

light and that this fact, combined with the claimant's disability, meant that the claim was within time and not statute barred. While the archdiocese did not accept that the priest had abused the claimant, the judge was nevertheless satisfied that sexual abuse had occurred over a prolonged period. The judge rejected the contention that the defendant could be held vicariously liable for the abuse. He reviewed the law on vicarious liability and concluded 'that the assaults which [the priest] carried out on the claimant were not so closely connected with [his] employment or quasi-employment by the Church that it would be fair and just to hold the Church liable'. Applying a similar test, he also found that the defendant could not be held liable for the inaction of the priest in charge of the parish in not investigating the complaints made against his assistant. [WA]

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R (on the application of Ghai) v Newcastle City Council

Administrative Court: Cranston J, May 2009

Hindu – cremation – open air – human rights

Davender Kumar Ghai, a Hindu, wished to have his body cremated on an open-air pyre following his death and so requested, on behalf of the Anglo Asian Friendship Society, suitable land from Newcastle City Council. The Council replied saying that Ghai's request could not be considered because the law prohibited funeral pyres. Ghai sought a review of this decision. The Secretary of State for Justice, a Sikh temple and a wildlife trust made additional representations. Cranston J held that English law 'effectively prohibits open air funeral pyres'. The Cremation Act 1902 enables burial authorities to establish crematoria and makes it a criminal offence knowingly to take part in the burning of any human remains except in accordance with the provisions of the Act. Likewise, the Cremation (England and Wales) Regulations 2008 (SI 2008/2841) defines cremation as 'the burning of human remains' and states that 'no cremation may take place except in a crematorium the opening of which has been notified to the Secretary of State'. Although the Consultation Paper that preceded the 2008 Regulations stated that 'any question as to whether the regulations permit funeral pyres is a matter for the courts and outside the scope of these regulations',¹ Cranston J held that the 1902 Act and the 2008 Regulations 'put the matter beyond doubt: open air cremation is not permitted'. The effect of the 1902 Act and the 2008 Regulations was that

1 Ministry of Justice, 'Cremation regulations: consolidation and modernisation' (CP 11/07, July 2007) (available at <<http://webarchive.nationalarchives.gov.uk/> + /<http://www.justice.gov.uk/docs/cpi07.pdf>>, accessed 12 June 2009), para 40.

cremations take place in a building, and the argument that the Regulations were *ultra vires* failed.

The claimant and the Sikh temple invoked Articles 9 and 8 of the European Convention on Human Rights (ECHR). Cranston J noted that Article 9 does not protect every act motivated or inspired by religion or belief and that there remained a coherent and remarkably consistent body of authority at the Strasbourg level that showed that interference was not easily established. Noting the Secretary of State's contention that the weight to be given to religious rights depends on how close the subject matter is to the core of the religion's values, and rejecting the submission that the determination of the core content of the Hindu religion is not a matter for the court, Cranston J held that Ghai's beliefs about an open-air funeral pyre were such as to satisfy the *Williamson* threshold:² they had the requisite degree of seriousness and importance and were concerned with central rather than peripheral matters. In contrast, he held that Article 9 accorded no protection to the Sikh tradition of using open-air funeral pyres because it was conceded that their use was simply matter of tradition and 'not a matter of dogma and belief'. He held that there had been interference with Ghai's Article 9 rights but that this interference was justified under Article 9(2). The findings as to the 1902 Act and the 2008 Regulations meant that the interference was prescribed by law. The legitimate aim was the protection of public safety and public morals, in that others in the community would be upset and offended by human remains being burned in this way. The claimant contended that Strasbourg had made it plain that the role of the state is not to remove the cause of tension but to ensure mutual tolerance between opposing groups. The religious rites of minorities should not be swept aside to pacify the unease of the majority. Cranston J held that the current balance struck by the 1902 Act and the 2008 Regulations was proportionate. Since this was a delicate and sensitive issue, the court had to accord primacy to the conclusion of elected representatives and it was within their remit to conclude that a significant number of people would find cremation on open-air pyres a cause of offence.

As to Article 8, Cranston J held that the right had no purchase in relation to cremation on open-air funeral pyres because the event would have a public character and so the claimant was stepping outside the private and familial spheres. Although Article 8 may in some circumstances offer protection to particular funeral arrangements, this case did not fall under its 'protective wing' and, even if it had, any interference would have been justified along the same lines as that of Article 9. In relation to Article 14, Cranston J held that Ghai had not established that he had suffered disproportionate treatment, given that the

2 *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15, [2005] 2 AC 246, HL.

law only required that cremations take place in a building. Even if Article 14 was engaged, this too would be justified for the same reasons as for Article 9. Cranston J held that, if there had been a violation of the ECHR, it would not have been possible to give a Convention-compatible reading to the 1902 Act and the 2008 Regulations, since that would require the adoption of a meaning inconsistent with the fundamental feature of the legislation or its underlying thrust. The claimant's arguments based on the Race Relations Act 1976 and the Equality Act 2006 were dismissed on the basis of the exemption in both statutes for acts done with statutory authority.

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Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales

Charity Tribunal: McKenna, President, June 2009

Adoption agency – Equality Act (Sexual Orientation) Regulations – charitable objects

The appellant was a Roman Catholic adoption agency. Prior to the coming into force of the Equality Act (Sexual Orientation) Regulations 2007 ('the Regulations') it had never, for religious reasons, provided adoption services to homosexuals. Regulation 18(1) provides an exemption where a person acts 'in pursuance of a charitable instrument, and the restriction of benefits to persons of [a specified] sexual orientation is imposed by reason of or on the grounds of the provisions of the charitable instrument'. The agency therefore sought the Charity Commission's consent to replace the objects clause in its Memorandum of Association with a new one intended to bring it within the exemption under Regulation 18(1). The Commission refused and the charity appealed.

The tribunal was mindful of the human rights of 'hard-to-place' children and the charity's success with such children but nevertheless ruled that, to allow the appeal, it would have to be satisfied that the public benefit arising from the charity's activities was sufficiently linked to its ability to discriminate on grounds of sexual orientation. The Regulations had to be interpreted as a coherent whole, mindful of the mischief that Parliament had intended to avert. The tribunal concluded that Regulation 18 permitted discrimination by charities only when their activities did not stray into the areas covered by the other regulations. Regulation 18 could not be relied upon to condone activity that was no longer permitted or