HUMAN RIGHTS AND HUMAN REMAINS: THE IMPACT OF *DÖDSBO v SWEDEN*

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The legal revolution brought about by the Human Rights Act 1998 has affected arcane legal areas such as the law of exhumation,[2] by questioning whether refusal to grant an application to exhume and move a dead body would breach the applicant's human rights under the European Convention on Human Rights (ECHR). While the Consistory Courts have been quick to develop arguments based on human rights, the majority of the European Court of Human Rights in its recent judgment in *Dödsbo v Sweden*[3] showed a greater reluctance to do so, emphasising the fact that although the refusal to exhume may interfere with the applicant's human rights, such an interference could be valid under the terms of the ECHR.

DOMESTIC LAW

In English ecclesiastical law (applicable to the Church of England), there is effectively a presumption against exhumation: the leading case *Re Christ Church, Alsager*[4] provides a test founded on the principle that 'there should be no disturbance of the remains save for good and proper reason' and then elucidates when such a disturbance will be permitted. This test was applied by the Chichester Consistory Court in *Re Durrington Cemetery*.[5] The case concerned a practising Jew who had been buried, according to the rites of the Church of England, in a municipal cemetery in order to allow his widow to visit the grave. However, several years after his death, the widow emigrated and the deceased's Jewish relatives sought a faculty for the remains to be removed for reinterment in a Jewish cemetery in accordance with Jewish law. Neither the widow nor the borough council objected to this. Chancellor Hill granted the faculty. Although there was a considerable delay between the original burial and the application,[6] such delay was caused by the 'dignified and principled restraint on the part of [the] orthodox Jewish relatives out of respect for [the] widow'. Having decided the application in the affirmative, the Chancellor also

[1] I would like to thank Professor Norman Doe and Eithne D'Auria of the Centre for Law and Religion for their invaluable support in the preparation of this piece.
[2] P Petchey, 'Exhumation Reconsidered' (2001) 6 Ecc LJ 122 at p 132.
[3] Application no 61564/00, 17/01/06 (Unreported).
[4] *Re Christ Church, Alsager* [1999] Fam 142, [1999] 1 All ER 117, 17 CCCC No 19, (1998) 5 Ecc LJ 214, Ch Ct of York.
[5] *Re Durrington Cemetery* [2001] Fam 33, 19 CCCC No 17, (2000) 6 Ecc LJ 80, Chichester Cons Ct.
[6] Which under the *Alsager* test is a persuasive justification for refusal of a faculty.

thought it proper to make reference to the Human Rights Act 1998 and considered the impact of the ECHR as if the Act had been in force.[7] Citing Article 9 (freedom of thought, conscience and religion), Chancellor Hill maintained that the Consistory Court 'would be seriously at risk of acting unlawfully under the Human Rights Act 1998 were it to deny the freedom of the orthodox Jewish relatives ... to manifest their religion in practice and observance by securing the reinterment of [the] cremated remains in a Jewish cemetery and in accordance with Jewish law'.[8]

A few months later, after the Human Rights Act 1998 had come into force, the St Albans Consistory Court revisited this area in the case of *Re Crawley Green Road Cemetery, Luton*.[9] The petitioner, the widow of the deceased, sought a faculty to exhume her husband's ashes that had been buried following a humanist funeral in consecrated ground in a cemetery in Luton. The petitioner had been unaware that the plot had 'church associations' and said that had she known this prior to burial, the family would have regarded it as hypocritical and not proceeded. She had subsequently moved to London and sought exhumation in order to inter the ashes closer to her new home. She also contended that she had suffered from a long term depressive illness when making the original decisions. Chancellor Bursell held that although under the *Alsager* test, 'medical reasons relating to the petitioner' may be persuasive in favour of exhumation, on the facts the medical condition did not displace the presumption against exhumation.[10] However, relying upon the petitioner's 'secondary motive' that exhumation was required because burial in consecrated ground was hypocritical given her humanist beliefs, the Chancellor examined her Article 9 rights. In this case, the Chancellor's comments were part of the *ratio* of the case:[11] he held that a refusal to grant a faculty would be incompatible with her right under Article 9 to remove the ashes from a location since Article 9 not only includes 'the freedom of the act of thinking' but also includes 'to some extent at least' the 'expression' of one's beliefs.[12] Although Chancellor Hill's acknowledgment of the Article 9 right is welcome, the decision of Chancellor Bursell in *Re Crawley Green Road* is questionable given its reliance on Article 9 as an absolute right since this ignores the limits on the right to manifest found in Article 9(2).[13]

[7] The judgment was delivered on 5 June 2000; the Act came into force on 1 October 2000.
[8] *Re Durrington Cemetery* [2001] Fam 33 at p 37.
[9] *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308, 19 CCCC No 48, (2000) 6 Ecc LJ 168, St Albans Cons Ct.
[10] [2001] Fam 308 at 310.
[11] Cf Chancellor Hill's *obiter* comments in *Re Durrington Cemetery,* the matter having already been determined under the substantive domestic law.
[12] [2001] Fam 308 at 311.
[13] That is not to say that a detailed discussion of Article 9 rights is itself essential since the qualified nature of the Convention right may be evaluated in the proper application of the substantive law.

ARTICLE 9

Although Article 9 of ECHR protects the absolute right to hold a religion or belief, the right to manifest religion or belief is qualified. It is limited in two ways: first, it is limited by the requirement in Article 9(1) that manifestation must be 'in worship, teaching, practice and observance'; and secondly, it is limited by Article 9(2), which outlines the circumstances in which a state may limit the manifestation of religion or belief. Even if there is *prima facie* an interference with the petitioner's Article 9 right to manifest their religion or belief, that interference will not constitute a breach of Article 9 if that interference is justified under Article 9(2). In short, the interference is justified if it is 'prescribed by law';[14] if there is a legitimate aim;[15] and if interference is 'necessary in a democratic society'.[16]

Although refusing to grant a faculty to exhume may interfere with the petitioner's rights under Article 9, this does not mean that a court that makes the decision to refuse will necessarily be in breach of Article 9 because that decision to refuse may be a justified interference in the terms of the Convention. Indeed, it is likely that such interference would be justified. An examination of the burgeoning Strasbourg jurisprudence on Article 9 conveys that the Article 9(2) tests have an elastic character: the legitimate aims provided are wide and discretionary—one could justify almost any interference on grounds of 'public safety', 'public order' or 'public morals'; while the 'necessary in a democratic society' test essentially allows the court to decide whether it considers that the interference is justified and then support that conclusion with the law.[17] The court's flexibility is also buttressed by its employment of the concept of the 'margin of appreciation' which permits a level of discretion to states in recognition of local circumstances.[18] The recent decision in *Dödsbo v Sweden* in relation to exhumation illustrates how the Convention may not provide petitioners with the absolute rights supposed by *Re Crawley Green Road Cemetery, Luton*.

[14] That is, it must have some basis in domestic law and that law should be accessible and its effects foreseeable: *Sahin v Turkey* (2005) 41 EHRR 8.

[15] The legitimate aims are those outlined in ECHR, Article 9(2): 'public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

[16] That is, 'any such restriction must correspond to a "pressing social need" and must be "proportionate" to the legitimate aim pursued': *Serif v Greece* (2001) 31 EHRR 20.

[17] See generally M Hill, The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom (2005) 19 *Emory International Law Review* 1129–1186.

[18] Note that in Sweden there is no equivalent of the Human Rights Act 1998, s 13(1), which 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 or religion, it must have particular regard to the importance of that right'. An English court (civil or ecclesiastical) may find itself having to give greater weight to the freedom of religion and less to its limitation.

DÖDSBO v SWEDEN

The applicant, the widow of the deceased, sought to move her husband's urn from a burial plot in Fagersta to a family burial plot in Stockholm, the city to which she had moved. All her children agreed to the removal but the authorities denied the request under the Funeral Act 1990, which, in company with English law, adopted a presumption in favour of 'a peaceful rest'. Domestic appeals were rejected and the applicant herself died and was buried at Stockholm. The five children as sole heirs of the applicant pursued the application to the European Court of Human Rights invoking Article 8 (right to privacy and family life). The Court by a 4:3 majority held that there had been no violation of Article 8 of the ECHR.

Although this case is distinguishable from the Consistory Court cases examined in that it relates to Article 8 not Article 9, it is contended that this precedent will also apply in relation to cases where a breach of Article 9 is claimed. The two Articles are framed similarly: the main difference being that the exceptions in Article 8(2) apply to all the rights in Article 8(1).[19] Like Article 9(2), Article 8(2) provides a three stage test whereby interference will not constitute a breach of Article 8(1): the interference is justified if it is 'in accordance with the law';[20] if there is a legitimate aim;[21] and if interference is 'necessary in a democratic society'. The majority recited this test to reach their conclusion that the decision to refuse exhumation was a justified interference under Article 8(2).

The majority held that it was undisputed that the refusal to allow the removal of the urn constituted an interference with the applicant's private life.[22] The court did not question the Swedish Government's submission that the interference was in accordance with law, the Funeral Act 1990. The majority held that the interference had the legitimate aim of the 'prevention of disorder, for the protection of morals, and/or for the protection of the rights of others' and that this was 'necessary in a democratic society' because 'ensuring the sanctity of graves' was 'such an important and sensitive issue that the States should be afforded a wide margin of appreciation'.[23] The majority stressed that the Swedish authorities had balanced the relevant circumstances carefully acting within their margin of appreciation.[24]

The minority agreed that there had been an interference with the applicant's rights under Article 8(1) but contended that this did constitute a breach of the Convention since it could not be justified under Article 8(2). They said that the interference served no legitimate aim, reasoning that the removal of an urn from one sacred place to another sacred place would not jeopardise

[19] Cf ECHR, Article 9 (2), which concerns only the right to manifest.
[20] Cf 'prescribed by law' under Article 9.
[21] The legitimate aims differ and are outlined in Article 8(2).
[22] They did not consider it necessary 'to determine whether such a refusal involves the notions of "family life" or "private life" cited in Article 8' but proceeded 'on the assumption that there has been an interference'.
[23] *Dödsbo v Sweden*, para 25.
[24] *Dödsbo v Sweden*, paras 26-27.

the principle of the sanctity of graves. Furthermore, the interference was not 'necessary in a democratic society' since 'the applicant's interest in moving the ashes of her spouse to the family grave in Stockholm weighs more heavily than the public interest invoked by the government'. Judges Türmen, Ugrekhelidze and Mularoni thus dissented in holding that there had been a violation of Article 8.

CONCLUSION

Dödsbo v Sweden shows that although it is important to consider Convention rights,[25] it is important not to read qualified rights as absolute provisions. It is clear that even if refusing to grant an application to exhume and move a dead body breaches the applicant's human rights, this does not mean that courts must reverse the presumption against exhumation to ensure that they are not in breach of the ECHR. Although *Dödsbo v Sweden* is a narrow decision, focussing on Article 8 not Article 9, it does allow ecclesiastical courts to decide petitions on a case-by-case basis by reference to the *Alsager* test within the English margin of appreciation without the fear that the invoking of ECHR rights will compel a homogenous rubber-stamping of petitions.

[25] Cf *Re Blagdon Cemetery* [2002] Fam 299, [2002] 4 All ER 482, (2002) 6 Ecc LJ 420, where the Court of Arches held that both *Re Durrington Cemetery* and *Re Crawley Green Road Cemetery, Luton,* could have been decided 'without the need for recourse to the Human Rights Act 1998'.