RECENT ECCLESIASTICAL CASES

edited by

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Re St Nicholas, Bookham
(Guildford Consistory Court: Jordan Ch, October 2003)

Icon—legality

The rector and churchwardens sought a faculty to introduce an icon to the east wall of the chancel of the church. The widow and friends of a founding member of the Friends of St Nicholas had presented the icon to the church. It was drawn from Eastern Orthodoxy depicting Christ in majesty. The PCC unanimously recommended its installation to the left of the altar. There were various objections, although no parties opponent. The objections included: the fact that there would be an unbalanced appearance, the appearance of a strongly coloured piece of Eastern Orthodox art was inconsistent with the interior of a fourteenth-century chancel, that it would be a focus away from the altar cross, and that there should have been the creation of a piece of locally commissioned art. The chancellor concluded that the introduction of the icon was not unlawful, that a judgment on aesthetics was not a function of the chancellor where it was not established by objective criteria that the works were out of keeping with the building, that the objection to the installation of the icon in a particular location was immaterial if it was a worthy addition to the church, that diversity of style is often seen as an enhancing element, that any church may have different foci as different aspects of the divine image and that the introduction of a traditional, though foreign, piece of imagery was not wrong in principle. The faculty was granted. [JG]

R (AMICUS) v Secretary of State for Trade and Industry
(Administrative Court: Richards J, April 2004) [2004] EWHC 860

Employment—sexual orientation—discrimination—organised religion

An article by barrister Leslie Samuels ('Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights'), summarising this decision, appears at page 74 of this issue.

R (Begum) v Headteacher and Governors of Denbigh High School
(Administrative Court: Bennett J, June 2004) [2004] EWHC 1389

Muslim dress—school—exclusion—human rights

The claimant, through her litigation friend, applied for a judicial review of the defendant and Luton Borough Council, seeking; a declaration that the defendant had unlawfully excluded the claimant from school, denied her access to suitable and appropriate education in breach of Article 2 of the European Convention on Human Rights, denied her the right to manifest her religion in breach of Article 9; a mandatory order that the defendant and the council make swift arrangements for the claimant's return to Denbigh High School; and damages.

For two years prior to September 2002 the claimant had worn the school uniform in the form of a Shalwar Kameeze without any complaint. She arrived on the first day of term with her brother and another man asking to wear a Jalbaab (a long cloak), claiming that the Shalwar Kameeze was un-Islamic. She was sent home and told that, should she wear the school uniform she would be allowed back to school. She refused to wear the school uniform and spent a year out of school. She claimed that the defendant had excluded her from school. The judge reviewed the school's uniform policy, which had been drafted with the assistance of local Mosques. He reviewed the expert evidence on both sides and the decision of the school not to allow the claimant to wear the Jalbaab in the light of, inter alia, health and safety policy. He concluded that the reality of the situation was that the claimant, entirely of her own volition, chose not to attend school. The defendant had earnestly and sincerely wanted the claimant to attend school, insisting only that she wore school uniform. If the defendant had not excluded the claimant from school, then the claim had to fail.

The judge ruled (although this was *obiter dicta*) that the claimant's refusal to attend school was due to her refusal to respect the school uniform policy rather than her religious beliefs and accordingly there was no breach of Article 9. He ruled that the limitation on wearing the Jalbaab was not 'necessary' in the interests of public safety or for the protection of health but it was necessary for the protection of the rights and freedoms of others as the Shalwar Kameeze was worn by Muslims, Hindus and Sikhs alike. The claimant had always had a choice about attending schools. The fact

that she refused to change her mind did not invalidate the fact that she had a choice; she had other schools that she could have gone to; accordingly there was no breach of Article 2. [JG]

Re St Peter, Limpsfield
(Southwark Consistory Court: Petchey Dep Ch, June 2004)

Memorial—no grave

A faculty was sought to erect a monument to the former churchwarden and treasurer of the PCC, Lieutenant Colonel Peter Morris. The proposed memorial would be 6 feet high, 18 inches wide and 3 inches deep, of green slate with an inscription and an owl carved into it. The memorial would be higher than any other monument in the churchyard and would not mark a grave, the ashes having been scattered on Limpsfield Common. The DAC was divided on the point of principle regarding the lack of a grave and concerned about setting a precedent in terms of height. The chancellor reviewed the *Chancellor's Guidance on Churchyard Memorials* (2003) and concluded that; the memorial would stick out, did not consider this was a case for making an exception to the *Guidelines* and was concerned about setting a precedent in terms of size. He concluded that the purpose of a churchyard was for the interment of human remains and a memorial absent remains would use up space in consecrated ground. The petition was rejected. [JG]

Cunningham v Shearman
(Diocesan Tribunal of Brisbane, Australia, July 2004)

Ecclesiastical offence—relinquishment of orders—resignation

The promoter, Robert James Cunningham, who was appointed by the Archbishop of Brisbane, promoted a charge against the respondent the Right Reverend Donald Norman Shearman, who was a bishop resident in the diocese. The respondent was charged with an offence under section 3(1)(f) of the Tribunal Canon 2003 of conduct whenever occurring which would be disgraceful if committed by a member of the clergy, and which at the time the charge is preferred is productive or if known publicly would be productive of scandal or evil report. The particulars of the charge were that between 1954 and 1956 the respondent when the warden of a hostel and assistant priest in Forbes, New South Wales, had maintained a sexual relationship with the complainant who was aged 15 to 17 years.

Prior to the charge being preferred, the respondent executed a document entitled Deed Relinquishing Holy Orders of Deacon, Priest and Bishop. The tribunal found that on the basis of Canon 76 of 1603 and *Barnes v Shore* (1846) 8 QB 640, the respondent did not thereby terminate his holy orders. After the charge was preferred the respondent sent a letter to the

Archbishop stating that he had severed his relationship with the Anglican Church of Australia. The tribunal found that the respondent by sending the letter of resignation from the Church did not deprive the tribunal of jurisdiction.

The tribunal found that the hearing of the charge was analogous to a disciplinary proceeding. The tribunal, relying on the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 350, 362-363, applied the civil standard of proof which is on the balance of probabilities, but having regard to the seriousness of the allegations and the consequences if they are found proved. The tribunal had no hesitation in accepting the truth of the complainant's account of events and unanimously found the respondent guilty of the charge.

In making its recommendation to the archbishop the tribunal accepted that the offence was at the extreme end of the scale of events against morality by a person in holy orders, and that the complainant had endured suffering as a result of being a victim of the respondent's sexual misconduct and abuse of position. It was relevant to penalty that the respondent's offence had had a deleterious effect on the reputation of the Church in the community. The respondent's current age (78 years) and state of health had no bearing on the nature of his misconduct and abuse of position and the widespread publicity following the reporting of his conduct. The tribunal unanimously recommended that deposition from holy orders was the only appropriate penalty in the circumstances. On 26 August 2004 the archbishop accepted the recommendation of the tribunal and pronounced sentence that the respondent be deposed from holy orders. The archbishop considered that the positive ministry which the respondent was able to exercise was not a reason to mitigate against what he accepted was the appropriate response to the offence.

The Diocesan Tribunal comprised the Hon Justice Debra Mullins, Deputy President, the Revd Canon B E Maughan, the Revd I J Trainor, Mrs L J Briggs, Mr A J Gallimore and Mr A D Levick. The Diocesan Tribunal is the court of the Archbishop and has jurisdiction to hear and determine charges of breaches of faith, ritual, ceremonial and discipline and ecclesiastical offences against persons licensed by the Archbishop or any other person in holy orders resident in the diocese. See the Constitution of the Anglican Church of Australia, Ch IX, s 54. Case note kindly provided by Garth Blake SC.

Re St Mary and All Saints, Trentham
(Lichfield Consistory Court: Shand Ch, July 2004)

Unauthorised works—confirmatory faculty

In June 2003 the incumbent caused the font to be removed from its original position to the east end of the north aisle and had an area under the gallery and over to the original area of the font carpeted, covering

important Minton tiles. No faculty had been sought. In the past ten years five faculties had been granted to the church. Indeed, in 1999 the moving of the font had been canvassed as part of a scheme to re-order the church. That petition was dismissed in January 2003 due to the lack of progress and the incumbent's 'ill-concealed impatience with any opposition to his scheme, no matter how constructive'. The incumbent apologised for his unlawful behaviour acting in knowing disobedience of his oath of canonical obedience. The chancellor concluded, absent any excuse, that the incumbent had felt frustrated at being thwarted and had no taste for the opposition and need for constructive dialogue that he would have to face if he had filed a petition. The chancellor concluded that making a restoration order, although justified, would be too simplistic an approach and, subject to certain conditions (and bearing in mind the lack of opposition for the scheme from the Area Bishop, the DAC and English Heritage) granted a confirmatory faculty on a time limited basis. The petitioners were ordered to pay the costs. [JG]