

Religious Freedom in the UK
Neil Addison – Talk 24 Sep 2010

Neil Addison, Barrister and National Director of the Thomas More Legal Centre was one of the speakers at a conference in Dublin organised by The Iona Institute on 24 September. Below is the text of the speech he made, which reviews the various cases involving religious freedom issues which have come before the British Courts over the past few years.

The best summary of the current position for Religious believers in Britain was given by Dr Rowan Williams Archbishop of Canterbury when he said in an Interview on 11 December 2009: "The trouble with a lot of Government initiatives about faith is that they assume it is a problem, it's an eccentricity, it's practised by oddities, foreigners and minorities"

..and a similar comment was made by Catholic Archbishop Peter Smith: "religion is regarded as a legally permissible private eccentricity; allowable behind closed doors once a week, but not in any way to be given expression in public or working life"

The growing secularisation of British life is of course something shared with much of Europe but two specific problems in Britain arise from the 30 year history of the Northern Ireland troubles followed by the September 11 2001 attacks in New York and the July 7 2005 attack in London. In consequence Religion is often subconsciously seen in Britain as not merely a harmless eccentricity but as a potentially dangerous eccentricity.

LEGISLATION

Because the legal position relating to religion in the UK differs in detail between the four nations which form the Union I shall primarily concentrate on the position in England and on the principle English cases. The main legal provisions which are relevant are:

The Human Rights Act 1998

The Employment Equality (Religion or Belief) Regulations 2003

Part 2 The Equality Act 2006 (Religious Discrimination in Goods & Services)

The Human Rights Act incorporated into UK Law the European Convention on Human Rights including Article 9 of the Convention which says:

9.1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

9.2 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.

As I hope to demonstrate in this talk almost any restriction on freedom to manifest religion can be justified under the caveats in 9.2.

ARTICLE 9

The first major test of Article 9 came with the case of Begum where schoolgirl Shabina Begum wanted to wear the Islamic Jilbab in school, the Jilbab being contrary to the School rules. The Judicial Committee of the House of Lords (now the UK Supreme Court) held that the rules of the School were justified under 9.2. The most important words in the Begum judgment came in the judgment of Lord Hoffman where he said at para 51: "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing".

That phrase, which was quite understandable in its context, has since been repeated in virtually every case where religious believers have tried to rely upon Article 9 and in has made Article 9 of little practical value.

RELIGIOUS AND GAY RIGHTS IN EMPLOYMENT

Though there have been some other attempts to utilise Article 9.2 the main legal thrust since Begum has been under the 2003 Regulations and the 2006 Act and the main challenge involving these legislative provisions is that they were passed in association with The Employment Equality (Sexual Orientation) Regulations 2003 Equality Act (Sexual Orientation) Regulations 2007; which has made discrimination on the grounds of sexual orientation illegal in both employment and the delivery of goods and services.

The main case involving a clash between the principle of freedom of religious belief and non discrimination on grounds of sexual orientation was the case of Ladelle. Lillian Ladelle was a Registrar of Marriages employed by Islington Council in London and when the Civil Partnership Act 2004 came into force she was also designated as a Registrar of Civil Partnerships. As a Christian she disapproved of same sex partnerships and so arranged to swap Civil Partnership ceremonies with colleagues who were willing to perform them. It is important to note that it was accepted throughout all the legal proceedings that no same sex couple were ever deprived of a partnership ceremony and the registrar service in Islington was not affected or reduced.

Unlike the position in Ireland it is not a criminal offence in England for a registrar to refuse to perform a marriage or a civil partnership ceremony however 2 gay members of staff in Islington complained to Islington Council about Lilian's practice of arranging that she would not perform same sex partnerships and she was ordered to perform such ceremonies. She claimed religious discrimination and the case went to an Employment Tribunal where she won her case, the ET said: "This is a case where there is a direct conflict between the legislative protection afforded to religion and belief and the legislative protection afforded to sexual orientation One set of rights cannot overrule the other set of rights".

The idea that Courts seek to balance conflicting rights is an old one in Law and it was therefore surprising that both the Employment Appeal Tribunal and the Court of Appeal overturned the Tribunal decision. The Master of the Rolls (The Senior English Civil Judge) said: "Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished."

The idea that a Civil Court could or should decide what is or is not a "core part" of a religion is startling and disturbing because on that basis one can almost ignore every form of Religious Discrimination on the basis that the belief is not a "core" part of the religion. In addition the remark that Ladelle was still free to worship, in her own time, is extraordinary in the context of a claim about religious discrimination in the workplace. The point is that she was faced with a choice of either leaving the job she had done without criticism for many years or acting contrary

to her conscience.

Another phrase by the Master of the Rolls in *Ladelle* demonstrated complete inability to get to grips with the real issues in the case when he said: "It would have been no more acceptable for someone with Ms Ladele's views to refuse to perform civil partnerships than it would have been for a militant gay registrar to refuse to perform marriages between people who, for religious reasons, objected to homosexual relationships or civil partnerships."

The real difficulty with this remark was that it fails to distinguish between dislike of the individual and moral complicity in a wrongful act. The Court also failed to really grapple with the idea of an employer making reasonable accommodations for an employees religious beliefs where such accommodation would not prejudice the work of the employer.

The *Ladelle* case was firmly followed in the case of *McFarlane v Relate* where a Christian relationship counsellor asked not to have to counsel same sex couples re their sexual problems. In an attempt to appeal the decision Lord Carey (a former Archbishop of Canterbury) put in an Affidavit asking for understanding for Christian objection in these situations. This led to an extraordinary response from Lord Justice Lords who said that giving any legal protection to manifestations of religious belief would lead to a "Theocracy". A Theocracy, of course, imposes its beliefs on others and it is in my view arguable that what the courts have done in *Ladelle* and *McFarlane* is much closer to the spirit of a Theocracy than the requests by these Claimants that their freedom of conscience should be respected.

In his rejection of Lord Carey's concerns about the trend of anti-religious, and specifically anti-Christian decisions by Courts dealing with religious freedom cases Lord Justice Lords said: "Lord Carey's observations are misplaced. The judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as "disreputable". Nor have they likened Christians to bigots".

However only two months later in a decision in the Supreme Court *HJ (Iran)* regarding the rights of gay asylum seekers Lord Hope referred to: "The rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa".

WEARING A CROSS

The next major issue in religious freedom involved the wearing of a cross by an Employee of British Airways *Nadia Eweida* BA claimed that this cross was in breach of its uniform policy though it accepted that it permitted Muslims to wear Hijabs and Sikhs to wear Turbans and Kara bracelets. The Court decided that *Eweida* was not discriminated against because: "visible display of the cross [was not] a requirement of the Christian faith".

This decision is particularly hard to square with another decision where a school was told that it must allow a Sikh schoolgirl *Sakira Singh* to wear a Kara bracelet even though the court in that case accepted: "the claimant is not obliged by her religion to wear a Kara, it is clearly in her case [an] extremely important indication of her faith".

The logic of the decision in *Eweida* was followed in the case of *Chaplin v Exeter NHS Trust* where the Employment Tribunal said: "there is no mandatory requirement of the Christian faith that a Christian should wear a crucifix".

As with the case of *Ladelle* the Courts were assuming that they had the right to allocate levels of seriousness to religious belief and practice.

FREEDOM OF RELIGIOUS ORGANISATIONS

Serious though these cases were a far more fundamental issue has arisen as to the extent to which religious organisations are going to be allowed to exercise freedom in their internal structures. The most serious example of this was the case of *R v JFS School*. Formerly known as the Jewish Free School JFS selected pupils who were designated as Jewish according to principles laid down by the Chief Rabbi in accordance with millennia old Jewish law under which a person is Jew either through conversion or through matrilineal descent.

The child 'R' in the case who had a Jewish father and non Jewish mother was therefore not classified as a Jew and so he was not eligible to go to JFS. His mother had actually converted to Judaism but via a reformed rather than an orthodox Synagogue and therefore her conversion was not recognised as valid by the Chief Rabbi who is Orthodox. The Supreme Court by a majority of 5-4 held that the rules applied by the Chief Rabbi were racist and therefore illegal.

Lady Hale in the main majority judgment said in para. 66: "Is the criterion adopted by the Chief Rabbi, and thus without question by the school, based upon the child's ethnic origins? In my view, it clearly is. M was rejected because of his mother's ethnic origins, which were Italian and Roman Catholic."

whilst Lord Rogers put the alternative view: "Lady Hale says that M was rejected because of his mother's ethnic origins which were Italian and Roman Catholic. I respectfully disagree. His mother could have been as Italian in origin as Sophia Loren and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices"

Whatever the legal merits of the decision in terms of theoretical law the principle behind the JFS decision is astonishing. What the Supreme Court in effect said was that it had the right to overrule the Chief Rabbi and to say that someone was a Jew when the Chief Rabbi said that he was not. I rhetorically asked in the *Catholic Herald* "what next. Will the Courts say that someone is a Catholic or indeed a Catholic Priest even though the Pope says they are not" The right of a religion (or indeed any organisation) to determine its own membership is fundamental to the survival of a free society and yet that fundamental principle seems to be being ignored by Court interpretations of Equality legislation

Another case involved the application of the Sexual Orientation Regulations (SOR's) to Catholic Adoption Agencies. There were over 20 Catholic charitable agencies attached to various Diocese many of which had operated for over 100 years providing a variety of social services including adoption services. They did not themselves arrange adoptions which remain the responsibility of local authorities but they were employed by local authorities to find prospective adoptive parents. They were particularly successful in finding parents for children who were hard to adopt often because of disability or for other reasons.

The problem for the agencies was that adoption services were covered by the SOR's and therefore the agencies would be obliged to accept same sex couples as potential adoptive parents contrary to Catholic teaching. Most of the agencies caved in to this and separated from the Church however two tried to carry on by amending their constitution to specifically state that adoption services would only be provided to heterosexual couples. Having such a clause would

allow them to take advantage of a specific provision in the SOR's which permits Charities to discriminate if that is set out in their constitution (NB This exemption is standard in all UK anti-discrimination legislation and, for example, permits charities to be formed which provide services only for women, people from a particular country or persons suffering from a specific disability).

The Charity Commission regulates charities and has to approve changes to their constitutions and it refused to allow the adoption agencies to change their constitution because “Discrimination on the ground of sexual orientation is a serious matter “ What was of no importance was the religious nature of the Charity and no respect was shown to the fact that it had been formed by the Catholic Church which naturally wanted its own charity to act in accordance with Catholic teaching. No regard was paid to the idea of an organisation having the right to its own identity

THE FUTURE

How the future will develop for religious freedom in the UK in the future is difficult to tell. We are constantly being told that we are a secular society and at the same time that we are a multi-faith society and the conflict between those two positions has not yet been truly faced up to let alone resolved.

One new factor is the economic crisis which has already caused our new coalition government to look to charities and voluntary groups as having an increasingly important social role under the government policy of “the big society”. A fact that some government ministers are beginning to articulate is that the majority of charities and voluntary organisations have a religious basis or backing and there is a real question as to how far government is prepared to allow religious groups their own freedom of action.

In his speech in Westminster Hall on 17 September 2010 the Pope set out this challenge to Government when he said: “I am convinced that, within this country too, there are many areas in which the Church and the public authorities can work together for the good of citizens, in harmony with Britain’s long-standing tradition. For such cooperation to be possible, religious bodies – including institutions linked to the Catholic Church – need to be free to act in accordance with their own principles and specific convictions based upon the faith and the official teaching of the Church. In this way, such basic rights as religious freedom, freedom of conscience and freedom of association are guaranteed”

Whether government and courts will allow religious organisations this level of freedom remains an open question but the omens are not good.