requirement not faced by someone of Jewish birth.

The decision in this case achieves a welcome result. The student, who defines himself as Jewish and whose family views itself as Jewish, should not be excluded from the school due to an institutional definition of membership of the religion. If a student views himself or herself as belonging to a religion, a state-funded school should not be permitted to exclude them.

It could be asked whether this approach does not undermine the autonomy of religious schools, the rationale behind the funding of separate faith schools. It does not. The right, under the European Convention of Human Rights (Protocol 1 Article 2) is given to the parents to choose education in conformity with their views, not to the religious community and its institutions.

Indeed, without this protection followers of non-dominant streams within the faith will find themselves excluded from the school of their faith. (As happened in this case to followers of the Masorti Judaism, a non-Orthodox Stream of Judaism). However, the *JFS* decision results in differential treatment of Jewish schools as compared with other faith schools. This point, indeed, was raised by Lord Rodger in dissent. But this observation should not lead to a different legal outcome in this case. It is not that the discrimination practised by JFS should be permissible, but rather that the law should be changed so that no discrimination would be permissible by schools of other faiths. In

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Judaism, membership is defined through ethnicity rather than through faith. The decision means that the school cannot give priority to members of the Jewish religion as it defines them. In other religions, membership is not defined through ethnicity but through faith. Other schools (for instance, Catholic schools) are able, under existing law, to give priority admission to members as it defines them and exclude others. But, surely, the conclusion should not be that Jewish faith schools should not be exempt from discrimination, but rather that other faith schools should not be allowed to discriminate on religious as well as racial grounds. This will require a review of existing legislation, but that is the way to protect the right of students to study in a school in conformity with their beliefs. This is the right which the state must protect.

ANAT SCOLNICOV

THE RIGHT TO FAMILY LIFE IN EXTRADITION CASES: MORE DEFENDANT-FRIENDLY THAN STRASBOURG REQUIRES

MOST people will readily agree that criminal investigations and trials (to say nothing of punishment) are highly disagreeable experiences for defendants and their families. Adverse consequences for private and family life are part and parcel of the criminal process. So far, these effects have not been used to argue that any decision by prosecutors to bring defendants to trial must be tested against Article 8 ECHR. But what if the prosecution is brought by a foreign state with which the United Kingdom has entered into an extradition agreement? Is extradition different?

Extradition on the basis of a bilateral extradition treaty is now governed by the Extradition Act 2003, and requires the judge in an extradition hearing to "decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998". In *Norris* v. *Government of the United States of America (No. 2)* [2010] UKSC 9, [2010] 2 W.L.R. 572, the appellant, a former chief executive officer of a company, was in 2004 indicted by a Pennsylvania Grand Jury on charges of price-fixing and obstructing justice (the latter charge arising from his alleged efforts to destroy evidence of price-fixing). As one of a small number of employees not to benefit from a plea bargain struck by his former employer with the United States' prosecutorial authorities, the appellant in 2008 succeeded in resisting his extradition on charges of price-fixing on the basis that price-fixing was, at the relevant time, not a criminal offence in the UK (*Norris* v. *Government of the United States of America* [2008] UKHL 16, [2008] A.C. 920, noted by O'Keefe [2009] C.L.J. 9). He then

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