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 Re M [2018] All ER (D) 16 (Jan); [2018] Fam Law 263 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 (as *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 trans 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) 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 contemplates 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 FLR 729 which held that judges should be reluctant to allow the "implacable hostility" (at [736]) of one parent to prevent contact.

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 makes clear that it is important to distinguish between lay and legal understandings of "discrimination" and "victimisation" (at [86]). There is 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 confirms, 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, goes 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 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 warns 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-empts and responds to potential challenges here should a judge be minded to order direct contact with the father. It does this 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, 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 "intractable 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* [2012] EWCA Civ 1233; 2012] All ER (D) 50 (Oct); [2013] 1 FLR 677. 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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