

Interpreting the European Convention on Human Rights in the United Kingdom Courts: The Impact for Religious Organisations

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INTRODUCTION

When considering, in a comparative context, the manner in which an international instrument such as the European Convention on Human Rights is implemented in domestic courts of individual states, an understanding of the particular constitutional conditions is first necessary. The United Kingdom has no written constitution, nor does it have a bill of rights or charter of fundamental freedoms. It is a liberal democracy in which Parliament is sovereign. It does not have a constitutional court in which legislation is scrutinised for its compliance or otherwise with any free-standing constitutional precepts or principles. Put simply, Parliament makes the law and the judges apply it. However, a significant shift has taken place following Tony Blair's Labour government coming into power in 1997. This can best be appreciated following a description of the traditional approach of English law.

THE TRADITIONAL APPROACH OF ENGLISH LAW

The legal approach to religion and religious liberty has differed over time and across societies. The current human rights era marks an abrupt shift from passive religious tolerance to the active promotion of religious liberty as a basic right. As such, the changes of the last decade need to be placed in historical context.² The ousting of papal jurisdiction marked by the reformation statutes of the 1530s not only led to the

¹ I want to record my thanks to Russell Sandberg, lecturer in law at Cardiff University and an associate of its Centre for Law and Religion, for all the assistance that I have received from him in the co-authorship of a series of recent papers which collectively form the basis of the current study. His scholarship and incisive analysis have sharpened my thinking, and his research has helped to inform the analysis and conclusions.

² For a brief description of the historical development in England see: N Doe, 'National Identity, the Constitutional Tradition and the Structures of Law on Religion in the United Kingdom' in *Religions in European Union Law*, Proceedings of the European Consortium of Church and State Research (1997, Luxembourg) p.107-110, and C Hamilton, *Family, Law and Religion* (1996, London) chapter 1. For a more general overview see J Gunn, 'Religious Liberty (Modern Period)' in E Fahlbusch *et al*, ed, *Encyclopaedia of Christianity* (2005, William B Eerdmans, Michigan) Vol. 4, pp 605-617 and J Witte, *God's Joust, God's Justice: Law and Religion in the Western Tradition* (2006, William B Eerdmans Publishing Company).

formation of the Church of England but also resulted in religious intolerance. The predominance of a state church with the secular monarch as supreme governor led to the disadvantaging of other religions, most notably Roman Catholicism.³ After 1689, this tradition eventually gave way to limited and piecemeal toleration.⁴ The following centuries witnessed the widening of toleration and the limited introduction of legal freedoms. However, by the closing decades of the twentieth century there was some evidence of a move from mere toleration of religious difference to respect for religious liberty. From the 1950s onwards, international human rights treaties and the ideals they embodied began to influence the law. But the rigidity of international instruments posed problems for the judiciary in producing convincing, consistent, and coherent reasoning when interpreting and applying them in the domestic context.⁵

THE IMPACT OF THE HUMAN RIGHTS ACT 1998

The Human Rights Act 1998 brought about something of a legal revolution.⁶ To assert that the Human Rights Act incorporated the European Convention on Human Rights (hereafter 'ECHR') into English law is a convenient – although slightly misleading – shorthand.⁷ The ECHR was not an irrelevance prior to 1998 but a treaty obligation with status in international law.⁸ As such, although it was not part of domestic law, its Articles, including Article 9, were regarded as 'an aid to interpretation' and English courts sought to ensure that their decisions conformed to the ECHR.⁹ The short title of the Human Rights Act states that it is 'an Act to give *further effect* to the rights and freedoms guaranteed under the European Convention on Human Rights'.¹⁰ Much more importance is now placed by domestic courts on Strasbourg jurisprudence.¹¹ It is clear that the Human Rights Act 1998 had two explicit purposes, and one pervasive effect.

Statutory Interpretation

The Human Rights Act requires the courts to interpret United Kingdom legislation so far as is possible in a manner compatible with Convention rights¹² and, in so doing, to take into account – though not necessarily follow – the decisions of the European Court of

³ With the exception of the period of Mary's reign when papal authority was restored (1553-1558) and the commonwealth period when dissenting protestant groups were tolerated (1648-1660).

⁴ Whereby dissenters were permitted to have their own places of worship provided they gave notice to a Church of England Bishop and met with unlocked doors: Toleration Act 1689.

⁵ See, for example, the comments of Mummery LJ in *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932; [2005] ICR 1789 at para 35 where he noted that Strasbourg principles are simply "repeated assertions unsupported by the evidence or reasoning that would normally accompany a judicial ruling", which "are difficult to square with the supposed fundamental character of the rights" and are inconsistently applied. In the same decision, Rix LJ suggested that Convention jurisprudence actually runs counter to the very needs for which a concern for human rights is supposed to exist (para 60).

⁶ See M Hill, ed, *Religious Liberty and Human Rights* (2002, University of Wales Press, Cardiff). Under section 3 of the Act, courts are required to interpret United Kingdom legislation so far as is possible in a manner compatible with the rights outlined in the ECHR.

⁷ A full discussion may be found in R Clayton and H Tomlinson, *The Law of Human Rights* (Oxford, 2000) and an insightful and thorough reflection on the first twelve months during which the Act has been in force is contained in the First Annual Updating Supplement (Oxford, 2001).

⁸ *R v DDP ex p. Kebeline* [2000] 2 AC 326, see the judgment of Laws LJ.

⁹ *Ahmad v ILEA* [1977] 1 QB 36.

¹⁰ Emphasis added.

¹¹ As required by section 2(1) of the Human Rights Act 1998, although it is not slavishly followed as the Court of Appeal's judgment in *Copsey v WWB Devon Clays Ltd* (above) makes plain.

¹² Section 3(1). In the event of there being an irreconcilable inconsistency, the domestic legislation prevails subject to a 'fast-track' system of executive action to bring English law into line with the Convention. See section 4 (declaration of incompatibility) and section 10 (remedial action).

Human Rights at Strasbourg.¹³ It must be remembered that the procedures of Strasbourg are subsidiary to the national systems. It has been observed, 'by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions'.¹⁴ Thus not every Strasbourg decision is of direct application in the English courts.

Since the Church of England legislates by Measure and since such Measures are classified under the Act as primary legislation,¹⁵ they are to be interpreted, wherever possible, in a manner compatible with Convention rights. Courts are obliged to use as the principal guide to the construction of all primary and subordinate legislation not parliamentary intention¹⁶ but compatibility with Convention rights.¹⁷ If no compatible reading of a piece of primary legislation is possible,¹⁸ the court has power to make a declaration of incompatibility.¹⁹ If it does so, a Minister of the Crown *may* by order make such amendments to the legislation as he considers necessary to remove the incompatibility.²⁰ Thus there is now provision for higher courts to scrutinise the compatibility of United Kingdom legislation with the provisions of the ECHR, but not to strike down such legislation as 'unconstitutional'. Parliament remains supreme.

Regulation of public authorities

The second effect of the Act was to render unlawful any act by a public authority which is incompatible with a Convention right.²¹ Religious organisations are potentially 'public authorities' under the Act.²² An early question to be decided under therefore, was whether the Church of England, as an established church in part of the United Kingdom was a 'public authority' for the purposes of the Act.²³

The horizontal effect of the Act

Beyond these two explicit purposes the Act has a broader effect, the extent of which may not fully have been appreciated by its drafters. To the extent that a court is itself a public authority,²⁴ prohibited from acting in a way incompatible with Convention rights,²⁵ such rights will fall to be considered in resolving private disputes between individual litigants.

¹³ See section 2. The Court of Appeal, in its unanimous judgment in *Aston Cantlow Parochial Church Council v Wallbank* (reversed on other grounds) put the matter with disarming simplicity: 'our task is not to cast around in the European Human Rights Reports like black-letter lawyers seeking clues. In the light of s 2(1) of the Human Rights Act 1998 it is to draw out the broad principles which animate the Convention'.

¹⁴ *Buckley v United Kingdom* (1996) 23 EHRR 101 at 1299.

¹⁵ See section 21.

¹⁶ Note the extent of the search for legislative intent as discussed in *Pepper v Hart* [1993] AC 593 HL.

¹⁷ Human Rights Act 1998, s 3(1).

¹⁸ A powerful indication has been given by the Judicial Committee of the House of Lords that courts will strain to find a compatible meaning even if that means reading down the statutory provision. See *R v A* (No 2) [2001] 2 WLR 1546 and, more particularly, *R v Lambert* [2001] 3 WLR 206.

¹⁹ Human Rights Act 1998, section 4(4).

²⁰ *Ibid*, section 10(2). He is not *obliged* to do so. Note also that this fast track remedial action by ministerial intervention is not available in respect of Church of England Measures: see section 10(9).

²¹ See section 6.

²² See H Quane, 'The Strasbourg Jurisprudence and the Meaning of a "Public Authority" under the Human Rights Act' [2006] *Public Law* 106-123.

²³ *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 A.C 546, discussed in detail below.

²⁴ Section 6(3)(a).

²⁵ Section 6(1).

The development of the common law in this manner has been styled the ‘privatisation’ of human rights.²⁶

There has traditionally been a general reluctance to interfere with the regulation of religious bodies as identified in the Strasbourg jurisprudence and in the domestic courts.²⁷ This now finds expression in section 13 of the Act which provides that if a court’s determination of any question arising under the Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, then the court must have particular regard to the importance of that right.²⁸ Whilst section 13 might give presumptive priority to religious freedom, it does not allow religious freedom to trump other rights such as Article 6.²⁹ Commentators seem divided as to the significance of the section.³⁰

DECISIONS OF THE HOUSE OF LORDS

The highest appellate court is the Judicial Committee of the House of Lords, which is the closest the United Kingdom comes to a constitutional court. To date, three cases directly concerning religious liberty have reached this court and there is an appeal pending in one other case.³¹ This paper considers them in chronological order.

A Shakespearean church

A lay rector who owns land to which the obligation applies, is required to keep the chancel of the parish concerned in good repair. This common law liability existed long before the Reformation and its enforcement was a matter for the ecclesiastical courts. However, following the Chancel Repairs Act 1932, a procedure was introduced whereby the secular courts enforce the liability by way of an action for a sum of money representing the cost of repair. The Parochial Church Council of the ancient Warwickshire church of Aston Cantlow (where William Shakespeare’s parents had married) sought to recover from the lay rector the cost of repair to the chancel. The lay rector conceded the existence of the common law obligation of which he had full knowledge at the time the land was acquired but argued that the enforcement of the obligation was in breach of the provisions of the Human Rights Act 1998.

²⁶ See A Clapham, ‘The Privatisation of Human Rights’ [1995] EHRLR 20 and A Clapham, *Human Rights in the Public Sphere* (Oxford, 1993). For an example concerning exhumation see *Re Durrington Cemetery* [2001] Fam 33 *per* Hill Ch, followed in *Re Cranley Green Road Cemetery, Luton* [2001] Fam 308 *per* Bursell Ch.

²⁷ See M Hill, ‘Judicial Approaches to Religious Disputes’ in R O’Dair and A Lewis (eds), *Law and Religion*, Current Legal Issues IV (2001, Oxford University Press) 409-420.

²⁸ See P Cumper, ‘The Protection of Religious Rights under Section 13 of the Human Rights Act 1998’ [2000] *Public Law* 265. Note also the ironic observation of Lord Nicholls of Birkenhead that were component institutions of the Church of England to be classified as public authorities, they would, by definition, lose their status of victim and with it any right of action in respect of a violation of Convention rights, including that of freedom of religion: see *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 at para 15.

²⁹ *R(on the application of Ullah) v Special Adjudicator* [2002] EWHC 1584 (Admin) *per* Harrison J.

³⁰ For Rivers the provision increases the ‘interpretative discretion’ of the judiciary while Cumper regards it merely as a symbolic political statement designed to placate religious opponents: see J Rivers, ‘Religious Liberty as a Collective Right’ in R O’Dair and A Lewis (eds), *Law and Religion*, Current Legal Issues IV (2001, Oxford University Press) 246; J Rivers, ‘From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom’s Human Rights Act’ in R Ahdar, (ed) *Law and Religion* (2000, Ashgate) p 138 and Cumper (above) p 265. Hill concludes that it is ‘at best an articulation and codification of the [pre-Human Rights Act] position’: M Hill, ‘Judicial Approaches to Religious Disputes’ (above) at p 418.

³¹ One further case, in the field of extradition, contained a superficial treatment of Article 9: *R(on the application of Ullah) v Immigration Appeal Tribunal* [2004] UKHL 26.

The House of Lords considered this area of property law arcane and unsatisfactory, stating that the very language was redolent of a society long disappeared. However the importance of the decision for the Church of England lies not in provisions of the Chancel Repairs Act but rather in the discussion of the nature of Church itself and its place in society and government. The House of Lords enjoyed a rare opportunity to consider the constitutional status of the Church of England in contemporary jurisprudence.³² Lord Nicholls of Birkenhead observed:

Historically the Church of England has discharged an important and influential role in the life of this country. As the established church it still has special links with central government. But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation.³³

Having cited passages from the second edition of Hill, *Ecclesiastical Law*,³⁴ Lord Hope of Craighead stated that the Church of England as a whole has no legal status or personality.³⁵ Whilst acknowledging that the Church of England had regulatory functions within its own sphere of activity, he concluded that it could not be considered to be a part of government, observing that the State has not surrendered or delegated any of its functions or powers to the Church:³⁶ ‘The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government’.³⁷ Lord Rodger of Earlsferry, in a concurring speech, observed that ‘the juridical nature of the Church [of England] is, notoriously, somewhat amorphous’.³⁸ He concluded,

The mission of the Church is a *religious* mission, distinct from the secular mission of government, whether central or local. Founding on scriptural and other recognised authority, the Church seeks to serve the purposes of God, not those of the government carried on by the modern equivalents of Caesar and his proconsuls. This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position but they do not make it a department of state: *Marshall v Graham* [1907] 2 KB 112, 126, per Phillimore J. In

³² See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank Parochial Church Council of Aston Cantlow v Wallbank* [2004] 1 AC 546; [2003] 3 All ER 1213, HL.

³³ *Ibid* per Lord Nicholls of Birkenhead at para 13.

³⁴ Para 58 referring to M Hill, *Ecclesiastical Law* (2nd edn, Oxford, 2001), paras 3.11 and 3.74.

³⁵ *Aston Cantlow* (supra) at para 61 per Lord Hope of Craighead. He continued ‘There is no Act of Parliament that purports to establish it as the Church of England: *Sir Lewis Dibdin, Establishment in England: Essays on Church and State* (1932), p 111. What establishment in law means is that the state has incorporated its law into the law of the realm as a branch of its general law. In *Marshall v Graham* [1907] 2 KB 112, 126 Phillimore J said: ‘A Church which is established is not thereby made a department of state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.’ The Church of England is identified with the state in other ways, the monarch being the head of each.’

³⁶ Note, however, the Church of England Assembly (Powers) Act 1919 speaks in its preamble of powers in regard to legislation touching matters concerning the Church of England being ‘conferred on’ what is now the General Synod subject to the control and authority of the Monarch and of the two Houses of Parliament.

³⁷ *Aston Cantlow* (supra) at para 61 per Lord Hope of Craighead.

³⁸ *Ibid* at para 154 per Lord Rodger of Earlsferry.

so far as the ties are intended to assist the Church, it is to accomplish the Church's own mission, not the aims and objectives of the Government of the United Kingdom.³⁹

These assertions may seem both obvious and self-evident, but the Court of Appeal had previously reached the opposite conclusion on the specific question of whether a parochial church council is a public authority for the purposes of the Human Rights Act 1998.⁴⁰ The Court of Appeal had regarded the established nature of the Church of England as imbuing its component institutions with a governmental function sufficient to render them public authorities. The analysis of the House of Lords is much to be preferred, being more cogent and more soundly argued. The consequent reversal of the Court of Appeal's ruling accorded with widespread academic opinion.⁴¹ Thus, a parochial church council is *not* classified as a 'public authority' nor do its actions in enforcing chancel repair liability engage the ECHR.

The chastisement of children

In February 2005 the House of Lords, in *R (Williamson) v Secretary of State for Education and Employment*,⁴² delivered a significant judgment on freedom of religion, parental rights, corporal punishment and children's welfare.⁴³ In parallel, the law redefined reasonable chastisement, from the Education Act 1993, to the Children Act 2004. To be lawful, corporal punishment administered by a parent must now stop short of causing actual bodily harm. The Court of Appeal decided the case on narrow Article 9(1) grounds. It held that the legislation prevented the delegation by parents to teachers of the parental right to administer reasonable physical chastisement. The judges disagreed whether corporal punishment in this context was a manifestation of religion or belief under Article 9(1). However, they all agreed that the prohibition did not constitute an interference with freedom of religion, as it was possible for the applicants lawfully to manifest their belief in corporal punishment by alternative means. Accordingly, there was no breach of Article 9 or the Protocol.

The House of Lords rejected the further appeal, but took a more generous approach to freedom of religion and belief and closely followed the structure of Article 9. The prohibition, it held, constituted an interference with the manifestation of the parents' beliefs but one which was justified under Article 9(2). The House of Lords gave a wide scope to freedom of religion or belief, and Lord Nicholls recognised that 'it is not for the

³⁹ Ibid at para 156 per Lord Rodger of Earlsferry.

⁴⁰ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2002] Ch 51, [2001] 3 All ER 393, CA, Sir Andrew Morritt V-C, Robert Walker and Sedley LJ.

⁴¹ See D Oliver 'Chancel Repairs and the Human Rights' [2002] *Public Law* 651; I Leigh 'Freedom of religion: public/private, rights/wrongs' in M Hill (ed) *Religious Liberty and Human Rights* (University of Wales Press, 2002) 128-158; I Dawson and A Dunn, 'Seeking the principle: chancels, choices and human rights' (2002) 22 *Journal of Legal Studies* 238; S Whale, 'Pawnbrokers and parishes: the protection of property under the Human Rights Act' [2002] EHRLR 67 at 78-79; and M Hill's case note and editorial in the *Ecclesiastical Law Journal* at (2001) 6 Ecc LJ 173 and (2004) 7 Ecc LJ 246-249 respectively. Note, however, the partial dissent of Lord Scott of Foscote in the House of Lords on the public authority issue: *Aston Cantlow* (supra) paras 130-132.

⁴² *Regina v Secretary of State for Education and Employment ex parte Williamson* [2005] UKHL 15; [2005] 1 FCR 498 noted at (2005) 8 Ecc LJ 237. For convenience, reference hereafter to the speeches in the House of Lords are simply prefaced *Williamson*.

⁴³ The Education Act 1996, s 548(1) provides: 'Corporal punishment given by, or on the authority of, a member of staff to a child ... for whom education is provided at any school ... cannot be justified in any proceedings on the ground that it was given in pursuance of a right exercisable by the member of staff by virtue of his position as such'. For a full discussion see S Langlaude, 'Flogging Children with Religion: A Comment on the House of Lords' Decision in *Williamson*' (2006) 8 Ecc LJ 339.

court to embark on an inquiry into the asserted belief and judge its “validity”.⁴⁴ Lord Walker agreed that ‘in matters of human rights the court should not show liberal tolerance only to tolerant liberals’.⁴⁵ The House of Lords accepted uncritically that the parents were manifesting their beliefs when they authorised a child’s school to administer corporal punishment:⁴⁶

In the present case the essence of the parents’ beliefs is that, as part of their proper upbringing, when necessary children should be disciplined in a particular way at home and at school. It follows that when parents administer corporal punishment to their children in accordance with these beliefs they are manifesting these beliefs. Similarly, they are manifesting their beliefs when they authorise a child’s school to administer corporal punishment. Or, put more broadly, the claimant parents manifest their beliefs on corporal punishment when they place their children in a school where corporal punishment is practised. Article 9 is therefore engaged in the present case in respect of the claimant parents.⁴⁷

The House of Lords relied on the distinction established by the European Commission on Human Rights in *Arrowsmith v United Kingdom*.⁴⁸ In this case the Commission set up an important test to distinguish a ‘practice’ which is a manifestation of a religion or belief (falling under the protection of Article 9), from the broad range of actions which are merely motivated or inspired by them (not falling under the protection of Article 9). A direct link is needed between the belief and the action, and this has come to be interpreted as a ‘necessity test’. The requirement is one of causal proximity. Strasbourg had been cautious in its approach, focusing on those elements of observance and ritual which are central to the lives of believers, rather than on activities that are merely motivated by the religious beliefs.⁴⁹

The House of Lords was less restrictive than Strasbourg. Lord Nicholls said: ‘I do not read the examples of acts of worship and devotion given by the European Commission [...] as exhaustive of the scope of manifestation of a belief in practice’.⁵⁰ This raises the question whether the distinction between manifestation and motivation is tenable. Shifting the discussion to the issue of justification is to be welcomed because this is the where the real battleground where the dispute must be addressed as a matter of social policy and jurisprudence.

The House of Lords then examined whether the restriction was justified under Article 9(2). After finding that the interference was prescribed by law, and was aimed at

⁴⁴ *Williamson*, paragraph 22.

⁴⁵ *Williamson*, paragraph 60. The Strasbourg judgments in *Refah Partisi (The Welfare Party) v Turkey* and *Şahin v Turkey* seem to suggest that there should be no tolerance for those who are intolerant, and no freedom for those who do not respect the freedoms of others; but this view has been rightly criticised: see M Evans, ‘Believing in Communities, European Style’ in N Ghanea (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff Publishers, Leiden & Boston 2004), 133-155, at 153-154; and K Boyle, ‘Human Rights, Religion and Democracy: The Refah Party Case’ (2004) 1(1) *Essex Human Rights Review* 1, at 12-14.

⁴⁶ *Williamson*, paragraphs 36-37. The rights of the parents (but not of the teachers) under the Protocol were also engaged.

⁴⁷ *Williams*, paragraph 35.

⁴⁸ Application 7050/75 (1978).

⁴⁹ M Evans (above) at 138.

⁵⁰ *Williamson*, paragraph 32.

protecting children and promoting their wellbeing,⁵¹ it found that the restriction on parental rights was not disproportionate:

the legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. Parliament was entitled, if it saw fit, to lead and guide public opinion. Parliament was further entitled to take the view that a universal ban was the appropriate way to achieve the desired end. Parliament was entitled to decide that, contrary to the claimants' submissions, a universal ban is preferable to a selective ban which exempts schools where the parents or teachers have an ideological belief in the efficacy and desirability of a mild degree of carefully-controlled corporal punishment [...] Parliament was entitled to take this course because this issue is one of broad social policy. As such it is pre-eminently well suited for decision by Parliament.⁵²

Lord Nicholls identified the conflict between parents and the State. He found that there was large support for the ban on corporal punishment, drawing on parliamentary debate, a number of reports in England, and ECHR caselaw, therefore Parliament was entitled to legislate on the issue. Baroness Hale outlined the issue from the perspective of children's rights and differed from the classic human rights approach adopted by Lord Nicholls. She said:

This is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no-one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of the adults. No non-governmental organisation, such as the Children's Rights Alliance, has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults. This has clouded and over-complicated what should have been a simple issue.⁵³

She argued that the essential question had always been 'whether the legislation achieves a fair balance between the rights and freedoms of the parents and teachers and the rights, freedoms and interests, not only of their children, but also of any other children who might be affected by the persistence of corporal punishment in some schools'.⁵⁴ Strasbourg has already acknowledged in *Martins Casimiro and Cerveira Ferreira v Luxembourg*,⁵⁵ and *Çiftçi v Turkey*,⁵⁶ that when there is a conflict between the parents' right to respect for their religious convictions and the child's right to education, the interests of the child prevail. Accordingly, with 'such an array of international and professional support, it is quite impossible to say that Parliament was not entitled to limit the practice of corporal punishment in all schools in order to protect the rights and freedoms of all children'.⁵⁷

There are problems with the approach adopted by Baroness Hale. Instead of being what she calls 'a simple issue', she makes it more complicated by re-characterising it as

⁵¹ *Williamson*, paragraphs 48-49.

⁵² *Williamson*, paragraphs 50-51.

⁵³ *Williamson*, paragraph 71.

⁵⁴ *Williamson*, paragraph 74.

⁵⁵ Application 44888/98 (1999).

⁵⁶ Application 71860/01 (2004).

⁵⁷ *Williamson*, paragraph 86.

involving children's rights. One could argue that Lord Nicholls' approach is the simpler because it represents a straightforward claim between two competing views of the child's best interests – the State and the parents. In comparison with the lengthy – and at times contradictory – judgments in the Court of Appeal, the relative brevity and the clarity of the speeches in the House of Lords are welcome. In particular, the Law Lords used the framework of Article 9 overtly and comprehensibly, paying careful attention to freedom of religion and belief. The House of Lords' reasoning was clear, and it was only at the stage of the justification of the restriction that it found in favour of the State rather than the individual.

The muslim veil in schools

In *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*,⁵⁸ Shabina Begum, a Muslim, stopped attending Denbigh High School when the school refused to allow her to wear the jilbab,⁵⁹ which she described as the only garment that met her religious requirements since it concealed the contours of the female body, including the shape of her arms and legs.⁶⁰ At first instance,⁶¹ Bennett J gave little prominence to Begum's alleged Article 9 right to manifest her religion by wearing the jilbab. He held that although her refusal to respect the school uniform policy was 'motivated by religious beliefs', there had been no interference with her Article 9(1) right since even if Begum had been excluded (which he held she was not) she would have been 'excluded for her refusal to abide by the school uniform policy rather than her beliefs as such'.⁶²

The Court of Appeal judgment reversing the decision of Bennett J was subject to much academic criticism.⁶³ The flaw was not the treatment of Article 9(1), but rather the application of Article 9(2). The Court of Appeal followed Strasbourg jurisprudence to hold that Article 9(1) was engaged but, in deciding that the limitation of the right was justified under Article 9(2), Brooke LJ's interpretation of the Strasbourg jurisprudence was mistaken.⁶⁴ Rather than deciding whether the limitation could be justified as being necessary in a democratic society, he outlined the decision-making structure which the school should have used since, on his findings, the onus lay on the school to justify its interference with the Convention right.⁶⁵ This is unsupportable. Whilst courts apply such a procedural test in judicial review of decisions of public authorities, there is nothing in the Human Rights Act, the ECHR or Convention jurisprudence requiring public authorities to adopt a proportionality approach to the structuring of their own decision-making.⁶⁶

Although the subsequent House of Lords' decision⁶⁷ was therefore welcome in that it corrected the Court of Appeal's overly formulaic approach to Article 9(2), and held that there was no breach of Article 9, the majority of their Lordships repeated and

⁵⁸ [2006] UKHL 15, [2006] 2 WLR 719.

⁵⁹ An item of clothing that was variously described by the House of Lords as 'a long coat-like garment'; 'a long shapeless back gown'; and 'a long shapeless dress ending at the ankle and designed to conceal the shape of the wearer's arms and legs': [2006] UKHL *per* Lord Bingham at para 10, Lord Hoffmann at para 46 and Lord Scott at para 79.

⁶⁰ See the Court of Appeal judgment of Brooke LJ, [2005] EWCA Civ 199 para 8 and 14.

⁶¹ [2004] EWHC 1389.

⁶² See paras 72-74.

⁶³ [2005] EWCA Civ 199. See, for example, T Poole, 'Of Headscarves and Heresies: The *Denbigh High School* Case and Public Authority Decision Making under the Human Rights Act' [2005] *Public Law* p.685.

⁶⁴ Poole (above) p 689-690.

⁶⁵ Paras 75-76.

⁶⁶ Poole (above) p 689-690.

⁶⁷ [2006] UKHL 15, [2006] 2 WLR 719.

compounded an error originally made by Bennett J in relation to Article 9(1).⁶⁸ Lords Bingham of Cornhill, Hoffmann and Scott of Foscote held that there had been no interference with Begum's rights under Article 9(1) but their confused, and not always consistent, understanding of Convention case law evidences defective reasoning: Lord Scott even spoke of an Article 9(2) right to manifest one's religion.⁶⁹

Their Lordships adopted the 'specific situation' rule and applied it as a gateway as if it had general effect.⁷⁰ Lord Bingham quoted selectively from numerous Strasbourg and domestic cases on the 'specific situation' rule but omitted to mention references to the caveats to the rule. No reason was given why the 'specific situation' rule ought to be applied to school pupils. Lord Bingham seemed to think that the application of Strasbourg case law to university students was justification enough, but this is to ignore the fact that unlike a university student, a school pupil has not voluntarily accepted an employment or role which might legitimately limit his Article 9 rights. In state schools there is no contractual relationship between school and pupil: thus the argument of waiver or voluntary surrender of rights can be of no application

The reasoning in the opinions of Lord Nicholls and Lady Hale (differing from the other three Law Lords but concurring in the ultimate disposal of the appeal) is correct in law and consistent with Strasbourg jurisprudence in that they recognised that Begum's right under Article 9 had been engaged but that this was justified under Article 9(2). However, the minority speeches did not explain why their approach was the consistent interpretation of Strasbourg jurisprudence. Lord Nicholls noted that he would prefer to state that there was interference with Article 9 and then to consider whether that interference was justified since this would require the public authority to 'explain and justify its decision'.⁷¹ However, his Lordship did not find it necessary fully to elucidate this approach, which, had it been adopted by the whole House, would have produced a more satisfactory analysis.⁷² The restriction of Article 9(1) by the majority was unnecessary given that legitimate limitations on the right are (and in this instance were) routinely justified under Article 9(2).⁷³

GENERAL TRENDS IN THE LOWER COURTS

In a common law jurisdiction such as the United Kingdom's, it is often possible to identify certain general trends in the lower courts. However, in view of the fact that the Human Rights Act has been in force for just seven years, and that it has not been consistently applied even in the House of Lords, the articulation of such trends can be, at best, only tentative.

⁶⁸ For a detailed analysis of this decision, see M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488-506.

⁶⁹ Para 85. This is erroneous in that the right is contained in Article 9(1); Article 9(2) simply contains the limitations to the exercise of the right.

⁷⁰ As discussed above, the 'specific situation' rule is derived from and has been elucidated by the European Court of Human Rights' determinations in the cases of *Dablab v Switzerland* and *Sabin v Turkey*.

⁷¹ Para 41. Albeit not in the formulaic manner which had influenced the flawed reasoning in the Court of Appeal, discussed above.

⁷² It is significant that Lords Bingham and Hoffmann still felt it necessary to consider Article 9(2) in depth anyway.

⁷³ For a more detailed analysis see M Hill and R Sandberg, 'Muslim Dress in English Law: Lifting the Veil on Human Rights' (2006) Vol 1 *Derecho y Religión* 302-328.

Religious dress

The decision and reasoning in *Begum* was held to constitute ‘an insuperable barrier’ to the claim for judicial review in *R (on the application of X) v The Headteacher of Y School*.⁷⁴ The claimant, a 12 year old Muslim girl, refused to attend school on the basis that the school would not permit her to wear a niqab veil, which covered her entire face save her eyes. Silber J held that there had been no interference with the claimant’s Article 9 rights and, even if there had been, it would have been justified under Article 9(2). He implicitly accepted Lord Bingham’s assertion that the ‘specific situation’ rule applied in the case of schools. The weakness of the approach of English law post-*Begum* was underlined by Silber J’s comments commending the school on having in place a well-thought out policy, because the proper approach makes the quality of the policy irrelevant. Provided that the right to manifest can be exercised elsewhere, it seems that the court will be entitled, or even obliged, to find that there has been no interference. By giving general effect to a filtering device which has hitherto been used only by Strasbourg in a limited class of specific cases, and, in consequence, closing down the reach of Article 9(1), the domestic courts are applying too broad an approach.⁷⁵ This seems contrary both to the spirit of the ECHR as previously interpreted by the House of Lords in *Williamson*⁷⁶ and by the European Court of Human Rights in Strasbourg.⁷⁷ Collins notes that recent years have witnessed a ‘profound reorientation’ in interpretation towards an ‘integrated approach’ which ‘involves an interpretation of Convention rights with reference to the rights contained in social and economic charters’.⁷⁸

More recently, in *R (on the application of Playfoot) v Governing Body of Millais School*,⁷⁹ a student of Millais School, sought judicial review of the decision of the school’s governing body not to permit her to wear a ‘purity’ ring as a symbol of her Christian commitment to celibacy before marriage. She maintained that the school’s prohibition of jewellery breached her right under Article 9 of the European Convention on Human Rights to manifest her religious belief of abstinence before marriage through the wearing of a ring, known as the ‘silver ring thing’.⁸⁰ The court found there to be no manifestation of belief in this instance as the wearing of the ring was not ‘intimately linked’ to her belief in chastity before marriage. The applicant conceded that she was under no strict obligation to wear the ring but merely felt compelled to wear it. The judge held that there was no interference with the applicant’s Article 9 right as she voluntarily accepted the uniform policy, the prohibition of jewellery being well known.

⁷⁴ [2007] EWHC 298, [2007] All ER (D) 267, Silber J.

⁷⁵ The admirable analysis of Article 9(2) by Silber J is entirely *obiter*, he having determined that Article 9(1) was not engaged in the first place.

⁷⁶ *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, [2005] 2 AC 246.

⁷⁷ Strasbourg has recognised that, ‘The State’s role as the neutral and impartial organiser of the practising of various religions, denominations and beliefs is conducive to religious harmony and tolerance in a democratic society’: *Refah Partisi v Turkey* (41340/98) (31 July 2001).

⁷⁸ H Collins, ‘The Protection of Civil Liberties in the Workplace’ (2006) 69(4) *Modern Law Review* p.619-643.

⁷⁹ Michael Supperstone QC, sitting as a Deputy High Court Judge, (July 2007, unreported).

⁸⁰ The SRT Group, which operates as a not-for-profit corporation, was founded in the USA as a means of educating mainly teenagers on the benefits, spiritual or otherwise, of sexual abstinence until marriage through evangelical Christian messages. On successful completion of the ‘SRT434’ educational programme candidates are offered the chance to purchase a silver ring as an outward sign of their inner commitment, but with no obligation to wear the ring. See <http://www.silverringthing.org.uk/FAQShow.asp?ID=14>.

Sacred symbols

In *R (on the application of Swami Surayanda) v The Welsh Ministers*,⁸¹ The Welsh Assembly Government appealed a decision quashing a decision of the Welsh Minister of Sustainability and Rural Development which ordered the slaughter of a bullock (Shambo), kept by the Community of the Many Names of God at Skanda Vale Temple, Wales.⁸² The Court of Appeal allowed the appeal. The Community comprised a Hindu sect at the temple complex in rural west Wales where Shambo was installed as the temple bullock and revered as sacred. The Community hold as a fundamental tenet of their beliefs the sanctity of all life; thus, the slaughter of Shambo would constitute a sacrilegious act and a serious desecration of the temple and its beliefs. Shambo tested positive for bovine tuberculosis in 2007 and the Minister made arrangements for Shambo's slaughter, which the Community sought to challenge on the basis that it infringed the Community's right to freedom of religion under Article 9 of the European Convention on Human Rights.

Lord Justice Pill categorised the litigation as 'the clash between the duties of the agriculture and health authority and the rights of the members of the Community to practise and manifest their religious beliefs and practices'. Applying Lord Bingham of Cornhill's analysis in *R (on the application of Begum) v Governors of Denbigh High School*,⁸³ the Court of Appeal was required to make an objective value judgement assessing the proportionality of the decision, which involved a careful analysis of expert evidence to determine whether interference with the Article 9 right was justifiable under the qualifications to the right: was the action prescribed by law? What was the legitimate objective? Was the proposed action proportionate in scope and effect to the achievement of that objective? The court considered the success of the surveillance and slaughter policy elsewhere in the EU, the need for post mortem tests to validate the infection of the disease and the subsequent difficulty in risk assessment for the rest of the herd, and the difficulty in providing facilities for bio-hazard free isolation of infected animals to be important considerations as to why the alternatives to slaughter, such as isolation, could not be justified.

Religious discrimination

Since 2003, discrimination on the grounds of religion or belief has been unlawful. The Employment Equality (Religion or Belief) Regulations 2003⁸⁴ and Part 2 of the Equality Act 2006⁸⁵ outlaw direct and indirect discrimination and victimisation on the grounds of religion or belief in relation to employment, vocational training and the provision of goods, facilities and services.⁸⁶ Harassment on the grounds of religion or belief is outlawed only in relation to employment and vocational training.⁸⁷

The effect of the new religious discrimination law upon this jurisprudence has, to date, only been tested in certain employment tribunals and occasionally in the Employment

⁸¹ Court of Appeal, July 2007.

⁸² For the first instance judgment decided on 16 July 2007, see *R (on the application of Swami Suryananda) v The Welsh Ministers* [2007] EWHC 1736 (Admin).

⁸³ [2007] 1 AC 100, at paragraph 30

⁸⁴ SI 2003/1660. See N De Marco, *Blackstone's Guide to the Employment Equality Regulations 2003* (Oxford University Press, 2004).

⁸⁵ See Sandberg, above.

⁸⁶ For definitions of these terms see Equality Act 2006, s45 and Equality Act 2006: Explanatory Notes p 20.

⁸⁷ For a definition see reg 5 of the Employment Equality (Religion or Belief) Regulations 2003.

Appeal Tribunal.⁸⁸ Nevertheless, important issues have arisen in relation to religious dress and symbols.⁸⁹ The early case law indicates that whilst employment tribunals employ a wide definition of religion, they use a narrow definition of belief.⁹⁰

The Employment Appeals Tribunal has confirmed that religious discrimination cases follow the two-stage process outlined in *Wong v Igen Ltd (formerly Leeds Careers Guidance)*.⁹¹ The applicant has to prove facts from which the tribunal could conclude that unlawful discrimination has occurred before the burden of the proof passes to the respondent.⁹² To date, claims relating to religious dress or symbols have been unsuccessful on the grounds that the applicant has not made such a case.⁹³ There have been three such cases at employment tribunal level: *Ferri v Key Languages Limited*,⁹⁴ *Mohmed v West Coast Trains Ltd*,⁹⁵ and *Azmi v Kirklees Metropolitan Council*.⁹⁶ In *Ferri*, for example, the Tribunal decided that a Roman Catholic who was told not to wear certain necklaces at work as they were rather loud and overtly religious, but who was dismissed as a result of alleged poor performance, had not established a *prima facie* case, given the cogent evidence that the Applicant was sacked for her poor performance and not her religious beliefs. Read together with *R (on the application of X v The Headteacher of Y School)*,⁹⁷ *Azmi* may suggest the beginning of a trend whereby Article 9 is interpreted more strictly in English courts than it is in Strasbourg. It is a matter of concern that the general application erroneously given by the House of Lords to the Strasbourg 'specific situation' rule seems to be becoming the false orthodoxy of employment tribunals.

Sexual orientation discrimination

In *R v Secretary of State for Trade and Industry ex parte Amicus and others*, Mr Justice Richards was asked to consider challenges brought by 7 public sector unions in relation to several of the regulations in the Employment Equality (Sexual Orientation) Regulations 2003. The challenges were targeted against regulations that allowed exceptions to the general prohibition against discrimination on the grounds of sexual orientation where employment or vocational training is for the purposes of an organised religion.⁹⁸ The Judge was being asked to rule on the correct balance to be struck between these two competing rights: the right of non-discrimination on the grounds of sexual orientation and the right to manifest one's religion or beliefs.

⁸⁸ Such decisions do not serve as binding precedent for subsequent cases but give an impression of the early effect of the new law. *Secretary of State for Trade and Industry v Cook* [1997] ICR 288 at 292, per Morison P. See *Halsbury's Laws of England*, (4th ed) Vol 16: Employment (2000) para 684.

⁸⁹ R Sandberg, 'Flags, Beards and Pilgrimages: A Review of the Early Case Law on Religious Discrimination' (2007) 9 Ecc LJ 87.

⁹⁰ It has been decided, for example, that a rule banning the stitching of an American flag upon a reflective waistcoat did not support a claim for religious discrimination, despite the Applicant's insistence his loyalty to his native country amounted to a belief: *Williams v South Central Limited* ET, Case Number: 2306989/2003 (16 June 2004). See also *Baggs v Fudge* ET, Case Number: 1400114/2005 (23 March 2005) and compare *Hussain v Buller Bros* ET, Case Number: 1806638/2004 (5 July 2005), as discussed by Sandberg, n 86 above.

⁹¹ [2005] EWCA Civ 142.

⁹² *Mohmed v West Coast Trains Ltd* EAT, (2006) WL 25224803 (30 August 2006)

⁹³ For discussion of successful cases on other employment issues, see Sandberg, n 86 above.

⁹⁴ ET, Case Number: 2302172/2004 (12 July 2004).

⁹⁵ ET, Case Number: 2201814/2004 (12-14 October 2004; 20 May 2005); EAT, (2006) WL 25224803 (30 August 2006).

⁹⁶ ET, Case Number: 1801450/06 (6 October 2006). Affirmed on appeal.

⁹⁷ [2007] EWHC 298, [2007] All ER (D) 267, Silber J (discussed above).

⁹⁸ For a full discussion see L Samuels, 'Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights' (2005) 8 Ecc LJ 74.

At the core of the case were submissions put evangelical Christian organisations who submitted that their ability to hold their religious beliefs and to carry on their teaching and practices would be undermined if forced to employ persons whose sexual practices and beliefs about those sexual practices were at odds with their own beliefs, teachings and practices. It was argued that employees working for Christian organisations were expected to behave in accordance with a Christian ethos and belief. Employing those who did not share this ethos would fatally undermine such an organisation's ability to achieve its objectives.

The Judge held that the exception was intended to be a very narrow one and, on its proper construction, was very narrow, affording an exception only in very limited circumstances. He said that the tests set out were objective not subjective and were going to be far from easy to satisfy in practice. He held it unlikely that this exception would apply to the various situations put forward on behalf of the Applicant unions to illustrate their concerns, such as a church unwilling to employ a homosexual man as a cleaner.

In *Reaney v Bishop of Hereford*,⁹⁹ the claimant had applied for the post of Diocesan Youth Officer, was short listed and interviewed for the post. In his application and in the interview he disclosed that he was homosexual and had been in a same gender relationship which had recently ended and did not intend to enter into a fresh one. He was unanimously recommended as the best candidate but the Bishop considered the claimant's lifestyle a serious impediment to the post and he was not offered the post. The claimant claimed he had been harassed and discriminated against on account of his sexual orientation. The tribunal considered that the claimant would not have been required to convince the Bishop of his future intentions to the sort of standard that the Bishop required had he not disclosed his sexual orientation. The Bishop had therefore discriminated directly against the claimant.

A recent judicial review considered subsequent Northern Ireland regulations,¹⁰⁰ which outlaw direct and indirect discrimination and victimisation on grounds of sexual orientation in the provisions of goods and services. The regulations have various exemptions, including an exemption for 'organisations relating to religion or belief'.¹⁰¹ Both provide a purposive definition of the term 'organisations relating to religion or belief'¹⁰² and state that such organisations may lawfully restrict the provision of goods and services and membership or participation in the organisation on one of two bases. The first is 'if it is necessary to comply with the doctrine of the organisation', the second is 'so as to avoid conflicting with the strongly held religious convictions of a significant number of the religions followers'. Both regulations state that this exemption is lost if

⁹⁹ The decision in *Reaney v Bishop of Hereford* was handed down in July 2007. See (2008) 10 Ecc LJ 131.

¹⁰⁰ Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 SI 439.

¹⁰¹ Equality Act (Sexual Orientation) Regulations 2007, reg 14; Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, reg 16.

¹⁰² Compare this with the regulations prohibiting discrimination in relation to employment where exemptions are addressed to 'organised religions': see Sex Discrimination Act 1975, s 19 and Employment Equality (Sexual Orientation) Regulations 2003, reg 7(3). The definition of an 'organisation relating to religion or belief' differs from that used in religious discrimination in two respects: the fifth purpose of such an organisation ('to improve relations, to maintain good relations, between persons of different religions or beliefs') is omitted and it is also stated that the section does not apply to educational organisations: compare Equality Act 2006, s 57.

organisation makes provision with and ‘on behalf of a public authority under the terms of a contract’.¹⁰³

The enactment of the Northern Ireland Regulations proved controversial.¹⁰⁴ A number of Christian organisations and charities¹⁰⁵ sought a judicial review of the regulations.¹⁰⁶ In relation to procedure, Mr Justice Weatherup noted that although the consultation period was the shorter than that usual, it was adequate in the circumstances. However, he held that the absence of proper consultation on the harassment provisions, coupled by concern as to their extended reach, meant that the harassment provisions in the Regulations would be quashed.

On the substantive objections, Weatherup J did not accept any generalised complaints concerning the Regulations. In relation to Article 9, he noted that although the right to manifest religion or belief was engaged¹⁰⁷ and the introduction of the Regulations would result in ‘instances of material interference’ with the right,¹⁰⁸ these may be justified under Article 9(2): the Regulations were ‘prescribed by law’, had the legitimate aim of the protection of the rights of others and were proportionate.¹⁰⁹

Differentiation in the right to marry

The Home Office introduced a scheme whereby a person who was not a citizen of the European Economic Area need a certificate of approval from the Secretary of State before he or she could marry. The policy operated by the Home Office was to refuse a certificate to anyone who did not have a valid right to enter or remain in the United Kingdom with at least three months unexpired. The issue for the court was whether this scheme was compatible with Article 12 of the European Convention for Human Rights – the right to marry.

The Court of Appeal concluded that although the legislative object of preventing sham marriages entered into so as to avoid immigration control was sufficiently important to justify limiting the Article 12 right, the scheme as it operated was not rationally connected to that legislative aim and it therefore failed on the grounds of proportionality. The Court of Appeal dismissed the appeal and affirmed the decision of Mr Justice

¹⁰³ This explains why the Roman Catholic objection to the Regulations focussed specifically on the need for an exemption for Catholic Adoption Agencies.

¹⁰⁴ In January 2007, after the Regulations had come into effect, Opposition peer Lord Morrow, moved a debate in the House of Lords (unsuccessfully) praying that they be annulled: House of Lords Hansard, 9 Jan 2007: Column 179.

¹⁰⁵ Namely: the Christian Institute, the Reformed Presbyterian Church in Ireland, the Congregational Union of Ireland, the Evangelical Presbyterian Church of Ireland, the Association of Baptist Churches in Ireland, the Fellowship of Independent Methodist Churches and Christian Camping International (UK) Limited.

¹⁰⁶ *The Christian Institute & Ors, Re Application for Judicial Review* [2007] NIQB 66.

¹⁰⁷ Since the orthodox Christian belief that the practice of homosexuality is sinful ‘is a long established part of the belief system of the world’s major religions’ and ‘is not a belief that is unworthy of recognition’: at para 50.

¹⁰⁸ This generous interpretation of the Article 9 (1) right goes against the trend of the recent cases concerning religious dress and symbols in England and Wales: see M Hill and R Sandberg, ‘Is Nothing Sacred? Clashing Symbols in a Secular World’ [2007] *Public Law* 488-506 and R Sandberg, ‘Controversial Recent Claims to Religious Liberty’ (2008) *Law Quarterly Review* (forthcoming).

¹⁰⁹ See R Sandberg, ‘Gods and Services: Religious Groups and Sexual Orientation Discrimination’ (2008) 10 *Ecc LJ* (forthcoming).

Silber.¹¹⁰ Silber J had described the discriminatory nature of the scheme (in not applying to Anglican marriages) as probably the most important reason for his decision. The Court of Appeal was denied the opportunity of addressing the question of the engagement of Art, because the Secretary of State told the court that 'legislation would be passed in due course to remove the discriminatory aspects of the present scheme'.

At first instance Silber J had stated that discrimination on grounds of religion requires very weighty reasons to justify it. He considered that the regime introduced by the Home Office constituted direct discrimination as the group being targeted by that scheme as requiring certificates of approval comprises those who because of their religious convictions or lack of them are unable or unwilling to marry pursuant to the rites of the Church of England while those who wish to marry pursuant to those rites are exempted from the scheme. He was satisfied that there was no evidence which explained why non-Anglican religious ceremonies should be treated differently from marriages pursuant to Anglican rites, although he concluded that 'there may be cases where for historical reasons, some special treatment of the established religion may be justifiable but that is not the justification relied on in this case by the Secretary of State'.¹¹¹

CONCLUSIONS

In a study of this type it is difficult to postulate meaningful conclusions in relation to a jurisprudence which remains in its infancy. For the sake of discussion, I venture the following:

1. The time since the coming into force of the Human Rights Act 1989 has brought religious liberty more assertively into the public domain;
2. However, the academic debate lacks pragmatism whilst judicial decisions are yet to demonstrate a consistency of approach;
3. The courts have made some unbelievably bad decisions, not least the Court of Appeal decisions in *Aston Cantlow* and *Begum*, but in both these instances the matter has been corrected in the House of Lords;
4. The courts have engaged in some remarkably ill-informed discussion, particularly the Court of Appeal in *Williamson*, although again the House of Lords has demonstrated greater sophistication in its argumentation;
5. A more mature analysis seems now to be developing thanks largely to the House of Lords in *Williamson* and *Begum*, but assisted by the contributions of academics;
6. A generous interpretation of 'manifestation' should be adopted so as to avoid the courts the unedifying task of assessing the validity of religious beliefs and practices;
7. The following approach ought to be of universal application:
 - (1) is there a relevant Convention right which qualifies for protection under Article 9(1)?
 - (2) has it been violated?
 - (3) was the interference prescribed by law?
 - (4) did the interference have a legitimate aim?

¹¹⁰ *R(Baiai, Trzcinska, Bigoku & Tilki) v Secretary of State for the Home Department* [2007] 1 WLR 693, 2006] EWHC 823 [Admin], 10 April 2006, Silber J.

¹¹¹ A case is pending in the House of Lords which will consider whether the denial of an exemption to the Mormon church of a local tax exemption enjoyed by the Church of England and other religions whose worship is public, amounts to a violation of Articles 9 and 14 when read together. See the judgment of the Court of Appeal, sought to be impugned in *Church of Jesus Christ of Latter-day Saints v Gallagher* (2007) 9 Ecc LJ 241, CA, Mummery, Jacob and Neuberger LJ. For reasons which are not obvious, the ECHR points were not argued in the lower courts.

(5) was the interference necessary in a democratic society for the purpose of achieving that aim?

If so, the interference is justified under Article 9(2) and there is no infringement of the Convention right to freedom of religion. If not, the breach will be proved.

8. Some courts, however, are either not following this approach or are adopting an overly formulaic and legalistic approach in their analysis of the processes of individual decision makers.
9. The judiciary is coming much more into the political arena and decisions are becoming overtly policy-led. This leads to an unwelcome level of arbitrariness and a lack of predictability. The purposive sociology of Baroness Hale may be inspiring but it does little to assist the legal profession in giving meaningful advice to clients.
10. The Church of England might be considered to be somewhat naïve: it nearly threw away its own freedom of religion by not challenging the *Aston Cantlow* decision in the Court of Appeal. Even though the Church of England is an established church, it is not an organ of government. Any provision which appears to give preferential treatment to the Church of England will be regarded as discriminatory and a violation of Article 14.

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