EXHUMATION RECONSIDERED

PHILIP PETCHEY
Barrister, and Deputy Chancellor of the Diocese of Southwark

1. INTRODUCTION

In an article in this journal published in 1998 entitled 'Digging Up Exhumation',[1] Rupert Bursell, Chancellor of the Dioceses of Durham and St Albans, surveyed the then existing case law on exhumation and identified divergencies of approach between the cases. He concluded: 'A definitive decision from the Court of Arches and Provincial Court may, therefore, seem to be called for [...]'. Shortly afterwards the Chancery Court of York had occasion to consider the matter in *Re Christ Church, Alsager*.[2] This article considers that case as well as two cases subsequent to it where the impact of Article 9 of the European Convention on Human Rights has fallen to be considered.

2. PRELIMINARY

In *Alsager*, the Chancery Court of York addressed the issue as to circumstances in which exhumation of human remains may be appropriate. The Court recognised that the issue was a difficult one and that different approaches had been adopted by different chancellors. Against this background, the court set out to provide a judgment which would be of assistance for chancellors in the Provinces of both York and Canterbury.

In its judgment, the court did three things:

(i) it formulated a test as to the circumstances in which exhumation may be appropriate;
(ii) it commended a set of guidelines which it formulated, and gave general guidance; and
(iii) it decided the appeal before it.

It will be argued that the test is unhelpful and that some of the guidance is questionable. The actual decision is a harsh one and might have been different had a different approach been taken.

In the light of the critical tone of some of this article, two observations are appropriate at the outset. First, the appeal in *Alsager* was decided on the basis of written representations.[3] It is likely that the judgment of the court would have been fuller if it had had the benefit of oral argument. Second, cases involving exhumation are sensitive ones and this may lead to a tendency for arguments to be not fully articulated.

3. *ALSAGER*: THE FACTS

The essential facts of *Alsager* were that the petitioner's father had died in 1981 and been cremated. His ashes were then interred in the Garden of Remembrance in the churchyard of Christ Church, Alsager.

[1] (1998) 5 Ecc LJ 18.
[2] [1999] Fam 142. The Court comprised Sir John Owen (Auditor) and Chancellors Coningsby and Bursell. Thus Bursell Ch, had the opportunity of considering in a judicial capacity the matters which he had canvassed in yhis article in this journal. The case will hereafter be referred to as *Alsager*.
[3] The court had to decide as a preliminary issue whether it had power to decide the case on the basis of written representations.

The petitioner's mother died in 1995. She was buried in the churchyard of Christ Church, Alsager about ninety feet away from her husband's ashes. The petitioner was concerned about the situation because he wished that the remains of his parents could lie in the same grave. Accordingly he petitioned for a faculty to exhume the ashes of his father, and for them to be buried in his mother's grave. The petition was dismissed by Chancellor Lomas sitting in the Chester Consistory Court and an appeal to the Chancery Court of York was unsuccessful.

The reader of this outline of the facts will wonder why the petitioner did not arrange for his mother's remains to be cremated and for her ashes to be buried in the Garden of Remembrance.

From the account in the judgment of the Chancery Court, it might appear that perhaps what had happened is that the petitioner had preferred that his mother's remains should be buried and that the undertakers *at the time of the petitioner's mother's funeral* had mistakenly advised the petitioner that the situation about which he was concerned could be addressed by the exhumation of his father's ashes; a matter about which they assured him there would be no difficulty. However, the facts as recorded by the Chancery Court are ambiguous. The court records that the petitioner's mother died in 1995 and they also record that in 1995 the petitioner discussed his wish to exhume the remains of his father with the undertakers, at which point they seem to have advised him that there would be no difficulty about the matter. The court does not however say whether this discussion—in which the undertakers assured the petitioner there would be no difficulty about such exhumation—took place before or after the burial of the petitioner's mother.[4]

Consideration of the judgment of Chancellor Lomas[5] does not entirely resolve the ambiguity, although it does reveal another aspect of the case which is not referred to by the Chancery Court. The Chancery Court *does* record that shortly before her death the petitioner's mother was received back into the Roman Catholic Church. What the Chancery Court does not record is that this was the reason why the petitioner arranged for his mother's remains to be buried:

> 'Mr Davies has said that he accepted the burial of his mother rather than cremation because he then believed that it was a fundamental requirement of her return to the Roman Catholic faith that she should be buried rather than cremated. He states that he took this for granted because he had attended a number of Roman Catholic funerals, namely those of his mother's father and mother and three sisters. He states that he became concerned at the situation immediately after the burial of his mother because he wished that his parents should be, as he put it, laid to rest in the same grave.'

It is clear that Chancellor Lomas accepted this evidence:

> 'It does appear from Mr Davies' evidence that he would in the ordinary case have arranged for his mother's remains to be cremated but he understood that that could not properly be done on account of his mother's faith and so he arranged a burial and for her remains to be interred at Christ Church, Alsager, which again had been her church during most of her lifetime so far as Mr Davies was aware, saving of course during the final years when she resided in Stone and indeed, rejoined the Roman Catholic Church.'

[4] This is a matter which might have been clarified had there been a hearing.
[5] 3 September 1997 (unreported).

In fact Mr Davies was mistaken in his view that it was a fundamental requirement of his mother's return to the Roman Catholic Church that she should be buried rather than cremated. Roman Catholic canon law recommends the practice of burying the bodies of the dead, but does not prohibit cremation.[6]

From a strict reading of Chancellor Lomas's judgment it seems that the undertaker's advice about the ease with which his father's ashes could be exhumed occurred *after* his mother's burial: '[the petitioner] states that he became concerned at the situation **immediately after the burial of his mother** [...]' (emphasis supplied). This is surely important because if the petitioner had been advised at the time of the interment of his mother's remains that the exhumation of his father's ashes might not be a straightforward matter, he might have sought further advice on the question of the Roman Catholic Church's attitude to cremation, rather than rest upon his own assumptions as to the position. However this may be, as recorded in Chancellor Lomas's judgment the operative mistake appears to have been that of the petitioner as to the attitude of the Roman Catholic Church as to cremation rather than as to the degree of difficulty surrounding an application to exhume his father's ashes. Certainly the emphasis of Chancellor Lomas's judgment is on the petitioner's mistake rather than that of the undertaker.

It is unfortunate that the facts in *Alsager* are not clearer. Moreover, it would appear that the Chancery Court did not regard the petitioner's mistake as to the attitude of the Roman Catholic Church to cremation as material; otherwise it would have referred to it.[7] It would however have been helpful if it had expressly referred to point.

4. THE TEST

The test formulated was: 'Is there a good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large?'

The court did not explain how the views of right thinking members of the church at large are to be ascertained. The reference to right thinking members of the church at large is surely to a notional body. If the chancellor thinks that a good and proper reason has been shown he will grant the faculty; if he thinks otherwise, he will not. However, a reference to the notional views of right thinking members of the church at large will have the effect of apparently shifting the responsibility for a decision to refuse a faculty from his own shoulders. No doubt it will be his earnest hope after full consideration that his decision *will* reflect the views of right thinking members of the church at large, but this is surely a consequence of a correct judgment rather than the cause of it.

That the reference to right thinking members of the church at large is notional is surely demonstrated by the fact that the petition in *Alsager* was unopposed. Thus the vicar did not object and neither did any parishioner. The archdeacon was called as a witness before the chancellor. His view was that 'in this particular case there

[6] See Canon 1176(3): 'The Church earnestly recommends that the pious custom of burial be retained; but does not forbid cremation, unless this is chosen for reasons which are contrary to Christian teaching.' In fact, cremation is not infrequent in the Roman Catholic community in England and Wales. Note, however, that until 1963 Roman Catholic canon law did prohibit cremation, and this no doubt explains Mr Davies's mistake.

[7] At p 150D the appeal court refers to Chancellor Lomas's judgment *seeming to stress some matters which we do not find helpful.* It may be that this is one aspect of the matter which they had in mind.

were stronger pastoral circumstances than perhaps are found in many cases.'[8] He did not object.

In these circumstances such evidence as there was as to the views of right thinking members of the church at large would surely point to the conclusion that they would not object; whereas it would seem to flow from the Chancery Court's decision to dismiss the appeal and not to grant a faculty that they *would* object. It was surely appropriate for the Chancery Court to refer to this apparent discrepancy, but it did not.

5. THE GUIDELINES

(1) Once a body or ashes have been interred in consecrated ground, whether in a churchyard or in a consecrated section of a municipal cemetery, there should be no disturbance of the remains save for good and proper reason.

This guideline is unexceptionable. However, the difficult question that arises is as to what is a good and proper reason. This guideline does not address this issue.

(2) Where a mistake has been made in effecting the burial, for example, burial in the wrong grave, the Court is likely to find that a good reason exists, especially when the petition is presented promptly after the discovery of the facts.

This is a helpful guideline, identifying circumstances when exhumation may be appropriate. Mistakes of the kind envisaged by the guideline will be ones that are very distressing to relatives and their prompt rectification is the most satisfactory way of addressing the situation.

(3) In other cases it will not normally be sufficient to show a change of mind on the part of the relatives of the deceased, or that the spouse or another close relative of the deceased has subsequently been buried elsewhere. Some other circumstance must usually be shown.

This guideline identifies two situations where the court suggests that a faculty would not normally be granted. The first is a straight 'change of mind' case. If a change of mind of the relatives could be good and sufficient reason it will be apparent that all that would be required to justify exhumation would be the agreement of all the relevant relatives. Without anticipating the discussion below of the justification for a restrictive approach to the grant of permission for exhumation, it is not difficult to see that to justify exhumation on the basis of a simple change of mind accords insufficient importance to the finality of Christian burial. The second situation identified by the court encompasses a range of situations from simple change of mind to something more complex, such as the facts in *Alsager* itself. What will need to be explored is the circumstances in which the spouse or close relative of the deceased was subsequently buried elsewhere. In *Alsager* there was a convincing reason why Mr Davies's mother was not buried with his father. This guideline does not address what sort of reasons would be of sufficient weight to overcome the force of the word *normally* used in the guideline.

(4) The passage of time, especially when this runs into a number of years, may make it less likely that a faculty will be granted.

This is in some ways the most difficult guideline.

[8] This is recorded in the unreported judgment of Chancellor Lomas.

Guideline 2 indicates that a petition based on mistake should be presented promptly after the discovery of the facts. This is surely correct (although in some ways it is no doubt *more* distressing if exhumation takes place shortly after the original interment). Nonetheless there is not the same reason for promptness as exists, for example, in the case of applications for judicial review, namely the requirement of good administration.

The relevance of delay after the discovery of the facts in exhumation cases is likely to be evidential, namely as to the fact that the matter has not been perceived as of much importance. Nonetheless one can envisage a situation where it is only after a delay that it becomes apparent that next of kin are having difficulties in coming to terms with the situation. It would not be appropriate to take any point on delay in such a case.

The passage of time is also potentially relevant in respect of the process of decay. Guideline (5) suggests that the extent of the processes of decay may be a material factor because they may affect the sensibilities of a congregation or neighbours. It is suggested below that concern for their sensibilities *per se* may be misplaced. In any event it does not seem that it is this concern which leads the Chancery Court to articulate Guideline (4). This is because on the facts before the court in *Alsager* '[the petitioner's] father's remains were placed in an Oak Casket with an inner plastic liner. The plastic liner can be buried for many years without deterioration (this is a proven scientific fact [...]).'[9]

Nonetheless the Court held that the passage of seventeen years in *Alsager* was one of two weighty factors leading it to uphold the chancellor's judgment.

The writer cannot see any reason *per se* why the passage of time makes it less appropriate to grant a faculty for exhumation.[10]

(5) No distinction is to be drawn between a body and cremated remains, except in so far as the processes of decay may affect a coffin more than a casket containing ashes and may also affect the sensibilities of a congregation or neighbours.

This guideline is surely correct in emphasising that the same considerations apply to the remains of a body as to cremated remains. In the light of the actual decision in *Alsager*—which concerned cremated remains which had not been subject to decay, but where a faculty did not issue—it may be that the Court's *caveat* will not have any practical application.

---

[9] At 146G.

[10] An interesting case to be considered in this context is *Re Talbot* [1901] P1 where a faculty was granted 110 years after burial. One cannot help thinking that after the passage of that amount of time—which would necessarily have involved the death of every person who knew the deceased—made it more likely that the petition would be successful. Of course there may not in the circumstances be cogent reasons justifying exhumation: *Re Talbot* itself concerned a petition for the removal the remains of a principal of a Roman Catholic seminary from a cemetery in London to the precincts of the college's current premises. On any view this was an unusual case, as was *Re St Mary the Virgin, Hurley* [2001] WLR 831, 6 Ecc LJ 166. This concerned a petition for the exhumation of the remains of a Brazilian patriot and their reburial in Brazil. The petition was made more than 175 years after the original interment of the remains. Following *Alsager*, Boydell Ch held that the length of time since interment counted against exhumation. However, this factor was outweighed by the special circumstances of the case in which the principle of the comity of nations played a part (the petitioner was the Brazilian Ambassador). Although the decision is (it is submitted) eminently justifiable, cases of this type—which at root are similar to the 'portable remains' cases—are not altogether happy exceptions to the *Alsager* principle.

(6) It is immaterial whether or not a Home Office licence has already been obtained.

If such a licence had not been obtained, it would be appropriate for safety's sake to make a faculty conditional upon the grant of a Home Office licence.[11]

Relevant factors arguing for or against a faculty

(i) [...] mistaken advice by a funeral director or anyone as to the likelihood of a successful petition in itself is unlikely to carry much weight [...]

The emphasis here surely is on the words *in itself*. After an interment has taken place, mistaken advice is unfortunate, but obviously is not capable of affecting the decision as to the arrangement made in the first place as regards interment. *In itself*, therefore it is surely right to observe that mistaken advice should not carry much weight.

(ii) [...] a mistake by the applicant or by a third party, such as an incumbent, churchwarden, next of kin, an undertaker, or some other person *eg* as to locality, may be persuasive to the grant of a faculty [...]

The writer has already commented on Guideline (2) enunciated by the Chancery Court. It is submitted that any operative mistake (*ie* a mistake influencing a decision as regards interment or made in effecting that decision) should be a persuasive factor, although the extent to which it is persuasive will of course depend upon the nature of the mistake.

(iii) Medical reasons relating to the applicant

Two obvious matters occur. The applicant may by reason of ill-health find it difficult to visit a particular grave. Although one may have great sympathy with a person in this position, it is unlikely that would be regarded as a compelling reason for the grant of a faculty.

The second matter relates to the applicant's mental health. This is particularly troublesome. If relatives make an application for exhumation they are likely to be distressed as to the existing situation and if their wishes are not met they may be more distressed. This could be used as a form of emotional blackmail of the chancellor. Chancellors will no doubt be astute to resist that blackmail. However, if there is evidence that a relative's health is being adversely affected by the situation that obtains it is, it is submitted, inappropriate not to grant a faculty. In *Re South London Crematorium: petition of Mary Murphy*[12] George Ch went slightly further:

> 'Whilst the evidence in the present case falls short of proving, or even suggesting, that refusal of the petition would seriously exacerbate [the medical condition of the petitioner's brother], it seems to me that 'right thinking members of the Church at large' (to apply the Alsager test) would be influenced by Leonard's history of serious depression, the fragility of his mental condition, and the positive impact which the local co-burial of his parents would (or at least might) achieve. The achievement of that positive impact is dependent upon exhumation. Accordingly, I am satisfied that this is one of those rare cases where it is right to grant the faculty [...]'.

[11] A licence is not required if the remains are removed from one consecrated place of burial to another by faculty: see section 25 of the Burial Act 1857.
[12] (2000) 6 Ecc LJ 85.

(iv) [... the fact] that all close relatives are in agreement, and the fact that the incumbent, the PCC and any nearby residents agree

One may begin by observing that in so far as was relevant this was the case in *Alsager*. It was not however viewed as a sufficient reason for granting a faculty.

If the close relatives disagree among themselves it will surely normally be inappropriate to grant a faculty or the court would be bound to upset someone and in these circumstances it is better to stay with the *status quo* as most likely to assist the preservation of family amity. The court recognised this when it observed later in its guidance that 'if there is reasonable opposition from members of the family [this] will be [a factor] arguing against the grant of a faculty'. The Court referred to *reasonable* opposition: it is submitted that it might not be appropriate to grant a faculty even if the opposition is not entirely reasonable.

As regards the incumbent and PCC, if they object it should surely be for reason given, which reason can be assessed on its merits. The incumbent and PCC should not have a veto over the matter. One would hope that their views would reflect those of right thinking members of the Church at large and, if they do, no doubt this fact will afford some reassurance to the chancellor. Nonetheless if there were a conflict, the views of right thinking members of the Church at large should prevail (if that is to be the appropriate test).

It is difficult to see circumstances in which the views of neighbours could be very important.

Running through this part of the guidance is the thought that it is the sensibilities of congregations and neighbours which are an important factor. Thus the court concludes this part of the guidance by saying: 'That there is little risk of affecting the sensibilities of congregations or neighbours, may be persuasive although in practice this is not likely to apply to municipal cemeteries'.[13]

Later the court observes that 'if there is a risk of affecting the congregation or neighbourhood, [this] will be [a factor] arguing against the grant of a faculty'.[14]

Similarly, in its articulation of its guidelines the court had said, as has been seen, that a distinction might be drawn between a coffin and a casket containing ashes because the processes of decay may affect the former more than the latter and thus affect the sensibilities of a congregation or neighbours.

It is submitted that the sensibilities of a congregation or neighbours are an inadequate basis on which to determine whether to grant a faculty. It envisages that cases which are essentially identical will be treated differently depending on whether congregation or neighbours object.[15] It is also at odds with the actual decision in *Alsager* where no such

[13] At 149G. The phrase 'municipal cemetery' is probably used to indicate any large burial ground which is not in the vicinity of a church. The idea is that in these circumstances, where there is not a congregation worshipping nearby and there are unlikely to be any other near neighbours, there will not be any sensibilities to be affected. If this analysis be correct, the fact that there is little risk of affecting the sensibilities of congregations or neighbours in the context of a non-municipal cemetery is not strictly a matter persuasive of permitting a faculty but the absence of a matter arguing the other way.

[14] At 150A.

[15] This could mean that it is easier to obtain a faculty in respect of an interment in the consecrated part of a municipal cemetery than in respect of an interment in a churchyard. One would have thought that it is unlikely that there would be objections of this kind in many cases (but see footnote 156 below). (The facts of *Re St James's Churchyard, Hampton Hill* (see footnote 16 below) may be contrasted in this regard in *Re St Mary the Virgin, Hurley* (see footnote 10 above)).

sensibilities were involved. It is possible indeed that the court did not mean really to suggest this: the underlying thought being that the sensibilities of congregations and neighbours will only be affected for good cause. If so, it is a pity that this was not made clear.[16]

(v) The passage of a substantial period of time will argue against the grant of a faculty

This has been commented upon already in the context of Guideline (4).

(vi) Public health factors and improper motives, *eg* serious unreasonableness or family feuds will be factors arguing against the grant

No comment is called for.

(vii) If there is no ground other than that the applicant has moved to a new area and wishes the remains also to be removed this is likely to be one inadequate reason

This is now provides the authority of an appellate court that a faculty should not usually be granted in a 'portable remains' case.

(viii) In normal circumstances if there is no intention to reinter in consecrated ground this will be a factor against the grant of a faculty

The reason for this aspect of the guidance is presumably that such a reinterment would remove the remains from the jurisdiction of the consistory court. That the ground is unconsecrated might suggest that it is unsuitable for other reasons *eg* if it is private land, there may be difficulty in ensuring that access will necessarily continue to be available to relatives. However, all other things being equal, it is hard to see why a proposal to re-inter in unconsecrated land should fail for that reason alone. Certainly there is no basis for objection on the basis that burial in unconsecrated ground is intrinsically unsatisfactory. (It may be noted that Canon B 38(5) envisages burial according to the rites of the Church of England in unconsecrated ground. Where such burial takes place, the grave is first to be blessed.)

(ix) If the removal would be contrary to the intentions and wishes of the deceased

No comment is called for.

6. THE DECISION

One factor which did not weigh with the court has already been identified—namely that the petitioner's mother had been buried under the mistaken understanding that burial was a requirement of the Roman Catholic Church.

[16] It is worth considering in this context *Re St James's Churchyard, Hampton Hill* (28 October 1982), a judgment of Chancellor Newsom, sitting as Chancellor of the Diocese of London. In that case there was opposition from a number of parishioners to the exhumation of the remains of a Canadian who had died and been buried in England in 1923. Some objectors took the view that exhumation would 'desecrate' the churchyard although as articulated by their representative the objection was: 'we say that nothing should be dug up from our churchyard and removed to another places of burial'. Chancellor Newsom considered the objection as misconceived: 'Orders for exhumation are in fact quite often made, where a family wishes to gather the remains of its deceased members in one place'. On the face of it, however, the Chancery Court would not have granted a faculty in this case. Note that Chancellor Newsom drew attention to the provisions of what is now rule 13(9)(a) of the Faculty Jurisdiction Rules 2000 (SI 2000 No 2047) whereby a chancellor can dispense with citation in an exhumation case if he is satisfied that any near relatives or others reasonable to regard as being concerned consent to the proposed faculty. This does indeed argue against undue weight being given to the concerns of congregations and neighbours.

Two factors which weighed most heavily with the court were the length of time since the burial of the ashes of the petitioner's father and the nearness of the two sets of remains.

As regards the former, comment has already been made as to the passage of time as a relevant factor. One may test the position in this way. Surely it would not have made any difference in *Alsager* if the petitioner's father had died only six months earlier: the objection should be to exhumation *per se* not to exhumation after seventeen years.

As regards the second factor, it should be noted that the petitioner's case was not based on the difficulty he had in visiting his mother's grave. The reason he wanted his parents to rest in the same grave was essentially a matter of feeling, which the writer would suggest is entirely understandable, if not ultimately entirely rational. That matter of feeling is not, it is submitted, addressed by saying that although the remains are not together, they are not very far apart. It would have been better, if this is what the Chancery Court actually thought, to say that the desire for remains to be buried together in the circumstances such as arose is not one which justifies exhumation. If this is the case it would not matter whether the two graves were separated by a short or by a long distance.

None of this is to say that the decision in *Alsager* is necessarily wrong. Before considering that issue it is appropriate to examine the exhumation cases decided since *Alsager* which have considered exhumation in the context of the European Convention on Human Rights.

7. HUMAN RIGHTS CASES

In *Re Durrington Cemetery*[17] the facts were that Maurice Saunders died in 1981. During his lifetime he had been a practising Jew. However, he had married outside the Jewish faith. His widow made the arrangements for the funeral. He was buried in a part of a municipal cemetery which had been consecrated according to the rites of the Church of England, the burial being carried out by a minister of the United Reformed Church. Some years later Mr Saunders's widow emigrated to Australia. His sister (together with the Administrator of the Federation of Synagogues Burial Society) then petitioned for his remains to be exhumed and reburied in a Jewish cemetery. Mr Saunders's widow did not object.

These facts speak to an unhappy family situation, and indeed it was suggested in the written submissions on behalf of the petitioner that the arrangements for Mr Saunders's funeral were made without reference to his Jewish relatives, who were not informed of his death. The chancellor (Hill Ch) made no finding about these suggestions.

One may readily understand why Mr Saunders's sister and other Jewish relatives would have wished that he should buried in a Jewish cemetery. It is submitted that the facts amounted to circumstances which were a good and proper reason for exhumation in accordance with the *Alsager* guidelines, and indeed the chancellor held that this was the case.

[17] [2001] Fam 33 (Chichester Consistory Court). The case will hereafter be referred to as *Durrington*.

However, *Durrington* is important because Hill Ch invoked the Human Rights Act 1998 as part of the reason for his decision.[18] He said:

> '[...] it seems to me that in the facts of the present petition, this court would be seriously at risk of acting unlawfully under the Human Rights Act were it to deny the freedom of the orthodox Jewish relatives of the late Mr Saunders to manifest their religion in practice and observance by securing the reinterment of his cremated remains in a Jewish cemetery and in accordance with Jewish law.'[19]

Article 9 of the Convention provides as follows:

> '1. Everyone has the right to freedom of thought, conscience and religion; this right includes [...] 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, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

In the writer's opinion there is only limited material in the judgment as to Jewish belief as to what ought to happen if a Jew is buried in a non-Jewish burial place. It is submitted that it is only if it is part of the practice and observance of the Jewish faith that exhumation and reburial ought, in these circumstances, to take place that interference with this practice and observance—by refusing to grant a faculty for exhumation—can amount to breach of the Convention. Moreover, even if exhumation and reburial be appropriate in accordance with Jewish belief, the European Commission of Human Rights has drawn a distinction between what is permissible and what is required.[20]

Chancellor Hill had before him a submission by a judge of the Beth Din but if he made any submissions on this point they are not recorded. In fact that part of his submission which is quoted emphasised that burial in the Jewish faith is intended to be permanent which, so far as it goes, argued against exhumation in this case. The Archdeacon of Chichester (in a passage relied upon by Chancellor Hill) referred to *the importance for Jews to be buried in a Jewish burial ground*[21] but no further elaboration is given.

Re Crawley Green Road Cemetery, Luton[22] concerned the remains of Joseph Sunasky who had died in 1996 and whose ashes had been buried in the consecrated part of a cemetery in Luton following a humanist funeral. His widow was unaware that the plot where the interment took place was consecrated.[23] When she became so, she

[18] The Human Rights Act 1998 had not come into force at the time of his judgment. However, Hill Ch considered the case on the basis that it had come into force. The interesting jurisprudential issues which arise from this approach (which have been considered in litigation in other non-ecclesiastical cases) do not concern this article.

[19] At 37D

[20] See *Khan v United Kingdom* App No 11579/85, 48 Eur Comm'n HR Dec and Rep 253 (1986); *D v France* App No 10180/82, 35 Eur Comm'n HR Dec and Rep 199 (1983).

[21] At 37E.

[22] [2001] 2 WLR 1175. The case will hereafter be referred to as *Luton*.

[23] It is not clear when she did become so aware. In his consideration of the facts of the case against the *Alsager* guidelines Bursell Ch said: 'I appreciate that the petitioner might well not have made the decisions that she did if she had not been grieving but a change of mind is not normally sufficient.' This would suggest some degree of knowledge on her part at the time of her husband's death.

formed the view that his burial in consecrated ground was hypocritical, and this formed the secondary motive for her petition that her husband ashes be exhumed and reburied at a crematorium in Ruislip. The primary motive for her petition was her very human wish to have her husband's remains close to where she lived. Bursell Ch held that Mrs Sunasky's primary motive was insufficient to displace the presumption against exhumation.[24] However, he concluded that 'the Court would [...] be acting in a manner incompatible with the petitioner's Convention rights if it were in the particular circumstances to deny her the right to remove her husband's ashes from a place where their burial is, at least in her eyes, hypocritical and contrary to her humanist beliefs.'

Bursell Ch cited *Kokkinakis v Greece*[25] as authority for bringing Mrs Sunasky's humanist beliefs within the scope of Article 9 of the Convention and was clearly correct to do so. Further, he recognised that not all manifestations of belief will be protected.[26] However, it is submitted that, just as in *Durrington*, there was limited consideration as to the nature of Mrs Sunasky's belief. One may understand that a humanist might not *like* the idea of his husband's or wife's remains being buried in consecrated ground, but it is difficult to see how the denial of an entitlement to remove them from such a place would have amounted to denying Mrs Sunasky the right to manifest her belief in practice and observance. Certainly denying her that right would not involve her in hypocrisy.

It may be objected that the kind of critique to which *Durrington* and *Luton* have been subjected by the writer is unedifying and that the consistory court should not be astute to seek to limit the application of the European Convention on Human Rights. To this criticism there are two answers.

One goes beyond the scope of this article. It is that what is accepted in the apparently arcane area of the law of exhumation will be relied upon in other, more mainstream, applications of the Convention.

The other is that the application of the Convention in the field of exhumation as envisaged by *Durrington* and *Luton* opens up an exception to *Alsager* which is potentially significant. Yet looking at the matter broadly a case like *Luton* is not more meritorious than *Alsager*. The petitioner in *Alsager* felt strongly and reasonably that he should be allowed to organise the exhumation of his father's ashes but was not allowed to do so. To grant a faculty in *Luton* but to refuse it in *Alsager* looks somewhat unfair, particularly when one remembers that *Luton* was *primarily* a 'portable remains' case (although it failed on this basis).

In this context it is worth recalling Article 9.2 of the Convention. In many cases under the Convention the limitations envisaged by this provision are invoked to defeat the entitlement to manifest the religion or belief which would otherwise exist. In *Durrington*, if Mrs Saunders had been opposed to reburial one may see how an issue might have arisen between the rights of the petitioners and her rights and freedoms. Otherwise it is difficult to see how reference to public order, health or morals could apply in exhumation cases to defeat what would otherwise be a right under the Con-

[24] He considered some medical evidence as to the mental health of the petitioner but held that this did not justify allowing the petition.
[25] (1994) 17 EHRR 397.
[26] He did not however consider whether there might be a distinction between what Mrs Sunasky's beliefs permitted and what they required. It is possible (although surely unlikely) that, irrespective of her move to London, Mrs Sunasky would have wished for the remains of her husband to be exhumed and reinterred in unconsecrated ground.

vention. If this be so it does point up the fact that the public policy considerations in *Alsager* are not of the strongest kind.

8. CONCLUSION

What it is contended is lacking in *Alsager* is any clear articulation of the reason why the court thought that it should be so difficult to obtain a faculty for exhumation. The writer has already criticised the approach which would base the reason on the sensibilities of congregations and neighbours. There was no doctrinal objection to exhumation and re-interment.[27]

Surely the objection to exhumation lies in the fact that it strikes at the finality of Christian burial.[28] If it were possible without much difficulty to obtain a faculty for exhumation, the symbolism involved in burial—ashes to ashes, dust to dust—would be devalued. The objection is to the generality of exhumation and has nothing to do with sensibilities in respect of any particular burial.

In *Re West Norwood Cemetery: petition of Jean Murray*,[29] George Ch said:

> 'The presumption arises because of two considerations, one principled, one pragmatic:
>
> (1) respect for the dead. Most people, and not merely most Christian people, feel a sense of respect for the dead and a reluctance to interfere with their remains. This reluctance is increased by the realisation that human remains decay after burial, just as do ashes themselves, and, despite the best attentions of undertakers engaged in the exercise of exhumation and re-burial, such interference threatens what integrity the remains may continue to possess.
>
> (2) social mobility. It is now extremely common for close relatives of the deceased to move away from the place of burial, and to experience inconvenience and difficulty in visiting the grave, particularly by comparison with what was possible when they lived close by. To allow (save exceptionally) exhumation in such circumstances would inevitably encourage transportation of remains from one place to another at the wish of those surviving the deceased.'

However, in terms of cases concerning petitions for exhumation, the problem with the first justification is that in the particular case it is likely that the relatives (who are most closely concerned) will all agree. As regards the pragmatic justification, it does

---

[27] The chancellor had certified, pursuant to section 10(3) of the Ecclesiastical Jurisdiction Measure 1963 that the case did not involve a question of doctrine, ritual or ceremonial. The court said of this:

> 'This certification seems to us of particular importance in this case as it underlines the fact that the evidence of the archdeacon, although concerned with the theology of burial, did no more than emphasise in addition to the pastoral side of burial services that the committal of mortal remains is of substantial importance. In other words his evidence underscored the theological reason for the protective jurisdiction of ecclesiastical courts in consecrated ground.'

The fact of course that there is not a doctrinal issue in the case does not mean that there is not a theological basis for the court's concern as regards exhumation. It is nonetheless difficult to see how the certificate underscored the archdeacon's evidence in this case. What principally flowed from it surely was that there was not a doctrinal objection to what was proposed; and that, as has been seen, he did not object.

[28] One should add, as practised within the Anglican Church. Practices in the rest of Europe may be different. Thus in Venice the dead are buried on the island cemetery of San Michele and remain in separate graves for a period of twelve years. Thereafter their bones are put in a common grave (see James Morris *Venice* (2nd edition, 1983, pp 157, 291–292)).

[29] Unreported, 3 July 2000, Southwark Consistory Court.

not address the question as to why 'portable remains' cases should be discouraged. It could be said, of course, that it encourages a superstitious attitude to human remains (which would not be a pragmatic reason for justifying a restrictive rule). However, a chancellor would have to be robust to assert that this was the case on the facts before him, and it is harsh to refuse a petition on the basis of a general concern which does not apply on the facts of the particular case.

Against this background where one draws the line is, to a degree, arbitrary. The Court of Arches has taken the view, and the writer would agree, that in the 'portable remains' cases sufficient cause for exhumation has not been shown. On the facts of *Alsager* he would for his part consider that sufficient cause had been shown.

The writer would suggest that an 'exceptional circumstances' test would be better than the test articulated by the Chancery Court in *Alsager* with its reference to right thinking members of the Church at large. It could be supplemented by guidance having more reference to particular typical cases or typical arguments than to more generalised factors.[30] Whatever guidance is given, it will be difficult to achieve consistency.

It is submitted that clarity in this matter has not been assisted by the two cases on the European Convention on Human Rights. If *Alsager* was too restrictive, *Durrington* and *Luton* were, it is submitted, insufficiently focused on the issue as to precisely what rights would have been denied if the petitions in question had not been granted. In the view of the writer the impact of the Convention in this field ought to be limited, and it may be that in any event the *Luton* case will be seen as turning on its own facts. However, too many cases like *Luton* would begin to undermine the restrictive approach taken in *Alsager*.

In the view of the writer *Alsager* may come in time to be seen as the high water mark of the arguments against exhumation rather than setting a new and more restrictive norm.

One may suspect that this is an issue which will not go away and that it is likely that in due course it will be addressed once again by the Chancery Court or Court of Arches.

[30] Note that in *Re St. Mark, Fairfield* (Worcester Consistory Court, September 1999) (5 Ecc LJ 391), Mynors Ch expanded the third guideline in *Alsager* along these lines.