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Case No: CO/9067/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2009

Before :
MR JUSTICE CRANSTON
- -
Between :

Mr Davender Kumar Ghai	**Claimant**
-	
and -	
Ramgharia Gurdwara, Hitchin	**First Intervener**
-and-	
Alice Barker Welfare and Wildlife Trust	**Second Intervener**
v	
Newcastle City Council	**Defendant**
Secretary of State for Justice	**Interested Party**

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- -

Ramby de Mello Tony Muman and Martin Henley (instructed by **J M Wilson Solicitors**) for the **Claimant**
Satvinder Singh Juss (Pro bono) for the **First Intervener**
Richard Drabble QC, Eric Fripp and Ellis Wilford
(instructed by **Simons Muirhead & Burton)** for the **Second Intervener**

John McGuinness QC (instructed by **Newcastle City Council Legal Services)** for the **Defendant**
Jonathan Swift and **Joanne Clement**
(instructed by **Treasury Solicitors)** for the **Interested Party**
Hearing dates: 24-26 March 2009
- -

Judgment

Mr Justice Cranston :

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INTRODUCTION

1. The claimant, Davender Kumar Ghai (Baba Ji), is what I will describe as an orthodox Hindu who wishes his body to be cremated on an open air pyre following his death. He also wants similar open air funerals for other Hindus. The defendant is the Newcastle City Council ("the Council"), which the claimant approached to facilitate these goals. The Interested Party is the Secretary of State for Justice (the "Secretary of State"). The First Intervener is a Sikh Temple (Gurdwara). In broad terms it made out its case for intervention on the basis that while Sikhs do not as a matter of doctrine and dogma cremate their dead on an open air funeral pyre, traditionally they have done so. The Second Intervener is the Alice Barker Wildlife and Welfare Trust, a charitable organisation which is concerned with assisting persons of no religious faith, and those like the claimant of strong religious faith, to obtain lawful access to cremation or burial of human remains in natural circumstances.

BACKGROUND

The claim

2. At the end of January 2006 the claimant sent an "earnest request" on behalf of the Anglo Asian Friendship Society to Councillor Peter Arnold, leader of the Newcastle City Council. After setting out the background, that in India open air funeral pyres are an integral component for the transmigration of peoples' souls, and that the absence of this in Britain led bereaved families to suffer remorse, the claimant submitted that dedicated grounds for traditional open air funeral pyres were the only safeguard for sincere religious observants. "Pledging out-of-town land, some 10-12 miles from the city and adjacent to flowing water, would mark the Council's principled endorsement and establish Newcastle as a pioneering force in global inter-faith appreciation". The claimant referred to the segregated burial grounds made available to Britain's Jewish population from the 17th century and commented that funeral pyres by comparison would not strain already limited land resources. He acknowledged that the legality of funeral pyres, as with crematoria, was contingent on the application of the Environmental Protection Act of 1990 and that the Society was committed to complying with both the letter and spirit of such laws. The Council need not fund the project but the Society was desirous of the provision of suitable land "as a sincere gesture of principled support".

3. A fortnight later Councillor Arnold replied. This is the first decision under challenge. In it Cllr Arnold said that the Council had always been sensitive and proactive in the provision of bereavement services for all faiths and beliefs. However, the law prohibited funeral pyres and as such the Council could not consider the claimant's request until the law was changed. He referred to the Cremation Act of 1902 and the regulations made under it and to the Pollution, Prevention and Control (England and Wales) Regulations 2000. Under the latter permits had to be obtained with conditions aimed at ensuring the reduction or mitigation of, omissions to the air and pollution of the water and soil. It was common practice at the Council's West Road crematorium to allow mourners at a Hindu or Sikh cremation to charge the coffin into the cremator and on some occasions to remain in the crematory to view the entire cremation process. In addition, remains were left uncremulated in accordance with the wishes of the families. The Council was sensitive to all cultural requirements and would be happy to discuss the matter should the law be changed.

4. There was further correspondence. Then in October 2006 the claimant wrote to the Council recording that he had personally lit the funeral pyre of Rajpal Mehat at an undisclosed, private location in Northumberland. That funeral had been, on his account, sanctioned by the Northumberland Police. He understood that the position of the Council, on the advice of leading counsel, was that open air funeral pyres were illegal. He said that the Hindu community continued to press the Anglo Asian Friendship Society for such funeral rites and that it did not wish to break the law. On behalf of the Society he had asked for the donation of dedicated land some way from the city on which the Society could carry out future funeral pyres for fellow Hindu believers and their families. Those cremations would be carried out at no cost to those from low income families or those unable to afford the trip to India for cremation there. "[A]s a devout practicing Hindu myself, I have also expressed my own wish to be cremated on an open air funeral pyre upon my passing. My desire, in accordance with my religious belief, is that my eldest son will light the pyre and my family will stand over me as my soul safely transgresses into the after-life. Without an open air funeral pyre this cannot be done and there is simply no substitute for it." He thanked the Council for its expressed sympathy but asked for dedicated grounds to perform traditional open air funeral pyres and a declaration as to the legality of them.

5. Shortly after the Council replied, referred to the advice it had received from Mr McGuiness QC, and confirmed that funeral pyres were at the present time illegal. The Council asked for the claimant to identify specifically which parts of the advice he might take issue with. It recorded that, having received legal advice from a leading QC that the activity was unlawful, it would be inappropriate to donate dedicated land for the purpose of open air funeral pyres. The letter concluded by opining that the Anglo Asian Friendship Society sought to effect a change in the law. The Council was clearly not in a position to do that. There was further correspondence to which it is unnecessary to refer. It should be noted that the claimant has made clear that he bears no animosity towards the Council.

6. The claim was issued in late 2006. In it the claimant challenged the Council's decision of February 2006 to refuse him and the Anglo Asian Friendship Society the provision of land for a funeral pyre in Newcastle; their refusal to reconsider its earlier decision; and their decision to maintain the earlier decision. The claimant also sought review of the Council's decision not to permit the funeral rites of Hindus residing within its area to be observed or within the Council's crematoria. Thirdly, the claimant sought declarations as to whether the burning of human remains in a place which was not a crematorium was an activity subject to the provisions of the Cremation Act 1902, or regulations made under it or pollution regulations, and whether open air funeral pyres were or were not lawful.

The claimant and his beliefs

7. In three witness statements the claimant explains that he is a Hindu, born in Nairobi in 1939, and raised in a devoted Hindu family. He came to this country in 1958 and his father and a few others were the founding members of the first ever mandir (Hindu temple) in Newcastle. He also became the founding president of the Anglo Asian Friendship Society, a multi faith registered charity. The claimant has been a vice-chair of the Newcastle Racial Equality Council and arbitrator for various north-east faith organisations and, amongst other things, has been awarded a UNESCO gold medal for peacekeeping activity.

8. Because of his religious beliefs the claimant believes that nothing short of an open air funeral pyre, where his body can be burned, is good enough on his death. Any compromise in that regard will, in his view, have devastating effects for him in the afterlife. In his view Hindus are required to perform sixteen sacraments including the anthyesthi sanskara. Cremation must be performed upon an open air funeral pyre. His belief derives in part from the central role which fire forms as part of his daily worship. Every day he lights holy flames in a purpose-built havan kund chamber. The fire is the embodiment of the god Agni. From the age of five he saw how fire played a crucial role in the last rites ceremonies performed in Nairobi for Hindus and Sikhs at an open air funeral pyre site. He estimates that he attended between 120 and 130 open air funerals in Nairobi. As a mourner he found that they were a profound experience, providing spiritual enlightenment and stoic resolve to overcome the pain of personal loss. Subsequently, he had not witnessed that while attending funerals in Britain, whether Hindu or otherwise. Now that he was growing older his mortality drew his attention to the final Samskara, or duty of life. Belief in reincarnation was at the heart of the Hindu faith and death viewed as life's pivotal point, the culmination of religious devotion and the forbearer of wellbeing in the hereafter.

9. In the claimant's belief the cremation grounds for open air pyres must be in the open air and exposed to sunlight. His cremation should involve lowering his simply covered body onto wooden logs. Mourners would watch the burning pyre for hours and would thus be encouraged to purge themselves of their grief. In his view, grief now cripples Hindu families living in Britain. The claimant believes that the Vedic last rites are essential to release his soul from his body.

With the purification and sacred energy of Agni's concentrated fire these will produce a sacramental rebirth, not unlike the mythical phoenix rising anew from the flames. It is essential that ritual fire is not performed with a gas flame, since purity is essential. Also necessary, in the claimant's view, is the rite of circumambulation with an Agni-baring torch, both for the safety of the soul and mourners. There needs to be a nearby running stream or river, or alternatively showers or a fountain. These produce the thermo spiritual cooling of the cremation ground to offset the effects of the heat of the fire, enable the dispersal of ashes, and are for the benefit of those participating in the funeral ritual. It is also essential in his view to perform a ritual or actual breaking of the skull. In cremations he has witnessed that was performed in the latter stages of the cremation by the chief mourner or officiating priest. At that stage the skull crumbles immediately upon a single prod of a bamboo stick. He recognises that a symbolic breaking is also widely practiced in India, a practice families might wish to adopt.

The Council's cremation policy

10. Newcastle City Council ("the Council") has 10 cemeteries and one crematorium, on West Road. The Council says that it attempts to take into account the diverse needs regarding death and funeral rites of different groups. It has prepared a statement for its staff headed "Equalities and diversities as issues – bereavement services". For Hindu and Sikh cremations, the Council's crematorium provides a special religious symbol which can be placed on the catafalque, allows the lid of the coffin to be removed during the service so the deceased can be viewed and bereavement cards placed in it, permits mourners into the crematory to view the coffin being charged into the cremator, and enables one mourner to push the button to commence the cremation process. Family members used to be allowed to push the coffin into the cremator, but on health and safety advice this practice was discontinued. The family is also allowed to remove the cremated remains from the crematorium before cremulation. In the Council's evidence it has received only one complaint, from a Dr Anand, whose son had been cremated in what Dr Anand said was a manner which failed to accord to Hindu sensitivities. Dr Anand's letter is before the court. In it Dr Anand itemises a number of issues where he claims a Council official at the West Road crematorium insensitively impeded his reasonable requests as to how the cremation should have been conducted.

11. It is perhaps appropriate at this point to mention a short witness statement by Michael Stow, who owns some 55 acres of agricultural land about 5 ½ miles from the centre of Newcastle. About half the land is woodland and there is a stream running down its length. Mr Stow says that a planning application for change of use from agricultural land to a woodland burial site is being prepared and that he believes that one part of it could be used for open air cremations. The cremation pyre ashes could be immersed in the stream. In his view the local community and public at large would not be offended by the thought of natural cremations occurring on the land, he having been a local resident for 40 years. The cremation process on the site could be concealed from the general public. It is important to note, however, that the land lies within the boundaries

of the Gateshead Borough Council. Thus it, and not Newcastle City Council, is the local planning authority.

Government Policy

12. The Secretary of State for Justice ("the Secretary of State") has responsibility for cremation law. In his Summary Grounds for these proceedings, the Secretary of State advanced three reasons justifying the present ban on open air cremation. These were (i) considerations of public safety, having regard to the possible risks resulting from the use of open air funeral pyres; (ii) the protection of public health (the burning of human remains on open sites would result, for example, in the release of dioxins, mercury emissions, and polycyclic aromatic hydrocarbons, pollutants which are harmful or carcinogenic); and (iii) the protection of public morals and the rights and freedoms of others, having regard to the likely reaction of other persons to the practice of burning human remains other than in buildings.

13. In two statements for these proceedings Brian Patterson, who is the responsible civil servant within the Ministry of Justice, gives greater depth to these factors. Mr Patterson says that under the legislation the purpose of requiring that cremation only take place at a properly established crematorium is to ensure suitable standards of propriety and decency. He goes on to say that the Ministry of Justice is concerned that open air funeral pyres will offend against this since people seeing the body being burned on the pyre, or simply seeing the burning pyre itself, may suffer emotionally or be traumatised. For the same reasons it is highly undesirable for a cremation to be visible to those other than mourners, for example passers-by or local inhabitants. The Department's expert for these proceedings, Dr Firth, had reported on the opposition from within the Hindu community to the idea of open air funeral pyres because of the need to adapt an ever-evolving religion, climatic conditions and also the trauma of watching a cremation, especially when the body moves.

14. Although Mr Patterson concedes that a small number of Dr Firth's respondents favoured open air pyres, he says that the Ministry of Justice shared the concern set out in Dr Firth's report about the emotional effect on mourners, the body moving or not being properly burned, the ceremony turning into a spectacle, the disposal of burnt bones in rivers and also the danger of the bereaved throwing themselves on the fire.

> "The Department considers that anyone observing the pyre is likely to find the proceedings upsetting and disturbing. Even if the procedure is partly hidden from view there is the inevitable risk that the pyre will be seen by the curious and the casual passer-by, including children. Great Britain is a crowded country and it would be very difficult to find a location which would not be overseen by someone, whether a resident, worker or person engaging in a leisure activity (for example, the right to roam now enjoyed throughout Britain)."

The Ministry of Justice understood that the cremation industry made every effort to ensure that religious and cultural requirements were met and believes that

mainstream Hindu opinion acknowledges that position. There is also the need to maintain the procedural requirements set out in the cremation regulations to guard against a body being destroyed by fire in circumstances of foul play.

> "The Department further considers that, even if the open air funeral pyres were not seen or smelled, it would cause great offence to the vast majority of inhabitants of the UK to know that corpses were being burned on open air funeral pyres. The cultural expectation in the UK is that the funeral rites in this country take place in a way in which the body is concealed within a coffin at the time of burial or cremation (although it is acceptable for many to view the body in the coffin before the funeral, often when the body has been embalmed) as opposed to placing the uncoffined corpse in the grave space or into the cremator at the crematorium, all in sight of the public."

The First Intervener

15. As indicated, the first intervener is Ramgharia Gurdwara, a Sikh temple in Hitchin. The Gurdwara was set up in 1970 and was the first in the Anglia region. In a statement for these proceedings the chair of trustees, Gulzar Singh Sahota, says that it is one of the leading Sikh Gurdwaras in Hertfordshire and its congregation comprises several hundred devotees from across the region and beyond. It performs all major Sikh ceremonies and festivals and is open on a regular basis.

16. The statement confirms that should the option of open air cremations be available for British Sikhs, the Gurdwara would not only advise members about the facility but would be at the forefront of lobbying local councils to make land available for the purpose. Since Sikhs in India have routinely used open air cremations in the same way as Hindus, it could not be ruled out that some Sikhs would also wish to avail themselves of open pyre cremations. This was not a matter of doctrine and dogma in the Sikh tradition, but was the traditional practice. Since Christians and Muslims had burial grounds allocated to them, other parts of the community such as Sikhs should have their practices recognised. The Sikh Code of Conduct was quite clear in stating a clear preference for cremation of a dead body, although where this is not possible it can be disposed of in any other practicable manner. As a matter of custom and practice in India the Sikhs had long adhered to the practise of open air funerals. In early 2008 the remains of a former Punjab government minister were consigned to flames with full state honours at the Model Town cremation grounds. Similarly, the seventh President of India, Sardar Zail Singh, was ceremoniously cremated when he died in 1994. The First Intervener's statement concludes: "[O]ur claim is not based on doctrine. It is based on the practise of the Sikhs as a particular faith community. We stand by that position."

The Second Intervener

17. The Second Intervener is, as mentioned earlier, the Alice Barker Wildlife and Welfare Trust. This is a registered charity which combines social work and wildlife conservation. The trust was publicly launched in 1994 by John Barker,

also known as John Bradfield. In a statement Mr Barker explains that the concerns of the trust include attitudes to bereavement and its aftermath, in particular burial, exhumations and cremations. He says that the trust is regarded as a leading organisation campaigning in the field. It provides free information on all funeral options, but only promotes burials in bona fide nature reserves. Over 100 such burials have taken place in three nature reserves in North Yorkshire.

18. Mr Barker became involved in the open air funeral pyre of Rajpal Mehat which took place in the Newcastle area in July 2006. That was the funeral pyre which was lit by the claimant in this case. Mr Barker describes that there was no odour and very little smoke, presumably because of the dry wood and intensity of the heat. Because the heat was so intense the only bone fragments he found the next morning were small. To Mr Barker it was an intensely personal and intensely social occasion. He was profoundly moved by the community cohesion and the responsible attitude of those involved. Collectively the mourners took responsibility and maintained close physical engagement with the entire process.

> "I have no doubt, that the ability to be and feel in control of the experience was of immense value to the mourners and that the process was of infinite therapeutic value to some individuals. I believe that the experience would have served to protect their mental health, because denial of bereavement is recurrently a factor in severe, disabling grief."

Mr Barker opines that he could see that the Hindu approach to death contributed greatly to an understanding of the spiritual cognitive and social dimensions of bereavement. Those such as himself who were witness to the event could feel a change in outlook and a new respect for the living.

19. In his statement Mr Barker goes on to express his belief that our bereavement services have yet to grasp the full lessons of maximising the help provided during an emotional crisis and not after it has passed. He also sets out in his statement what he sees to be the consequences of frustrating the wishes of people as to how their funerals are to be conducted. He endorses the view that proper grieving is most disrupted amongst the migrant communities in Western nations, where there is a lack of help from ritual specialists. He concludes by saying that out of door cremations are in the public interest in terms of meeting the most basic needs of a proportion of the public; that his trust could be expanded to train volunteers to assist with funerals incorporating outdoor pyres; that mainstream bereavement services, including crematoria, often frustrate the grieving process; and that from his own experience of the damaging consequences of this, the provision of natural cremation sites would remove a potential cause of division in a society in which there is a wide variety of views regarding funeral arrangements.

20. In the bundles there is also a paper by John Barker, entitled Natural Cremation in the UK. Viability and Proposal Paper, October 2008. It sets out what is said to be a viable blueprint to accommodate the claimant's personal needs. After identifying certain overriding policy objectives, one of which is faithfully to reflect and facilitate Hindu sacramental last rites, the paper identifies various

aspects relating to design and operational priorities. Included are the need for privacy and freedom. As to location and site it is said that there would be a semi-rural location some 2km from the nearest residential buildings, with the advantage of low local ambient pollution levels, reasonable accessibility from major conurbations and low density of residential housing and passing traffic. The actual pyre site would not be directly visible from roads, local housing or land. Certain designed features are included relating to the reception building, resource centre, viewing gallery, temple site, and pyre pavilion. The pavilion would have pillars encircling the pyre, defining the site, providing easy access and acting as a partial weather barrier.

HINDU BELIEFS

The expert evidence

(a) Professor H R Sharma

21. Professor HR Sharma is the first of the claimant's experts on religious and cultural matters. Professor Sharma is professor of Veda and head of the department of Veda at Banaras Hindu University. The university was founded under Indian law to promote the study of scripture and Sanskrit literature. Professor Sharma is an acknowledged expert in the specific field of Vedic sacrifice, the spiritual concepts in Vedic texts and Vedic etymology. Professor Sharma confirms that there is a broad consensus between himself and the Secretary of State's expert, Dr Firth, on matters of scriptural Hindu theology. He says that the scriptural basis provides an extremely strong, indeed irrefutable, ground to substantiate the claimant's case that open air cremation is an essential component of the antyeshti sacrament, the Hindu last rites. He explains that Hindu last rites originate directly from hymns in the Rgveda, which is the most holy text for Hindus. He refers as well to other texts which depict funerary rites in detail. In his opinion the findings of English language scholarly research confirm that his views are consistent with virtually the entire, general academic work.

22. In his expert report Professor Sharma agrees with Dr Firth that cremation is a sacrifice to the sacred fire, Agni. The Sanskrit term for cremation, antyeshti, denotes a last sacrifice, whereby the deceased becomes the ultimate victim of the sacrificer's ultimate grand sacrifice. Agni is the living deity manifested in consecrated fire and, in practical terms, no Hindu anywhere in the world goes through life without encountering its all pervasive influence, whether during daily worship, ritual fire ceremonies (havans), weddings or funerals. Over half the Rgveda is devoted to Agni. The Brahmanas, the technical manuals on sacrifice ritual performance, depict a three stage process by which Agni makes the deceased worthy and capable of absorption into the divine plane. The three stages are purification, transformation, and the bestowal of energy. Purification comes when the funeral pyre is first lit and Agni ritually invoked. Transformation requires a nuanced fusion with Agni so that heat properly penetrates. Professor Sharma makes a stark contrast with the blistering undiscerning heat of gas cremation chambers. "Agni's thermal energy must be

carefully tempered and 'encompassed by cooling agents if it is to be properly harnessed for creative ends … if the fire burns too violently it must be put out.'" Once duly purified and transformed, the deceased can then be imbued with Agni's sacred energy and propelled on a transcendental journey towards the land of the forefathers and gods.

23. Professor Sharma says that only if the rituals are fully performed is the sacrifice acceptable and the object of cremation fulfilled. Thus the "all in one" pre-packaged offering of enclosure in coffins and pulpit prayers prior to British cremations served no meaningful spiritual purpose at all. What is essential in the ceremony is the precise and faultless execution, in accordance with rules, of numerous rites and recitations. It is critically important to understand that Agni's divine power does not apply to all kinds of fire, but only to consecrated fire. Gas crematoria provide only enclosed, industrial furnaces which cremate using a profound form of fire and preclude the strictly timed sequence of mantras and oblations. "Without a ritually pure and carefully monitored invocation of Agni, the very raison d'être of Hindu cremation becomes redundant and devoid of Agni's unique ability to perform, transform, revivify and protect the body". Thus Professor Sharma rejects Dr Firth's assertion that the mere presence of some fire, whether at a crematorium or a pyre, suffices. He also takes issue with her view that the soul departs the body at the commonly perceived point of death. In his view death does not occur at the cessation of physiological functioning but during the last rites (death in the truest sense defined as mrityu). Professor Sharma quotes the Satapata Brahmanam, II.2.4.8

> "And when he dies … and when they place him on the fire,
> Then he is born again out of the fire, and the fire consumes
> only his body."

He comments that by contrast to the ostensible destructive act of cremation, sacrifice to Agni entails profound, multi dimensional rebirth.

24. Precise instructions dictating the requirements of cremation site are drawn, Professor Sharma says, from Satapata Brahmanam, XIII.8.1 and Asvalayana-Grihya-Sutra IV.1.2. These are

- an open site upon which the sun can directly shine at midday;
- fertile land surrounded by a thicket of trees (with the exception of certain categories of thorn bearing plants);
- a site not visible from neighbouring houses nor from the nearest road;
- a site near a stream of running water, to the north or west; and
- a trench to be dug on the side of the site and consecrated prior to cremation, to the dimension of one fathom breath, one span depth and the length equivalent to a man with upraised arms.

25. For Professor Sharma there can be little debate as to the significance of these detailed requirements. He explains the Banaras Crematorium, mentioned below,

as a local government initiative specifically for the benefit of low income families. Notwithstanding some tokenist revisions, the absence of Agni utterly precludes the efficacy of the sacrificial last rites. In his view the advent of crematoria in India is less relevant than the fact that natural cremation is still practiced by the overwhelming majority despite the comparative convenience of crematoria. He comments that India is a secular country and in parallel to the terms of the claimant's case India provides funeral pyres for followers of the sacraments, and crematoria for those who are not. As to Dr Firth's informants, if they represent current cremation practices among Hindus in the United Kingdom it reveals an alarming lack of knowledge and awareness. He is critical of Dr Firth's straw poll, mentioned later in this judgment.

26. Professor Sharma comments critically on two alternatives for Hindu cremation advanced by Dr Firth, but positively on that suggested by the Second Intervener. In relation to Dr Firth's proposals, he says that his report explains why crematoria, purpose built or otherwise, cannot comply with the stipulated requirements of a Hindu cremation ground. Nor do they enable a nuanced fusion of mantra, sacred fire and oblation. He sets out the essential rituals which are impossible or extremely difficult to observe during cremation in the enclosed gas crematorium furnace: Agni invocation and the regulation of its discrete stages are relegated to a uniformly destructive fire; cirumambulating the body with Agni, to afford protection from spirits, becomes meaninglessly substituted with incense or water for fear of health and safety hazards; consecration of the cremation site, to maintain the appropriate level of divine thermal energy before each cremation, becomes impractical; lighting of the pyre by the chief mourner is the most significant and poignant rite of the funeral ceremony for which pushing the coffin into the furnace is not really a substitute; there is an inability to perform the kapala kriya, to release the final vital breath so that the soul can progress from the state of preta; and meticulously timed sequences of mantras and oblations are tokenisticly pre-packaged. In the concluding section of his report, Professor Sharma suggests that the use of later texts to supersede Vedic funeral rites doctrine has represented a pervasive bias in Western Indology since the 19th century.

(b) Dr Roger Ballard

27. The second of the claimant's experts is Dr Roger Ballard, from the independent Centre for Applied South Asian Studies in Manchester. Dr Ballard was an academic but is now a consultant anthropologist and has given over 400 expert reports for use in legal proceedings concerning British Indic faith community issues. In Dr Ballard's view, human death has far greater implications beyond the disposal of one's physical remains. The immense social and psychological impact of death raises fundamental questions of mortality, meaning and human purpose. Funerary rituals provide spiritual succour and are best regarded as quintessentially religious events, regardless of the scriptural basis or limited common knowledge of refined theological and cosmological premises. Dr Ballard opines that the Indic traditions do not accept burial as a proper terminal condition for human beings expecting reincarnation, and thus the ritual reductions of the physical remains to ashes in the flames of the pyre is a central focus of the funerary process. By contrast, when cremation is practiced by

followers of Abrahamic traditions, it is regarded as an inferior means to burial where the internment is ritualised. With cremation, however, while the internment of the ashes may be the focus of ritual activity, cremation itself is viewed as a means of disposal which is modern, pragmatic and space saving. Dr Ballard notes that despite the secularisation of contemporary Britain there are no signs of an abandonment of the symbolic celebration of death.

28. Commenting on the Hindu tradition, Dr Ballard notes that the cyclical process of existence and eventual re-emergence of life in new manifestations means a greater concentration on the rites of passage when compared with the more linear vision around various Abrahamic traditions. In Indic religious traditions failure properly to perform these rites is held to damage one's karma and also the future course of one's atma (soul). He underlines the importance of the Hindu fire ceremony, a central component of every Hindu sacrament including the last rite of passage, the antyeshti sanskara, by contrast with British cremations. In Indic conventions the treatment of the body is a public event. Far from concealing it the mourners take a "hands on" approach in preparing it for the last journey. Preparation of the body is not handed over to professional specialists and the family is involved at every stage in the proceedings.

29. Dr Ballard draws attention to the "age pyramid" of Britain's Hindu population, which is now relatively mature since immigration reached its peak several decades ago. The result is that there will be an increase in Hindu deaths in the coming years and hence a greater demand by Hindus for their own funeral rituals. He opines that the contradictions between the Abrahamic and Indic expectations are possibly beyond the degrees of mutual accommodation on offer in British crematoria. Dr Ballard's view is that open air cremation has long been the routine format for end of life rituals in virtually every Indic tradition.

> "My own first hand observation of South Asian settlements in the UK is that popular domestic ritual practice remains deeply traditional in character, and strenuous efforts ensue to reproduce all aspects of what was done "back home" despite the challenges of a largely alien environment. … No doubt funerary services have responded to pressure from their Indic clientele, enabling a range of practical accommodations … [T]he level of accommodation falls far short of ideal expectations and do not enable the full panoply of ritual practices most Hindus and Sikhs wish to deploy". …

Crematorium facilities in Newcastle, and indeed in the United Kingdom at large, are organised and designed to preclude most, if not all, from Indic faith backgrounds from expressing their last rite beliefs and practices as fully as they wish. In a supplementary report Dr Ballard address the issue of whether Indic funeral pyres would offend against proprietary and decency. He takes the view that this raises a fundamental issue, contemporary indigenous socio-cultural conventions regarding the sight of a corpse as something likely to offend. That, in his view, is a culturally grounded taboo which is in no way universal.

(c) Dr Firth

30. The Secretary of State's expert, Dr Shirley Firth, has as her special field of study death and bereavement in the British Hindu community. Her research has given rise to a number of publications, most notably Dying, Death and Bereavement in a British Hindu Community (Leuven, Peters, 1977). Dr Firth has attended many Hindu funerals among the Indian community in this country and in addition to the ethnographic aspect of her research has traced funeral traditions through the sacred texts of Hinduism. During her university career she taught courses on Hinduism, in particular on death in the Indian traditions. Her reports for this case are based partly on the field work undertaken prior to publication of her book but as well on interviews with 26 Hindus, five Indian undertakers and, amongst others, officials of national Hindu associations. She describes this as a "straw poll" of public opinion. It is fair to say that some of Dr Firth's informants have asked to be dissociated with her first report.

31. Dr Firth opines that it is quite difficult to state what a Hindu view is because there are such a range of languages, traditions and regional and caste customs. Hindus may follow different gurus, or belong to a sect or none at all. Many British Hindus have come directly from India but others from East Africa. Most of her informants were mainly Punjabi and Gujarati. The process of migration brings its own adaptations and there is a syncretisation of different traditions. In this country, she says, many temples started off, and some remain, eclectic, welcoming people of all traditions. Elsewhere there are enough members of a particular community so that, for example, Gujarati temples have been established. She refers to

> "the difficulty of stating any one is specifically Hindu, but may be associated with the tradition of the individual. How funerals are conducted is thus influenced by the sampradaya [sect] to which the family belong. As to beliefs, they vary enormously, and it is sometimes difficult to disentangle traditions, since there is no one authority, and no single scripture, despite claims that everything is in the Vedas."

32. Dr Firth discusses the claimant's references to a "good death" and "bad death". As to a good death, she says that if one observes one's dharma, often translated as religion, one generates good karma and hopes to be reborn in a better life next time. The ultimate goal is to get off the treadmill of recurring births and deaths and to reach liberation, nirvana. The concept of good death is very much a feature of the thinking of practising Hindus, but applies more than just to cremation. A good death is a death at the right time astrologically and in the right place, ideally on the banks of the Ganges in Banaras but, if not, at home and on the floor. A person should be ready spiritually and as death approaches the person should deal with unfinished business, saying goodbye to people, giving property away and so on. The most important thing at the point of death is to remember God. By contrast a bad death is a sudden, premature or unprepared death. While a good death and rebirth depend on one's good karma or bank of good deeds, relatives have to help by ensuring the end is quiet and peaceful, with rituals at the moment of death. The responsibility is that of the chief mourner, the eldest or the youngest son.

33. In describing funerals in India Dr Firth says at the outset that there need to be elements of generalisation because of the complexity of Hinduism and the enormous variations according to caste, scriptural injunctions and guidelines, sex, and local variations and customs. Pandits differ in some details according to the traditions and Vedic texts they follow. The rituals themselves are evolving. There are also regional variations. Electric crematoria are increasingly common in urban areas in India. Nonetheless, Dr Firth describes how following a death the body is laid on the floor with a light placed by the head. After it is bathed it is placed on a ladder-like wooden stretcher. Various substances are placed on it and it is decorated. In the house the mourners circumambulate the body in an auspicious direction, clockwise, and it is then taken outside and carried to the cremation ground. The cremation journey itself is ritualised with a number of stops for the performance of rituals.

34. Cremation traditionally takes place on an open pyre, although now in many cities there are electric crematoria. Dried cow dung, one of the five sacred products of the cow, may be used for all or part of the pyre. For those who can afford it, sandalwood is used. The stretcher, if it is wood, is placed on a pile of wood, arranged on the ground. At the head of the procession the chief mourner brings fire in a pot from the domestic pyre. It is his sacred duty to light the fire. The fire is lit with camphor, burning cow dung from the domestic fire, and kusha grass, or wood. This is the antyeshti, the last sacrifice. In some regions the chief mourner also breaks the skull. A pot is broken in most regions in India at some stage before or during the cremation, to symbolise the release of the atman from the head as well as the breaking of the bond with the family. Following the cremation the male mourners bathe and return home. The women will have thrown out the deceased's possessions and cleaned the house and then prepared a simple meal for the mourners. This is only the beginning of the mourning rituals, which continue over the following days. Further rituals occur throughout the next lunar year, with offerings made frequently to the deceased. There is a feast on the anniversary of the death.

35. In her first report Dr Firth discusses the scriptural origins of the cremation ritual. While it draws on the Vedas, as Professor Sharma explained, the main source of the ritual today are the Ashvalayana Grhya Sutra and the Garuda Purana. Echoing Professor Sharma, Dr Firth says that cremation is a sacrifice to the sacred fire, Agni. Although she opines that it is not clear exactly what survives physical death in the Rgveda, she says there is no express reference to the disposal of ashes in the Vedas unless the burial hymn can be taken to refer to it. The Garuda Purana introduces ideas such as the breaking of the skull.

36. Commenting on the claimant's case, Dr Firth says that neglecting the antyeshti commandments is seen, in the scriptures and in practice, as preventing the soul from reaching its destination. But there appears to be no evidence from the texts or ethnographic studies that this has to involve a pyre out of doors. Historically this was the only option, but the fact that even in Banaras crematoria are increasingly used suggest that it is the rituals accompanying the cremation which are essential, not the open air pyre per se. She includes a personal communication from Professor Parry, to whom I refer later in this judgment:

> "Where is the textual authority for saying [the pyre] has to be out of doors? Where is the ethnography to justify this claim? Even in Banaras most people don't believe this and some bodies are brought to Banaras for an electric cremation, suggesting it is the place [Banaras] and the rituals that matter, not the outdoor pyre on its own."

In commenting on the claimant's case, that only an open pyre will enable him to attain reincarnation, and as to whether this is a typical view, Dr Firth explains the difficulty that Hinduism is so complex, with many different scriptures and sects. In the diaspora, a Hindu may well pick one aspect of, for example, a good death to the exclusion of others. In the "straw poll" which she conducted for the report, it was unanimously the view of Hindus, whom Dr Firth interviewed, that reincarnation did not depend on an open pyre and that the soul left the body at death. Even one of her pandit informants, who wanted an open pyre in line with tradition, agreed that an electric or gas crematorium would not make any difference to the progress of the soul, since this was based on a person's karma.

37. In a second statement Dr Firth comments on the expert reports by Professor Sharma and Dr Ballard. She reiterates the nature of her research. Her work is not theoretical nor based on scholarly questions as to what is or is not good practice, but based on observations and reports of what ordinary Hindus and some pandits have said and done. Thus when Professor Sharma states that British cremations serve no meaningful spiritual purpose, Dr Firth replies that for the participants they do. "British Hindus and their pandits have to salvage what they can from a difficult situation and invest it with significance and meaning." Dr Firth says that the difficulty is whether all Hindus would take the same position as the claimant and Professor Sharma that open air funeral pyres are the only method to enable the soul to move on to its next life and is therefore an essential part of Hindu religious beliefs. Dr Firth is puzzled as to how Professor Sharma has identified the prerequisites of an essential Hindu cremation from the many details set out in the holy texts. She suggests that the rituals Professor Sharma describes are designed for one who is initiated into and maintains sacred fires. She knows of very few Hindus in the United Kingdom, or among those she knows in India, who qualify. Would this mean, she asks, that no other Hindu could qualify for the outdoor ritual?

38. Crucially most of Dr Firth's informants in both her recent research and earlier field work did not see the key to proper rites to be an outside pyre; they had other concerns. The majority of Hindus in the United Kingdom, to her knowledge, do not believe that salvation or rebirth depends on an open pyre and observation of the five conditions set out in Professor Sharma's report. Cremation, however, is absolutely essential to enable the preta to move on to its rightful destination. Even the pandits she interviewed in Banaras said that they had problems viewing cremation as a sacrifice, despite the term antyeshti sanskara. None of Dr Firth's informants in the United Kingdom were satisfied with aspects of current crematoria here but wanted to improve them, rather than to have open air pyres. In her first report Dr Firth advances a number of proposals whereby that could be achieved.

39. In concluding Dr Firth says that her informants thought open air pyres were unrealistic in the United Kingdom during much of the year. A good death depends on a proper spiritual and practical preparation for it: rituals at the moment of death, dying in a conscious state with the mind fixed on God, cremation, disposal of ashes in a river, and post cremation rituals to create a new body, culminating in the sappindikarana ritual, which sends the deceased to join his ancestors. For the majority of Hindus the need was to adapt the existing facilities to Hindu cremations so that they can be consistent with their beliefs. The claimant's belief that an open air pyre is required as a matter of religious obligation is not consistent with the religious beliefs of the majority of British Hindus, who regard a good death as having many more aspects to it than an open air funeral pyre. Concerns about open air pyres among her informants included difficult weather conditions, the trauma for the chief mourner of having to preside over the cremation and the need to perform the breaking of the skull.

(d) Dr Raj Pandit Sharma

40. Finally under this heading it is convenient to include reference to a brief statement by Dr Raj Pandit Sharma, who is currently head of the Hindu Priest Association in the United Kingdom. His statement was prepared during the course of the hearing to assist me with a number of issues I raised with the claimant's counsel. First, he explains that there are a number of Holy Books within the Hindu faith spanning several volumes, each compiled over thousands of years. They are in Sanskrit and although translated it is widely agreed amongst most Indologists that the translated versions are not accurate and distort the true context in what is being said. He says that only Sanskrit scholars and trained pandits are qualified to decipher and interpret these books. Secondly, Dr Sharma clarifies the abhorrence of gas as a substitute for natural fire. Agni, meaning sacred fire as from fire per se, is kindled using pure ingredients, unused, untreated wood. The body on the pyre is sacrificial and a final offering, in other words antyeshthi. Agni cannot be equated with other types of fire such as fire used to cook or provide warmth. Gas, because of its origin, is impure and wholly unacceptable. Thirdly, Dr Sharma spells out the precise requirements pertaining to water for cremation: first, water is for washing and bathing after the cremation and second, it is to dampen the embers. The purest source of water is preferred for this purpose, such as a running stream or a substitute like a fountain or a tap.

The literature

41. Professor Jonathan Parry's Death in Banaras (Cambridge, Cambridge University Press, 1994) is perhaps the most outstanding piece of literature before me. Professor Parry was Professor of Anthropology at the London School of Economics. His study in Banaras was of communities of "sacred specialists", who presided over rituals concerned with the disposal of the corpse, the fate of the soul and the purification of mourners. The work is referred to by the experts and is cross-referred to in some of the other literature before the court. Professor HR Sharma cites the book with approval.

42. In his chapter "The last sacrifice", Professor Parry refers to good and bad death in the Hindu tradition. He says that cremation is known as dah sanskar, the

"sacrament of fire" or, more revealingly perhaps, as antyeshti, the "last sacrifice".

> "Very closely connected with sacrifice … the dead man [is] an offering to the Gods." The typical Brahmanic sacrifice is a fire sacrifice (hom), and the sacrificer's "last oblation" (and antyahuti) to the fire is his own body (at 178, footnotes excluded).

Commenting on the parallels between cremation and the sacrificial procedure, Professor Parry quotes from V. Das, Structure and Cognition: Aspects of Hindu Caste and Ritual, 2nd edn, Oxford University Press, 1982.

> "Thus the site of cremation is prepared in exactly the same way as in fire sacrifice, i.e. the prescriptive use of ritually pure wood, the purification of the site, its consecration with holy water, and the establishment of Agni [the God of fire] with a proper use of mantras … The dead body is prepared in the same manner as the victim of a sacrifice and is attributed with divinity. Just as the victim of a sacrifice is exalted not to take any revenge for the pains which the sacrifice has inflicted on him so the mourners pray to the preta to spare them from his anger at the burns he has suffered in the pyre (Garuda Purana)" (at 122-3).

Professor Parry continues that the corpse is given water to drink, is lustrated, anointed with ghee and enclosed in the sacred place by being circumambulated with fire along the lines of what happens to a sacrificial victim. Like the sacrificial victim the corpse is treated as being as of great sacredness, even as a deity. The corpse must be guarded against pollution and the funeral pyre is ignited by the chief mourner only after his purification.

43. Professor Parry points to the parallels with birth and the symbolism of birth and confinement in a cremation, since birth comes from one's parents, from sacrifice and from cremation. This explains the cracking of the skull, since during the fifth month of pregnancy vital breath enters the embryo through the suture at the top of the skull. That is released in death by the rite of kapal kriya, the rite of the skull already described. Professor Parry comments that nowadays many sons do not have the stomach to deal the deceased more than a symbolic blow (at 177). Professor Parry's informant priests advanced various theories but

> "all agree that some crucial aspects of the person's life-force remains imprisoned in the body when normal physiological functions (pulse, heartbeat, breathing) have ceased. Consistent with this, it is held to be completely inappropriate to refer to the deceased as a disembodied pret until after the rite of kapal kriya" (at 181).

Thus life is finally extinguished on the pyre and only at the moment of the breaking of the skull does death pollution begin. As Professor Parry says, confirmed by at least one of his informants, all this implies that the corpse is not

a corpse but an animate oblation to the fire so that a person is killed on the pyre. On this theory cremation becomes a sacrifice in the real sense of the term. The view of others, however, is that life is extinguished at the time of physiological arrest and the corpse is merely an impure carcass. It is the deceased's eldest son who in principle is "the one who gives fire", the "vehicle of the preta".

44. The claimant places considerable weight on an article by Dr Pittu Laungani, "The Changing Patterns of Hindu Funerals in Britain", Pharos International, vol 64(4), 1998. Dr Laungani is a former associate professor of psychology at South Bank University. After outlining the attitude to death, Dr Laungani describes funeral arrangements in India. The article is accompanied by photographs. He describes how the body is taken to the crematorium and is placed on a pile of logs with logs placed on top of the body to secure it. The priest then performs the final ceremony, lights a fire and passes the burning torch to the nearest and closest relative of the deceased. In accordance with the Hindu scriptures it is the sacred duty of the eldest son to perform the final funeral rites of his father. Dr Laungani then goes on to say that although some Hindu families may bring the deceased home and undertake the preparation of the corpse, most Hindus entrust these arrangements to funeral directors. He calls for research into whether this is because of fears associated with handling a corpse, inexperience, ignorance of their own civic rights in such matters, or unwillingness to question bureaucratic caveats.

45. In comparing the Hindu funeral practices in India with those of Hindus in Britain, Dr Laungani says that one is struck by the vast differences. He makes a number of suggestions so that Hindu funerals in Britain may be more in keeping with their tradition. One radical solution he advances is that Hindus and Sikhs in Britain come together and with assistance from the local authority acquire land and build their own crematoria. In his conclusion Dr Laungani pleas for an appreciation of Indians in the West from their own cultural perspective. Westerners make the mistake of being misled by the perceived westernisation of ethnic minorities. The assumption is that if the Indian speaks English fluently, dresses in a Western manner, and is involved in a professional occupation he has been divested of most, if not all, of his cultural inheritance. Beneath that appearance, however, is found a psyche whose routes can be traced back to the person's own ancestral, cultural upbringing, which will exercise a profound influence.

Hindu organisations in Britain

46. The only evidence before the court of the population of Hindus in the United Kingdom estimates it variously as between 600,000 and 900,000 persons, one to one and a half percent of the population. There are a number of bodies representing Hindu interests in the United Kingdom, including the Hindu Council and the Hindu Forum.

47. The Hindu Council is said to be Britain's largest national network of Hindu temples, bodies and cultural associations, coordinating all different schools of Hindu theology within the United Kingdom. In a statement in April 2007, the Hindu Council said that it had never supported the introduction of open air pyres, believing them to be a cultural, rather than a religious phenomenon, and

unsuited to the British climate. Given recent public attention, however, its executive had consulted widely with members. While its members understood and sympathised with the concerns of the Anglo Asian Friendship Society – the claimant's society – "the consensus of opinion is that there is no theological requirement for open air funeral pyres in the UK and that the majority of British Hindus do not wish to see them introduced here." The statement went on to say that it had become clear to the Hindu Council, as a result of its enquires, that the Hindu community felt that facilities at British crematoria do not fully meet their needs and that it had begun the process of commissioning a report on the matter to explore how theological and practical matters could be addressed.

48. Then in October 2008 the Hindu Council wrote to the Newcastle City Council in relation to the claimant's wish to be cremated on an open air pyre. It was pointed out that Hindus deal with death in an elaborate manner over eleven to thirteen days, depending on custom. Prayers were performed at home and then the body was taken to the crematorium where it was returned to its elements through the use of fire. The soul would have left the body immediately on death, but until all the eleven days of ceremonies are completed the belief is that the soul may still have an attachment to the material world. In the Hindu Council's view, the problem was that the body had to be cremated according to current crematoria rules in the United Kingdom. After intense debate amongst its entire executive, the council were of the opinion that while it remained against the idea of open air cremations, crematoria fell well short of accommodating Hindu sentiments.

49. The letter then set out five specific changes to be allowed "to cover all eventualities in an ancient faith which has always moved with the times". These included allowing the coffin to be without a lid, prayers to be read in the ceremonial hall, the body to be moved to the retort area, a short ceremony to be held to ignite the fire in the coffin, and the priest to conduct a small ceremony. Once completed the coffin, without the cover, and the small fire burning inside, could be moved into the retort, the retort to be thoroughly cleaned before the cremation. After the cremation the choice should be given to the family to supervise the collection and grinding of ashes. Those specific changes in procedure would be optional. Each family would decide whether to exercise their choice of an open air cremation along those lines, with Vedic rites suited to the modern era. The letter concluded by pointing out that the polarity of opinions within the executive was extreme, with a lot of emotion.

50. In February 2009 the Hindu Council issued a further policy statement on open air funeral pyres. Following its consideration of the report by Professor H R Sharma, the executive had revised its policy. While essentially it remained unchanged it now included an additional clause:

> "It was recognised that open air funeral pyres are sanctioned by Hindu scriptures. Therefore individual choice of those Hindus who follow the directives of Hindu scriptures and wish to have open air funerals should be honoured."

The statement added that the executive considered reform of existing crematoria rules, along the lines of its letter to Newcastle City Council, remained the

priority. However, it also requested the authorities to allow for new open air facilities in a small, controlled area away from existing crematoria, "for those Hindu's whose consolation rests in adhering to ancient scriptural guidance".

51. The Hindu Forum claims to be the largest representative body for British Hindus, with over 275 member organisations. There is no statement from it on the matter before the court, but the claimant referred me to a press statement from its secretary-general in 2008 in which he said "according to Hindu scriptures, the body is laid on an offering to the fire and because it is an inauspicious fire it must be let out into the open air. There are certain rituals that can be performed only in the open air. There is a demand within the community for this and they must have that choice. But we recognise it must not break the law and endanger public health and safety."

52. There is also a letter to the claimant dated November 2008 from the National Council of Hindu Priests UK. The council says that it is the first and largest umbrella organisation representing pandits in Britain and the only such organisation operating at a national level. The council was not a party to the Hindu Council's consultations but had taken the opportunity to discuss the issues raised by in the claimant's judicial review. After discussing the role of pandits in Britain, the council goes on to comment on the lamentable provision in Britain for Hindus using public bereavement services. Hindu families in Britain, it says, are confused about what is the right thing to do according to their religion. Regrettably pandits in Britain have been unable to take a collective stand on the issue. The council was not aware of any single practicing pandit in Britain with relevant training in Hindu last rites sacraments, a highly specialised area of ritual practice. The council had conducted painstaking research into the ritual imperatives of the antyeshti sanskara and was clear that,

> "Subject to legality and issues of wider concern, open air cremation (as part of the entire ritual process) is the only method the [National Council] can officially endorse – based exclusively upon the theological requirements of Vedic scriptures and ritual practice. However, the [National Council] is not prescribing open air cremation upon Hindus in Britain. As they have thus far, pandits in Britain will continue to play a valuable role in numerous forms of last rites ceremonies, guided by what individual families feel is most appropriate for them. … We feel there is a very large prospect of use of open air cremation grounds in Britain. However this would only be realised upon absolute clarification of the law and eventual satisfaction that approved sites were providing appropriate facilities in safe and sensitive surroundings. … If British laws permitted, the [National Council] members would advise families that open air cremation is an essential part of the Vedic sacrament and naturally this would be expected to substantially increase existing levels of demand in the future."

THE SIKH POSITION

53. The position of the First Intervener has been outlined earlier. It refers to the support of a relatively small number of the some 600 Gudwaras in the United Kingdom. It acknowledges that there is opposition.

> "[T]his opposition is on doctrinal grounds, we accept that Sikh doctrine as set out in the Sikh code of conduct (which was established in the early 20th century) is less than helpful but our claim is not based on doctrine. It is based on the practice of the Sikhs as a particular faith community."

54. Professor Hew McLeod is a leading historian of Sikhism. (He was formerly professor of history at the University of Otago in New Zealand. His contribution was acknowledged in a book of essays, Sikhism and History, edited by Pashaura Singh and N Gerald Barrier, published by Oxford University Press in the United States in 2004, to which Sikh scholars contributed). In his book Sikhism, (Penguin Books, 1997), Professor McLeod asserts that in studying the religion of Sikhs one is inevitably confronted by the same contrast as affects other religions. To any question normative Sikhism, or at least orthodox Sikhism, gives one answer; Sikh practice, however frequently delivers a different answer. Professor McLeod rejects the view that the study of the religion of the Sikhs should focus on the ideal to which all Sikhs should strive to match. His approach is that religion can only have meaning as applied in practice and if the Sikh religion is to be understood it is necessary to deal directly with a variety of social routines (at xxii). Professor McLeod says that while the Sikh religion is today separate and independent that was not always the case. However, during the late 19th and early 20th centuries reformers emphasised the distance between the Sikh and Hindu tradition, with the result that Sikhism emerged as a genuinely separate system (at xxvii). Professor McLeod emphasises that not all Sikhs believe in the religion of the Sikhism. It is quite possible to be born into a Sikh family and maintain the outward appearance of a Sikh without assenting to the religious doctrines of the community (at xxix).

55. The Guru Granth Sahib, assembled in its original version by Guru Arjun Dev in 1604, is the fundamental religious text for Sikhs. It was not suggested before me that it contains anything which relates directly to cremation by open air pyre. In 1894, Major A E Barstow of the 15th Ludhiana Sikhs, and later of the 2/11th Sikh Regiment, published his book, The Sikhs. A revised edition was published in 1928 at the request of the Government of India (Low Price Publications, Delhi). The book, in Major Barstow's words, represents an earnest endeavour to interpret in a readable form the masses of information on record in connection with the Sikhs. Under the heading "Ceremonies relating to death", Major Barstow says that these are simple compared with those carried out by Hindus.

> "When death is approaching the patient is laid on the floor, though amongst the educated community he is allowed to remain on his charpoy until death overtakes him. The principle adhered to is that he should be cremated before sunset. If, however, death occurs in the night, the corpse is kept and watched until morning. In the meanwhile wood is collected n the burial ground. The corpse is then lifted onto a bier and

> carried on the shoulders of four men, near relatives of the deceased, to the place of cremation. The procession follows the bier reading "Shabads". The body is put on the funeral pyre and set alight. When the body is nearly burned the procession returns, halting at some well or tap, where they bathe or sometimes only wash face, hands and feet.
>
> 'Karaparshad' is either prepared on the spot or at the house of the deceased, at which all members of the procession partake. They then disperse. A male member of the family remains outside, and a female inside, to receive the sympathies of relatives and other villagers who come there for the purpose. The reading of the "Granth Sahib" commences and is terminated on the 10th day after death …
>
> On the third day after death the bones of the deceased are collected …
>
> A child of under 5 years of age is usually buried …" (at 149).

56. As part of the revivalist movement in the late 19th and early 20th centuries, the Reht Maryada, or Code of Conduct for Sikhs, was developed. It was not until mid century that the final version of the Code of Conduct was agreed. Article XIX(c) reads:

> "However young the deceased may be, the body should be cremated. However where arrangements for cremation cannot be made, there should be no qualm about the body being immersed in flowing water or disposed of in any other manner".

Article XIX contains instructions about what should be recited, how the survivors should grieve, and how the body should be prepared. Article XIX(d) says that as to the time of cremation, no consideration should weigh as to whether it takes place during day or night. Article XIX(e) reads that while the body is being carried to the cremation ground, hymns that induce feelings of detachment should be recited. On reaching the cremation ground the pyre should be laid, then the Ardas for consigning the body to the fire should be offered. The dead body should then be placed on the pyre and the son or any other relation or friend of the deceased should set fire to it. Further guidance is set out. When the pyre is fully aflame the Kirtan Sohila should be recited, and the Ardas offered. Piercing the skull is contrary to the Guru's tenets. When the pyre is burnt out the whole bulk of the ashes, including the bones, are to be gathered up and immersed in flowing water or buried at the place. There are various injunctions against identified practices set out in Article XIX. Once the congregation returns home, a reading of the Guru Granth Sahib should be commenced and should be completed on the tenth day. In oral argument, the First intervener referred to the concept of a prescribed 'Sikh Code of Conduct Funeral' under the Rehat Maryada.

57. Referring to these provisions in the Code of Conduct, Professor McLeod says that in Western countries the rite has necessarily been adapted to local convention by placing the body in a coffin and transporting it in a hearse to a crematorium. He adds that the lighting of the pyre is replaced by the mourner pushing the button which consigns the body and the coffin to the furnace. Coffins are not a feature of normal Sikh burials and their introduction, though necessary, has caused some dismay amongst those brought up in India.

58. Commenting on the Code of Conduct, the First Intervener says that it is quite clear in stating that although the clear preference is for the cremation of a dead body, where this is not possible it can be disposed of in any other practicable manner. However, this only makes a distinction between dogma and doctrine on the one hand, and custom and practice on the other. As a matter of theology Sikhs are not enjoined to have open air funerals. It was not difficult to see why Sikhism has a different religious doctrine to Hinduism, since Sikhism was founded in the 16th century to attack caste, institutionalised religion, priesthood and the worship of icons, and its teachers taught in the local vernacular and encouraged women to join their gatherings. As a matter of custom and practice in India, Sikhs have long adhered to the practice of open air funerals both in the rural Punjab and big cities like Delhi. In fact Sikhs and Hindus share the same cremation grounds.

59. There is a letter in the evidence from the President of the Shiromani Gurdwara Parbandhak Committee in Sri Amritsar, the Golden Temple. It is directed to the Prime Minister of India but contains a request that the Government of the United Kingdom "may kindly be impressed upon the need for allowing open air cremations about 8-10 kms away from towns". A letter from the President of the Delhi Sikh Gurdwara Management Committee to the claimant appreciates his efforts for the establishment of open air cremation grounds in the United Kingdom. "No doubt the Government of the United Kingdom has provided electric cremation centres in the state but in that system last religious rituals cannot be performed, which can only be performed in an open air cremation ground".

60. By contrast a letter from Dr Indarjit Singh, Director of the Network of Sikh Organisations in the United Kingdom, which links more than 90 United Kingdom Gurdwaras and other Sikh organisations, asserts that "the suggestion that Sikhs want open air cremations is absurd. Modern day crematoria are perfectly acceptable to Sikhs … What are the public, not knowing the truth behind cheap media headlines, supposed to think about media reports that suggest the possibility that perhaps thousands of open air cremations marring the tranquillity of our beautiful countryside? They would hardly feel well disposed to the communities supposedly involved."

ENVIRONMENTAL etc. MATTERS

61. There are two expert reports from Mr M P Etkind, head of the local authority pollution control policy team in the Department for Environment, Food and Rural Affairs. He explains that the government's position is that while open air funeral pyres will result in emissions which could cause harm to public health, the Government does not seek to justify a ban on open air funeral pyres on

public health grounds. It takes the view that public health concerns can be addressed by regulation.

62. Mr Etkind explains that cremation activity is regulated under a regime known as Local Air Pollution Prevention and Control (LAPPC), which provides for the regulation of atmospheric emissions from a large number of installations covering approximately 80 different sectors. The legal basis lies in the Environmental Permitting (England and Wales) Regulations 2007, SI 2007 No 3258 (previously the Pollution, Prevention and Control (England and Wales) Regulations 2000, 2000 SI No 1973), where cremation of human remains is listed as an activity requiring a permit (schedule 1, part 2, part B, section 5.1). Mr Etkind sets out the definition of "installation" in regulation 2 as a stationary technical unit. In the light of a General Guidance Manual, he opines that

> "a simple funeral pyre comprising only an organised heap of wood on which the body is place[d], without any technical apparatus, does not amount to a technical unit which would constitute an installation for the purposes of the PPC Regulations. A pyre which consisted of an engineered grate and/or some form of hood to capture some or all of the emissions, as referred to in Dr Firth's expert evidence, would in my view be an installation for these purposes. Consequently an open pyre comprising no technical apparatus would be outside the PPC controls (but not, as such, prohibited); a pyre consisting of technical apparatus would be subject to LAPPC."

Mr Etkind goes on to explain the ramifications for installations which require a permit. He refers to the steps necessary for crematoria to comply with statutory guidance, most recently to create a secondary combustion zone in which polluting gases are substantially destroyed. He also refers to recent requirements to comply with mercury control standards, necessitating filters or equivalent technology to be fitted after the secondary combustion zone.

63. In his second witness statement dated 20 February 2009, Mr Etkind says that to his mind the key components of a pyre for the purposes of determining whether it would be an "installation" are a trench and the large logs and wood spindles placed in the trench. From his understanding of the policy of the Environment Agency, and that the trench described in Professor Sharma's report is little more than an earth trench for the purpose of supporting the foundations of the pyre and collecting the resultant wood ashes, it seems to him that a pyre of that character would not amount to an installation. However, were there to be a grate, which would presumably be supported by a cement block structure, that could reasonably be regarded as a technical unit. Having a grate would improve combustion and therefore reduce polluting emissions so that it would be desirable from an environmental prospective. The existence of a pillared structure, or windbreaks, would not in his view lead to categorisation of an open air pyre as a technical unit.

64. As far as the Clean Air Act 1993 is concerned, Mr Etkind explains that that is concerned with dark smoke emissions from open burning, such as a bonfire. He opines that although he has no evidence as to whether the burning of a body

would cause emissions of dark smoke, he believes it to be likely. The use of materials other than clean or virgin wood, the composition of any covering wrapped or draped over the body, and whether any items other than the body are placed on the pyre would also affect the potential dark smoke emission. The Clean Air Act regime would be applicable to any funeral pyre which did not comprise technical apparatus.

65. References are also made in Mr Etkind's report to the statutory nuisance regime in Part 3 of the Environmental Protection Act 1990, which defines a statutory nuisance as smoke emitted from premises so as to be prejudicial to health or a nuisance, or dust, steam, smell or other efflua arising on industrial trade or business premises and being prejudicial to health or a nuisance. Dark smoke emitted otherwise than from industrial or trade premises does not fall within the scope of Part 3. Mr Etkind's report also refers to the Oslo and Paris Commission Recommendation 2003/4 on controlling the dispersal of mercury from crematoria. The recommendation provides that contracting parties should ensure that operators of crematoria prevent the dispersal into the environment of mercury from human remains, especially from dental amalgam. "Crematorium" is defined as "an establishment for the disposal of human remains by cremation". Although the recommendation is not binding, the United Kingdom intends that it should be followed. However, no consideration has been given to its implementation in relation to pyres which do not comprise technical apparatus.

66. Statutory guidance in relation to crematoria has been issued under PPG5/2 (04). Since the 2007 Regulations replaced the 2000 Regulations this guidance has been superseded by the General guidance Manual on Policy and Procedures for A2 and B Installations, published in revised form in 2008. Local authorities must have regard to it. The Guidance sets out the key emissions which constitute pollution warranting control under the Regulations: odour, particular matter (dust), hydrogen chloride, nitrogen oxides, carbon monoxide, volatile organic compounds (from methane to polycyclic aromatic hydrocarbons), mercury compounds and dioxins. In the Guidance are emission limit values for certain pollutants and also standards for the temperature in the second combustion chamber where the waste gases are burned. As well there is the minimum length of time the gases should remain in this chamber and the oxygen conditions in it. The Guidance also sets out many of the techniques which can be used to achieve the emission limits.

67. Included in Mr Etkind's report is an analysis by Dr Janet Dixon, a senior scientific officer in the science policy unit of Air and Environment Quality Division in his department. That identifies the main health impacts of various substances. As regards odour, Mr Etkind does not believe that to be a problem at crematoria. However, with the likely poorer combustion conditions in an open air pyre he would expect there to be a potential for unpleasant odour emissions. His report concludes with some tentative calculations as to the impact of open funeral pyres on air quality.

68. The claimant's expert on these matters, Dr Ivan Vince, is director of a health, safety and environmental consultancy firm. He has over 30 years experience in industrial hazards and combustion generated pollution. As to health and safety

risks he says that mourners would be exposed to those similar to what would be encountered by any person attending a bonfire of a similar size. In relation to emissions he says that mercury would not be a threat because, as he understood it any dental amalgam would be removed from the deceased before an open air pyre funeral. Regarding other air pollutants, he criticises Mr Etkind's statement for not addressing the issue in quantitative terms by considering ground level concentrations and exposure durations. While he accepts that purpose designed crematoria will, on the whole, emit less pollution per operation than open air pyres, he points out that crematoria are generally situated in suburban environments. The proposed open air pyres would be situated in open country, a minimum of 2km from the nearest house. Since ashes would be collected by the mourners, there would be no contamination of the soil. The evidence from the destruction of cattle during the BSE crisis did not support the suggestion that there could be significant soil pollution or any risk to health or the environment from funeral pyre ashes. Even if the pyre location were in use every week and the wind blew in the same direction throughout every one of the funerals, Dr Vince takes the view that pyres would contribute less than 5 percent of the provisional national objective for ground level concentrations of pollutants. He concludes his first statement as follows: "My results show that, 2km downwind of the pyre, none of the pollutants will be present at a concentration greater than a small fraction of the air quality guideline (or equivalent measure). There will thus be negligible health risks to the public 2km away".

69. In his second statement Mr Etkind criticises some aspects of Dr Vince's opinion in relation to mercury. He says that there could be no guarantee that teeth would be removed, so as to avoid any mercury emissions. (The claimant does not have mercury fillings). He also takes issue with Dr Vince's assumption that open air pyres will be in the countryside, a minimum of 2 km from the nearest house; Dr Vince does not explain how this will be guaranteed. Even if Dr Vince is correct in assuming that emissions from a funeral pyre will not breach air quality limit values, a local planning authority may consider the desirability of increasing the pollution burden on the atmosphere, particularly if there are alternatives which are less polluting, i.e. crematoria, and the need to allow industrial and other facilities to be established which contribute to air emissions. Much depends, Mr Etkind says, on the scale of usage of open air funeral pyres. Mr Etkind also retails the Environment Agency's policy on the disposal of funeral ashes into water. The Environment Agency is not adverse to the practice so long as funeral ceremonies ensure that the environment is not damaged and that other members of the public are not upset. Mr Etkind adds that the Environment Agency would have to consider on a case specific basis the disposal to surface waters of funeral pyre remains which have not been ground to ash or which are partially burned.

70. In his second statement Mr Etkind also identifies the application of the planning regime to open air pyres. His colleagues in the Department for Communities and Local Government have informed him that planning permission may be required if conducting open air pyres constitutes a material change of use under the Town and Country Planning Act of 1990. When considering an application for planning permission a local planning authority would need to determine it in accordance with the development plan for the area. Mr Etkind recalls section 5 of the Cremation Act 1902, that a crematorium must not be situated within 200

yards of a dwelling house except with the consent of the owner, lessee or occupier of that house, or within 50 yards of any public highway.

71. In a second statement to the court Dr Vince addresses the issue of combustion conditions in the pyre, in particular that they may be too low. In response to Mr Patterson's evidence that the combustion temperature of the primary and secondary chambers of a cremator are 700-800ºc and at least 850ºc respectively, Dr Vince opines that 850ºc is not a particularly high temperature for a fully developed fire. The duration of an open air funeral pyre would typically be at least double that of the process in a crematorium and prolongation would be necessary to ensure complete combustion.

CREMATION LAW

The Common law

72. Dr William Price was a surgeon, healer, Druid, vegetarian and self-declared infidel. The culmination of a life of controversy was when he attempted to cremate his five months old son, named Iesu Grist, on 10 January 1884. This was considered the height of blasphemy and paganism, and it is said that the whole country was roused against him: T Islwyn Nicholas, A Welsh Heretic (Foyle's Welsh Co, London, nd), 35. Although an inquest found that the child's death was due to natural causes, Price was prosecuted at the Cardiff assizes.

73. Price appeared unrepresented before Stephen J. As to whether it was a misdemeanour at common law to burn the body, Stephen J directed the jury that a person who burns instead of burying a body does not commit a criminal act, unless he does it in such a manner as to amount to a common law public nuisance (R v Price (1884) 12 QBD 247, at 254-5). There were some instances, no doubt, in which the courts of justice would declare acts to be misdemeanours which had never previously been decided to be so, but they involved great public mischief or moral scandal. Before he could hold that it must be a misdemeanour to burn a dead body, Stephen J said that he had to be satisfied not only that some people, or even that many people, objected to the practice, but that it was, on plain, undeniable grounds, highly mischievous or grossly scandalous. In this case he could not take even the first step.

> "I do not think, however, that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanour at common law. … As for the public interest in the matter, burning, on the one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might no doubt destroy the evidence of crime. These, however, are matters for the legislature, and not for me. It may be that it would be well for Parliament to regulate or to forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law" (at 255-6).

74. As mentioned Stephen J's direction to the jury was that burning a dead body could be a public nuisance if done in such a manner as to be offensive to others. "To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go is beyond all doubt a nuisance, as nothing more offensive to both sight and to smell can be imagined" (at 256). Price escaped conviction on that basis as well. Nine years later, when he himself died at the age of almost ninety-three, he was cremated in accordance with his wishes. It is said that at least twenty thousand people arrived in his village for the occasion. Admission tickets were sold and people scrambled among the debris of the aftermath for souvenirs (T Islwyn Nicholas, at 41-47).

The Cremation Act 1902

75. Following R v Price, a number of attempts were made in Parliament to regulate the burning of human remains. In April 1884 the Disposal of the Dead (Regulations) Bill received a Second Reading in the House of Commons, but ultimately it was not enacted. The aim of the Bill was twofold: (1) to prevent public cremations which were described as being contrary to "public decorum and decency" and (2) to protect society against the concealment and destruction of evidence of homicidal crime, on the basis that totally unregulated cremations afforded even greater facilities than burial for the concealment of deeds of violence and wrong-doing. After further attempts to introduce legislation, the Cremation Act ("the 1902 Act") was passed. The object of the Act was, "to provide for the regulation of the burning of human remains, and to enable burial authorities to establish crematoria.", and to "place the question of cremation under the general law and under uniform rules": HL Deb, 7 March 1901, v. 90, cc. 768-74; HL Deb, 27 January 1902, v. 101, cc. 904-6. The concern with regulating the practice of cremation is evident in the Act's preamble, an Act, "…for the regulation of the burning of Human Remains, and to enable Burial Authorities to establish Crematoria."

76. The key provisions of the 1902 Act are as follows. Section 2 defines a "crematorium" as:

> "…any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto."

Section 4 enables burial authorities to establish crematoria. Under section 5 the location of crematoria is controlled: no crematorium shall be constructed within 200 yards of a dwelling house (except with the written consent of the owner, lessee and occupier of such a house), within 50 yards of any public highway, or in the consecrated part of the burial ground of any burial authority. The regulation making power is contained in section 7:

> "The Secretary of State shall make regulations…prescribing in which cases and under what particular conditions the burning of human remains may take place, and directing disposition or internment of the ashes, and prescribing the forms of the

> notices, certificates and declarations to be given or made before any such burning is permitted to take place…"

Section 8(1) of the 1902 Act makes it a criminal offence to contravene regulations made under section 7 of the 1902 Act or knowingly to carry out the burning of any human remains, except in accordance with the regulations. It reads:

> "Every person who shall contravene any such regulation as aforesaid [i.e. made under section 7 of the 1902 Act] or shall knowingly carry out or procure or take part in the burning of any human remains except in accordance with such regulations and the provisions of this Act shall (in addition to any liability or penalty which he may otherwise incur) be liable on summary conviction to a penalty not exceeding level 3 on the standard scale."

The 2008 Regulations

77. Various sets of regulations have been made under section 7 of the 1902 Act. Regulations were initially made in 1903: Cremation Regulations, SI 1903 No 286. There were ultimately replaced by the Cremation Regulations 1930, SI No 1016 ("the 1930 Regulations). The 1930 Regulations were amended, in 1952, 1965, 1979, 1985, 2000 and 2006. From 1 January 2009, the relevant regulations are the Cremation (England and Wales) Regulations 2008, SI 2008 No 2841 ("the 2008 Regulations"). The 2008 Regulations are consolidatory regulations. In its consultation paper, Cremation Regulations. Consolidation and Modernisation, CP 11/07, 16 July 2007, the Ministry of Justice noted that cremation took place at more than 200 crematoria across England and Wales. It asserted that the proposed changes should not adversely affect any group of individuals or sectors of society. It recognised that cremation was much more important to some faiths than others (Hinduism and Sikhism, for example, as opposed to Judaism and Islam, where burial was almost invariably practised). The proposed regulations did not produce any adverse impact which solely affected one race, faith or ethnic grouping. The Consultation Paper said:

> "40. We recognise that some faiths would prefer to cremate the remains of a member of that faith on what is known as a funeral pyre. Any question as to whether the regulations permit funeral pyres is a matter for the courts and outside the scope of these regulations."

78. Cremation is defined, for the first time, in regulation 2(1) of the 2008 Regulations as "the burning of human remains." For present purposes, regulation 13 is crucial:

> "No cremation may take place except in a crematorium the opening of which has been notified to the Secretary of State."

The procedural requirements prior to any cremation are contained in Part 4 of the Regulations. In essence these demand that there be medical certificates and

confirmatory medical certificates relating to a death. The forms specified for these purposes are contained in Schedule 1. The regulations make provision for the first time for an applicant for cremation to inspect the medical certificates: regulation 22.

Open air cremation not permitted

79. To my mind the 1902 Act and the 2008 Regulations put the matter beyond doubt: open air cremation is not permitted. Certainly the 1902 Act was designed to enable local authorities to provide a service, crematoria, but it was also concerned with open air cremations. R v Price was part of the legislative background. That case was conventional in the reluctance of Stephen J to create new common law crimes. In any event, the preamble to the 1902 Act is explicit: an Act to provide "for the regulation of the burning of human remains, and to enable burial authorities to establish crematoria" (my emphasis). If the Act had been intended to apply only to the burning of human remains inside crematoria, it could and would have said so.

80. Clear too, in my view, is the power conferred on the Secretary of State to make regulations "as to the maintenance and inspection of crematoria and prescribing in what cases and under what conditions the burning of any human remains may take place …" (my emphasis). There is no limitation of the regulation-making power to the burning of human remains within crematoria. Given those wide enabling words the contention of the claimant, that the regulations are ultra vires the Act, simply cannot stand. Paragraph 40 of the 2007 Consultation Paper, quoted earlier, takes the argument nowhere. It is a recognition by the executive that the construction of the regulations is ultimately a task for the courts. Thus in my view the law is accessible, foreseeable and formultated with sufficient precision that individuals can regulate their conduct. To anticipate arguments considered later, it meets the requirements of Articles 8 and 9 of the European Convention on Human Rights that matters be "prescribed by law".

81. The claimant further submits that the general words of section 7 of the 1902 Act cannot in the absence of clear words or by necessary implication override the claimant's fundamental right to undertake an open air funeral pyre in accordance with his religious or cultural belief. Such implication must be compellingly clear: R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] UKHL 21; [2003] 1 AC 563 at [43]-[46]. Section 7, it is said, does not disclose a clear Parliamentary intention to thwart the claimant's fundamental right to undertake a religious cremation, whether inside or outside a crematorium, with or without regulation. In my view the difficulty with this submission is in identifying the fundamental right which is said to be in issue. Religious cremation is said to be that right, but there is nothing in either the common law or the international instruments to which reference has been made which specifically recognises that right as fundamental. Religious cremation is not on the same plane as the legal professional privilege at issue in the Morgan Grenfell case. In any event, there is nothing equivocal in the enabling power section 7 confers.

82. Further, I reject the submission that crematorium in regulation 13 can be read as meaning an open crematorium, specifically designated as a regulated place for

open air pyres. That is because a crematorium is defined as a building. There is no definition of building in the 1902 Act or 2008 Regulations, but in ordinary usage it means a structure with a roof and walls. That definition gives the architect considerable latitude as to the nature of the roof and walls. As I observed in argument, the roof could be clear, possibly even retractable. Moreover, there is no prescription in the 1902 Act or the 2008 Regulations as to the internal arrangements of the building. But building there must be, and open crematoria, for open air funeral pyres, are forbidden.

83. In my view, then, the combined effect of the legislation and attendant regulations is plain: a cremation is the burning of human remains: regulation 2(1)); all cremations must take place in a crematorium: regulation 13; a crematorium is a building: (1902 Act, section 2); and the burning of human remains other than in accordance with the provisions of the 2008 Regulations is a criminal offence (1902 Act, section 8). Thus the burning of human remains, other than in a building, such as on open air pyre, is an offence.

84. This construction, on the basis of the plain words of the legislation, is supported by the legislative purpose. As indicated, reference to Hansard and the Act's preamble confirms that the aim of the 1902 legislation was to regulate the burning of human remains, and to establish uniform rules to govern the matter. This aim would be undermined if the effect of the legislation were to establish a series of detailed rules for the burning of human remains inside crematoria, but to leave the burning of human remains outside crematoria unregulated. The claimant contends that at one point officials at the Home Office thought open air funeral pyres were "quite outside the restrictions of the Cremation Act and regulations under it." That was said sometime after the legislation was enacted and is of no assistance in its construction. (I am grateful to Mr Stephen White for this reference; he prepared a note on the history of the legislation, which became available during the hearing). The logical corollary of the claimant's case is that all of the protections and safeguards in the 2008 Regulations could be avoided by an entirely unregulated, but lawful, burning of human remains in a place other than a crematorium. If that is correct, the consequence would be that the burning of human remains could take place outside of a crematorium, subject to no form of regulation at all. Given the purposes pursued both by the 1902 Act and by the 2008 Regulations I accept the Secretary of State's submission that this is an entirely implausible eventuality.

85. Finally, it cannot be said that the interpretation I favour is undermined in any way by R v Byers (1907) 71 JP 205. That was apparently a test case taken to deal with what was then the serious problem of infanticide and baby farming. Four counts on the indictment against Jessie Byers were framed under section 8 of the Cremation Act 1902. The Crown submitted that there was no definition of cremation in the Act, that one needed to look to the derivation of the word which was "burning", and that that must mean burning anywhere. Kennedy J held that there was no evidence to go to the jury on those counts, the defendant having submitted that the meaning was the burning of a body in a crematorium. In his note for the court, Mr Stephen White points out that in the Daily Telegraph report of the case Kennedy J said that he was inclined to agree with Stephen J in R v Price, that Parliament should make clear whether cremation

outside regulated crematoria was a crime. This ruling of Kennedy J in R v Byers was in the course of a criminal trial. The case has never been fully or officially reported. Despite the eminence of the judge, its authority is in my view further undermined by the failure to refer to the Cremation Regulations 1903. In particular, they specifically provided that no cremation of human remains should take place except in a crematorium, the opening of which notice had been given to the Secretary of State: regulation 3 (now regulation 13 in the 2008 Regulations). Had the regulations been referred to, section 8 of the 1902 Act would, in my view, have been interpreted differently.

FREEDOM OF RELIGION: ARTICLE 9 ECHR

86. Article 9 of the European Convention of Human Rights ("ECHR" or "the Convention") provides:

> "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes 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."

The right to hold a particular belief is absolute under Article 9. No issue arises about this in the present case; the claimant's beliefs are clearly religious and there is no question that he genuinely and in good faith believes that one of the sacraments he must perform is cremation on an open air pyre (anthyesthi sanskara). However, the right to manifest a belief is a qualified right under Article 9. A number of matters arise in relation to this aspect of the case. First, the claimant must establish that cremation on an open air pyre is a "manifestation of belief", protected by Article 9. Secondly, he must be able to establish that the requirement under the 1902 Act and its attendant regulations are an interference with his right to manifest his belief. If the claimant can establish these matters the third issue is whether the Secretary of State can establish that any interference with the claimant's right to manifest his religious beliefs is justified under Article 9(2).

Manifestation of belief

(a) The jurisprudence

87. Article 9 does not protect every act motivated or inspired by a religion or belief. The starting point for an analysis of how to identify what is or is not protected is R (Williamson) v Secretary of State for Employment and Education [2005] UKHL 15; [2005] 2 AC 246. That was a case where parents and teachers at independent schools believed, for religious reasons, in mild corporal punishment. Section 548(1) of the Education Act 1996 in effect prohibited the

use of corporal punishment by all teachers in all schools. The claimants contended, in short, that this was an interference with their freedom to manifest their religion or beliefs contrary to Article 9. The House of Lords held that the freedom to manifest beliefs was a qualified right; that as regards manifestation of beliefs, the beliefs had to satisfy certain objective minimum thresholds relating to seriousness, coherence and conformity with accepted standards of human dignity and integrity; and that the manifestation of a belief that corporal punishment was an appropriate tool of discipline for children was capable of being protected so long as it was of a limited character. However, the House of Lords went on to hold that the prohibition in section 548(1) was justified under Article 9(2).

88. Because of the agreement of other law lords, the speeches of each of Lord Nicholls, Lord Walker and Baroness Hale are authoritative. In terms of the right to hold a belief Lord Nicholls held that it is emphatically not for the court to embark on an inquiry as to the validity of a belief by some standard such as a religious text or whether it conforms or differs from that of others professing the same religion (at [22]). The protection of Article 9 also embraces the beliefs of the atheist, agnostic or the sceptic. As to manifestation of a belief, Lord Nicholls said this:

> "23. Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. … The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, 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. But, again, too much should not be demanded in this regard. … Overall, 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: see Arden LJ [2003] QB 1300, 1371, para 258."

Later in his speech, Lord Nicholls dealt with manifesting a belief in practice and held that there was a further prerequisite to be satisfied before Article 9 was engaged. "[A]rticle 9 does not protect every act motivated or inspired by a religion or belief" he said, referring to Sahin v Turkey (2005) 19 BHRC 590 (at [32]). From the following paragraphs in his speech it seems that Lord Nicholls was concerned with whether the act claimed to be the manifestation of the belief is consistent with the nature and scope of the belief and whether it is one which the person can reasonably expect to be at liberty to perform (at [32]-[33], [38]).

89. In his speech Lord Walker referred to the filters applicable with Article 9 protection, although he emphasised that Article 9 (1) and 9 (2) issues overlap (at [58], [66]). The court was not equipped to weigh the cogency, seriousness and coherence of theological doctrines (at [60]). As to manifestation, there was usually a central core of required beliefs and observance, and relatively peripheral matters observed by only the most devout (at [62]):

> "63. It is clear that not every act which is in some way motivated or inspired by religious belief is to be regarded as the manifestation of religious belief: see Hasan and Chaush v Bulgaria (2002) 34 EHRR 1339, 1358, para 60. Article 9 protects (as well as the forum internum*)*
>
> > . . . "acts which are intimately linked to [personal convictions and religious beliefs], such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form."
>
> See Kalac v Turkey (1997) 27 EHRR 552, 558 (para 34 of the Commission's opinion) and 564 (para 27 of the judgment of the Court); the admissibility proceedings in Konttinen v Finland Application No. 24949/94; and Sahin v Turkey Application No. 44774/98, judgment given 29 June 2004, para 66. Richards J made a similar point, in the Amicus case, [2004] IRLR 430, 438, para 44, when he observed that: "the weight to be given to religious rights may depend upon how close the subject-matter is to the core of the religion's values or organisation." In the Oregon case 494 US 872, 888, footnote 4, Scalia J gave a particularly vivid example:
>
> > ". . . dispensing with a 'centrality' inquiry is utterly unworkable. It would require, for example, the same degree of 'compelling state interest' to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church.""

90. Baroness Hale referred in her speech to manifestation as the point where beliefs have an impact on others. As between religious and other beliefs she explained that in practice it may be easier to show that some religious beliefs have the required level of cogency, seriousness, cohesion and importance. A free and plural society must expect to tolerate all sorts of views, but allowing them to be practiced was another thing (at [77]-[78]).

91. Just over a year later the House of Lords revisited the issue in R (on the application of Begum) v Denbigh High School [2006] UKHL 15; [2007] 1 AC 100, the case of a girl who insisted upon wearing an Islamic head covering against the rules of her school. Lord Bingham referred to the fundamental importance of the Article 9 right and then turned to the issue of interference with the right to manifest a belief.

"22. As my noble and learned friend pointed out in Williamson, above, para 38, "What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice". As the Strasbourg court put it in Kalaç v Turkey (1997) 27 EHRR 552, para 27,

> "Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account."

The Grand Chamber endorsed this paragraph in Sahin v Turkey, (Application No 44774/98, 10 November 2005, unreported), para 105. The Commission ruled to similar effect in Ahmad v United Kingdom (1981) 4 EHRR 126, para 11:

> ". . . the freedom of religion, as guaranteed by Article 9, is not absolute, but subject to the limitations set out in Article 9(2). Moreover, it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom."

23. 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 practise or observe his or her religion without undue hardship or inconvenience. Thus in X v Denmark (1976) 5 DR 157 a clergyman was held to have accepted the discipline of his church when he took employment, and his right to leave the church guaranteed his freedom of religion. His claim under article 9 failed. In Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711, paras 54 and 57, parents' philosophical and religious objections to sex education in state schools was rejected on the ground that they could send their children to state schools or educate them at home. The applicant's article 9 claim in Ahmad, above, paras 13, 14 and 15, failed because he had accepted a contract which did not provide for him to absent himself from his teaching duties to attend prayers, he had not brought his religious requirements to the employer's notice when seeking employment and he was at all times free to seek other employment which would accommodate his religious observance. Karaduman v Turkey (1993) 74 DR 93 is a strong case. The applicant was denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf. The Commission found (p 109) no interference with her article 9

> right because (p 108) "by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs". In rejecting the applicant's claim in Konttinen v Finland (1996) 87-A DR 68 the Commission pointed out, in para 1, page 75, that he had not been pressured to change his religious views or prevented from manifesting his religion or belief; having found that his working hours conflicted with his religious convictions, he was free to relinquish his post. An application by a child punished for refusing to attend a National Day parade in contravention of her beliefs as a Jehovah's Witness, to which her parents were also party, was similarly unsuccessful in Valsamis v Greece (1996) 24 EHRR 294. It was held (para 38) that article 9 did not confer a right to exemption from disciplinary rules which applied generally and in a neutral manner and that there had been no interference with the child's right to freedom to manifest her religion or belief. In Stedman v United Kingdom (1997) 23 EHRR CD 168 it was fatal to the applicant's article 9 claim that she was free to resign rather than work on Sundays. The applicant in Kalaç, above, paras 28-29, failed because he had, in choosing a military career, accepted of his own accord a system of military discipline that by its nature implied the possibility of special limitations on certain rights and freedoms, and he had been able to fulfil the ordinary obligations of Muslim belief. In Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France (2000) 9 BHRC 27, para 81, the applicants' challenge to the regulation of ritual slaughter in France, which did not satisfy their exacting religious standards, was rejected because they could easily obtain supplies of meat, slaughtered in accordance with those standards, from Belgium."

92. Lord Bingham added that although the Strasbourg institutions may have erred on the side of strictness in rejecting complaints of interference, there remained a coherent and remarkably consistent body of authority which United Kingdom courts had to take into account and which showed that interference was not easily established.

(b) The Secretary of State's case

93. The Secretary of State accepts that if a belief takes the form of a perceived obligation to act in a specific way then, in principle, doing that act pursuant to the belief is itself a manifestation of the belief in practice. In light of the evidence of Professor Sharma, the Secretary of State concedes that the claimant's personal perception amounts to an obligation, derived from scriptural texts, to be burned on an open air funeral pyre after his death. That amounts to a manifestation of the claimant's religious beliefs. However, invoking Lord

Walker in Williamson, the Secretary of State contends that the weight to be given to religious rights depends on how close the subject matter is to the core of the religion's values or organisation. It will be recalled that Lord Walker observed that there will usually be a central core of required belief and observance and relatively peripheral matters observed by only the most devout.

94. In the Secretary of State's submission the claimant's position on open air funeral pyres is not at the core of Hinduism's values or organisation. It must be viewed in the context of his grievances as a whole. In his first witness statement the claimant said that his complaints lay with the reduction of complex Hindu funeral rituals to the lowest common denominator by the use of modern gas crematoria. It is significant, submits the Secretary of State, that the matter referred to as most critical was the fact that the ashes of one person should be kept separate from the ashes of any other person. That is quite distinct, says the Secretary of State, from the requirement under the 1902 Act and 2008 Regulations that a cremation must take place in a building. (The Secretary of State notes in passing that it is in fact the long-established policy of all crematoria in this country that ashes are kept separate.) The claimant's expert, Professor Sharma, invokes ancient Hindu scriptures, the Satapata Brahmanam and Asvalayana-Grihya-Sutra, to set out precise instructions dictating the requirements of a cremation site, requirements described by him as the absolute benchmark for orthopraxy. It seems, submits the Secretary of State, that Professor Sharma has been selective in identifying his criteria, since the sacred texts refer to details of the funeral procession, the placement of sacred fires, details about instruments placed on the body, and so on.

95. Heavy reliance is placed by the Secretary of State on the expert instructed on his behalf, Dr Firth. As outlined earlier her reports establish that the beliefs of Hindus in the United Kingdom about funeral rites are varied, and that even learned pandits use different ritual texts and stress the importance of different things. Dr Firth reported that there is a great range of religious beliefs within Hinduism, albeit with certain core concepts. One of those concepts is that cremation is essential for Hindus at the end of life. However, no one in the United Kingdom had informed Dr Firth that use of an open air pyre was essential to discharge their religious obligations. She concluded that the claimant's views about the need for cremation on an open air pyre for a good death would not be shared by most Hindus. The majority of Hindus in this country do not believe their salvation or rebirth depends on an open air pyre and the conditions laid down by Professor Sharma, albeit that cremation is a necessary condition. Dr Firth explained how a good death for Hindus depends on many factors. The rituals accompanying the cremation are essential, not the open air pyre per se. She concluded that if existing facilities for crematoria could be adapted to meet Hindu requirements, these would be consistent with the religious beliefs of the majority of Hindus here and they would prefer to use them. Moreover, the Secretary of State submits that none of those requirements was inconsistent with the only mandatory matter under the 1902 Act and 2008 Regulations, that cremation take place in a building. The Secretary of State also invokes as support the position of the Hindu Council.

96. Thus while the Secretary of State accepts that the desire for cremation on an open air pyre amounts to a manifestation of the claimant's religious beliefs, he contends that this falls outside the central core of the beliefs and observances shared by most Hindus in the United Kingdom. Nor in his submission does any requirement arising from the provisions of the 1902 Act or the 2008 Regulations affect any matter within this central core. The only relevant matter contained within either the 1902 Act or the 2008 Regulations stems from the definition of crematorium at section 2 of the 1902 Act, that a crematorium is a building. No further relevant point arises from the remaining part of the definition of crematorium, that the building should be fitted with appliances for the purpose of burning human remains, since no part of that requirement is inconsistent with any matter advanced by the claimant. The only component of Professor Sharma's requirements for a cremation site which cannot be met within the confines of the current legislative regime is "an open site upon which the sun can directly shine at midday". This is the consequence of the definition of crematorium as being a building. Yet this requirement for an open air pyre is observed only by the most orthodox Hindus. The vast majority of complaints about the current conduct of cremations in crematoria could be remedied within the current legislative scheme.

97. Further, the Secretary of State submits that any interference with the claimant's Article 9 rights is limited. What constitutes an interference with the claimant's manifestation of belief depends on all the circumstances of the case, including the extent to which an individual can reasonably expect to be at liberty to manifest his beliefs in practice. In the circumstances of this case the Secretary of State submits, in the alternative, that the 2008 Regulations do not amount to a significant interference with the claimant's right to manifest his religious beliefs. In the Secretary of State's view this is highly material to the issue of justification.

98. As to the First Intervener, the Secretary of State submits that Article 9 is not engaged on the facts of this case with regards to the Gurdwara, or the Sikh religion generally. The witness statement of Gulzar Singh Sahota, on behalf of the Intervener, confirms that the Sikh Code of Conduct does not require cremation. The witness statement further confirms that Sikhs do not as a matter of doctrine and dogma require that their dead be immolated on an open air funeral pyre. The highest point of the First Intervener's case is that it can establish a manifestation of belief because it can point to an established practice amongst Sikhs of disposing of their dead by open air funeral pyres. Crucially, however, this is not a practice motivated by any form of religious observation. As the practice has no connection to the Intervener's religious beliefs, the Secretary of State submits that it cannot constitute a manifestation of such belief for the purposes of Article 9 of the Convention.

Analysis and conclusion

99. Like the Secretary of State I am troubled by some aspects of the claimant's case as regards his freedom to manifest his religious belief. His conception of what is most critical about Hindu cremation seems to have been modified with time; for example, I am still not entirely certain as to whether the open air pyre is a public event or can be located in a secluded place. I assume it is public in the

sense that all who wish to mourn must be able to attend. On one interpretation of Professor Sharma's views he has been selective in what he regards as the bedrock of Hindu orthodoxy. Although the claimant draws support from Professor Sharma's analysis, Professor Sharma's essentials for cremation do not, as I read them, coincide in full with his own. The trench seems to be an example. Moreover, there is Professor Parry's puzzlement as to how Professor Sharma can conclude from the sacred texts or the ethnography that open air funeral pyres are one of the essential criteria for cremation. Further, there is Dr Firth's evidence, derived from many years of close study of Hindu religious practices in this country: open air funeral pyres are not regarded as an essential component of a good death.

100. Notwithstanding all this, the starting point for me is the claimant's genuine belief, held in good faith, that he must be cremated on an open air pyre and the fact, not disputed by the Secretary of State, that this is a manifestation of his religious belief. Despite the appeal of the Second Interested Party's submission, that the determination of the core content of the Hindu religion is not a matter for the court, the authorities compel me to decide whether anthyesthi sanskara is an essential belief of one strand of orthodox Hinduism. That the great majority of Hindus in the United Kingdom do not share the claimant's belief is not a complete answer. Despite the real difficulties for a judge in settling the issue, it is incumbent on me to decide whether the claimant's belief satisfies the modest thresholds laid down in Williamson.

101. In my judgment, the claimant's belief about an open air funeral pyre are such to satisfy the Williamson thresholds. First, it has the requisite degree of seriousness and importance. It concerns the disposal of human remains at death. Quite apart from the evidence before me, for example, from Dr Ballard and the Second Intervener, the case that it is not trivial derives support from the fact that many incidents of concern addressed to the Special Rapporteur on Freedom of Religion or Belief, appointed by the United Nations Commission on Human Rights, concerns a denial of funeral rites: Paul M Taylor, Freedom of Religion. UN and European Human Rights Law and Practice (New York, CUP, 2005), 284. As to the further threshold, that the belief must be concerned with central rather than peripheral matters, there is enough evidence from Professor Sharma to enable me to conclude that this is met for orthodox Hindus of the claimant's persuasion. No doubt there could be many hours of theological debate about the meaning of Hindu religious texts and the import of Hindu practice. That is not for me: all the law demands of me is that I be persuaded, as I am, that the claimant's belief in open air funeral pyres is sufficiently close to the core of one strand of orthodox Hinduism. Since the 1902 Act and 2008 Regulations stifle the claimant's desire to have an open air funeral pyre they constitute an interference with the manifestation of his religious belief.

102. As far as the First Intervener is concerned, it is certainly correct that article 9 is not confined to religious beliefs. Beliefs based on tradition might well be accorded protection so long as they meet the Williamson thresholds. The difficulty for the First Intervener is that the closest it can come to establishing that open air pyres are central to its traditional beliefs is the Sikh Code of Conduct. But the preference expressed there is for cremation, not cremation by

means of open air pyres. The First Intervener concedes that open air pyres are not a matter of dogma and belief. Open air pyres are simply a matter of tradition for Sikhs in India, Sikhs and Hindus sharing cremation grounds. In my view Article 9 accords no protection to the Sikh tradition of using open air funeral pyres.

Justification: Article 9 (2)

103. Notwithstanding any interference with Article 9 ECHR rights, the Secretary of State contends that this is justified under Article 9(2). Three issues arise in this regard: whether such interference is prescribed by law; whether it pursues the legitimate aim of protecting public morals and the rights and freedoms of others; and whether the interference is necessary in a democratic society to achieve that legitimate aim. The First Intervener submits that the Secretary of State was most vulnerable on the first issue. Since to my mind the 1902 Act and 2008 Regulations are clear in their impact, and the 2008 Regulations valid, the focus of my attention is on the second and third matters.

(a) The legitimate aim

104. Already I have referred to the legitimate aim relied on by the Secretary of State to justify the prohibition on open air funeral pyres: the protection of the rights and freedoms of others and, to use the Article 9 language, the protection of public morals. In support the Secretary of State makes reference to the legislative history of the Cremation Act 1902, where public cremations were described as being contrary to "public decorum and decency" and a prohibition described as necessary to protect society against the concealment of crime. In the Secretary of State's Summary Grounds, as already indicated, three broad aspects of public policy were raised: protecting public health, public morals and the rights and freedom of others. As well there is public safety, emphasised by the Council: it will be necessary in an open air pyre, they submit, for the fire to attain very high temperatures (700º -850º) to achieve the combustion necessary to reduce human remains to calcified bones. To achieve such combustion burning needs to be within a totally controlled environment since open air fires would not be readily controllable in terms of temperature and air mix. Moreover, open air pyres would be affected by wind speed and direction. Admittedly that evidence must be read in the light of Dr Vince's report.

105. As to public health, Mr Etkind's second statement, referred to earlier, accepts that public health concerns in respect of open air pyres could be addressed by regulation. The government does not now seek to justify a ban on open air funeral pyres on public health grounds. However, Mr Etkind's statement, even when read in the light of Dr Vince's evidence, demonstrates that the requisite regulation would not be entirely straightforward. The Secretary of State still attaches importance to the other factors mentioned in the summary grounds. It will be recalled that in two witness statements prepared by Mr Patterson, on behalf of the Secretary of State, it is said that a large proportion of the population of this country would be upset and offended by open air funeral pyres and would find it abhorrent that human remains were being burned in this manner. There is no need to repeat what is said there.

(b) The claimant's and interveners' submissions

106. The claimant contends that each of the reasons given for a prohibition on open air funeral pyres cannot be supported. As regards public safety, he submits that a local authority like the Council could obtain land where such cremations could take place in safety and could address fire safety issues in conjunction with the fire services. Setting of the fire would be in controlled conditions. The claimant would make a fire risk assessment and equip the area with the relevant fire-fighting equipment beforehand. Bonfires take place in Britain and open air funeral pyres would pose less risk. Cremation normally lasts three hours and this would enable the relevant authorities and family to ensure that the fire did not spread. Pyres would only be lit in optimal weather conditions. In any event, the Council had not undertaken a proper fire risk assessment.

107. As far as nuisance and similar objections are concerned, the government had accepted that suitable regulation could be introduced. In any event, the burning of cattle during the BSE crisis belied many of the concerns about emissions, dark smoke and other environmental problems. There was no evidence that the burning of human bodies caused nuisance by reason of odour. Crematoria around the country created much more pollution than would a limited number of open air funeral pyres. As to foul play, the claimant accepts that there will need to be controls.

108. With respect to the Secretary of State's contention that the ban is justified on grounds of public morals and protecting the rights and freedom of others, the claimant points first, to the proposals by the Second Intervener and Mr Stowe: a funeral site could be located in a semi-rural location, not directly visible from a public highway. A secluded, but confined, open space for funeral pyres would address the objection of the possible reaction of others to seeing them. Moreover, rightly thinking adults were unlikely to react to a religious funeral in the way suggested. Any unreasonable reaction by members of the public is not a reason to prevent it from taking place. Discerning adults would recognise, in time, with education and publicity, that a Hindu funeral pyre was a religious practice deserving of respect and not to be treated as a spectacle. The possibility of the public stumbling on a funeral pyre was remote and sufficient signs could be placed warning people of a funeral site. There was no evidence of mourners suffering trauma from watching a cremation; mourners with a sensitive disposition could avoid attending.

109. Even if a cremation were held in public, that does not mean that members of the public would rush to see it. Those adults who considered such funeral events distasteful would avoid attending or viewing Hindu cremations. The claimant is a man of peace and does not wish to cause provocation. If there were public order problems the authorities could intervene and ultimately arrest those committing a breach of the peace (citing Redmond-Bate v Director of Public Prosecutions [1999] EWHC Admin 732; [2007] HRLR 249, at [18], per Sedley LJ). The exercise of the claimant's right to have a Hindu cremation would not clash with the rights of persons who chose not to have an open air funeral pyre; their rights would not be disrespected because Hindus were permitted to have open air cremations. The reaction of the critics was based on a misapprehension about the significance of Hindu cremation; the Abrahamic expectation paid little

attention to the Indic expectation that anthyesthi sanskara is an explicitly public ritual in which mourners play an active role. People would in due course accept the funeral rites of minorities as normal.

110. As to specific problems said to accompany a removal of the ban, the claimant submits that a partial weather barrier could be erected. If it is possible to have bonfires in November there was no reason why an open funeral pyre could not take place in July. There was no evidence that a body will not be properly burnt, but in any event stewards would ensure constant burning. Bodies would be tied to the bier and weighed down with small logs to avoid their moving. There was no evidence of bones remaining but any human bones could be collected and cremulated. Finally, the dangers of people throwing themselves into the fire was highly imaginary, the Sati practice having evaporated into fiction.

111. In sum, the claimant's case is that the interference with this manifestation of his religious beliefs cannot be justified. The prohibition is not rationally connected with the public policy objectives: the claimant's funeral will not cause a public nuisance and no harm will be done to the public through pollution, nuisance or otherwise. As well, a prohibition is more than necessary to accomplish the policy objectives: R (on the application of Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532, 547-8, per Lord Steyn. The claimant's submissions in this regard are supported by the Second Intervener, who contends that while there are legitimate concerns these can be answered by suitable regulation. An absolute ban on open air funeral pyres cannot be justified. Less intrusive measures could be employed to attain the legislative objectives.

112. In the claimant's submissions the protected interest here is strong and so the corresponding public policy concerns have to be significant. The court needs to examine the material for itself when determining the question of proportionality. This involves a value judgment made by reference to the circumstances prevailing when the issue has to be decided: Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2003] AC, at [62] per Lord Nicholls. Less deference was due to public policy in this area because it derived importantly from subordinate legislation, the 2008 Regulations. The legislative policy could be accommodated readily and without distortion if Hindus were permitted to undertake Hindu cremations. Insufficient attention has been paid to the claimant's Convention rights; if his Convention right to undergo a religious funeral was acceded to, the legislative object would still survive unscathed. In this case it is clearly possible to permit the claimant to have a funeral in accordance with his religious rites and or his cultural practices on the strict condition that he complies with all the other regulations (e.g. obtaining a doctor's certificate, use of clean wood for burning, location of a site away from dwellings, ensuring that reasonable fire precautions are taken, agreeing to have the bones cremulated etc). The claimant has accepted that he will abide by all such legal terms and conditions currently set out in the 2008 Regulations and elsewhere in the law. The legislature was not entitled to impose an inflexible regime altogether prohibiting open air funeral pyres for Hindus.

113. Moreover, the claimant contends that the religious rites of minorities should not be swept aside to pacify the unease of the majority of British Hindus or the denizens of the United Kingdom. In particular, the claimant cites a passage in Sahin v Turkey (2005) 19 BHRC 590 (citations omitted):

> "107. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.
>
> 108. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead states to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society". "

In the claimant's case the role of the state is not to remove the cause of tension but ensure mutual tolerance between the opposing groups. The issues have not been subject to full debate or research. The Cremation Act 1902 is over a century old. As to the 2008 Regulations, when the 2007 Consultation Paper touched on the issue it said in the passage quoted earlier that whether the prospective regulations would permit open air funeral pyres was a matter for the courts. There had been no proper consultation with the claimant and or his organisation over the 2008 Regulations. There was no detailed consideration of the right to religion in the Consultation Paper. Reliance on the views of the Hindu Council was misplaced, since it was understandable that they wished to assuage potential hostility.

114. In general terms the Interveners support the claimant's position. For the first Intervener the abhorrence which the Secretary of State detects in a large section of the population regarding open air funeral pyres is conjecture. In particular the First Intervener cites a passage in Young, James and Webster v United Kingdom, Judgment of 13 August 1981, Series A No 44, p25, at [63], referred to in Sahin, that it is necessary to balance the rights of the majority and those of minorities, and the fact that the minority was small was not determinative. The interference with belief as a result of the cremation legislation was disproportionate both in scope and effect. As to the Second Intervener, it does not deny that legitimate concerns could arise in the absence of regulation, but those concerns can be answered by specific regulation and do not justify the maintenance of an absolute ban. The protected interest here is strong and the countervailing public interest correspondingly less significant than in some of the older authorities.

(c) Legislative framework justified

115. In broad terms the issue for me is whether the law – the 1902 Act and the 2008 Regulations – which I have held does interfere with one manifestation of the claimant's religious beliefs can be justified. That turns on whether that legislative framework pursues a legitimate aim and is necessary, 'necessary' for these purposes meaning that the interference is required to meet a pressing social need and is proportionate to the legitimate aim pursued: Wingrove v United Kingdom (1996) 24 EHRR 1, [53]. As to proportionality, Lord Bingham has said that the overriding requirement is whether a fair balance has been struck: Huang v Home Secretary [2007] UKHL 11; [2007] 2 AC 167; [19]. In this context the question for me is whether this rule of general application – in essence, the requirement that a cremation take place in a building – represents the striking of a fair balance between the rights of the claimant and the interests of society.

116. Before addressing that issue directly, it is necessary to review briefly a number of its backdrop features. First, it is of some importance that there is no blanket interference with the claimant's Article 9 rights either in relation to funeral arrangements or more generally. As an orthodox Hindu the claimant has a very wide freedom in this country to manifest his religious beliefs. In effect the only interference he complains of is the requirement that under the law his cremation must take place in a building. All other matters of Hindu funeral observance identified by the claimant are capable of being accommodated consistently with this requirement. Similarly, with Sikhs: they have very wide latitude to manifest their religious beliefs. Indeed, open air funeral pyres are not, in the First Intervener's candidly expressed evidence, a manifestation of Sikh religious belief but derive from tradition.

117. Secondly, Dr Firth's evidence is clear, that the vast majority of Hindus in this country do not consider that cremation on an open air pyre is essential to discharge their religious obligations. In its latest statement the Hindu Council have recognised that open air funeral pyres are sanctioned by Hindu scriptures and should be available to those "whose consolation rests in adhering to ancient scriptural guidance," but has said that reform of existing crematoria rules

remained its priority. The same point can be made in respect of Sikhs: support for open air funeral pyres is by no means universal.

118. Thirdly, there is the claimant's argument that the balance of the present law was struck in 1902 and for that reason can no longer be regarded as valid. But there is no significant objective evidence that on the issue of the disposal of human remains any significant cultural change has occurred since then. As much seems to be conceded by Dr Ballard, albeit that he may deplore it. Moreover, the matter has not been without attention since the 1902 Act. The Cremation Regulations were consolidated in 2008. The claimant was not consulted specifically, but the Consultation Paper on the 2008 Regulations was publicly available. Organisations to whom copies were sent include the Hindu Forum of Britain, as well as the British Sikh Consultative Forum and the Network of Sikh Organisations.

119. Fourthly, it is perhaps not irrelevant to note that the present issue is not a matter on which there is any European consensus which assists the claimant. The Secretary of State's evidence is that no Council of Europe state has indicated that it permits open air funeral pyres to take place. To the contrary, the embassies of twelve Council of Europe states have confirmed that open air funeral pyres are not permitted in their respective countries. This provides support for a conclusion that the requirement as presently contained in the 1902 Act and 2008 Regulations is proportionate and lawful.

120. Fifthly, it is no answer, despite the claimant's suggestion, that those who consider open air funeral pyres offensive can simply avoid attending. As a matter of fact members of the public may happen across them even if they are held in secluded locations. As a matter of law the suggestion is akin to that made by the applicant in Otto-Preminger Institut v Austria (1994) 19 EHRR 34, where individuals had to pay to see what was said to be the religiously offensive the film in question. It was argued that they could exercise a positive choice to avoid seeing the film, such that there was no real danger of anyone being exposed to objectionable material against their wishes. However, the European Court of Human Rights concluded that there was sufficient public knowledge of the basic content of the film to give a clear indication of its nature, such that it was capable in and of itself of causing offence, even though those offended had not been to see it: see [53] – [54]. The same principle must apply in the present case.

121. Let me now meet the central issue head on. There is no need to recapitulate the policy objectives the Secretary of State advances for the ban on open air cremations. But one has only to state what has become the major contention – the likely public reaction to this manifestation of belief – to appreciate that we are in difficult and delicate territory. In my view it is precisely for that reason that those democratically elected, with the legitimacy which election confers, are better placed than a court to decide where the balance lies. It is a matter where opinions reasonably differ. For that reason the balance struck by elected representatives is entitled to be given special weight: see Hatton v United Kingdom (2003) 37 EHRR 28, [97]. Support for this approach is derived from the approach of the European Court of Human Rights: it is for the national authorities to determine whether a particular act is likely to be perceived as

"essentially offensive" to the general public within their borders: Otto-Preminger Institut v Austria (1994) 19 EHRR 34, [56]. It is for national authorities to determine whether an individual's Convention rights are outweighed by features which make it offensive to the general public. Contained in Sahin, as well as the passages the claimant cites, is this important underscoring of the role of the state in matters of religion:

> "109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance … Rules in this sphere [public expression of a religious belief] will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned [references omitted].

122. In a sense the requirement in the 1902 Act and 2008 Regulations, that cremations take place in a building, is a minimal requirement. The Second Intervener, amongst others, has advanced a number of proposals which go some way to meeting the claimant's wishes. Whether these can be accommodated within the terms of the 1902 Act is not a matter for me. In my judgment the Secretary of State is entitled to conclude that the present legislative framework is consistent with mainstream cultural expectations of persons living in this country and secures in a practical way the avoidance of likely offence and distress. That calculation is not one on which a judge can speak with any great expertise or authority. The resolution of the various competing interests on this difficult and delicate issue by elected representatives is not one a court should easily set aside. It is within the remit of the Secretary of State to conclude, as he has, that a significant number of people would find both the principle and the reality of cremation by means of open air pyres to be a matter of offence.

123. Indeed, there are the points which the claimant himself makes which support this conclusion. One is his acceptance that regulation of open air funeral pyres will be necessary. The expert evidence on this was canvassed earlier in the judgment. Regulation may range from location (for example, a site away from public view) through the conduct of the burning (for example, the need for fire safety and environmental measures) to the subsequent arrangements (for example, the use of a cremulator; deciding which rivers can be used for the disposal of ashes). Reaching a decision on any future regime of regulation would be far from straightforward and would clearly entail detailed policy consideration and consultation. There would need to be a significant rebalancing of interests. These matters reinforce my apprehension about upsetting the current balance which elected representatives have struck. Moreover, the claimant concedes that with time, education and publicity, discerning adults will recognise that Hindu open air funerals are a practice worthy of respect. That favours engagement with the political, not the judicial,

process. The logic is that the claimant needs to pursue his cause in the public sphere, by campaigning, lobbying and the use of the other avenues open to him in a democratic society to try to effect a change in the legislative framework.

PRIVATE AND FAMILY LIFE: ARTICLE 8 ECHR

124. Article 8 provides that:

> "(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."

125. While the claimant's case rests on Article 9 ECHR, he also seeks to invoke Article 8 of the Convention. In essence he contends that preventing him from exercising his "moral/religious/cultural/familial choice of a funeral rite" does not accord respect for his private and family life. The interference with his Article 8 rights cannot be justified.

The legal principles

126. Three strands of Article 8 jurisprudence were invoked by the parties as relevant to the case. The first relates to issues of personal autonomy; the second, to specific rights relating to the disposal of one's remains on death; and the third, to the protection of a minority lifestyle.

(a) Personal autonomy

127. As to any protection Article 8 affords to personal autonomy, Pretty v United Kingdom (Application no 2346/021, 29 April 2002) was at the forefront of the parties' submissions. That was the well known case concerning an applicant who suffered from a progressive neuro-degenerative disease. She wished to be able to control how and when she died so as to be spared suffering and indignity. Her disease prevented her from committing suicide. She asked for an undertaking by the Director of Public Prosecutions not to prosecute her husband if he assisted her in committing suicide, a crime under English law. This was refused, and the House of Lords upheld the refusal.

128. The European Court of Human Rights said that although no previous case had established that Article 8 contained any right to self-determination it "considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees" (para 61). It then said:

> "64. In the present case … the applicant is suffering from the devastating effects of a degenerative disease which will cause her condition to deteriorate further and increase her physical and mental suffering. She wishes to mitigate that suffering by exercising a choice to end her life with the assistance of her husband. As stated by Lord Hope, the way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. …
>
> 67. The applicant in this case is prevented by law from exercising her choice to avoid what she consider will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 (1) of the Convention."

The court went on to find, however, that the ban on assisted suicide, and the refusal of the Director of Public Prosecutions to rule on what he would do, could be justified under Article 8 (2).

129. However, Article 8 does not confer any general rights of autonomy or self determination. The contrast between the type of private concerns engaging Article 8 raised in Pretty, with more public activities not attracting its protection, was at the forefront in R (Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] 1 AC 719. Lord Bingham said no analogy could be drawn between the "very personal and private concerns" in Petty and fox hunting, a very public activity, carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the spectacle" [at [15](1)]. Baroness Hale said:

> "116. … Article 8 protects the private space, both physical and psychological, within which individuals can develop and related to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it, and engaging in a very public gathering and activity."

See also at [55] per Lord Hope; [108] per Lord Rodger; and [138], per Lord Brown. To similar effect is Bruggemann v Federal Republic of Germany (1980) 3 EHRR 244, [57].

(b) Funeral and burial arrangements

130. Three Strasbourg cases deal specifically with the second matter, funeral and burial arrangements. The first was a decision of the European Commission of Human Rights, X v Federal Republic of Germany (Application no 8741/79, 10th March 1981). That case on admissibility arose from the refusal to permit the applicant to have his ashes scattered on his garden after death. The Commission said that it might be doubted whether Article 8 included the right of a person to choose the place and to determine the modalities of his burial. However, that

did not mean that no issue concerning such arrangements could arise under Article 8, since persons might feel the need to express their personality by the way they arrange how they are buried. The Commission accepted that the refusal by the German authorities to allow the applicant to have his ashes scattered in his garden on his death was so closely related to private life that it came within the sphere of Article 8 of the Convention (para 2). However, it held that not every law regulating burials constituted an interference with the right to respect for private life. Article 8 could not be interpreted as meaning that burials of corpses and crematorial ashes were, as a principle, solely a matter for the persons directly concerned.

131. Jones v United Kingdom was a decision of the Fourth Section of the European Court of Human Rights (Application no 42639/04, 13th September 2005). The applicant complained that the local authority had frustrated his wish to have a photographic image incorporated into his daughter's headstone. The local authority purported to act under the Local Authorities Cemeteries Order 1977, SI 1977 No 204. The court found the application inadmissible. It said that:

> "… the exercise of Article 8 rights of family and private life pertain, predominantly, to relationships between living and human beings. While it is not excluded that respect for family and private life extends to certain situations after death, for example, the ability to attend a close relative's funeral (Ploski v Poland No 26761/95, judgment of 12 November 2002, [32]) or delay by the authorities in releasing a child's body to the parents for a funeral (Pannullo and Forte v France, no 37794/97, ECHR 2001-X), there is no right as such to obtain any particular mode of funeral or attendant burial features" (para 2).

The court added that on the facts it did not find that the refusal impinged on the applicant's personal or relational sphere in such manner or to such a degree as to disclose an interference with his right to respect for his family life. As in X v Federal Republic of Germany the court also rejected the attempt to base the application on article 9.

132. Thirdly, there is Dödsbo v Sweden (Application no 61564/00, 17th January 2006), a case involving a challenge by a widow to the refusal of the authorities to permit the exhumation of her deceased husband's ashes and their reburial in Stockholm. She and her children had left the place of the original burial. Before the court, the government of Sweden did not dispute that the refusal to grant permission to remove the urn from one burial place to another involved an interference with the applicant's private life (para 19). The court reiterated that the concepts of "private and family life" were broad terms not susceptible to exhaustive definition, citing Pretty and X v Germany (para 23). The court did not consider it necessary to determine whether it was the "family life" or "private life" rights of the widow which were engaged. The court found the actions of the authorities to be justified: there was the absence of any indication that the applicant's husband had been buried otherwise then in accordance with his wishes at the time, that at that point the family had been established in that

area, and that his widow could ultimately if she wished be buried in the same place with him despite her subsequent change of residence.

> "28 The court finds that the Swedish authorities took all the relevant circumstances into consideration and weighed them carefully against each other; the reasons given by them for refusing the transfer of the urn were relevant and sufficient; and the national authorities acted within the wide margin of appreciation afforded to them in such matters".

133. The Second Intervener referred also to a decision of the Human Rights Chamber for Bosnia-Herzegovina: Mahmutovic v Republika Srpska (case CH/98/892), in which a municipality dominated by Serbs had passed an ordinance closing the only Muslim cemetery in the town, and ordered the disinterment of a Muslim buried in the cemetery notwithstanding its closure edict. Despite the fact that deceased Muslims had access to burial in consecrated ground in adjacent villages, if not in the town itself, the Chamber considered that:

> "As to Article 8 of the Convention, the European Commission of Human Rights held in the case of X v the Federal Republic of Germany (Decisions and Reports 24, p 137) that the refusal of the German authorities to allow the applicant in that case to have his ashes scattered on his garden was so closely related to private life that it came within the sphere of Article 8 (ibid at p 139). In the present case, the applicant asserts that his family originates from Prnjavor and that for many years family members have been buried at the family plot at the Mulim Cemetery where his late wife is buried. He also claims that numerous members of the family were severely upset by the authorities' action in ordering her exhumation."

(c) Protection of minorities

134. The third strand of jurisprudence concerns the protection of a minority lifestyle. That may fall within the scope of Article 8 if persons belong to "distinctive groups each with a traditional culture and lifestyle so fundamental as to form part of its identity": see R (Countryside Alliance) v Attorney General [2008] 1 AC 719, [15(2)] per Lord Bingham. The Lapps in G and E v Norway (1983) 35 DR 30 and the gypsies in Buckley v United Kingdom (1996) 23 EHRR 101 and Chapman v United Kingdom (2001) 33 EHRR 399 belonged to such distinctive groups.

The claimant's contentions

135. The claimant's case is that the denial to him of the possibility of having an open funeral pyre causes him considerable suffering during his life time. He dreads the prospect of death without a proper Hindu cremation. If he does not have that it will be a bad death and will have a devastating effect for him in the afterlife. It is on the funeral pyre that death occurs and his soul is released from the body. His son believes that it is his sacred duty to provide him with a Hindu cremation. The claimant feels humiliated by the prohibition imposed on him,

during his life time, which will prevent him undertaking a Hindu cremation after his death.

136. In his submission, supported by the Second Intervener, the claimant contends that to deny him the right to a Hindu funeral amounts to a denial of autonomy and self-determination: Pretty v United Kingdom. That goes to his private life. It is underscored by the suffering and humiliation he feels. The importance to him and his family of having a Hindu cremation is evident from it being a religious, cultural and public event. The family are involved at all stages of the proceedings; the son is the chief mourner. Article 8 is capable of being engaged because the claimant is prevented from choosing during his life time the manner of his funeral to avoid a bad death. The way he passes the closing moments of his life is part of the act of living because he contemplates it during his lifetime.

137. Article 8 is also engaged because, in the claimant's submission, he belongs to a minority group and seeks to manifest his religious and cultural funeral practices. That aspect of the case is bolstered by the special consideration which should be accorded to protect the social and cultural identity, and lifestyle, of minorities. Thus the Framework Convention for the Protection of National Minorities has been signed by almost all member states of the Council of Europe, and ratified by the United Kingdom. Article 5(1) enjoins parties to undertake to promote conditions necessary for national minorities "to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage". An open air funeral pyre is part of the claimant's religious and cultural lifestyle inherited from his forefathers. It is fundamental to him and his group identity and so can be brought within Article 8.

Article 8 not engaged

138. In my judgment the requirement that the cremation of human remains takes place in a building, and the corresponding prohibition on an open air pyres, do not amount to an interference with the right of respect for privacy and family life accorded by Article 8 of the Convention. In terms of the three strands of jurisprudence discussed earlier, it is clear that Article 8 does not comprise any general right of autonomy or self-determination: see Countryside Alliance, at para [15](1) per Lord Bingham; Pretty; M v Secretary of State for Work and Pensions [2006] 2 AC 91, at para [76], per Lord Waller. Cremation by an open air pyre has a public character, taking place outside and in daylight. The prohibition against the burning of human remains outside a crematorium is in place to ban cremations taking place in public in situations where they are likely to cause offence to others. As Baroness Hale has explained Article 8 does not protect things that an individual can only do by leaving private space and engaging in a public activity. As such, cremation by means of an open air pyre lies outside the private sphere of a person's existence protected by Article 8.

139. Secondly, I am also unimpressed with the argument that Article 8 is engaged because the use of open air funeral pyres by Hindus and Sikhs can be regarded as an aspect of their traditional culture and lifestyle, so fundamental as to form part of their identity. Even if this were true in India – and I am not sure the evidence supports it – it is simply not the case as regards the desire for open air

pyres within the Hindu and Sikh communities in this country today. It can not realistically be claimed that open air pyres are so fundamental to Hindus or Sikhs in the United Kingdom as to form part of the identity of these groups. The evolution of Hindu and Sikh practices here has resulted in the situation where the overwhelming majority of Hindus and Sikhs are content to have an indoor funeral service in a crematorium, subject to adjustments to the practices along the lines advanced by the Hindu Council.

140. However, I am inclined to interpret the case-law so that in some circumstances Article 8 protects a right to a particular kind of funeral, or a right to have burial or cremation take place in a specific way. The Secretary of State relies heavily on Jones and what he submits is the clear approach set out there. But Jones was an admissibility decision. Moreover, to my mind its language does not square precisely with that of the Commission in X v Federal Republic of Germany and the Court in Dödsbo v Sweden, albeit that in the latter case the Swedish government conceded that Article 8 was engaged. In my judgment, on one reading of the case law, Article 8 may afford protection to certain funeral arrangements. Moreover, I am not persuaded by the Secretary of State's argument that I can put to one side what the claimant submits are his son's Article 8 rights and his son's desire to carry out his father's wishes after his death, with the argument the claimant's son is not a party to these proceedings. Article 8 issues cannot focus narrowly upon the individual litigant: Beoku-Betts v Secretary of State for Home Department [2008] UKHL 39; [2008] 2 AC 115.

141. In any event, working from general principle it seems to me that in some circumstances the respect accorded to private (and indeed family life) in Article 8 can extend to aspects of funeral arrangements. That is because they are so closely related to a person's physical, psychological or familial identity. Legislative regulation could impact so significantly on the personal or relational sphere that it constitutes an interference which engages Article 8. In this case, however, Article 8 does not extend its protection to this claimant's wish to have an open air funeral pyre. That is because it involves his stepping outside those spheres. The manner in which it would be conducted would mean that it was no longer private or familial. The description which the claimant and others such as Dr Ballard paint is of a wide circle of mourners participating. The event would assume a public character and as such would not attract Article 8 protection.

Justification

142. Even if the claimant's Article 8 rights were infringed by the effective prohibition on the cremation of human remains on open air funeral pyres, this would be justified for the reasons I have given in response to the Article 9 claim. If the Article 9 claim fails, so too must the Article 8 claim.

DISCRIMINATION: ARTICLE 14 OF THE ECHR

143. Article 14 provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any

> ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

At the hearing the claimant contended that discrimination against him was plain from the prohibition imposed on open air funeral pyres. Less strongly he argued that there was also discrimination in the Council's refusal to grant land for open air funeral pyres or in its failure to acquire land outside the city for the purpose. Whereas Muslims, Jews and Christians are permitted to have a religious service in accordance with their religious faith Hindus, he says, are not. This, it is claimed, constitutes discrimination on the grounds of religion or ethnic origin. The claimant also submitted that regulation 13 of the 2008 Regulations has a disproportionate adverse impact on Hindus. The claimant's case was advanced on the basis of indirect discrimination.

Legal Principles

144. It is well-established that Article 14 has effect solely to prevent discrimination in relation to the enjoyment of the rights and freedoms safeguarded by the ECHR. In order to establish a breach of Article 14, considered in conjunction with Articles 8 and 9, the claimant must first show that his case comes with the ambit of these articles. The claimant must then show that there has been differential treatment on an Article 14 ground. In this regard the claimant referred me to the approach adopted by Brooke LJ in Wandsworth London Borough Council v Michalak [2002] EWCA Civ 271; [2003] 1 WLR 617, [20]: first ask whether the facts fall within the ambit of one or more of the substantive Convention provisions; if so, decide on whether there is different treatment as regards that right between the complainant and other persons put forward for comparison; then ensure the chosen comparators are in an analogous situation to the complainant's situation; and if so question whether the difference in treatment has an objective and reasonable justification. However, the House of Lords rejected the structured approach adopted by Brooke LJ in Michalak as not the best approach and held that the matter must be approached in a simple and non-technical manner: R (on the application of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173: per Lord Nicholls at [2]-[3], per Lord Hoffmann at [28]-[33], per Lord Walker at [64]-[68]. See also AL (Serbia) v Secretary of State for the Home Department [2008] UKHL 42; [2008] 1 WLR 1434, per Lady Hale at [24]-[31]. Thus, in Carson, Lord Nicholls stated:

> "[3] For my part, in company with all your Lordships, I prefer to keep the formulation of the relevant issues in these cases as simple and non technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their

> situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

145. As indicated, the claimant's case at the hearing was not of direct discrimination, that like cases should not be treated differently for a prohibited reason, but a claim of indirect discrimination, that a general rule should not be applied so as to treat different cases alike. The general rule in this case is that contained in the provisions of the 1902 Act and 2008 Regulations, which do not provide for less favourable treatment on the ground of any religious belief but are neutral as regards their impact on different faiths. With indirect discrimination the claimant must demonstrate that the requirement that the burning of human remains takes place only in a crematorium is disproportionately prejudicial to persons of the Hindu faith (see Esfandiari v Secretary of State for Work and Pensions [2006] EWCA Civ 282, per Carnworth LJ [17]-[18]). DH v the Czech Republic (2008) 47 EHRR 3 is now the leading authority in this regard. Effectively the Grand Chamber of the European Court of Human Rights applied the same test as Carnwath LJ in Esfandiari: does a general measure have a disproportionate prejudicial effect?

146. DH concerned the education of Roma children in the Czech Republic. Statistical information suggested that a Roma child was 27 times more likely to be placed in a special school than a non-Roma child. The applicants, all Roma children placed in special schools, accepted that the legislative and administrative schemes in place which governed whether children should go to special schools did not on their face discriminate against Roma. Nonetheless, they suggested that the statistical disparity led strongly to the conclusion that indirect racial discrimination was in play. The majority of the court accepted that it did. The Grand Chamber recapitulated the main principles thus:

> "175. … The court has also accepted that a general policy or measure that has disproportionately prejudicial affects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the convention may result from a de facto situation."

Once the defendant shows a difference in treatment, it is for the government to show it is justified at [177]:

> "189. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory. Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case, it would be extremely difficult in

practice for applicants to prove indirect discrimination without such a shift in the burden of proof": [footnotes excluded].

Article 14 not engaged

147. The claimant advances the contention that there is a disparate impact on the claimant either as a Hindu or as an Indian. While the rules on cremation are on the face neutral, Hindus are discriminated against indirectly by reason of cremation practices in crematoria which are Christian based or focused. The Second Intervener submits that Hindus as a whole are not the right group for the purposes of measurement. Once the claimant has established that his religious belief meets the requirements in Williamson as a valid, albeit minority view held in good faith, the correct comparator group are the persons holding identical beliefs, not the broader Hindu (or Indian) community, where views differ. In my view this is the correct approach. Thus if a Christian were claiming discrimination on the basis of a particular belief, and Article 9 was engaged, the relevant group to assess the existence of a disproportionately prejudicial affect would be that group of Christians of which he is she is a member, not Christians who do not share that doctrinal view, and certainly not Christians as a whole, including the non-practicing.

148. Invoking that analysis, the claimant sought to argue that there was a disproportionately prejudicial effect on the claimant from the prohibition of open air funeral pyres. In my view, however, there is no way the claimant can succeed in this argument. There is simply no evidence on the issue of land, the failure to grant land or to acquire it outside the City. All that was advanced in this regard was the power of the Council under section 120 of the Local Government Act 1972 to acquire land, within or outside Newcastle, for the purposes of any of its functions, or for the benefit, improvement or development of the area. I accept the submissions of the Council that land meeting the claimant's requirements, such as being 2km from housing, with water and reasonably secluded, is simply not available within the City boundaries. Moreover, any failure of the Council to purchase land gets nowhere when this, presumably, involves an allocation of resources away from other priorities.

149. But the claimant faces an even greater difficulty in his complaint about cremation practices, and that these constitute indirect discrimination. For this does not go to the law itself: all the law requires is that cremations occur in a building. The main complaint, that the prohibition on open air funeral pyres has a disproportionately prejudicial effect, faces the same difficulty. The only legal prohibition is that cremation take place in a building. The Second Intervener has advanced a number of innovative proposals to meet the claimant's needs. Further proposals for crematoria may do that and also constitute a building for these purposes of the 1902 Act and 2008 Regulations. Without evidence I cannot simply assume the disproportionately prejudicial impact which the law requires for the purposes of Article 14.

150. On the assumption, however, that the claimant could establish a disproportionately prejudicial treatment, the issue becomes justification. The claimant's contention is that the discrimination cannot be objectively and proportionately justified. That argument depends partly on the prohibition being

contained in subordinate legislation, the 2008 Regulations. Subordinate legislation cannot provide a lawful justification when it is incompatible with Convention rights: R (on the application of Bono) v Harlow District Council [2002] 1 WLR 2475, [34]. More importantly, the claimant contended that severe scrutiny is called for when discrimination concerns a sensitive subject such as race and, he adds, religion: R (on the application of Baiai v Secretary of State for the Home Department [2006] EWHC 823 (Admin); [2006] 1 WLR 693, [128]; R (Wilson) v Wychavon District Council [2007] EWCA Civ 52; [2007] QB 801, [46].

151. As I have said, the most recent guidance on justification is contained in DH v Czech Republic: a difference in treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim to be realised. Reasonable justification is interpreted as strictly possible where the difference in treatment is based on race, colour, ethnic origin or, it can be added, religion. Adopting that approach I have no hesitation in concluding that there is objective and reasonable justification for any disproportionately prejudicial treatment by reason of the factors already referred to in the consideration of justification under Article 9.

RAMIFICATION OF RIGHTS VIOLATION

152. In my judgment there is no violation of the claimant's Article 8 and Article 9 rights under the ECHR. If there had been the claimant contends that I should construe the 2008 Regulations compatibility with the claimant's Convention rights. A declaration of incompatibility should be a last resort. The following brief discussion is on the basis that there is a breach of the claimant's Convention rights in the prohibition of open air funeral pyres.

153. Section 3 (1) of the Human Rights 1998 provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." "

Unfortunately I am at a disadvantage because it was not explained in detail how I could interpret regulation 13 compatibly with the claimant's Convention rights. It will be recalled that that regulation reads: "No cremation may take place except in a crematorium the opening of which has been notified to the Secretary of State." The claimant contends that it is possible to interpret regulation 13 so that it does not apply to the burning of human remains on an open air funeral pyre. However, I am at a loss as to how this is to be done, what words to read in, or which words to remove, or how the consequences of the removal of this aspect of the present legislative scheme would work out in practice.

154. In my judgment it is not possible to give a Convention compatible reading to this or other aspects of the 1902 Act and the 2008 Regulations. There is clear authority that courts cannot adopt a meaning inconsistent with a fundamental feature of the legislation or which would be incompatible with its underlying thrust. Moreover, as Lord Nicholls put it in Ghaidan v Godin-Mendoza [2004]

UKHL 30; [2007] 2 AC 557 any words implied must "go with the grain of the legislation": [33]. To adopt an interpretation which would violate a cardinal principle or depart from a fundamental feature of the legislation would cross the boundary between interpretation and amendment. Section 3(1) does not allow a court to change the substance of a provision completely, to change a provision from one where Parliament prohibits something to one when it may happen. In such cases, only Parliament can remove the incompatibility by deciding to repeal or amend the provision.

155. In short, section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute. In my view the provisions of the 1902 Act and the 2008 Regulations are not discrete matters. They are inextricably linked, and exist together as a single scheme concerning the disposal of human remains by cremation. The requirements which exist by reason of section 2 of the 1902 Act and regulation 13 of the 2008 Regulations are both clear and integral to the legislative scheme. There is the requirement that the burning of human remains occur in a crematorium, a building. That cannot be interpreted away. To adopt a contrary meaning would be to cut across a fundamental feature of the legislation and would be contrary to the scheme of the 1902 Act and 2008 Regulations.

RACE RELATIONS AND EQUALITY

156. The claimant finally contended that the effective ban imposed on him from undertaking cremation on an open air pyre indirectly discriminates against him under domestic legislation. First, the prohibition and the refusal to grant Hindus land for the purpose constitute indirect discrimination contrary to section 1(1)(b) or section 1 (1A) of the Race Relations Act 1976. Indians are the identified racial group, Hindus and possibly Sikhs; Hindus are more likely than not to be of Indian origin or nationality. Secondly, the Equality Act 2006 was invoked in its prohibition on discrimination on the grounds of religion and belief: section 52(1) provides that it is unlawful for a public authority exercising a function to do any act which constitutes discrimination. Although the 1902 Act and 2008 Regulations relating to cremation appear neutral the claimant contended that there is disguised discrimination on the grounds of race, ethnic origins or religion.

157. There is no need to detail the claimant's submissions in either regard. The fact is that the claimant never came to grips with the exemption in both Acts for acts done with statutory authority. Even if discrimination were to be established, neither the Race Relations Act 1971 nor the Equality Act 2006 are privileged over other legislation. The prohibitions on discrimination do not apply to the House of Commons or the House of Lords, which were responsible for the adoption of both the 1902 Act and the 2008 Regulations. In addition, the prohibitions do not apply to preparing, passing or making, confirming, approving or considering an enactment or making regulations under it: Race Relations Act 1976, ss 19B(3)(a); 19C(2); Equality Act 2006, ss 52(3), 52(4)(c)(d). It is clear that this aspect of the claim cannot succeed.

158. At a late stage the claimant raised yet another argument: neither the Secretary of State nor the Council conducted a race impact assessment under section 71 of

the Race Relations Act 1976. Quite apart from questions whether Hindus (or Indians) obtain the protection of the Act, the fact is that the 2007 Consultation Paper does address the issue in the manner I summarised earlier in the judgment. The Council is simply implementing the law in relation to cremation so the claim in relation to it fails.

CONCLUSION

159. The Cremation Act 1902 and its attendant 2008 Regulations are clear in their effect: the burning of human remains, other than in a crematorium, is a criminal offence. This effectively prohibits open air funeral pyres. It is important to note, however, that the impact of the 1902 Act and 2008 Regulations is limited. A crematorium is defined as a building so all that is demanded is that cremations take place in a building; the design of the building and its internal arrangements are not prescribed. Crematoria are subject to a range of other environmental and planning legislation. The claimant concedes that cremations on an open air pyre would need to be controlled along similar lines, possibly with additional measures covering matters such as the collection of remaining bones and the disposal of ashes in rivers and streams.

160. The claimant and First Intervener invoke Article 9 of the ECHR, freedom of religion and belief, as protection of their right to conduct cremations on open air pyres. Reflecting the common law, the right to hold a belief in the necessity of cremation on open air pyres attracts absolute protection under Article 9. In my judgment Article 9 would also protect the claimant's freedom to manifest his religious belief in open air funeral pyres in the absence of justification. That follows because the evidence persuades me that the claimant's belief in open air funeral pyres is cogent and also central to his strand of orthodox Hinduism. It is beside the point that typically Hindus in this country do not share that belief. That conclusion does not follow however, for the First Intervener, who candidly concedes that open air funeral pyres are not a matter of Sikh dogma and belief but simply a matter of tradition.

161. In my view the prohibition on open air funeral pyres in the 1902 Act and 2008 Regulations is justified. The Secretary of State advances various arguments, in particular that others in the community would be upset and offended by them and would find it abhorrent that human remains were being burned in this way. The claimant takes issue with this. This is a difficult and sensitive issue. Precisely for that reason a court must accord primacy to the conclusion of elected representatives. It is within their remit to conclude that a significant number of people would find cremation on open air pyres a matter of offence. The balance they have struck in the 1902 Act and 2008 Regulations is entitled to respect. The claimant concedes that with time, education and publicity the public will not be offended but will recognise that open air funeral pyres are a practice worthy of respect. That points to engagement with the political process, to attempt to change the present balance of interests in the current legislative scheme.

162. The claimant and First Intervener also invoke Article 8, respect for private and family life. In my judgment Article 8 may in some circumstances offer protection to particular funeral arrangements. In the case of cremation on an

open air funeral pyre, however, Article 8 has no purchase. The claimant is stepping outside the private and familial spheres. The event would have a public character and as such would not fall under Article 8's protective wing. In any event, there would be justification for legislative interference with Article 8 protection; it would follow along the same lines as that with Article 9. There is no need to recapitulate my rejection of the other arguments advanced by the claimant and the interveners, in particular arguments relating to discrimination under Article 14 ECHR and the race and equality legislation. The claim fails.