

## Durham Research Online

---

### Deposited in DRO:

20 June 2012

### Version of attached file:

Published Version

### Peer-review status of attached file:

Peer-reviewed

### Citation for published item:

Leigh, I. (2012) 'Religious freedom in the UK after the Human Rights Act 1998.', in Freedom of religion under Bills of Rights. Adelaide: University of Adelaide Press, pp. 239-252.

### Further information on publisher's website:

<http://www.adelaide.edu.au/press/titles/freedom-religion/>

### Publisher's copyright statement:

© 2012 The Authors This book is copyright. Apart from any fair dealing for the purposes of private study, research, criticism or review as permitted under the Copyright Act, no part may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior written permission. Address all inquiries to the Director at [press@adelaide.edu.au](mailto:press@adelaide.edu.au)

### Additional information:

## Use policy

---

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

---

## Religious Freedom in the UK after the *Human Rights Act 1998*

Ian Leigh\*

According to a book title chosen by one commentator on the UK's *Human Rights Act 1998*, Professor Francesca Klug, human rights are *Values for a Godless Age*.<sup>1</sup> No doubt before the events of September 11 2001 the secularization thesis had a certain resonance. The legislation could be seen as a (very faint) shadow of that great hymn of the secular state — the French Declaration of the Rights of Man. Certainly some religious organisations feared that rather than the *Human Rights Act 1998* enhancing their religious freedom it would be used against them and they therefore sought — unsuccessfully — guarantees against litigation in the form of exemptions.<sup>2</sup> A decade later, the revolutionary fervour has cooled somewhat and an assessment can be made of the treatment of religious liberty under the Act to date. We now know also that the obituary notices for religious faith were premature, even in (comparatively) secular Western Europe: 'God is Back' as another recent book title has it.<sup>3</sup> Indeed, the resurgence of a vigorous religious discourse in public life in the UK is perhaps not just a reaction to secularization but in a sense also evidence of a growing human rights culture following incorporation of the European Convention.

---

\* I am grateful to Peter Edge for helpful comments on an earlier draft. The usual caveat applies.

<sup>1</sup> Francesca Klug, *Values for a Godless Age: The Story of Britain's New Bill of Rights (1998)*.

<sup>2</sup> Peter Cumper, 'The Protection of Religious Rights under Section 13 of the Human Rights Act' [2000] *Public Law* 254; Ian Leigh, 'Towards a Christian Approach to Religious Liberty' in Paul Beaumont (ed), *Christian Perspectives on Human Rights and Legal Philosophy* (1998) 64-71.

<sup>3</sup> John Micklethwait and Adrian Wooldridge, *God is Back: How the Global Rise of Faith is Changing the World* (2009).

The focus in this chapter is on a handful of the more controversial religious liberty claims that have come before the courts since 2000.<sup>4</sup> I have selected these for the range and variety of issues that they raise directly concerned with claims to manifest religious belief.<sup>5</sup> These include whether Christian parents have a right that their children be educated in private schools in accordance with their religious beliefs on discipline; whether a Muslim schoolgirl has the right to wear a jilbab, contrary to the school uniform policy of her (mixed) state secondary school; whether a Hindu community can resist an order for the destruction of a diseased bullock of sacred religious significance to them; and whether orthodox Hindus should be accommodated in their wish for cremation upon an open-air funeral pyre.

In fact, each of these claims ultimately failed (although the funeral pyre decision was successfully appealed on other grounds). Nevertheless, the hurdles that the applicants faced and the reasons for failure yield some important lessons about the treatment of religious liberty claims.

### **The constraints of the article 9 Strasbourg jurisprudence**

The *UK Human Rights Act 1998* is an Act to give further effect to the European Convention on Human Rights ('ECHR') in UK law. It does so by two primary mechanisms: a strong duty on the courts to interpret primary and secondary legislation as far as possible compatibly with Convention rights (section 3)<sup>6</sup> and a duty on public authorities (including the courts) to act in conformity with a person's Convention rights (section 6). In both instances UK courts and tribunals are to 'take account' of the jurisprudence of the European Court of Human Rights concerning the meaning of Convention rights.<sup>7</sup>

---

<sup>4</sup> The *Human Rights Act 1998* (UK) came into force on 2 October 2000.

<sup>5</sup> This is not a comprehensive treatment of all *Human Rights Act 1998* (UK) cases concerning religion. It does not include *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, in which art 9 was raised peripherally if unsuccessfully in a challenge to the law on assisted suicide, or *R (Baiai, Trzcinska, Bigoku & Tilki) v Secretary of State for the Home Department* [2007] 1 WLR 693 where religious discrimination under art 14 of the European Convention (which prevents discrimination in the enjoyment of Convention rights *inter alia* on grounds of religion) was raised in subsidiary argument. Also excluded is discussion of the litigation in which the House of Lords found that a Parochial Church Council of the Church of England was not a public authority within the meaning of the *Human Rights Act 1998* (UK): *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2004] 1 AC 546.

<sup>6</sup> Where this is not possible, the higher courts may issue a declaration of incompatibility drawing Parliament's attention to the inconsistency: *Human Rights Act 1998* (UK) s 4.

<sup>7</sup> *Human Rights Act 1998*, s 2. For a much more detailed general treatment, see Ian Leigh and Roger Masterman, *Making Rights Real: The UK Human Rights Act in its First Decade* (2008).

Among the Convention rights so incorporated into UK law is article 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.
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.

What use has been made of this provision since October 2000 when the *Human Rights Act 1998* came into force?

Firstly, it is clear that in conformity with their general approach, the UK courts are reluctant to give enhanced protection rights over and above that enjoyed at Strasbourg. This has disappointed one of the hopes for the *Human Rights Act 1998*, that it would lead to British judges giving a confident lead to other jurisdictions and to the European Court of Human Rights itself in the way that, for example, the German Constitutional Court has. If anything, the potential for doing so was greater with religious liberty than other rights since the Strasbourg jurisprudence developed very late (the first major cases were not decided until the 1990s) and the protection is weak by comparison with free speech or privacy.

In practice, however, UK courts have essentially tracked the limitations of the Strasbourg approach, although some domestic judges have voiced occasional misgivings. In *Ullah*, unsuccessful appeals were brought by two failed asylum-seekers, a Pakistani member of the Ahmadhiya faith and a Vietnamese Roman Catholic, who feared persecution if returned to their respective countries. The House of Lords refused to extend the principle under Convention jurisprudence that a deporting or extraditing state is liable for torture or inhuman or degrading treatment at the hands of the state to which a person is removed<sup>8</sup> to cover religious persecution. The European Court of Human Rights had not clearly extended the principle to cover denial of article 9 rights and the appellate committee held that it should not take this step either.<sup>9</sup>

---

<sup>8</sup> *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413.

<sup>9</sup> Of their Lordships, Lord Caswell came closest to allowing the possibility in a flagrant case (which did not apply on the facts here), as conceptually consistent with the ECtHR's reasoning (*R (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26), although in such cases art 3 would probably also be engaged.

As Lord Bingham put it:

It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be a product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.<sup>10</sup>

Similarly, in *Copsey v WWB Devon Clays Ltd*<sup>11</sup> the Court of Appeal found that an employee's freedom to manifest his religion under article 9 of the ECHR was not infringed when he was dismissed for refusing to work on Sundays. Mummery LJ applied the so-called 'non-interference' line of jurisprudence from the European Commission of Human Rights, and held that article 9(1) was not engaged because Mr Copsey was entitled to resign if his employer's work requirements were incompatible with manifesting his religion.<sup>12</sup> He found that, although much-criticised, this line of authority was clear and, in the absence of a change of heart at Strasbourg or a different view from the House of Lords, should apply.<sup>13</sup> Rix LJ stressed that this approach had the virtue of giving primacy to the autonomy of the parties and concluded that he had 'no difficulty with the general thesis that contracts freely entered into may limit an applicant's room for complaint about interference with his rights'.<sup>14</sup> For those who hoped that the UK courts would give a broader interpretation of religious freedom to overcome the limitations of the article 9 jurisprudence, *Copsey* came as a disappointment.<sup>15</sup>

---

<sup>10</sup> Ibid [20] (Lord Bingham).

<sup>11</sup> [2005] EWCA Civ 932.

<sup>12</sup> See especially *Stedman v United Kingdom* (1997) 23 EHHR 168; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2005) 176–179, 298 ff; Gillian Morris, 'Exclusion of Fundamental Rights by Agreement' (2001) 30 *Industrial Law Journal* 49.

<sup>13</sup> *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932 [26-39] (Mummery LJ).

<sup>14</sup> See especially at [52], referring to *Ahmad v ILEA* [1978] QB 36 and *Ahmad v United Kingdom* (1981) 4 EHRR 126 (refusal of time off for Muslim teacher to attend Friday prayers did not violate art 9). Rix LJ went on to find that unfair dismissal legislation could, even disregarding art 9, contain a concept of reasonable accommodation of religion: at [67-73]. Cf the judgment of Neuberger LJ.

<sup>15</sup> A case on similar facts would now be treated as an example of indirect religious discrimination under the *Equality Act 2010* (UK), in which case the question of voluntary acceptance of the limitation is not relevant: see, eg (under earlier legislation), *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWHC 1865 (Admin).

## Testing religious claims

A further major constraint on the development of article 9 comes from Strasbourg jurisprudence in the so-called *Arrowsmith* test.<sup>16</sup> This states that not all actions motivated by religious belief qualify, rather only those ‘intimately connected’ with the beliefs in question. Arguably, this approach (sometimes referred to as the necessity link or test) puts a gloss on the text of article 9 and has the effect of limiting religious liberty claims at the definitional stage, rather than as the structure of article 9 suggests at the stage of applying the ‘necessary in a democratic society’ test under article 9(2).

This aspect of the article 9 approach has led domestic courts under the *Human Rights Act 1998* to apply a threshold test to establish whether the beliefs or practices fall within the ambit of article 9 in the first place.<sup>17</sup> Judges in the common law world are aware of course of their lack of competence to rule on theological matters and the danger of interfering in disputes affecting the internal affairs of organized religions. These factors point toward judicial modesty and the hurdles are therefore set low. Even in this weakened form, however, they have tripped some litigants and in practice, some domestic judges appear to be operating a more demanding standard than in Strasbourg (where it is exceptionally rare for the court to rule that a belief that an applicant claims is religious is not in fact<sup>18</sup>).

The clearest example of the application of the threshold comes in *R (on the application of Playfoot) v Governing Body of Millais School*<sup>19</sup> in which a 16-year old schoolgirl challenged the refusal by her school under its policy against the wearing of jewellery of permission for her to wear a ‘purity ring’. The ring symbolised her commitment to celibacy before marriage, which she claimed was a manifestation of her religious belief as a Christian in pre-marital sexual abstinence. She argued that the school’s refusal violated her right to manifest her belief and was (in view of the school’s policy to permit some religious jewellery items) discriminatory contrary to article 14 of the Convention. Michael Supperstone QC (sitting as a Deputy High Court Judge)

---

<sup>16</sup> *Arrowsmith v United Kingdom* Application 7050/75 (1980) 19 *Eur Comm HR* 5.

<sup>17</sup> Art 9 gives an absolute right to freedom of belief (the so-called inner forum: *C v the United Kingdom*, Application 10358/83 (1984) 37 *Eur Comm HR* 142, 147) covering beliefs of all kinds. The right to manifest beliefs is however qualified and only applies to *religious* beliefs.

<sup>18</sup> *Valsamis v Greece* (1996) 24 EHRR 294 is an instance of the ECtHR so ruling. The Court found that participation in a National Day parade did not violate the applicant’s pacifist beliefs as Jehovah’s Witnesses, despite their claim that it did.

<sup>19</sup> [2007] EWHC 1698. See also *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56, in which the House of Lords held that the requirement under rating legislation for a place of worship to be open to the public in order to qualify for charitable relief did not violate arts 9 or 14 in the case of a Mormon temple. The majority (Lord Scott dissenting) found that there was no impediment on the right to manifest religion or belief.

found no ‘intimate link’ between the wearing of the ring and belief in celibacy before marriage for religious reasons. Consequently, it could not be said that in wearing the ring that the claimant was manifesting her religion.<sup>20</sup>

A similar conclusion was reached at first instance in *Williamson* in which Elias J in the High Court<sup>21</sup> and Buxton LJ in the Court of Appeal<sup>22</sup> found (in the context of a challenge brought by a number of Christian independent schools to the statutory ban on the use of corporal punishment) that parental discipline of children was a peripheral concern to Christian belief. This approach was not, however, followed by other members of the Court of Appeal or by the House of Lords.<sup>23</sup> As Lord Bingham’s speech argues:

[I]t is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion ...<sup>24</sup>

There is a clear danger in a court’s assuming the role of theological arbiter over a litigant’s beliefs in this way. Once the sincerity of the plaintiff’s beliefs has been accepted then it really should not matter whether the beliefs in question are peripheral or minority ones — they are nonetheless entitled to be considered as *religious* beliefs. (This does not mean, of course, that they are therefore automatically entitled to priority over other interests.)

One alternative is that judges will increasingly be drawn into hearing expert evidence on whether the beliefs in question are orthodox according to the religion in question. An example is the recent claim in *Ghai v Newcastle CC*<sup>25</sup> by orthodox

---

<sup>20</sup> Moreover, in any event she had voluntarily accepted the uniform policy of the school and there were other means open to her to practice her belief without undue hardship or inconvenience. Even had there been an interference it would have been proportionate because of the sound reasons based on promoting school identity, minimising differences of appearance and bullying, and promoting high standards and conduct underlying the school’s policy on uniform. Nor was there any evidence of breach of art 14 since although the school had made exceptions to its policy on occasion to accommodate other pupils this was after careful inquiry that wearing the items involved (which included a Kara bracelet in the case of one Sikh pupil) were required by the pupil’s religion.

<sup>21</sup> *R (on the application of Williamson) v Secretary of State for Education and Employment* [2001] EWHC Admin 960 [44-5].

<sup>22</sup> *Ibid* [26-9, 57-8].

<sup>23</sup> [2005] UKHL 15.

<sup>24</sup> *Ibid* [22].

<sup>25</sup> [2009] EWHC 978 (Admin).

Hindus that they be allowed by Newcastle City Council to hold open-air funeral pyres<sup>26</sup> — a claim supported by a Sikh temple but opposed by the Ministry of Justice, both intervening in the litigation. Cranston J's judgment evaluated the conflicting evidence of four experts submitted by the parties and intervenors as to Hindu and Sikh funeral practices, as well as related academic literature. This included evidence as to Hindu beliefs and practices from a professor at a Hindu university, from a consultant anthropologist, and from a specialist in death and bereavement in the British Hindu communities.

Cranston J concluded that although belief in the need for cremation on an open air funeral pyre was a minority belief among British Hindus generally, in the case of orthodox Hindus like the applicant that the belief in the practice was, nevertheless, central. However, in the case of a Sikh temple that had also intervened in the litigation this was not the case, since open-air funeral pyres were a matter of a tradition rather than belief. Although the judge's survey of funeral rites is fascinating and informative one is nevertheless left wondering about the value of exercise in determining what was supposed to be a cursory threshold check on the sincerity and cogency of the beliefs in question.<sup>27</sup> Ironically, despite this painstaking examination by the judge, the Court of Appeal later concluded that there was no necessary conflict between the applicant's beliefs and the legislation governing cremations.<sup>28</sup>

It is clear, however, that in the light of the approach in *Ghai* that would-be litigants would now be well-advised to first marshal their experts. Well-established religions with well-known or widely shared beliefs are clearly at an advantage here.<sup>29</sup> Although it should not matter how widely held the beliefs in question are, plainly where they can be shown to be conventional views this makes the evidential task easier.

---

<sup>26</sup> A claim for judicial review of the Council's refusal to set aside land for open-air funeral pyres for cremation according to orthodox Hindu practice. The law on cremation made it a criminal offence to cremate human remains other than in a licensed crematorium.

<sup>27</sup> Cranston J found that case law compelled him to apply a threshold test and determine whether an open-air funeral pyre fell within core beliefs (at [101]).

<sup>28</sup> *R (on the application of Ghai) v Newcastle CC and the Secretary of State* [2010] EWCA Civ 59. For discussion of further aspects of Cranston J's judgment see below (text at n 39).

<sup>29</sup> In a different context, a former Archbishop of Canterbury (Lord Carey) has suggested that some cases be heard by a panel of judges with greater familiarity and understanding of religious issues: *McFarlane v Relate* [2010] IRLR 872 (unsuccessful religious discrimination claim brought by a counsellor who declined to offer sexual counselling to same-sex couples). The suggestion was robustly rejected by Laws LJ (at [16-7]). See P Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace' (2011) 34 *University of New South Wales Law Journal* 281, 288–90.

## Proportionality and restrictions on religious liberty

Establishing that the beliefs or practice in question are religious is of course only the first hurdle, since religious liberty both under the ECHR and the ICCPR is a *qualified* right, subject to limitation. The ‘necessary in a democratic society’ test under article 9(2) of the ECHR suggests a high burden of justification on the state but this has often turned out to be illusory in practice. The European Court of Human Rights has not itself been completely consistent: on one occasion, for example, it denied an article 9 claim because the applicants (Orthodox Jews facing considerable difficulty in obtaining meat slaughtered in accordance with their religious dietary requirements) had not shown that it was ‘impossible’ to do so.<sup>30</sup>

Although some UK judges have expressed dissatisfaction with this approach, in the light of their overall approach to taking into account Convention jurisprudence under section 2 of the *Human Rights Act 1998*, they have felt obliged to replicate it where article 9 cases have arisen in the domestic courts.

In *Begum*, the House of Lords upheld a state secondary school’s refusal for a pupil to wear the jilbab (a loose-fitting garment covering the entire body except for the head, face and hands), contrary to the policy on school uniform. The school’s policy already permitted Muslim girls to wear the shalwar kameez (comprising a tunic and trousers), and allowed those who wished to do so to wear the hijab (a headscarf). The majority of the House of Lords (Lords Bingham, Hoffmann and Scott) considered that the facts that Shabina Begum had been content to comply with the policy on uniform until her religious views changed, that she had joined the school knowing the policy and that there were other state schools available to her where she could wear the jilbab meant that there was no interference with her rights under article 9.<sup>31</sup> As Lord Hoffmann put it:

---

<sup>30</sup> *Jewish Liturgical Assn Cha'are Shalom Ve Tsedek v France* (Application 27417/95) 27 June 2000.

<sup>31</sup> The approach of the majority in *Begum* was followed in *R (On the application of X) v The Headteacher of Y School* [2007] EWHC 298 (Admin), concerning the refusal of a selective all-girls Grammar school to allow a 12-year-old Muslim girl to wear a niqab veil (a veil which covered her entire face and head except her eyes). Silber J held that art 9 was engaged but that the school had not interfered with the pupil’s rights since she had an offer to attend an alternative school where she would be permitted to wear the niqab veil. Even had there been interference, however, Silber J held that it would have been justified under art 9(2). The conclusion was based on the absence of prior rulings from the European Court of Human Rights or domestic courts of interference with art 9 where a claimant could without excessive difficulty manifest or practice their religion as they wished in another place or in another way: at [38].

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. Common civility also has a place in the religious life.<sup>32</sup>

The minority were more sceptical of this application of the Strasbourg approach, however: Lord Nicholls laid more weight on the costs involved in changing schools and Baroness Hale emphasised that a choice of school was usually made by parents rather pupils. Notwithstanding this difference, all their Lordships found any interference to be justified under article 9(2). Their Lordships considered that the school had done its best to accommodate conflicting beliefs about school dress in a conscientious way. As Baroness Hale argued:

Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shalwar kameez, and by allowing those who wished to do so to wear the hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed their concern that if the jilbab were to be allowed they would face pressure to adopt it even though they do not wish to do so.<sup>33</sup>

The House of Lords also gave general advice on approaching proportionality claims. In his speech, Lord Hoffmann was particularly critical of the Court of Appeal's suggestion that the school governors should have asked a structured series of questions before finding that the article 9 right could be displaced.<sup>34</sup> This was a misguidedly formalistic approach: what mattered was the substance of the decision not the process for reaching it.

Following this general approach few judgments undertake anything approaching a rigorous analysis of whether it is 'necessary in a democratic society' to restrict the right under article 9(2). An honourable exception, however, was the first instance decision in a case that became a cause célèbre in Wales in 2007. This was the case of *Shambo the Sacred Calf*, a challenge by way of judicial review by a Krishna Community to the decision of the Welsh Assembly Government to issue a slaughter notice in respect of a bullock that had tested positively for Bovine tuberculosis. At first instance,

---

<sup>32</sup> *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [50]. Critics have pointed out that this approach represents an extension of the 'specific situation' principle in the art 9 jurisprudence, which had not been applied by the Strasbourg court to school pupils: Mark Hill and Russell Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488.

<sup>33</sup> *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [98].

<sup>34</sup> See *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [68] (Lord Hoffman).

His Honour Judge Hickinbottom (sitting as a Deputy High Court Judge) granted the application because there was no evidence that the government had correctly identified a legitimate public health objective under article 9(2) on which to justify a restriction.<sup>35</sup> His Honour based this conclusion on careful analysis of the relevant policy documents and of the decision to slaughter. The government's position was that it was 'imperative public health objective that the risk of transmission of bTB is entirely eliminated from any bovine which positively reacts to a tuberculin test. That elimination can only occur if the animal is slaughtered'.<sup>36</sup> On the other hand, the Community argued that because of the very great religious significance of Shambo to them, an exception should be made and proposed to isolate the animal and enforce other health safeguards. The judge found that government's policy was framed unduly narrowly and without any explanation of how it served the underlying public health considerations. The government had simply not correctly identified a legitimate objective to be balanced under article 9 in the first place. The Court of Appeal disagreed, however, and found that the minister had public health (rather than rigid policy) in mind as the objective.<sup>37</sup> The government's policy of slaughter and surveillance where infection was discovered was to be regarded as a means rather than an objective in its own right. Moreover, the refusal to make an exception to the policy in the case of the bullock Shambo was proportionate to this broader objective.

Although this may appear to be a semantic difference, the underlying issue of how governmental bodies are required to justify policies that impinge on religious freedom is important. At the one pole — as the House of Lords made clear in *Begum*<sup>38</sup> — it is whether a public body's actions infringe rights rather than the process of reasoning that matters, especially in the case of bodies like school governors which do not have constant and easy access to specialist legal advice. Equally, however, public bodies should not be allowed to 'Convention-proof' their actions through a 'tick-box' exercise and then present the case for restriction of rights in a way that prevents genuine questioning of whether to do so is necessary in a democratic society.

The Hindu funeral pyre litigation is a further cautionary example of the approach to proportionality. In the first instance decision in *Ghai*, Cranston J held that restrictions on open air funeral pyres were justified under article 9(2) as necessary in a democratic

<sup>35</sup> *R (on the application of Suryanda) v Welsh Ministers* [2007] EWHC 1376 (Admin).

<sup>36</sup> *Ibid* [97].

<sup>37</sup> *R (on the application of Suryanda) v Welsh Ministers* [2007] EWCA Civ 893.

<sup>38</sup> *See R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [68] (Lord Hoffman).

society.<sup>39</sup> The government had intervened to defend the policy based on health and environmental considerations and for reasons of public morals. The applicant argued that such concerns could be met by regulation, rather than prohibition: sites could be licensed away from housing and where the public in general would have access, conditions could deal with the possibility of poor weather or atmospheric conditions and so on. The applicant was, however, hampered perhaps by lack of detailed reference to a scheme of licensing elsewhere among Convention states.

Particularly contentious, however, was evidence from the Ministry of Justice — accepted as relevant by the judge — referring to the ‘abhorrence’ that would be felt by a large proportion of the population at the idea of the disposal of human remains by funeral pyre, invoking the protection of morals. Cranston J ruled that deference was owed to the view of elected representatives’ assessment of public offence.

Prohibition on the basis of offence at the very *idea* of the beliefs or practices of others has a familiar ring to it: indeed, ironically, the common law offence of blasphemy was only abolished in 2008 by Parliament in the UK.<sup>40</sup> Moreover, the state is not required to be consistent — some other religious practices that a significant proportion of the population may well abhor are legally permitted, including male circumcision and animal ritual slaughter.

The Court of Appeal subsequently found that the litigation had in effect wrongly proceeded on the assumption that a Hindu-compliant funeral pyre could not be licensed under existing legislation.<sup>41</sup> It concluded some structures used for Hindu cremations on funeral pyres *could* both comply with the legal requirement that cremation take place in a building and the applicant’s religious requirement that fire was used rather than electricity and that sunlight should be able to shine directly on the dead body: they could therefore be licensed under the *Cremation Act 1902*.<sup>42</sup>

Nevertheless, the High Court decision in *Ghai* stands alongside those in *Begum* and *Suryanda* in demonstrating the approach to proportionality in relation to article 9

---

<sup>39</sup> Similarly, there was no violation of art 8 (respect for private and family life) since cremation on a funeral pyre was necessarily a public act rather than an aspect of private life (*R (on the application of Ghai) v Newcastle CC and the Secretary of State* [2009] EWHC 978, [138]). Moreover, even if art 8 did apply to some aspects of funeral arrangements, any interference was justified. Nor was there a violation of art 14 (discrimination in the enjoyment of Convention rights): the applicant had failed to establish that the Council’s refusal had or the policy had a disproportionate impact on Hindus sharing his beliefs. Even if he had done so, however, the policy was capable of objective and reasonable justification in Cranston J’s view (at [151]).

<sup>40</sup> *Criminal Justice and Immigration Act 2008*, s 79(1).

<sup>41</sup> *R (on the application of Ghai) v Newcastle CC and the Secretary of State* [2010] EWCA Civ 59.

<sup>42</sup> This decision made it unnecessary, in the Court of Appeal’s view, to discuss any of the issues decided at first instance by Cranston J: *ibid* [40].

by UK courts. Although the results are disappointing, certainly by comparison with the more probing and rigorous analysis by South African or Canadian courts of the need for restrictions on religious liberty,<sup>43</sup> this perhaps exemplifies a more general lightness of touch by judges in the UK. The article 9 cases are by no means unique in this regard.<sup>44</sup>

The problems that religious liberty claimants face in first bringing their claims within the scope of article 9 and in overcoming state claims of the need for restrictions lead naturally to them pursuing alternative legal avenues for these claims — in particular, through use of anti-discrimination law.

### **By-passing the *Human Rights Act 1998*: Discrimination law**

In a sense, the restricted approach to article 9 demonstrated in these decisions creates incentives for claimants to bring their challenges within the ambit of discrimination law, rather than human rights law. The advantages of doing so can be seen by comparing the *Begum* case with the successful outcome for the applicant in a comparable challenge brought by a 14-year-old Sikh school girl of Punjabi-Welsh heritage, to the decision of Aberdare Girls' High School to prevent her from wearing a Kara (a religious bracelet) at her school. In *R (on the application of Watkins-Singh) v Governing Body of Aberdare Girls High School*<sup>45</sup> Silber J found that the decision not to grant a waiver from the school's uniform policy to the claimant to permit her to wear the Kara constituted indirect discrimination on grounds of race under the *Race Relations Act 1976* and on grounds of religion under the *Equality Act 2006*. The judge found that there was objective evidence that the wearing of the Kara was 'regarded universally by observant Sikhs as a matter of exceptional importance and it symbolises their loyalty to the teaching of their Gurus'. In view of this Silber J was satisfied that the school's decision placed an observant Sikh like the applicant under a 'particular disadvantage' or 'detriment' (the test under section 1(1)(1)(A) *Race Relations Act 1976* and section 45 (3) *Equality Act 2006*).

The key issue in satisfying the tests in discrimination law was that she genuinely believed for reasonable grounds that wearing the Kara was a matter of exceptional importance to her racial identity or her religious belief and it could be shown objectively to be of exceptional importance to her religion or race as a Sikh. Moreover, the Kara was unobtrusive (it was 50 millimetres wide and could be worn under long-sleeved garments). Silber J stressed that far from allowing an exception to the school's

---

<sup>43</sup> See, eg, *Prince v President of Law Society of Cape of Good Hope* (2002) SA 794; *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256.

<sup>44</sup> Leigh and Masterman, above n 7, ch 6.

<sup>45</sup> [2008] EWHC 1865 (Admin).

policy being regarded as somehow discriminatory against pupils who might want to wear other religious symbols (such as crucifixes), the correct approach was to focus on the specific detriment that this pupil would suffer if not allowed to wear the Kara, which would not affect other pupils without her beliefs.

There is a striking contrast in approach here to the *Begum* and *Playfoot* cases. It is plain that by using discrimination law where it is available a litigant may be able to overcome the stilted approach towards manifestation of religion in the Strasbourg jurisprudence.<sup>46</sup> Whereas the article 9 jurisprudence emphasizes voluntary commitments undertaken by a litigant as a reason for denying that religious liberty is even in issue, religious discrimination law effectively turns the scales by putting a duty to accommodate upon the employer or school.<sup>47</sup>

## Conclusion

Overall, it is unclear if the introduction of the *Human Rights Act 1998* in the UK has by itself increased litigiousness concerning religion. The picture is a more complex one.

Paradoxically, religious groups were some of the main opponents when the *Human Rights Act 1998* was progressing through Parliament — fearful for the effect of the Act on religious autonomy. It is perhaps ironic, then, that beleaguered religious groups have increasingly turned to human rights law to defend themselves in the face of more visible secularism and increasing pressures to privatise religion in public and social life. The language of human rights has a general resonance and acceptability

---

<sup>46</sup> There are signs that the European Court of Human Rights is moving away from a wide application of the *Arrowsmith* approach. In *Case of Leyla Sabin v Turkey* (Application no. 44774/98, 10 November 2005) the Grand Chamber of the Court considered the compatibility with art 9 of the prohibition on wearing the Islamic headscarf at Istanbul University and found the ban to be justified under art 9.2. The Court found that it was prescribed by law in pursuit of the legitimate aims of protecting the rights and freedoms of others and maintaining public order, in aiming to preserve the secular character of educational institutions, and was proportionate, thus satisfying art 9.2 (at [98-9]). By contrast, in *Karaduman v Turkey* (1993) 74 DR 93 the (former) Commission found *no interference* with a student's art 9 right because of her voluntary acceptance of the rules applicable in a secular university (at 108).

<sup>47</sup> Some later discrimination rulings, however, in effect 'read down' discrimination legislation in light of the courts' approach to art 9: see esp *Islington London Borough Council v Ladele* [2010] 1 WLR 955, [55-8] (Lord Neuberger MR) (council's refusal to accommodate marriage registrar's religious objections to officiating at same-sex civil partnership ceremonies did not constitute religious discrimination). A challenge to *Ladele* is pending at the European Court of Human Rights.

for beliefs and positions that the media and the liberal political and legal elite often otherwise treat as primitive or even distasteful.

In addition, minority religions that feel alienated or disadvantaged in Britain have also attempted to use the Act to 'level-up' their rights, although arguably tailor-made anti-discrimination legislation is a far more effective tool. It is perhaps significant that a number of the cases discussed in this chapter have concerned questions of manifestation of religious belief by what are admittedly minority groups within a mainstream religion. Such claimants face the inevitable difficulty that their beliefs may appear extreme or unorthodox when compared with the majority of adherents of the religion concerned. There is a clear risk that public bodies committed to religious freedom will consider that they have done sufficiently when they have accommodated mainstream opinion. Courts can be prone to a variation of the same approach in judging the extent to which religious liberty is engaged according to the core or central beliefs of the religion in question, with peripheral views accorded less or no respect.

As with the experience of the *Human Rights Act 1998* generally,<sup>48</sup> few of these claims have been ultimately successful. For the most part, courts using the Act have confirmed existing legal positions, albeit with new reasons. Nevertheless, the effect on public and political discourse has been considerable. Some of these developments are legally questionable or at least inconsistent — the Act has been cited, for example, as justification for the Royal Navy for the decision to provide storage space on board ship for the equipment of a practising Satanist and as the rationale for the *removal* of bibles from some hospital wards. In time, however, a new sensitivity towards religious liberty may indeed take root. If so, something of the revolutionary fervour that greeted the legislation may yet be justified.

---

<sup>48</sup> Leigh and Masterman, above n 7.