The Need for a Principled Approach to Religious Freedoms

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INTRODUCTION

The European Court of Human Rights has adopted a narrow and restrictive approach to the protection of religious freedoms which is inconsistent with some of its own judgments about the importance of religious freedoms. This narrow and restrictive approach has necessarily influenced the approach of the Courts in England and Wales, and the approach is not supportable on any principled grounds. This article examines what has gone wrong, and makes some suggestions for the future.

THE PROVISIONS

Relevant provisions of the European Convention on Human Rights ('ECHR'), are as follows:

> everyone has the right to freedom of thought, conscience and religion ... 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 (Article 9(1) of the ECHR)
>
> 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 for the protection of the rights and freedoms of others (Article 9(2) of the ECHR)
>
> the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... religion ... (Article 14 of the ECHR)
>
> ... in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (Article 2 of the First Protocol of the ECHR)

It might be noted that in the structure of Article 9 it is only the manifestation of religion or beliefs which may be subject to the limitations set out in Article 9(2).

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The general freedoms of thought, conscience and religion are absolute rights which may not be subject to any form of limitation or restriction. In this respect, at least on the wording of the ECHR, religious freedom is given very substantial protection.

SOME JURISPRUDENCE ON THE IMPORTANCE OF RELIGIOUS RIGHTS

The European Court and Commission of Human Rights have considered religious rights in a number of decisions. In some of those decisions the fundamental importance of religious rights appears to have been recognised, and protected.

Some of the best examples include *Kokkinakis v Greece*[1] where it was said (at paragraph 31) that:

> freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life ... the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions.

In *Otto-Preminger v Austria*[2] in which the actions of the Austrian State in seizing a film satirising religious beliefs was upheld, the statements made in *Kokkinakis* were repeated. It was also said (at paragraph 47):

> 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. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guarantee under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying

1 *Kokkinakis v Greece* (1993) 17 EHRR 397, ECtHR.
2 *Otto-Preminger v Austria* (1995) 19 EHRR 34, ECtHR.

> religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.

The Court and Commission have also recognised that as part of religious freedom, religious organisations must be able to choose with whom to associate. As was pointed out in *X v Denmark*:[3]

> a Church is an organised religious community based on identical or at least substantially similar views. Through the rights granted to its members under Article 9, the church itself is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters.

The approach was reaffirmed in *Hasan v Bulgaria*.[4] In that case the State had recognised one individual, but not another, as leader of the local Muslim community. The European Court of Human Rights (at paragraphs 60 to 62) stated:

> While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares … The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin … Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.

The Court specifically rejected (at paragraph 81) a Government argument that nothing prevented the applicant and others from organising meetings stating:

> it cannot seriously be maintained that any State action short of restricting the freedom of assembly could not amount to an interference with the

3 *X v Denmark* (1976) 5 DR 157.
4 [2002] EHRR 1339.

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> rights protected by Article 9 of the Convention even though it adversely affected the internal life of the religious community.

WHERE DID IT GO WRONG?

It might be thought that all this meant that religious freedoms would be properly protected. However, in many cases, the approach of the European Court and Commission to the protection of human rights has been much narrower and more restrictive than might have been anticipated from all the good words set out above. This has been because of the application of the doctrine of 'non-interference'.

This doctrine, which was identified by the Court of Appeal in *R (Williamson) v Secretary of State for Education*,[5] was interpreted to mean that, so long as there was a possibility that religious believers could act in the way that they desired somewhere, there was no material interference with the beliefs. Arden LJ considered that the doctrine could be expressed in the following manner:

> a person who can take steps which will avoid any conflict between his beliefs and those acts which he claims interfere with those beliefs, or voluntarily accepts a regime which leads to such a conflict, cannot complain of an interference with his freedom to manifest his beliefs.[6]

The doctrine was taken to its extreme in *Jewish Liturgical Association v France*[7] by the European Court of Human Rights. The Court considered that ultra-orthodox Jews would need to show that it was 'impossible' to eat meat slaughtered in accordance with the religious prescriptions that they considered applicable before there could be shown an interference with a freedom to manifest beliefs. The doctrine was described as 'unlikely to be right' by Rix LJ at paragraph 201 of the judgment of the Court of Appeal in *Williamson* and 'on the face of it . . . harsh' by Arden LJ at paragraph 280 in the same case. However the doctrine was applied in that case by the Court of Appeal and the Appellant's appeal was dismissed. The House of Lords took a different approach, as appears below. The doctrine has been applied since, see *Mohisin Khan v Royal Air Force Summary Appeal Court*[8] at paragraphs 61 to 65 (although the judgment was based on other grounds).

After the judgment of the House of Lords in *Williamson*[9] it appeared that the Courts in England and Wales would not be restricted by the doctrine of non-

5 *R (Williamson) v Secretary of State for Education* [2003] QB 1300.
6 See paragraph 262 of the judgment of the Court of Appeal.
7 *Jewish Liturgical Association v France* 9 BHRC 27.
8 *Mohisin Khan v Royal Air Force Summary Appeal Court* [2004] EWHC 2230.
9 [2005] 2 AC 246.

interference. Lord Nicholls set out in paragraphs 30 to 41 a proper approach to issues of manifestation of belief, and interference with manifestation, which avoided the difficulties of the doctrine of 'non-interference'. It involved a consideration of the belief, a consideration of the manifestation, and a consideration of the interference.

However Lord Nicholls' approach did not survive. In *R (SB) v Governors of Denbigh High School*[10] the House of Lords again confronted an issue of religious freedoms. The doctrine of 'non-interference' was again considered. Lord Bingham recorded, at paragraph 23 of the judgment, 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 practice or observe his or her religion without undue hardship or inconvenience.

Lord Bingham expressly noted criticism of that approach by the Court of Appeal in other cases as being 'overly restrictive' and noted that the House of Lords in *Williamson* questioned the approach in the *Jewish Liturgical* case. But in the end Lord Bingham concluded:

> even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference, there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established.

WHAT IS WRONG WITH THE DOCTRINE OF NON-INTERFERENCE

The doctrine is inconsistent with a principled approach to religious rights. First, it is impossible to reconcile the general points of principle made by the European Court of Human Rights about the importance of religious rights with the application of the doctrine. Secondly, there is no other fundamental right or freedom which is subjected to this doctrine, and the different approach to religious rights taken by the Strasbourg institutions is not justified by any material differences between the text of the articles guaranteeing rights and freedoms in the ECHR.

It is trite law that a broad and purposive approach needs to be taken to the interpretation of fundamental rights and freedoms guaranteed in instruments

10 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100.

such as the ECHR. A narrow approach to the interpretation of such rights, more consistent with the interpretation of commercial documents, is rightly rejected, and categorised as the 'austerity of tabulated legalism'.[11] But the doctrine of non-interference is worse than the austerity of tabulated legalism. This is because the doctrine of non-interference is not even founded on the wording of the ECHR itself. It is an impermissible gloss put on a fundamental freedom by institutions designed to protect that freedom.

WHY RELIGIOUS RIGHTS HAVE BEEN SUBJECTED TO THE DOCTRINE

Various explanations have been suggested for the imposition of the doctrine of non-interference. The suggestion made by Rix LJ at paragraph 95 of the judgment of the Court of Appeal in *Williamson* seems likely to be right, namely the knowledge that religious beliefs have caused conflict throughout history.

Others have suggested that doctrine exists because it is necessary to restrict the potential ambit of Article 9. It is plain that there have been some Article 9 cases where doubts have been raised about the existence of the religious belief. One such case was *R (Spiropoulos) v Brighton and Hove City Council*.[12] The claimant applied for judicial review of a local authority's decision regarding the method of payment of his housing benefit. The local authority had a long-standing policy of making payment by crossed cheque. The claimant refused to open a bank account claiming that it was contrary to his religious beliefs which required him to follow the tenets of classical Greece. Mitting J, noting that no evidence had been adduced to support this assertion, reasoned that whilst bank accounts would have been unknown in classical Greece there was nothing to suggest that, had they been known, they would have been prohibited.

A PRINCIPLED APPROACH

It is suggested that a principled response to religious rights is necessary. This requires a careful analysis of the religious belief which is engaged. Next it requires a proper analysis of the evidence showing the manifestation of the belief, and the interference with the manifestation. And finally it requires a fair approach to any issues of justification.

Arden LJ stated at paragraphs 251 and 252 of the judgment of the Court of Appeal in *Williamson*:

> In my judgment, it is a mixed question of fact and law whether a person has a religious belief for the purpose of Article 9. Thus the first step is

11 See *Minister of Home Affairs v Fisher* [1980] AC 319 at 328.
12 *R (Spiropoulos) v Brighton and Hove City Council* [2007] EWHC 342 (Admin).

> for the Judge to make findings on the evidence as to what are the actual beliefs of the complainant, so far as relevant . . . the second step is for the judge to decide whether those beliefs constitute religious beliefs for the purposes of the Convention. The latter is principally a question of law . . . Religious texts often form the basis from which adherents develop specific beliefs. It is not the Court's function to judge whether those beliefs are fairly based on the passages said to support them. Its function at the fact-finding stage is to decide what the beliefs are and whether they are genuinely held by the complainant. The fact that the beliefs are based on religious texts may help the Court reach its decision on this factual issue.

The approach of Arden LJ to ascertainment of beliefs was followed by Richards J in *R (Amicus) v Secretary of State for Trade and Industry, Christian Action Research Education and others intervening*.[13] It was this approach which was adopted by Lord Nicholls in *Williamson*.[14]

The issues of manifestation of the belief, and interference with the belief are next to be addressed. In considering these, the Courts should consider the evidence alone, and not subject the religious belief to the doctrine of 'non-interference'. The importance of requiring justification for any interference with religious rights (as opposed to pretending that there is no interference) is that the scope for wholly avoidable and unnecessary religious conflict will be avoided. Firstly the legislature is likely to have regard to the religious rights when legislating; and secondly the Courts will be able to test effectively the effect of any legislation which engages religious rights.

Finally, when addressing the issue of justification for any interference with the religious belief, there should be a balanced consideration of the issue of justification. There have been some suggestions that interference with religious rights can be more easily justified. The legislature, so far as England and Wales was concerned, does not seem to have intended that. Section 13 of the Human Rights Act 1998 provides:

> If a Court's determination of any question arising under this 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, it must have particular regard to the importance of that right.

Section 13 certainly does not justify allowing religious rights to trump other rights protected by the ECHR. But it does not permit the Courts to underplay

13 *R (Amicus) v Secretary of State for Trade and Industry, Christian Action Research Education and others intervening* [2004] IRLR 430 at paras 36 and 37.

14 Para 22.

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the importance of religious rights. This is particularly so because discrimination on religious grounds is a 'suspect ground', and subject to a more intensive review.[15]

CONCLUSION

It is plain that a religious belief cannot be a solvent of civil obligations in society. But it should be equally plain that the proper protection of religious freedoms is fundamental to freedom in society. Freedom of religion has been described as the paradigm freedom of conscience and of the essence of a free society. The doctrine of non-interference has done nothing to promote religious freedom, and there is no principled basis for the continued application of that doctrine.

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15 See *R(Carson) v Secretary of State* [2006] 1 AC 173 at paragraph 58, and *Morrison v PSNI* [2010] NIQB 51.