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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2017 No. 038954

IN THE MATTER OF AN APPLICATION BY LAURA SMYTH FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE GENERAL REGISTER OFFICE DATED 14 FEBRUARY 2017

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COLTON J

Background/Introduction

[1] The applicant is due to get married to her fiancé, Mr Eunan O'Kane on 22 June 2017 at a location in Northern Ireland.

[2] Although they both currently live in England, due to their professional commitments, they were both born and raised in Northern Ireland. Their families and many friends still live in this jurisdiction and they both hope to return to live here at some point in the future. They want to get married at what they consider is their home place together with family and friends.

[3] The applicant is a humanist and a member of the British Humanist Association. Her fiancé also identifies as a humanist.

[4] Through her connection with Northern Ireland Humanists she was introduced to Ms Isobel Russo who is head of ceremonies at the British Humanist Association ("BHA") and also a BHA wedding celebrant. On 19 October 2016 she engaged Ms Russo to perform her wedding ceremony in Northern Ireland. She has been in regular contact with her to make the arrangements. She wishes to have that ceremony legally recognised by the State.

[5] In accordance with this desire Ms Russo, with the applicant's approval, applied to the General Register Office ("GRO") in Northern Ireland to seek temporary authorisation to perform the marriage under Article 14 of the Marriage (Northern Ireland) Order 2003 ("the 2003 Order").

[6] The application was a comprehensive one including a detailed letter dated 12 December 2016 setting out the legal basis for the application, a form GRO365 Application for Temporary Approval, a constitution of the BHA, confirmation of the charitable status of the BHA, confirmation of the declaratory words to be spoken at the wedding ceremony pursuant to Article 10(3) of the 2003 Order, a letter from the Chief Executive of BHA confirming Ms Russo's good character and standing as an accredited celebrant by the BHA and a copy of the BHA submission to the Joint Committee on Human Rights on the Law on Marriage (June 2009).

[7] A response was provided on 14 February 2017 via the Departmental Solicitor's Office ("DSO") on behalf of the Registrar General which refused the application.

[8] Having considered this refusal the applicant instructed her solicitor to issue a pre-action letter to the GRO and to the Department of Finance, as the body responsible for marriage law in Northern Ireland. These letters were sent on 8 March 2017.

[9] The respondents replied maintaining their position on 14 April 2017.

[10] On 19 April 2017 the applicant submitted an application for leave to apply for judicial review of the decision of 14 February 2017.

[11] The matter came before me on 9 May 2017. Leave was opposed by both proposed respondents and Mr Philip Henry BL provided detailed written submissions in support of that opposition. I concluded having considered the written submissions of Mr Steven McQuitty BL, who appeared on behalf of the applicant, that an arguable case had been established and accordingly I granted leave on all grounds contained in the Order 53 statement.

[12] In light of the urgency of the matter I imposed a strict timetable for the submission of further affidavits and skeleton arguments. I listed the case for hearing on 26 May 2017.

[13] Because the applicant was challenging the lawfulness of provisions of the 2003 Order, which was subordinate legislation, in respect of which the applicant was seeking a declaration that provisions of the legislation were incompatible with the applicant's rights under the European Convention on Human Rights a devolution notice was served pursuant to the Northern Ireland Act 1998 Schedule 10 paragraph 5. A Notice of Incompatibility was also served pursuant to Order 121, Rule 3A

(Human Rights Compatibility) of the Rules of the Court of Judicature (Northern Ireland) 1980.

[14] Arising from those notices the Attorney General for Northern Ireland, Mr John Larkin QC appeared at the hearing on 26 May 2017.

[15] At the hearing the applicant was represented by Mr Steven McQuitty BL, the respondents by Mr Philip Henry BL and, as previously indicated the Attorney General also appeared.

[16] In the course of the hearing I was referred to two affidavits from the applicant. These were supported by affidavits from Ms Isobel Russo, Ms Jessica Bird, Karan Gibson, Richard Thompson and the applicant's solicitor Mr Ciaran Moynagh of McLernon Moynagh solicitors.

[17] I also received two affidavits from Ms Laura McPolin, who is the Deputy Director of the Civil Law Reform Division of the Department of Finance ("the Department"). The affidavits exhibited a substantial amount of material relevant to the issues.

[18] Counsel who appeared in the case provided detailed written submissions which were ably amplified in the course of their oral arguments.

[19] I am grateful to counsel and their respective solicitors for their skill and diligence in the preparation and presentation of this case which was of enormous assistance to me. In view of the urgency attaching to this matter I have only referred to the authorities and arguments considered essential to my determination, which I hope does no injustice to the significant volume of material and legal precedents which were submitted to me in the course of the hearing.

The relief sought

[20] The applicant seeks the following relief:

> **"As against the GRO/first respondent**
>
> (a) An order of *certiorari* to quash the impugned decision of the GRO dated 14 February 2017.
>
> (b) An order of *mandamus* to compel the GRO to take all necessary steps so as to grant the application of Isobel Russo made under Article 14 of the Marriage (Northern Ireland) Order 2003 so as to permit her to perform a legally valid and binding humanist wedding ceremony for the applicant on 22 June 2017.

(c) A declaration that the impugned decision was in breach of section 6 of the Human Rights Act 1998 as contrary to the applicant's rights under Article 9 and/or Article 14 ECHR and was, in any event, unlawful, *ultra vires* and of no force or effect.

(d) A declaration that the provision of the Marriage (Northern Ireland) Order 2003 can be read and given effect to in a way that is compatible with the applicant's rights under Articles 9 and/or Article 14 ECHR and that the GRO ought to have done so pursuant to section 3 of the Human Rights Act 1998, thereby enabling them to grant the application for temporary authorisation.

As against the Department of Finance/second respondent

(e) An order of *mandamus* to compel the Department to direct the GRO to grant the application made by Isobel Russo for temporary authorisation under the Marriage (Northern Ireland) Order 2003 so as to permit her to perform a legally valid and binding humanist wedding ceremony for the applicant on 22 June 2017.

(f) A declaration that the impugned provisions are unlawful and in breach of the applicant's rights under Article 9 and/or Article 14 ECHR.

(g) An order to strike down and/or disapply the impugned provisions (subordinate legislation) as incompatible with the applicant's Convention rights under Article 9 and/or Article 14, in accordance with section 6(1) of the Human Rights Act 1998.

(h) A declaration that the second respondent has acted in breach of section 6(1) of the Human Rights Act 1998 as in breach of the applicant's rights under Article 9 and Article 14 ECHR by their failure to take any adequate steps to remedy the incompatibility of the impugned provisions, particularly by their failure to introduce necessary regulations pursuant to Article 2(3) and Article 39 of the Marriage (Northern Ireland) Order 2003.

(i) A declaration that the second respondent has, in carrying out its functions, failed to discharge their statutory obligations pursuant to section 75 of the Northern Ireland Act 1998 by failing to have due regard to the need to promote equality of opportunity between persons of different religious belief, which must include persons of a non-religious belief, such as the applicant.

(j) An order of *mandamus* to introduce regulations pursuant to Article 2(3) and Article 39 of the Marriage (Northern Ireland) Order 2003 so as to allow the GRO to grant the application of the BHA dated 12 December 2016 and to so without delay and in advance of the wedding on 22 June 2017. …."

Legal context

[21] Marriages in Northern Ireland are governed by the 2003 Order.

[22] The 2003 Order introduced a uniform system of civil preliminaries for both religious and civil marriages. It shifted the emphasis in relation to religious marriages from a system based on the registration of buildings to one based on the registration of officiants and allowed for civil marriages to be solemnised in a wider range of locations, subject to the control of the local registration district.

[23] Article 9 of the Order provides that a marriage may only be solemnised by "by an officiant" or "a person appointed under Article 31".

[24] It provides for two types of marriages namely "religious marriages" and "civil marriages". The Order provides a uniform system of civil preliminaries for both types of marriage. The Order goes on to provide that a religious body may apply to the Register General for a member named in the application to be registered as empowered to solemnise marriages in Northern Ireland and sets out the procedure for such an application. A person appearing on the register is entitled to act an "officiant" at a marriage. Under Article 14 of the Order the Registrar General may grant to a member of a religious body a temporary authorisation to solemnise a religious marriage. Article 14 of the 2003 Order provides as follows:

> **"Temporary authorisation to solemnise religious marriage**
>
> 14.—(1) The Registrar General may grant to a member of a religious body who is aged 21 or over a temporary authorisation to solemnise -

(a) One or more specified marriages;

(b) Marriages during a specified period.

(2) An authorisation under paragraph (1) shall be in writing and subject to any specified conditions.

(3) In this Article 'specified' means specified in the authorisation."

[25] Article 31 provides for the appointment of a Registrar of Marriages and one or more Deputy Registrars of Marriages who solemnise civil marriages.

[26] The background to the introduction of this legislation is set out in the affidavit of Ms McPolin. Prior to the introduction of the Order it was felt that the law in relation to marriage was overly complex, outdated and difficult to administer. Therefore in January 1998 the Law Reform Advisory Committee for Northern Ireland (the Committee) was asked by the Secretary of State to consider whether it should be reformed.

[27] The Committee established a sub-committee which engaged in an extensive exercise in consultation and ultimately produced a report which set out its recommendations with regard to the reform of the law of marriage. The report was entitled "Marriage Law" and was published in December 2000.

[28] The Committee concluded that, in considering models for reform, the law in Scotland provided the best model for reform of the law in Northern Ireland. The recommendations for a new Order closely resembled the Marriage (Scotland) Act 1977 ("the 1977 Act").

[29] Officials from the Office of Law Reform (OLR) and the GRO considered the Committee's Report and invited the Minister of Finance and Personnel to accept the main recommendations. Officials also proposed that the Minister seek the views of the Committee for Finance and Personnel on the recommendations and agree to undertake a further round of consultation that would have a particular focus on the equality impact of the proposed reforms. That further round of consultation was approved and the consultation ran from 8 August 2001 to 25 October 2001. During the consultation the aims of the reform were broadly welcomed.

[30] The Bill to give effect to the accepted recommendations was introduced into the Northern Ireland Assembly on 17 June 2002 by the Minister of Finance and Personnel. The Bill passed the second stage on 25 June 2002. It then proceeded to Committee stage. The Committee raised the issue of the definition of marriage and was advised that it was outside the scope of the Bill. It also suggested the definition

of a religious "officiant" could be dealt with in regulations and was advised that the Department did not favour that approach. The Bill had almost reached the end of the Committee stage. However when the Assembly was suspended on 14 October 2002 it fell. The Bill was then converted to an Order in Council, with minimal change and was laid at Westminster.

[31] The 2003 Order was made on 27 February 2003 and came fully into operation on 1 January 2004.

Summary of arguments

[32] Put simply, the applicant's basic complaint is that whilst a wide range of religious groups are afforded the legal privilege of being able to marry their members in accordance with their own beliefs and traditions, this same legal privilege is being denied to humanists, without any proper justification in law. She says that she is entitled to have a legally recognised humanist marriage ceremony conducted by a humanist celebrant who should be approved as an officiant under the Order.

[33] She argues the decision is in breach of her rights under Article 9 and/or Article 14 (within the ambit of Article 9) of the ECHR. She says that the Order can be read compatibly to avoid this breach as was done in Scotland under equivalent provisions of the 1977 Act. She submits that the term "religious marriage" can and should now be read to include the concept of "belief marriage" which should be afforded equal recognition and which would encompass a humanist marriage performed by a BHA accredited celebrant.

[34] Alternatively she argues that those provisions of the 2003 Order which permit only authorisation of religious marriage on behalf of a religious body by the GRO and which thereby operate to exclude the possibility of granting temporary authorisation (and thereby legal recognition) for a humanist marriage ceremony are unlawful as they are in breach of Articles 9 and/or 14 of the ECHR and should be struck down insofar as they have breached the applicant's rights pursuant to section 6 of the Human Rights Act 1998. This aspect of the challenge is brought against the second respondent, the Department of Finance.

[35] She goes further and argues that the Department has acted unlawfully by its failure to introduce regulations to correct this illegality and for its failure to discharge its statutory obligation under section 75 of the Northern Ireland Act 1998.

[36] The respondents say that the provisions of the Order are clear and that there is no power to grant a temporary authorisation to a BHA celebrant which is not a religious body. Such a construction would be contrary to the clear intention of the Order. Whilst it is accepted by the respondents that "a belief in humanism may well come within the scope of Article 9" it is not accepted that the denial on granting legal

recognition to the wedding ceremony conducted by Ms Russo, who shares the applicant's humanist values, constitutes an interference with the applicant's Article 9 rights. They say there is no obligation on the State to facilitate every aspect of manifestation of religion or belief.

[37] The GRO argues, that whilst it does not dispute the genuineness of the applicant's belief in humanism, it cannot accede to the application for temporary authorisation as to do so would be ultra vires. It is submitted that the resolution of the BHA concerns would require an amendment to the 2003 Order, which is a matter for the local Assembly.

[38] The respondents say that there is no interference with the applicant's Article 9 rights. They say that in fact there is no discrimination under Article 14 under the ambit of Article 9. If there is a breach of Article 9 and/or Article 14 such interference is justified in law.

[39] The Attorney General's submissions primarily addressed the argument that, subject to a compliant interpretation not being possible, certain provisions of the 2003 Order are incompatible with Article 9 and/or Article 14 of the ECHR. He draws attention to the fact that Article 12 is in fact the ECHR *lex specilias* on marriage and that it is instructive that the applicant has not framed her challenge under this provision, something which could not be successfully attempted. He says that in fact Article 9 is not engaged, that her desire to have her humanist marriage or ceremony recognised as legally binding does not come within the ambit of a "manifestation" of her humanist belief within the meaning of Article 9(1) so as to enable consideration of Article 14. On an analysis of the authorities he argues that a finding by this court that Articles 9 and 14 ECHR required the State to provide legal recognition for humanist marriage would go far beyond anything currently decided in Strasbourg and indeed would go against the natural flow of existing Strasbourg case law. In short he says there is no illegality in the matters of which the applicant complains.

Consideration of the issues

1. <u>Is Article 9 engaged?</u>

[40] It seems to me that there are two related elements to this question. Firstly, is the applicant's humanism a belief within the meaning of Article 9(1) ECHR? Secondly, is the applicant's desire to have a humanist officiate at the wedding "a manifestation" of the applicant's humanist beliefs?

[41] Article 9(1) provides:

> "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."

[42] Article 9(2) qualifies the right to manifest one's religion or beliefs as follows:

> "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."

[43] Concerning the question of belief the applicant sets out her views in the following way in paragraph 8 of her first affidavit:

> "Humanism is a coherent and ethical world view that affirms that we have the right and responsibility to give meaning and to shape our own lives, using reason and compassion. I believe this life to be the one and only life that I have to live and I want to make the best of it, without any need to resort to supernatural ideas and notions. I believe ethical decisions should be made expressly by reference to evidence and human experience. I believe in the inherent worth and dignity of all human beings. I want to celebrate and affirm our common humanity, irrespective of the many issues that often divide us from each other. This is only a summary of my values and beliefs as they have been shaped by humanism."

[44] Ms Russo in her affidavit provides further detail in relation to humanism. At paragraph 3 she says:

> "3. Humanism is a non-religious world view. The BHA defines a humanist as describing someone who:
>
> - Trusts to the scientific method when it comes to understanding how the universe works and rejects the idea of the supernatural (and is therefore an atheist or agnostic).

- Makes their ethical decisions based on reason, empathy and a concern for human beings and other sentient animals.

- Believes that, in the absence of an afterlife and any discernible purpose of the universe, human beings can act to give their own lives meaning by seeking happiness in this life and helping others to do the same."

She then refers to the British Humanist Association's website and also the International Humanist and Ethical Unions "Amsterdam Declaration 2002".

[45] In relation to the British Humanist Association and Northern Ireland Humanist she avers:

> "6. The British Humanist Association was founded in 1896 as the Union of Ethical Societies, becoming the BHA in 1967. The BHA is registered in England and Wales as a charity (No. 285987) and is registered as operating throughout the UK and Crown dependencies. As exhibited at pages 18-20 of the exhibit bundle:
>
> > *The British Humanist Association promotes humanism and supports and represents people who seek to live good lives without religious or superstitious beliefs. The BHA provides educational resources on humanism and humanist funerals and other ceremonies and campaigns against religious privilege and discrimination on grounds of religion or belief.*
>
> And its charitable objects are:
>
> > *1. The advancement of humanism, namely a non-religious ethical life stance the essential elements of which are a commitment to human well-being and a reliance on reason, experience and a naturalistic view of the world;*
> >
> > *2. The advancement of education and in particular the study of and the dissemination of knowledge about*

humanism and about the arts and science as they relate to humanism;

3. The promotion of equality and non-discrimination and the protection of human rights as defined in international instruments to which the United Kingdom is party, in each case in particular as relates to religion and belief;

4. The promotion of understanding of people holding religious and non-religious beliefs so as to advance harmonious cooperation in society.

7. The BHA has 55,000 members and supporters and over 70 local and special interest affiliates. It is supported by over 150 prominent philosophers, scientists and other thinkers and experts as patrons and over 100 UK Parliamentarians who are in membership of the All Party Parliamentary Humanist Group. A list of our patrons is exhibited at pages 21-26 of the exhibit bundle. BHA trained and accredited celebrants conduct ceremonies attended by over one million people each year. The BHA is a member of the International Humanist and Ethical Union.

8. In Northern Ireland specifically, the BHA organises via Northern Ireland Humanist ("NIH"), a section of the BHA. It has been operating as a section since February 2016, albeit the BHA has been operating for much longer. There have been humanist organisations in Northern Ireland since 1964 and the first BHA ceremony in Northern Ireland was accredited at least as far back as 1995.

9. However since February 2016 the growth of the humanist movement in Northern Ireland has accelerated. NIH are holding five meetings a month in Belfast, Ballymena, Armagh, Larne and Derry. As of writing, NIH have 781 registered members and supporters in its database."

[46] In interpreting Article 9 I have regard to the universal declaration of human rights and in particular to general comment number 22 on Article 18 (which

provides for the right to freedom of belief) from the UN Human Rights Committee which provides as follows:

> "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community."

[47] The legal test for "belief" is perhaps best set out in the judgment in **Eweida and Others v United Kingdom** [2013] 57 EHRR 2113. The court held at paragraph [81]:

> "[81] The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance. … Provided this is satisfied, the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed."

[48] **I have come to the conclusion that the applicant easily meets this test and that her humanist beliefs have reached the level of cogency, seriousness, cohesion and importance to engage her Article 9 rights.**

[49] The more difficult question is whether or not her wish to have a legally recognised humanist marriage ceremony conducted by a humanist celebrant is a manifestation of that belief.

[50] Again the UN Human Rights Committee's commentary on Article 18 is instructive.

[51] Paragraph 44(4) states:

> "4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private".
>
> The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in ritual associated with certain stages of life, and the use of a particular language customarily spoken by a group. …."

[52] The House of Lords looked at the issue of the manifestation of beliefs in the case of **R (Williamson) v Secretary of State for Education and Employment** [2005] 2 AC. Lord Nicholls says at paragraph [23] of the judgment:

> "Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in Article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involves subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance."

[53] Later in the judgment, expressly addressing the issue of manifesting beliefs and practice, he says:

> "Thus, in deciding whether the claimants' conduct constitutes manifesting a belief in practice for the

> purposes of Article 9 one must first identify the nature and scope of the belief. If, as here, the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice. In such cases the act is 'intimately linked' to the belief, in the Strasbourg phraseology … see *Application 10295/82 v United Kingdom (1983) 6 EHRR 558*. This is so whether the perceived obligation is of a religious, ethical or social character. If this were not so, and if acting pursuant to such a perceived obligation did not suffice to constitute manifestation of that belief in practice, it would be difficult to see what in principle suffices to constitute manifestation of such a belief in practice. I do not read the examples of acts of worship and devotion given by the European Commission in *Application 10295/82 v United Kingdom* as exhaustive of the scope of manifestation of a belief in practice.
>
> This is not to say that a perceived obligation is a prerequisite to manifestation of a belief in practice. It is not: see, for instance, *Syndicat Northcrest v Amselem 241 DLR (4th) 1*, especially at pp 25-26, paras 46-50."

[54] In the **Williamson** case the court was dealing with what was perceived to be an obligation namely that the infliction of corporal punishment of a mild nature was necessary for the proper upbringing of children. The court held that this was a belief capable of being protected by Article 9(1) although went on to hold that the interference with the right was justified.

[55] The decision is authority for the proposition that the freedom to hold a belief was an absolute right, whereas the right to manifest a belief was a qualified right. When the genuineness of a person's belief was an issue in court proceedings the court could decide that as an issue of fact by conducting a limited enquiry to ensure that the beliefs were held in good faith. It would not conduct an enquiry into the beliefs provided they met the modest threshold requirements set out in paragraph 23 of the judgment. Specifically a perceived obligation is not a prerequisite to manifestation of a belief in practice. **Eweida** sets out the parameters for engagement.

> "Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief. Thus, for example, acts or

> omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 (see **Skugar and Others v Russia** (Dec), No. 40010/04, 3 December 2009 and for example, **Arrowsmith v The United Kingdom,** Commissioner's Report, 12 October 1978, Decisions and Reports 19, P. 5; C v The United Kingdom Commission Decision on 15 December 1983, DR 37, p. 142; **Zaoui v Switzerland** (Dec) No. 41615/98 18 January 2001). In order to count as a 'manifestation' within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case."

[56] The applicant sets out her views on the manifestation of her beliefs, inter alia, in paragraph 22 of her rejoinder affidavit as follows:

> "… I also want to have an explicitly humanist marriage ceremony (not a civil ceremony with attenuated humanist 'bits'), involving a clear public affirmation of our humanist values as individuals and as a couple, before our family and friends. This is part and parcel of my desire to have a legally valid humanist wedding. Legal validity is also important to me as it signifies that the State recognises my values as legitimate and worthy of legal recognition equal to the diverse religious beliefs that are afforded the same legal privilege. Furthermore the act of marriage is, in my view, a profoundly humanist event related to the fundamental human values of love, fidelity and trust, sharing and co-operation. We only have this one life and so the decision to share with one other person is all the more significant for a humanist. … And so my marriage ceremony provides me with a rare, communal event at which I can express and celebrate my humanism with my husband to be and our family and friends."

[57] She also refers to supporting affidavits from Karen Gibson and Jessica Bird who share the applicant's wish. She goes on to state at paragraph 24:

> "24. I should also say something here about the humanist tradition of which I am a part. I am aware that humanist marriage (and other significant ceremonies) has long been part of organised humanism across the world. … One of these ethical societies (the West London Ethical Society) had been founded in 1892 and by 1908 was performing a form of marriage ceremony in accordance with the Book of Ethical Rituals published by Stanton Coit. I am advised that marriages were routinely performed by the West London Ethical Society into the 1930s. A similar account could be given of the South Place Ethical Society which is now the Conway Hall Ethical Society in Central London. I am advised that this ethical society conducted marriages into the 1970s. The Ethical Union changed its name to the British Human Association in 1967 and early on identified the need, of some members, for explicitly humanist marriage ceremonies as a continuation of the earlier ethical model. Humanist marriage has grown and flourished out of these roots and I am proud to be standing in that venerable tradition. I have evidenced my position over a number of years and in the establishment, in particular, of Atheist NI. I am a person who acts on my beliefs and values. It is only natural then, for me to seek to have those beliefs and values, expressed through my marriage ceremony.
>
> 25. It would be fair to say that humanist marriage is a generally recognised custom or practice within the humanist tradition as I have known it. For example I would consider it unusual if a committed humanist couple were to have anything other than a humanist marriage ceremony. My desire to have a legally valid humanist marriage is central to my own humanist identity. The act of getting married is, of course, deeply personal and is bound by my humanist beliefs, values and aspirations."

[58] In her affidavit Isobel Russo sets out the history of humanist wedding ceremonies across the UK and Ireland.

[59] It is interesting to note that since humanist weddings were given legal recognition in Scotland in 2005 the number of humanist marriages have increased from 82 in 2005 to over 4,200 in 2015, greater than Church of Scotland marriages (4,052).

[60] In the Republic of Ireland after the introduction of the Civil Registration (Amendment) Act 2012 which extended legal recognition to marriages to bodies whose "principal objects are secular, ethical and humanist", Human Association of Ireland ("HAI") celebrants performed 1,264 marriages in 2015, putting them only behind the Catholic Church and civil marriages in terms of popularity.

[61] Ms Russo also sets out the details in relation to the training and accreditation of BHA celebrants.

[62] She avers that humanist wedding ceremonies are hugely popular because they allow humanist and non-religious couples to be married in a manner and at a time of their choosing, creating a bespoke and profound ceremony that accords with their wishes and deepest held beliefs. "Of central significance is the meaning created by being married by a celebrant who understands and shares their moral and ethical stance".

[63] The Attorney General argues that the indeterminate nature of humanism, focused as it is on "ethical" behaviour, means that it cannot be compared, nor can the BHA celebrant licensees, be compared with organised religion or even a distinct philosophical school. The respondents initially conceded that the applicant's desire to have a humanist officiant at her wedding could be considered a manifestation of her humanist beliefs but resiled from this to an extent in oral submissions.

[64] The State has chosen to expressly recognise marriage within organised religions as being a manifestation of religious belief. The 2003 Order defines a "religious body" as "an organised group of people meeting regularly for common religious worship".

[65] In the response to the pre-action protocol letter dated 14 April 2017 the solicitors acting for the respondents say as follows:

> "In the main, persons of religious faith in this jurisdiction have a belief that during a religious marriage their union is recognised and blessed by a supreme deity. There is a long tradition in this jurisdiction and others of a religious or spiritual dimension to marriage. The circumstances of persons of religious faith is therefore inherently different to that of the applicant who is humanist.

> In making the 2003 Order the State elected to continue the longstanding position whereby it gave legal recognition to marriages conducted according to a religious rite and with a spiritual dimension. By contrast, for persons such as the applicant the marriage is a purely legal construct with no accompanying religious or spiritual rite. The applicant's understanding of marriage is fully recognised by the State by way of a civil marriage, which is wholly secular in nature."

[66] This indeed reflects the history of how the 2003 Order came about as set out in the first affidavit of Ms McPolin when the Law Reform Advisory Committee for Northern Ireland "recognised the deep rooted involvement of religion in the communities of Northern Ireland". In rejecting an exclusively secularist approach to marriage, which has been adopted in countries such as France with individuals having the option of a separate religious ceremony which attracts no State recognition, the Committee had regard to "the role which religious bodies have played in the past within the community, and in particular in the context of marriage, continues to be regarded as central in Northern Ireland life and we consider that the law should continue to recognise the validity of both religious and civil weddings as giving rise to the legal status of marriage."

[67] There are in excess of 100 "religious bodies" currently registered in this jurisdiction under the 2003 Order. To put it mildly it is an eclectic mix. Many are obscure and others such as Zen Buddhists, for example, clearly have no belief in "their wedding being blessed by a 'supreme deity'". There is nothing in the Order or in the application forms used by the GRO which suggests that it requires that the religious body (or officiant) in making an application to be registered, must confirm a particular theological/philosophical understanding of the significance of marriage for that religious body and its adherents or indeed as to the role of the officiant in a religious ceremony.

[68] More importantly the respondents miss the fundamental point made on behalf of the applicant in that she does not want a "civil marriage", but rather a marriage solemnised by a humanist celebrant which is different and distinct from a civil marriage. The applicant does not understand her marriage as a "purely legal" construct but rather as a manifestation of her belief.

[69] The freedom to manifest a belief in practice encompasses a broad range of acts. It includes ceremonial acts which give direct expression to belief as well as the use of ritual formulae associated with ceremonial acts. There is no requirement that the applicant be under a duty to perform a humanist ceremony, but I consider that there is a sufficiently close and direct nexus between her proposed ceremony and her underlying beliefs. I accept the applicant's averment that her desire to have her

wedding officiated by a humanist celebrant at a humanist ceremony is directly linked to her humanist belief. Furthermore it is clear from the affidavit of Ms Russo and the applicant's own affidavit that humanist marriage is a generally recognised custom or practice within the humanist tradition and that it would be unusual if a committed humanist couple were to have anything other than a humanist marriage ceremony. I consider that humanist ceremonies are indeed a manifestation of humanist beliefs in general and are entirely consistent with the stated objects of the BHA which include the advancement of humanism, namely a non-religious ethical lifestance, the essential elements of which are commitment to human well-being and a reliance on reason, experience and a naturalist view of the world. I conclude that the performance of a humanist wedding ceremony comes within the ambit of 4(2) of the Association's objectives to:

> "… do all such other lawful things as are conductive or incidental to furthering or advancing any of the above named objects."

I have come to the conclusion that the applicant's desire to have a humanist officiate at her wedding is indeed a manifestation of her humanist beliefs and that therefore Article 9 in this respect is engaged in this case.

[70] **Has there been an interference with the applicant's Article 9 rights?**

[71] The applicant submits that Article 9 imposes an obligation on the State (including the respondents) to afford legal recognition to her humanist marriage, to be conducted by a BHA celebrant. She argues that the failure to do so constitutes an interference with her Article 9 rights. The respondents say the answer to this question is "no" because she is not prevented from marrying and she is not restricted from having a humanist influenced civil ceremony officiated over by a registrar. She can also have a separate humanist wedding, albeit absent legal status, officiated over by a celebrant of her choosing.

[72] Perhaps this argument is best met by the judgment of the United States Court of Appeal for the Seventh Circuit in **Centre for Enquiry and Reba Boyd Wooden v Marion Circuit Court Clerk and Marion County Prosecutor** No. 12-3751 (14 July 2014) (the US Court of Appeal is the last federal stop before an appeal to the Supreme Court) when the court ruled at page 7:

> "That's true enough—but it just restates the discrimination of which plaintiffs complain. Lutherans can solemnize their marriage in public ceremonies conducted by people who share their fundamental beliefs; humanists can't. Humanists' ability to carry out a sham ceremony, with the real

> business done in a back office, does not address the injustice of which plaintiffs complain."

[73] For "discrimination" and "injustice" I substitute "interference" for the purposes of this argument.

[74] In that case the Seventh Circuit concluded that the inconsistent treatment created by the relevant statute violated the First Amendment and remanded the case with instructions to issue an injunction allowing certified secular humanist celebrants to solemnise marriages in Indiana.

[75] In doing so the court relied on the decision of the US Supreme Court (**US v Seeger, Torcaso and Watkins**) that had forbidden distinctions between religious and secular beliefs that hold the same place in adherents lives.

[76] **I therefore conclude that there is an interference with the applicant's Article 9 rights.**

Is the interference lawful?

[77] The applicant says that the impugned decision is unlawful on the basis of a breach of her Article 9 rights alone. In the alternative she argues that her rights under Article 9 taken with Article 14 are breached.

[78] I do not consider it appropriate in the context of this case to consider the matter solely on the basis of Article 9. The essence of the applicant's case is based on the different treatment between religious bodies and humanists who share her beliefs. The applicant could not complain if the State had decided that the only basis for the legal recognition of marriage would be a civil ceremony – as for example in France. The basis of her claim is that in this jurisdiction the State has chosen to empower religious bodies to perform legally valid marriages in Northern Ireland. Her complaint is that the State has refused to extend this privilege to those like her who wish to marry in accordance with their humanist beliefs.

[79] Article 14 applies where the alleged discrimination is in connection with a Convention right and on the grounds stated in Article 14. Article 14 provides:

> "**Prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[80] In this case the alleged discrimination is in connection with a Convention right namely Article 9. The discrimination about which she complains is on a ground stated in Article 14 by reason of her non-religious belief or if necessary "other status".

[81] Article 14 extends not only to those elements of a substantive right which a State is required by the Convention to guarantee, but also to aspects of the rights which the State choses to guarantee without being obliged under the Convention to do so.

[82] The applicant places particular reliance on the European Court of Human Rights decision in **Savez Crkava Rijec Zivota v Croatia** (7798/08) (2012) 54 EHRR 36.

[83] The applicants in that case were churches of a reformist domination who complained that the Croatian authorities had afforded certain privileges to some religious groups including the ability to perform legally valid marriage ceremonies.

[84] In relation to whether or not Article 9 could be relied on in its own right at paragraph [56] the judgment says:

> "The court further reiterates that the Convention, including its Article 9(1), cannot be interpreted so as to impose an obligation on States to have the effects of religious marriages recognised as equal to those of civil marriages."

[85] However the court went on at paragraph [58] to hold that Article 14 when read with Article 9 was applicable to the facts of the case:

> "Nevertheless the court considers that celebration of a religious marriage, which amounts to observance of a religious right, and teaching of a religion both represent manifestations of religion within the meaning of Article 9(1) of the Convention. It also notes Croatia allows certain religious communities to provide religious education in public schools and nurseries and recognises religious marriages performed by them."

[86] The court reiterated that the prohibition of discrimination in Article 14 of the Convention applied also to those additional rights, falling within the wider ambit of any Convention article, for which the State has voluntarily decided to provide. Consequently the State which has gone beyond its obligations under Article 9 of the Convention in creating such rights cannot, in the application of those rights, take

discriminatory measures within the meaning of Article 14. It followed that, although Croatia is not obliged under Article 9 of the Convention to allow religious education in public schools and nurseries or to recognise religious marriages, the facts of the instant case nevertheless fell within the wider ambit of that article. Accordingly Article 14 of the Convention, read in conjunction with Article 9, was applicable.

[87] At paragraph [88] the court commented:

> "… The State had a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and its relations with different religions, dominations and beliefs. Therefore, such criteria called for particular scrutiny on the part of the court."

[88] The court ultimately held that the Croatian Government had not established any objective reasonable justification for the difference in treatment between the applicant churches and other religious communities in Croatia. Therefore there had been a breach of Article 14 in conjunction with Article 9.

[89] The Attorney General points out that in the Croatian case the applicants were religious bodies who performed marriage ceremonies themselves in contrast to the BHA who merely licence celebrants. The court was directly considering differences between two religious groups.

[90] In particular he relies on the European Court of Human Rights decision in **Munoz Diaz v Spain** (2010) 50 EHRR 49. In that case the applicant was married in 1971 in a marriage solemnized according to the rites of the Roma community. Following her husband's death in December 2000 the applicant applied for a survivor's pension but the application was refused on the ground that her marriage had not been registered in the Civil Register. The court held that there had been a violation of Article 14 taken together with Article 1 of Protocol No. 1. However the applicant also argued, relying on Article 14 taken together with Article 12 that the refusal by the authorities to recognise the validity of a Roma marriage constituted a breach of a right to marry.

[91] In rejecting that submission the court ruled as follows:

> "78. The Court reiterates that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the contracting States but the limitations thereby introduced must not

restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.

79. The Court observes that civil marriage in Spain, as in force since 1981, is open to everyone, and takes the view that its regulation does not entail any discrimination on religious or other grounds. The same form of marriage, before a mayor, a magistrate or another designated public servant, applies to everyone without distinction. There is no requirement to declare one's religion or beliefs or to belong to a cultural, linguistic, ethnic or other group.

80. It is true that certain religious forms of expression of consent are accepted under Spanish law, but those religious forms (Catholic, Protestant, Muslim and Jewish) are recognised by virtue of agreements with the State and thus produce the same effects as civil marriage, whereas other forms (religious or traditional) are not recognised. The Court observes, however, that this is a distinction derived from religious affiliation, which is not pertinent in the case of the Roma community. But that distinction does not impede or prohibit civil marriage, which is open to the Roma under the same conditions of equality as to persons not belonging to their community, and is a response to considerations that have to be taken into account by the legislature within its margin of appreciation, as the Government has argued.

81. Accordingly, the Court finds that the fact that Roma marriage has no civil effects as desired by the applicant does not constitute discrimination prohibited by Article 14. It follows that this complaint is manifestly ill-founded and must be rejected under Article 35(3) and (4) of the Convention."

[92] The Attorney General also draws my attention to a number of decisions of the European Court in which Article 14 taken in conjunction with Article 8 could not impose an obligation on States to provide same sex marriage when the more specific Article 12 could not do so. Put simply he says that it is clear that Articles 9 plus 14 could not equal 12 any more than 8 plus 14 can equal 12.

[93] Mr McQuitty counters that in relation to the Spanish case the applicants were seeking to have a marriage declared valid retrospectively whereas in this case the applicant is seeking to have a marriage declared legally valid before it actually happens. So far as the same sex marriage cases are concerned he says that in that case the applicant was seeking to establish a right to marry under Article 12. That is not the case here. The applicant does have the right to marry. She invokes Articles 9 and 14 on the basis that in the exercise of that right she suffers discrimination in breach of her Article 9 rights taken together with Article 14.

[94] The starting point must be that if the law is to protect freedom of religion under Article 9 it must recognise that all religions and beliefs should be treated equally.

[95] The State must be neutral and impartial in the arrangement it makes for the exercise of manifestations of various religions and beliefs.

[96] In relation to the solemnisation of marriage the State has chosen to authorise the solemnisation of religious marriage ceremonies in recognition of those bodies' beliefs. Having done so, in my view it should provide equal recognition to individuals who hold humanists beliefs on the basis of my findings that humanism does meet the test of a belief body and that a wedding ceremony conducted by a humanist constitutes a manifestation of that belief.

[97] **I consider that there has been a breach of the applicant's rights under Articles 9 and 14 of the ECHR.**

[98] **That being so the issue I must consider is whether the breach or difference in treatment is capable of objective justification.**

[99] In this regard Mr Henry argues firstly that any interference alleged is minor. The lesser the interference the lesser the justification that is required. He points out that at the applicant's civil ceremony she can introduce humanist elements, including the personalisation of her vows. The only actual interference relates to the person who officiates. There is some dispute about the degree of flexibility offered to those who chose a civil ceremony. In any event a marriage ceremony is no trivial matter. As the scoping document prepared by the Law Commission in England acknowledges "a couple's wedding day is one of profound emotional, cultural, social, and legal significance."

[100] Referring back to Article 9(2) the limitation is prescribed by law. The next question is whether the interference is necessary in a democratic society and this can be broken down into the following:

(a) Is the limitation pursuing a legitimate aim?

(b) If so, are the means chosen to achieve that aim proportionate in the circumstances? Proportionality is determined on an objective basis.

[101] What is the legitimate aim in respect of the limitation? The Order itself was intended to simplify, consolidate and modernise the law of marriage. In granting the "privileges" to religious bodies it was recognising "the deep rooted involvement of religion in the communities of Northern Ireland". The intention was to provide equal treatment insofar as it was possible balanced against the "need" to properly regulate marriage. By adopting the approach of a distinction between religious ceremonies and civil ceremonies it is argued that it has achieved the aim of simplifying the law, regulating marriage and achieving equal treatment.

[102] The respondents argue that if the applicant is successful this will create huge difficulties for the regulation of marriage. Mr Henry says affording humanists the right to officiate as a sub-set of the non-religious group and giving them special status that other non-religious groups do not have is beset with difficulties. How does one regulate it? What training and certification is necessary? How does one deal with other non-religious groups?

[103] He says that marriage is such an important civic issue with far reaching legal consequences (and is open to abuse), that there is a significant public interest in closely controlling (and limiting) those who are permitted to officiate. He suggests that permitting ceremonies to be officiated by any non-religious group could dilute the dignity and status of marriage in Northern Ireland.

[104] It seems to me that this latter argument falls into the very trap that Articles 9 and 14 are designed to avoid. It does not chime with the State's obligation to respect all religions and beliefs.

[105] More importantly these concerns which might be described as "the flood gate argument" are not borne out by the evidence.

[106] Firstly this is the only application that has been received by a non-religious body.

[107] Secondly, if granted temporary authorisation the application is still subject to the series of checks and balances applied to all marriages contained in the 2003 Order. These include a notice requirement, the keeping of a list of intended marriages, a power to require evidence, the possibility of objections, the production of the marriage schedule and subsequent registration obligations.

[108] Thirdly, an applicant must satisfy the test of a "belief". Not all beliefs will attract the protections afforded by Article 9. Thus the notional science fiction fan could hardly establish Article 9 belief credentials with the GRO so as to receive official status. Indeed the wide and diverse list of religious bodies currently on the

register suggests that it might be easier for such persons to argue for officiant status as a religious body.

[109] Furthermore the experience in Scotland between 2005 and 2015 suggests that, at least in that jurisdiction, registration of humanist officiants did not give rise to administrative chaos or difficulty.

[110] Insofar as there would be any concern, for example, in relation to sham marriages, forced marriages or the commercialisation of marriage these issues can be regulated under the existing provisions of the 2003 Order. Indeed one could argue that in the absence of proper regulation a similar risk could exist in relation to religious marriages.

[111] I agree that there is significant public interest in controlling and regulating marriage but this can be achieved without discriminating against those who wish to manifest humanist beliefs.

[112] In any event returning to Article 9(2) what are the relevant interests of public safety, protection of public order, health or morals or protection of the rights and freedoms of others which make the limitation necessary? Mr Henry suggested public order includes the efficient and effective administration of public offices, including the GRO dealing, inter alia, with the business around marriages. I think whether or not this is an issue of public order is very debatable. **In any event I do not consider that there is an objective basis for the justification raised by the respondents.**

The experience in other jurisdictions

[113] The way in which the legal recognition of humanist marriages has evolved in Scotland is particularly instructive. As previously indicated the 2003 Order was based very much on the model set out in the 1977 Act. The structure of the two is almost identical. They include detailed preliminaries to marriage, identify those persons who may solemnise marriage and make specific provision for religious marriages. The relevant sections in Scotland are contained in sections 9 to 16. These mirror Articles 10 to 16 in the 1977 Act.

[114] The provision in the Scottish Act which provides for the temporary authorisation of celebrants is section 12 which states:

> "**Temporary authorisation of celebrants**
>
> The Registrar General may, in accordance with such terms and conditions as may be specified in the authorisation, grant to any person a temporary written authorisation to solemnise—

(a) a marriage or marriages specified in the authorisation; or

(b) marriages during such period as shall be specified in the authorisation:

Provided that the authorised person must at the date of the granting of the authorisation be 21 years of age or over."

[115] On 5 March 2002 the Humanist Society of Scotland ("HSS") met with officials from the General Register Office for Scotland. The meeting was at the request of the HSS who expressed a wish to be recognised as registrars for marriage in the same way that religious celebrants were recognised. The Society presented materials to the General Registrar outlining the nature and extent of the provision of ceremonies by the Society. It suggested that the Society's officiants should be eligible for temporary authorisation under section 12 of the 1977 Act. The General Registrar responded that section 12 was for "one off type approvals" and also that section 12 comes under the heading "Religion". Accordingly, it was necessary to read section 12 under that general heading. The HSS suggested that "this may conflict with human rights legislation which talks about religion and belief". At that stage it was suggested that there be further discussion between the parties. There was further correspondence from HSS on 16 March 2002 and 30 July 2002 which prompted a reply from the General Registrar on 12 August 2002.

[116] The Registrar set out the office's view in the following way:

"It is correct that all legislation should now be read in the context of the Human Rights Act 1998, in particular section 3. However, we would suggest that section 3 does not permit a perverse reading to be taken. With this in mind the definition of the term 'religion' in section 26 of the Marriage (Scotland) Act 1977 is particularly relevant. In our view it would be an extremely strained interpretation to classify the Humanist Society of Scotland as 'an organised group of people meeting regularly for common religious worship'.

Our advisors can find no authority to suggest that 'religion' has been extended by the jurisprudence of the European Court of Human Rights, in this context, to include secular organisations such as your society, simply because your society has a 'system of belief'. However, even if your Society did so have, we would suggest that the fact that the 1977 Act makes provision for both religious and secular marriages

> would militate against a secular organisation making use of the provisions intended for the religious bodies. Indeed we cannot see from where would come the impetus for the court to extend the definition of 'religion' in such a direction given the wording of Article 9 of the ECHR. Article 9(2) makes clear provision for the protection of freedom to manifest one's religion *or* belief."

Thus it will be seen that the response from the General Register Office echoes precisely the view expressed by the Registrar in this jurisdiction.

[117] The HSS replied on 6 September 2002 challenging the response and included the following paragraph:

> "We find it incredible, that your legal advisors are unaware of any case which grants protection to secular beliefs on the same terms as religious beliefs, when they state 'Article 9(2) makes clear provision for the protection of freedom to manifest one's religion OR beliefs?' We ourselves drew their attention to the leading case in this matter – **Kokkinakis v Greece**, 1994, in which the European Court of Human Rights made it clear that atheists and other non-believers were protected on the same terms as members of theist religions. This was backed up by a further ruling from the ECHR that a State has no discretion to determine whether beliefs are legitimate – **Manoussakis v Greece**, 1996.
>
> Support for our position has also been given by a court in the United Kingdom. In R**e Crawley Green Road Cemetery, Luton – St Albans Consistory Court**; Dec 2000 the court found that:
>
> 'Article 9 embraced not only religious beliefs but also non-religious beliefs and humanist beliefs and refer not only to the holding of such beliefs but also to some extent to the expression thereof'."

[118] The General Register's Office was unmoved and replied on 27 September 2002 which correspondence included the following:

> "In my earlier letter I stated that it is correct that all legislation should now be read in the context of the

> Human Rights Act 1998. Nevertheless, I should point out that section 26 of the 1977 Act rests not just on the aspect of 'religion' but also quite specifically on 'religious worship'. In your letter you confirm that the Humanist Society does not meet for religious 'worship'. This fact appears to directly disqualify your Society from consideration under the 1977 Act."

[119] However, the letter did agree to take up the offer of a further meeting between the parties.

[120] There was on-going debate and discussion between the HSS and the General Register's Office which culminated with a meeting on 12 April 2005. The meeting was attended by representatives of the General Register's Office and HSS. The minutes of the meeting record as follows:

> "2. The review had accordingly been carried out, with particular care at the interaction between human rights legislation and Scottish marriage legislation. The review had spotlighted a June 2004 House of Lords judgment and an English case, with no link to marriage, which set out the correct approach to the application of Article 14 of the ECHR. Looking again at Article 14 in the light of that judgment, GROS had concluded that refusal to recognise humanist marriage celebrants was likely to be incompatible with that article. At the same time, recent developments in case law about the extent and purpose of the requirement in section 3 of the Human Rights Act 1998 (which provided that, so far as possible, legislation must be read in a way which is compatible with the ECHR) had pointed to the fact that section 12 of the 1977 Act could indeed be read to allow the authorisation of humanist celebrants. GROS was therefore prepared to authorise humanist celebrants under section 12. This did not involve counting humanist marriages as "religious", but simply applying to them the provisions which also applied to religious marriages."

[121] The cases to which the paragraph refers are the cases of **R (Carson) v Secretary of State for Work and Pensions** [2005] UKHL 37; and **Ghaidan v Godin-Mendosa** [2004] UKHL 30.

[122] The applicant says that the court should take a similar view in this case.

[123] Of course, as the respondents point out, the view of the General Register Office for Scotland and the practice adopted by it is in no way binding on this court or this jurisdiction. They also point out that the wording of section 12 is different from that of Article 14 of the 2003 Order in that section 12 provides that authorisation may be granted "to any person" as opposed to "a member of a religious body" in Article 14. Nonetheless it is clear that the Register Office in Scotland initially took the same view as the respondents in this case. It is clear that section 12 of the Act is set in the context of religious marriages. Notwithstanding this, in light of the relevant authorities, the Register's Office took the view that it should read section 12 to permit it to apply the provisions to humanist marriages in the same way that they are applied to religious marriages.

[124] As appears from the statistics to which I have referred earlier since the GROS adopted that view there has been a very significant increase in the number of humanist weddings authorised by the registrar. In 2005 there were 82 such marriages attributed to the HSS. By 2015 this figure had risen to 3,378. In addition there were 575 marriages authorised in relation to independent humanist ceremonies and 355 in relation to the Humanist Fellowship of Scotland.

[125] By virtue of the Marriage and Civil Partnership (Scotland) Act 2014 the 1977 Act was amended to recognise this stance by in effect substituting "religious or belief body" for references to "religious body" in the Act and provided a specific definition for "a belief body" ('belief body' means an organised group of people, not being a religious body, their principal object (or one of the principal objects) of which is to uphold or promote philosophical or humanitarian beliefs and meets regularly for that purpose"). Specifically section 12 was amended to substitute for "person" "member of a religious or belief body", thereby providing statutory recognition of the practice since 2005.

[126] There is no evidence to suggest that the temporary authorisation of humanist marriages in Scotland gave rise to administrative chaos.

[127] In England and Wales the situation is different. In that jurisdiction authorisation for the performance of marriage focused on locations rather than individuals. In relation to marriages by non-religious belief organisations, section 14 of the Marriage (Same Sex Couples) Act 2013 required the Secretary of State to arrange for a review of whether the law should be changed to permit non-religious belief organisations to solemnise marriage in England and Wales. The Ministry of Justice engaged in a consultation process and in its summary of responses it records that:

> "The majority of those responding to the consultation are in favour of the law being changed to allow legally valid marriage ceremonies for those with non-religious beliefs alongside religious and civil marriage

> ceremonies in England and Wales. The majority of those supporting a change in the law said that they viewed the current law as being unfair or discriminatory. The principal reason provided was that, unlike religious couples, humanist couples cannot currently marry in a legal ceremony rooted in their beliefs conducted by a person who shares those beliefs or in a place which is personally meaningful to them".

[128] Arising from the consultation process the Government asked the Law Commission to consider a broader view of the law concerning marriage ceremonies. One key difficulty that arose in England and Wales which does not apply in this jurisdiction concerned where belief marriages would take place, something which is not a problem in this jurisdiction. In any event the Law Commission prepared a scoping report. The report identified many of the same issues which confronted the Advisory Committee in this jurisdiction back in 2000, namely the fact that the law was far from modern, unduly complex and lacked certainty.

[129] Dealing with the issue of belief marriages the report says as follows:

> "1.22 First, there is a growing demand for an alternative to the current civil and religious options for a marriage ceremony. The decline in adherence to formal religion, and the feeling that a civil option does not allow sufficient scope for personalisation, has led to individuals seeking other options that are meaningful to them. Interfaith couples may be looking for a tailored ceremony that reflects each partner's beliefs equally, while others may wish for a ceremony according to a particular set of beliefs, such as humanism.
>
> 1.23 As a result there is a thriving and largely unregulated market in celebrants conducting non-legally binding marriage ceremonies. While the couples undertaking such ceremonies will usually have an additional civil ceremony and are rarely under any illusions about the legal status of their ceremony of choice, this developing practice does indicate a popular demand for legal change that was lacking in earlier decades.
>
> 1.24 Social change does not automatically require legal recognition, but there is growing

> acknowledgement of the legitimacy of the demands of those currently excluded from being able to solemnise legally binding marriages. The concept of "belief" is now regarded as encompassing more than just religious beliefs. A large proportion of responses to the 2004 consultation on non-religious belief organisation drew attention to the point that "humanist couples cannot currently marry in a legal ceremony rooted in their beliefs, conducted by a person who shares those beliefs, or in a place which is personally meaningful to them'."

[130] In the Republic of Ireland as a result of the Civil Registration (Amendment) Act 2012, marriages by organisations that are "secular, ethical and humanist" are permitted.

[131] The report also records that marriages by celebrants that are solemnised by non-religious belief associations are also permitted in New Zealand, New York State, Massachusetts and Ontario. Elsewhere independent celebrants are authorised to conduct marriages in both New Zealand and Australia and in a number of US states and Canadian provinces.

[132] The Commission's conclusion was that "there is no simple solution that would solve the range of problems with the law that we have identified". The report says "the answer cannot be simply to exercise the order-making power contained in section 14(4) of the Marriage (Same Sex Couples) Act 2013 to enable non-religious belief organisations to solemnise marriages. That is not to say that the law should not be reformed to accommodate marriages by non-religious belief organisations; but any steps to do that need to take place alongside a broader updating of the law of marriage that seeks to address a number of longstanding problems".

[133] The applicant would say that in this jurisdiction those "longstanding problems" have already been addressed in the 2003 Order.

[134] In its later discussion concerning a lack of an option that is neither civil nor religious the report comments at 2.80:

> "… There is clearly a difference between incorporating material into a civil ceremony and having the ceremony conducted by an individual who shares the couples' beliefs. Humanists might well feel unfairly treated if they face restrictions on the expression of their commitment to one another that those who subscribe to religious beliefs do not."

[135] The report recommends that the law of marriage should be reformed and dealing with the issue of fairness and equality the report concludes at 3.6:

> "The system needs to be fair to those from different beliefs and cultures, as well as complying with legislation relating to human rights and equality. This does not mean that the system should not recognise and acknowledge differences between different religions or beliefs. Rather, it means that the level of regulation should be the same for all groups that solemnise marriages, unless there is a good reason to depart from that. The ideal system would be one in which sufficient common ground between different religions and beliefs has been identified to enable a single framework to be put in place, but with sufficient scope for different traditions to be recognised."

[136] The report states at 3.32 that:

> "We are of the view that the project should address all the ways in which people can marry rather than considering universal civil marriage as an option or simply how to enable non-religious belief organisations to conduct marriages within the current framework. The project would set out reforms that were informed by the guiding principles identified in the outset of this chapter, aiming to find ways of streamlining the current routes into marriage in a way that could accommodate religious and non-religious marriages. This could include the introduction of universal civil preliminaries. The project would clarify what was required for a valid marriage and determine the regulation necessary to meet the concerns of the State. It would also aim to maximise the degree of choice for couples within that legal framework."

[137] Again the applicant would point out that universal civil preliminaries are already provided in this jurisdiction under the 2003 Order.

[138] Arising from this a Law Commission Reform project is underway and the matter remains under consideration.

[139] Finally in relation to international practice Mr McQuitty drew my attention to the report of the Special Rapporteur on Freedom of Religion and Belief on his Mission to Denmark published on 28 December 2016 which looked at the wording of Article 67 of the Danish Constitution which specifically looked at the issue of Humanist Association. The Rapporteur concluded as follows:

> "**Humanist Association**
>
> 42. Whereas neighbouring Norway reportedly hosts the highest percentage of organised humanist members worldwide, the Humanist Association in Denmark establish in 2008 has only a few hundred members. Obviously, the humanists do not consider themselves a religious community. Although certainly not all of them are atheists, and some have their own separate organisations, the humanists generally promote world views, ethics and norms without reference to God. At the same time they practice rituals and ceremonies in analogy to religious communities, including initiation rights, humanist confirmation (a term apparently borrowed from Protestantism), marriages and funerals. Furthermore they also promote freedom of religion or a belief for non-religious persons especially in the field of school education.
>
> 43. Since 2010, the Danish Humanist Society has established a dialogue with the Government in order to make it possible for a group such as themselves, which shares a lifestance but lacks a belief in a transcendent power ("Gudsdyrkelse"), to apply for the status necessary to conduct marriage ceremonies.
>
> 44. By rendering the acknowledgement of a religious community dependent on faith in a transcendent power, the Danish law deviates from European and international human rights law. Both the European Court of Human Rights and the Human Rights Committee, which monitors compliance with International Covenant on Civil and Political Rights, have developed jurisprudence that understands freedom of religion or belief more broadly. According to the Human Rights Committee, Article 18 of the Covenant protects 'the theistic, non-theistic and atheistic beliefs, as well as the right not to profess

> any religion or belief'. In other words, freedom of religion or belief covers the whole range of identity shaping convictions and conviction based practices, including beyond traditional forms of monotheistic faith and worship. For Article 67 of the Constitution to remain in line with the development of freedom of religious or belief in European international human rights law, it should be interpreted in a broad and inclusive way. The future treatment of the humanist may in this context assume the quality of a test case."

[140] Mr McQuitty says that a review of this material points to a direction of travel that is clear. The respondents say that none of this is in any way binding on this jurisdiction and in any event the examples demonstrate that this a matter which should be left to the legislature who should consult widely and take into account the myriad of issues arising before producing any changes in the law.

Section 3 of the Human Rights Act 1998

[141] I have come to the conclusion that there has been an unlawful interference with the Convention rights of the applicant, with no objective justification in law. I turn now to the question of remedy.

[142] In light of my findings I am required by section 3 of the Human Rights Act ("so far as it is possible to do so") to interpret the 2003 Order in a way that is compatible with the ECHR.

[143] Professor Gordon Anthony in his leading text, *Judicial Review in Northern Ireland (2nd Edition)* describes the section 3 duty as follows at paragraph 5.14:

> "Where the courts consider that legislation should be read in the light of section 3, this will require them to use a purposive and contextual interpretative technique. The cannon of interpretation in section 3 has been described as a 'strong adjuration', and a court must try to achieve the harmonious interpretation of legislation relative to the ECHR, whether by reading words into or out of legislation, by giving existing words a meaning that is deemed more suited to their human rights context, or by departing from its own precedents – though not those of a higher court – where the previous interpretative approach would result in incompatibility."

[144] The principles applicable to the scope of the court's section 3 obligation are set out in the leading judgment of Lord Nicholls in the case of **Ghaidan v Godin-Mendoza** [2004] 2 AC as follows:

> "30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
>
> 31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

> 32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> 33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

[145] In **Ghaidan** the court considered the meaning of "spouse" as defined in paragraph 2 of Schedule 1 of the Rent Act 1977. The House of Lords upheld the Court of Appeal's decision to the effect that placing a surviving homosexual partner in a less favourable position than the survivor of a heterosexual partnership infringed the defendant's rights under Articles 8 and 14 of the Convention on Human Rights. The court held, pursuant to section 3 of the Human Rights Act 1998 that it was possible to give effect to paragraph 2(2) in a way that was compatible with the Convention rights by reading it as extending to persons living with the original tenant as if they were his or her wife or husband. The House of Lords held

that the defendant's rights under Articles 8 and 14 of the Convention were infringed; that section 3 of the 1998 Act required that legislation be given a Convention-compliant meaning wherever possible, subject only to the modified meaning remaining consistent with the fundamental features of the legislative scheme and that it was possible to read paragraph 2(2) as extending to same sex partners so as to eliminate its discriminatory effect on such persons without contradicting any cardinal principle of the 1977 Act.

[146] It should be noted also that section 3 imposes this obligation not just on the courts but also on those tasked with interpreting and applying the relevant legislation as Lord Rodger of Earlsferry put it at paragraph [106] of the judgment:

> "Nevertheless, the section is not aimed exclusively, or indeed mainly, at the courts. … section 3 is carefully drafted in the passive voice to avoid specifying, and so limiting, the class of persons who are to read and give effect to the legislation in accordance with it. Parliament thereby indicates that the section is of general application. It applies, of course, to the courts, but it applies also to everyone else who may have to interpret and give effect to legislation. The most obvious examples are public authorities such as organs of central and local government …"

[147] It was on this basis that in Scotland the GROS chose to interpret section 12 of the 1977 Act to permit it to grant temporary recognition to humanist officiants.

[148] In this case the respondents rely on the "unambiguous meaning" of the legislation – namely that Article 14 only applies to "a member of a religious body". However as **Ghaidan** makes clear section 3 enables a court to read in words which changed the meaning of the enacted legislation so as to make it Convention compliant. This of course is subject to the caveat that the court cannot adopt a meaning inconsistent with a fundamental feature of the legislation which would be to cross a "constitutional boundary" section 3 seeks to demarcate and preserve. Lord Justice Gillen in the case of **Re E's Application** [2007] NIQB 58 said of section 3 that:

> "It allows the court to alter the meaning of the words even if to do so will involve a departure from the meaning they were intended to have when the provision was enacted by Parliament."

[149] He goes on to pithily describe his task in considering section 3 to strive "to draw the line between interpretation and interpolation."

[150] As set out in Ms McPolin's affidavit the precursor for the 2003 Order was the report of the Law Reform Advisory Committee for Northern Ireland. It sought to simplify the law and to put in place clear preliminary requirements for marriage.

[151] A guiding principle of the report was to provide for the continuing validity of religious as well as civil marriages and so the Committee did not recommend the exclusively secularist approach adopted in countries such as France in which it is a civil marriage alone by which the law give rise to the creation of the marriage state.

[152] When recognising the importance of religious weddings in Northern Ireland life the Committee was anxious to ensure equality of treatment of all religions. Thus paragraph 3.5(b) which is under the heading "Guiding Principles for Reform" states:

> "Equal and fair treatment of all irrespective of any particular religious belief or practice is imperative for all legislation. This is particularly so in the Northern Ireland context. Thus any new legislation must ensure that so far as possible the adherence of the various Christian and non-Christian religious groupings are equally treated. Accordingly, it would not be possible to justify the conferring of a privileged position on any religious grouping and any new legislation must be framed so far as possible to ensure common rights and duties irrespective of religious affiliation. For this reason legislation must aim as far as possible to introduce a universally applicable and effective system relating to matters which arise in relation to any marriage including rules relating to venues, preliminary procedural requirements, authorisation of celebrants, registration requirements and hours and forms of marriage. Any differential treatment must be objectively justified and necessary."

[153] The report was prepared before the Human Rights Act came into effect although clearly the Committee were conscious of the European Convention and specific reference is made to Articles 12 and 14 thereof. There is nothing in the report that suggests that belief bodies other than religious bodies was considered by the Committee. No humanist organisation contributed to the consultation. Put simply the issue of belief bodies other than religious bodies was not on the Committee's radar. The only distinction was between "religious" and "civil" ceremonies. However since 2000 there has clearly been a significant development in the legal recognition of such bodies. Article 9 embraces not only religious beliefs but also such non-religious beliefs as humanism. I consider that placing belief bodies on a par with religious bodies for the purpose of marriage ceremonies would

be entirely consistent with the approach and intention of the Law Reform Committee's report. The "imperative" that all legislation should provide equal and fair treatment of all irrespective of any particular religious belief or practice in my view embraces equal and fair treatment of all religions or belief bodies. I consider that this interpretation is in keeping with the aims of the Law Reform Advisory Committee having regard to their concern for equality under the law. If the law is going to protect freedom of religion and belief then it has to accept that all religions and beliefs are equal. Such an interpretation does not in my view go against the grain of the legislation nor does it cross the constitutional boundary which section 3 seeks to demarcate and preserve. It does not amount to interpolation.

[154] In this regard I am fortified by the views of the Supreme Court expressed in the case of **Re G (Adoption); (Unmarried Couple)** [2008] UKHL 38. As Lord Hoffman put it in paragraph [20] of the judgment:

> "The judge and the Court of Appeal both emphasised that the question of whether unmarried couples should be allowed to adopt raised a question of social policy and that social policy was in principle a matter for the legislator. That is true in the sense that where questions of social policy admit of more than one rational choice, the courts will ordinarily regard that choice as being a matter for Parliament … But that does not mean that Parliament is entitled to discriminate in any case which can be described as social policy. The discrimination must at least have a rational basis."

Lord Hoffmann along with the majority of his colleagues stressed that the issue was one for the domestic court. He therefore says at paragraph [29]:

> "I therefore do not think that Your Lordships should be inhibited from declaring that Article 14 of the 1987 Order is unlawful discrimination, contrary to Articles 8 and 14 of the Convention, by the thought that you might be going further than the Strasbourg Court."

Thus "Convention rights" within the meaning of the 1998 Act are domestic and not international rights. On the issue of social policy and constitutional responsibility Lord Hope said at paragraph [48] of the judgment:

> "It is, of course, now well settled that the best guide as to whether the courts should deal with the issue is whether it lies within the field of social or economic policy on the one hand or of the constitutional

> responsibility which resides especially with them on the other … The fact that the issue is a political issue too adds weight to the argument that, because it lies in the area of the social policy, it is best left to the judgment of the legislature. But the reason why I differ from the Court of Appeal's approach is that it lies in the latter area as well. Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."

In paragraph [122] of the judgment Lady Hale described the court's obligation in this way:

> "If therefore, we have formed the view that there is no objective and reasonable justification for this difference in treatment, it is our duty to act compatibly with the Convention rights and afford the applicants a remedy."

[155] How then do I give effect to an interpretation of the 2003 Order which would be consistent with the applicant's Convention rights, which are incorporated in our domestic law under the Human Rights Act 1998?

[156] On one view the appropriate remedy would be to "read in" the words "or belief" to those parts of the Order which refer to "religious body" so that the phrase is then read as "religious or belief body". The same approach would be required for reference to "religious marriage" so as to include "belief marriage" as well. For completeness it would also require a definition of a "belief body".

[157] However I have decided to take a more modest approach which echoes the approach taken by the Scottish authorities in relation to the 1977 Act by reading in the words "or belief" in Articles 14, 15, 16 and 17 in each reference to "religious marriage" and "religious body" so that the Articles read "religious or belief marriage" and "religious or belief body".

[158] The applicant may well complain that this still discriminates against her and those wishing to have a humanist celebrant officiate a marriage in that it provides for temporary authorisation only.

[159] Nonetheless I consider that this is the appropriate relief to grant in the circumstances of this case. I say so for a number of reasons. Firstly, it is consistent with the approach adopted by the applicant in seeking temporary authorisation only. Secondly, it will provide the GRO with an opportunity to monitor and assess the extent to which belief bodies seek to avail of this opportunity for temporary authorisation. Thirdly, it will provide a greater degree of control over the process which will enable the Registrar General to guard against the potential difficulties it has suggested might arise in the event that belief bodies are permitted to avail of the entitlements provided in respect of religious marriages.

[160] I bear in mind in granting this relief that the Registrar General can impose conditions which are deemed necessary for any temporary authorisations. All the other protections in the 2003 Order remain in place. I consider that this is the minimum interpretation required to ensure a Convention compliant interpretation of the 2003 Order.

[161] I do not therefore propose to make a declaration of incompatibility in respect of the Order. Nor do I propose to make a declaration that the second respondent has, in carrying out its functions, failed to discharge its statutory obligations pursuant to section 75 of the Northern Ireland Act 1998.

[162] Whilst I make no order in this regard I consider that the Department should now proceed to exercise its powers to introduce regulations pursuant to Article 2(3) and Article 39 of the Order so as to remedy the breaches of the Convention rights that I have identified in this judgment.

[163] Accordingly I grant the following relief:

As against the GRO/first respondent:

(a) An order of *certiorari* quashing the decision of the GRO dated 14 February 2017.

(b) An order of *mandamus* to compel the GRO to take all necessary steps so as to grant the application of Isobel Russo made under Article 14 of the 2003 Order so as to permit her to perform a legally valid and binding humanist wedding ceremony for the applicant on 22 June 2017.

(c) A declaration that the decision of the GRO dated 14 February 2017 was in breach of section 6 of the Human Rights Act 1998 as contrary to the applicant's rights under Article 9 and Article 14 ECHR.

(d) A declaration that the provisions of the 2003 Order can be read and given effect to in a way that it is compatible with the applicant's rights under Articles 9 and 14 ECHR pursuant to section 3 of the Human

Rights 1998 thereby enabling the GRO to grant the application for temporary authorisation under Article 14 of the 2003 Order by "reading in" the words "or belief" so that all references to "religious marriage" and "religious body" in Articles 14, 15, 16 and 17 of the Order read "religious or belief marriage" and "religious or belief body".

As against the Department of Finance/second respondent:

(a) An order of *mandamus* to compel the Department to direct the GRO to grant the application made by Isobel Russo for temporary authorisation under the 2003 Order so as to permit her to perform a legally valid and binding humanist wedding ceremony for the applicant on 22 June 2017.

(b) A declaration that the provisions of the 2003 Order can be read and given effect to in a way that it is compatible with the applicant's rights under Articles 9 and 14 ECHR pursuant to section 3 of the Human Rights 1998 thereby enabling the GRO to grant the application for temporary authorisation under Article 14 of the 2003 Order by "reading in" the words "or belief" so that all references to "religious marriage" and "religious body" in Articles 14, 15, 16 and 17 of the Order read "religious or belief marriage" and "religious or belief body".