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EDITORIAL

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It would appear that cases in the House of Lords concerning religious liberty are like London buses. We go for ages without any, then two arrive at once: and, looking at some of the reasoning of the most recent arrivals, they seem to resemble more closely the 'bendy bus' so beloved of Ken Livingstone than the familiar and traditionally rigid 'routemaster'.

Each of the decisions receives coverage in this issue, both in the Case Notes and in the Comment section, but I should like to venture a further reflection on certain slightly surprising elements of the two decisions. Russell Sandberg points to several concerns in relation to *Gallagher v Church of Jesus Christ of Latter-day Saints*,[1] and it is perhaps unfortunate that their Lordships did not consider with any degree of rigour the interplay between Articles 9 and 14 of the European Convention on Human Rights. The prohibition of discrimination in the enjoyment of convention rights is not subject to the qualifications that serve to narrow the compass of primary rights. The House of Lords did not address head on the simple point that certain religious gatherings for collective worship have the benefit of an exemption from rating liability while others do not. That is discrimination plain and simple and it is not enough to read over the concept of public benefit from charity law into rating legislation on the subject of public religious worship.

As to *R (Baiai) v Secretary of State for the Home Department*,[2] the position is even more strange. The Secretary of State conceded before the Court of Appeal that a scheme requiring illegal immigrants to secure ministerial consent to marry could not legitimately allow an exemption for Anglican marriages.[3] The point was therefore no longer in play when the matter came before the House of Lords. But this did not prevent Baroness Hale of Richmond making the following teasingly coquettish comment:

> Section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 applies to all marriages which are to be solemnised on the authority of a superintendent registrar's certificate under the Marriage Act 1949 where a party is subject to immigration control (s 19(1)). It does not

1 [2008] UKHL 56.
2 [2008] UKHL 53.
3 See my previous Editorial at (2007) 9 Ecc LJ 247–248.

> apply to marriages conducted according to the rites of the Church of England on the authority of ecclesiastical preliminaries. This is discriminatory. It is also irrational as *the Church of England believes itself* (with some Parliamentary encouragement, for example in sections 57 and 58 of the Matrimonial Causes Act 1857) *required to marry* for the first time anyone who lives in the parish regardless of faith or the lack of it.[4]

Why did Baroness Hale express herself so tentatively? Why did she only say that the Church of England 'believes itself' required to marry parishioners? Assuming the legal requirements are satisfied, it is generally understood that there is a legal right to be married in one's parish church.[5] The right is the mirror image of the minister's duty to solemnise matrimony. This derives from the Clandestine Marriages Act 1753 (Lord Hardwicke's Marriage Act);[6] and the existence and scope of the duty has been discussed in the pages of this *Journal*.[7] Contrary to the impression given by Baroness Hale, this is not the exercise of self-belief on the part of an ecclesial community (albeit the established church of the nation) but it is part of the law of the land. If the duty to marry were only a perceived obligation on the part of the Church of England, why would Parliament consistently (and most recently in 2007) make provision for a 'conscience' clause, relieving parochial clergy of their duty in certain specified circumstances?[8]

These two decisions provide useful material for discussion by academics and scholars, but they represent missed opportunities. The first is a failure to grapple with Article 14 when read together with Article 9 and to consider appropriate redress for the pervasive nature of discrimination in society and its laws.[9] Their Lordships' ultimate conclusion may well be right but their reasoning was ill-informed and uncompelling. The second demonstrates that, even at its most senior level, the judiciary should be wary of going off-piste. For indeed,

4 *R (on the application of Baiai and Trzinska & others) v Secretary of State for the Home Department* [2008] UKHL 53, at para 37, per Baroness Hale of Richmond (emphasis added).

5 See M Hill, *Ecclesiastical Law* (third edition, Oxford, 2007), para 5.34.

6 The existence of such a right has been questioned by N Doe: see *Legal Framework of the Church of England* (Oxford, 1996), pp 358–362. He styles it 'a legal fiction' on p 359.

7 For an authoritative and revisionist view doubting the received understanding and approving Doe (above), see M Smith, 'An interpretation of *Argar v Holdsworth*', (1998) 5 Ecc LJ 34, and, for a spirited defence of the orthodox view, see J Humphreys, 'The right to marry in church: a rehabilitation of *Argar v Holdsworth*', (2004) 7 Ecc LJ 405.

8 See the Matrimonial Causes Act 1965, s 8(2); the Marriage Act 1949, s 5A (as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, s 3 and the Marriage Act 1949 (Remedial) Order 2007, SI 2007/438, art 2(b)); the Marriage Act 1949, s 5B (as amended by the Gender Recognition Act 2004, s 11, Sch 4).

9 The Employment Tribunal made a better (if not entirely successful) attempt at addressing discrimination in *Ladele v London Borough of Islington*, as did the High Court in *Singh v Aberdare Girls' High School* (see Case Notes at pages 122–123 and 126–127 respectively of this issue), although these cases were overtly founded upon discrimination legislation rather than placing reliance on the interpretation of the Human Rights Act 1998 with particular reference to religious liberty.

not only is the requirement of parochial clergy to marry parishioners a matter of English domestic law (as opposed to Anglican self-belief), it is also a duty that, since 1 October 2008, has been substantially extended by the enlargement of the categories of persons who have the right to demand that the duty be exercised, by dint of their 'qualifying connection' with the parish church.[10] A less opportune moment for such a random and unnecessary *obiter dictum* is hard to imagine.

10 See the Church of England Marriage Measure 2008.

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