

## Litigating Religious Rights

Professor Mark Hill QC

It is unlikely – dare I say unthinkable – that twenty years ago anyone would have considered a paper on this topic, still less in a faraway outpost such as Newcastle on a Monday evening in February.

Even in the United Kingdom, parts of which have the benefits and burdens of established churches and an overt and historic form of public religion, faith is generally considered to be a private matter for the individual conscience. I have written elsewhere about the historical development of religious freedom and the significant change recently engendered (perhaps unintentionally) by the Human Rights Act 1998 from passive toleration and accommodation to active and aggressive promotion of tightly defined rights.<sup>1</sup>

Today's lecture is intended not as a scholarly treatise on the law of religious liberty, but as a practical, pragmatic and mildly tendentious snapshot of the current state of play in the courts of England and Wales with regard to litigation religious rights.

### A canter through history

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.<sup>2</sup> Religious tolerance is a relatively recent phenomenon; an historical view shows that religious disadvantage and discrimination had previously been the common experience.<sup>3</sup> The ousting of papal jurisdiction marked by the reformation statutes of the 1530s not only led to the 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.<sup>4</sup> This tradition eventually gave way to limited and piecemeal toleration.<sup>5</sup> The law tolerated some religious difference but there was little evidence of a universal respect for religious liberty.

The centuries following the original toleration legislation witnessed the widening of toleration and the introduction of some legal freedoms. Further, the spread of toleration led to the lifting of legal disabilities by the positive conferring of progressive but partial rights. However, such

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<sup>1</sup> Much of the legal discussion which follows is derived from M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (Kluwer Law International, The Netherlands, 2011); and certain passages were first published in M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' (2007) *Public Law* 488-506.

<sup>2</sup> 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, Wm B Eerdmans, Michigan) Vol. 4, pp 605-617.

<sup>3</sup> P. Weller, 'Addressing Religious Difference and Islamophobia' (2006) 17:3 *Journal of Islamic Studies* p.297.

<sup>4</sup> 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).

<sup>5</sup> 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.

rights did not amount to a general right to religious liberty. Rather, at common law, religious liberty existed as a broad and largely negative freedom rather than a positive right.<sup>6</sup> Legal mechanisms generally favoured individual freedom of action: in the absence of a legal prohibition people were permitted to do as they wished.<sup>7</sup> Although the parameters of religious freedom were deliberately kept indistinct, the common law was nevertheless able to define long-stop boundaries when the circumstances so demanded. The legislature and judiciary adopted a stance of passive accommodation as opposed to prescriptive regulation.

This largely negative approach to religious liberty was reflected in the attitude of the law towards religious dress and symbols. No general positive right to display religious symbols or dress was prescribed but a broad freedom existed at common law whereby individuals could wear what they pleased unless they were obliged to conform to a dress or uniform code at work or school.<sup>8</sup> Further, this common law position was supplemented by specific statutory exceptions designed to lift legal disabilities. This was most notable in relation to the Sikh turban.<sup>9</sup> Sikhs alone are exempt from the requirement to wear a safety hat on a construction site<sup>10</sup> and are among those exempted from the law relating to the wearing of protective headgear for motor cyclists.<sup>11</sup> Such provisions owe more to the tradition of tolerance than to any notion of religious liberty as a widespread positive right.

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. This shift at common law was equally as protracted and piecemeal as the move from intolerance to toleration. From the 1950s onwards, international human rights treaties and the ideals they embodied began to influence the law. That said, although judicial decisions often had regard to the spirit of these international obligations, they did not slavishly follow them to the letter.<sup>12</sup> As legal debate focuses on the precise reach of positive legal rights, there is a risk that the spirit of the obligations may be obscured by the formalism of their modern articulation, which lacks the ambiguity and the indistinct boundaries of the common law. Lord Denning's famous warning that the European Convention on Human Rights "is drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation" now seems prophetic.<sup>13</sup> The rigidity of international instruments poses problems for the judiciary who struggle to produce convincing, consistent, and coherent reasoning for their practical

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<sup>6</sup> As Donaldson MR noted in 1990, "the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law ... or by statute": *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 A.C. 109. See generally, M. Hill, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom' (2005) 19(2) *Emory International Law Review* 1129 at p.1131-1132.

<sup>7</sup> See S Poulter, *Asian Traditions and English Law* (1990, Trentham Books) p.1.

<sup>8</sup> J Rivers, 'Religious Dress: British Perspectives and OSCE Developments' (Strasbourg Conference) Available from <http://www.strasbourgconference.org/papers>.

<sup>9</sup> For a full account, see S. Poulter, *Ethnicity, Law and Human Rights* (Oxford University Press, 1998) chapter 8.

<sup>10</sup> Employment Act 1989, s11 provides that the requirement will not "be imposed on a Sikh ... at any time when he is wearing a turban".

<sup>11</sup> Now found in s16 of the Road Traffic Act 1988. In addition to the exemption for "any follower of the Sikh religion while he is wearing a turban", a mechanism is provided for a free standing right that can be exercised by anyone once the Secretary of State has exempted them by Regulation. A further example is the Sikh kirpan, a small ceremonial dagger, which benefits from an exemption from the criminal offence of having a blade in a public place. However, the Criminal Justice Act 1988, s 139 is broadly drafted and provides a defence if the blade is carried 'for religious reasons'. Thus religious symbols in addition to the kirpan are protected.

<sup>12</sup> See, for example, Lord Denning's judgment in *Panesar v Nestle Co Ltd* [1980] I.C.R. 144 (Orthodox Sikh refused job in a chocolate making factory since firm prohibited the wearing of beards on hygiene grounds).

<sup>13</sup> *Ahmad v Inner London Education Authority* [1978] QB 36 at p.41.

application.<sup>14</sup> The application of human rights principles and jurisprudence may do little to extend the legal protection and may on occasions offer less protection than that provided by domestic law.<sup>15</sup>

This new focus upon positive legal rights is predicated upon adopting a different perspective on religious liberty. Whereas the common law historically was communitarian, taking the good of the society as its starting point, the recent rights-based legislation is essentially individualistic regarding religion as the manifestation of a personal belief.<sup>16</sup> The common law permitted the holding of different beliefs, and to a lesser degree their manifestation, but not in the prescriptive manner as came to be articulated in human rights guarantees found in international instruments. In 1978, Scarman LJ enthusiastically but unsuccessfully tried to persuade his fellow Court of Appeal judges to refer to international human rights in religious liberty cases on the basis that such cases call “not for a policy of the blind eye but for one of understanding”.<sup>17</sup> I suggest that the converse has actually become true. By examining the effect upon religious liberty of two areas of law (namely the Human Rights Act 1998 together with its interpretive regime, and the raft of anti-discrimination laws), the broad sweep of liberal tolerance and the subtlety and nuance previously found at common law has become lost in the detail of the regulation which brings with it the intellectual dishonesty of the blind eye.

### **The impact of the Human Rights Act 1998**

The Human Rights Act 1998 has brought about something of a legal revolution.<sup>18</sup> The House of Lords has now conclusively determined that a parochial church council of the (established) Church of England is not a core “public authority” for the purposes of the Human Rights Act 1998.<sup>19</sup> Further, 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.<sup>20</sup> This has been furthered by 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

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<sup>14</sup> 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 are supposed to exist (para 60).

<sup>15</sup> In *Copsey*, Neuberger LJ focussed entirely upon the domestic law of unfair dismissal claiming it to be the “proper analysis” on the grounds that reliance on Convention rights would not protect the claimant “as far as his reliance on the effect of domestic law” could: paras 77, 81 and 90-91. Lord Bingham of Cornhill made clear in *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20, that domestic law may provide for rights more generous than those granted by the ECHR, provided that they do not seek to do so by reference to its provisions.

<sup>16</sup> This theme is well expressed in Locke’s Second Treatise on Government. See J Locke, *Two Treatises of Government* (ed) M Goldie (Dent, London, 1993) and the discussion in the context of religious liberty to be found in R Ruston, *Human Rights and the Image of God*, (SCM Press, London, 2004) ch 14 pp. 236-250. See also CB Macpherson, *The Political Theory of Possessive Individualism* (Oxford University Press, Oxford, 1962) p. 221.

<sup>17</sup> He added that, “The system must be made sufficiently flexible to accommodate their beliefs and their observances”: *Ahmad v Inner London Education Authority* [1978] Q.B. 36 at p.48.

<sup>18</sup> See M Hill, ed, *Religious Liberty and Human Rights* (2002, University of Wales Press, Cardiff). Under section 3, courts are required to interpret United Kingdom legislation so far as is possible in a manner compatible with the rights outlined in the ECHR.

<sup>19</sup> See *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 A.C 546. Through extension by analogy, this seminal case will have a significant effect on other component institutions of the Church of England. The House of Lords expressly rejected the reasoning of the Court of Appeal which had held that the Church of England being an established church automatically rendered its component bodies public authorities. See the report of the Joint Parliamentary Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (February 2004), HL Paper 39, HC 382.

<sup>20</sup> 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) pp 409-420.

right.<sup>21</sup> Whilst section 13 might give presumptive priority to religious freedom,<sup>22</sup> it does not allow religious freedom to trump other rights such as Article 6.<sup>23</sup> Commentators seem divided as to the significance of the section.<sup>24</sup>

Irrespective of the questionable buttressing of section 13 of the Human Rights Act, Article 9 of the ECHR is now directly justiciable in domestic courts. It provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

The right to freedom of thought, conscience and religion is absolute. This includes the right to hold a religion or belief and to change it and the right not to allow the State to determine whether one's religion or belief is legitimate.<sup>25</sup> In contrast, the right to manifest one's religion or belief is qualified by Article 9(1) in that the manifestation must be "in worship, teaching, practice and observance" and by the permissible limitations in Article 9(2) which allow the State to interfere with the right if: (a) the interference is "prescribed by law" in that it has some basis in domestic law, is accessible and its effects foreseeable;<sup>26</sup> (b) meets one of the legitimate aims outlined in the article;<sup>27</sup> and (c) is "necessary in a democratic society" in that the interference corresponds to a pressing social need and is proportionate to the legitimate aim pursued.<sup>28</sup>

The ECHR, however, was not a dead letter prior to 1998 but a treaty obligation with status in international law.<sup>29</sup> As such, although it was not part of domestic law, Articles of the

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<sup>21</sup> See P. Cumper, 'The Protection of Religious Rights under Section 13 of the Human Rights Act 1998 [2000] *Public Law* p.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 A.C. 546 at para 15.

<sup>22</sup> See by analogy cases concerning the parallel provisions in s 12 concerning the importance to be afforded to the Convention right to freedom of expression: *Douglas v Hello! Ltd* [2001] Q.B 967, per Sedley LJ; *Lakeside Homes Limited v BBC* [2000] W.L 1841602, per Creswell J.

<sup>23</sup> *The Queen on the Application of Ullah v Special Adjudicator* [2002] EWHC 1584 (Admin) per Harrison J.

<sup>24</sup> For Rivers the provision increases the "interpretative discretion" of the judiciary while Cumper regards it merely 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) p 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, n.27 above, p.265. Other writers have also downplayed the significance of s13. See, for example, J Wadham, and H Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (1998, London) p 55.) Hill concludes that it is "at best an articulation and codification of the [pre-Human Rights Act] position" (Hill, above p 419) while Sedley has contended extra-judicially that section 13(1) of the Act serves simply "to reassure congregations that they are on the individual, not the state, side of the Convention" (Sir Stephen Sedley, 'Preface' in M Hill, above). Ahdar and Leigh seem to describe the consensus when they call the provision "rather mild". (Ahdar and Leigh, above, p 359).

<sup>25</sup> *Manoussakis v Greece* (1997) 23 EHRR 387; *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306.

<sup>26</sup> *Sahin v Turkey* (2005) 41 EHRR 8 (Grand Chamber decision).

<sup>27</sup> Namely "public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

<sup>28</sup> *Serif v Greece* (2001) 31 E.H.R.R. 20. See R Sandberg, 'Human Rights and Human Remains: The Impact of Dödsbo v Sweden' (2006) 8 *Ecclesiastical Law Journal* p.453-457.

<sup>29</sup> *P v DDP ex p Kebeline* [2000] 2 A.C 326, see the judgment of Laws LJ.

Convention, including Article 9, were regarded as “an aid to interpretation” and English courts sought to ensure that their decisions conformed to the ECHR.<sup>30</sup> The short title of the Human Rights Act is that it is “an Act to give *further effect* to the rights and freedoms guaranteed under the European Convention on Human Rights”.<sup>31</sup> That said, much of this “further effect” has been novel and influential: for example, the expression “religion or belief” as used in Article 9 has become a standard phrase both in political discourse and legislation.<sup>32</sup> Much more importance is now placed by domestic courts on the Strasbourg jurisprudence,<sup>33</sup> although it is not slavishly followed as the Court of Appeal’s judgment in *Copsey v WWB Devon Clays Ltd* makes plain.<sup>34</sup>

### **Aston Cantlow**

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 PCC of Aston Cantlow 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 it 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.

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.

In order for Convention rights to come into play, the court must first be satisfied that the alleged wrongdoer is a ‘public authority’ for the purposes of the Act. The Court of Appeal had found that the PCC was such an authority, basing its assessment principally upon the fact the Church of England is an established church. The five Law Lords unanimously rejected both its reasoning and conclusion.

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 organization. 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

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<sup>30</sup> *Ahmad v ILEA* [1977] 1 Q.B 36.

<sup>31</sup> Emphasis added.

<sup>32</sup> For example, note the use of the phrase in the Employment Equality (Religion or Belief) Regulations 2003.

<sup>33</sup> As required by section 2(1) of the Human Rights Act 1998.

<sup>34</sup> [2005] EWCA Civ 932; [2005] ICR 1789. In the case, concerning the application of Article 9 to employment law, Rix LJ pointed out that English Courts need not follow the Strasbourg case law on this topic since it does not constitute a “clear and constant jurisprudence” (see para 66). Neuberger LJ noted that there was “no reason, either on the authorities or in principle, how or why Article 9 of the Convention” should be applied since “Article 9 does not even get Mr Copsey as far as his reliance on the effect of domestic law” (para 91). See, generally, G Watson, ‘Sunday Working and Human Rights: A Critique of *Copsey v Devon Clays*’ (2006) 8 *Ecclesiastical Law Journal* pp 333-335.

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 organization.<sup>35</sup>

Lord Hope of Craighead recognised that the Church of England as a whole has no legal status or personality, but that its relationship with the state is one of recognition, not the devolution to it of any of the powers or functions of government. Lord Rodger of Earlsferry stated that 'the juridical nature of the Church is, notoriously, somewhat amorphous' but considered that the mission of the Church is a *religious* mission, distinct from the secular mission of the government, whether central or local. The ties with the state are intended to accomplish the Church's own mission, not the aims and objectives of government. He concluded that the PCC exists to carry forward the Church's mission at the local level.

Were it to be otherwise, and the component institutions of the Church of England classified as 'public authorities', then, by virtue of the way the Human Rights Act is drafted, those institutions would lose the status of 'victim'. This would prevent them from complaining of any violation of Convention rights, including that of freedom of religion. This would have been an extraordinary conclusion since, as Lord Nicholls of Birkenhead pointed out, the Act goes out of its way in section 13 to single out for express mention the exercise by religious organisations of the Convention right to freedom of thought, conscience and religion.

Not being classified a 'public authority', the Church of England remains free to engage in its mission and witness. In doing so it is on an equal footing with all other denominations and faith communities in the United Kingdom. It may well be that at some future date chancel repair liability will be revisited but in a dignified and systematic way providing compensation for parishes in the process. The House of Lords has ensured that lay rectors cannot avail themselves of the Human Rights Act to evade a clear legal liability and achieve a windfall increase in the value of their property.

### **Religious dress**

Article 9 provides a positive right to both the freedom of thought, conscience and religion and the manifestation of that religion or belief. The right to freedom of thought, conscience and religion is absolute. In contrast, the right to manifest one's religion or belief is limited by Article 9(1) in that the manifestation must be 'in worship, teaching, practice and observance' and, more importantly, by the qualifications in Article 9(2) which permit the state to interfere with the right if three tests in Article 9(2) are met: the interference must be 'prescribed by law', have one or more of the legitimate aims listed and be 'necessary in a democratic society'. Litigants need to show that there has been an interference with the manifestation of their religion or belief under Article 9(1), and the onus then falls on the State to show that this interference was justified under Article 9(2).

#### **(i) Interference under Article 9(1)**

The European Court of Human Rights in Strasbourg generally takes a formulaic approach to Article 9 cases. The Court invariably begins by stressing the importance of the right, citing the leading case, *Kokkinakis v Greece*,<sup>36</sup> which described how 'freedom of thought, conscience and

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<sup>35</sup> Per Lord Nicholls of Birkenhead at paragraph 13.

<sup>36</sup> (1994) 17 EHRR 397.

religion is one of the foundations of a “democratic society” within the meaning of the Convention’.<sup>37</sup> The Court then asks whether there has been an interference with Article 9(1) and if there has been, whether that interference is justified under Article 9(2). The question of whether there has been an interference is often a formality: it is sometimes expressed as asking whether Article 9 has been engaged. Strasbourg has employed three ‘filtering devices’ to exclude claims under the question of interference: the definition of belief, the manifestation/motivation requirement and the specific situation rule.<sup>38</sup>

#### (a) Definition of Belief<sup>39</sup>

The European Court of Human Rights has taken a liberal approach to the definition of religion. Strasbourg institutions have considered claims concerning scientology,<sup>40</sup> druidism,<sup>41</sup> pacifism,<sup>42</sup> communism,<sup>43</sup> atheism,<sup>44</sup> pro-life,<sup>45</sup> Divine Light Zentrum,<sup>46</sup> the Moon Sect,<sup>47</sup> as well as ‘splinter’ groups within larger traditions,<sup>48</sup> and have invariably done so without questioning whether the objects of such claims are protected.<sup>49</sup> Strasbourg case law tends to revolve around the definition of ‘belief’, rather than the definition of ‘religion’. The term ‘belief’ is considered in Strasbourg jurisprudence to require a worldview rather than a mere opinion.<sup>50</sup> However, Strasbourg has only been prepared to use the belief filter in exceptional cases.

The Strasbourg approach has been replicated at the domestic level. In the House of Lords decision of *R v Secretary of State for Education and Employment and others ex parte Williamson*,<sup>51</sup> Lord Nicholls noted that the protection of ‘religion or belief’ meant that the question of ‘deciding whether a belief is to be characterised as religious ... will seldom, if ever, arise under the European Convention’ because it does not matter whether the belief is religious or non-religious.<sup>52</sup> Moreover, Lord Nicholls noted that ‘freedom of religion protects the subjective belief of an individual’.<sup>53</sup> Lord Walker of Gestingthorpe, in particular, doubted

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<sup>37</sup> The *Kokkinakis* justification is twofold, stressing both the social and personal functions of religion. The European Court of Human Rights permits a ‘margin of appreciation’ allowing States to differ from each other in relation to their laws and policies to some extent to allow for their different cultures. While previously Strasbourg has spoken of the existence of a wide margin of appreciation in the sphere of morals and religion (especially in relation to attacks on religious convictions), recent decisions suggest a degree of inconsistency in the deference which the Strasbourg Court will afford to national legislatures on matters of religion: see *Sahin v Turkey* (2005) 41 EHRR 8 and *Lautsi v Italy* [2009] ECHR (Application No. 30814/06), where the decision of the Grand Chamber is awaited at the time of writing.

<sup>38</sup> R Sandberg, ‘The Changing Position of Religious Minorities in English Law: The Legacy of *Begum*’, in R Grillo et al (ed), *Legal Practice and Cultural Diversity* (Aldershot: Ashgate, 2009), 267–282.

<sup>39</sup> See R Sandberg, ‘Defining Religion: Towards An Interdisciplinary Approach’, *Revista General de Derecho Canonico y Derecho Eclesiástico del Estado* 17 (2008): 1–23.

<sup>40</sup> *X and Church of Scientology v Sweden* (1978) 16 DR 68.

<sup>41</sup> *Chappell v United Kingdom* (1987) 53 DR 241. Although the existence of Druidism as a religion was questioned, the case was decided purely on the grounds that State restrictions on the celebration of the summer solstice at Stonehenge were justified under Article 9(2).

<sup>42</sup> *Arrowsmith v United Kingdom* (1978) 19 DR 5.

<sup>43</sup> *Hazar, Hazar and Acik v Turkey* (1991) 72 DR 200.

<sup>44</sup> *Angeleni v Sweden* (1986) 51 DR 41.

<sup>45</sup> *Plattform ‘Ärzte für das Leben’ v Austria* (1985) 44 DR 65.

<sup>46</sup> *Omkanananda and the Divine Light Zentrum v Switzerland* (1981) 25 DR 105.

<sup>47</sup> *X v Austria* (1981) 26 DR 89.

<sup>48</sup> For example, *Serif v Greece* (1999) 31 EHRR 561 (Mufti elected by Mosque congregations in opposition to the Mufti appointed by the Government).

<sup>49</sup> R Ahdar & I Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005), 124; PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), 207.

<sup>50</sup> It was defined in *Campbell and Cosans v United Kingdom*, (1982) 4 EHRR 293 as denoting ‘views that attain a certain level of cogency, seriousness, cohesion and importance’ (para 36).

<sup>51</sup> [2005] UKHL 15, [2005] 2 AC 246.

<sup>52</sup> Paragraph 24.

<sup>53</sup> Paragraph 22.

whether it was right for courts, except in extreme cases, 'to impose an evaluative filter' at the stage of identifying whether there was a belief, 'especially when religious beliefs are involved'.<sup>54</sup> Generally, however, United Kingdom domestic courts have not relied upon the definition of belief as a filter in their interpretation of Article 9.<sup>55</sup>

#### *(b) The Manifestation or Motivation Requirement*

The second filter used in relation to Article 9(1) is the manifestation/motivation requirement, which requires that the claimant's actions actually express his or her religion or belief and area a manifestation of that religion or belief as opposed to being merely motivated by it.<sup>56</sup> It is not surprising, therefore, that this filter is not always employed by the court.<sup>57</sup> At Strasbourg, the test has often been rephrased as requiring, for example, that the action is 'intimately linked' to the claimant's religion or belief,<sup>58</sup> or whether the actions 'give expression' to his religion or belief.<sup>59</sup>

In *R v Secretary of State for Education and Employment and others ex parte Williamson*,<sup>60</sup> although Lord Nicholls did note the motivation requirement, stating that 'Article 9 does not "in all cases" guarantee the right to behave in public in a way "dictated by a belief"',<sup>61</sup> he held that this should not exclude the claim. He further noted that if 'the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice' and that 'in such cases the act is 'intimately linked' to the belief'.<sup>62</sup> However, he added this did not mean 'that a perceived obligation is a prerequisite to manifestation of a belief in practice'.<sup>63</sup> That a belief was obligatory was simply good evidence that the exercise of that belief was manifestation protected by Article 9; it was not the case that a belief had to be obligatory to be protected by Article 9.

#### *(c) The Specific Situation Rule*

The third 'filtering device' may be styled the specific situation rule. It recognises that a person's Article 9 rights may be influenced by the particular situation of the individual claiming that freedom. This principle is not of universal application: it only applies where a person voluntarily submitted to a particular system of rules. Strasbourg has recognised that the application of this rule in specific situations such as in relation to detainees,<sup>64</sup> non-compulsory military service,<sup>65</sup>

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<sup>54</sup> Paragraph 57.

<sup>55</sup> This is shown by two cases concerning religious drug use. In *R v Taylor* [2001] EWCA Crim 2263 and *R v Andrews* [2004] EWCA Crim 947, cases concerning the possession and importing of cannabis by Rastafarians, the Court of Appeal held that drug prohibition laws could be justified under Article 9(2). It was assumed without comment that Rastafarianism was a religion and that drug-taking was capable being a manifestation of that religion under Article 9(1).

<sup>56</sup> *Arrowsmith v. United Kingdom* (1981) 3 EHRR 218. This rule has been criticised on the basis that the presence or absence of religious motivation may actually serve as a good indicator of whether a belief should be protected and that a rigid adherence to the manifestation requirement 'would seem to discriminate against religions without an established cultural base in European States' whose devotions 'take different forms, such as sexual intercourse, ritual violence, or refusal to pay taxes to a centralised state hostile to their beliefs'. See PW Edge, 'Current Problems in Article 9 of the European Convention on Human Rights' *Juridical Review* (1996): 42 at 45–47.

<sup>57</sup> S Knights, *Freedom of Religion, Minorities and the Law* (Oxford University Press, Oxford 2007), 44; R. Sandberg, 'The Changing Position of Religious Minorities in English Law: The Legacy of *Begum*', in R Grillo et al (ed) *Legal Practice and Cultural Diversity*, (Aldershot: Ashgate, 2009).

<sup>58</sup> *C v UK* (1983) 37 DR 142, 144; *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55.

<sup>59</sup> *Knudsen v. Norway* (1985) 42 DR 247.

<sup>60</sup> [2005] UKHL 15, [2005] 2 AC 246.

<sup>61</sup> Paragraph 30.

<sup>62</sup> At paras 32–33.

<sup>63</sup> At paras 32–33.

<sup>64</sup> *X v United Kingdom* (1974) 1 D& R at 41–42.

<sup>65</sup> *Kalaç v Turkey* (1997) 27 EHRR 552.



employment,<sup>66</sup> and enrolment at university.<sup>67</sup> However, in *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*<sup>68</sup> Strasbourg seemed to go further by imposing an 'impossibility test': the Court commented that an 'alternative means of accommodating religious beliefs had ... to be "impossible" before a claim of interference under Article 9 could succeed.' This broader approach has not been consistently followed in subsequent Strasbourg cases and in *Sahin v Turkey*,<sup>69</sup> concerning a university regulation banning a student from wearing a headscarf at enrolment, lectures and examinations, although the specific situation rule was referred to by the Court,<sup>70</sup> the Court proceeded 'on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion'.<sup>71</sup>

The early decisions of United Kingdom domestic courts recognised the specific situation rule but echoed the later Strasbourg jurisprudence in noting its limited scope and refrained from enthusiastically applying the rule.<sup>72</sup> The House of Lords' decision in *Williamson* also recognised the existence of the specific situation rule, but did not apply it to the facts of the case. As Lord Nicholls noted, 'What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice', meaning that an individual 'may need to take his specific situation into account'.<sup>73</sup>

### ***(ii) Justification Under Article 9(2)***

In Strasbourg jurisprudence the focus invariably shifts from the question of interference under Article 9(1) to the Article 9(2) qualifications, which are used to determine whether the interference by the State was justified. The same is also true of domestic decisions, though for the reasons discussed above, in most cases the consideration of Article 9(2) by a domestic court is often *obiter*, the court having rejected the claim on the question of interference under Article 9(1). Nevertheless the vast majority of decisions address the three tests laid out in Article 9(2) applying them one by one: to be justified the interference must be 'prescribed by law', have a 'legitimate aim' and be 'necessary in a democratic society'.

#### ***(a) Prescribed by Law***

This first test requires that the interference must have some basis in domestic law. This test has not proved problematic for the domestic judiciary: for instance, the House of Lords has held that both a rule 'prescribed by primary legislation in clear terms'<sup>74</sup> and a school uniform policy<sup>75</sup> were, respectively, prescribed by law. In relation to the latter, emphasis was given to the fact

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<sup>66</sup> *Stedman v United Kingdom* (1997) 5 EHRLR 544; *Ahmad v United Kingdom* (1981) 4 EHRR 126.

<sup>67</sup> *Karaduman v Turkey* (1993) 74 DR 93.

<sup>68</sup> (2000) 9 BHRC 27.

<sup>69</sup> (2005) 41EHRR 8.

<sup>70</sup> Para 66.

<sup>71</sup> Para 71.

<sup>72</sup> This was epitomised by the Court of Appeal decision in *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932 concerning an employee dismissed after he had refused to agree to a contractual variation in his working hours to introduce a rotating shift procedure which included some Sunday working. Although Court of Appeal dismissed the employee's appeal on the basis of domestic employment law, the judges were extremely critical of Article 9 and the Strasbourg specific situation rule questioning whether it enhanced the protection afforded by domestic law.

<sup>73</sup> Para 38.

<sup>74</sup> *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, [2005] 2 AC 246.

<sup>75</sup> This was accepted by all of the appellate committee in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, the full judgment in which is discussed in greater detail below.

that schools and their governors were permitted under statutory authority to make rules on uniform and those rules had been very clearly communicated to those affected by them.<sup>76</sup>

*(b) Legitimate Aim*

The second test is that the interference fulfils one of the aims listed in Article 9(2). These overlap substantially.<sup>77</sup> At Strasbourg, this requirement is often a formality: Taylor has noted that the margin of appreciation adopted by European institutions means that they ‘tend to accept rather than challenge the aim claimed by the State, and accordingly pass over this precondition with little detailed analysis’.<sup>78</sup> The same appears to be true at a domestic level. Although in most cases the legitimate aim is protecting the rights and freedoms of others,<sup>79</sup> referring to the Convention rights of others, a wide range of legitimate aims have been cited by courts.<sup>80</sup>

*(c) Necessary in a Democratic Society*

The third test has been the subject of clarification by Strasbourg. It is understood that the requirement that the interference be necessary in a democratic society requires two tests to be met: the interference must correspond to a ‘pressing social need’ and it must be ‘proportionate to the legitimate aim pursued’.<sup>81</sup> This requires a ‘balancing exercise’ whereby the court asks ‘whether the interference with the right is more extensive than is justified by the legitimate aim’.<sup>82</sup> Since ‘the notion of proportionality will always contain some subjective element and depend significantly on the context’,<sup>83</sup> it is not surprising that different judges have taken differing approaches to this test.

***Discrimination in the enjoyment of Convention Rights***

The enjoyment of all Convention rights is subject to Article 14. While Article 9 may be said to be concerned with positive religious freedom (the liberty to believe and manifest one’s belief), Article 14 is concerned with negative religious freedom (the liberty from discrimination on the grounds of belief).<sup>84</sup> Article 14 forbids discrimination on, *inter alia*, grounds of religion but only does so in regard to ‘the rights and freedoms set forth in this Convention’. Article 1 of Protocol 12 extends this to ‘any right set forth by law’ but this has not been ratified in the United Kingdom. This does not mean that a ‘violation of a substantive Article need to be established at

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<sup>76</sup> Lord Bingham in *Begum* (ibid) at para 26.

<sup>77</sup> C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2002).

<sup>78</sup> PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), 301–302.

<sup>79</sup> See *Begum*, Lord Bingham at para 26, Lord Hoffmann at 58 and Baroness Hale at 94.

<sup>80</sup> The question of how narrow a legitimate aim may be was addressed by the Court of Appeal in *R (on the Application of Swami Suryananda) v. Welsh Ministers* [2007] EWCA Civ 893 concerning the decision by the Welsh Assembly Government to order the slaughter of Shambo, a bullock at the claimant’s Hindu temple, who had tested positive for the bacterium that causes bovine tuberculosis (TB). The claimant applied for judicial review, contesting that, since the sacredness of life was a cornerstone of Hindu beliefs and bovines played an important part in Hinduism, the decision breached his rights under Article 9 ECHR. The High Court [2007] EWHC (Admin) 1736 granted the application for judicial review and quashed the decision by the Welsh Ministers, holding that the Welsh Assembly Government had defined this legitimate object too narrowly to be a proper public interest objective for the purposes of Article 9(2): the elimination of any risk of a particular animal transmitting TB may be appropriate in the pursuit of some wider public health objective but cannot be a public health objective in itself. The Court of Appeal unanimously allowed the appeal and on the question of the legitimate aim held that although there was a risk that an objective may be framed so narrowly that it becomes coincident with the results sought, in the instant case the Welsh Ministers had a public health objective – the eradication or at least control of bovine tuberculosis and so the Minister was entitled to make the decision she did.

<sup>81</sup> *Serif v Greece* (2001) 31 EHRR 20.

<sup>82</sup> D Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford: Oxford University Press, 2002), 57.

<sup>83</sup> C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2002) at page 145.

<sup>84</sup> R Ahdar & I Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) at page 100.

all in cases involving discrimination' under Article 14.<sup>85</sup> Strasbourg has confirmed that 'a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature',<sup>86</sup> that is, if the distinction has no objective and reasonable justification.<sup>87</sup> Other Articles will often interact with Article 9; for instance, where freedom of expression clashes with freedom of religion. Strasbourg has held that the freedom to manifest religion does not include a right to be exempt from all criticism<sup>88</sup> and freedom of expression contains 'a duty to avoid expressions that are gratuitously offensive to others and profane'.<sup>89</sup>

Although the reasoning of the European Court of Human Rights in Strasbourg in some respects may be suspect, the United Kingdom domestic courts are nevertheless under a statutory duty to take it into account.<sup>90</sup> In the cases concerning religious liberty heard in England since the enactment of the Human Rights Act, some judgments have been delivered without reference to Article 9 or to freedom of religion at all.<sup>91</sup> In other cases, detailed reference to and the application of the Article 9 rights have reinforced the common law position, not necessarily changing the outcome of the case but augmenting and, on occasion, improving the reasoning upon which the decision was made.<sup>92</sup> Recent cases on the use of drugs for a religious purpose are a clear example of this: the Human Rights Act 1998 has allowed judges to use the limitations under Article 9(2) as the process by which to determine the matter.<sup>93</sup> This seems preferable to the approach used by the American District Court which excluded a similar claim by relying instead upon a restrictive definition of religion as a filtering device.<sup>94</sup> The English interpretation of the Article 9 right and its limitations seems more satisfactory than the American approach which effectively assesses the legitimacy of a religious belief and crudely manipulates its definition of religion.

### Religious dress

In common with many civic freedoms, the legal regulation of religious matters has been affected by the Human Rights Act. No longer are restrictions on religious symbols and religious dress merely governed by *Wednesbury* unreasonableness,<sup>95</sup> as Poulter had previously suggested.<sup>96</sup> There are now be an alternative cause of action under Article 9 itself. As already discussed, the European Court of Human Rights has determined that wearing religious dress or displaying religious symbols is a manifestation of one's religion or belief and is thus protected by Article 9(1), but it has consistently upheld limitations upon the exercise of the right. In *Dahlab v*

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<sup>85</sup> PM Taylor, *Freedom of Religion* (Cambridge: Cambridge University Press, 2005), 182–183.

<sup>86</sup> *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1979-80) 1 EHRR 252 at 282.

<sup>87</sup> Infringement of Article 14 may be justified if it pursues a 'legitimate aim' and if there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised': *Darby v Sweden* (1991) 13 EHRR 774.

<sup>88</sup> *IA v Turkey* (Application no 42571/98) 13 September 2005, para 28: 'Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.'

<sup>89</sup> *IA v Turkey* (Application no 42571/98) 13 September 2005, para 24.

<sup>90</sup> Though not necessarily follow it: *Copsey v WWB Devon Clays Ltd* [2005] ICR 1789.

<sup>91</sup> See, for example, *Gallagher v Church of Jesus Christ of the Latter-Day Saints* [2006] EWCA Civ 1598.

<sup>92</sup> See, for example, *Re Durrington Cemetery* [2000] 3 WLR 1322 *per* Hill Ch, concerning the exhumation of the remains of a Jew from a graveyard consecrated in accordance with the rites of the Church of England.

<sup>93</sup> *R v Taylor* [2001] EWCA Crim 2263.

<sup>94</sup> *United States v Kuch* 288 F Supp 439 (1968).

<sup>95</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1KB 223.

<sup>96</sup> S Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* p.68-69.

*Switzerland*,<sup>97</sup> the Court held that a ban preventing a teacher of small children from wearing her headscarf at school was justified as it had the legitimate aim of protecting the rights and freedoms of others, public order and public safety and there was a pressing social need given the impact that the 'powerful external symbol' conveyed by her wearing a headscarf could have upon young children and by the possible proselytising effect. In *Sahin v Turkey*,<sup>98</sup> the court held that a university regulation banning a student from wearing a headscarf at enrolment, lectures and examinations was justified as being prescribed by law, having the legitimate aim of protecting the rights and freedoms of others and of protecting public order and being necessary in a democratic society.<sup>99</sup>

### **The jilbab**

The most substantive discussion of the law affecting religious dress for school pupils is to be found in the decision of *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*,<sup>100</sup> both at first instance and in two subsequent appeals. Shabina Begum, a Muslim, stopped attending Denbigh High School when the school refused to allow her to wear the jilbab,<sup>101</sup> 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.<sup>102</sup> At first instance,<sup>103</sup> 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'.<sup>104</sup> This approach was not in conformity with Strasbourg jurisprudence. The bold assertion that insistence on wearing religious dress does not constitute a manifestation of one's religion or belief is wrong.

The subsequent Court of Appeal judgment, which reversed the decision of Bennett J, was subject to much academic criticism.<sup>105</sup> The flaw was not the treatment of Article 9(1), which was undoubtedly correct, but rather the application of Article 9(2). The Court of Appeal followed Strasbourg jurisprudence to hold that Article 9(1) was engaged but, as Poole has pointed out, in deciding that the limitation of the right was justified under Article 9(2) Brooke LJ's interpretation of the Strasbourg jurisprudence was predicated upon a basic mistake.<sup>106</sup> Rather than deciding whether the limitation could be justified as being necessary in a democratic society, he outlined the decision-making structure and process which the school should have used since, on his

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<sup>97</sup> Unreported, Application no 42393/98, 15 February 2001.

<sup>98</sup> (2005) 41 EHRR 8.

<sup>99</sup> The Court held that the interference had a pressing social need given the existence of extremist political movements in Turkey and 'the impact which wearing such a symbol ... may have on those who choose not to wear it'. The interference was also proportionate since the authorities 'sought throughout that decision-making process to adapt to the evolving situation through continued dialogue with those concerned, while at the same time ensuring that order was maintained on the premises'.

<sup>100</sup> [2006] UKHL 15, [2006] 2 WLR 719.

<sup>101</sup> 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.

<sup>102</sup> See the Court of Appeal judgment of Brooke LJ, [2005] EWCA Civ 199 para 8 and 14.

<sup>103</sup> [2004] EWHC 1389.

<sup>104</sup> See paras 72-74.

<sup>105</sup> [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.

<sup>106</sup> Poole, p 689-690.

findings, the onus lay on the school to justify its interference with the Convention right.<sup>107</sup> This is a legally unsupportable approach. Whilst courts adopt a procedural analysis in the Administrative Court when subjecting the decisions of public authorities to judicial review, there is nothing in the Human Rights Act, the ECHR or Convention jurisprudence from Strasbourg requiring public authorities themselves to adopt a proportionality approach to the structuring of their own decision-making.<sup>108</sup>

The further appeal to the House of Lords (now reconstituted as the United Kingdom's Supreme Court) led to a decision<sup>109</sup> which was welcomed in that it corrected the Court of Appeal's overly formulaic approach to Article 9(2), and held, correctly in my view, that there was no breach of Article 9. However, the majority of their Lordships repeated and compounded the error originally made by Bennett J in relation to Article 9(1). Lords Bingham of Cornhill, Hoffmann and Scott of Foscote properly 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.<sup>110</sup> Their Lordships applied the 'specific situation' rule as if it were of general effect.<sup>111</sup> Lord Bingham correctly elucidated the rule but proceeded to apply it to the facts of the *Begum* case without explanation. He quoted selectively from numerous Strasbourg and domestic cases which had addressed the rule but omitted to mention references to the specific limits to its scope and extent. 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, and not infrequently little choice as to the school which a child must attend.

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 more consistent with Strasbourg jurisprudence in that they both recognised that Begum's right under Article 9 had been engaged but that this was justified under Article 9(2). 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'.<sup>112</sup> 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 fuller and more satisfactory analysis.<sup>113</sup> The restriction of Article 9(1) by the majority was unnecessary given that legitimate limitations on the right are routinely justified under Article 9(2).

Although the ultimate disposal of the case in the House of Lords was undoubtedly correct, restoring as it did the dismissal of the claim by Bennett J, the reasoning is not entirely

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<sup>107</sup> Paras 75-76.

<sup>108</sup> Poole, p 689-690.

<sup>109</sup> [2006] UKHL 15, [2006] 2 WLR 719.

<sup>110</sup> 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.

<sup>111</sup> 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 *Dahlab v Switzerland* and *Sahin v Turkey*.

<sup>112</sup> Para 41. Albeit not in the formulaic manner which had influenced the flawed reasoning in the Court of Appeal, discussed above.

<sup>113</sup> It is significant that Lords Bingham and Hoffmann still felt it necessary to consider Article 9(2) in depth anyway.

satisfactory, in common with many of the early cases brought to the appellate courts in the altered legal landscape of the Human Rights Act 1998. Lord Bingham stated that:

The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.<sup>114</sup>

He concluded that the Strasbourg case law indicated that ‘interference is not easily established’<sup>115</sup> before applying the ‘specific situation’ rule to the case without explanation.

The House of Lords conceptualised the question largely in terms of proportionality, giving scant attention to identifying a pressing social need.<sup>116</sup> Lady Hale concluded that the school’s uniform policy was a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed their concern that if the *jilbab* were to be allowed they would face pressure to adopt it even though they might not wish to do so.<sup>117</sup> The analysis of the House of Lords would have been far more satisfactory had it adopted the classic Strasbourg approach, without recourse to the ‘specific situation’ rule:

- i. was the wearing of the *jilbab* a manifestation of the applicant’s religion? - yes
- ii. was its prohibition an interference? – yes
- iii. could the prohibition be justified? - yes

### **The *niqab***

In *R (on the application of X) v Y School*,<sup>118</sup> Silber J considered the *Begum* precedent to be ‘an insuperable barrier’ to a claim for judicial review by a schoolgirl who wished to wear a *niqab* veil while she was being taught by male teachers at school or was likely to be seen by men. 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 in *Begum* that the ‘specific situation’ rule applied in the case of schools. Further, unlike Lord Bingham, Silber J stated that there would be no interference with the Article 9 right simply because ‘there are other means open to practise or observe [one’s] religion without undue hardship or inconvenience’.<sup>119</sup>

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<sup>114</sup> At para. 23.

<sup>115</sup> At para. 24.

<sup>116</sup> Lord Bingham para 26, Lady Hale at para 94.

<sup>117</sup> Paragraph 98. Drawing upon the Strasbourg decision in *Sahin*, Lord Bingham concluded that that the interference with the Article 9(1) right was proportionate since the school ‘had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way’: para 34.

<sup>118</sup> [2006] EWHC (Admin) 298.

<sup>119</sup> This arose from Silber J’s (mis)interpretation of Lord Bingham’s elucidation of the ‘specific situation’ rule. Lord Bingham had said that “The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance *and* there are other means open to practise or observe his or her religion without undue hardship or inconvenience”. Silber J interpreted this as meaning that there would be no interference either (a) where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance *or* (b) where there are other means open to practise or observe his or her religion without undue hardship or inconvenience. He appears to dilute Lord Bingham’s test.

Silber J four reasons for dismissing the claim, in my assessment, are based upon a questionable reading of the Strasbourg jurisprudence and fail to explain why the 'specific situation' rule should be given general effect. His first reason amounted to nothing more than a recitation of Lord Scott's proposition in *Begum* that there is no infringement of the right to manifest 'where other public institutions offering similar services' are available. Similarly, the second reason was a quotation of Lord Hoffmann's assertion in *Begum* that 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'. The third, derived from Strasbourg jurisprudence, was that 'the Strasbourg case law shows that there is no interference with an Article 9 right where there is an alternative place at which the services in question can be provided without the objectionable rule in question'.<sup>120</sup> And the fourth reason was that Strasbourg had imposed 'a high threshold before interference can be established'.<sup>121</sup> Quoting Lord Bingham, Silber J found no interference with the claimant's rights under Article 9 and interpreted Lord Bingham's elucidation of the specific situation rule in *Begum* as meaning that there would be no interference whenever a person had voluntarily accepted an employment or role that does not accommodate that practice or observance or where there are other means open to practise or observe that religion without undue hardship or inconvenience. In other words, since it was open to the girl to move to another school (as was the case in *Begum*) where she would be permitted to wear the garment in question, there was no interference in the manifestation of her religion.

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. Ironically, the approach now taken by English law 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 had been no interference. Surely the better approach would have been to require schools to provide a balanced policy, judged against the factors enumerated in Article 9(2). In his admirable treatment of Article 9(2), Silber J unwittingly showed the inadequacy of the approach now taken by English courts applying the reasoning in *Begum*. By giving general effect to a filtering device which had hitherto been used only by the European Court of Human Rights 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.<sup>122</sup> This seems contrary both to the spirit of the ECHR as previously interpreted by the House of Lords in *Williamson*<sup>123</sup> and by the European Court of Human Rights in Strasbourg.<sup>124</sup> This is particularly concerning given that Strasbourg has started to take a less restricted approach. 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

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<sup>120</sup> For this proposition, Silber J cited the *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 BHRC 27, the authority of which he later questioned by repeating Lord Hoffmann's comment in *Begum* that use of the term impossible 'may be setting the test rather high'.

<sup>121</sup> Silber J stated that he had not been shown or found any case where 'it was held that there would be an infringement of person's Article 9 rights when he or she could without excessive difficulty manifest or practice their religion as they wished in another place or in another way': see para 38.

<sup>122</sup> 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.

<sup>123</sup> *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, [2005] 2 A.C. 246.

<sup>124</sup> 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).

and economic charters'.<sup>125</sup> This wider mechanism as employed by the European Court of Human Rights contrasts sharply with the increasingly narrow approach taken by English courts.

### **The purity ring**

In *R (on the Application of Playfoot (A Child)) v Millais School Governing Body*,<sup>126</sup> an application for judicial review of a decision by a school to prevent a schoolgirl from wearing a 'purity' ring on grounds of Articles 9 and 14 of the ECHR was refused by the High Court on the question of interference. The judge held that Article 9 was not engaged since, although the claimant held a 'religious belief', in that she had made a decision to remain a virgin until marriage because she was a Christian, the wearing of the ring was not 'intimately linked' to the belief in chastity before marriage because *Playfoot* was under no obligation, by reason of her faith, to wear the ring. The judge correctly cited Lord Nicholls in *Williamson* as stating that if 'the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice' but incorrectly said that this meant that the reverse was also true: if there was no such obligation then the act cannot be a manifestation of that belief.<sup>127</sup> The judge further commented that even if he had found that the purity ring was a manifestation of religion then, there would have been no interference with Article 9 since the claimant had voluntarily accepted the school's uniform policy and there were other means open to her to practise her belief without undue hardship or inconvenience. Thus he relied upon the slightly crude 'specific situation' rule rather than a more nuanced analysis of the Article 9 formulaic approach.

### **The Sikh Kara bracelet**

In *R (on the application of Watkins-Singh) v The Governing Body of Aberdare Girls' High School*,<sup>128</sup> a school girl who was an observant though non-initiated Sikh sought to wear her Kara bracelet to school. Silber J heard expert evidence that although the Kara was often worn it was only compulsory in the case of initiated Sikhs. Silber J stated that disadvantage would occur – but would not only occur – where a pupil is forbidden from wearing an item where 'that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to his or her racial identity or his or her religious belief' and where 'the wearing of the item can be shown objectively to be of exceptional importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person's religion or race'.<sup>129</sup> This approach, though related to religious discrimination law, is in line with the most recent Strasbourg jurisprudence on the manifestation/motivation requirement discussed above. According to some commentators,<sup>130</sup> the success of the claim in *Watkins-Singh* means that litigants are now best advised not to pursue claims under Article 9 but to invoke the detailed anti-discrimination provisions under the Equality Act and secondary legislation made thereunder.<sup>131</sup>

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<sup>125</sup> H Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69(4) *Modern Law Review* pp 619-643.

<sup>126</sup> [2007] EWHC Admin 1698.

<sup>127</sup> Paragraph 23.

<sup>128</sup> [2008] EWHC (Admin) 1865.

<sup>129</sup> Paragraphs 56–57.

<sup>130</sup> R Sandberg, 'The Changing Position of Religious Minorities in English Law: The Legacy of *Begum*', in R Grillo et al (ed) *Legal Practice and Cultural Diversity* (Aldershot: Ashgate, 2009), 267; I Leigh, 'Recent Developments in Religious Liberty', (2009) 11 *Ecc LJ* 65.

<sup>131</sup> However, *dicta* from *Begum* have been influential in a number of religious discrimination decisions, such as *Ladele v London Borough of Islington* [2009] EWCA (Civ) 1357, see paras 54–61.



## Chastisement of children

On 24 February 2005 the House of Lords delivered a significant judgment on freedom of religion, parental rights to religious freedom, corporal punishment and children's rights: *R (Williamson) v Secretary of State for Education and Employment*<sup>132</sup> which demonstrates that the House of Lords adopts a much more generous approach to freedom of religion or belief than the European Court of Human Rights.<sup>133</sup>

The abolition of corporal punishment at schools in England and Wales developed from the Education (No 2) Act 1986,<sup>134</sup> to section 548 of the Education Act 1996,<sup>135</sup> (as extended by section 131 of the School Standards and Framework Act 1998).<sup>136</sup> In parallel, the law has redefined reasonable chastisement, from the Education Act 1993,<sup>137</sup> to the Children Act 2004.<sup>138</sup> Accordingly, to be lawful, corporal punishment administered by a parent must now stop short of causing actual bodily harm.

The Court of Appeal had decided the case on narrow Article 9(1) grounds. It had held that section 548 did prevent 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 section 548 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. Under Article 9(1), the applicants' beliefs were engaged and they were manifesting their religion. Section 548 constituted an interference with the manifestation of their 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 court to embark on an inquiry into the asserted belief and judge its "validity"'.<sup>139</sup> Lord Walker agreed that 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals'.<sup>140</sup> This is remarkable, considering the on-going discussion between the 'compatibility' of religion with human rights principles, especially at ECHR level. For example in *Refah Partisi (The Welfare Party) and others v Turkey*, the Court said this:

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<sup>132</sup> *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*.

<sup>133</sup> 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

<sup>134</sup> Applicable to maintained schools (state schools) and non-maintained schools (independent schools) receiving public funding. This followed *Campbell and Cosans v UK*, Applications 7511/76-7743/76 (1982)

<sup>135</sup> Section 548(1) provides: 'Corporal punishment given by, or on the authority of, a member of staff to a child- (a) 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'.

<sup>136</sup> Applicable to privately-maintained schools.

<sup>137</sup> This followed *Costello-Roberts v UK*, Application 13134/87 (1993).

<sup>138</sup> This followed *A v UK*, Application 25599/94 (1998).

<sup>139</sup> *Williamson*, paragraph 22.

<sup>140</sup> *Williamson*, paragraph 60.

the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention.<sup>141</sup>

The same point was made in *Şahin v Turkey*,<sup>142</sup> and the European Court has also stated, for example, that Sharia law is incompatible with democracy.<sup>143</sup> In the view of Strasbourg, it appears that there is no tolerance for those who are intolerant, no freedom for those who do not respect the freedoms of others. The House of Lords differs from the position of Strasbourg, as it seems to advocate a more liberal and 'tolerant' approach to religious beliefs, an approach which is to be welcomed.

The House of Lords simply accepted that the applicants were manifesting their beliefs when they authorised a child's school to administer corporal punishment.<sup>144</sup>

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.<sup>145</sup>

The House of Lords relied on the distinction established by the European Commission on Human Rights in *Arrowsmith v UK*.<sup>146</sup> 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'. Strasbourg has 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 motivated by the religious beliefs.<sup>147</sup>

The House of Lords is more generous than Strasbourg and 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'.<sup>148</sup> This raises the question whether the distinction between manifestation and motivation is tenable. Shifting the discussion to the issue

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<sup>141</sup> Applications 41340/98-41342/98-41343/98-41344/98 (2003), paragraph 93.

<sup>142</sup> Application 44774/98 (2004), paragraph 99.

<sup>143</sup> *Refah Partisi*, paragraph 123. This view has been criticised by 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.

<sup>144</sup> *Williamson*, paragraphs 36-37. The rights of the parents (but not of the teachers) under the Protocol were also engaged.

<sup>145</sup> *Williams*, paragraph 35.

<sup>146</sup> Application 7050/75 (1978).

<sup>147</sup> M Evans (above) at 138.

<sup>148</sup> *Williamson*, paragraph 32.

of justification is to be welcomed because this is the real battleground with human rights and corporal punishment.

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 protecting children and promoting their wellbeing,<sup>149</sup> 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. On this 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.<sup>150</sup>

Lord Nicholls adopted a classic human rights approach as he identified the conflict between parents and the State. He found that there was a large support in favour of the ban on corporal punishment, including 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.<sup>151</sup>

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'.<sup>152</sup> Strasbourg has already acknowledged in *Martins Casimiro and Cerveira Ferreira v Luxembourg*,<sup>153</sup> and *Çiftçi v Turkey*,<sup>154</sup> 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.

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<sup>149</sup> *Williamson*, paragraphs 48-49.

<sup>150</sup> *Williamson*, paragraphs 50-51.

<sup>151</sup> *Williamson*, paragraph 71.

<sup>152</sup> *Williamson*, paragraph 74.

<sup>153</sup> Application 44888/98 (1999).

<sup>154</sup> Application 71860/01 (2004).

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’.<sup>155</sup> 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 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 followed a classic human rights approach, and it is only at stage of the justification of the restriction that it found in favour of the State rather than the individual.

### Exhumation

In English ecclesiastical law (applicable to the Church of England), there is a presumption against exhumation: the leading case *Re Christ Church, Alsager*<sup>156</sup> provides a test founded on the principle that ‘there should be no disturbance of the remains save for good and proper reason’ and then elucidates when such a disturbance will be permitted. This test was applied by the Consistory Court in *Re Durrington Cemetery*.<sup>157</sup> The case concerned a practising Jew who had been buried, according to the rites of the Church of England, in a municipal cemetery in order to allow his widow to visit the grave. However, several years after his death, the widow emigrated and the deceased’s Jewish relatives sought a faculty for the remains to be removed for reinterment in a Jewish cemetery in accordance with Jewish law. Neither the widow nor the borough council objected to this. Chancellor Hill granted the faculty. Although there was a considerable delay between the original burial and the application,<sup>158</sup> such delay was caused by the ‘dignified and principled restraint on the part of [the] orthodox Jewish relatives out of respect for [the] widow’. Having decided the application in the affirmative, the Chancellor also thought it proper to make reference to the Human Rights Act 1998 and considered the impact of the ECHR as if the Act had been in force.<sup>159</sup> Citing Article 9 (freedom of thought, conscience and religion), Chancellor Hill maintained that the Consistory Court ‘would be seriously at risk of acting unlawfully under the Human Rights Act 1998 were it to deny the freedom of the orthodox Jewish relatives... to manifest their religion in practice and observance by securing the reinterment of [the] cremated remains in a Jewish cemetery and in accordance with Jewish law’.<sup>160</sup>

A few months later, after the Human Rights Act 1998 had come into force, the Consistory Court revisited this area in the case of *Re Crawley Green Road Cemetery, Luton*.<sup>161</sup> The petitioner, the widow of the deceased, sought a faculty to exhume her husband’s ashes that had been buried following a humanist funeral in consecrated ground in a cemetery in Luton. The petitioner had been unaware that the plot had ‘church associations’ and said that had she known this prior to

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<sup>155</sup> *Williamson*, paragraph 86.

<sup>156</sup> [1999] Fam 142.

<sup>157</sup> [2001] Fam 33.

<sup>158</sup> Which under the *Alsager* test is a persuasive justification for refusal of a faculty.

<sup>159</sup> The judgment was delivered on 5 June 2000; the Act came into force on 1 October 2000.

<sup>160</sup> [2001] Fam 33 at p 37.

<sup>161</sup> [2001] Fam 308.

burial, the family would have regarded it as hypocritical and not proceeded. She had subsequently moved to London and sought exhumation in order to inter the ashes closer to her new home. She also contended that she had suffered from a long term depressive illness when making the original decisions. Chancellor Bursell relied upon the petitioner's 'secondary motive' that exhumation was required because burial in consecrated ground was hypocritical given her humanist beliefs, the Chancellor examined her Article 9 rights; and held that a refusal to grant a faculty would be incompatible with her right under Article 9 to remove the ashes from a location since Article 9 not only includes 'the freedom of the act of thinking' but also includes 'to some extent at least' the 'expression' of one's beliefs.<sup>162</sup>

Although Article 9 protects the absolute right to hold a religion or belief, the right to manifest religion or belief is qualified. It is limited in two ways: firstly, it is limited by the requirement in Article 9(1) that manifestation must be 'in worship, teaching, practice and observance'; and secondly, it is limited by Article 9(2) which outlines the circumstances in which a State may limit the manifestation of religion or belief. Even if there is *prima facie* an interference with the petitioner's Article 9 right to manifest their religion or belief, that interference will not constitute a breach of Article 9 if that interference is justified under Article 9(2). In short, the interference is justified if it is 'prescribed by law';<sup>163</sup> if there is a legitimate aim;<sup>164</sup> and if interference is 'necessary in a democratic society'.<sup>165</sup>

The recent decision in *Dödsbo v Sweden* in relation to exhumation illustrates how the Convention may not provide petitioners with the absolute rights supposed by *Re Crawley Green Road*.<sup>166</sup> The applicant, the widow of the deceased, sought to move her husband's urn from a burial plot in Fagersta to a family burial plot in Stockholm the city to which she had moved. All her children agreed to the removal but the authorities denied the request under the Funeral Act 1990, which, (doctrinally or otherwise) adopted a presumption in favour of 'a peaceful rest'. Domestic appeals were rejected and the applicant herself died and was buried at Stockholm. The five children as sole heirs of the applicant pursued the application to the European Court of Human Rights invoking Article 8 (right to privacy and family life). The Court by a 4:3 majority held that there had been no violation of Article 8 of the ECHR.

The majority held that it was undisputed that the refusal to allow the removal of the urn constituted an interference with the applicant's private life.<sup>167</sup> The Court did not question the Swedish Government's submission that the interference was in accordance with law, the Funeral Act 1990. The majority held that the interference has the legitimate aim of the 'prevention of disorder, for the protection of morals, and/or for the protection of the rights of others' and that this was 'necessary in a democratic society' because 'ensuring the sanctity of graves' was 'such an important and sensitive issue that the States should be afforded a wide

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<sup>162</sup> At p 311.

<sup>163</sup> That is, it must have some basis in domestic law and that law should be accessible and its effects foreseeable: *Sahin v Turkey* (2005) 41 EHRR 8.

<sup>164</sup> The legitimate aims are those outlined in Article 9(2): 'public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

<sup>165</sup> That is, 'any such restriction must correspond to a "pressing social need" and must be "proportionate" to the legitimate aim pursued': *Serif v Greece* (2001) 31 EHRR 20.

<sup>166</sup> For a full discussion see R Sandberg, 'Human Rights and Human Remains: The Impact of *Dödsbo v Sweden*' (2006) 8 *Ecclesiastical Law Journal* p.453-457.

<sup>167</sup> They did not consider it necessary 'to determine whether such a refusal involves the notions of "family life" or "private life" cited in Article 8' but proceeded 'on the assumption that there has been an interference'.

margin of appreciation'.<sup>168</sup> The majority stressed that the Swedish authorities had balanced the relevant circumstances carefully acting within their margin of appreciation.<sup>169</sup>

The minority agreed that there had been an interference with the applicant's rights under Article 8(1) but contended that this did constitute a breach of the Convention since it could not be justified under Article 8(2). They said that the interference served no legitimate aim, reasoning that the removal of an urn from one sacred place to another sacred place would not jeopardize the principle of the sanctity of graves. Furthermore, the interference was not 'necessary in a democratic society' since 'the applicant's interest in moving the ashes of her spouse to the family grave in Stockholm weighs more heavily than the public interest invoked by the government'.

*Dödsbo v Sweden* shows that although it is important to consider Convention rights,<sup>170</sup> it is important not to read qualified rights as absolute provisions. It is clear that even if refusing to grant an application to exhume and move a dead body breaches the applicant's human rights, this does not mean that courts must reverse the presumption against exhumation to ensure that they are not in breach of the ECHR.

### Discrimination

It may be said that the legislation of the last decade or so has resulted in a 'new' law on religion and a 'new' law on sexual orientation.<sup>171</sup> There have been four important legal developments. First, the Human Rights Act 1998, in force from October 2000, 'brought rights home' by largely incorporating the European Convention on Human Rights into English law, including the Article 8 right to respect for private and family life and the Article 9 right to freedom of thought, conscience and religion.<sup>172</sup> Second, the Civil Partnership Act 2004 created a new legally recognised human relationship based on sexual orientation that excluded religion: the law prohibited the use of a religious service during a civil partnership ceremony and stipulated that a civil partnership could not be registered on religious premises. Third, there were developments in criminal law: stirring up hatred on grounds of religion or belief and sexual orientation became specifically outlawed.<sup>173</sup> Fourth, there were developments in discrimination law: discrimination on grounds of religion or belief and sexual orientation was expressly prohibited in England and Wales in relation to employment,<sup>174</sup> and goods and services.<sup>175</sup>

These developments are on-going. The Equality Act 2010 has recently consolidated the substantive law relating to religious and sexual orientation discrimination and the exceptions<sup>176</sup>

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<sup>168</sup> At para 25

<sup>169</sup> At paras 26-27

<sup>170</sup> Cf. *Re Blagdon Cemetery* [2002] 3 WLR 603 (Court of Arches held that both *Re Durrington* and *Re Crawley Green Road* could have been decided "without the need for recourse to the Human Rights Act 1998").

<sup>171</sup> For further analysis of the 'new' law regulating religion and its significance see R Sandberg, *Law and Religion* (Cambridge University Press, 2011).

<sup>172</sup> Other rights are also of importance. Article 12 provides the right to marry and Article 14 provides that the enjoyment of convention rights shall be secured without discrimination.

<sup>173</sup> Public Order Act 1986 part 3A, as added by the Racial and Religious Hatred Act 2006; as amended Criminal Justice and Immigration Act 2008

<sup>174</sup> Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations. Prior to 2003, discrimination law covered only race and sex (Race Relations Act 1976; Sex Discrimination Act 1975) as discussed below.

<sup>175</sup> Equality Act 2006, part 2; Equality Act (Sexual Orientation) Regulations 2007.

<sup>176</sup> There is a debate as to whether the term 'exception' or 'exemption' should be used. This article follows the practice of the Equality Act 2010 which refers to 'exceptions'. This can be contrasted with much of the Parliamentary debates where the use of the term 'exemption' was commonplace.

that exist for religious groups. And section 202 of the Act made provisions to remove the prohibition on registering civil partnerships on religious premises but this is not yet in force. Moreover, these legislative developments have led to a great deal of litigation concerning the ambit of these new laws and what should happen when provisions protecting sexual orientation clash with those protecting religion or belief.

Collectively these developments constitute a significant shift from non-discrimination to anti-discrimination, from passive tolerance to the active promotion of religious freedom and sexual autonomy as positive legal rights. The legal framework today is very different from ten years ago. The law now goes notably further than the *ad hoc* and piecemeal protection which existed in the twentieth century. In addition to ascertaining the effect upon religion, it may also be asked what impact this has had upon the right to discriminate: to what extent does English law allow religious groups and individuals to follow their own beliefs regarding human sexuality?<sup>177</sup>

**Further reading:**

- R Ahdar & I Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005)  
M Hill, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom' (2005) 19(2) *Emory International Law Review* 1129  
M Hill (ed), *Religious Liberty and Human Rights* (University of Wales Press, Cardiff, 2002)  
M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' (2007) *Public Law* 488-506.  
M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (Kluwer Law International, The Netherlands, 2011)  
J Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (Oxford, 2010)

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<sup>177</sup> On which see R Sandberg, 'The Right to Discriminate' (2011) *Ecclesiastical Law Journal* (forthcoming).