



Neutral Citation Number: [2019] EWHC 70 (Admin)

Case No: CO/3352/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2019

Before:

LORD JUSTICE SINGH
and
MRS JUSTICE CARR

Between :

The Queen (on the application of Atta Ul Haq)
- and -
Walsall Metropolitan Borough Council

Claimant

Defendant

Michael Fordham QC and Nikolaus Grubeck (instructed by Fountain Solicitors) for the
Claimant
Jonathan Auburn and Zoe Gannon (instructed by the Solicitor, Walsall Metropolitan
Borough Council) for the Defendant

Hearing dates: 4-5 December 2018

Approved Judgment

Lord Justice Singh and Mrs Justice Carr:

Introduction

1. This is the judgment of the Court.
2. This is a claim for judicial review in which the Claimant challenges the lawfulness of a policy adopted by the Defendant, Walsall Metropolitan Borough Council, entitled 'Rules and Regulations in respect of Cemeteries and Crematoria' (the "Cemetery Policy"), specifically those provisions (contained in para. 6.9(g)) which preclude individuals from erecting raised edging around the grave of a deceased person.
3. The Claimant, Mr Atta Ul Haq, is a practising Barelvi Muslim. His father, Mr Hafiz Khudadad Qadri ("Mr Qadri"), who was a prominent member of the community and an imam, passed away on 21 June 2015 and was buried on the following day at Streetly Cemetery, which is administered by the Defendant local authority. The Defendant has refused to give the Claimant permission for the erection of a four-inch raised marble edging around his father's grave. The Claimant's request arises from his religious belief that the grave is sacrosanct and stepping on the grave is an offensive, religiously proscribed act that must be prevented.
4. The Claimant challenges the Cemetery Policy in light of the Defendant's refusal on the grounds, first, that such action constitutes a breach of Articles 9 and 8 of the European Convention on Human Rights ("ECHR"); and secondly, that it constitutes unjustified discrimination contrary to sections 13 and 19 of the Equality Act 2010. The Claimant seeks an order (a) quashing the Defendant's policy and (b) prohibiting the Defendant from enforcing the prohibition on the edging of Muslim graves.
5. Permission to bring this claim for judicial review was granted by Cheema-Grubb J on 15 February 2018.
6. At the hearing, oral submissions were made by Mr Michael Fordham QC for the Claimant and Mr Jonathan Auburn for the Defendant. We are grateful to all counsel and those instructing them for their written and oral submissions.

Factual and Procedural Background

7. As we have mentioned, the Claimant is a practising Barelvi Muslim. He lives in the Walsall area. His father was a well-known and respected Islamic scholar, who passed away on 21 June 2015. He was buried the next day in what is described as the "lawn cemetery" section of Streetly Cemetery, Aldridge, Walsall, which is owned and managed by the Defendant. Shortly after the burial, the Claimant sought permission from the Defendant to erect a small marble edging, no higher than four inches, around his father's grave. This edging was intended to prevent people from walking across the grave, so as to bring the grave into compliance with his understanding of the requirements of Islam.

8. To illustrate the significance of this, the Claimant relies on the expert report prepared by Shaykh Mohammed Yazdani Raza (Misbahi), who is a Hanafi jurist of the London Fatwa Council. Shaykh Raza states in his report dated 21 March 2017, that “stepping on [a] grave ... without a religious reason ... is forbidden”. Standing or walking over it, according to Islamic belief, “literally harms the inhabitant of the grave”. Edgings or a “sufficiently raised mound of soil above the grave” are necessary in order to prevent the grave being walked upon (it should be noted that he does not say that only edgings are required). This is especially so in relation to scholarly figures, such as the Claimant’s father. Such views are corroborated by Mufti Abdul Karim of the Ghamkol Sharif Mosque in Birmingham, whose opinions are also relied upon in evidence filed on behalf of the Claimant.
9. However, the Defendant refused to grant the Claimant permission to erect raised edging around his father’s grave. It relied on the Cemetery Policy, which was formulated originally in 2009, para. 6.12 of which was entitled “Memorials on Lawn Headstone Sections”, this being the version that was in force at the relevant time. So far as relevant, it provided that:
 - “d) Any additional memorial [besides a headstone/table conforming to the dimension requirements stipulated in Rule 6.12(a)-(c)] in the form of a surround ... will not extend beyond 610mm. (2 ft.) from the head end of the grave space or beyond the width of the grave space nor be of a height greater than 100mm (4 ins.) ...
 - g) No kerbstone or any other form of monument or memorial whatsoever will be allowed in this section of the cemeteries.
 - h) Nothing else may be placed or erected on or over a grave except wreaths and flowers at the time of interment.”
10. In the light of a public consultation which took place between 1 February and 31 March 2016, this policy was updated in October 2016, with the relevant rules now contained in para. 6.9. The only material change is contained in para. 6.9(g), which now provides:
 - “No kerbstone or any other form of monument or memorial whatsoever will be allowed in this section of the cemeteries. However, upon payment of a fee, the council shall install a standard wooden frame level with the surrounding ground that will not impede the grass maintenance regime. The council will not maintain such a frame and will require it to be removed and replaced if a further burial takes place”.
11. This Policy (both in its original and updated form) was relied on by the Defendant to provide the justification for the refusal of the Claimant’s request.
12. In responding to this claim for judicial review the Defendant relies on the evidence of Mr Stephen Billings, its Bereavement and Registration Services Manager. Mr Billings has filed three witness statements during the course of these proceedings.

13. Mr Billings' evidence shows that Streetly Cemetery is divided into a number of areas, comprising the "traditional area, cremated remains areas, children's areas and the lawn areas". Each area is further broken down into sections. For example, within the "adult lawn area", there is a dedicated section for the Muslim community known as the "T" section (where Mr Qadri is buried). There are, in addition, sections which are dedicated to infant graves (sections NB (for Muslim burials), Q and W).
14. According to Mr Billings' evidence, the Council has opted to manage the cemetery in accordance with the "lawn principle", which is based on the Commonwealth War Graves method of laying out burial plots. This is the principle that graves should have a uniform appearance, with rows of consecutive headstones laid out and lawn areas placed in front of each memorial. No fences, barriers or other obstructions are placed between the graves. One reason for this is that, as a matter of appearance, it affords an opportunity to contemplate in a quiet and (in general) a uniform setting. There is also an underlying point about societal values, which goes beyond the aesthetic: the layout emphasises that we are all equal in death and that attention is not drawn to any particular grave because of that person's status. Although that may not be (and in the case of this Claimant is not) the motivation behind the erection of marble edging, it may be perceived in that way by others, if not now, then in years to come, since a grave and marble edging are designed to last for a long time.
15. Mr Billings acknowledges that there are some exceptions to the lawn cemetery principle to be found at Streetly Cemetery. For example, an older section of the cemetery is laid out in a traditional churchyard style, and, being historical, cannot be changed. Different rules apply to the section of the cemetery for the burial of babies and infants, to reflect the particular emotional issues that come with the loss of a baby or infant. These graves can include raised marble edgings if desired. Moreover, in other sections, permission has been granted by the Council to have graves on lawn sections to be mounded by approximately 6 inches on request. Whilst this does, to an extent, affect the uniformity of the cemetery, the general appearance of a simple lawn area without barriers or obstructions remains. Individuals have the further option to seek permission to use "wooden grave edgings flush with the ground", which can be installed upon request. The Defendant in 2017 also decided to erect signs advising visitors to avoid walking on the graves in the Muslim sections wherever possible in both English and Urdu. However, the Claimant considers that none of these options is satisfactory, and his requests for further accommodation have been rejected by the Defendant.
16. The parties have engaged in significant correspondence in order to resolve the issue without litigation, but the parties have been unable to reach a compromise. In accordance with the amended para. 6.9 of the Cemetery Policy, the proposed solutions by the Defendant thus far have involved ground-level alterations. The Defendant remains concerned that any divergence from this would inhibit lawn maintenance and would upset the uniformity and equality of appearance of the present layout. That does not satisfy the Claimant, since it would not prevent individuals or machines (such as lawnmowers) passing over the grave, contrary to the Claimant's beliefs. That said, Mr Fordham made clear at the hearing before us that the Claimant would not object to a strimmer passing over his father's grave. He recognises that the grave needs to be maintained and this includes the cutting of grass.
17. In correspondence the Claimant offered the undertaking that, if the Council's refusals derive from grass maintenance concerns, his family and the wider community would

endeavour to ensure that the grave was properly maintained if their requests were allowed. This was unsuccessful. The Claimant then placed a temporary edging of domestic wire garden fencing around the grave, pending a more permanent solution. This was removed by the Defendant in January 2018.

18. In a letter dated 28 October 2016, the Defendant agreed to suspend enforcement action whilst the legal issues surrounding the matter were considered.
19. The Claimant drafted Detailed Grounds for Judicial Review and provided those to the Defendant in April 2017 in the hope that an amicable settlement could be reached. An agreement could not be reached and the Claimant lodged this claim for judicial review on 21 July 2017. At that time the Claimant sought permission to apply for judicial review in respect of three actions of the Council, namely: (i) the Cemetery Policy; (ii) the Council's refusal to allow the Claimant (and other Muslims) to erect edging around the graves of loved ones buried in cemeteries for which the Council is responsible; and (iii) the Council's proposed enforcement action against the temporary edging currently placed around the grave of the Claimant's father. Permission was granted by Cheema-Grubb J in respect of action (i), but not for actions (ii) or (iii), on 15 February 2018.
20. Action (ii) was concerned with a further issue between the parties, that is, whether Mr Qadri, the Claimant's father, held a special status as an Islamic *pir* (saint). The claim that Mr Qadri was a *pir* meant, according to the Claimant, that the Defendant should erect edges around the grave in any event. In her Order of 15 February 2018, Cheema-Grubb J made a direction for the parties to address the *pir* issue outside the context of the present proceedings. The Defendant made the decision that it did not consider the Claimant's father to be a *pir*, and the Claimant decided not to challenge that decision in the present proceedings. Accordingly, no more will be said about it here.

Material legislation

21. The Defendant local authority is a "burial authority" within the meaning of section 214 of the Local Government Act 1972: see subsection (1). Burial authorities may provide and maintain cemeteries whether in or outside their area: see subsection (2). Subsection (3) confers power on the Secretary of State to make provision by order with respect to the management, regulation and control of the cemeteries of burial authorities.
22. The relevant order which has been made by the Secretary of State is the Local Authorities' Cemeteries Order 1977 (SI 1977 No. 204) ("the Order").
23. Article 3(1) of the Order provides that:

"Subject to the provisions of this order, a burial authority may do all such things as they consider necessary or desirable for the proper management, regulation and control of a cemetery."
24. Article 4(1) of the Order provides:

“A burial authority may enclose, lay out and embellish a cemetery in such manner as they think fit, and from time to time improve it, and shall keep the cemetery in good order and repair, together with all buildings, walls and fences thereon and other buildings provided for use therewith.”

25. Article 10 of the Order provides:

“(1) A burial authority may grant, on such terms and subject to such conditions as they think proper—

(a) to any person—

(i) the exclusive right of burial in any grave space or grave, or the right to construct a walled grave or vault together with the exclusive right of burial therein; or

(ii) the right to one or more burials in any grave space or grave which is not subject to any exclusive right of burial;

(b) to the owner of a right described in (a)(i) or (ii) (or to any person who satisfies them that he is a relative of a person buried in the grave or vault, or is acting at the request of such a relative and that it is impractical for him, or such relative, to trace the owner of the right so described), the right to place and maintain, or to put any additional inscription on, a tombstone or other memorial on the grave space, grave or vault in respect of which the right so described subsists;...”

26. Section 6 of the Human Rights Act 1998 (“HRA”) makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The Defendant local authority is plainly a public authority. The relevant Convention rights are set out in Sch. 1 to the HRA and include Articles 9 and 8.

27. Article 9 of the ECHR provides:

“(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

28. Article 8 of the ECHR is also relied on by the Claimant in this case. He claims that the Defendant's refusal to permit his father's burial in the favoured manner according to his moral, religious and familial views amounts to an unjustified interference with the right to respect for private and family life in Article 8, which provides:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

29. The Claimant also relies on certain provisions in the Equality Act 2010 (“the 2010 Act”).

30. Section 13 of the 2010 Act prohibits direct discrimination. The present judicial review challenge involves a claim of direct discrimination on the grounds of age, because the grave of an infant would be permitted by the Defendant to have the edging sought by the Claimant whereas the grave of an adult is not permitted to have it. Section 13 provides:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.”

31. The Claimant also relies on section 19 of the 2010 Act, which prohibits indirect discrimination. It provides:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

age; ...

religion or belief; ...”

The Claimant's Grounds

32. The Claimant advances four grounds of challenge to the Defendant's policy:

(1) Breach of Article 9 of the ECHR.

(2) Breach of Article 8 of the ECHR.

(3) Direct discrimination contrary to section 13 of the 2010 Act.

(4) Indirect discrimination contrary to section 19 of the 2010 Act.

Submissions of the Parties

33. The Claimant submits that the policy of the Defendant is unlawful. Article 9(1) is engaged since, first, manifestation of religion is made out. Although the court should not play arbiter in choosing between different points of view between religious experts, there is ample evidence that stepping on graves is prohibited in Islam. Secondly, if this is so, plainly the Defendant's policy entails an interference with this manifestation. Thirdly, this interference cannot be justified under Article 9(2).

34. The Claimant also advances arguments based on Article 8 of the ECHR and the 2010 Act, but Mr Fordham acknowledges that, in substance, they overlap considerably with the arguments under Article 9.

35. Article 8, he submits, is plainly engaged, and such interference is not justified for the same reasons as under Article 9.

36. Mr Fordham also submits that the Defendant has directly discriminated against the Claimant on the grounds of age, since it adopts two different policies expressly based on the age of the deceased. The apparently neutral policy also has a disproportionate impact on Muslim families, and as such constitutes *prima facie* indirect discrimination on grounds of religion. Neither form of discrimination is justified for the above reasons. For those reasons Mr Fordham submits that there has been a breach of the 2010 Act.

37. The Defendant argues that the Claimant's grounds should be rejected. At one stage, at least in the Defendant's written submissions, there was a comprehensive attack on each and every element of the Claimant's arguments under Article 9. It was denied even that

the Claimant had established a relevant religious belief so as to engage Article 9(1) at all. It was submitted that the relevant religious belief in this case is veneration of/respect for the dead: there is no distinct belief in raised marble edgings. The Defendant said that it has already accommodated that religious belief, properly understood, since measures such as mounding are, on the Claimant's own evidence, sufficient to allay concerns about walking over graves. However, as will become apparent, matters were clarified during the course of the hearing before us and this first issue at least now appears not to be dispute, in other words that the Claimant does have a relevant religious belief so as to engage Article 9(1).

38. Secondly, the Defendant submitted that the erection of raised marble edges is not a "manifestation" of religious belief, rather it is a cultural preference of some South Asians, unconnected to Barelvi practice, properly understood.
39. Thirdly, the Defendant submitted that there is no relevant "interference" with religious belief, since there exists a choice *not* to bury one's loved ones at Streetly Cemetery.
40. Fourthly, any such interference is justified. The Council seeks to have a relatively uniform appearance to provide a place of calm for the bereaved, and effective measures can be taken to discourage people from walking over graves. Further, allowing edgings would distress other Muslims who are opposed, for religious reasons, to having raised edgings. A margin of judgement should be afforded to the Council in deciding the means by which to deter people walking over graves.
41. The Defendant submits that both the Article 8 and the Equality Act grounds fail for substantially similar reasons as the ground under Article 9.

Relevant principles under Article 9 of the ECHR

42. It is unnecessary to set out the relevant principles under Article 9 of the ECHR in detail here since the Divisional Court recently had occasion to set out those principles in *R (Adath Yisroel Burial Society) v Inner North London Senior Coroner* [2018] EWHC 969 (Admin); [2018] 3 WLR 1354, at paras. 93-99.
43. After setting out what the European Court of Human Rights had said in *Eweida v United Kingdom* (2013) 57 EHRR 213, at paras. 79-81, Singh LJ (giving the judgment of the Court, which also included Whipple J) said the following at paras. 95-99:

"95. As is apparent from that passage, there are several things of importance to note about the terms of article 9.

96. First, it does not protect only freedom of religion. It protects freedom of all thought (including the beliefs of those who have no religious faith) and freedom of conscience.

97. Secondly, the first right set out in article 9 (the right to freedom of thought, conscience and religion) is an absolute one. The second right (freedom to change religion or belief) is also absolute. However, the third right (freedom to manifest one's religion or beliefs) is not absolute but can in principle be subject to limitations.

98. Thirdly, as paragraph 2 of article 9 makes clear, for those limitations to be lawful the following requirements must be satisfied:

- (1) The limitation must be ‘prescribed by law’. ...
- (2) The limitation must be necessary in order to serve one of the legitimate aims set out: in particular reliance can be placed by the defendant in the present context on ‘the protection of the rights and freedoms of others’.

99. For a limitation on a fundamental right such as this to be ‘necessary’, it must satisfy the principles of proportionality, which are well established in the case law both of the European Court of Human Rights and of our own courts under the HRA. It is now well established that the following four questions have to be addressed:

- (1) Is the legitimate objective sufficiently important to justify limiting a fundamental right?
- (2) Are the measures that have been designed to meet it rationally connected to that objective?
- (3) Are they no more than are necessary to accomplish it? and
- (4) Do they strike a fair balance between the rights of the individual and the interests of the community?”

44. Before this Court Mr Fordham has also emphasised what the Divisional Court said at para. 115:

“The kind of society which is envisaged by the Convention and the HRA is one which is based on respect for everyone's fundamental rights, on an equal basis. ... it is a society which is characterised by pluralism, tolerance and broad-mindedness. It regards democracy as being a community of equals. ...”

45. Mr Fordham also reminded us of what the Court said at para. 111:

“... What on its face looks like a general policy which applies to everyone equally may in fact have an unequal impact on a minority. In other words, to treat everyone in the same way is not necessarily to treat them equally. Uniformity is not the same thing as equality.”

46. It is also important to note that, at para. 161, the Court emphasised that there will be a “margin of judgement” afforded to the public authority when assessing the proportionality of a measure that interferes with the right to manifest a belief in Article 9.
47. The two leading authorities in domestic caselaw are *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246 and *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.
48. Mr Fordham placed particular emphasis before this Court on the decision of the Supreme Court of Canada in *Amsellem v Syndicat Northcrest* (2004) 241 DLR (4th) 1; [2004] 2 SCR 551. However, we note that that case was considered by the House of Lords in *Williamson* and we do not consider that there is a need to refer to the underlying judgments of the Supreme Court of Canada in detail. Rather we should follow the approach taken by the House of Lords, which in turn took account of what the Supreme Court of Canada had said. Furthermore, for reasons that will become apparent in this judgment, the real issue in the present case has become one of whether there is justification for an interference with Article 9 rights under para. (2) rather than whether those rights are engaged in the first place or whether there has been an interference with them.
49. In *Williamson* the main opinion was given by Lord Nicholls of Birkenhead: see in particular paras. 21-23; and 30-33. See also Lord Walker of Gestingthorpe, at paras. 58, 62-64 and 66; and Baroness Hale of Richmond at paras. 75-78.
50. At para. 23 Lord Nicholls said that:

“... when questions of ‘manifestation’ arise, ... a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in Article 9 ... the belief must be consistent with basic standards of human dignity or integrity. ... The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. ... It must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. ... These threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention ...”
51. At para. 30 Lord Nicholls said:

“... Article 9 is not engaged unless the complainants’ activity under consideration is within the scope of the protection the Article affords to the complainants’ beliefs. As to this, the Strasbourg jurisprudence has consistently held that Article 9 does not protect every act motivated or inspired by a religion or belief. ...”

52. At para. 32 Lord Nicholls observed that the Strasbourg authorities make it clear that the act need not be mandated by religion. However, the act must be “intimately linked” to belief. It may be sufficient that the belief is one of perceived obligation although that is not a necessary condition.
53. In *SB* a challenge was made by a Muslim girl to a school’s uniform policy, which would not permit her to wear a jilbab. The majority of the House of Lords did not think that there was an interference with Article 9 rights because the complainant could have gone to another school where she would have been allowed to wear the item of dress that she wished to. The minority considered that there was an interference. The House of Lords were unanimous in the view that any interference was objectively justified under para. 9(2).
54. At para. 23 Lord Bingham of Cornhill said:
- “The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or inconvenience. ...”
55. In relation to justification, Lord Bingham emphasised that different schools were entitled to have different uniform policies and that the court lacks the relevant experience, background and detailed knowledge which others such as the headteacher and governors have in what is a sensitive area: see paras. 33-34.
56. At para. 50 Lord Hoffmann said:
- “... Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing. ...”
57. In the same paragraph Lord Hoffmann noted that the complainant’s family had chosen the school in question for her with knowledge of its uniform requirements.

Application of the above principles to the facts of this case

58. It is common ground that the principal issue in this case arises under Article 9 of the ECHR. The other arguments, under Article 8 and under the Equality Act 2010, raise no materially different issues, save for one point under the 2010 Act, to which we will return later.
59. Applying the principles we have summarised earlier to the facts of the present case, our views are as follows.

60. First, there can be no doubt that the Claimant does have a sincere belief, derived from his religion, that people should not step onto his father's grave. At an earlier stage of these proceedings there was a suggestion made by the Defendant that the belief in question was something else, namely that there should be marble edging around the grave and that, it was said, was not required by Islam and indeed was in conflict with it. It was mainly for that reason that a large amount of evidence about the tenets of Islam were placed before the Court. During the course of the hearing before us it was clarified that this first issue is common ground, once one identifies the relevant religious belief as being that people should not step onto a person's grave.
61. The second issue is whether the act which the Claimant has been refused permission to engage in is a manifestation of that belief. This remains in dispute between the parties although it was not at the forefront of Mr Auburn's submissions on behalf of the Defendant at the hearing before us. We are persuaded that the Claimant's wish to have the marble edging in question is sufficiently linked to the underlying belief to constitute a manifestation of that belief.
62. Our attention was drawn to the decision in *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 (Admin); [2007] HRLR 34, in which Mr Michael Supperstone QC (then sitting as a Deputy Judge of the High Court) applied the principles in *Williamson* and *SB* to the facts of the particular case before him. Those facts concerned a pupil at a school which had a uniform policy providing that jewellery must not be worn. The claimant started wearing a "Silver Ring Thing" purity ring. Her father wrote to the school claiming that she wore the ring to demonstrate her personal commitment to sexual abstinence prior to marriage. The school prohibited her from wearing the ring because it did not conform to its uniform policy. The claim for judicial review, which was based on Articles 9 and 14 of the ECHR, was rejected.
63. At para. 23 the Judge said that the act of wearing a ring was not "intimately linked" to the belief in chastity before marriage. He also observed that the claimant was under no obligation, by reason of her belief, to wear the ring nor did she suggest that she was so obliged.
64. Each case must turn on its own facts. In our judgement, the decision in *Playfoot* does not provide assistance in resolution of the issues in the present case. This is not least because the Claimant clearly does regard the requirement to have the edging which he seeks in order to honour his father's grave as being an obligation which arose from his religious beliefs. There is also the practical consideration that it will, certainly on his understanding, help in preventing members of the public from stepping onto his father's grave, something which it is common ground is offensive to Islam. Accordingly, we have come to the conclusion that in the present case there is an intimate link between the religious beliefs of the Claimant and the particular manner in which he seeks to manifest those beliefs.
65. Turning to the third issue which arises under Article 9, we are also persuaded that this is a case where there has been an interference by a public authority with the Claimant's rights in Article 9. Mr Auburn draws attention to the fact that the Claimant chose to have his father buried at this particular cemetery, which has operated the lawn cemetery principle for nearly 20 years in the Muslim section of the cemetery. He submits that there were other cemeteries available either in the local area (although not in the administrative area of this local authority) or more widely.

66. Mr Auburn relies on the decision of the House of Lords in *SB*, in which a majority of the Appellate Committee concluded that there had been no interference with the right to freedom of religion. However, in our view, that case can be distinguished on two grounds.
67. First, that was a case where the claimant's family had chosen to send her to a school which was outside their catchment area on a basis which was described by Lord Bingham as a free and informed choice. That was not the case here. The Claimant had his father buried in the only cemetery available to him within the administrative area of this local authority. He had to act quickly because of the requirements of his religion that a person should be buried on the same day as his death or as soon as possible after that date. The Defendant's forms did not clearly spell out what the rules and regulations were. In those circumstances we do not consider that the Claimant can be said to have exercised a choice between different cemeteries that was free and informed. That is even before one gets to any issues about distance and cost. We note that it is accepted on behalf of the Defendant that the cost of using a cemetery in another nearby local authority such as Birmingham City Council would have been several thousand pounds more than in Walsall. Furthermore, we note that the Claimant's father was a respected figure in the local Muslim community in Walsall. We consider that it was reasonable for him to wish to have his father buried in the cemetery which was local to them.
68. Secondly, we think that *SB* is distinguishable because the pupil in that case could still move to another school which would have a different uniform policy (one which would permit her to wear a jilbab). In contrast in the present case it is impossible for the Claimant to exercise any choice now. No one has suggested, nor could it reasonably be suggested, that he could have his father's grave moved to another cemetery.
69. In those circumstances we have reached the conclusion that there has been an interference with the Claimant's rights under Article 9. That interference therefore has to be justified as being in accordance with para. (2) of Article 9.
70. As to the first requirement of para. (2), it is common ground that any interference with Article 9 rights was prescribed by law.
71. Turning to justification under Article 9(2), the Defendant clearly had one or more legitimate aims. These could be described generically as protection of the rights of others. Those others include the loved ones of people who have been buried in the Muslim section of this cemetery for many years in the past on the understanding that it would conform to the lawn cemetery principle. It is far too late for them to change their conduct for obvious reasons. It also includes the protection of the 'lawn cemetery principle', which is of importance not only to others who have a religious belief but to those who do not. That principle is based on a concept originally devised to commemorate the fallen from various parts of the Commonwealth (then the British Empire) in the two World Wars. Finally, there is the legitimate aim of the protection of health and safety, both of those who visit the cemetery and walk around it, and those who have to work there, for example when they are carrying or using machinery to cut the grass and otherwise maintain the cemetery.
72. The means adopted by the Defendant have a rational connection to those legitimate aims.

73. When it comes to whether there are less intrusive means and whether the Defendant has maintained a fair balance between the rights of the individual and the general interest of the community, it seems to us that Mr Auburn is right to submit that a certain margin of judgement must be afforded to public authorities in this sensitive area.
74. Before we consider that issue in more detail, it is important to summarise the evidence on this.

The evidence

75. Both parties have placed a great deal of evidence before the Court concerning the religious matters which form the background to this case. For reasons which will be apparent from elsewhere in this judgment, we have not considered it necessary to set out that evidence in detail. This is for two reasons. First, it is not appropriate for a secular court such as this one to enter into what are essentially doctrinal debates about religious matters. That is not said out of disrespect to those concerned or the importance of the underlying issues. Far from it. It is precisely because a secular court respects the sincerely held religious views of people in society that it would not be appropriate for it to adjudicate upon such doctrinal debates.
76. Secondly, we have reached the conclusion in any event that on the facts of this case an issue does arise under Article 9(1) of the ECHR and therefore justification needs to be provided by the Defendant for an interference with the Claimant's rights, pursuant to para. (2) of Article 9.
77. That said, it should be noted that the Defendant, itself a secular public authority charged with compliance with its obligations under the HRA, was presented with a range of different views, including those expressed by at least some members of the Muslim community. By way of example, we note that, in the evidence filed on behalf of the Claimant in these proceedings, there is a letter dated 11 April 2017 from Mufti Abdul Karim of the Central Jamia Masjid Ghamkol Sharif Birmingham, which includes the following passage:

“Under usual circumstances, only the graves of scholarly and saintly figures should have edgings and/or be formed in similar fashion to a traditional grave, i.e. one with an elevated marbled/stoned boundary. This is to differentiate such graves from those of common Muslims, as the graves of scholarly and saintly figures are considered to be a place where blessings descend according to the belief of the Ahlus-Sunnah (the largest denomination of the Muslim faith). Conversely, permission is also granted for edgings around the graves of common Muslims where there is a risk of people traversing them, as has unfortunately been the case in the cemetery where Mr Ul-Haq's father is buried. The permitting of raised edgings around graves will certainly prove to be conducive in preventing anybody from stepping on them.”

78. There is also before the Court a letter dated 11 May 2018 from the Good Muslim Foundation written by (Shaykh) Mohammed Sajid (Younus Sultani). That states, at para. 15.1:

“There are certainly differing views of grave edgings amongst the Muslims. At one extreme there are the ‘puritanical’ views that there should be no markings of graves at all, despite the practices of the Prophet to use stones to identify graves. ... On the other hand, there are those that build grand structures over the grave and mark it out with marble and other adornments. ... However personally I would recommend one only do as much as is necessary and not display extravagance in the matter. Despite this, [the] practice of Muslims after the first generation has been to have graves that are clearly marked out with headstones and edgings, at a minimum, so lawn graves have been the exception rather than the rule. ... the four-inch edgings are the middle path between absolutely unmarked graves and extravagant mausoleums.”

79. Against that background, where there were differing views from within the Muslim community itself, including at least some views (even though the Claimant disagrees with them) that there should positively *not* be marble edging around graves of this type, in our view, the Defendant was entitled within its margin of judgement to proceed in a sensitive fashion, trying as it must to respect different (and sometimes completely contradictory) religious views. It also had to take account of the views of those who are not Muslims and indeed may not have any faith at all, who value the lawn cemetery appearance of the area concerned.
80. As we have said the evidence on behalf of the Defendant comes principally from three witness statements filed by Mr Billings.
81. At para. 4 of his first witness statement, Mr Billings informs the Court that the Defendant first laid out Muslim sections in James Bridge Cemetery in around 1960 and that, ever since that time, the burial sections for the Muslim community at the cemetery have always been provided on the lawn principle.
82. At para. 16(iv) Mr Billings states that permission to have graves in the lawn sections mounded by approximately 6 inches on request has been available since 2011. This followed lengthy discussions with representatives of some of the Muslim communities that began with the Communities Services Scrutiny and Performance Panel in November 2011. However, he continues that, while an element of difference is thereby created, the Defendant still retains the core lawn cemetery approach of a simple lawned area with headstones and no fences, barriers or other obstructions. He states:

“In our view this is a reasonable accommodation which has not undermined the objects of the lawn cemetery.”

83. At para. 16(vi) he states that permission to use wooden grave edgings flush with the ground was introduced approximately four years earlier, following a request from the Muslim community and Muslim Councillors. This can be installed around any grave in the lawn sections on request.

84. At para. 17 Mr Billings states:

“... To allow the erection of permanent raised edgings around graves would very greatly undermine the lawn cemetery principle and the relatively uniform appearance which it produces. It would also be extremely difficult to impose limits on the forms of fencing or enclosure which people erected, who did that and what they used. Allowing this would upset a lot of people. Whilst it is predominantly Muslims who use the T section of the cemetery, that section is located such that all communities walk past it on their way through to other parts of the cemetery.”

85. At paras. 26-30 Mr Billings informs the Court that there have been concerns expressed by members of the public, both Muslim and non-Muslim, that graves such as Mr Ul-Haq's late father's did not comply with the Cemetery Policy and they were upset about their appearance. It is true, as Mr Billings says, that these were not formal complaints and therefore logs were not kept of them. Nevertheless, this is evidence before the Court and it is not contradicted nor was there any application made on behalf of the Claimant to cross-examine Mr Billings on his evidence. We can see no good reason not to accept what Mr Billings states in his evidence.

86. It is not a sufficient answer to the concern about equality to say that others can have the sort of grave which they wish to see for their loved ones but should not deny what this Claimant wishes to see for his father. This is because the appearance of one grave in a cemetery inevitably affects the perception of the cemetery which others have as well. This was a view expressed by at least some within the Muslim community itself. For example, the Defendant was provided with a report by Sheikh Doctor Usama Hasan and Sheikh Doctor Salah al-Ansari of Quillian International, dated 4 January 2018. This observed, at para. 6.2:

“The Islamic and civic principle of equality demands that no-one receives special treatment.”

The report continued, at para. 6.3:

“... We consider that a headstone, bearing the name, titles and status of the deceased, as well as grave surroundings, within permitted rules, is sufficient to recognise the status of such a person, if the family so wishes. However, this must be done in a way to avoid ostentation, to avoid disrespecting the feelings of the families of the deceased buried in neighbouring graves.”

87. The Defendant also had a supplementary report from Dr Usama Hasan, dated 21 May 2018. At pp.3-4, that report included a section headed ‘Upsetting other Muslim groups who use this cemetery’, where it was said:

“The Muslim section of Streetly Cemetery is used by all Muslims. Other Muslim groups are firmly against raised borders, fences and built structures surrounding graves, based on the extensive Sunni Muslim jurisprudence that we detailed in our original report. To allow edgings would certainly cause upset amongst these people, who use this section of the cemetery. The traditional and established practice is for mounding the graves only, and not building structures upon them.

For example, allowing raised borders or structures around the Muslim graves in Streetly Cemetery would upset Deobandi Muslims, who are also Sunni-Hanafi-Sufi and take very strictly the Islamic prohibition against building over graves. And prominent schools of jurisprudence, such as the Maliki, Shafi’i and Hanbali Schools all have groups who are very opposed to having structures on graves, based on the authentic Prophetic hadiths that we quoted in our original report. These people would be upset by having structures over graves.”

88. We turn next to the practical issues concerning maintenance of the cemetery. This is dealt with in particular at paras. 31-41 of Mr Billings’ first statement. It is unnecessary to set out what he says there in full. Suffice to say that he informs the Court, at para. 35, that, from his experience in working with cemetery maintenance issues, the request to have solid edging around a grave:

“is more likely to result in stepping onto the grave for the grass cutting, since the edgings prevent the pedestrian operated lawn mowers from being used without interruption among the graves, and would make the manoeuvring of such a mower very difficult. This will then require the workers to then have to step onto the edged graves in order to access the grass and cut it.”

89. At para. 36 Mr Billings states that the other option would be to use a strimmer but:

“... again the solid edging of the grave is more likely to result in stepping onto the grave, as it affects the manoeuvring of the machinery.”

90. Mr Billings returns to such practical matters at paras. 15-23 of his second witness statement. We would observe that there has been no evidence filed on behalf of the Claimant to contradict Mr Billings’ evidence in this regard. Nor, as we have already mentioned, has there been any application to cross-examine Mr Billings upon it.

91. Mr Billings explains that, although grave spaces are 5 feet wide and 8.5 feet long, the interment itself will not use the full space allocated because there are areas within the allocated space which are set aside for safety, memorial safety and access reasons: see para. 15. At para. 17, he states that interments rarely use a space larger than 4 feet wide and 7 feet long. The unused space means that there is an access strip which is approximately 1 foot wide between grave spaces, and approximately 1.5 feet wide at the foot end of the grave space. He continues:

“This access strip is used to traverse the rows in order to utilise other graves and to carry out maintenance tasks, including where a grave has collapsed through natural ground settlement. Visitors also use these access strips in order to visit their loved ones’ graves without the need to step on the space where a body is interred.”

92. At para. 21 Mr Billings continues that the installation of any raised edging would reduce the dimensions of the access strip and would limit access for visitors and maintenance workers. His opinion is that:

“It would greatly affect maintenance work.”

In the same paragraph he states that, following discussions with representatives of some of the Muslim communities in November 2011, the graves in the T section of Streetly Cemetery are maintained, in the main, by using hand held trimmers and, where applicable, hand held spraying equipment. Pedestrian-based equipment such as trimmers require a minimum safe working area to operate. He states that:

“The current working space between the end of the grave and the next raft allows a working area of 14 inches (355 mm). Raised borders would reduce the effective working space for such pedestrian-based equipment and make maintenance significantly more difficult. The spacing of the graves at Streetly and its T section has been designed on the basis of it being set out as a lawn cemetery.”

93. At para. 22 Mr Billings states:

“Working in tight spaces invariably requires more lifting, twisting, stretching etc., all of which put additional stress on the body. Equipment held out from the body may cause the user to have to change the position of stance to maintain balance, again causing stress on the body. The addition of a 4 inch, or higher, raised edging will add a trip hazard when manoeuvring between the graves. This is likely to lead to a need to step onto or walk over graves, in contravention of our instruction to maintenance workers to not do so. Again, this arises in part because Streetly’s T section was set out to be a lawn section.”

94. At para. 23 Mr Billings concludes on this point:

“Walsall Council also has to consider the interest of visitors to the cemetery, and the accessibility of the graves. A grave site with a severely restricted walkway would impede a visitor’s range of motion. The access strip would no longer be sufficient to turn, twist or bend safely. Indeed, these motions could result in a need to step directly onto the interment space in order to avoid tripping over a raised border.”

Our assessment

95. In our view, that evidence, based as it is on the Council’s own extensive experience of such practical matters and the maintenance of cemeteries, should lead this Court to conclude that what the Defendant has decided clearly falls within its margin of judgement.

96. On the facts of this particular case, it seems to us that the Defendant has acted in a way which is justified under Article 9(2). We bear in mind in particular the following factors:

(1) The Defendant consulted widely on the revision of its policy in 2016. That policy had been in place for many years before that.

(2) The Defendant has been willing to accommodate the wishes of various parts of the Muslim community, in particular by permitting mounding although not marble edging around graves. This is important not only because it shows a willingness to be flexible on the part of the Defendant authority. It has shown that it is prepared to make reasonable accommodations to its normal policy in order to assist those Muslims who wish to mark their loved ones’ graves with a raised grave while maintaining the general appearance of a lawn cemetery. This point also goes to another one. It is that it helps to focus on the precise issue before the Court now. This relates to the degree of the interference with the Claimant’s Article 9 rights. Although we do not belittle how he feels about the matter, it is objectively considered a relatively less serious interference than would be (for example) a decision by a public authority that a person could not have a burial in accordance with his or her religious beliefs at all. The dispute between the parties has in a sense come down to this important but relatively narrow question: how is the objective of minimising the risk of someone walking on a grave best to be achieved? Is it by a combination of methods which include mounding but not marble edging (as the Defendant contends) or is by a combination of methods which include mounding and also marble edging? In the end we do not consider that the decision of the Defendant in this regard is one which falls outside the margin of judgement afforded to it by the law.

(3) The Defendant is well placed with its experience and knowledge of the requirements of cemetery maintenance to form the judgement which it has as to the practicalities, including health and safety issues. There is evidence before this Court, from Mr Billings, that the erection of marble edging would intrude upon the

space available (described as an “access strip”) around a grave to enable maintenance work to be done; and that it would increase the risk of people stepping onto the grave where a person is buried. Finally, Mr Billings’ evidence is that there would be an increased trip hazard because people may step onto the edging in order to avoid walking on a grave and the edging would be only four inches high. We have reached the view that such matters are essentially within the margin of judgement afforded to the local authority in this context. It has relied upon the considered view of its officer, who has 30 years’ experience in the field of maintenance of cemeteries. Although Mr Fordham criticised his evidence by reference to other documents that are before the Court, we note that no evidence has been filed in response to that of Mr Billings, still less to contradict his evidence. We also note that no application was made to cross-examine him and certainly no order was made permitting such cross-examination. In those circumstances we accept Mr Billings’ evidence.

(4) Legitimate distinctions do exist from the children’s section of the cemetery. We return to this issue in detail below, when we address the grounds of challenge under the 2010 Act.

97. In summary, our conclusion is that there has been no breach of Article 9 in this case. It follows that there has been no breach of Article 8.

The discrimination claim under the 2010 Act

98. We turn to the 2010 Act. The claim based on indirect discrimination on grounds of religion in substance raises the same issues as those that arise under Article 9. We reject that claim for the same reasons.

99. That leaves the claim for direct discrimination on the ground of age because the family of a baby or infant are treated differently from that of an adult who has died.

100. In this context, Mr Fordham reminded this Court of what was said by the Divisional Court in *Adath Yisroel Burial Society*, at para. 119, when it emphasised:

“... an important point of equality law which must not be overlooked. It is that, in a discrimination case, what has to be justified is not only the underlying measure but the discrimination: see *A v Secretary of State for the Home Department* [2005] 2 AC 68, para 68 per Lord Bingham of Cornhill.”

101. Against that background of principle we turn to the evidence on this issue.

102. At para. 4 of his third witness statement Mr Billings informs the Court that there is a separate Muslim infant graves section at Streetly Cemetery as well as the general infants section.

103. At para. 7 Mr Billings states:

“Management of the cemeteries, and particularly the infant graves sections of the cemeteries, is one of the most sensitive areas of the Council’s work. I have worked in this area for over 30 years and have extensive experience of dealing with and assisting grieving relatives following the death of a baby or infant. It is a truly terrible thing to lose a baby or infant. It goes against what we as a society consider the normal order of the life cycle. It raises in people a very acute sense of the cruelty of life, that an infant or baby, can suffer such a fate. People also invest hope for the future of their family, and the natural order of renewal, around babies and infants. That is not to say that losing adult friends or relatives is not painful. Of course it is, but where it is the death of a very young child or infant it is generally felt by the family more painfully or deeply. That child has not had the chance to live a full life and the loss is felt very acutely by the family. I would have thought that it went without saying that the loss of an infant raises a unique emotional reaction which is different to that which arises with the loss of an aging relative or indeed any adult, who has lived a full life. In saying this I am speaking from the experience of many years of dealing at close quarters with families who have experienced loss.”

104. At para. 8 Mr Billings expresses the view that:

“It is good practice in cemetery management to adopt different, more relaxed rules and regulations in relation to infant graves, as compared to adult graves. ...”

105. At para. 9 he expresses the Defendant’s assessment that:

“the different approach for this infant section does not undermine the overall uniformity we maintain at the Cemetery as a whole ... it is never an easy balance to strike. We recognise that there are competing wishes. In terms of the impact on uniformity and collective balance of interests, I cannot recall ever having had a complaint by anyone about the different appearance of the infant sections of the Cemetery. In contrast, when we have sought to take a sensitive approach and deferred enforcement in the adult sections ... we have received complaints from both Muslims and non-Muslims alike.”

106. At para. 12 Mr Billings notes, for completeness, that there are occasions when children are buried in the adult lawn sections. This usually arises when a family wants an infant to be buried alongside a parent. When this is what families want, an infant can be buried in the adult section but only on the understanding that the ordinary rules as to that adult section will apply.

107. Finally, Mr Billings draws attention to the different maintenance considerations which apply to infant sections, at para. 11, where he states:

“There are also different maintenance considerations. Infant sections were originally laid out on lawned areas, however it was noted that any items that families left on the graves deteriorated quite rapidly. It was also difficult for the Council to maintain the grass. Due to the small size of these grave plots, cutting the grass around such items was extremely time consuming and sometimes resulted in damage to the items. For this reason, when the Council set up the newer of the two infant graves sections it covered the ground in a membrane layer and put down shingle. This means that the area can be easily maintained without disturbing the items left by family members.”

108. On the facts of this case, we have reached the conclusion that the Defendant has shown that there is sufficient justification for the difference of treatment. In particular this is because of the objective consideration that there is more space in the children’s sections of the cemetery. There are also the different maintenance considerations to which Mr Billings refers in his evidence. The Defendant was also entitled to reach the view it did because of the sensitive emotional matters to which Mr Billings draws attention in his evidence.

109. Accordingly, we have reached the conclusion that there was no breach of the 2010 Act.

Conclusion

110. For the reasons we have set out this claim for judicial review is dismissed.