Re St Giles, Exhall
Court of Arches: Ellis Dean, Turner and Arlow Chh, 16 June 2021
[2021] EACC 1
Memorials – inscriptions – language

In the first instance decision, the Consistory Court of Coventry had declined to grant a faculty for a memorial bearing the Irish words 'In ár gcroíthe go deo', meaning 'in our hearts forever', unless it was accompanied by an English translation ([2020] ECC Cov 1, 6 May 2020). The petitioner was given permission to appeal ([2020] EACC 1, 18 August 2020), on the grounds of unjustifiable exercise of discretion/unfairness and other compelling reasons, namely:

i. The subject of non-English inscriptions on memorials had not been considered by the Arches Court or the Chancery Court;
ii. England was a multi-ethnic and multi-cultural society. For a significant minority of families who choose burial in an Anglican churchyard, the English language might not be the natural or complete form of expression and/or of ceremonial expression;
iii. The issue of non-English words on memorials was therefore likely to arise in future cases; and
iv. Questions of the approach to intelligibility and suitability of a Christian memorial in a Church of England churchyard were important matters of principle which the Court of Arches should consider, including in relation to the European Convention on Human Rights (ECHR).

On the first ground, the appellant argued that:

i. The court's conclusions that the inscription would be unintelligible to all but a small minority of readers in English-speaking Coventry, with a risk that it would be regarded as some form of slogan, or that its inclusion without translation would of itself be seen as a political statement, were unsupported by any evidence or based on the outdated prejudiced notion that the Irish language is associated with Irish dissident republicanism;
ii. The court's reasons for distinguishing *re St Peter & St Paul, Nutfield* [2018] ECC Swk 1, in which the single Welsh word 'Tangnefedd' had been permitted on a memorial, were legally flawed;
iii. There was an inconsistency in approach in Exhall churchyard, where there was a memorial bearing an untranslated phrase in Welsh;
iv. The court's reasoning was at odds with that set out in *re St Mary the Virgin, Eccleston* [2017] ECC Bla 4, *Nutfield* and *re St Mary, Woodkirk* [2020] ECC Lee 3; and

https://doi.org/10.1017/S0956618X2100079X Published online by Cambridge University Press

v. The decision was directly discriminatory on grounds of a protected characteristic, contrary to the Equality Act 2010. While that Act does not apply to the exercise of judicial functions, consistory courts should generally give effect to the duty to eliminate prohibited discrimination.

On the second ground, the appellant argued that:

i. The court had acted inconsistently with Article 8 and/or Article 10 of the ECHR, alone or in conjunction with Article 14, in violation of section 6 of the Human Rights Act 1998 (HRA), and as a public authority under section 6(3) of the HRA had acted unlawfully;
ii. None of the court's reasons for refusing to allow an Irish-only inscription constituted one of the exhaustive legitimate aims on which basis it would be permissible to interfere with the appellant's Article 8 or Article 10 rights;
iii. Article 14 – providing for the enjoyment of Convention rights without discrimination on any ground, including race, language, national or social origin, association with a national minority or other status – was violated.

The first issue was whether the decision of the consistory court was, in all the circumstances, including the chancellor's stated reasons for requiring an English translation, and the provisions and objectives of the Equality Act 2010, an unlawful exercise of the chancellor's discretion. The court commended the summary description in the Church of England's *Churchyards Handbook* of the purpose of memorials: to honour the dead, to comfort the living and to inform posterity. In the context of the first and third of these purposes, it was not irrational in itself to consider the intelligibility of a proposed memorial.

However, the chancellor's conclusions that the inscription would be unintelligible to all but a small minority of readers in English-speaking Coventry, with a risk that it would be regarded as some form of slogan, or that its inclusion without translation would of itself be seen as a political statement, were fundamental to his decision to require a translation. The Court of Arches found that the sentiments expressed in the judgment, which were not founded on evidence, ran so strongly counter to the reality of twenty-first-century Britain, a multi-cultural society with ready access to the internet as a source of instant translation, and to the cultural make-up of Coventry, as to have crossed the boundary from the realm of a permissible exercise of discretion into the territory of unreasonableness in the legal sense of that term.

It seemed that the chancellor was unaware of the presence in Exhall churchyard of a memorial with an untranslated Welsh phrase, as well as inscriptions in Hebrew and Latin; that reinforced the unevidenced nature of the relevant reasoning and highlighted the disproportionate result. The earlier case of *Eccleston*, which permitted an untranslated inscription in Irish, and the

https://doi.org/10.1017/S0956618X2100079X Published online by Cambridge University Press

subsequent case of *Woodkirk*, permitting an inscription in Chinese characters without translation, also strengthened the impression that the chancellor's decision was disproportionate and based on flawed reasoning.

In relation to the Equality Act, the court accepted that, although the public sector equality duty under the Act does not apply to the exercise of judicial functions, consistory courts should generally give effect to the duty to eliminate discrimination as prohibited by the Act, as set out in *re Holy Trinity, Eccleshall* [2010] 3 WLR 1761, Court of Arches. The court stressed the importance of applying the Act as a matter of principle in relation to all potential classes of discrimination. The requirement for a translation in this case was based on Irishness, a racial characteristic, and the effect of the chancellor's decision was to discriminate directly against the appellant on the basis of her race.

The judgment was unreasonable, flawed in the legal sense and should not stand. Accordingly, the appeal was allowed on Ground 1. The petition was redetermined; the appellant had no objection to a condition requiring the provision of an English translation in the parish record, and a faculty was granted, subject to that condition. (In the granted faculty, the inscription was corrected at the appellant's request to INÁR GCROÍ GO DEO.)

The second issue was whether the appellant's petition lay within the ambit of Article 8 and/or Article 10 of the ECHR and, if so, whether she had suffered discrimination or failed to receive equal treatment within the terms of Article 14. The court stated that it was plainly right that consistory courts were public authorities under the HRA. Considering Article 14 first, the court determined that it was not necessary to establish a breach of Article 8 or Article 10 but only that there was discrimination within the ambit of one or other of the Articles – that is, with a more than merely tenuous connection with them. That test was certainly met in this case. While noting that there was no right to erect a memorial, if there was a scheme whereby permission for a memorial might be granted, it must be administered without discrimination on any of the grounds identified in Article 14. It followed from the discrimination findings on Ground 1 that the chancellor's decision also breached Article 14.

There were limitations on the arguments put forward on Articles 8 and 10, and the court's brief consideration and conclusions on those points were not essential to its decision. In relation to Article 8, it concluded that the regulation of headstones in churchyards was an activity that was beyond the purview of Article 8 as it was essentially a public statement in a public place. In relation to Article 10, the court noted that the appellant had always been permitted to use the chosen Irish phrase; the intrusion was more limited than a requirement for English only and that must be relevant to the question whether there had, in law, been an interference with the right. In the circumstances, where argument had been limited and a decision on the point was not essential, the court declined to rule on the matter.

The third issue was that of what factors and principles chancellors should take into account and apply concerning inscriptions in languages other than English, both when making schemes of delegation (commonly known as 'Churchyard Regulations') and when determining faculty petitions. This section of the judgment was not essential to the determination of the appeal but was intended to be of assistance to all those involved in administering the faculty jurisdiction in relation to memorials.

The court reviewed the differing approaches to faculty petitions for departures from Churchyard Regulations. Some consistory courts imposed no higher threshold than the burden of proof in a merits-based test, as summarised in *re St John the Baptist, Adel* [2016] ECC Lee 8. Others applied a higher standard, such as requiring a 'powerful reason' for approving a departure from the Churchyard Regulations: for example, *re St Paul, Rusthall* [2016] ECC Roc 2 and *re St Mary, Prestwich* [2016] ECC Man 1. The court considered that the merits-based approach was the correct one: there should not be a starting presumption against allowing a memorial outside the parameters of the Churchyard Regulations.

As far as the Churchyard Regulations themselves were concerned, a rule or presumption against expressions in non-English languages as a matter of principle was likely to fall foul of Article 14 of the ECHR and not be justifiable within Articles 8(2) and 10(2) in the event that those Articles were engaged in a particular case. Abiding by the principles set out in Articles 8(2) and 10(2), however, should ensure that Regulations did not contravene Article 14 or the Equality Act 2010. Similarly, these principles should set the tone for consideration of individual faculty petitions, which needed to be considered in a spirit of alertness to avoiding discrimination. The court suggested that chancellors should review their Churchyard Regulations with these principles in mind. [DW]

doi:10.1017/S0956618X2100079X

Re Holy Trinity, High Hurstwood

Chichester Consistory Court: Hill Ch, 12 July 2021

[2021] ECC Chi 5

Re-ordering – upholstered chairs – application of Aston Rowant principle

In a petition for a re-ordering, including the replacement of Victorian pews with chairs, the petitioners sought and the Diocesan Advisory Committee (DAC) recommended a faculty for upholstered chairs. The case for the removal of the pews was cogent and overwhelming. However, while the evidence clearly supported the replacement of the benches with chairs, it did not justify the