

Judicial Communications Office

28 June 2018

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

Summary of Judgment

The Court of Appeal today decided that the statutory prohibition of a humanist celebrant as the person solemnising a marriage would have constituted discrimination. It held that Article 31 of the 2003 Marriage (Northern Ireland) Order 2003 provides a basis for avoiding such discrimination by enabling the appointment of a humanist celebrant.

Background

Laura Smyth ("the respondent") is a humanist as is her husband. She is a member of the British Humanist Association ("BHA"). She arranged to get married on 22 June 2017 in Northern Ireland and engaged Ms Isobel Russo, head of ceremonies at the BHA and also a BHA accredited wedding celebrant, to celebrate her wedding ceremony in Northern Ireland. Ms Russo applied to the General Register Office ("GRO") for temporary authorisation to celebrate the marriage under Article 14 of the Marriage (Northern Ireland) Order 2003 ("the 2003 Order").

On 14 February 2017 the Departmental Solicitors Office ("DSO") replied on behalf of the Registrar General refusing the application. The respondent submitted an application for leave to apply for judicial review of the Registrar General's decision. On 9 June 2017 Mr Justice Colton ("the trial judge") made an order of mandamus compelling the Department of Finance 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 respondent on 22 June 2017.

The Attorney General lodged a notice of appeal on the same day and that was followed by a notice of appeal on behalf of the Department of Finance and the GRO ("the appellants"). The case was listed on 19 June 2017 at which stage the Court of Appeal made an interim Order that the order of the trial judge be stayed and the Registrar General, pursuant to Article 31 of the 2003 Order, should direct the local registration authority at Ballymena to appoint Isobel Russo, humanist celebrant, for the purpose of solemnising the marriage of Laura Smyth and Eunan O'Kane on 22 June 2017 at Galgorm Manor, County Antrim. The Court of Appeal then adjourned the proceedings to enable further affidavits to be filed by the parties and resumed the hearing on 15 January 2018.

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The statutory background

The 2003 Order provides for the solemnisation of marriages. There are different regimes for what are described as religious marriages and civil marriages. The distinction is made in the legislation to ensure that religious bodies can put forward persons who can be authorised to officiate at the solemnisation of a marriage whereas Article 31 of the 2003 Order provides that the local registration authority appoints the person officiating in all other cases. A religious body is defined as meaning an organised group of people meeting regularly for common religious worship. Where such a body applies for a member to be registered the Registrar General will refuse the application if he considers that the body making it is not a religious body, that the marriage ceremony used by the body does not include or is inconsistent with an “appropriate declaration” or that the person named in the application is not a fit and proper person to solemnise a marriage. The “appropriate declaration” means a declaration by the parties in the presence of each other, the officiant and two witnesses that they accept each other as husband and wife.

Article 14 of the 2003 Order provides that the Registrar General may grant to a member of a religious body temporary authorisation to solemnise one or more specified marriages or marriages during a specified period. Article 31 provides for those who may solemnise marriages other than those solemnised by members of religious bodies. It provides that a local registration authority shall, with the approval of the Registrar General, appoint a registrar of marriages and additional persons to solemnise civil marriages and carry out other functions for the purposes of the Order. By virtue of Article 19 a person shall not solemnise a civil marriage except in accordance with a form of ceremony which is of a secular nature and includes an “appropriate declaration” meaning a declaration by the parties in the presence of each other, the person solemnising the marriage and two witnesses that they accept each other as husband and wife. Both parties to the marriage, both witnesses to the marriage and the person who solemnised it must sign the marriage schedule immediately after the solemnisation of the civil marriage.

The trial judge's decision

The trial judge set out the affidavit evidence indicating that humanism is a non-religious world view. Humanists trust to the scientific method when it comes to understanding how the universe works and reject the idea of the supernatural. They make their ethical decisions based on reason, empathy and a concern for human beings and other sentient animals. They believe that human beings can act to give their own lives meaning by seeking happiness in this life and helping others to do the same.

The trial judge considered that the respondent easily established that humanist beliefs had reached the level of cogency, seriousness, cohesion and importance to engage her Article 9 rights. He then went on to examine whether her wish to have a

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legally recognised humanist marriage ceremony conducted by a humanist celebrant was a manifestation of that belief. He concluded that the freedom to manifest a belief in practice encompasses a broad range of acts, including ceremonial acts, which give direct expression to belief. He accepted that the respondent's desire to have a wedding officiated by a humanist celebrant at a humanist ceremony was directly linked to her humanist belief. He found that humanist ceremonies were a manifestation of humanist beliefs in general and that the respondent's desire to have a humanist officiant at her wedding was a manifestation of her humanist beliefs so that Article 9 was engaged.

The respondent submitted that Article 9 imposed an obligation on the State to afford legal recognition to a humanist marriage conducted by a BHA celebrant. The trial judge accepted that there was interference with the respondent's Article 9 rights which he also described as discrimination and injustice. He indicated that the essence of the respondent's case was based on different treatment between religious bodies and humanists.

The trial judge indicated that in relation to the solemnisation of marriage the State had chosen to authorise the solemnisation of religious marriage ceremonies in recognition of those bodies' beliefs. Having done so, it should provide equal recognition to individuals who held humanist beliefs on the basis of the judge's findings that humanism did meet the test of a belief body and that a wedding ceremony conducted by a humanist constituted a manifestation of that belief. He accordingly concluded that there had been a breach of the applicant's rights under Articles 9 and 14 of the ECHR.

The judge then looked at whether the "breach or difference in treatment" was capable of objective justification. He rejected a floodgates argument. He noted that the registration of humanist officiants did not give rise to administrative chaos or difficulty in Scotland between 2005 and 2015. He said the significant public interest in controlling and regulating marriage could be achieved without discriminating against those who wished to manifest humanist beliefs. He concluded that there was no objective basis for the justification relied upon by the appellants.

The trial judge noted that the Scottish General Registrar conceded in April 2005 that it would grant temporary authorisation to humanist celebrants under the equivalent of Article 14 of the 2003 Order. In England and Wales there is an ongoing debate about the entitlement of humanist celebrants to solemnise marriages whereas in the Republic of Ireland legislation has already been put in place to provide for a change. The trial judge further noted the guiding principles for the marriage reforms set out in the report of the Law Reform Advisory Committee for Northern Ireland which preceded the making of the 2003 Order. Those included that equal and fair treatment was imperative for all irrespective of any particular religious belief or practice. In light of the discrimination found by the judge he considered that he should read in

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the words "or belief" to those parts of the 2003 Order which referred to "religious body" in Articles 14, 15, 16 and 17 of the 2003 Order.

The submissions of the parties

The Attorney General contended that the BHA does not exercise a marriage ministry and the trial judge was wrong, therefore, to rely upon its objectives for the purpose of establishing a nexus between the respondent's wish to have a particular form of marriage recognised by law and her underlying beliefs. He submitted that, given the existence of civil marriage, the trial judge ought to have enquired into what was, from the respondent's perspective, missing from a civil ceremony and whether what was missing had a sufficiently close nexus with her underlying belief.

The Attorney General further submitted that the trial judge erred in concluding that the respondent's proposed celebrant was in a relevantly comparable situation to those who are capable of being granted temporary authorisation to solemnise marriages pursuant to Article 14 of the 2003 Order. He contended that such an authorisation can only be issued to a member of a religious body and claimed that the evidence does not suggest that humanists meet regularly for purposes connected with the manifestation of humanist beliefs: "The learned trial judge has expanded the belief system element but has made no adjustment either to activity or purpose. That is impermissible judicial legislation".

The Attorney General also submitted that the judge erred in not finding that the refusal of temporary authorisation was justified. He claimed that justification arose from the need to protect the dignity of marriage by preventing the commercialisation of the solemnisation of marriages. He stated that the BHA does not itself celebrate humanist marriages but merely licenses others to do it. It was submitted that this merely provides a commercial platform for certain individuals to earn money. Finally it was submitted that the finding that Article 9 and 14 ECHR required the state to provide legal recognition for humanist marriage would go far beyond anything currently decided in Strasbourg and go against the natural flow of existing Strasbourg case law.

The Department of Finance and the GRO supported the submissions of the Attorney and claimed that this was not a case in which questions of freedom of thought, conscience and religion arose. They also supported the submission that the relief granted by the trial judge went against the grain of the legislation. When the issue of humanist marriages had been considered in England and Wales the conclusion was that such a decision should only be made following review, consultation and report.

The respondent claimed that the marriage ceremony was a ritual associated with certain states of life and that the conclusion that a humanist marriage was a manifestation of belief was unimpeachable. A humanist marriage ceremony was a generally recognised custom and practice within the humanist tradition. The

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respondent did not want a civil marriage because that was not a humanist marriage. The respondent submitted that she was the victim of discrimination in this case whereas the Attorney sought to compare the positions of a religious celebrant and her proposed celebrant, Ms Russo. She claimed there was no rational connection between meeting for worship and the solemnisation of marriage in the context of non-religious beliefs such as humanism and, accordingly, the trial judge was entitled to read in "belief body" using section 3 of the Human Rights Act 1998.

Consideration

Manifestation of belief

The Court of Appeal commented that the right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance. It said there is no dispute that the respondent's humanist views are such as to deserve protection under Article 9 of the Convention but there is, however, a dispute as to whether the desire to have an officiant accredited by the BHA at her wedding is a manifestation of the her humanist beliefs.

Religious bodies commonly manifest their beliefs as an organised group meeting regularly for common religious worship. The marriage ceremony generally forms part of the practice of a religion and often has a generally recognised form. Where a member of a religious body has been registered as an officiant by the Registrar General the ceremony conducted by that officiant will satisfy the test for a manifestation of belief. Those of humanist beliefs, however, are generally not organised to meet regularly for the purpose of the manifestation of humanist beliefs. Ceremonies such as marriage or funerals do represent important milestones in the life-and-death of human beings and the respondent relies upon her expression of belief in connection with her marriage ceremony, including the belief of the officiant, as providing a sufficiently close and direct nexus to establish a manifestation in this case. There is no prescribed form for humanist marriages but the respondent points to the extensive experience in Scotland and the Republic of Ireland where such ceremonies provide a platform for the expression of belief at a point of change of status within society for those being married. It is submitted that such ceremonies are intimately connected with the belief of the participants.

The appellants submitted that the form of the service which the respondent may wish to enjoy in connection with her marriage is not prescribed by the statute. They contend that she can have an accredited humanist celebrant participate and it is no interference with the manifestation of belief that there must be present an officiant appointed by the Registrar General who will ensure that the formalities required by Article 19 of the 2003 Order are observed. In light of the flexibility of the service which is available to the respondent the appellants say that any prohibition on the appointment of an accredited humanist as an officiant does not constitute an interference with the freedom to manifest the respondent's views. In any event the

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issue in this case is not whether there has been an interference with the freedom to manifest one's view but rather whether the conduct of a humanist wedding ceremony by a humanist officiant has a sufficiently close and direct nexus with humanist beliefs to be within the ambit of Article 9. It is not concerned with whether the BHA has espoused a particular view about the marriage ceremony as an expression of belief but rather whether the facts of this case demonstrate that the ceremony satisfies the necessary connection.

The Court of Appeal said it was inclined to agree with the trial judge that such a ceremonial act is a direct expression of the respondent's humanist beliefs and satisfies the test for manifestation of belief and it was entirely satisfied that the conduct of a humanist wedding ceremony by a humanist wedding officiant for a person holding humanist views is within the ambit of Article 9.

Article 14 ECHR

The respondent's case is that if she is not permitted to have a humanist officiant at her wedding there will be a difference in treatment between her and those with religious beliefs. She contends that those are persons in analogous or relevantly similar situations and that the difference in treatment has no objective and reasonable justification. The appellants submit that the respondent's proposed celebrant is not in a relevantly comparable situation to those who are capable of being granted temporary authorisation to solemnise a marriage pursuant to Article 14 as they have to satisfy the religious body test whereas a humanist celebrant is not part of an organised group of people meeting regularly in connection with humanism and marriage is not a core activity in humanism.

The Court of Appeal said it was required to examine the position of the respondent as compared to the position of a person holding a religious belief:

"Each wishes to have a ceremony manifesting their belief. Each wishes to have an officiant who shares that belief. Although it may be said that to some extent the first of those objectives can be accommodated, in the case of the respondent she is denied the benefit of the second objective which is available to a person holding a religious view. The comparison between humanism and religious bodies does not affect the fact that the respondent and a member of such a body preparing for marriage are in an analogous or relatively similar situation."

Justification

The appellants argued that the distinction between religious ceremonies and civil ceremonies achieves the aim of simplifying the law, regulating marriage and achieving equal treatment. Permitting the ceremonies to be officiated by any non-religious group could dilute the dignity and status of marriage in Northern Ireland. They further contended that an amendment to equate humanism with religious

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bodies may lead to other organisations attempting to rely on such provisions to secure authorisation to conduct marriage ceremonies. This would introduce a greater risk of sham or forced marriages or inappropriate ceremonies and may ultimately result in greater commercialisation. In addition the administration of the more elaborate system could be considerable and those costs would have to be recouped.

Article 12

The appellants contended that Article 12 ECHR was the *lex specialis* dealing with marriage and that the only relevant right which the applicant had was a right to marry. Clearly she was able to do so by way of civil marriage if she wished. The Court of Appeal said this case was not, however, about the right to marry. The claim under Articles 9 and 14 was based on discrimination. The state provided arrangements for religious belief bodies and the issue was whether there was discrimination against the respondent by failing to provide her with the option of having a humanist celebrant. The issue would have been exactly the same if this case had been based upon Article 12 and 14.

The legislation

The 2003 Order provides for a series of steps by way of notice and application that must be taken by any persons seeking to go through a marriage ceremony. It provides that a marriage may be solemnised only by an officiant or a person appointed under Article 31. Particular arrangements are made in relation to the registration of members of religious bodies as officiants and for temporary authorisation to be granted to a member of a religious body to solemnise one or more specified marriages or marriages during a specified period. The definition of religious body means an organised group of people meeting regularly for common religious worship. The Court of Appeal commented that the ordinary meaning of those words plainly does not include humanism because humanists are not an organised group of people meeting regularly and in any event when they do meet it is not for common manifestation of humanist belief. It said that unless the legislation is read down in some way, the provisions in relation to religious marriages do not assist the respondent.

Civil marriages may be solemnised by persons appointed under Article 31 of the 2003 Order. A local registration authority shall, at the direction of the Registrar General, appoint additional persons to solemnise civil marriages and carry out other functions for the purposes of the 2003 Order. The only constraint within the statute is that the person appointed should not be under the age of 21. The Court of Appeal commented that it was undoubtedly the case that it was never contemplated that this power might be used in order to avoid discriminatory treatment in respect of the background of a marriage celebrant but said that where such discriminatory

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treatment arises it is the responsibility of the Registrar General to act in a way which avoids the discrimination:

“If the Registrar General is satisfied that a couple want a humanist celebrant to officiate at their marriage or civil partnership in order to express their humanist beliefs he should accommodate that request if content that the proposed celebrant will carry out the solemnisation of the marriage according to law. Whether or not the authorisation should be for a single marriage or a period of time is a matter for the judgement of the Registrar General exercised lawfully.”

It was submitted that Article 19 of the 2003 Order which provides that a person shall not solemnise a civil marriage except in accordance with a form of ceremony which is of a secular nature would prevent readings supporting or promoting humanist beliefs. The Court of Appeal did not accept that submission and held that the prohibitions in Article 19 should be narrowly construed and ought not to interfere in any way with non-religious material.

Conclusion

The Court of Appeal accepted that the statutory prohibition of a humanist celebrant as the person solemnising the respondent's marriage would have constituted discrimination pursuant to Articles 9 and 14 ECHR in the case of this respondent. It considered that Article 31 of the 2003 Order provides a basis for avoiding such discrimination by enabling the appointment of Ms Russo without having to utilise the interpretive tool provided by section 3 of the Human Rights Act 1998. It held that the fact that the person solemnising the marriage is appointed pursuant to Article 31 of the 2003 Order rather than Article 14 does not in its view give rise to any difference of treatment. Accordingly the Court of Appeal allowed the appeal, quashed the mandatory Order made by Colton J and set aside his declaration but otherwise agreed with his carefully reasoned judgment.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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