

CASE NOTES

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Barrister, Deputy Chancellor of the Dioceses of Chichester and Norwich

Jivraj v Hashwani

Supreme Court: Lords Phillips, Walker, Mance, Clarke and Dyson, July 2011
Arbitration clauses – religious discrimination

The parties entered into a joint venture agreement which provided that any dispute between them would be resolved by arbitration before three arbitrators who were each respected members of the Ismaili Muslim community (see case notes at (2010) 12 Ecc LJ 121 and (2011) 13 Ecc LJ 121). The issue on the appeal was whether the arbitration clause was void in light of the Employment Equality (Religion or Belief) Regulations 2003 (as now replaced by the Equality Act 2010) as constituting an unlawful arrangement to discriminate on grounds of religion. In allowing the appeal, the court held that the regulations did not apply to the selection, engagement or appointment of arbitrators who were not ‘employees’ within the terms of the regulations but rather independent providers of services who were not in a relationship of subordination with the parties or working under the direction of the parties. *Obiter*, the court considered the question of whether being a member of the Ismaili community was a genuine occupational requirement of the position of arbitrator in this case. The court held that that requirement must be genuine, and objectively legitimate and justified. One of the more significant and characteristic spirits of the Ismaili community was an enthusiasm for dispute resolution within that community, a spirit that the parties had reflected in their engagement of members of the Ismaili community to perform mediation services earlier in the dispute. In those circumstances the requirement for Ismaili arbitrators was a genuine occupational requirement. [RA]

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Re Bacup Cemetery

Manchester Consistory Court: Tattersall Ch, September 2011
Exhumation

The chancellor refused to grant a faculty for the exhumation of the deceased from her mother’s grave in order that she could be re-interred in a grave in

which her husband could also be buried upon his death. The deceased's widower sought the faculty on the basis that he had been 'tricked' into consenting to the deceased's burial with her mother on the understanding that he could also be buried there, but that that was no longer the case. The remainder of the deceased's family objected to the faculty being granted on the basis that the petitioner had been convicted of sexual offences against the deceased's daughter and others. The chancellor held that the petitioner had not been 'tricked' as he alleged but had simply been honouring the deceased's wishes in burying her with her mother. He found that, had the deceased known the full extent of the petitioner's criminality, it would have been inconceivable that she would have wanted to be interred with the petitioner. He further acknowledged the distress that would be caused to the deceased's family should they be required to mourn the deceased at a grave in which the petitioner was also interred. [RA]

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R (on the Application of Quila and others) v Secretary of State for the Home Department

Supreme Court: Lord Phillips, Baroness Hale, Lords Clarke, Wilson and Brown, October 2011

Immigration rules – right to family life

The Home Secretary appealed the decision of the Court of Appeal concerning rule 277 of the Immigration Rules 1994, which restricts visa applications or sponsorship to those over 21. The Home Secretary argued that the raised age limit for visa applications or sponsorship was intended to protect young people, predominantly women, at risk of forced marriage. Quila was an 18-year-old Chilean man, married to an 18-year-old British wife. Bibi was a Pakistani woman, married to a British national of Asian background. In respect of both marriages, visas to enable the non-British partners to enter or remain in the UK to live with their spouses had been refused. The court held that the refusal to allow foreign spouses to reside in the UK with their new British spouses amounted to an interference with the claimants' right to family life under Article 8 of the ECHR. Given the legitimate purpose of the restriction in protecting young people from forced marriage, the court went on to consider whether that restriction could be justified under Article 8(2). The court considered whether the measures were rationally connected to the objective, whether they were no more than necessary to accomplish that objective, and whether they struck a fair balance between individual and community. It was held that the measures were rationally connected to the objective. The