



# CORNWALL STREET

BARRISTERS

Briefing Note

## **Case Comment: *J v B and The Children*** **(Ultra-Orthodox Judaism: Transgender) [2017] EWFC 4**

### **INTRODUCTION**

The Family Court sitting at Manchester was required to consider ‘an exceptionally difficult welfare assessment’ involving a difficult balancing exercise between two entirely incompatible ideologies.<sup>1</sup>

The Applicant, a transgender woman who used to live as an Ultra-Orthodox Jewish man before realising her true gender identity, applied to the court for a Child Arrangements Order providing for direct contact between herself and her children. The application concerned five children whom the Applicant had fathered with the Respondent mother during the course of their marriage. The mother opposed the application due to fears that she and the children would be ostracised by their Charedi Jewish community, which did not recognise or accept transgenderism.

The case highlighted the stark clash that can arise between modern day UK diversity and the belief systems of some insular religious communities living in the UK. This clash made for a ‘very troubling case’, with the children ‘caught between two apparently incompatible ways of living’.<sup>2</sup>

Mr Justice Peter Jackson was tasked with a Catch-22 decision: if direct contact was ordered, there was a real risk that the children would be ostracised by the community to such an extent that they would be forced to leave it, thereby effectively condemning the children to abandon their cultural identity and community lifestyle. By contrast, if the father’s application was refused, the court would be depriving the children of the recognised benefits of the involvement of both of their parents in their lives.

### **APPLICATION OF RELEVANT LEGAL PRINCIPLES**

#### *Welfare of the child*

In all cases involving an application for a Child Arrangements Order, the welfare of the child is always the court’s paramount consideration.<sup>3</sup> The court must have regard to the Welfare Checklist in order to determine what will be in the best interests of the child.<sup>4</sup> Contact between parent and child is



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considered as a fundamental part of family life. It is understood that the involvement of a parent in a child's life will be beneficial for their welfare<sup>5</sup> and only in exceptional circumstances should it cease or be refused.<sup>6</sup>

Furthermore, Article 8 of the European Convention on Human Rights (ECHR) provides that 'everyone has the right to respect for his private and family life'. Jackson J considered Munby LJ's summary of the application of Article 8 to Children Act proceedings in *Re C (A Child) (Suspension of Contact)* [2011] EWCA Civ 521, in which it is stated for example that 'contact between parent and child is a fundamental element of family life and is almost always in the interests of the child'.<sup>7</sup>

Jackson J also had regard to the United Nations Convention on the Rights of the Child 1989 which provides additional protection to children, for example protection from discrimination on the basis of their parents' identity (Article 2).

### *Equality rights of transgender persons*

There is now a core framework of legislation in place protecting transgender persons from discrimination: the Sex Discrimination (Gender Reassignment) Regulations 1999, the Gender Recognition Act 2004, the Equal Treatment Directive (2004/113/EC) and the Sex Discrimination (Amendment of Legislation) Regulations 2008.

Article 14 of the ECHR also provides that enjoyment of Convention rights shall be secured without discrimination on any grounds, including therefore a person's transgender status. As such, the father's identity as a transgender woman could not affect her entitlement to Convention rights, including her right to a family life with her children.

### *Right to the freedom of religion*

Article 9 of the ECHR provides that 'everyone has the right to freedom of thought, conscience and religion'. The court must take a fully objective view of the evidence and cannot take into consideration for example the validity of different religious beliefs and practices: the court must remain fully neutral in all matters concerning faith.



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Section 4 of the Equality Act 2010 also makes religion or belief a protected characteristic.

### THE JUDGMENT

Despite identifying 15 'formidable'<sup>8</sup> arguments in favour of direct contact versus only 2 key arguments against contact, Jackson J rejected the father's application for direct contact due to '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'.<sup>9</sup>

Jackson J emphasised that his decision was 'an unwelcome conclusion' that he had arrived at with 'real regret' knowing the pain that it would cause to the father.<sup>10</sup> Whilst undoubtedly the judgment will come in for some heavy criticism from some quarters, it is clear that the central principle of the welfare of the child was considered and followed with the utmost care.

The court also 'reject[ed] the bald proposition that seeing the father would be too much for the children...The truth is that for the children to see their father would be too much for the adults.'<sup>11</sup> This simple and yet powerful observation encapsulates the issues at the heart of this case. The judgment highlights the need for urgent work to be done to assist the integration of fundamentalist communities into wider UK society whilst upholding and promoting tolerance, diversity and acceptance.

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<sup>1</sup> Para 11

<sup>2</sup> Para 162

<sup>3</sup> Section 1(1) Children Act 1989

<sup>4</sup> Section 1(3) Children Act 1989

<sup>5</sup> Section 1(2A) Children Act 1989

<sup>6</sup> Re M (Contact: Supervision) [1998] 1 FLR 727 per Ward LJ – ‘contact is almost always in the interests of the child and should not be prevented unless the order would hinder the welfare of the child...contact should not be prevented unless there are cogent reasons for doing so’.

<sup>7</sup> Para 52

<sup>8</sup> Para 166

<sup>9</sup> Para 177

<sup>10</sup> Para 187-8

<sup>11</sup> Para 181