(2007) 9 Ecc LJ 247–249 © The Ecclesiastical Law Society
doi: 10.1017/S0956618X07000609

EDITORIAL

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Ecclesiastical lawyers in the United Kingdom and abroad, whether specialists in canon law or in secular constitutional law, have devoted much of their time and energy in recent years to considering the status of civil partnerships and contrasting this with sacramental marriage. The content of recent issues of this *Journal* have reflected this. However, the institution of marriage – in its own right – recently fell to be considered by the Court of Appeal.[1]

The Home Office introduced a scheme whereby a person who was not a citizen of the European Economic Area needed a certificate of approval from the Secretary of State before he or she could marry. The policy operated by the Home Office was to refuse a certificate to anyone who did not have a valid right to enter or remain in the United Kingdom with at least three months unexpired. The issue for the court was whether this scheme was compatible with Article 12 of the European Convention for Human Rights – the right to marry.

The Court of Appeal concluded that, although the legislative object of preventing sham marriages entered into so as to avoid immigration control was sufficiently important to justify limiting the Article 12 right, the scheme as it operated was not rationally connected to that legislative aim and it therefore failed on the grounds of proportionality. The Court of Appeal therefore dismissed the appeal and affirmed the decision of Silber J.[2] In fact, for a variety of procedural reasons, Silber J had delivered himself of three separate judgments at first instance, of which this is the first and most comprehensive, the latter two being issue-specific. In the second judgment,[3] Silber J described the discriminatory nature of the scheme (in not applying to Anglican marriages) as probably the most important reason for his decision. As it transpired, the Court of Appeal was denied the opportunity of addressing this discrete argument because, before the appeal opened, the Secretary of State indicated that he no longer sought to appeal that part of the judge's decision. His counsel told the court that 'legislation would be passed in due course to remove the

1 *R(Baiai, Trzcinska, Bigoku & Tilki) v Secretary of State for the Home Department* [2007] EWCA Civ 478, 23 May 2007, Waller, Buxton and Lloyd LJJ.
2 *R(Baiai, Trzcinska, Bigoku & Tilki) v Secretary of State for the Home Department* [2007] 1 WLR 693, [2006] EWHC 823 [Admin], 10 April 2006, Silber J.
3 At para 44.

discriminatory aspects of the present scheme'. But, as Buxton LJ pointedly observed, 'The Secretary of State was not, however, able to tell us what exact aspects of the scheme he accepted to be discriminatory, nor what steps he would be taking to rectify that breach of the law.'[4]

At first instance, Silber J had stated that discrimination on grounds of religion requires very weighty reasons to justify it. He considered that the regime introduced by the Home Office constituted direct discrimination, as the group being targeted by that scheme as requiring certificates of approval comprises those who, because of their religious convictions or lack of them, are unable or unwilling to marry pursuant to the rites of the Church of England, while those who wish to marry pursuant to those rites are exempted from the scheme. He was satisfied that there was no evidence that explained why non-Anglican religious ceremonies should be treated differently from marriages pursuant to Anglican rites, although he concluded that 'there may be cases where for historical reasons, some special treatment of the established religion may be justifiable but that is not the justification relied on in this case by the Secretary of State'.

It will be interesting to see whether the House of Lords is prepared to entertain detailed arguments about the discriminatory effect of rating legislation as it applies to places of worship of different religious organisations when it determines the appeal from the Court of Appeal in *The Church of Jesus Christ of Latter-day Saints v Gallagher*.[5] Neither Article 9 (freedom of religion) nor Article 14 (non-discrimination) were raised in the lower courts, and the fact that the House of Lords has given permission to appeal based on a petition raising these grounds gives hope that they will receive serious treatment by the Law Lords for the first time.

The dynamic that exists between the government and religious organisations remains in the forefront of public consciousness. It has recently been played out in the field of Christian adoption agencies and homosexual parenting, and Catholic leaders are becoming outspoken as to how Catholic parliamentarians should vote on issues of abortion. It is perhaps timely to remember the existence and role of the Churches Main Committee, which was set up in 1941 to co-ordinate negotiations with the Government over compensation for war damage. It is now an ecumenical body that acts as a channel of communication between the churches and government – in the widest sense – on issues of secular law as they affect religion. On the recent retirement of Derek Taylor Thompson, who had been secretary for almost twenty years, the decision was taken to invite tenders to provide secretariat services. The contract was awarded to Central Lobby Consultants Ltd – one of whose directors happens to be Frank Cranmer, who will be in day-to-day charge of the work as de facto

4 See para 6 of the Court of Appeal judgment.
5 (2007) 9 Ecc LJ 241, CA, Mummery, Jacob and Neuberger LJJ.

https://doi.org/10.1017/S0956618X07000609 Published online by Cambridge University Press

secretary. Frank, formerly Clerk of Bills in the House of Commons is well known to readers of this *Journal* as the author of regular Parliamentary Reports and co-ordinator of the reports of the proceedings of various national and provincial synods. He is a valued member of the editorial board and also a frequent contributor on a wide variety of subjects. At a time when the demands on the Churches Main Committee are increasing in both scope and importance, Frank's expertise as secretary will prove invaluable and we wish him well.

In this issue, the last of Volume 9 for 2007, Frank's customary Parliamentary Report finds itself alongside the other regular features of Conference Reports, Book Reviews and Case Notes, together with a report of the proceedings of the Governing Body of the Church in Wales, which was still awaited when the January issue went to press. Alongside Comment on the religious market place, the causes of saints, and the ongoing debate on constitutional conventions as they apply to the established church, this issue includes three substantial articles. Rupert Bursell offers an early critique on the Clergy Discipline Measure 2003, while Eithne D'Auria examines sacramental sharing in an international comparative context. The contribution by Gregory Cameron concerning the Anglican Communion is the revised text of the lecture that he delivered at the Society's residential conference in Liverpool in January 2007.

As this issue concludes Volume 9, a consolidated list of contents in respect of Issues 1, 2 and 3 for 2007 is printed at the end of the issue for ease of reference. For those who have their volumes bound, this consolidated list can be removed, together with the frontispiece, and placed at the front of Issue 1 in the binding process. By way of advance notice, next year the Ecclesiastical Law Society Day Conference will take place on Saturday 8 March 2008 at Vaughan House Conference Centre in Westminster on the subject of Clergy Conditions and Terms of Service. Speakers will include the Right Reverend Michael Nazir-Ali, Bishop of Rochester, together with others having particular expertise and experience, representing various shades of opinion. Booking details will be sent separately.