

Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-Day Saints [2008] UKHL 56

Jorren Knibbe

August 2008

In *Gallagher* the House of Lords considered whether certain buildings within a complex belonging to the Mormon church in Lancashire were exempt from liability to non-domestic rates under paragraph 11 of Schedule 5 of the Local Government Finance Act 1988. In so doing, their Lordships addressed the question whether the right to freedom of religion under Article 9 of the European Convention on Human Rights was engaged, and reached a somewhat surprising result.

Background

The case centred on the treatment under the 1988 Act of the "Temple", a large building within the complex which was open only to "Patrons" - Mormons who had received a 'recommend' from the bishop and had shown appropriate beliefs and lifestyle as well as payment of a required contribution to the church funds. The Temple was the key building within the complex, and was surrounded by various domestic and non-domestic buildings including the "Stake Centre", a smaller chapel and hall.

The Church argued that the Temple was exempt from non-domestic rates as a "*place of public religious worship*" within paragraph 11(1)(a) of Schedule 5 to the 1988 Act. Alternatively the Church argued that the Temple was exempt by virtue of paragraph 11(1)(b) as a "*church hall, chapel hall or other similar building used in connection with*" a "*place of public religious worship*" (namely the Stake Centre, which the valuation officer accepted was a *place of public religious worship*).

Public religious worship

On first point, the Church was faced with the earlier decision of the House of Lords in *Church of Jesus Christ of Latter-Day Saints v Henning (Valuation Officer)* [1964] AC 420. In *Henning* the HL ruled (in relation to another Mormon Temple) that a building could not be a "*place of public religious worship*" within the meaning of the predecessor provision to paragraph 11(1)(a) if the public were excluded from it.

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

The Church's argument that the HL should depart from its previous decision in *Henning* was rejected unanimously by their Lordships. Lord Hope referred to the presumption that "*where Parliament has continued to use words of which the meaning has been settled by decisions of the court, [...] it intends the words to continue to have that meaning*" (para. 26). None of their Lordships found any indication to the contrary in the present case.

The Church's human rights argument

The Church then argued that section 3 of the Human Rights Act 1998 now required that paragraph 11(1)(a) be interpreted differently, since the reservation of the Temple to Patrons was an expression of the Mormon religion, and to deny exemption from non-domestic rates on this ground would discriminate against Mormons on the grounds of their religion, contrary to Articles 9 and 14 ECHR.

As Lord Hoffmann observed, the rule in paragraph 11(1)(a) (as interpreted in *Henning*) was "*perfectly general*" (applying to all religions) and thus was not directly discriminatory (see paragraph 12). It might however discriminate indirectly against Mormons if they were in a materially different position from adherents of other religions and paragraph 11(1)(a) failed to recognise this by treating them differently - namely by recognising that the Temple, although restricted to Patrons, was a place of *public* worship. As Lord Hoffmann noted, this possibility arose because of relatively recent developments in the jurisprudence of the European Court of Human Rights relating to Article 14 ECHR, recognising the concept of indirect discrimination - see *DH v Czech Republic* (2008) 47 EHRR 3 at paragraph 175 - as well as the need to treat different situations differently - see *Thlimmenos v Greece* (2001) 31 EHRR 15 at paragraph 44.

However, since Article 14 ECHR applies only in conjunction with other Convention rights, it fell to be determined whether the right to manifest one's religion under Article 9 ECHR was engaged. As expressed by Lords Hoffmann, Hope and Scott, the question was whether the measure fell "*within the ambit*" of Article 9 (see paragraphs 13, 31 and 48). The House of Lords held by a majority (with Lord Scott dissenting) that it did not.

Lord Hoffmann (with whom Lords Hope, Mance and Carswell agreed) held that liability to non-domestic rates would not prevent the Mormons from manifesting their religion, and that they were not "*taxed on account of their religion. It is only that their religion prevents them from providing the public benefit necessary to secure a tax advantage. That seems to me an altogether different matter*" (para. 13).

Lord Hoffmann compared the case to *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, in which a woman was deprived of a reduction in her child maintenance payments, which would have been available had she been living with a male partner, because she lived with a same-sex partner. The House of Lords in that case held that the alleged discrimination did not fall *within the ambit* of Article 8 (the right to family life). In *Gallagher*, Lord Hoffman explained the *M* case on the basis that "*loss of the opportunity to gain a financial advantage was **too remote** from interference with the right in question. The same seems to me true of [Gallagher]*" (paragraph 14; emphasis added).

On this point Lord Scott dissented. Summarising his view in paragraph 49, Lord Scott said the following:

"The case-law as to when an act of discrimination, not being in breach of a particular substantive article, will sufficiently relate to that article in order to be capable of constituting a breach of article 14 does really no more than ask whether the act is within "the ambit" of the article. There is no precise yardstick; the requirement is left inherently, and perhaps unsatisfactorily, flexible. It seems to me, however, that the levying of taxation on a place of religious worship, or on those who enter the premises for that purpose, would be capable in particular circumstances of constituting a breach

of article 9 and, accordingly, that it is difficult to regard the levying of rates on such premises as otherwise than within the ambit of article 9".

In any event, their Lordships held unanimously that in the present circumstances any indirect discrimination which did arise could be justified. As Lord Hoffmann noted, Parliament has a wide discretion to decide what should be regarded as sufficient public benefit to justify a tax exemption, and was entitled to take the view that public access to religious services is such a benefit (paragraph 15). Lords Hope (at paragraph 31) and Scott (at paragraph 51) took a similar view.

Outcome

It followed that section 3 of the Human Rights Act 1998 did not require a different interpretation of paragraph 11(1)(a) of Schedule 5 to the 1988 Act, and the Temple was not exempted from non-domestic rates as a "*place of public religious worship*".

The HL also unanimously rejected the Church's remaining argument - that the Temple was exempt under paragraph 11(1)(b) as a "*church hall, chapel hall or other similar building used in connection with*" a place of public religious worship, here the Stake Centre. Lord Hope held that the Temple was not "*used in connection with*" the Stake Centre, since this would imply that the use of the Temple would be "*subsidiary to*" or "*ancillary to*" the use of the Stake Centre, which was not the case on the facts (paragraphs 33-36). Lord Hoffmann added that, as Donovan LJ had observed in the Court of Appeal in *Henning*, the Temple was "*far too important in the life of the Mormon Church*" to be described as equivalent to a church hall (paragraphs 16-17).

Comment

The majority decision in *Gallagher* appears to take a surprisingly restrictive approach to assessing the 'ambit' of Article 9. In this regard it is similar to the *M* case (described above). As Lord Bingham observed in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 at paragraph 13, the phrases used in the jurisprudence of the European Court of Human Rights, "*such as 'ambit', 'scope' and 'linked' are not precise and exact in their meaning*"; instead this is an area which calls "*for a value judgment*". Lord Scott's approach in *Gallagher* might have provided some sort of analytical framework, by asking whether the measure "*would be capable in particular circumstances of constituting a breach*" of the relevant Convention provision. However the answer to Lord Scott's question must presumably generally be yes; in any event, Lord Scott's formulation failed to find favour with the majority. In contrast, the alternative test which Lord Hoffmann appeared to prefer - assessing the "*remoteness*" of the interference with the relevant convention right - seems unlikely to add to the existing jurisprudence significantly.

Tim Ward appeared as junior counsel for the Secretary of State for Communities and Local Government (the Intervener in this case), instructed by the Treasury Solicitor

For more information on Tim Ward or Jorren Knibbe, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on www.monckton.com.

