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COMMENT

Recent Developments in Religious Liberty

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This is the first in what is intended as a series of comments on current developments in the law concerning freedom of religion that will appear regularly in this *Journal*. This first survey deals with religious liberty challenges brought in the UK courts in 2007 and 2008. A subsequent survey will examine similar developments in international human rights law and especially before the European Court of Human Rights.

ARTICLE 9 AND THE HUMAN RIGHTS ACT

Although the future of the Human Rights Act is in doubt, following announcements from both the Labour government and the Conservative opposition of proposals to reform it, the Act is undoubtedly having an accelerating impact upon religious liberty claims. The knotty problem, common to many cases, is the extent to which specific conduct for which protection is sought can be said to be a *manifestation* of religion or belief and thus protected by Article 9:

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 ... or for the protection of the rights and freedoms of others.

The Strasbourg jurisprudence states in the *Arrowsmith* test[1] that not all actions motivated by religious belief qualify for protection but only those intimately connected with the beliefs in question. Critics argue that this puts a gloss on the text of Article 9 and has the effect of limiting religious liberty claims at the

1 *Arrowsmith v United Kingdom* Application 7050/75 (1978).

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definitional stage, rather than – as the structure of Article 9 suggests – at the stage of applying the 'necessary in a democratic society' test under Article 9(2). Although some domestic judges have expressed dissatisfaction with this approach, in the light of their new statutory duty under section 2 of the Human Rights Act to take into account Convention jurisprudence, they have felt obliged to replicate it. As Lord Hoffmann put it in *Begum*, 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life.'[2] Famously, in that decision, the House of Lords upheld the school's refusal to allow a pupil to wear the jilbab. School uniform policies have remained a major pressure point, with several later challenges.[3]

R (on the application of X) v The Headteacher of Y School[4] concerned the refusal of a selective girls grammar school to allow a twelve-year-old Muslim girl to wear a niqab veil (a veil that covered her entire face and head except her eyes). Silber J held that Article 9 was engaged but that the school had not interfered with the pupil's rights since she had had an offer to attend an alternative school where she would be permitted to wear the niqab veil. Even had there been interference, however, Silber J held that it would have been justified under Article 9(2). The conclusion was based on the absence of prior rulings from the European Court of Human Rights or domestic courts of interference with Article 9 where a claimant

> could without excessive difficulty manifest or practise their religion as they wished in another place or in another way. The approach in Strasbourg courts to complaints that an applicant has been unable to manifest his or her religion or belief has been to impose a high threshold before interference can be established.[5]

This approach follows that of the majority of their Lordships in *Begum*. It would seem that, despite the misgivings of some judges in *Begum* (see the speeches of Baroness Hale and Lord Nicholls), UK courts are now firmly following the Strasbourg model of casting the burden of weighing alternatives on the complainant rather than on the state, as the text of Article 9(2) requires.

In *R (on the application of Playfoot) v Governing Body of Millais School*,[6] a 16-year-old schoolgirl challenged the refusal by her school, under its policy

2 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15 [2007] 1 AC 100, para 50.
3 See generally M Hill and R Sandberg, 'Is nothing sacred? Clashing symbols in a secular world' (2007) *Public Law* 488–506.
4 [2007] EWHC 298 (Admin), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/298.html>, accessed 13 October 2008.
5 *R (On the application of X) v The Headteacher of Y School*, [2007] EWHC 298 (Admin), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/298.html>, accessed 13 October 2008, para 38.
6 [2007] EWHC 1698. See also (2008) 10 Ecc LJ 130–131.

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against wearing jewellery, to allow her to wear a purity ring symbolising her commitment to celibacy before marriage, which she argued was a manifestation of her religious belief as a Christian in pre-marital sexual abstinence. She argued that the school's refusal violated her right to manifest her belief and was (in view of the school's policy to permit some religious jewellery items) discriminatory contrary to Article 14 of the Convention. Michael Supperstone QC (sitting as a Deputy High Court Judge) found no 'intimate link' between the wearing of the ring and belief in celibacy before marriage for religious reasons. Consequently, it could not be said that, in wearing the ring, the claimant was manifesting her religion. Moreover, she had voluntarily accepted the uniform policy of the school and there were other means open to her to practise her belief without undue hardship or inconvenience. Even had there been an interference it would have been proportionate because of the sound reasons underlying the school's policy on uniform, based on promoting school identity, minimising differences of appearance and bullying, and promoting high standards and conduct. Nor was there any evidence of a breach of Article 14 since, although the school had made exceptions to its policy on occasion to accommodate other pupils, this was after careful inquiry as to whether wearing the items – including a Kara bracelet in the case of one Sikh pupil – was required by the pupil's religion.

In a sense, the restricted approach to Article 9 demonstrated in these decisions creates incentives for claimants to bring their challenges within the ambit of discrimination law rather than human rights law. The advantages of doing so can be seen from the successful outcome for the applicant in a comparable challenge, brought by a 14-year-old Sikh school girl of Punjabi–Welsh heritage to the decision of Aberdare Girls High School to prevent her from wearing a Kara at her school. In *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls High School*,[7] Silber J found that the decision not to grant a waiver from the school's uniform policy constituted indirect discrimination on grounds of race under the Race Relations Act 1976 and on grounds of religion under the Equality Act 2006. The judge found that there was objective evidence that the wearing of the Kara was 'regarded universally by observant Sikhs as a matter of exceptional importance and it symbolises their loyalty to the teaching of their Gurus' and he was satisfied that there was a 'particular disadvantage' or 'detriment' (the test under section 1(1)(1)(A) of the Race Relations Act 1976 and section 45 (3) of the Equality Act 2006) for an observant Sikh such as the applicant. The key issue in satisfying the tests in discrimination law was that she genuinely believed for reasonable grounds that wearing the Kara was a matter of exceptional importance to her racial identity or her religious belief and that

7 [2008] EWHC 1865 (Admin). See also the case note on pp 126–127 of this issue.

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such could be shown objectively. Moreover, the Kara was unobtrusive (it was 5 mm wide and could be worn under long-sleeved garments). Silber J stressed that, far from allowing an exception to the school's policy to be regarded as somehow discriminatory against pupils who might want to wear other religious symbols (such as crucifixes), the correct approach was to focus on the specific detriment that this pupil would suffer if not allowed to wear the Kara, which would not affect other pupils who did not hold her beliefs.

It would be wrong, of course, to suggest that discrimination law and human rights law have no common ground in addressing questions of religious clothing and symbols. The approach to issues of justification and proportionality defences in indirect discrimination claims is very similar to the process of analysing restrictions under Article 9(2). Nevertheless, it is plain that, by using discrimination law where it is available, a litigant may be able to overcome the stilted approach towards manifestation of religion in the Strasbourg jurisprudence. However, comparison of the *Playfoot* and *Watkins-Singh* decisions yields a further lesson for those advising would-be litigants, namely the crucial importance of a clear evidential link between the practice in question and strongly held and demonstrable religious beliefs. *Playfoot* failed because the link only established a religious belief in celibacy before marriage, rather than the wearing of the ring as such; in *Watkins-Singh*, however, the court accepted expert evidence of the religious significance of wearing the Kara to Sikhs in general. Although it should not matter how widely held these beliefs are in the religious community in question, where they can be shown to be conventional views this plainly makes the evidential task easier.

BALANCING ARTICLE 9 RIGHTS

Further light on the process of balancing religious freedom with restrictions on the right was shed in a case that became a cause célèbre within Wales in 2007. This was the case of Shambo the Sacred Calf, a challenge by way of judicial review by a Krishna Community to the decision of the Welsh Assembly Government to issue a slaughter notice in respect of a bullock that had tested positively for bovine tuberculosis.[8]

At first instance, His Honour Judge Hickinbottom (sitting as a Deputy High Court Judge) granted the application because there was no evidence that the government had correctly identified a legitimate public health objective under Article 9(2) on which to justify a restriction This conclusion was based on careful analysis of the relevant policy documents and of the decision to slaughter. The government's position was that it was an 'imperative public health

8 *R (on the application of Suryanda) v Welsh Ministers* [2007] EWHC 1376 (Admin). See the note at (2008) 10 Ecc LJ 127–129.

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objective that the risk of transmission of bTB is entirely eliminated from any bovine which positively reacts to a tuberculin test. That elimination can only occur if the animal is slaughtered.'[9] The community, on the other hand, argued that, because of the very great religious significance of Shambo to them, an exception should be made. They proposed to isolate the animal and enforce other health safeguards. The judge found that the government's policy was framed unduly narrowly and without any explanation of how it served the underlying public health considerations. The government had simply not correctly identified a legitimate objective to be balanced under Article 9 in the first place. The Court of Appeal disagreed and found that the minister had public health (rather than rigid policy) in mind as the objective.[10] The government's policy of slaughter and surveillance where infection was discovered was to be regarded as a means rather than an objective in its own right. Moreover, the refusal to make an exception to the policy in the case of the bullock Shambo was proportionate to this broader objective.

Although this may appear to be a semantic difference, the underlying issue of how governmental bodies are required to justify policies that impinge on religious freedom is important. At one pole – as the House of Lords made clear in *Begum*[11] – it is whether a public body's actions infringe rights rather than the process of reasoning that matters, especially in the case of bodies such as school governors, which do not have constant and easy access to specialist legal advice. At the other extreme, however, public bodies should not be allowed to 'Convention-proof' their actions through a 'tick-box' exercise and then present the case for restriction of rights in a way that prevents genuine questioning of whether to do so is necessary in a democratic society.

The issues of clashes between Article 9 and other rights (notably freedom of expression under Article 10) was central to what transpired to be the last, unsuccessful, attempt to invoke the common law of blasphemy.[12] In recent years, the erroneous argument has often been made that the common law offence of blasphemy violates the European Convention on Human Rights.[13] Bearing in mind a string of unsuccessful challenges to blasphemy laws (including three unsuccessful cases brought from the UK[14]), this position involved a combination of wishful thinking and misstatement of the Strasbourg jurisprudence on the

9 Ibid, para 97.
10 *R (on the application of Suryanda) v Welsh Ministers* [2007] EWCA Civ 893; also noted at (2008) 10 Ecc LJ 127–129.
11 See *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, per Lord Hoffmann at para 68.
12 *Green v The City of Westminster Magistrates' Court* [2007] EWHC (Admin) 2785. See also (2008) 10 Ecc LJ 254.
13 R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford, 2005), ch. 10.
14 *Gay News Ltd v United Kingdom* (1983) 5 EHRR, 123; *Choudhury v United Kingdom* (1991) 12 HRLJ 172; *Wingrove v United Kingdom* (1997) 24 EHRR 1.

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part of abolitionists. Indeed, the European Court of Human Rights has consistently held that protection of religious believers under Article 9 may permit some restriction on freedom of expression[15] and it held as recently as 2005 that the blasphemy law in Turkey does not violate Article 10 of the Convention.[16]

In the first post-Human Rights Act challenge, the High Court affirmed that the common law offence was Convention-compatible because of its limited ambit.[17] In rejecting a challenge to the refusal to bring proceedings at the instigation of Christians offended at the staging and television screening of *Jerry Springer: the opera*, the High Court confirmed that the offence was sufficiently certain in its scope to satisfy the requirement of a restriction on freedom of expression prescribed by law under Article 10 of the Convention. It was not, however, applicable to the facts because provisions in the Theatres Act 1968 and the Broadcasting Act 1990 precluded prosecution. This ruling will be remembered, however, as a mere historical footnote since, as Norman Doe and Russell Sandberg have argued, ironically the confirmation of Convention compatibility only hastened the demise of the offence.[18] After well over a century's worth of unsuccessful private member's Bills, the end finally came in an amendment to the Criminal Justice and Immigration Act 2008, section 79(1). The National Secular Society held a 'Bye-Bye Blasphemy' party to celebrate the conclusion of its 140-year campaign for abolition of the offence.

Attention may now shift to the offence of incitement of religious hatred under the Racial and Religious Hatred Act 2006.[19] The European Court of Human Rights has ruled in several recent instances that convictions of national courts under religious defamation laws violated Article 10 by excessively curtailing public criticism of religious figures or groups.[20] In the UK's case, however, it is likely that the Lester amendment did more than enough to meet free speech concerns.

Quite apart from Article 9, there have been significant domestic decisions in another aspect of religious discrimination, namely claims under Article 14 of the ECHR of religious discrimination in the enjoyment of Convention rights.

15 *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34.
16 *IA v Turkey* (2007) 45 EHRR 30.
17 *Green v The City of Westminster Magistrates' Court.*
18 N Doe and R. Sandberg, 'The strange death of blasphemy', (2008) 71 *Modern Law Review* 971.
19 A Jeremy, 'Practical implications of the enactment of the Racial and Religious Hatred Act 2006', (2007) 9 Ecc LJ 187; J Oliva, 'The legal protection of believers and beliefs in the United Kingdom', (2007) 9 Ecc LJ 66.
20 *Giniewski v France*, Appl 64016/00, judgment of 31 January 2006; *Klein v Slovakia*, Appl No 722208/01, judgment of 31 October 2006; ECtHR (2nd section), *Aydin Tatlav v Turkey*, 2 May 2006.

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ARTICLE 14 AND RELIGIOUS DISCRIMINATION

In *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints*,[21] the House of Lords held that the requirement under rating legislation for a place of worship to be open to the public in order to qualify for rating relief did not violate Articles 9 or 14 in the case of a Mormon temple. Their Lordships held that, in order to be found discriminatory on grounds of religion for the purpose of Article 14, the refusal had to fall within the ambit of Article 9. The majority held, however, that denial of local tax relief did not interfere with the church's Article 9 rights. Lord Hoffmann argued:

> If the legislation imposed rates only upon Mormons, I would regard that as being within the ambit of article 9 even if the Mormons could easily afford to pay them. But the present case is not one in which the Mormons are taxed on account of their religion. It is only that their religion prevents them from providing the public benefit necessary to secure a tax advantage. That seems to me an altogether different matter.[22]

Likewise Lord Hope of Craighead:

> Those who are qualified to worship in the Temple are not prevented from manifesting their religion or their belief by the fact that it is subject to non-domestic rating. The legislation is not directed at Mormons because of what they believe in.[23]

Lord Scott took a different view, holding that the requirement that the discrimination fall within the ambit of a Convention right should be interpreted more loosely. He went on, however, to find that the requirement for public access was justifiable under Article 14.[24] Although the decision follows case law predating the Human Rights Act,[25] the restricted approach taken to both Articles 9 and 14 has potentially significant wider implications, bearing in mind recent controversy over the public benefit requirement in charity law.[26]

Article 14 was used to greater effect in a challenge to section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 in *R (on the application*

21 [2008] UKHL 56, noted on pp 125–126 of this issue. See also R Sandberg 'Underrating human rights: *Gallagher v Church of Jesus Christ of Latter-day Saints*', on pp 75–80 of this issue.
22 *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints*, para 13.
23 Ibid, para 31.
24 Ibid, paras 49–51.
25 See *Church of Jesus Christ of Latter-day Saints v Henning (Valuation Officer)* [1964] AC 420.
26 See Charities Act 2006, Part I and Charity Commission, *Public Benefit and the Advancement of Religion* (2008), available at <http://www.charity-commission.gov.uk/Library/publicbenefit/pdfs/pbarsum.pdf>, accessed 13 October 2008.

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of Baiai, Trzcinska, Bigoku & Tilki) v Secretary of State for the Home Department,[27] in which Silber J found that there was discrimination in relation to the scheme to combat 'sham marriages', which required people from outside the European Economic Area to have a ministerial consent before being permitted to marry in the UK.[28] The Secretary of State's policy was to deny permission to those without leave to enter or remain in the UK for at least three months. Since the scheme was constructed on the foundation of Part III of the Marriage Act 1949 (that is, it applied to marriages solemnised on the authority of a certificate issued by a superintendent registrar), it was subject to exceptions for Anglican marriages. The scheme was found to be contrary to Article 14 in that it discriminated unjustifiably on grounds of nationality and religion and to Article 12 of the ECHR since it was a disproportionate restriction on the right to marry. The Secretary of State conceded that the scheme was discriminatory contrary to Article 14 but appealed the Article 12 ruling (unsuccessfully).[29] On the further appeal to the House of Lords, it was held that the legislation on sham marriages was a disproportionately wide restriction on the right to marry under Article 12, and the discrimination point was therefore redundant.[30]

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The Legal Challenges of Religious Polygamy in the USA

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A century and a half ago, Mormons made national headlines by claiming a First Amendment right to practise polygamy, despite criminal laws against it. In four cases, from 1879 to 1890, the United States Supreme Court firmly rejected their claim, and threatened to dissolve the Mormon church if they persisted. Part of the Court's argument was historical: the common law has always defined marriage as monogamous, and to change those rules 'would be a return to

27 [2007] 1 WLR 693, [2006] EWHC 823 (Admin).
28 See paras 109–150.
29 [2007] EWCA Civ 478, [2008] QB 143, discussed in the Editorial of this *Journal* at (2007) 9 Ecc LJ 247.
30 *R (on the application of Baiai) v Secretary of State for the Home Department* [2008] UK HL 53, noted on pp 124–125 of this issue.

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