

Children's Rights Judgments: From Academic Vision to New Practice (Oxford 2017), ch. 6) highlights, that was not obviously a child-centred decision that gave due regard to the child's rights, inter alia, to know and be cared for by her family as far as possible, protected by Article 7 of the UN Convention on the Rights of the Child. That UNCRC right was given prominence by Lord Neuberger in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 1 W.L.R. 1911, noted [2014] C.L.J. 28 (with reference to B. Sloan, "Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child" [2013] C.F.L.Q. 40), and Cobb J.'s decision is consistent with Article 7 even though he did not mention it.

By way of another contrast, *Webster v Norfolk CC* itself demonstrates that an adoption order will not necessarily be set aside where it is shown to be underpinned by a flawed factual analysis, while *Re J* suggests that this will sometimes occur. In *Webster*, the appeal was dismissed even though the three children concerned had originally been removed from their parents on the basis that one child had been injured culpably, but it later transpired that the injuries had in fact been caused by scurvy (consequent on adherence to medical advice). There are limits, then, to the law's concern for procedure and truth in this area, such that seemingly incorrect decisions can still be upheld for reasons of perceived child welfare and public policy. F was fortunate (as was J, by extension) both that Cobb J. took a generous approach to the requirements of natural justice (since earlier case law suggested that he would not have an absolute right to participate in the adoption proceedings) and (not least for Art. 8 purposes; see [2011] C.L.J. 314) that M and SF had allowed him into J's life before he attempted to appeal against the adoption order.

In short, *Re J* is to be welcomed as a decision that did not allow the "peculiar finality" of adoption (*Re B (Adoption: Jurisdiction to Set Aside)*, p. 251, per Sir Thomas Bingham M.R.) to prevail over a child's rights and interests relating to his origins, in circumstances consistent with the reality of his life. What is less clear is whether it can be seen as setting any sort of wider precedent.

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MUSCULAR LIBERALISM AND THE BEST INTERESTS OF THE CHILD

SOMETIMES it is the cases with the most unusual facts that reveal most acutely tensions between laws and their underlying principles. *Re M (Children)* [2017] EWCA Civ 2164, [2018] All E.R. (D) 16, is just

such a case, and the academic and media attention the case has attracted reflects the extent to which it occupies a fault line in a number of contemporary legal, social, and political debates.

On one level it is a typical family law dispute about contact between separated parents; the father wanting to see his children and the mother objecting. But it was complicated here by the following facts: the father was transgender and lived as a woman; the mother and children were members of an ultra-orthodox Jewish Charedi community; the father had left the community but both parents wanted the children to remain within it; the community would not accept transgender identity and the imposition of contact risked exposing the children to the harm of being ostracised by their community.

At the first hearing (*J v B (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4), Jackson J. refused the father's application for direct contact. Describing the children as being "caught between two apparently incompatible ways of living" (at [162]) he made clear that the decision was not about religious rights trumping transgender rights but was based on an analysis of what was in the best interests of the children, in accordance with section 1 of the Children Act 1989. Despite noting 15 "formidable" arguments in favour of direct contact between the father and the children (at [166]), in his final analysis he held that these were outweighed by the likelihood and the harmful consequences of the children being ostracised by their community. This was also the conclusion recommended by the expert child psychologists.

The inherent uncertainty of the "best interests" principle in child law has at times been criticised for masking the imposition of judicial values. This was not the case here; Jackson J. made clear his "real regret" (at [188]), acknowledged the "bleak conclusion" (at [178]), and his lack of sympathy with the community's response was implicit in his description of expert rabbinical opinions at odds with the community's as "humane" (at [178]). Nevertheless, he held that "these considerations cannot deflect the court's focus from the welfare of these children" (at [17]).

The Court of Appeal, in a joint judgment of Munby P., Arden L.J. and Singh L.J., took a very different approach. Describing the outcome as "disturbing" and acknowledging that they understood why many would think "how can this be right?" (at [11]), they reached the conclusion that it was not, upheld the father's appeal and ordered a rehearing.

In the context of family law, the key finding (applying *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2012] All E.R. (D) 50), was that Jackson J. had failed to act as the "judicial reasonable parent", as the role required "judging the child's welfare by the standards of reasonable men or 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” (at [60]). Rather than simply accepting the parents’ joint wish that the children be brought up within the community, this role required and legitimised a more invasive approach. Indeed, in the absence of a “real change of attitude” on the part of the mother and the community, the judgment explicitly contemplated the possibility of the court having 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” (at [77]).

The judgment queried why indirect contact was considered feasible but direct contact was not and, more fundamentally, held that Jackson J. had given up too easily on trying to make contact work. The judgment reiterated the Strasbourg jurisprudence’s emphasis on the positive duty on the state to support contact and cited the decision in *Re J (A Minor)(Contact)* [1994] 1 F.L.R. 729 which held that judges should be reluctant to allow the “implacable hostility” of one parent to prevent contact (at [736]).

Going beyond family law, the judgment examined the potential application of equality laws and human rights provisions. While attentiveness to discriminatory practices can and should inform the undertaking of the role of the “judicial reasonable parent”, the judgment made clear that it is important to distinguish between lay and legal understandings of “discrimination” and “victimisation” (at [86]). There was a potential circularity here, as equality laws may and often will be an important source for establishing “changes in social attitudes” (at [60]) which the reasonable judicial parent should be alive to.

The judgment confirmed, although it was not in dispute, that the Equality Act 2010 “does not apply to such a nebulous entity as ‘the community’” (at [86]), but could apply to the activities of a school. This was important because evidence about how the children might be treated by their schools was critical. Jackson J.’s concern in this respect was such that he noted that he would be sending a copy of his judgment to the Secretary of State for Education (at [191]). The Court of Appeal, however, went further and held that (at [97]) “should there be action by a school under the Equality Act, the courts of this country should not as a matter for public policy, simply treat it as a factor to be weighed against permitting direct contact. To do so would, in our view, be contrary to the rule of law”. While recommending that at the rehearing of the case the judge should “consider very carefully” whether there would be unlawful conduct and “to what extent” it “should be given weight” in assessing the children’s best interests (at [98]), what exactly that recommendation means in practice for a family court focusing on the immediate welfare of children is far from clear.

In emphasising the potential applicability of the principle of non-discrimination in Article 14 of the ECHR, the judgment held that the fact

that the parents agreed that their children should be raised in the community did not “absolve a court of its own duty to comply with the HRA” (at [100]). The clear implication here is that, while a refusal to order direct contact might be justified under Article 8 (the right to respect for private and family life), it does not automatically follow that it will be justified under Article 14. Consequently, the judgment warned that at the rehearing the judge “will wish to scrutinise with care the suggested justification for the apparent discrimination which the father faces . . . not least to ensure that the court itself does not breach its duty under section 6 of the HRA” (at [115]).

With regard to Article 9, the freedom of thought, conscience and religion, the judgment effectively pre-empted and responded to potential challenges here should a judge be minded to order direct contact with the father. It did so by accepting that beliefs which resulted in the exclusion of children from their community might not meet the criteria for a religious belief that was entitled to protection under Article 9, and, if interference with such a right was established, by doubting whether such a right could not legitimately be restricted.

In its comprehensive and systematic refusal to accept that the discriminatory behaviour of the community might be lawfully acceptable, the Court of Appeal’s approach reflects a clear endorsement of muscular liberalism. The judgment is likely to find favour with those viewing the case from an equality and transgender rights perspective, perceiving it as another step in the process of incremental progress that, in family law, started with the rejection by the courts of the infamous discriminatory treatment of lesbian mothers in custody cases.

The judgment is also likely to be applauded by secularists and others concerned about children being brought up in isolated religious communities that espouse beliefs contrary to dominant liberal or British values. In the currently controversial context of education and concerns about “extremist” values in particular, intentionally or otherwise, the judgment provides legal arguments that could be used to support more invasive forms of surveillance and regulation.

Yet from the perspective of child law, the judgment gives rise to a number of concerns which go beyond the specific facts of this case. It provides little comfort to feminist commentators who have queried the too often unquestioned assumptions about the benefits of contact and the concept of “inplacable hostility”.

More fundamentally, in explaining the function of the reasonable judicial parent, the emphasis on the liberal value of living an autonomous adult life, coupled with the threat of draconian measures, risks overlooking the reality of children’s lived experiences within communities and the importance of taking seriously ongoing relationships as an equally crucial aspect of child welfare (considerations which are also clear from *Re G*). In this

respect it is perhaps revealing that, unlike Jackson J., the Court of Appeal made no reference to the importance of ascertaining the wishes and feelings of the child. Albeit for the most compelling reasons, the approach of the Court of Appeal risks putting the interests and principles of others before the welfare of the children. There may be legitimate reasons for so doing, but it is hard to reconcile such an approach with the “best interests” principle.

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LEGITIMATE EXPECTATIONS AND HMRC ADVICE

FOR the tax system to function efficiently, it is necessary for the tax authority to provide advice to taxpayers. What is the consequence, however, where the advice is predicated on an error of law, and HM Revenue & Customs then later seeks to correct this error? That is the question that came before the Court of Appeal in *HMRC v Hely-Hutchinson* [2017] EWCA Civ 1075, [2017] S.T.C. 2048. The judgment underlines the difficulties that taxpayers face when seeking to rely upon HMRC assurances and when seeking to invoke the doctrine of legitimate expectations generally.

In 2003, the Inland Revenue issued guidance in respect of the calculation of capital gains tax on sales of share options. In 2009, HMRC acknowledged that the guidance contained an error of law and produced revised guidance. As regards closed cases in which the 2003 guidance was relied upon (namely those cases where taxpayers’ enquiries were closed), HMRC applied the terms of the 2003 guidance. What about open cases, in other words, instances where there was an open enquiry in 2009? This question was pertinent to the case of Ralph Hely-Hutchinson, who relied upon the 2003 guidance but whose case was still open in 2009. HMRC refused to treat him in accordance with the 2003 guidance, instead applying the less favourable 2009 guidance. Whipple J. in the High Court ([2015] EWHC 3261 (Admin), [2016] S.T.C. 962) found that this breached the taxpayer’s legitimate expectation that he would obtain the treatment specified in the 2003 guidance. The Court of Appeal disagreed and found in favour of HMRC, critically noting that the taxpayer did not *rely* upon the HMRC advice. The specific facts of the case may be viewed then as limiting the scope of the judgment.

The Court of Appeal considered the general principles that apply in cases of legitimate expectation and in particular where the expectation arises from HMRC assurances. As a public body invested with the duty to collect tax