RECENT ECCLESIASTICAL CASES

edited by

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Elli Poluhas Dodsbo v Sweden
(European Court of Human Rights, August 2004)

Exhumation—Human Rights

The ashes of the late husband of the applicant had been buried in a family grave in Fagersta in 1963 (the late husband had been Catholic). In 1980 the applicant moved 70 kilometres away, to be closer to her children. In 1996, the applicant requested that her husband's urn be moved to a family burial plot in Stockholm, 180 kilometres from Fagersta, on the basis that she had no connections with Fagersta any more and all her children were in agreement with the proposed move. The funeral authorities having considered the Funeral Act 1990 turned down her application. On appeal the County Administrative Board found no special reasons to allow the removal of the urn having regard to the deceased's right to a peaceful rest, there being no evidence of the deceased's wishes when he was alive and there being no connection with Stockholm. The applicant's request for leave to appeal domestically was rejected. She died in 2003 and was buried in the family plot in Stockholm. The applicant complained under Article 8 of the European Convention on Human Rights. The European Court of Human Rights analysed the Funeral Act 1990 and concluded that the interpretation of the Act is 'very strict' citing for example that the fact that surviving relatives have moved and that there is no public transport to enable a visit to a grave is not sufficient. The government argued that, whilst the refusal to remove the urn constituted an interference with the applicant's private life, it was in accordance with the law and served legitimate aims — *inter alia*, the sanctity of the grave. The government argued for a wide margin of appreciation in the particular facts of this

case. The court considered that the complaint raised serious issues of fact and law under the Convention, the determination of which should be on an examination of the merits. [JG]

Re St Barnabas, Heaton
(Bradford Consistory Court: Walford Ch, September 2004)

Telecommunications masts—health and morals

A petition was sought for the installation of a telecommunications mast. Objectors had, *inter alia*, signed a petition opposing the installation, attempting to distinguish the judgment given in *Re St Margaret, Hawes, Re Holy Trinity, Knaresborough* (2004) 7 Ecc LJ 364, Ripon and Leeds Cons Ct, on the basis that the present proposed mast was 'third generation' and the fact that the petitioners had signed a contract with Playboy whereby images could be accessed via their mobile phones. The Chancellor was satisfied that the equipment to be installed complied with the guidelines and that there was no compelling evidence that the exposure levels from living near to mobile phone base stations posed a risk to health. The fact that the installation is 'third generation' did not appear to increase the risk. The Chancellor was satisfied that, with safeguards proposed by the petitioners, there were no ethical objections to the petition. It was granted as prayed. [JG]

*Re Locock deceased (*sub nom *In Re St Nicholas, Sevenoaks)*
(Arches Court of Canterbury: Dean of Arches; Collier and Wiggs Chs, September 2004)

Exhumation

The facts are as set out in *Re Locock deceased* (2003) 7 Ecc LJ 237, Rochester Cons Ct. The judgment of the Court of Arches is now reported at [2005] 1 WLR 1011.

The appellant argued that the Chancellor had erred in concluding that the appellant had failed to discharge the burden of proof resting upon him to prove on a balance of probabilities that there were special circumstances in his case justifying making an exception from the norm that Christian burial is final. The court adopted the approach in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, Ct of Arches, to draw any inferences of fact which might have been drawn by the Chancellor and substitute its discretion if his discretion was based on an erroneous evaluation of the facts taken as a whole. The court adopted the reasoning of *Re Hing Lo* (McClean Ch, unreported) stating that consistory courts in each province should have regard to decisions of the appellate court, whether or not given in their province, and a later decision should prevail if it differs from an earlier decision irrespective of the province concerned.

The appellant relied on two reasons for the exhumation: (1) he and his family wished to have their belief that Princess Louise was the deceased's mother confirmed or disproved; (2) confirmation that Princess Louise gave birth to a child at that time would be of interest in various areas of nineteenth-century law. The court agreed with the appellant's submissions that there would be no problem in identifying the remains, that there would be a better than 50 per cent chance of obtaining DNA but dismissed the appellant's submission that Article 8 of the European Convention on Human Rights was engaged or, if it was, that no breach could be established because of the remoteness of the relationship which the appellant sought to investigate. The court dismissed the appellant's submissions that the Chancellor had not attached sufficient weight to the appellant's wishes to discover from whence they came. The court extensively reviewed the evidence led by the appellant (which was in part different and more comprehensive than that led before the Chancellor) and dismissed it as speculative or improbable, and thus the court did not have to consider (2) above. The appeal was dismissed. [JG]

Re Brightlingsea Churchyard
(Chelmsford Consistory Court: Pulman Ch, December 2004)

Churchyard—closure—reservation of grave space

The court heard two petitions at the same time. The first, a petition by F for the reservation of a gravespace in the churchyard and the second, a request by the Archdeacon of Colchester for a ruling on the use of pathways in churchyards for burials. The first petition was amended during the course of the hearing to an application for a faculty allowing the burial of F and his wife in the grave of F's great-grandfather. This faculty was granted.

The vicar and PCC considered that the churchyard was full and sought to have the churchyard closed by Order in Council. The Home Office had consulted Brightlingsea Town Council who contended that there was room for new graves on paths and in an area used as a spoil heap and to store equipment. The Home Office considered that there was still space remaining. The Chancellor held that the latter area had been used for burials since 1929 and could not be re-used. He further held that the paths that the Town Council contended could be used for burial could not be so used. In one case this was because of the consequent damage to the roots of protected trees. In all cases the paths were necessary for safe and seemly passage through the churchyard for those visiting graves. The Chancellor considered that Brightlingsea Town Council, as the elected local authority, had a responsibility to the community whose local burial place would be removed by the closure of the churchyard. They were thus rightly concerned and their intervention in the process did not intrude on the rights and duties of the PCC. The Chancellor declared that there is no more burial space within Brightlingsea Churchyard. [WA]

Re Farrell deceased
(High Court of Northern Ireland: Girvan J, January 2005)

Summons—validity—service on Sunday

A complaint was laid before a Justice of the Peace for the Petty Sessions area of Belfast and Newtonabbey alleging that the defendant had driven a motor vehicle on a road or other public place after consuming so much alcohol that the proportion of it exceeded the prescribed limit. On 28 April 2004 a justice of the peace validly issued a summons ordering the defendant to appear at the Laganside Court House on 2 September 2004. On 10 June the police tried to serve the summons on the defendant at his home, but he was not in. The police left a note informing him a summons had been issued and left a contact number. The applicant attended the police station on Sunday 13 June 2004 where the summons was given to him. The applicant argued before the resident magistrate that the summons had not been validly served as Section 7 of the Sunday Observance Act (Ireland) 1695 provides that 'no person upon the Lord's day commonly called Sunday shall serve ... any writ, process, warrant, order, judgement or decree ... but that service ... shall be void to all intents and purposes whatsoever, and the ... persons so serving ... shall be liable to the suit of the party grieved, and to answer damage to him for doing thereof'. The resident magistrate drew a distinction between the complaint and the summons. The applicant was aware of the existence of the complaint and the summons when he arranged to collect it. The applicant appealed, repeating the argument. The Crown argued that due to a fundamental change in public attitudes to Sunday observance, section 7 should be construed narrowly. The list of 'writs etc' all pointed to matters having a legal significance in themselves in that they encompassed or were capable of encompassing a judicial act or finding. The issue of a summons is purely administrative, being a means of informing the defendant of the complaint. The Crown argued that the point taken was without merit and was entirely technical and since no prejudice was caused to the defendant it was an abuse of the process. Further the Crown argued that the court should exercise its discretion and should decline to grant any relief. The court ruled that Section 7 of the 1695 Act remains in force and its continuing force had been recognised in certain recent legislation. Section 7 was drawn in very wide terms. A summons was clearly a process. The giving of the document to him in the police station on Sunday was clearly service of the document. Accordingly section 7 had been breached. Although the point was a technical one and might appear to lack merit, procedural provisions that give rise to jurisdiction must be properly complied with. The resident magistrate's decision was quashed and he could not proceed with the hearing of the complaint until a fresh summons had been served on the defendant. [JG]

The neutral citation for this case is [2005] NIQB 6. The editors are very grateful to Professor Norman Doe and to Terence Dunlop of the Northern Ireland Courts Service for providing a copy of the judgment.

Re Emmanuel, Bentley
(Lichfield Consistory Court: Shand Ch, January 2005)

Telecommunication aerial—health and safety—pastoral concerns

The Churchwardens (the parish being in vacancy) and QS4 Ltd (the Archbishops' Council's sole approved installers of telecommunication aerials on churches) petitioned for a faculty to place an aerial on the tower of the church. Whilst the church was unlisted the petitioners still had to make a case for the granting of a faculty. The PCC unanimously approved the scheme and the DAC had also approved. Over 180 local residents signed letters of objection and a formal objection was lodged by the headteacher and chair of governors of a nearby primary school.The Chancellor found that the contractors had made out a case for commercial need. The PCC had also made out a case for need based on the financial returns that the installation would afford. There had been considerable discussion of the aesthetics of the scheme and the petitioners and the DAC had agreed an aesthetically acceptable plan. The primary focus of the objectors' case was on potential health and safety risks. The Chancellor sympathised with the concern of the objectors and of parents of children in the nearby school. However, he found himself obliged to give judgment on the balance of probabilities and, having reviewed guidelines on the issue would, all else being equal, have granted a faculty. However, having regard to the role of the parish church as a local centre of worship and mission (Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 1), the Chancellor found that the siting of an aerial on this particular church in the face of very strong local opposition could cause significant pastoral difficulties. The application was dismissed on the facts of the case but the Chancellor stressed that subsequent petitions for aerials would be considered on their merits. [WA]

Re Strood Cemetery
(Rochester Consistory Court: Goodman Ch, January 2005)

Exhumation of cremated remains—de minimis

Mrs A had reserved a burial plot for herself in the consecrated part of the municipal cemetery in 1958. Since that time her first husband and the ashes of two sons-in-law had been buried in the grave. At the time of the subsequent burials it had been Mrs A's wish to be cremated after her death and for her remains to be interred in the top of the grave with her sons-in-law. She had now changed her mind. Mrs A's daughter and grand-daughter sought a faculty for the exhumation of the cremated remains after Mrs A's death and the placing of the remains in her coffin, which would be buried in the grave in question. The Chancellor questioned whether it would be practical and seemly to allow the petition. He also questioned whether he could grant a faculty to enable something that would happen only after Mrs A's death and when she could not be a petitioner. The Chancellor

found that the faculty could be granted to the petitioners with the assent of Mrs A but noted that such a faculty would be permissive rather than binding. The Chancellor found that enabling family members' remains to be kept together was sufficient ground to rebut the presumption against exhumation. Moreover, had the petition not included the plan to remove the cremated remains and place them in Mrs A's coffin (after her death) he considered that a faculty would not be necessary – the partial displacement within a grave of previously buried remains being *de minimis* when preparing for a subsequent burial in the same plot, even if the displaced remains need to be laid on the surface prior to reburial. In this case, the remains would, for practical purposes, have to be removed from the cemetery to be placed in Mrs A's coffin. The petitioners, with the assent of Mrs A, modified their petition and a faculty was granted for the cremated remains to be removed, the grave dug and the cremated remains replaced in the grave on top or at the side of the coffin prior to the grave being filled in. The possibility that the cremated remains would need to be put in new caskets and possibly stored overnight in the cemetery chapel (if the grave needed to be dug the previous day) meant that the request was not *de minimis* and a faculty was required. [WA]

R v Secretary of State for Education and Employment, ex parte Williamson (House of Lords: Lords Bingham of Cornhill, Nicholls of Birkenhead, Walker of Gestingthorpe, Baroness Hale of Richmond, and Lord Brown of Eaton-under-Heywood, February 2005)

Corporal punishment—faith schools—human rights

In response to the decision of the European Court of Human Right's decision in the case of *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, Parliament enacted the Education (No 2) Act 1986 which made it illegal for school teachers in maintained (state) schools to administer corporal punishment. It was also illegal for teachers to administer corporal punishment to pupils within the independent sector who received public funding, for instance under the assisted places scheme. In 1993 in response to the decision of the ECtHR in *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 and in compliance with Article 3 of the European Convention on Human Rights, which imposes upon states a positive obligation to ensure that individuals are not subjected to 'inhuman or degrading' punishment, Parliament intervened again with regard to those children at private schools who were not covered by the earlier legislation. Section 293 of the Education Act 1993 provided that the corporal punishment of children could not be justified if 'inhuman or degrading'. In 1998 the ban pursuant to the 1986 Act was extended to include privately funded children attending independent schools by way of section 548(1) of the Education Act 1996. The extension of the ban was challenged by the appellants in the present case who were head teachers, teachers and parents of children at four independent Christian schools. They contended that the ban was incompatible with their Convention right

to freedom of religion and freedom to manifest their religion in practice, a right guaranteed under Article 9 of the Convention on Human Rights. Their application for judicial review failed in the court of first instance and they also failed in the Court of Appeal (2004) 7 Ecc LJ 491. The appellants believed that, correctly used, discipline of this type was an effective deterrent against behaviour that was unacceptable in the community. They stated that there were 40 schools conducted in accordance with these beliefs, which were grounded in Scripture.

The claimants argued that section 548(1) of the Education Act 1996 did not apply where parents had delegated to a teacher their common law right to discipline their child. This argument was rejected, as the plain purpose of the section was to prohibit the use of corporal punishment by all teachers in all schools. Parents cannot opt in or out of the prohibition. They also claimed that they were seeking to exercise their right to manifest religious beliefs protected by Article 9 of the Convention and to educate their children according to their right protected by Article 2 of the First Protocol to the Convention. The conduct of the claimants was capable of engaging Article 9 as it was rooted in a belief. The rights of the parents under Article 2 of the First Protocol were also engaged although as the Article extended only to parents the teachers had no rights protected by it. As to Article 9 of the Convention the teachers' rights were ancillary to those of the parents. Section 548 constituted a material interference with the claimant parents' manifestation of their beliefs but it was one that was justified under Article 9(2). The ban against corporal punishment had been prescribed by primary legislation in clear terms and was 'necessary in a democratic society ... for the protection of the rights and freedoms of others'. The statutory ban was intended to protect a vulnerable group, namely children, from harm that *might* be caused by corporal punishment. The legislature was entitled to take the overall view that (balancing the conflicting considerations) all corporal punishment of children at school was undesirable and unnecessary and that other non-violent means of discipline were available and preferable. [LY]

This case is reported at [2005] UKHL 15.

Re Mangotsfield Cemetery
(Bristol Consistory Court: Behrens Ch, February 2005)

Exhumation—mistake

Mrs Suhr married W in 1968. They had a son later that year. They separated in 1971 and divorced in 1977. It is disputed whether W paid any maintenance despite a court order. The son died in 1975 and his ashes were buried in Mangotsfield Cemetery. The plot was in the name of W only. Mrs W moved to Germany, married Suhr and died in 1995. In accordance with her wishes, but without W's knowledge, Mrs Suhr's ashes were buried with those of her son and the headstone was amended

accordingly. W only discovered the true facts in 2002, having not visited his son's grave since 1986. His petition was to have his ex-wife's ashes removed and the headstone returned to the original. The Chancellor found that Mrs Suhr had contributed to the cost of the plot and that the deceased firmly believed the plot belonged to her, that her second husband and widower had acted in good faith and that any failure lay with the council who failed to check their records. He rejected W's reasons for not visiting his son's grave for 16 years. The council had offered to pay for Mrs Suhr's ashes to be removed. Her family declined the offer. The Home Office had offered for both sets of ashes to be removed and re-buried. W had rejected that offer. The Chancellor extensively reviewed the law and, taking into account the general presumption against exhumation, the length of time since interment, the opposition of Mrs Suhr's family and W's callous behaviour, dismissed the petition. [JG]

Re Swaden
(Southwark Consistory Court: George Ch, February 2005)

Exhumation—mistake—forgery

Half of Sylvia Swaden's ashes were interred in 1992 in the cemetery, half were scattered at Clacton-on-Sea. Her second son (Paul) became the registered owner of exclusive rights to burial in the plot. He claimed that there was a rift between his late mother and his father and that she did not want her husband to be buried in the same grave as her after his death. The Chancellor found that the rest of the family had contributed both to the funeral expenses and the memorial. Paul had an entry made in the cemetery register that the plot was not to be opened without personal application to him. In 2003 Mrs Swaden's husband died and his ashes were interred in the plot. The Chancellor concluded that it was more likely than not that the required documents had been signed with a forged signature, thus Paul's father was interred without Paul's consent. Matters descended to overt squabbling at the graveside. Paul petitioned to have his father's remains removed from the plot. The Chancellor concluded, on the particular facts of the case and the background facts that he had found, that a constructive trust had been created such that Paul's legal title was held on trust for the family and thus Paul had no right to refuse consent for his father's interment as this could be enforced by the executor (*Williams v Williams* (1882) 20 Ch D 659). He concluded that the law of proprietary estopppel could have achieved the same result, as Paul's father had contributed to the memorial, which plainly envisaged that he would be buried alongside his wife. Thus Paul's consent was unnecessary and the false burial form of no effect. The Chancellor was not persuaded that there had been a true mistake here as such term is applied in exhumation cases, and refused the petition. [JG]

R (Begum) v Headteacher and Governors of Denbigh High School
(Court of Appeal, Civil Division: Brooke, Mummery, Scott Baker LJJ, February 2005)

Muslim Dress—school—exclusion—human rights

The facts are as set out in (2005) 8 Ecc LJ 113.

The court was only concerned with an application for a declaration about an alleged breach of Article 9 of the European Convention on Human Rights, which raised three questions:

(i) Was the claimant excluded from school?
(ii) If 'yes', was it because her rights under Article 9(1) were being limited?
(iii) If 'yes', were they being justifiably limited pursuant to Article 9(2)?

The court rejected Bennett J's analysis that the school had not excluded the claimant, concluding that the school had sent her away for disciplinary reasons because she was not willing to comply with the discipline of wearing school uniform. Statutory procedures and departmental guidance had not been followed.

The court reviewed the differing viewpoints ('more liberal' and 'more strict') on the correct dress for Muslim women and accepted the sincerity of the claimant's belief in the correctness of the minority view. It followed that her freedom to manifest her religion or belief in public was being limited, and as a matter of Convention law it would be for the school to justify the limitation on her freedom. The court concluded that the limitation on the applicant's Article 9 (1) freedom was one that was prescribed by law in the Convention sense. In relation to the question of whether the limitation was necessary the court reviewed the ECHR case law relating to countries that maintained a policy of secular education, distinguishing them on the basis that the UK was not a secular state and had no written constitution. In the UK provision is made for religious education and worship in schools. Every shade of religious belief, if genuinely held, is entitled to due consideration under Article 9. The position of the school was that, despite a policy of inclusiveness, it permitted girls to wear a headscarf identifying them as Muslim. The issue then was whether it was necessary in a democratic state to place a particular restriction on those Muslim girls who sincerely believed that when they arrived at the age of puberty they should cover themselves more comprehensively than was permitted in the school uniform policy. The court identified the decision-making structure as:

(i) Has the claimant established that she has a relevant Convention right which qualifies for protection under Article 9 (1)?
(ii) Subject to any justification that is established under Article 9 (2), had that Convention right been violated?

(iii) Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
(iv) Did the interference have a legitimate aim?
(v) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
(vi) Was the interference justified under Article 9(2)?

The school's approach had been completely different, starting from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school. Thus the school could not resist the declarations:

(i) That it unlawfully excluded her from school,
(ii) That it unlawfully denied her the right to manifest her religion,
(iii) That it unlawfully denied her access to suitable and appropriate education.

The court was at pains to point out that nothing in the judgment should be taken as meaning that it would be impossible for the school to justify its stance if it were to reconsider its uniform policy in the light of this judgment and were to determine not to alter it in any significant respect. The court had considerable sympathy with the problems the school faced and recommended that teachers and governors ought to be given authoritative written guidance from the Department for Education and Skills on the handling of human rights issues in schools. [JG]

This case is reported at [2004] EHWC 1389.

CORRIGENDA

In the Recent Ecclesiastical Cases reported in Issue 35, parts of the headings of two case notes were inadvertently transposed. The case of Re St John the Divine Pemberton *(2004) 7 Ecc LJ 493 should have been attributed to Liverpool Consistory Court, Hedley Ch, January 2004, and that of* Re St Augustine, Scisset *(2004) 7 Ecc LJ 495 to Wakefield Consistory Court, Collier Ch, November 2003. We regret any confusion which may have been caused. [JG]*