of certain values in society and the willingness to act in accordance with them). The outcome of the present case may be welcomed by those who propagate the second conception and disapproved by those who dismiss it. I have tried to show that the freedom of conscience and religion is difficult to reconcile with the second conception. In the case under discussion, citizens' freedoms are compromised with an appeal to supposedly justificatory measures to include them in society. The guise of such measures makes the threat, ironically, a veiled one.

doi:10.1017/S0956618X18000078

A Way Out of *Laïcité*? The Child's Best Interests as Justification for Religious Manifestation

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Keywords: freedom of manifestation, child's best interests, *laïcité*, France, education

Over the last couple of years, France has built up the reputation of a staunchly secular society where, slowly but surely, signs of religious manifestation are being removed from the public space with an appeal to *laïcité* (French secularism) and other French values.[1] This is why it came as a surprise that, after a long list of unsuccessful religious manifestation cases,[2] in August 2017 the Dijon Administrative Tribunal ruled against a municipality that had decided no to longer accommodate Muslim and Jewish dietary prescriptions in school canteens.[3] The reason for the sudden change appeared to be the approach taken in the relevant case: rather than basing itself on freedom of manifestation,

1 See M Hunter-Henin, 'Why the French don't like the burqa: *laïcité*, national identity and religious freedom', (2012) 61:3 *International and Comparative Law Quarterly* 613–639; J Baubérot, *Les 7 Laïcités françaises: le modèle français de laïcité n'existe pas* (Paris, 2015), pp 133–150.

2 These cases have often centred on the right to wear religious attire in schools, at work, in public generally and most recently on the beach (Cour Administrative d'Appel de Marseille, req 17MA01337, 3 July 2017), but others have, eg, been concerned with ritual slaughter, such as Conseil d'État, 8th Chamber, req 391499, 13 March 2017.

3 Tribunal Administratif de Dijon, *Décision de la ville de Chalon-sur-Saône concernant les menus de substitution dans les cantines scolaires*, req 1502100, 1502726, 28 August 2017, available at <http://dijon.tribunal-administratif.fr/content/download/109427/1101437/version/1/file/1502100%2C%201502726.pdf>, accessed 31 October 2017 (hereafter TA Dijon, *Décision Chalon-sur-Saône*).

the tribunal had chosen to decide the case solely on the basis of the best interests of the child. Although that approach offered some much-desired relief for the religious communities involved, following an overview of the case below, I will argue that it may not be a sustainable answer to the curtailing of religious manifestations in the name of *laïcité*.

THE CASE AGAINST CHALON-SUR-SAÔNE

At the start of the school year in 2015, the Republican mayor of Chalon-sur-Saône presented a proposal to the city council for the discontinuation of alternative, pork-free lunches in school canteens.[4] These alternative meals (*plats de substitution*) had been in place since 1984 to accommodate Muslim and Jewish objection to meals containing pork. The proposal was adopted by a large majority. Yet the new regulation was promptly challenged by two Muslim organisations who equally sought to obtain interim injunctions to eliminate its effect. Those injunctions were not granted by the Dijon Administrative Tribunal.[5] However, in August 2017 the same tribunal found against the municipality in the main proceedings.[6]

The main proceedings in question took the form of an administrative appeal based on fundamental rights, similar to a judicial review under English law. The applicants took the conventional route, arguing that the discontinuance of alternative meals violated freedom of religion under both national and international law (the latter made possible because of France's monist system).[7] They relied in particular on Article 9 of the 1789 Declaration of the Rights of Man and of the Citizen (Déclaration des droits de l'homme et du citoyen) (freedom of thought), Article 1 of the 1905 law on the separation of Church and State (freedom of conscience and manifestation), Article 18 of the International Covenant on Civil and Political Rights (freedom of religion and manifestation), Article 9 of the European Convention on Human Rights (ECHR) (freedom of religion and manifestation) and Article of the 10 Charter of Fundamental Rights of the European Union (freedom of religion and manifestation). In response, the municipality argued on the tested principles of *laïcité* and equality, the latter because schools tended to separate pupils on the basis of their meal to facilitate a quick distribution.[8] On the face of it, the application appeared

4 'Chalon-sur-Saône: la justice annule la fin des menus sans porc dans les cantines', *Le Monde*, 28 August 2017, available at <http://www.lemonde.fr/societe/article/2017/08/28/chalon-sur-saone-la-justice-annule-la-fin-des-menus-sans-porc-dans-les-cantines_5177551_3224.html>, accessed 31 October 2017.
5 Ibid.
6 TA Dijon, *Décision Chalon-sur-Saône*.
7 Ibid. Article 55 of the French Constitution directly imports international law into the French legal system.
8 Ibid.

https://doi.org/10.1017/S0956618X1800008X Published online by Cambridge University Press

doomed from the start. Since the second 'headscarf-affair',[9] numerous applications had followed the same set of reasoning and in every single one of them the French courts had held that the principles of *laïcité* and equality could justifiably limit religious manifestations within the educational context.[10] Having further received the backing of the European Court of Human Rights (ECtHR) on the matter,[11] it was highly unlikely that the Administrative Tribunal would find for the plaintiffs.

Before pronouncing itself on the matter, however, the tribunal took the unusual step of soliciting an advisory opinion from both the French Human Rights Commission (Commission Nationale Consultative des Droits de l'Homme) and the Ombudsman (Défenseur des Droits).[12] The Ombudsman suggested that there might be discrimination involved – an argument not too far removed from that of the applicants. By contrast, the Human Rights Commission dismissed arguments based on *laïcité*, freedom of religion or equality and embarked on an entirely novel route.[13] It based its entire argument in favour of maintaining alternative meals on Article 3 of the Convention on the Rights of the Child (CRC), which is concerned with the best interests of the child and enjoys direct effect in France.[14] The Commission argued that the abolition of alternative meals violated the interests of children who would now be deprived of (nutritious) school lunches for political gain.[15] It concluded that the municipality's decision was not made with the best interests of the child in mind as it should have been under Article 3 CRC. Abolishing alternative

9 The first headscarf affair dates back to 1989, when two girls were suspended for refusing to take off their headscarves; the second relates to the 2004 law prohibiting the wearing of all ostentatious religious attire in schools. See E Beller, 'The headscarf affair: the Conseil d'État on the role of religion and culture in French society', (2004) 39 *Texas International Law Journal* 581–623, esp 581 and 585.

10 See above, note 2; E Erlings, '"The government did not refer to it": *SAS v France* and *ordre public* at the European Court of Human Rights', (2015) 16:2 *Melbourne Journal of International Law* 587–608 at 601. The only case that can be seen as a possible exception is Tribunal Administratif de Nice, *Mme D*, req. 1305386, 9 June 2015, in which the court held that volunteer parents accompanying students on a school trip should be allowed to wear religious attire as long as this did not violate public policy or interfere with the functioning of the education service.

11 For an overview, including cases, see Erlings, 'The government did not refer to it', p 601. By contrast, the Human Rights Commission found a violation of freedom of religion, yet its views have been ignored by the French government: Human Rights Committee, Communication No 1928/2010: *Shingara Mann Singh v France*, UN Doc CCPR/C/108/D/1928/2010 (26 September 2013).

12 TA Dijon, *Décision Chalon-sur-Saône*.

13 It was arguably novel in the circumstances: the argument on best interests is regularly invoked in the context of family law and has functioned as a guard against imposed religious practice. See G Gonzales, 'Les droits de l'enfant à la liberté de religion et la Convention Européenne des Droits de l'Homme', (2013) 3 *Société, Droit et Religion* 153–169, esp 154 and 162.

14 Conseil d'État, Juge des référés, req 386865, 9 Janury 2015 (interim injunction confirming the direct effect of Article 3 CRC).

15 Commission Nationale Consultative des Droits de l'Homme (hereafter CNCDH), 'Décision du TA de Dijon concernant les menus de substitution', *CNCDH*, 29 August 2017, available at <http://www.cncdh.fr/node/1620>, accessed 31 October 2017. A 2011 decree regulates the nutritional value of school meals: *Décret n° 2011-1227 du 30 septembre 2011 relatif à la qualité nutritionnelle des repas servis dans le cadre de la restauration scolaire*.

https://doi.org/10.1017/S0956618X1800008X Published online by Cambridge University Press

meals therefore violated international law and the tribunal should find against the municipality.

Swayed by the Commission's arguments, the Dijon tribunal decided that it was not necessary to engage with the parties' submissions based on provisions concerned with freedom of religion or *laïcité*. Instead, it referred solely to Article 3 CRC and the General Comment adopted in respect of the best interests principle enshrined therein.[16] Applying the provision to the situation at hand, the tribunal held that the municipality had failed to properly balance the interests involved and to give primary consideration to the interests of the children affected. The municipality had not cited any technical or financial difficulties preventing the provision of alternative meals and the Court did not find the municipality's submission that alternative meals would single children out persuasive (it suggested that canteens could consider a self-service for all children rather than prepared trays). By contrast, the provision of alternative meals was an established practice in Chalon-sur-Saône that, until now, had continued unchallenged since 1984. The meals provided a choice to children and parents which could accommodate their religious and cultural concerns, which choice was now taken from them. Moreover, not every family had access to other means of lunch provision. The decision to discontinue the alternative meal plan could consequently 'not be regarded as having accorded, in the sense of Article 3(1) CRC, a primary consideration to the best interests of the children concerned' and had to be annulled.[17]

AN IDEAL TEST CASE

The case against Chalon-sur-Saône appeared to be the ideal test case for a best-interests approach to what was essentially a matter of freedom of religion – and one that would probably not have survived the test of *laïcité*.[18] School lunches in France are heavily subsidised based on parental income. Those in the lowest earning category only pay €0.95 (£0.85) for a three-course meal with cheese in Chalon-sur-Saône.[19] A shop-bought equivalent would be at least ten times as expensive – a dramatic increase in family expenses. During the legal proceedings it became evident that some parents simply could not afford to give their

16 Committee on the Rights of the Child, 'General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)', UN Doc CRC/C/GC/14 (29 May 2013).
17 TA Dijon, *Décision Chalon-sur-Saône*.
18 See above, note 10 and accompanying text.
19 Chalon-sur-Saône, 'Inscrire mon enfant au restaurant scolaire', 2016, available at <http://www.chalon.fr/fr/je-suis/parent/mon-enfant-et-lecole/mon-enfant-au-restaurant-scolaire.html>, accessed 31 October 2017.

https://doi.org/10.1017/S0956618X1800008X Published online by Cambridge University Press

children their own lunch and some children had effectively gone hungry.[20] Potential religious interests were therefore layered with everyday ones, making the case for an interest approach particularly convincing.

Yet at its core this case was about religious manifestation. The consequence of the tribunal admitting the new approach is that, now that the precedent has been set, administrative courts should expect to be increasingly confronted with religious manifestation cases framed in the language of children's interests. The ripple effect of the decision against Chalon-sur-Saône could be vast, especially in cases involving children using government services that have traditionally been decided on the basis of a *laïcité* that increasingly erases religious manifestation from the public sphere. Some such cases could even be brought back to court, with applicants now reformulating their arguments in the language of children's interests. Would it, for example, violate children's interests to prohibit them from wearing religious attire in public schools? The answer might differ from that given when the question considered was whether *laïcité* allowed for a restriction on religious manifestation.[21]

SOLUTION OR *FAUX AMI*?

So, have we found a way out of the *laïcité* malaise, or is the principle of best interests a *faux ami*? A reformulation of religious claims into children's interests can be extremely beneficial to religious communities and believing children seeking to protect religious practices within French society. While freedom of religion has become a thorny issue entangled with political considerations, who can object to children's interests? Certainly not French courts, in whose procedures the best interests principle enjoys direct effect and takes on a superior status as a provision of international law. A cleverly formulated best interests claim to maintain a religious practice (especially one that equally touches upon more mundane considerations such as children's physical wellbeing and family relations[22]) has a far greater chance of success than a request founded on freedom of manifestation. Indeed, the Committee on the Rights of the Child itself stated in the General Comment quoted by the Dijon tribunal that children's religious identity forms a consideration for a determination of interests.[23] Religious manifestation forms part of that identity.[24] Moreover, not only would a best interest

20 TA Dijon, *Décision Chalon-sur-Saône*; K Willsher, 'Non-pork meals must be available for school lunch rules French court', *The Guardian*, 29 August 2017, available at <https://www.theguardian.com/world/2017/aug/28/non-pork-meals-must-be-available-for-school-lunch-rules-french-court>, accessed 31 October 2017.

21 See above, note 10.

22 See, eg, the custody case of Cour d'Appel Versailles II, *Edouard X c/ Marie-Laure Y*, req 05/06909, 29 June 2006, in which an order was made that it was in the child's best interests to take the same religious instruction classes that her brother had taken with a view to sibling unity and equality.

23 Committee on the Rights of the Child, 'General comment', para 55.

24 A Scolnicov, 'The child's right to religious freedom and formation of identity', (2007) 15:2 *International Journal of Children's Rights* 251–267.

https://doi.org/10.1017/S0956618X1800008X Published online by Cambridge University Press

claim be much stronger at the national level but it would equally place appellants in a more advantageous position at the European level (not to mention the international level).[25] Best interests do not officially form part of the ECHR regime, but in *Neulinger v Shuruk* the ECtHR explicitly adopted the principle for cases concerning children.[26] Although the Court generally grants states a wide margin of appreciation in cases involving best interests,[27] this margin is much more limited than the exceptionally wide margin it tends to cede in freedom of manifestation cases.[28] A best interests approach is therefore bound to fare better than a religious freedom approach and may thus present the answer to an increasingly restrictive form of *laïcité*.

However, while at first sight the best interests approach appears to offer a long-awaited solution for believing children and religious communities, the approach may turn out to be a *faux ami*, both for children generally and also for religious communities. The approach is problematic for French children because of what Eekelaar terms the 'lack of transparency objection' to best interests or welfare.[29] A best interests approach might actually 'fail to provide sufficient protection to children's interests because its use conceals the fact that the interests of others ... actually drive the decision'.[30] In short, the objection states that, where the emphasis is on children's interests, there is the danger that adult concerns are reformulated or moulded into the language of children's interests. Children's interests then become a vehicle for parents and the religious community to push through an agenda that serves them, but not necessarily the children on whose behalf they claim to argue. A good example of such a situation would be where religious parents seek to argue that the best interests of their children are compromised if religiously motivated exemption requests to co-educational swimming classes are not granted.[31] The argument could be based on both religious interests (whether or not projected onto the child) and more mundane relationship-focused interests such as the interest in maintaining positive parent–child relationships.[32] A relatively convincing case might be built upon the two, especially

25 Since 2016 France is a party to the CRC's Individual Complaints Procedure, where cases regarding Article 3 CRC can be brought. However, given France's failure to respond to the HRC's views in *Shingara Mann Singh v France* (see above note 11), the focus should be on the European level.

26 *Neulinger and Shuruk v Switzerland* App no 41615/07 (ECtHR Grand Chamber, 06 July 2010). Yet the Court has been comfortable with interest determinations for a long time: *Olsson v Sweden* App No 10465/83 (European Commission of Human Rights, 2 December 1986), para 143.

27 *Olsson v Sweden*.

28 See, for example, *SAS v France* App no 43835/11 (ECtHR Grand Chamber, 1 July 2014), paras 129–131, 157.

29 J Eekelaar, 'Beyond the welfare principle', (2002) 14:3 *Child & Family Law Quarterly* 237–249 at 237.

30 Ibid.

31 This issue was recently – and unsuccessfully – argued on a freedom of religion basis in the German courts: Bundesverfassungsgericht, 2nd chamber, 1 BvR 3237/13 - Rn. (1-35), 8 November 2016, available at: <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/11/rk20161108_1bvr323713.html>, accessed 31 October 2017.

32 Research has indicated a negative effect on parent–child relationships where children do not manifest the parental religion. See C Stokes and M Regnerus, 'When faith divides family: religious

https://doi.org/10.1017/S0956618X1800008X Published online by Cambridge University Press

if courts are willing to place emphasis on continued positive relationships in the same way they do in custody cases.[33] Yet is it really in children's interests that they be exempted from co-educational swimming classes? It is not difficult to see how best interests can become the reserve of adults and communities, rather than the children themselves, in matters of religious manifestation.

In the long run, however, a best interests approach is equally problematic for religious communities. This is because taking a best interests approach to what is essentially a religious practice fails to address the underlying religious issue. It pushes the religious arguments that should be at the forefront of the reasoning to the sides, thereby diminishing the relevance of those arguments and religion itself. Too great a reliance on best interests precludes the discussion on the place of religion in society that can provide legitimacy to religious manifestation. Best interests may circumvent *laïcité* but, without challenging the current interpretation of the principle, they cannot take on France's radical secularism that is at the root of limits on religious manifestation in the public sphere.[34] While a pragmatic solution for the moment, best interests may therefore not be a long-term friend.

CONCLUSION

The newly discovered 'best interests of the child' approach to administrative religious manifestation cases should excite both interest and caution in France. While it may prove a useful means to overcome the restraints of *laïcité*, its application may see children's interests exploited for the benefit of others and cannot provide more than a sticking plaster for French believers. This is because it cannot offer a genuine discussion of the real, religious, concern that underlies freedom of manifestation cases. For the moment, however, it may be the only viable option for the protection of controversial religious manifestations.

Back in France, the municipality has indicated that they will appeal the decision.[35] They might get a different outcome, but they will not be able to avoid a new approach to freedom of religion cases.

doi:10.1017/S0956618X1800008X

discord and adolescent reports of parent–child relations', (2009) 38 *Social Science Research* 155–167 at 164.

33 Although no such approach is yet apparent in French courts, English courts have regularly considered whether, eg, imposing vaccination would lead to parents rejecting their children. See, for example, *Re C (A child) (Immunisation: Parental rights)* [2003] EWHC 1376 (Fam), confirmed by *Re C (A child) (Immunisation: Parental rights)* [2003] EWCA Civ 1148.

34 Baubérot, *Les 7 Laïcités françaises*, pp 133–150.

35 G Platret, 'Communiqué de Presse du Maire de Chalon-sur-Saône' in L Guillaumé, 'Menus de substitution à Chalon: Gilles Platret entend faire appel auprès de la cour administrative de Lyon…', *Chalon Info*, 28 August 2017, available at <http://info-chalon.com/articles/chalon-sur-saone/2017/08/28/32034/menus-de-substitution-a-chalon-gilles-platret-entend-faire-appel-aupres-de-la-cour-administrative-de-lyon/>, accessed 31 October 2017.