(2011) 13 Ecc LJ 129–131 © Ecclesiastical Law Society
doi:10.1017/S0956618X11000019

EDITORIAL

Mark Hill

It was the late Douglas Adams, author of *The Hitchhiker's Guide to the Galaxy*, who said how much he loved deadlines, particularly the whooshing sound they made as they rush by. Those readers who think that this scholarly journal appears in January, May and September with effortless routine would be sadly disabused were they to see the train of email, exhorting, encouraging, cajoling and threatening which precede the appearance of each issue. The perennial difficulty, however, is to find something topical to say twelve weeks in advance of publication. To be wise and witty is a bonus, to which one always aspires, but in the ever-changing world of law and religion, one either chooses a subject which has been forgotten by the time these pages are read, or makes an ill-fated attempt at prescience which serves only to demonstrate how wide of the mark one's assessment turns out to be.

This time, slightly beyond the deadline, which was graciously elasticated by Cambridge University Press, came the decision of the Administrative Court in *Johns v Derby City Council*.[1] Casual readers are immediately drawn in by the language of the judgment. Many of the arguments of counsel for the applicant are described as being 'couched in extravagant rhetoric'[2] and are 'for the greater part in [the Court's] judgment, simply wrong as to the factual premises on which they are based and at best tendentious in their analysis of the issues'.[3] In reflecting on some of the content of counsel's skeleton argument, the Court commented, 'It is hard to know where to start with this travesty of the reality'.[4]

On one level, the judgment is of no consequence. It is no more than the refusal of an application for permission to apply for judicial review of a putative decision yet to be made by a local authority, coupled with a similar refusal to give declaratory relief as to the approach which agencies should adopt when prospective foster parents assert that their religious beliefs are antithetical to homosexual orientation and practice. Procedurally the case was doomed to failure, and ordinarily it would have been disposed of swiftly and summarily. But, in this instance, the Administrative Court felt compelled to deliver a reserved judgment running to more than a hundred paragraphs in which the usual robustness

1 *R (Johns and Johns) v Derby City Council (Equality and Human Rights Commission intervening)* [2011] EWHC 375, Munby LJ and Beatson J.
2 Ibid, at paras 32 and 50.
3 Ibid, at para 32.
4 Ibid, at para 33.

of Munby LJ was co-mingled with the scholarliness of Beatson J, who prior to his appointment to the High Court bench had held the post of Rouse Ball Professor of English Law in the University of Cambridge. Collectively they could 'not avoid the need to re-state what ought to be, but seemingly are not, well-understood principles regulating the relationship of religion and law in our society'.[5]

Whilst a pedant might take issue with the bald and unqualified assertion that 'this country … has an established church which is Christian',[6] the remainder of the substantive disquisition is scholarly, illuminating, exhaustive and – to the informed jurist, at least – anodyne. It traces the historic relationship between religion and the law through the common law and into the European Convention on Human Rights and more recent discrimination law. It emphasises the fact that secular judges serve a multi-cultural community of many faiths. And it underscores the content and effect of the observations of Laws LJ in dismissing an application for permission to appeal in the case of *Mcfarlane*,[7] upon which I had occasion to comment a little while ago.[8]

The comments of the senior judiciary in the judgments in *Johns v Derby City Council* and *Mcfarlane* will doubtless be the subject of much comment and discussion, not least in the pages of this journal which leads the field in its incisive and balanced analysis of emergent jurisprudence in the field of law and religion. But it must be remembered that in both cases what was said, however accurate and authoritative, forms no part of the *ratio decidendi* of the case.[9] Indeed, in the *Derby City Council* case, any dispute between the parties had yet to arise: what was being sought was prospective guidance by way of a declaration.

But how will these *obiter dicta* affect the legal landscape? Not much, in reality, since there is nothing novel or groundbreaking in these judicial comments. They are merely an articulation of long established principles. What is troubling is that these principles need to be restated at all. Respect for religious doctrine is

5 Ibid, at para 36.

6 Ibid, para 38. If the Court meant Great Britain, then it has, of course, not one but two established churches; and if the intent was merely to refer to the Administrative Court's jurisdiction of England and Wales, a fuller statement would have encompassed disestablishment in Wales and some contiguous parishes in England: see M Hill, 'Church and State in the United Kingdom: anachronism or microcosm?' in S Ferrari and R Cristofori (eds), *Law and Religion in the 21st Century* (Farnham, 2010) pp 199–209.

7 *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880, noted at (2010) 12 Ecc LJ 208. After rehearsing the substantial reasoning in the the judgment of Laws LJ, Munby LJ and Beatson J plainly state, 'We respectfully and emphatically agree with every word of that'. See further R Sandberg, 'Laws and religion: unravelling *McFarlane v Relate Avon Limited*' (2010) 12 Ecc LJ 361.

8 M Hill, 'Editorial' (2010) 12 Ecc LJ 263 at 264; and, more fully, M Hill 'Judges should not be hand picked' (2010) *Church Times*, 23 April.

9 Compare these general judicial observations of principle with the practical fact-specific judgment of HHJ Rutherford in the Bristol County Court decision in *Hall and Preddy v Bull and Bull* (2011) 18 January, unreported, Case No 9BS 02095, 02096, concerning the refusal of the Christian owners of a small hotel in Cornwall to supply a double room to unmarried couples. As an appeal is pending in this matter, it would not be appropriate to speculate upon the correctness of the first instance decision. Rest assured the appellate decision will receive full coverage in due course.

part of the tapestry of the constitutional framework in the United Kingdom, but the adopting of extreme positions by certain litigants, ostensibly in the name of religion, may have a deleterious effect upon those who strive within the confines of the law actively, and successfully, to engage with the delicate balancing of competing rights and freedoms. Measured and moderate submissions are more likely to advance the cause of faith communities. Extreme positions, expressed with hyperbole and aggression, will serve to alienate public opinion and reinforce the existing prejudices of secularists.

The decision of the Administrative Court produced much media speculation which is still current at the time of writing. Whether the caravan will have moved on by the time this issue is published is a matter of speculation. One thing is certain, however, namely that religious rights will continue to be litigated in the years ahead. It is to be hoped that this particular storm will blow over and will not be a distraction from the more meritorious claims yet to be argued.