IN THE COURT OF APPEAL (CIVIL DIVISION) No. C1/2017/3073
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(**Rowena Collins Rice**)
(Sitting as a Deputy Judge of the High Court)
CO/3456/2016

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 12 March 2019

Before:

LORD JUSTICE IRWIN

LORD JUSTICE HADDON-CAVE

SIR JACK BEATSON

B E T W E E N :

R (FELIX NGOLE) Appellant

- and -

UNIVERSITY OF SHEFFIELD Respondent

HEALTH AND CARE PROFESSIONS COUNCIL Intervener

MR P. DIAMOND (instructed on a Direct Access basis) appeared on behalf of the Appellant.

MS S. HANNETT (instructed by Pinsent Masons) appeared on behalf of the Respondent.

THE INTERVENER was not present and was not represented.

P R O C E E D I N G S

I N D E X

(Transcript prepared from a poor recording)

Tuesday, 12 March 2019

(10.44 a.m.)

LORD JUSTICE IRWIN: Yes, Mr Diamond?

MR DIAMOND: My Lords, I represent Mr Felix Ngole, he used to be a student at the University of Sheffield. My learned friend, Ms Hannett, represents the University of Sheffield.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: There is a bit of housekeeping just to tidy up. The first thing is in the appeal hearing bundle, and I do not know whether it is the first time you have seen this bundle, but there should be at p.125, the skeleton argument for the substantive hearing before the trial judge.

LORD JUSTICE IRWIN: Right.

MR DIAMOND: So that is there. I am just checking – previously it was the permission skeleton argument.

LORD JUSTICE IRWIN: "Skeleton argument for permission for judicial review"?

MR DIAMOND: No, you have the permission one, you should----

SIR JACK BEATSON: Mine just says: "Skeleton argument on behalf of claimant".

MR DIAMOND: Yes.

SIR JACK BEATSON: Is that the right one, or?

MR DIAMOND: My Lord, you have the right one. It is not a permission.

LORD JUSTICE IRWIN: Okay.

MR DIAMOND: You have the permission one.

LORD JUSTICE IRWIN: So there's one on the Bench that is – yes, I see.

SIR JACK BEATSON: Oh, this is the one that came yesterday.

MR DIAMOND: Yes, it is the one that came yesterday, but the permission skeleton makes things a bit more easy, I would submit.

The second bit of housekeeping is there is an additional file at your desk, and I know it is adding authority after authority, and often these authorities only show small points, but there is an additional supplemental bundle of authorities, this one.

LORD JUSTICE IRWIN: The blue one?

MR DIAMOND: Yes. I know your Lordships are more than familiar with most of the authorities, and will be very familiar with (inaudible).

LORD JUSTICE IRWIN: Also loose on the Bench, Mr Diamond, is skeleton argument on behalf of the defendant, at p.140. Is that a replacement?

MS HANNETT: What was intended was that in tab C of the core bundle you have the permissions skeleton by accident----

LORD JUSTICE IRWIN: Right.

MS HANNETT: -- and what we were intending to do is take out those and replace them with the two substantive skeleton arguments.

LORD JUSTICE IRWIN: Okay.

MS HANNETT: I hope that is clear.

LORD JUSTICE IRWIN: Thank you. Sorry, Mr Diamond – yes?

MR DIAMOND: My Lords, I need to set the structure for the case, so I intend to do an introduction. I intend to take you through some of the facts that we believe are salient and important, and your attention should be taken to them, discussion of the judgment and then the principles that should be applied to this case from the Convention and from domestic authorities.

This is a difficult case, and on this side we submit it is an important case. This case is about freedom – freedom of religious speech, freedom of speech. It is not a case where anyone is required to agree with Mr Ngole's views, nor endorse them, it is the wider case on freedom of citizens.

The reason we say this is an unusual and important case, by way of introduction, this case is, in fact, a reversal of the Hart/Devlin debates of the late 1950s and early 1960s, and on the position of the Wolfenden Committee, and again it focuses on the same issue, which has clearly stood the test of time, the controversial issue of homosexuality. Of course, in those days Professor Hart, from Oxford, was the liberal, and Lord Devlin was the reactionary seeking to enforce morality via the law.

LORD JUSTICE IRWIN: Mr Diamond, just before you plunge in----

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: I think it will be helpful for us, first, to say we have read what we think is all the essential material for both sides, and so looking at your structure that's absolutely fine and helpful. There might be times when we say: 'We have got that', and I hope you will not mind if we move you through a bit, but do not be distracted from anything you think is essential. So that is the first thing to say.

The second thing is I think we should have a timetable in mind. I do not know whether you two have thought about a timetable----

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: -- and what that is?

MR DIAMOND: I am intending certainly to end before 3 p.m., if not 2.30 p.m., and my learned friend is hoping to start at that time. I do not tend to be too 'waffley', although you may be fooled by that by my introduction, but I seek to cover the ground. Many of the authorities you will be familiar with----

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: -- and you will not want taking to in great depth, but I am prepared to do so. I think there is some factual evidence we would like to emphasise----

LORD JUSTICE IRWIN: Of course.

MR DIAMOND: -- so there may be some elements there that, even at a pace, I would like to draw to your attention.

LORD JUSTICE IRWIN: So you are aiming for 2.30/3 p.m.?

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: And then, Ms Hannett, when do you----

MS HANNETT: My Lord, between us we had thought that if I had finished – I am sure I will comfortably finish – by 12.30, no later, tomorrow, which would give Mr Diamond half an hour in reply----

LORD JUSTICE IRWIN: Yes, okay.

MS HANNETT: -- and allow us to finish at lunch time, which is the time estimate for the case.

LORD JUSTICE IRWIN: I wonder if you might try and aim for noon tomorrow, and see, because----

MS HANNETT: That was a sort of----

LORD JUSTICE IRWIN: -- we cannot spill over into tomorrow afternoon, that is the main thing, so we need to make sure that there is not excessive pressure within that time frame.

MR DIAMOND: I think I can bring it forward, I will try and be as concise as possible.

LORD JUSTICE IRWIN: Thank you very much. Yes?

MR DIAMOND: I am making a point, though, that we have a reversal on the whole question of the old Hart/Devlin debates, and there is now a new morality, the proponents of sexual orientation equality, that is now the new morality, and they are now, using Lord Devlin's position, the new moral enforcers against religious folk and, particularly in this case, a

Christian, but it includes Jews and Muslims, who are out of step with the new morality. It is actually Mr Ngole who now seeks to claim the protection of the liberal principles, and the liberal principles are the right to choose your own version of the common good and the choosing of the common good is something the State should be neutral on.

If I may just emphasise some of the important principles in this case, if I may just take you to tab 19 of the authorities bundle. I just want to take a quote from this case, which I urge as a form of reasoning, and why freedom of speech in the United Kingdom is in such a desperate state at the moment. Let me take you to para. 99 of Mrs Justice Lang's decision in the case of *Core Issues Trust v Transport for London* [2013] EWHC 651 (Admin). It is something I used in that case, but I have used it for a purpose, so forgive me for repeating the argument:

> "99. These observations echo the arguments in favour of free speech by the celebrated philosopher J.S. Mill (*On Liberty*, 1859) and more recently, the late Ronald Dworkin in the foreword to *Extreme Speech and Democracy* ed. Hare and Weinstein (2009), cited to me by Mr Diamond. Dworkin also warned against censorship on anti-discrimination grounds, saying:
>
> > 'The strong conviction that freedom of speech is a universal value is challenged today not only by freedom's oldest opponents (the despots and ruling thieves who fear it), but also by new enemies who claim to speak for justice not tyranny. These new enemies point to other values we respect, including self-determination, equality, and freedom from racial hatred and prejudice, as reasons why the right of free speech should now be demoted to a much lower grade of urgency and importance.'
> >
> > 'These calls for censorship will strike many people as reasonable and signal, just for that reason, a new and particularly dangerous threat to free speech, for we are more likely to relax our defence of that freedom when our betrayers are foreign, or when the speech in question seems worthless or even vile. But if we do, then the principle is inevitably weakened, not just in such cases, but generally'."

There will be a submission on this case on the sort of the application of the meaning of a heckler's veto, but before we go there, I urge on this court the wise words of the late Professor Dworkin. You either believe in freedom, or you do not believe in freedom. You either believe in freedom of speech, or you do not believe in freedom of speech, and the threats to freedom of speech are greater now. Every day in our media people are offended.

Groups are upset. There is very close to irrational conduct with which I shall deal later, and just because some of those calls to limit our freedoms, and freedom of speech, are couched in languages: 'Why should this person who is overweight be criticised for being overweight?' 'Why should this minority suffer further grounds of hostility?' They sound seductive, as Professor Dworkin said, but precisely because they are so seductive we must be on our guard to maintain the freedoms of speech in our country.

Another reason why we say this case is important is because it is going to focus on the contested question: whether religious traditionalists have a right to express the view that homosexuality is a sin, it is immoral? This case is going to need to decide that and, with due regret, the learned trial judge failed to decide that.

The reality is the State cannot coerce religion, we have abandoned that. In our submission, it should neither coerce sexual practice acceptance if religious people do not accept that, and it is a view held by millions, and I will be submitting, in conclusion, that the place of the Christian faith in society, in particular, has sustained such systemic governmental and public assaults it has seriously weakened, and people are seriously intimidated.

Then there is another reason why this case is important, and that reason is the issue of professional regulation of speech. Professionals are people, they have speech, there is no special regime for professionals. Professional regulation has potential to restrict free speech very widely, to restrict speech only for professionals, that non-professionals can actually articulate and say. Very often, and it will be argued in more and more cases that come before these courts unless it is dealt with, they are not going to be restricted to interactions in the professional field, not by perhaps something to do with judging, or being a lawyer, or a professional relationship with a client, or performance in court, or academic writing, but for wider and wider reasons.

Professional rules can amount to a speech code. They can be used to supress certain viewpoints that are just not approved of and that, we submit, would be contrary to Article 10. Very often, it is said that the speech is 'discriminatory', 'derogatory', 'prejudicial', 'biased', but it has no known restriction under our free speech codes. It is very often directed to ideas, not the manner but the idea and, of course, the idea of Mr Felix Ngole is, indeed, very

controversial. He does believe homosexuality is a sin, and he does want to inform people of that.

It is also a very bizarre restriction. One would believe that professionals can engage in social and political advocacy. There is no reason why Mr Ngole could not decide to stand as a Labour candidate, and advocate a whole range of policies – surely a professional can do that? There is no reason why Mr Ngole, as he is, a lay youth pastor, cannot take teaching roles in that and express himself publicly in a religious forum.

There is an additional problem with regulatory supervision, and the court needs, I am going to request, humbly as counsel does, that the court is robust because freedom is falling and it needs to be expressly stated by this court. I am urging on this court to make a very grave decision, but there is something additionally alarming about regulatory restrictions, and that is, as in this case, the complaint was anonymous. The complainant, Mr Ngole, is neither relevant nor substantive past this case, but it may be he knew the individual and the individual is ideologically opposed.

The complaints process is simply used to silence a viewpoint of someone they disagree with. It can be done anonymously, it can be done without any need to justify it, or the reasons why we have done it. It then, as in this case, is adjudicated on by a professional disciplinary Body and the professional disciplinary Body, although knowing their field, are not lawyers and judges, aware of the defence of importance of principles such as free speech and Convention rights, which are much wider, and those truths cannot be masked, as we say in this case, by a pretext that this is some form of lack of insight.

For these reasons, if I may be so bold, the reversal of the Hart/Devlin debates, Professor Dworkin, we have to actually stand by freedom of speech, whether we agree with it or not. The damage and almost attempt to eradicate Christian teaching on the contested issue of homosexuality is a sin, and the role of professional regulations, mean that this court needs to be ever vigilant.

If I could now just briefly go to the supplemental hearing bundle to touch the facts.

LORD JUSTICE IRWIN: Supplemental authorities?

MR DIAMOND: No, supplemental hearing bundle.

LORD JUSTICE IRWIN: Okay.

MR DIAMOND: My Lord, obviously at p.1, and I am sure your Lordships have read the Facebook posts, and these are the Facebook posts in question.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: He engaged with these Facebook posts in his private capacity, either identifying himself as a student of Sheffield, or as a social worker, simply in a private capacity.

The debate is fairly robust, as you know these debates can be, about the arrest of the American marriage registrar in Kentucky. If you look at p.2, he does say:

> "However, same sex marriage is a sin whether we accept it or not. It is God's words and man's sentiments would not change His words."

and then there are questions about what they believe God, that is God's word.

Then over the page, p.3, there are bible verses. On p.4 you see the two stars by some comments at p.4 at the bottom. He did not put that there, the university must have put that there. You have various passages where it talks of sexual immorality, including homosexuality.

> "Homosexuality is a sin, no matter how you want to dress it up.
>
> However it is your constitution to protect everyone's religious beliefs. Am I wrong? I see a clash in the interpretation of your constitution that's all. And as I said earlier, the devil has hijacked the constitution of the USA."

Now, I just want to stop at this moment, I want to just focus, because this case is focusing on Article 10, but there is something I am going to ask the court to step from its comfort zone into the mindset of a religious adherent.

Sexual morality, ethics, these are the teachings of the ancient Jews, it is the teaching of the New Testament, it is the component factor of most religious thought and, of course, it is also one of the most challenging parts of religious thought. Religious language, and I did try and argue something through this, I think to little avail, in the trial court, it is difficult to

comprehend. Yes, it does sound strong, "sin", "devil", "Hell", "your eternal future", it is strong, there is no denying about it. It is strong, but it is religious speech, it needs to be respected. It is not demeaning or derogatory. Mr Ngole would not see himself as demeaning anybody by warning them of their eternal salvation and how to comply with God's law. That is what he is trying to do, and he would also say he has an Article 10 or Article 9 right to say that, and he would also say the recipient of that word has a right (Articles 9 and 10) to say: "No, I don't agree with you. I refute it" or "I have a different faith", or "You are the one going to hell. I am the one who is not going to hell".

I think we have to be very careful – and I called this, in my judgment, 'incompatible rationalities' – of seeking to force either party to speak the language of the other party. What I mean by that is the religious adherent should not be required to express himself in terms that the secularist can understand – that is very polite, that is very good. Nor should the secularist----

LORD JUSTICE IRWIN: Just take this slower. You must not force the religious adherent to express himself or herself?

MR DIAMOND: Or herself in the framework as a secularist would like that individual to express themselves. I called it "incompatible rationalities" in the trial at court. Both are rational approaches. Mr Ngole is entirely rational in his belief that Jesus Christ, Lord Jesus rose and he is, himself, he is the saviour of the world, and this is how you need to conform. The secularist is entirely rational in saying: "I do not accept that premise."

LORD JUSTICE IRWIN: It is a difference of premises, is it not?

MR DIAMOND: It is a difference of premises, I call it 'incompatible rationalities', but under the principle of the – if I can put it rather colourfully – the Church/State divide, you do not force one into the mould of the other. We no longer impose religious authority and coerce religious belief in Britain, and nor should we coerce religious appearance to comply with secular norms. So I am asking you, that is why there was a bit of debate whether this is Article 9 or Article 10 in the lower court, and I did not want to throw the baby totally out with the bathwater, because there is a distinct category of evangelism, prophetism, it is called 'free speech' in Article 10, it is called 'prophetism' in Article 9. I am not going to fall on a division, but what I am asking this court to do is to put itself into that role that the languages, as my Lord has said, are different premises, they do not necessarily speak to each other clearly, they speak past each other, but that does not mean the language is derogatory or demeaning. I think Mr Ngole, I can say, who is a church leader and who has never

discriminated against anyone, would be mortified if he felt that anyone had been unduly upset. All this was, was an extremely robust internet conversation of which these conversations do take place, and because they are third party you do not often see the person, you can shoot too much. Just to sort of say, there are lots of quotes of the bible, and there's (inaudible), p.6 – I will take you to it, I will have to address it – at the bottom of p.6 two Felix Ngole quotes, "God calls the act abominable just as it is. God created Adam and Eve", and then: ". . . the bible says a man shall leave his mother and father and get married to a woman not a man. God hates sin and not man." That may sound rather complex, yes, it's an internet post. It reads hard.

There is a reality in this, that the old testament is very hard on homosexuality, it is called an "abomination" and a "sin for man to sleep with a man as woman" – I think that is the phrase used – and "God hates sin and not man", that has always been the Christian doctrine; the sin is hated but the man is loved, and we want to save the man. But there is a paradox in this case, that is what the bible says. It says lots of things that we do not like. It talks about drunkenness, (inaudible), it talks about honesty and integrity – we might like that in our secular rationality, we can understand 'integrity' and 'honesty', but we do not understand why the sexual theme, or the drunkenness theme, or other themes play such a prominent role, but that is the complexity of a lawful religion. Indeed, in the case of Christianity it is more than lawful, it has actually been our State religion for quite some time.

Like all blogs, there is lots of hostility – Catholic priests are up to no good, and I just take p.12, it is random, there are lots of mutual insults. There is somebody called 'Rawle' two from the bottom, he just says: "God made male and female, not man and man or woman and woman, God be with him". Someone supports him. Then someone said: "He is here. Really? Was he there for your 4 marriages?" – this lady has four marriages – "or the birth of your OUT OF WEDLOCK children? Shut up and take a seat, bigot". There are lots of other comments like that.

What I would say is Mr Ngole was always polite. He explains his Christian position and he gave it, he gave it straight, and other people said very offensive things. Are we really reaching a society where we can Google people on Facebook, Tweets, or whatever they said, and they can be livelihood endangered by this, and this is why this case is important, one needs a strong judgment for freedom in this case.

Mr Ngole is then called to a meeting on this anonymous complaint, and if we go to p.28, tab 2.

LORD JUSTICE IRWIN: That is in?

MR DIAMOND: The same bundle, it should be.

LORD JUSTICE IRWIN: I do not have a tab, I have A, B, C.

MR DIAMOND: Oh, p.28.

LORD JUSTICE IRWIN: 28 I have.

MR DIAMOND: I am terribly sorry, I put tabs in myself because of the Word tabs. If we go to p.28----

LORD JUSTICE IRWIN: "Notes of Interview", yes.

MR DIAMOND: It comes up in a letter. If you go to p.17, they are searching for Mr Ngole – I am not quite sure who is searching, but there are various searches, and then you see here, this is someone saying: "Your family supports you. LGBT, it's just perfect." Page 17 is a line of comments, over the page, p.18 is a line of comments by various strangers. Page 19 is a line of comments by various strangers, and then you will see, p.20, halfway down, there is a Felix Ngole note. That was hunted down, and found that he disapproves of LGBT, various matters. Well, I am not sure what he did. I think with these Facebooks you 'thumb up' and 'thumb down' as your favour takes.

You see the scale of searching they have done for his views; they are looking. Those of us of a certain generation, my Lords, we may not be Facebook crazy, we may not be tweeting what is happening in the court this afternoon, but the reality is your children will be doing it, and your students will be doing it, and it is a reality, and people hunt through it – "What's he said on this?" "Is it something I can get this person on, because I don't like him."

Then, we go to p.28. And then we see this is his first meeting on 11 November. The central paragraph: "JL advised FN that she was contacted by a third party regarding the social media posting . . .", they produced them all, including a posting which is actually on p.27, which was – sorry, I am jumping back a bit, just one page back.

LORD JUSTICE IRWIN: Can we just correlate the reference on 28, to p.27?

MR DIAMOND: Yes. He says, in his name in Google:

> "JL found conversation which was taking place – a lady in the USA suspended as she refused to sign marriage licence. JL pointed out the

> discussion with David Calabra . . . JL proceeded to show FN the documents of the conversation on Facebook. JL also referred to postings found via Google supporting gay children . . ."

That's the one note I showed you:

> ". . . and where FN has commented 'No'. The evidence of the conversation was shown to FN. The 3rd piece of evidence shown to FN was relating to a discussion on the Holocaust and the slave trade."

And that is at p.27 where Felix Ngole simply said:

> "Bearing in mind that the slave owners were compensated handsomely for losing their 'business', and the Jews compensated for the Holocaust then why not? Is the slave trade not as bad as the Holocaust?"

What you have is people going through your 'pub talk', your 'dinner talk', you are expressing yourself, not perhaps articulately as you should, and saying: "You know what, let's get this person. We don't agree with that view. How can you say the slave trade is as bad? Maybe Jewish people won't like that, or maybe he's a black Nationalist. Let's see what we can go on this."

LORD JUSTICE HADDON-CAVE: Mr Diamond, you refer to this as 'pub talk', of course it is not, this is public. That is the great change that has come about in the last 10, 15 years, that your footprint on the web remains, and remarks that you made 10 years ago are still there. If you Google a name you may be able to find them, and they may come back to bite you. That, surely has been the big strategic change. It is not a private 'pub talk'.

MR DIAMOND: I could not agree with you more, it is a reality. I do not want to go over sinister but you put it on the web, it is up there forever. People can find these emails, which are stored for very long periods, and everything you may have said foolishly and cleverly, and they can find out things that you said because it is said publicly, and that is different because anyone can Google it. But the principles have got quite a wide application.

One of the things that came up in the lower court: what if Mr Ngole had given a sermon in a church and that had been on YouTube, that is also public. What if someone from the public had walked into that church, who was a service-user, and heard him? I am not convinced, my Lords, if we do not get some robust judgments there will come a time when private conversations at dinner parties will come up.

LORD JUSTICE HADDON-CAVE: I follow that submission, but this court has to deal with the world as it is now, and technology as it is now. We need submissions that, in a sense, address the world as it is not as we may like it to have been.

MR DIAMOND: No, but that is why, when we consider the proportionality questions courts need to now – I mean obviously I cannot predict every example, or every stupid comment that someone makes on Facebook, but we need now some grip on the situation. We are swirling, my Lord, at the moment. Cambridge University has banned Linda Bellos – you remember Linda Bellos, the Lambeth leader, she has been 'no platformed'. Professor Finnis of Oxford has been questioned on his views on abortion, whether he can publicly speak and have a role there. It is one thing to say: "Well, this is a private act, I have got to defer to a private institution", but unless – and the learned judge failed to do this in this case, she left all the questions unresolved: what can you say? How can you say it? She just focused on the easy points and then said "I will defer".

I am urging on this court to start grappling with these questions, because if we do not grapple with it now we are going to be in a Tsunami, and we are on the edge of a Tsunami.

LORD JUSTICE HADDON-CAVE: Indeed, I appreciate all that, but it is important that this court, in submissions, grapple with the world as it is----

MR DIAMOND: I will focus on----

LORD JUSTICE HADDON-CAVE: -- and the reality is that technology means that what you say five or 10 years ago, Facebook, Instagram, will be there.

MR DIAMOND: Yes, and when the court obviously does proportionality analysis, which we will come to in the end when I conclude, when was it said? How was it said? What's the tradition of the person? That all comes into it. It was said five years ago, he may have been drunk, he was a student.

LORD JUSTICE IRWIN: Yes, but I think what my Lord has been putting to you is 'pub talk' – 'pub talk' is, by definition, evanescent, particularly because people quite often do not remember what you said----

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: -- they are in the pub at the time, whereas the obvious point is that, as your client found out, what is put on the internet, as you observe, is not evanescent, it stays for ever. Now, there is difference between the two and the question, or one question that you will have to address for us, is given that there is a difference, because it persists and is accessible, whatever the motive for accessing it it is accessible, then that combines not

merely with considerations of the private citizen who can say anything he wants, but how does that combine? How does that relate to professional responsibilities.

MR DIAMOND: I think I understand that----

LORD JUSTICE IRWIN: That is where you need to get to, is it not?

MR DIAMOND: Yes, I will get to that, I will put that in the proportionality balance: how do we deal with this Facebook proportionality, or social media proportionality.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: But there is a slight irony in this case that if you actually Google Mr Felix Ngole, what will come up is not this, which is virtually impossible to find unless you are dedicated to finding it, what will actually come up is that Mr Ngole has been challenging his rights to say this. So you are now definitely going to know he has said it, but he has done it by exercising his legal rights and access to the court, so the problem is 'complex'----

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: -- if I can put it that way. What we do say, of p.29, we have the comment, the discussion what takes place, and at p.29 Felix Ngole says:

> "[I] Gave the explanation. I did post it. Before I came into the Social Work I was already a Christian and had been in many professions. The Bible tells me I should love people. I don't love people because of social work values, but because of the Bible. God is an example of love."

He goes on:

> "I don't condemn people . . . It doesn't matter whether that person is homosexual, a murderer, paedophile, liar, it doesn't matter. I do it because God has asked me. I have worked with gay people and I have beliefs about what they do but I won't treat them any different. I never discriminate against anybody. I am not a hypocrite. In my placement report it mentions I work with people in same sex relationships. The people I worked with didn't complain about me treating them any differently. I follow the bible . . . God hates sin . . ."

And so on. I ask you just to read it.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: What he is saying is 'These are my thoughts, yes, but I've never discriminated against anyone, and I've worked with same sex people, my social work report notes it, and there were no complaints.'

Then, he is responded by 'DB', who is, I think, Mr Bosworth, and he says:

> "The issue is working in a Professional Practice. There may be a family who are gay and see your social media posting, this could be problematic for you. I am not saying not to hold your beliefs, but this is about regulations to behave in a certain way. The comments are incongruous with the values of the Social Work profession, this is about personal conduct."

LORD JUSTICE IRWIN: It is obvious, Mr Diamond, these notes are notes, they are quite full but they are not verbatim, so we all must read them with that in mind.

MR DIAMOND: Yes, well, these are the notes, of course, by the university.

LORD JUSTICE IRWIN: Of course, no, no, I understand.

SIR JACK BEATSON: This is the first meeting?

MR DIAMOND: This is the first meeting, and if you just go over the page, p.30, three paragraphs down, DB says:

> "We have to look at the conduct guidance. You've not tried to hide anything, and I thank you for your honesty and integrity. I don't think you would behave in a discriminatory way. However, you could inadvertently discriminate. The person on the receiving end of your comments could be discriminated. This is very complicated. I wish to give you every opportunity to state your cause. This could have a major impact on you and your family."

And then, if we just jump – this is a formal note when it goes forward to the Fitness to Practise, p.31, and it says: "Details of Concern": "Postings that indicate views of a discriminatory nature." I just want to stop there because you can see where I am trying to direct your Lordship's thinking. He is called forward: 'I have never done anything wrong. I've never discriminated against anyone'. The university say: 'You are a man of integrity and honesty, you haven't held anything back. There is nothing we would obviously recognise as not making you fit to be a student or a decent citizen. The thing we actually identify is the views, incongruous with the social work profession.' You can imagine, they are very out of step these views.

Then, the descriptor of Christian views as discriminatory. I just want to touch on that, because that is unacceptable, of course, and I am going to ask this court to deal with that.

You cannot describe Christian views as discriminatory and derogatory. That is an animus and hostility to Christian thinking.

LORD JUSTICE IRWIN: Could we, before you develop that point, just bear in mind the passage you took us to when the Chair, DB says: "I don't think you'd behave in a discriminatory way, however, you could inadvertently discriminate." Now, that is obviously compressed because it is a note. It must mean, one would have thought: 'you do not deliberately discriminate, but you might do so inadvertently, because your beliefs on these issues are so strong'. Then he says: 'This is complicated', and 'it could be important for you.' So, on what basis do we take the shorthand on the next page, "views of a discriminatory nature", how is that different from what has been said there?

MR DIAMOND: The point is, why this is a matter for the courts and not a Fitness to Practise Committee, is that this case involves speech, and people have strong views – Christian views, Islamic views, that is just religion; political views, social views, people have strong views. The whole of life, my Lords you have strong views no doubt, but I hope when we are in this room together you are going to say: 'I am going to listen to this counsel, though I haven't got the foggiest what he said, I'm going to act professionally, because I can divorce my private views from my professional role', and that is what society is about, and to actually say: 'You have got strong views that you want a Corbyn Government, or Israel is a Zionist Nazi experiment, so that means you cannot distribute your functions' those are matters for the court to decide, and also we will be looking at some cases, like *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin) on that. This is why I am back to Dworkin. You either believe in free speech or you do not believe in free speech.

LORD JUSTICE HADDON-CAVE: Sorry to interrupt, just so I can understand the gravamen of this submission, are you saying that any speech is all right----

MR DIAMOND: No.

LORD JUSTICE HADDON-CAVE: -- and no speech is for a professional Body. So just explain what the curtilage is of this submission.

MR DIAMOND: The curtilage of this submission is there is actually a lot of mutual agreement between me and my learned friend and a lot of the judgment, as I said in my skeleton, was unnecessary. We agree that professional conduct rules cover public and private life. We would submit it should be limited in some extent to professional activities, and we agree there will be moments of such disreputable conduct showing a lack of moral turpitude that the public would need to be protected by (inaudible).

LORD JUSTICE HADDON-CAVE: Can you say that again?

MR DIAMOND: Some lack of moral turpitude of some sort in your private – you fiddle the bank account, or----

SIR JACK BEATSON: That is moral turpitude, is it not?

MR DIAMOND: Oh, well, yes. Excuse me, yes. Excuse me, I probably need----

SIR JACK BEATSON: No, no, it is all right, it is okay.

LORD JUSTICE IRWIN: That gets away from speech, I mean if the core of what we are dealing with here, as you say, is the limit of free speech for professionals. You have so far said, in fairly broad terms, that there is a risk of professional regulation and professional limits on what is said go too far. But is it not necessary to distinguish between different professions? I was thinking of that as you made that submission. You, as a lawyer, can say all sorts of things because people choose you, and they may choose you, or not choose you, in part because they feel you are sympathetic to their point of view. I, as a judge, I am not chosen by Mr Ngole, or anyone else, and so I have to be much more restrained than you do in expressing what views I have. Do we not need to get beyond thinking professional limits on free speech in general terms? We need to hear what you have to say about it----

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: -- but that, surely, is part and parcel of what we need to think about. It is not just professional limits in general terms, it is professional limits about social workers.

MR DIAMOND: Yes. First, I mean it is a very big question you have thrown. Dealing with the first question, what is the curtilage of this? If he had said a racist tirade, or some clearly obvious societal consensus speech that we all know is unacceptable, of course, the profession should be caught by it, whether you are a teacher, doctor or a lawyer.

Also, of course, it depends on the profession, and it goes without saying judges have one of the most difficult roles both in court, in fact, and out of court – how they say and what they say – and I would not necessarily address that on a free speech, I would address that as the privilege of being a judge and having such power as the correlation of having a certain limitation.

LORD JUSTICE IRWIN: Yes, our free speech is limited particularly----

MR DIAMOND: That is particularly unusual----

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: -- because of the extreme power judges wield, and they are not accountable to the electorate like a politician who said something wholly foolish.

If I could just take you to p.172 – jumping again, but I am going to come back, if I may, but I am going to take you to p.172.

LORD JUSTICE IRWIN: That is in the typed----

MR DIAMOND: It is still the same bundle.

LORD IRWIN: Yes, but it is the typed, it is the Guidance on Conduct. The typed number.

MR DIAMOND: Yes, there are a couple of bundles, I think. That is the pleaded bundle.

SIR JACK BEATSON: Could you say the number again?

MR DIAMOND: It begins at 172.

SIR JACK BEATSON: Thank you very much.

MR DIAMOND: And I am going to go to 175. This is my Lord's second question, this is the Health and Care Professionals Council, and you see a list of what they regulate by these same regulations.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: So these regulations that Mr Ngole has, as a social worker, and we will have a look at what it says later when we get there. It also applies to art therapists, chiropodists, dieticians, hearing aid dispensers. I mean this obviously is going to feed into the 'prescribed by law' point, but, my Lord, you can see that this Body covers a whole range of professions, some which it would be a surprise they are covered, and others that we would say: 'I am not surprised they are covered', but the same rules and terms apply to them all.

SIR JACK BEATSON: So why would we say then we are surprised by some? I mean just in broad terms?

MR DIAMOND: Well, a dietician should be regulated? A hearing aid dispenser – I do not know.

SIR JACK BEATSON: Sorry, I understand the ones you highlighted them.

LORD IRWIN: It may be that what you are advancing is that it may be different whether a hearing aid dispenser says 'homosexuality is an abomination' as opposed to a social worker, so they are different, that must be right.

MR DIAMOND: It may be, I know the learned trial judge tried to do that. I felt it was very weak, and I explained in my skeleton argument why. But also this – my Lord is going to criticise me for making a general point – there is an over regulation taking place by the State, and that is another reason why the court stands in the interface between the State and the individual. The State may want to regulate more and more, and control more and more, but the court – as Lord Denning no doubt would have said – has to stand firm.

LORD JUSTICE HADDON-CAVE: But we are not dealing with hearing aid dispensers in this case, are we?

MR DIAMOND: No, we are not, but we need to bear in mind that the code applies to them.

LORD JUSTICE HADDON-CAVE: You agree, do you, that there may be different considerations for different professions, or parts of the profession?

MR DIAMOND: Yes, that there is a difficulty in prescribing rules for such a broad category of individuals.

I will just draw to your attention, I think, back to the facts, p.35.

SIR JACK BEATSON: This is the appeal notice.

MR DIAMOND: This is where he writes to the Fitness to Practise Tribunal and just explains his views again. It is, perhaps, not too dissimilar. Paragraph 3 perhaps I will just draw to your attention, he just says: "When called upon to give my views on an issue, I should be truthful at all times . . .", and one would have thought when people ask for your views most people would tell what they think.

Then at para. 6:

> "The only assumption made by the chair and investigating officer is that people from same sex relationship 'will not feel comfortable approaching me because of my views on homosexuality'. However, I merely stated what the bible says on the topic after I was asked to do so."

And he is feeling very set upon if you read that. He certainly interprets the meeting as saying: 'We don't like your Christian views'. At this stage that's all we have, they do not like the views. It goes forward, over the page, 36, he is told he has got a Fitness to Practise meeting, and the Bench is listed. Then it says at the last paragraph: "I would be grateful if you would confirm whether or not you accept the membership."

Over the page, 38, he immediately says: "I do not accept the membership of one of the Committee members, Mr B Murphy", and he gives the reasons.

LORD JUSTICE IRWIN: Sorry, p. 30?

MR DIAMOND: 38.

LORD JUSTICE IRWIN: Yes, thank you.

MR DIAMOND: He is asked: "Do you object"? He says "Yes, I do object".

LORD JUSTICE IRWIN: Yes, dissertation supervisor.

MR DIAMOND: The point I am drawing is that he is not a wallflower holding back when objection is mentioned.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: Then, the only note we have of the meeting is on p.40, and we just draw attention at this stage that no notes of the meeting have been provided, nor have we been able to get any notes from the meeting. We just draw that as a red mark, we would say, to bear in mind.

There we just simply have a pro form. All I ask you to note at this form on p.40, is it is chaired by Professor Jackie Marsh, and there is Professor Ade Omooba attending as his friend. I want to draw your attention, he is actually quite a senior pastor, but I will come to that later.

LORD JUSTICE IRWIN: Right.

LORD JUSTICE HADDON-CAVE: Was there discussion about whether or not notes had been taken, what the disclosure position was, whether there should have been notes, what the normal procedure was?

MR DIAMOND: I hope my learned friend will not object, the only evidence I have on that, on inquiry to my own client, Mr Ngole, he told me "they had been destroyed" were the words he said to me. But what we do know is they had not been disclosed and they would have been extremely useful.

LORD JUSTICE IRWIN: There clearly was a bundle, if you look at numbered para. "2", "The department outlined the facts of the case drawing attention to the material in the bundle. Student Adviser Committee put questions and asked . . . presented." So that must have been held by everyone?

MR DIAMOND: Yes, the bundle was the Facebook posts, the appeal notice, and that kind of stuff, it was not a recording of the actual hearing itself.

LORD JUSTICE IRWIN: No, no, no.

MR DIAMOND: Then you have his appeal – it is undated – at p.42. This is Mr Ngole's appeal, stamped "23rd". He has now lost his livelihood, and it is in his case I can assure you, he has already got a First degree. This course is funded because it is professional qualification.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: Then he goes: "This penalty . . ." third paragraph down ". . . for ending my professional career is *manifestly unreasonable*. I could have been issued a warning about the

use of Facebook or informed which Christian viewpoints the university approve of." He is not intransigent, he is saying: 'I don't want to give up my faith, but what can I say?'

Then point 1 "Grounds of appeal", he says: There is "hostility" to my Christian views, never seen the complaint. He says, at para. 2: "I have been removed from the course for the expression of the Orthodox Christian viewpoint." You might want to read that on your own, I just draw your attention to paragraph 8. He says:

> "I am a hard working student, honest, kind, decent, who does not believe in discrimination, now facing a life changing detriment to my Christian views."

I go back to this eradication point. This is not about – well, I go back to whether you can actually say that the contested question, whether you have a right to express that homosexuality is immoral. We have here, we would say, a decent, hardworking citizen, who happens to be a Christian and believes in the bible. He is hard working, decent and kind, but if you suffer the detriment of free speech, of losing your career, it is worse than a criminal penalty, my Lords. If you are a plumber and go to prison for two years, you can come out and be a plumber presumably.

LORD JUSTICE IRWIN: But you could not come out and be a social worker. I am not sure how close these parallels are. The point you make is he has suffered a loss, and I think that the judge below accepted that. There is no doubt that the loss of an occupation----

MR DIAMOND: Well, she did not fully, actually, she did not make a finding that his career had ended, in fact, she said he could do other things, but I think that is----

LORD JUSTICE IRWIN: Well, we will see whether that is contested, but for the moment let us proceed on the basis that loss of a career you would otherwise have is a clearly definable loss. The question is whether that is justifiable, that is the issue, is it not?

MR DIAMOND: It is the issue, but I mean obviously I am just drawing that attention, we say he is a decent hard working citizen, and we say this is----

LORD JUSTICE IRWIN: But nobody is saying anything different. Nobody is saying he is not a decent hard working citizen, or that in other ways he is qualified for the course, or qualified for the----

MR DIAMOND: I will pursue that point. You know the issue I am trying to make, but of course there are decent fine people who are unteachable, or whatever, but we say this is not such a case.

Then at p.45, third paragraph down: "Mr Ngole, your objection to Mr Andrew Cowley, School of Law." So, on the appeal he makes another objection, clearly.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: He is not holding that, is the only point I make. Then we do have non-verbatim notes at 47 of what actually took place. There is clearly quite a free-flowing debate in this hearing, and the university are of the view that his views became entrenched – that is p.48 at the top. "FM's stance very quickly became entrenched", and then:

> "Tried to get across was not the religious content that was in issue but the actions were contrary to the code of practice, accepting that their guidance on social media is ambiguous."

Well, that is part of the problem that this court has to address. They determine the rules are ambiguous. Then, if I could just jump, "AO", that is Ade Omooba, the Pastor, on the same page near the bottom, it says:

> "Refers to guidance which also protects beliefs, but knows that caution and diplomacy is needed in what is posted, and it is fair to ask people to act in this way, but not to denounce their religious faith."

And we say there is clearly compromise conversation taking place.

LORD JUSTICE IRWIN: And what are your submissions about what is being said and meant there?

MR DIAMOND: I will come to that. May I just go over the page, I will take you to Mr Omooba's witness statement? Just over the page: "AO says": ". . . states about caution and diplomacy" again. "Important, FN agrees and feels this was not offered to him. He believes he was told not to post on Facebook. That, he feels, is wrong."

LORD JUSTICE IRWIN: SB is the departmental rep. is it not? That is the man who was – sorry, that may be wrong. Sorry, that may be my fault.

MR DIAMOND: No, no. Stephanie Best is the secretary.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: Then, just below that, AO again: "Are you suggesting . . ." so someone has said this, we suggest: ". . . the postings are homophobic, but they are just quotes from the scriptures". So you can see the nature of the debate that is taking place, we say the notes are sufficient, and what I am trying to dispel is that he is an intransigent student.

If I could just now – maybe this is the moment – follow up with this, if we go to p.204 I think in this bundle. I would like to address this, actually it is a good moment.

LORD JUSTICE IRWIN: That is Pastor----

MR DIAMOND: Pastor Omooba. I just wanted to say a bit about this because there is a (inaudible) to this. I hope you do not think I am going too wide. It should be the same bundle, p.204, I am not going out of the bundle.

SIR JACK BEATSON: This is in a bundle for me marked "Supplemental bundle 2".

MR DIAMOND: Okay, so sorry, my Lord.

SIR JACK BEATSON: This is a witness statement.

MR DIAMOND: Yes, I just think it is a good moment to deal with it because questions were asked what took place in that appeal meeting and this is what our case is saying, we want to draw your attention to it and I think we believe we can prove it by the documentation. The documentation, we say, is clear.

First, we have the introduction, he is a British clergyman, and he is a serving director of the National Church Leaders Forum. He works at Christian Concern, and he is involved in a large number of organisations including A 100 Social Action, National Church Leaders Forum, Black Christian Voice, Christian Concern and the Christian Legal Centre. He goes on: "I am part of the Leadership of Churches, and have had policy meetings . . ." he said ". . . with Prime Minister Gordon Brown and . . .", over the page, ". . . the Royal family. In para. 7 he says:

> "This situation was by no means unusual for me. Christian Legal Services Centre is often approached by Christians who face disciplinary proceedings for manifesting their Christian beliefs, and who want to help in negotiating an amicable solution with e.g. their employer. As a Christian Pastor I always try to mediate and help the parties to find the common sense solution."

We say this is a man of high calibre. He is a hard hitter, he has advised Prime Ministers. He says he wants to find a common solution. There is a sort of media conception that cases are manufactured and there are a lot of disputes taking place in the courts. This case is not manufactured, Mr Ngole has lost his career. Mr Ngole is fighting. There was a serious attempt by a serious individual to reach a sensible compromise, and we say that compromise was: "Tell us what he can say."

Then, at para. 8, he goes on "Professor Marsh". He says: "We didn't know of her involvement. (Inaudible) issue." Then at para. 10: "I have no doubt he would have objected to Professor Marsh", and I think that would appear to be the case we would say.

At para. 11:

> "I am aware that Professor Marsh now denies that she described Felix postings as 'homophobic' or 'discriminatory' during the hearing. I distinctly recall her using those expressions, both at the first hearing which she chaired in January, and at the appeal hearing."

They were called "discriminatory views". Pastor Omooba did ask the question: "Are you saying he is homophobic?" It is unlikely the chair would have shifted from their position. Then he repeats that again at para. 13, and then at 14 and 15 he says:

> "I also made the point it was wrong and unhelpful for the panel to require Felix to denounce his Christian beliefs; it would be much better to try and find a mutually acceptable solution. If the University simply want Felix to be more discrete in his social media postings he would be happy to comply with any such guidance (however, none were offered).
>
> I have been shown paragraphs 13 -14 of the witness statement . . . We are both described as adopting a very entrenched view. I refute this. The University was insisting that Felix cannot express his Christian beliefs . . ."

This is not a conflict of evidence on this, it is going to be we have to take the documents. We are reviewing this on a documentary basis, and the documents clearly show these questions: "Are you saying this is homophobic?" The appeal ground, I am going to take you to one further appeal ground, the OIH discusses this in detail, before this court hearing below and, in fact, the fact that discrimination was certainly discussed at the hearing. So before I leave the witness statements, maybe if we just go to p.79, I am going to conclude my evidential submissions in a minute, I just want to labour the point a bit, if I may.

Page 79 is a witness statement by Jackie Marsh, and this is before any knowledge of her involvement in any matters. Paragraph 35 of her statement on p.86 says:

> "The FFTPC noted that Mr Ngole was familiar with posting views to public web spaces, such as Facebook, and understood the implications of sharing information via Facebook which could be perceived as expressing views which albeit based on his religious beliefs, were discriminatory towards single sex couples."

Then it certainly was an issue that was discussed, how it was discussed we say the documentary evidence supports us.

Then if I could just take you to p.221, this is when we say the university made its mind up to recast their position from one of: 'Your views are unacceptable, we will not have your Christian views' to one of: 'You are not accepting our saying you cannot have Christian views, and because you do not accept us you are lacking insight', whatever that means. This document goes from p.221 to 231. It repeats repeatedly: 'He lacks insight'. 'He didn't realise the effects', 'He's just not suitable, he's unteachable, what can we do?' It never says in this document: 'We did discuss with Mr Ngole how he could say it, but he insisted on being totally rude, or not restraining how he is going to say it, or being flat out on it'. So there is nowhere in this document where they say: 'You know what, we tried to reach a compromise with him but he really was intransigent. They just keep going on: 'He lacked insight, and service users could be troubled'.

Then if we go to p.232, this is to the OIA, it is the document submitted to the OIA, and you will see he is quite strong on this. He goes:

> "I refute the University's version of events. The university is recasting the issues and introducing new matters."

Then he gives their explanation in the next paragraph. He goes, the next line:

> "This explanation was not given to me by the university; instead, I was led to believe, and I still believe, that the real reason for being removed was because of my views."

Then he quotes that bit: "honesty and integrity", and then it goes:

> "At the same interview, Mr Bosworth said in relation to my Facebook post, that "*The comments are incongruous with the values of the Social Work profession*. The issue has always been with the substance/ content of what was said on the Facebook posting. The University's position that I had lack of insight/understanding simply meant that I needed to agree with the University about the unacceptable 'content' of the postings.
>
> There was no attempt to reach a sensible conclusion or resolution . . ."

He said at the bottom of p.232: "I felt under attack" and over at 233, top paragraph: ". . . ". . . explore the issue that I was required to denounce my beliefs", we support that. Then he said, two paragraphs down:

> "In the senate hearing on 23 March 2016 it was mentioned once again, by Professor Jackie Marsh that I had homophobic views. Professor Omooba, who accompanied me, challenged her on this, stating that their entrenched view on referring to bible quotations' as homophobic views was not helping the situation. This further demonstrates that part of the reason for the decision to remove me was based on my views which were treated with hostility."

And then it goes:

> ". . . Pastor Ade Omooba clearly recognised the need for '*diplomacy*', but states my understanding that it was the content of the views that could not be posted on Facebook."

Then, very interestingly, where the sign says "page 8" he said: "The university say 'we actively encouraged Mr Ngole to reflect on his actions'." He goes on:

> "That simply did not happen. The implied response that the university wanted me to accept was to agree with the University's position that the 'content' of the Facebook postings was unacceptable."

Two paragraphs below that:

> "At best, we were talking past each other at this meeting. The University staff lacked understanding on religious belief and diversity; or, at worse, it is evidence of clear animus to the Christian faith. I found Ms Laing's premise challenging to accept; and was certainly not something I could 'reflect' on. I was being clearly pushed by the

University to accept that sex was 'just sex', and homosexuality was okay regardless of my Christian beliefs."

Now, that actually reinforces a point I am making. First, we say the documentary evidence was quite clear. It is our case that Mr Ngole wants to publicly say homosexuality is a sin. It is the case he is a professional, and he accepts he is guided. It is the case, we say, he is willing to work with university authorities. Maybe he could say something better, but he still wants to be able to warn people that homosexuality is a sin, and warn people of their eternal salvation, and that can involve a degree of strong language.

This letter also feeds in two of my other points, and that is (i) the talking past each other, the incompatible rationalities I say. They are talking past each other, this is actually very common in Article 9 cases. It is very common, people do not understand the premises and frameworks of discussion. If someone says: 'Religious people do believe there is a devil, in fact, the bible says there is a devil, Lucifer Beel, the bible discusses that. You do not have to believe it, but religious people who believe the bible believe that is more than an allegory. You cannot talk past each other.

Also, I urge on this court to be concerned about the language when people talk about religion. It is not treated with the respect that is required, we say, (inaudible). Words such as "derogatory", "homophobic", my Lords, are too infantile and primitive to be taken seriously. Religion needs to be respected. It is a complex phenomenon. It's a belief system that citizens adhere to and, whether you like it or not, or agree with the religious view or not, a civilised society needs to respect those views.

LORD JUSTICE IRWIN: Yes, but first of all, much of what you are describing are social change. It is not a question of the courts prescribing such views or, indeed, defending such views, except, of course, freedom of speech applies to those people who are dismissive of religion as it does to those who support religion.

I wonder if we could try and take this back again to the essence of the case. First, you have drawn attention to various passages from the documents that suggest your client was less intransigent than the other side said he was. We are not hearing acceptance, we are not finding fact for the first time, so the only basis on which that can be relevant is to say that the judgment of the judge below, who was, herself, reviewing – so we have two layers of review

– the only basis on which that is relevant is that some conclusion of hers about your client was wrong. That is the first point.

A

The second point is, to pick up your now re-emphasised point, that religious language can be misunderstood and that people, as your client put it, 'talk past each other'. Is that not relevant to what will or can be anticipated will be understood by his forceful use in public of religious language? If it is right that people who are not educated in, for example, the Christian

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teaching that you hate the sin but love the sinner, the whole notion of redemption which, after all, is central to Christian teaching – lots of people do not know that – and so when your client expresses himself in the language that he does, and accepts that it may be misunderstood by those not educated in Christian teaching, where does that leave the debate

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about what someone, who is going to be a social worker, can and cannot say? I wonder if it does not cease to become straightforward freedom of speech: 'I, as a Christian, have the right to express myself as I wish about my religion, using religious language, carrying with it the freight of religious teaching which I understand.' For a private citizen that is obviously right.

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The question here is whether it can be right if language does create ships passing each other and does create misunderstanding. Of course, someone who then may be dealing, will be dealing with homosexual clients, who may be in a position of recommending whether a child can remain with two homosexual parents in a couple, etc. etc. So, I think that is where,

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speaking for myself, I need you to develop what you are saying a little more.

MR DIAMOND: I will do that. First, we obviously say it has never been the position in this case that you can say whatever you want, you cannot say there is a fire in a theatre, you cannot say whatever you want----

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LORD JUSTICE IRWIN: Yes.

MR DIAMOND: -- it has never been our position that that is the case. I am trying to labour the point, actually, there was an attempt to find the middle ground.

LORD JUSTICE IRWIN: Yes, well, I think we have got that point.

MR DIAMOND: You have got that.

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LORD JUSTICE IRWIN: Yes.

MR DIAMOND: The second thing about societal norms, you mentioned that, my Lord. You said, these are societal norms, courts cannot do this. That is why I have been tritely seeking a firm judgment, and you do not think, well, this is crazy, how can he do that? That is the

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defect with the judgment below. The judgment below does not grapple with any of the issues

in my submission – I will come to that in a minute. It simply is a wonderful statement, we would say, of governmental policy, but it does not defend citizen's rights. Nowhere in that judgment does it say: 'You can say this'. Nowhere in this judgment does it say 'if there was a compromise', or 'you could say it to private citizens', 'have these rights'. The judge simply skips to, and I believe an incorrect conclusion in law, that 'this individual is covered by the regulations, they have the power to do it, and I am going to defer to the decision'. Even if you are not convinced by me of Mr Ngole's integrity and decency, and fitness to be a social worker, which I am arguing, the court needs to give guidance on this. The court does not say there is free speech, or religious speech, or modest religious speech by professionals is permissible. This judgment would go down and be a harbinger on all the other professions in the land, what you can say and what you cannot say done by non-legal Bodies who clearly do not like what you are saying. We cannot go down that route. It has two angles to it and I submit the judge failed to address both angles correctly.

On the deference point, well, judicial review and Convention point, it has always been an issue that the Court of Appeal can decide the Convention point. At the end of the day it is documents on documents, there is no benefit of being a trial judge, there is no demur of the witness, or the thrashing cross-examination, this is the function of judicial review, we are reviewing it, and it is a human rights' point, and we say the judge plainly got it wrong and what inferences were drawn, and they are actually raising full judgment, and I have to say I thought it would be a difficult judgment to attack, but actually it is more full than substance in my submission. She does actually list all the points of defect, and we say you are not bound by inferences drawn that are unsustainable and not supported by the evidence, in our submission.

Talking past each other, that is a difficult point, and that is why the compromise was an important point. Hecklers' veto is essentially non-rational direct action, I would submit, to silence the viewpoint you disagree with, and it is rampant in our universities and it is rampant in our wider society that people are just scared to speak. Listeners reaction has never been a reason to limit free speech, because the listeners do not like what you are saying has almost been the reason why we have got free speech to say what is controversial and decide all that. Then, listeners education to understand what that free speech says is even more remote.

Now, there is, obviously, a balance in all cases. I am not sure social workers are so specialist as a policeman would be, who is a Muslim policeman and has strong views on Shariah law. I did actually mention in my appeal notice Judge Quereshi, who is a judge and is also President of the Muslim Appeal Tribunal which implements Shariah law. What is at stake is the balance between the individual and the religious belief, and the capacity we have always had in societies for people to divorce their own particular feelings or political activities, as judges, as lawyers, from their professional function.

LORD JUSTICE HADDON-CAVE: Mr Diamond, speaking for myself, I am not sure that you have entirely dealt with my Lord's second point, which is one cannot expect members of the public either to know or to understand religious speak, let alone interpolate or dial down some of the extreme language that there is in religious speak, extreme adjectives such as "wicked", "abominable", "devil", that is the point that my Lord put to you, and what do you say about that?

MR DIAMOND: I think what I say about that is, and you were closer than you think, my Lord, because I do not want my arguments misinterpreted, it is obviously wrong that he cannot say it, under Article 10.

LORD JUSTICE HADDON-CAVE: He cannot say what under Article 10?

MR DIAMOND: It is wicked, or it is sinful, to cure Article 10 analysis. It is obviously inappropriate to terminate someone's career for a one-off posting that was, perhaps, ill-advised – I say that was disproportionate. What this case has moved to is that he is not fit to practise because he is intransigent in saying: "I want to put 'wicked' and 'sinful' on public things." What we are saying is: 'No, there is a balance on this'. He says: 'Tell me what I can say. Let us discuss what I can say, but clearly I have a private and religious life, and I do believe homosexuality is a sin. I am actually active in the Church, in a leadership role, what can I say? Are you saying you can never say that word as a social worker? You cannot be active in that?' I gave you an example of Judge Quereshi. He influenced Shariah law. Women have less rights than men. He sits as a judge in Britain. We have every confidence that when he is in the Criminal Division he is not going to discriminate against a female individual because that is the role of people's private lives. It is a private/public division, and you cannot permit, whether it is by the reality of social media, this total intrusion of people's private lives on the pretext that it has a public role.

LORD JUSTICE IRWIN: What that comes to is the judge was wrong, and one error she made was that there should have been a compromise.

MR DIAMOND: That is on the facts of this case----

LORD JUSTICE IRWIN: That is really what you are saying.

MR DIAMOND: -- I also find it alarming that she has actually addressed all the free speech issues and put demarcation lines down.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: But, on this, the judgment actually has no legitimate aim, it swings and swerves covering every angle. She does not deal with the compromise point. When she does deal with it, she puts it all on Mr Ngole to come up with the solutions, he should know better – in the last few paragraphs – absolutely inappropriate, they are the authorities, they are the ones pastoring him, counselling him, encouraging him, and so we would say it is wrong in law, and it is wrong on the actual application in this case. Courts have to look through (inaudible) texts. (Inaudible) a Body comes up with a line: 'We're calling you un-educatable' on the flimsiest of evidence, it is nowhere explained what his lack of insight means, they do not address in any of these OIA submissions, it is just a blank thing saying: "You cannot go there", and this is primarily a role for the courts. So, if I may I will close on that and just move very briefly on. I am going to finish on time.

LORD JUSTICE IRWIN: We have asked you a number of questions, so I do not want to----

MR DIAMOND: No, no. I think it is a complex case, and we believe it is an important case whether we are five minutes late, or something.

If I may just go to my skeleton, because I think my skeleton sometimes says it better than I can say it now – that is at p.14 of the hearing bundle.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: You may think I am really reiterating a point, but I like reiterating points as you have probably gathered.

LORD JUSTICE HADDON-CAVE: No, we do not, because we do listen carefully and we have read everything.

SIR JACK BEATSON: I am going to reiterate a question. Did you say "40" or "14"?

MR DIAMOND: 14. Just para. 1 details the scope of this decision. Paragraph 4 I use the words " Orwellian *Thought Police*", and I list in a, b, c and d, my reasons for making that submission.

If we now turn to the judgment itself, the judgment deals with a number of areas, but it weaves in and out without actually, in our submission, addressing any of the substantive issues. If we go to "Legitimate Aim"----

LORD JUSTICE IRWIN: In the judgment or in your----

MR DIAMOND: In the judgment, and that is tab 8, paragraph----

SIR JACK BEATSON: (After a pause) Do you want us to look at "Legitimate Aim"?

MR DIAMOND: Yes.

SIR JACK BEATSON: It starts at 94, I think.

MR DIAMOND: Thank you, my Lord. Paragraph 94 – we just say this as an example in our best support of why we believe she is wrong in law and a lot of the substance. There is no clear legitimate aim. First, at the end of para. 95, the learned judge said: "The issue does not relate at all to the matter of giving offence." It has nothing to do with giving offence. Then, she goes on at 97: "The overarching aim of the entire regulatory regime is the protection of the public . . ." then: "The social work profession is a front line provider of public services . . .", and we submit there is nothing particular about social work. Yes, there are sensitive areas. There is nothing that could not have been said about anyone from a housing officer in *Smith v Trafford Housing Trust* [2012] EWHC 3221 to a lawyer that could not be said in this case about general laws.

At para. 99, ". . . the importance of the perception of service users. . ." this is now the next thing.

> "That perhaps is a better way to put the idea of 'inadvertent discrimination'. It is not about the intention, it is about the impact. That can be a harm in itself . . ."

Then, if I may jump to para. 104, towards the end of the paragraph:

> "They are helpful to the present case because they support the legitimacy of aims directed at ensuring that, in using public services, everyone's experience is that diversity of sexual orientation is treated purely professionally, with dignity and without the intrusion of the personal views of service providers . . ."

That is another aim, we say. Then, at 105, they are entitled to wonder how he might act, look at one side. Then she discusses you then have behaviour points and that is rejected. Then, at 107, the last sentence: "The future risk it had in mind was of repetition . . ." so that is now the concern, it is a repetition "of the sort of course of conduct which had produced the NBC postings, and of the potential impact of that on trust in the social work profession." So, it is

repetition but repetition of what – lawful postings, unlawful postings, postings that you refuse to listen to, to advise on?

Then at para. 108

> ". . . Mr Ngole was clear that if in future he was asked about his religious views on same-sex sexuality he would give an unambiguous response. That could happen in the course of his service delivery; he did not rule that out. A service user could ask that question. The University would be concerned about the manner and form, and impact . . ."

So is our concern: what if someone asks you a question? Is he a decent person, I suppose, could he even answer a question sensibly. Then she goes on at the bottom of para.108:

> "*This is not a prying intervention into mere belief* (ibid). It is about real life risks to service delivery, and the compatibility, in perception terms, of the views expressed with the ethos of the service."

Well, I think that is absolutely chilling. Then, at the bottom of para.110, there is concern over homophobia, that is another legitimate aim. We say if you cover every angle and do not deal with the issues, it looks very good, and it was a very impressive judgment, but it does not address any of the issues, namely what you can say, what is the reach of the law, and when it comes to actually addressing poor Mr Ngole himself, and what his reactions should be----

LORD JUSTICE HADDON-CAVE: Which was the bit you said was 'chilling'?

MR DIAMOND: I was looking at the bottom of 108, I believe.

LORD JUSTICE IRWIN: It is "the compatibility in perception terms of the views expressed with the ethos of the profession."

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: That is what I got it down as.

LORD JUSTICE HADDON-CAVE: Thank you.

MR DIAMOND: Yes. The deference case is, of course, the Lord Carlile case, and I will come back to that when I make my legal submissions just in a few moments.

The case of showing deference is a case of constitutional division between the international foreign policy of Her Majesty's Government with the Republic of Iran, and the court's immigration application of the Convention to let a known terrorist into the United Kingdom, to meet members of Parliament, that is the case of Deference.

Then at para. 177, when it comes actually to the findings of poor Mr Ngole and the evidence in this case, she simply says:

> "Perhaps there could have been ways to express public support for Kim Davis, complete with Biblical authorities, while leaving the audience in no doubt about the poster's caring professionalism. There was a point when it seemed, from the contemporary notes of the Appeals Committee hearing, that the student's representative, Pastor Omooba, was suggesting that 'caution and diplomacy' might have been a route to reconciliation; that sounded like wise advice. Mr Diamond suggested that the University was not helping achieve that. He asked rhetorically what diplomacy would have looked like. The student complained that no-one told him what sort of religious speech and Bible quotations were allowed and which were not. But trainee professionals might be expected to show they could think that through for themselves; to work out the impression that might be given in the wider world; to take personal responsibility for it; to work through to a professional solution; and if in doubt to take a balanced and consultative approach. A mature student, moreover, might be expected to do so more confidently and independently than a student new to adulthood.
>
> "178. As Mr Diamond said, religious speech has 'multiple meanings': it is multi-layered . . ."

LORD JUSTICE HADDON-CAVE: Can you read on?

MR DIAMOND: Yes.

LORD JUSTICE HADDON-CAVE: "Its theological layer is not necessarily widely understood. . ."

MR DIAMOND: Yes.

LORD JUSTICE HADDON-CAVE: That echoes the point that my Lord was putting to you earlier, that these levels of meaning are not widely understood, therefore the proposition is that the extreme nature of some biblical language may be misunderstood, it may not be understood, it may be regarded by the recipient as challenging, discriminatory. That seems to be the mischief that these aspects go to.

MR DIAMOND: And what I am saying is I concur with that piece of mischief, but it is the job of the court to delineate what that mischief is, explaining what can be said, what cannot be said. You just cannot just leave this to vague rules and a committee, and a debate is not about that because they have accepted it is not about offence. What this has become about is that he is intransigent, and it is all on him. There was some wise talk but Mr Ngole should have negotiated and been sensible and worked it out. That is not even a correct pastoral response from the university, who should be guiding students. If he seeks (inaudible) wisdom this matter could have been 'picked in the bud. The reason it is not 'picked in the bud – if that is the right word – is simply because it is not about whether he said it bad, it is not about how he can say it.

LORD JUSTICE IRWIN: So what you are really saying is the judge failed to crack this----

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: -- because the truth we should draw from the evidence, that the complaint expressed about the impact on service users was, in truth, a complaint about the underlying beliefs?

MR DIAMOND: That is correct, and their reason to act from an unknown anonymous complaint was not to resolve this issue. It was not to say: "Well, no one has really seen this let us detail with this, let us look. We know you are a Christian, you believe it is a sin, let us think how you may be able to say it is a sin without using the word 'wicked' or something, or just quote bible verses.

That, in itself, is not dealt with and it has not cracked the issue, but you cannot let this judgment lie where it is, it is so wide-ranging, there is no legitimate aim, no prescribed by law, no balance in Article 10 – I just want to quickly deal with that now.

If this judgment stands as it is, it will be the next wave of terror on the British people, if I can put it in that way. It will be the market stall trader will not be allowed to have a stall licensed by the local authority because his views they do not agree with. It will be the housing officer in *Smith v Trafford* with those views, could not house vulnerable homosexual couples. It is just opening the floodgates.

The court has two roles in this. It has the wider freedom of speech role to demark it and prescribe by law. Then we say, on the facts of this case, it was totally wrong to put the burden on Mr Ngole. They should have reached a compromise. It is quite clear they do not

like the views, the views are not acceptable. We do not want our citizens running around, "What can I say?" or "What if someone didn't like what I . . . ?" You know, you would be amazed that many of your neighbours might hold some of these views and attend the local church.

LORD JUSTICE HADDON-CAVE: If we can dial down the rhetoric for a moment, just read on to what the judge actually says in the third and fourth sentences:

> "Social workers have to deal with how people will actually react to it in real life, and express themselves accordingly. That is not about a 'blanket ban', or about stifling religious speech or about denouncing faith; it is about seeing the world as others see it, and making the connection between what you say and the provision of public services in sensitive and diverse circumstances . . ."

MR DIAMOND: And the point is that you believe he should have been dismissed and had his career terminated for one post?

LORD JUSTICE HADDON-CAVE: I ask the questions----

MR DIAMOND: Okay. What I would say to that----

LORD JUSTICE HADDON-CAVE: -- Mr Diamond. I am just asking you for your submissions about this nuanced two or three paragraphs by the judge where she appears to be focusing on the need for sensitivity by the social workers in the language that they use, or the way in which they express their beliefs. That is what I understand that paragraph to be looking at.

MR DIAMOND: I do not disagree with that. We also believe it applies to every profession – policemen who have to deal with diverse people, and if you had extreme views that would be a problem. A lawyer, in fact, they closed a law school in Canada because it was a Christian law school but, you know, it is happening, and yes----

LORD JUSTICE HADDON-CAVE: Let us pursue this point, if I may?

MR DIAMOND: Yes.

LORD JUSTICE HADDON-CAVE: Take, for example, for instance a marriage counsellor who, in conversations with the people that she is counselling, says: "And, by the way, I think that adultery, which you have committed, is wicked and an abomination" – let us just take that scenario. So, it is strong language which that person may believe because of their religious beliefs, is that an acceptable thing to do?

MR DIAMOND: No, and that is not what this case is about. Anybody who does that is professionally incompetent.

LORD JUSTICE HADDON-CAVE: Let us take scenario two, that the people who have been dealt with by this marriage counsellor happen to google the counsellor's name, and see that that counsellor has expressed those views with that sort of language: "wicked" and "abomination", again what is your submission about that scenario in the context of this case?

MR DIAMOND: My context, I would be hoping that the client seeing them had been served fantastically, and they say: "What a lovely Christian counsellor, she has always been so sweet and helpful to us, I am very surprised that she has these private views. Maybe I'll discuss them with her." And if they then discussed it with her and she goes: "You're going to burn in Hellfire", well, there may be a case. If someone says: "What are your views?" and they say: "Well, my views are this", that is called 'conversation'.

LORD JUSTICE HADDON-CAVE: Well, let us take scenario three, which is the one you have just submitted, which is that they are not particularly happy with the service that they have had and they google and find these views expressed in that language?

MR DIAMOND: I think we have to work----

LORD JUSTICE HADDON-CAVE: You must "submit" not "think".

MR DIAMOND: Okay, I submit that there has to be a failing in service delivery that is reviewable, absent the views of the individual concerned, because there are simply too many views held in society that you could object to, and we are focusing on one nature of a view that it could be only a social political view that people may have expressed themselves on, and the person who is dissatisfied with their service for multifarious reasons, and society works on the basis of there is a Chinese wall between our private and public lives.

LORD JUSTICE IRWIN: That is a clear proposition, let us try and test it in another way. Suppose it was discovered in the course of a similar process in relation to an immigration officer, that he or she held and wished to express directly racist views. No proof, no evidence of a failure of service delivery. No evidence of actual discrimination in the course of exercising that job. I am sure you will understand, it is rather difficult to establish such, but there is none. Do you say that the individual who expressed directly racist views should be disciplined?

MR DIAMOND: No. I am going to sound very contradictory, that is, I would submit, a lawful exercise of power and, indeed, the Church of England and the Police Force do not allow people to become clergymen or policemen if they are members of extremist political parties.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: And the point I am making in this case is, and the judgment has failed to deal with this, we have got to make a distinction between religious belief, which needs to be

respected and held by centuries and is actually recognised, we would say, by the European Court in *Eweida* [2013] ECHR 37, and from derogatory discriminatory racist beliefs. In fact, the only guidance given to Felix Ngole was in one of the bundles, it is at p.188 of the authorities bundle. The only guidance given is that you should not post racist or sexually explicit commentary.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: What I am submitting in this case, and arguing, is that Article 9 and religious belief need to be respected. This is not a comparator, or comparable, to a sexually explicit post, or a racist tirade.

SIR JACK BEATSON: Well, just to take a recent thing that has been in the Press, there is a very distinguished scientist or psychologist, I cannot remember exactly what he is, who has said that he thinks that basically Afro-Caribbeans have a different intellectual capacity to members of other races, at least European races, and there is a big issue about what should happen. Now, is that racist or – it is obviously this person's belief, and it is something that is manifested as free speech. It is something which I suspect this person would say they do not mean to be insulting to anybody, but it is just like if Beatson has cancer, then I have got to tell him.

MR DIAMOND: Well, I hear that. There are two points I would make on that. First, I am seeking to resist saying: "Go up in to the racist tirade". I ask that question, but I am seeking to say that religion is a noble angst. I think Lord Hoffmann used to say in some of his *Aga Khan* cases, it is something the court should encourage but not get too involved in. It is something good for people, it is a public good, so I am parking that there.

Addressing your question, my Lord, I do not know the answer to that but, I mean, obviously that is a question of academic freedom, and I am aware of one case on that, and that is called *Asku v Turkey*. I am just trying to be helpful on that. In that case an academic professor produced a book on gypsies, which had a lot of defects about the gypsies, and that went to the European Court because the gypsies complained. The European Court said that this was a valid piece of work, and just because the outcomes are not liked, academic freedom is protected. So there was that – it is called *Asku v Turkey*, it is the only case I know about, it is from the European Court.

I was recently, if I may say so, in a case called *Caspian* seeking permission where an individual at Bath Spa University was not allowed to research reverse gender reassignment,

because the university thought that was too controversial. So, what I am trying to do is actually place this case in a wider context. It is not enough for the courts to sit back and say these are private actors, these are universities.

LORD JUSTICE HADDON-CAVE: What you seem to be doing from your recent submissions, is actually drawing the veil of religion around some of this language, as if, somehow, that allows this language to be uttered without any moderation, without any limit?

MR DIAMOND: I do not think I would accept that, my Lord.

LORD JUSTICE HADDON-CAVE: No, but that appears to be one of the thrusts of what you are really asking us to do, to say: "This is religious language and, therefore, even though words such as 'wicked' and 'abomination' may well not be understood by Joe Average, nevertheless, because it is religious language it should be allowed to be used. Speaking for myself, I find that quite a difficult proposition.

MR DIAMOND: I think what I am trying to say, two points: one is I am not saying that, if I can put it that way; I am not submitting that. We are submitting in this individual case that there was a scope for compromise. The bedrock behind that failed compromise, we would submit, was the content of the views that homosexuality is a sin, can you say that? This is what the court must decide, and we say the court has decided it, and we say the court decided it in *Smith v Trafford* and in *Sandown Church*, and that is why at the beginning of this submission I focused very firmly on Dworkin and general principles of the Hart/Devlin debate. It is freedom at stake, not whether you agree with it or like it; it is freedom. Also, the languages are difficult. I accept if somebody says: 'What you are doing is wrong, I want to have a debate with you'. If somebody said: 'What you are doing is a sin and will anger God' people do get more agitated because it isn't a language that, in our secular society, many people are familiar with, but that does not mean the courts do not protect it, and should not protect it.

I mean, of course, there are limits. If someone says, you know, 'Jihad' and 'I want to eat babies, that is my faith', those are different concepts, but the belief, as I said in the beginning, really is a contested question – whether religious traditionalists have a right to express the view that homosexuality is immoral and that is the question.

LORD JUSTICE IRWIN: Well, I think we understand you say that is the question, but I want to revert. The reason I chose the 'racist views' is that that is clearly unacceptable, and your client does not say it is acceptable, and you have accepted it is unacceptable and must affect professional impact. Precisely then to move to religion, and you have just said it: what if the religious views, genuinely and sincerely held, are violent Jihadism? Now, do you say that

because it is an accepted or established variant, or strain of Islam, that it should be treated in some different way to violent content views that are not religious?

MR DIAMOND: There is a Professor of law in this room, who has probably got great skill in jurisprudence. What I would submit is the answer is our culture and the rule of law and how we live is a product of many societal forces, and in the United Kingdom's case it is clearly highly based on the Judeo-Christian tradition, and the Christian religion, and that is where many of our concepts of right and wrong come from. Within that framework, is what I am arguing because I because I would submit the rule of law and a society of tolerance is part of the Judeo-Christian tradition or the secular tradition, whichever 'club' you go for, this is acceptable speech, there has to be a sensible compromise on the Christian view of homosexuality being sinful, and what someone can say in their private life and still have a successful career, it is submitted, as a social worker.

When it comes to other value systems even further removed from ours, there will be issues I guarantee the courts will be grappling with in years to come. But, on this issue, I think it is important that the court, as I say, delineates what can be said and what cannot be said, and the private/public divide is maintained.

LORD JUSTICE IRWIN: We know you say that, but I am trying to get help from you as to how you say we should do that? Let me repeat the point. You have said in answer both to me and to my Lord, that established religion is different.

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: The answer you have just given locates your response really in Christianity as part of the Judeo-Christian tradition, and it sounds as if you say the law should treat differently views which equally come from religious beliefs, but which are in that Judeo-Christian tradition, particularly the Christian aspect of it, and others. Can that really be the law?

MR DIAMOND: No, I am not saying that. I am saying the values that we adhere by, subconsciously or consciously, as to what is good and bad, are shaped by our culture and obviously historical forces.

I am endorsing decency. I am endorsing and submitting that if someone gives a racist tirade, or says: 'My religion is cannibalism', or 'My religion supports Jihad' the court should be firm against that. If, on the other hand, the religious expression does not advocate any incitement to violence or the clear and present danger test, but merely expressed a well-known religious

view, I am submitting that should be accepted by the court. And I would go further, I would say if someone gets religious solace for giving the 28th Rolls Royce to some Indian Guru so be it; that is a religious manifestation which is not obviously harmful to third parties.

LORD JUSTICE HADDON-CAVE: Just explore this a little further, polygamy is a well-known religious view in certain religions. Does that fit within your construct: "This is a religious view"?

MR DIAMOND: I would simply, on that case, rely on the approach of the United States which had the Mormons, they conquered the State of Utah about 1890, which had polygamy and Mormonism, and there was a big First Amendment case and----

LORD JUSTICE HADDON-CAVE: Indeed.

MR DIAMOND: -- they said "No".

LORD JUSTICE HADDON-CAVE: But something close to home, Islam, readings of it, you are allowed to have four wives?

MR DIAMOND: I would say the State passes laws and the State gives effect – that would be a wider policy decision, and the State has not recognised four wives. I am not saying that will not come under political pressure in years to come.

LORD JUSTICE HADDON-CAVE: Well, the State has not passed a law against, for instance, adultery, which is a sin; where does that fit in?

MR DIAMOND: I have no doubt if you asked Mr Ngole's views on that you would probably get quite a straight reply on that.

LORD JUSTICE HADDON-CAVE: I am asking you, where does that fit into your construct of the argument because, like my Lord, I thought I heard you make a distinction between Christian or Judeo-Christian tradition, and other religions?

MR DIAMOND: I made that purely on a philosophical basis, our freedom and culture is obviously what we understand is good and bad is our historical culture. Obviously, I am a proponent and submit in many cases on the freedom of religion. If, on a particular incident of adultery, someone was in a church, or put on a Facebook page: 'God disapproves of adultery' and let us say the Hindu God disapproves of adultery and he puts that on a page, so be it. People have robust religious discussions, that should be encouraged, and because I do not like the Hindu God, or the views on it does not mean I can object.

LORD JUSTICE HADDON-CAVE: Cutting to the chase, the issue here is whether or not, as I suggested to you, a marriage counsellor, who had put this sort of view on the Facebook: 'Adultery is a wicked abomination' whether that would bring the profession of marriage

counsellors into disrepute if subjects of her/his work found that on Facebook. That is the closest example.

MR DIAMOND: Yes, and our submission to that is we could understand a professional Body saying that 'You cannot quite say it like this, calling it an 'abomination' and 'wicked'. We understand your views. You can say it is wrong, but we would suggest you either just purely quote a bible verse on it, or just use a toned down word as 'wrong' because people do not understand religious thoughts any more'. But what we would not like is them to say: 'We do not think adultery is wrong, and you are not going to even say it.'

LORD JUSTICE HADDON-CAVE: And apply that now to this case?

MR DIAMOND: Yes, and we are saying Pastor Omooba, those documents show that he was not intransigent, he simply wanted to know what he could say, but his interpretation was not: 'You need to tone it down', his understanding he clearly got from the documentation is: 'You can't say it in any way'.

SIR JACK BEATSON: So that is really the nub – forgive me for interrupting – we have come back to this a couple of times, it is where you said the issue changed – the nub of it is that you say that what this is about is not lack of insight, but it is the straightforward expression of those views.

MR DIAMOND: That is correct.

SIR JACK BEATSON: And then what you say is that the university, or its Fitness to Practise people, should have said: 'You should not use 'abomination' and 'wicked'. You can express your views, your religious belief, but it has got to be language that will not frighten', and it is for them to have done this, and that the judge was wrong in regarding the case as a case about lack of insight?

MR DIAMOND: Yes.

SIR JACK BEATSON: As I understand it, that is the core of your case?

MR DIAMOND: That is the core, but I do believe the judgment is actually extremely dangerous in its current state as well, because of its wide implications, no limits, no discussion of public/private. It is a dangerous judgment.

SIR JACK BEATSON: Well, it is getting worse as it goes along. I have written down various descriptors along the way.

MR DIAMOND: (Inaudible) politics, I know.

LORD JUSTICE IRWIN: All right, now we have asked you a lot of questions. I know that you want to take us to the law, and I am conscious of the time.

MR DIAMOND: I am going to finish at 1. I propose to finish at 1 and let my learned friend start at 2.

LORD JUSTICE IRWIN: Fine.

MR DIAMOND: But, if there is time at the end there may be a bit more availability, but I am conscious that my learned friend may want to start, and may want to finish, and we do not have much time.

LORD JUSTICE IRWIN: Yes, I think it is right that you get your propositions of law out insofar as you need to develop them before----

MR DIAMOND: Yes, I have few propositions of law. The first – if we go to the authorities bundle – we say that Article 10 protects speech, and I have argued very softly that Article 9 (inaudible). The first case I go to is *Re Sandown Free Presbyterian Church* [2011] NIQB 26 which is in tab 15 in the authorities bundle.

It is a case that may raise hairs, but I think the case needs to be put in perspective, and it is about an advertisement put out by a Church calling homosexuality an 'abomination' in Ireland. If I can just take you to para. 15, this was the actual advertisement they put out, and it says:

> "**THE WORD OF GOD**
>
> **AGAINST SODOMY**.
>
> "Last year in the 'gay pride parade' a banner stating 'Jesus is a Fag' was carried by one of the participants. The supporter of homosexuality was able to walk through the streets of Belfast displaying this offensive placard in spite of the presence of the PSNI, representatives from the Commission and the march organisers. The act of sodomy is a grave offence to every Bible believer who, in accepting the pure message of God's precious Word, express the mind of God by declaring it to be an abomination . . ."

And there is a bible quote here. If I can just address that. This is modern Britain. There has been a lot of focus on can Mr Ngole say this on the Facebook? It is not as if we are very polite society nowadays. Even in Northern Ireland you can parade saying bad words about religious believers. It is a great offence to religious believers and we know that is on television every night, and we know it is commented on every night.

So, the advertisement was in response, and we submit the learned judge at para. 73----

LORD JUSTICE IRWIN: In our judgment?

MR DIAMOND: No, in *Sandown* – addresses the issue in the round, of course he considers all the authorities, interference, what has been said, prescribed by law. He said:

> "The applicant's religious views and the biblical scripture which underpins those views no doubt cause offence, even serious offence, to those of a certain sexual orientation. Likewise, the practice of homosexuality may have a similar effect on those of a particular religious faith. But Art 10 protects expressive rights which offend shock or disturb. Moreover, Art 10 protects not only the content and substance of information but also the means of dissemination since any restriction on the means necessarily interferes with the right to receive and impart information. Whilst, in principle the manner in which beliefs and doctrines are opposed (or propagated) can engage the responsibility of the State and justify restriction under Art 10(2), the necessity for any restriction must be convincingly established. In the present case I consider that the respondent has failed to convincingly establish the necessity for such restriction which, in my view, disproportionately interferes with the applicant's freedom of expression. In making this assessment I have taken into account the very particular context in which the advertisement was placed, the fact that the advertisement did not condone and was not likely to provoke violence, contained no exhortation to other improper or illegal activity, constituted a genuine attempt to stand up for their religious beliefs and to encourage others to similarly bear witness and did so by citing well known portions of scripture which underpinned their religious faith and their call to bear witness. Whilst such views and scriptural references may be strongly disdained and considered seriously offensive by some, this does not justify the full scope of the restrictions contained in the impugned determination."

Then, if we just go back up to para. 72:

> "It is against this very specific context and purpose of the advertisement that the nature and scope of the impugned determination must be viewed. If the applicant is prohibited or materially inhibited, in the advertisement, from articulating their religious conviction and call to bear witness by reference to the very scripture that underpins it, that restriction, from their perspective, can appear like a form of censorship."

LORD JUSTICE HADDON-CAVE: I am not sure how assisted – I speak for myself – we are by a case on advertising standards when we are looking at the context of professional regulation.

MR DIAMOND: I am obliged. I am just focussing on Article 10, and you can see what standards are like in our society and the many issues. It is not as if this is the most offensive man. A lot of offensive things take place in modern society.

I would like to go to *Smith v Trafford* then, if that may help you, I think that is on point. It is at tab 18. In para. 1 – I think it is directly relevant, and the learned judge did not grapple with this correctly – but para. 1:

> "During the morning of Sunday 13 February 2011 Mr Adrian Smith, the claimant in this matter, read on his computer a news article on the BBC news website headed:
>
> 'Gay church 'marriages' set to get the go-ahead'.'
>
> Mr Smith is a practising Christian and occasional lay preacher. Thinking that the BBC article and his response to it might interest some of his many Christian friends, particularly in Africa, at 12.18 on the same day he posted a link to the BBC article on his Facebook wall page, together with the following comment, under his name:
>
> 'an equality too far'."

So he is identifying himself and his employer – this comes later – and then para. 5:

> "For making those two comments Mr Smith was suspended from work, on full pay, on 17 February, made the subject of a disciplinary investigation and then disciplinary proceedings leading to a hearing on 8 March, at the end of which he was told that he had been guilty of gross misconduct for which he deserved to be dismissed . . ."

Then para. 15, discusses the housing contract with various policies that he had signed up to with the Housing Trust, Mr Smith's contract as housing manager. "(a) You are required to perform the duties and activities . . .". (b) and then:

> "(c) You must ensure that you are familiar with the law and regulation as it applies to your duties and that you comply at all times. You should also familiarise yourself with, and adhere to, all Trust policies and procedures and standards of performance asking for clarification if required. …"

Then 18:

"(b) Conduct that occurs outside working hours or away from the premises of the Trust may be considered as a breach of discipline and be subject to disciplinary procedures."

Then it has para. 20, halfway down, there are 23 examples of gross misconduct: "ranging from violence, drug abuse, fraud and corruption . . ." Then it has the code of conduct, 21. It says, halfway down on the following page: ". . . 'We expect all employees to be committed to the aims of the Trust' . . ." Then para. 22: "Employees are required to maintain the highest standards . . .".

"Employees are required to act in a non-confrontational, non-judgmental manner with all customers, with their family/friends and colleagues. The Trust is a non-political, non-denominational organisation and employees should not attempt to promote their political or religious views . . ."

Paragraph 23:

"Behaviour to external authorities/outside interests

'Employees should not engage in any activities which may bring the Trust into disrepute, either at work or outside work. This includes not engaging in any unruly or unlawful conduct where you are or can be identified as an employee, making derogatory comment about the Trust, its customers, clients or partners' . . ."

And then we have the Equal Opportunities Police, so people are free from harassment and so forth. Then it is on his Facebook page, there are numerous people able to watch it. I will jump to para. 51, which details the allegations: ". . . the postings were 'activities which may bring the Trust into disrepute". It was said that he was promoting his religious views, and the third, he was "failing to treat fellow-employees with dignity and respect, including being non-judgmental ".

Jumping to para. 53: Mr Justice Briggs (as he then was) said:

". . . Like any piece of writing, a code or a policy must be interpreted as a whole, and particular forms of behaviour may constitute misconduct even though not precisely specified and prohibited.

Nonetheless codes and policies which form part of a contractual framework (in the sense that the employee is required to observe and abide by them) must be objectively construed, by reference to what a reasonable person with the knowledge and understanding of an employee of the type in question would understand by the language used. If an employee is liable to be demoted and to have his salary substantially reduced as a result of misconduct, he must be entitled to ascertain from the codes and policies to which he is subjected what he is and is not permitted to do, and to understand the extent to which those obligations extend beyond the workplace into his personal or social life."

Paragraph 57:

"Taking those two points in turn, I do not consider that any reasonable reader of Mr Smith's Facebook wall page could rationally conclude that his two postings about gay marriage in church were made in any relevant sense on the Trust's behalf . . ."

Then para. 66, if I may:

"The second question raised by this part of the Code of Conduct is the extent to which a reasonable managerial employee would think it purported to lay down any rule or instruction about how he (or she) should behave outside the workplace or the work context. The right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. Of course, an employer may legitimately restrict or prohibit such activities at work, or in a work related context, but it would be prima facie surprising to find that an employer had, by the incorporation of a code of conduct into the employee's contract, extended that prohibition to his personal or social life."

Paragraph 68:

"The question whether Mr Smith's Facebook pages had by February 2011 acquired a sufficiently work related context to attract the application of the Code of Conduct and Equal Opportunities Policy lies at the heart of both the second and third ways in which the Trust puts its case on misconduct. The question is both one of interpretation of those documents and of their application in a fact intensive context. Dealing first with interpretation, the Disciplinary Policy makes it clear at section B(1)(b) that conduct outside working hours or away from the Trust's premises may be considered as a breach of discipline. To that extent, the reasonable employee is fairly warned that conduct in his personal or social life is not wholly unaffected by the Code and

> Policies. Beyond that, the question whether and if so how far particular provisions of those documents affect an employee's personal or social life requires careful consideration of each relevant provision, its purpose (in the better conduct of the Trust's affairs) and its consequences (in terms of the potential for invasion of the employee's human rights of expression and belief) . . ."

LORD JUSTICE HADDON-CAVE: This is an employment contract case.

MR DIAMOND: Yes.

LORD JUSTICE HADDON-CAVE: It is not a case about the professional standards, professional regulation, so how does it help us?

MR DIAMOND: My Lord, I submit it is directly on point. It is simply about an individual in an employment context who has similar provisions applied to him as a professional disciplinary code, in which his manifestation of free expression and free religious expression were deemed, all the things, to bring the Trust into disrepute, affect service users, and so forth, and the learned judge, now a Law Lord, deals with that very fully in our submission. In our submission it is directly relevant. There is nothing in the learned judge's judgment at first instance which could not apply to Mr Smith. He is an individual dealing with vulnerable people seeking housing. People could at least ask whether they might be given a house or not because of his views on the Facebook page, and they had entered a same sex marriage. These are real questions that have to be looked into, and we say that paras. 72, 76, 78 and 82 fully preserve freedom of speech, and freedom of religious belief, and with the force necessary to ensure that people can preserve.

Perhaps I will just read a bit from 82 and finish on that, about a third of the way down the paragraph:

> ". . . The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech. To construe this provision as having application to every situation outside work where an employee comes into contact with one or more work colleagues would be to impose a fetter on the employee's freedom of speech in circumstances beyond those to which a reasonable reader of the Code and Policy would think they applied. . ."

So, my Lords, it may not be a professional argument, there is no case directly like the instant one we have before us, but that is submitted and, we say, comes close.

Now, if I could take you to the case of *Livingstone*----

LORD JUSTICE IRWIN: I wonder, since it is two minutes to one, whether we do that at 2 o'clock?

MR DIAMOND: Right.

(Adjourned for a short time)

(2.15 p.m.)

LORD JUSTICE IRWIN: Yes, Mr Diamond, you were taking us to the next case.

MR DIAMOND: Yes, tab 9, *Livingstone*. The facts of this case are obviously well known, and para.5 repeats the altercation between Mr Livingstone and the journalist for the Evening Standard, Mr Finegold.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: And certainly not his finest moment. Of particular interest is the fact that at para.8, the second part, he refuses to apologise, simply just ignores it, and then later, at para.10, he gives a sort of apology through gritted teeth after a complaint by the British Board of Deputies. And the question related to the functions of the applicability of these codes to his private life and whether he was acting in his function, had the capacity. The actual -- if we could just go to para.19:

> "The ESO's [which is the reviewing body] opinion was that when responding to the questions of Mr Finegold' the appellant was, albeit he was leaving the building after the reception, acting in his official capacity. The Tribunal did not agree since in its view official capacity meant that a member was conducting the business of the authority or the office to which he had been elected or acting as a representative of the authority. It is highly doubtful that the observations made by the appellant could properly be regarded as responses to the questions of Mr Finegold, but, even if they could, they do not and could not reasonably have been regarded as being uttered in his official capacity. This was what is popularly known as doorstepping ..."

Just to say it was found that Mr Livingstone was at a reception celebrating Chris Smith, the Secretary of State. His travel to the reception was in his private time. His departure, the minute he stood down from that stage, fell into his private life, and even though he was exiting the building to an official car, he was then doorstepped, and that fell within his private capacity. Nevertheless, there was another provision which said "other circumstances", and

that is what the case hinged on: was this an "other circumstances" case, not in his official capacity? That is addressed at para.32 by Collins J:

> "I shall deal with this latter submission first. The right of freedom of speech has always been recognised by the common law."

And then he repeats the well-known quotes in *Derbyshire*. Then he goes on to mention Article 10. Then he goes on in 33:

> "There can be no doubt that restraints imposed by a code of conduct designed to uphold proper standards in public life are in principle likely to be within Article 10(2). But it is important that the restraints should not extend beyond what is necessary to maintain those standards. There has always been a debate over the extent to which conduct in private as opposed to public life should be regulated and that debate continues."

And then he goes on at 34:

> "Mr Maurici has suggested that the appellant was making a political comment so that there is a higher threshold to be surmounted in establishing that the restraint was proportionate. Interference with the right of free speech which impedes political debate must be subjected to particularly close scrutiny [and then *Sanders v Kingston is* quoted, and] the high level of protection given to expressions of political views."

That was someone again -- Counsellor Saunders from Peterborough made extremely abusive comments about the troubles in Ireland.

> "I have no doubt that the appellant was not to be regarded as expressing a political opinion which attracts the high level of protection. He was indulging in offensive abuse of a journalist whom he regarded as carrying out on his newspaper's behalf activities which the appellant regarded as abhorrent. Nevertheless ... Article 10 applied. Anyone is entitled to say what he likes of another provided he does not act unlawfully and so commits an offence under, for example, the Public Order Act. Surprising as it may perhaps appear to some, the right of freedom of speech does extend to abuse."

And then he goes on about the privileged position that freedom of speech has, and then, at para.36, he discusses the position of the tribunal that found Mr Livingstone guilty - if that is the word - of a breach in the code of conduct, and he quotes 68. This is what the tribunal found, not the judgment:

> "The exchange between the Mayor of London and a journalist which gave rise to this reference took place immediately after the Mayor left a reception at City Hall and began with the journalist asking how the evening had gone. The Mayor chose to make some comment. Although finding that the Mayor was not at that time fulfilling his official duties (they having ceased for the day), the Case Tribunal has no difficulty in saying that the events were sufficiently proximate in time, in place and, so far as the journalist's question was

concerned in content, to mean, that it is proper to regard Paragraph 4 of the Code of Conduct as being applicable to the situation."

A And I think many people would have thought that leaving a public meeting where you are performing a function as Mayor, that has a proximate cause to your functions as Mayor. Paragraph 37:

> "I do not accept the reasoning set out in Paragraph 68. The appellant had ceased to act in his official capacity as host of the reception and was leaving
B the building to go home."

Then he goes on at para.39 that he draws -- there is a distinction to be drawn between bringing yourself into disrepute and your functions as a Mayor, and he goes on at para.40:

> "In my view, the distinction is more than theoretical. There is a danger in
C regarding any misconduct as particularly affecting the reputation of the office rather than the man. If a councillor commits sexual misconduct or is convicted of theft, I do not think the reputation of the office is thereby necessarily brought into disrepute. His certainly will be. If the high profile test is correct, anything done by the appellant which can be regarded as improper may fall within Paragraph 4, however remote from his official position. Having said that, I recognise the force of the Tribunal's view of the difficulty in separating
D the man from the office. I have no doubt that the Tribunal was entitled to conclude that what he said did bring him into disrepute. I am less clear that in reality it was right to say that the office of Mayor was brought into disrepute."

And then if I may just jump to the last sentence before para.42, seven lines up:

E "Either approach involves giving weight to the fact that the Tribunal in question has expertise."

LORD JUSTICE IRWIN: Paragraph 42?

MR DIAMOND: Just above 42.

LORD JUSTICE IRWIN: Oh, above 42.

F MR DIAMOND: (Inaudible).

LORD JUSTICE IRWIN: Sorry. Yes, thank you.

MR DIAMOND:

> "Either approach involves giving weight to the fact that the Tribunal in question has expertise."

G

LORD JUSTICE IRWIN: I am sorry, what approach are they talking about? We need to see what that is. What are they talking about?

MR DIAMOND: An approach to consider appeals -- it provides that if a tribunal----

LORD JUSTICE IRWIN: Is it re-hearing or review?

H

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: Right. Okay.

MR DIAMOND:

> "... giving weight to the fact that the Tribunal in question has expertise. This Tribunal sets the standards and has a member who has experience in local government. Thus I should and do give considerable weight to its judgment, but in this case that is not so important since the appeal turns more on the construction of the statutory provisions and of Paragraph 4 of the Code. Furthermore, in relation to Article 10, I do not think that the Tribunal has particular expertise."

There is a number of propositions involved in this. The obvious question is: well, it is not related to a social worker, he is an elected Mayor. But what is clear from this judgment is the clear division between public and private life, even in this case, to a very extreme division of actually leaving a public function to the official car, your functions had ceased for the day. And let us not forget that Mr Ngole never identified himself as anything to do with the university. He never identified himself. He never said: "I am a social worker". It simply would be a random search of a name. The Mayor was directly involved, so they drew a very firm decision. Secondly, there was a strict construction of the words and how it applies, and in this case not only was he outside of it, but there was an Article 10 application, which applies to abuse, and there was an additional hurdle: he brought himself into disrepute. He is not particularly charming, but he has not brought the office of Mayor into disrepute because it is simply -- that is a sexual misdemeanour, it is a theft, a crime. That is not in any way -- there is not enough linkage to the office, in our submission. Perhaps if he was taking funding in his position as Mayor or perhaps if he had done something inappropriate as Mayor to get investment on which there was a pay-back, that would be bringing the office into disrepute. But when you bring yourself into disrepute, there are sufficient processes to deal with that, such as anti-discrimination law in Mr Ngole's case, or the criminal law or public----

SIR JACK BEATSON: I have got two questions. One, which I do not know whether we have an answer for. There is only one date given at the beginning there. I do not know whether that means this was an unreserved judgment, but my question is this suggests that if a Minister of the Crown was engaged in highly sexually immoral conduct that came into the eyes, for example, in the Profumo affair, that that would not bring the office into disrepute, so that is -- it is that broad.

MR DIAMOND: It is that broad, and I am not sure, may I submit -- is that wrong? I mean, people----

SIR JACK BEATSON: I did not say it was wrong.

MR DIAMOND: No.

SIR JACK BEATSON: I just want to see how broad----

MR DIAMOND: I think it is that broad.

SIR JACK BEATSON: And do we know -- I mean, I do not know whether it is, or it does not really matter, but it is obviously a very experienced public law judge at first instance, and we have to take it for what it is.

MR DIAMOND: Yes. But, I mean, an addition was the last comment, where he says: "I do not think that the Tribunal has any particular expertise in Article 10". But that is the thing, because the court has its own prerogatives. It is not as helpless as the trial judge says it is, and must humbly defer to executive or specialist decisions. Where it involves construction of statute, where it involves definition of Convention rights, where it involves free speech, where it would involve something like access to the court, yes, the court is mindful of the constitutional divisions. If you have something like assisted suicide, like the *Nicklinson* case, we all know they had a nine-Bench Supreme Court, they were heavily divided on what could or could not be said to Parliament, or whether Parliament had the final say. We also know in the *Lord Carlile* case, that was a significant Iranian dissident which the Foreign Office believed would damage relations. That is a conditional division of our powers, and obviously the court does not have any expertise in those matters. But when it comes to Article 10, free speech, when it comes to access to the court, when it comes to the court defending its own prerogatives, when it comes to the court preventing, in our submission, abusive treatment of a Christian - that is our case - the court has full rule. There is no deference to this experienced tribunal in this case, *Livingstone*, where it deals with conduct matters and it had local government officials on it. This is a pure freedom case, and I am afraid it is probably correct, Article 10 does protect an awful lot of speech and that is why it is so valuable to our society. It is not a question of we agree with Mr Livingstone, it is----

LORD JUSTICE HADDON-CAVE: I am sorry to interrupt. Lord Bingham made it very clear that when it came to questions of the protection of the reputation of certain professions, then that was something that the courts ought to give deference to the experts and the professionals in that field.

MR DIAMOND: When it is related to the professions. The point of this case is a linkage, and Lord Bingham I believe said that in *Bolton v The Law Society*.

LORD JUSTICE HADDON-CAVE: Indeed.

MR DIAMOND: Well, that was a classic case of professional regulation. You had a solicitor who disbursed the income of a property sale without taking the standard precautions.

LORD JUSTICE HADDON-CAVE: So it is your case here that this has got nothing to do with professional regulation? Is that right? Is that your submission?

MR DIAMOND: My submission is this falls into Article 10 and a Convention right, where the court does have full jurisdiction. Now, you may not be with Mr Ngole but the deference point falls. If Mr Ngole had written a social work article where he had described the process of taking same-sex children into care and had made an erroneous -- said: "Well, I will refer it to this panel before that panel", that would be something that professional social workers would say: "Well, you do not do that. That was an error, you failed to protect their rights, it is professional conduct". But this judgment, I submit, is damaging. It is so wide, it could apply to anything anybody says, and that is precisely why Collins J is saying: "No, you may not like what people say, but this does not fall within your public functions. You are"----

LORD JUSTICE HADDON-CAVE: So Article 10 rights are qualified rights, are they not, Mr Diamond?

MR DIAMOND: Well, yes, and no. I mean, they are qualified rights, but if you qualify them out of existence, they do not stand for much. That is the point of Article 10 rights, that they are very wide and expansive and they are restrictively construed, for convincing reasons.

LORD JUSTICE IRWIN: Well, I think, before we get -- or sitting alongside that, are you really saying that the court below and this court should pay no deference to an expert tribunal in considering the impact on potential users of social workers or clients of social workers? Is that not a matter where there is a basis for deference? It is not a question of interpretation of Article 10 or interpretation of law, where clearly this court will exercise its own judgment. But so far as the impact on those who need to be assisted or will be referred to social workers, that must be something they have expertise in.

MR DIAMOND: Well, I----

LORD JUSTICE IRWIN: And both of those are things----

MR DIAMOND: -- am not perhaps describing my position well. Of course I am not saying no deference, but it is not a matter where, on the *Lord Carlile/Nicklinson* level that the court has to be mindful of constitutional divisions in----

SIR JACK BEATSON: But a narrowing of scope of review has been applied in many cases - I cannot see them in the bundle necessarily - which have got nothing -- constitutional allegations. *Nicklinson*, the distinction between the Justices had to do with when the court should do something and when Parliament should do something. And *Carlile* was when the

court should do something and when the government should do something. But there are plenty of cases where, for example, matters of common -- let us take *R v South Yorkshire* -- *R v Monopolies Commission, ex parte South Yorkshire Transport* about a consolidation -- about a monopolies reference about linking bus companies in South Yorkshire, where Lord Mustill says: "Well, this is a jurisdictional question, but it is on the question of whether this area is a substantial part of the UK, and that is an economic question, and although it is a jurisdiction question, we cannot interfere unless it goes outside the bounds of reasonableness, because it is not justiciable". So there are plenty of areas. I do not think we can carve *Carlile* out as just being about constitution allocation. There are plenty of examples.

MR DIAMOND: Yes.

SIR JACK BEATSON: That does not take away from your point.

MR DIAMOND: No.

SIR JACK BEATSON: But it----

MR DIAMOND: I mean----

SIR JACK BEATSON: What degree of -- you say well, you do not remove any -- I hate the word "deference", I must tell you.

MR DIAMOND: Yes.

SIR JACK BEATSON: You say: "I am not saying there should be no deference, respect, institution" -- but then what should they do? The courts are allowed to do something, so what is your submission on what the court is allowed to do?

MR DIAMOND: Well, my submission is that what the courts are allowed to do is protect Convention rights, fundamental rights, and their own prerogatives. They are always the judge of their own prerogatives, such as access to the court, or even the membership of the judiciary. Those are matters where the court has expertise. The question is, on the whole deference question, whether it is foreign affairs or international relations or drones flying over America, we have had a whole series of cases -- is that it is a question of competence of the court, a question of deference to an experienced decision maker. Now, all the cases my learned friend relies on: *Bolton*, which was a clear failure to put clients' money in the correct account; there are other cases of medical students where there are behavioural difficulties and there was shouting at people -- all these cases are self-evident cases where the person is unfit, he has got a problem, Counsellor Saunders shouted abuse at the Irish people, and swearing on a media station. Those are all areas where you can say: "Well, this is clearly bringing the profession into disrepute". But what Collins J, I submit, is arguing is there has to be a linkage. If it is not an obvious----

LORD JUSTICE IRWIN: That is a separate issue, Mr Diamond. Forgive me. The question to you was: what degree of deference -- or, rather, what degree of particular weight, if you want, should be added to the conclusions of a specialist tribunal in a specialist field? That is not -- that is a separate question from the linkage point, which we have heard you on. So the question is this. And you can take it in a broad way, but that is not all that helpful. The question of what is the impact on potential users of social workers or clients of social workers -- what degree of deference should be paid to, in this instance, university authorities looking at the training of social workers? That is the issue. Now, I have written down that you say no need for deference. I did that before I corrected my language to special weight, but it is the same issue. Now, you then said there must be some difference, but I am not clear about how far you go. Forget about all the other areas, talk about this area.

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: How much weight should the court give to those who are responsible for training social workers when they are looking at the impact on those who would be the clients of social workers? That is the question.

MR DIAMOND: I hear that, and there are two responses to that. Obviously -- well, three responses. You do give weight to them because obviously they are a special trained body, but the question is: whose expertise does it fall within? Is it a matter that you should defer to? Our submission is no, for two reasons: it is a constitutional right, and, secondly, we say it is subterfuge being played on the real issues in this case, and the court should go through to the real issues: the content of the message and the lack of compromise.

LORD JUSTICE HADDON-CAVE: Can I just try and understand that submission? Proposition A, you do give weight to those training social workers and their views. Proposition two appears to be: but whose expertise? It is a constitutional right, and this is all a subterfuge. I am sorry, I just do not understand that submission. (After a pause) It is a simple question.

MR DIAMOND: Yes. Well, I am saying in this case this is not a matter where the court should give much deference to the views of the body in this case for the reason that it falls within the court's prerogatives of Article 10, as in *Livingstone*, and we also say, on top of that, there is an element of subterfuge----

LORD JUSTICE IRWIN: That is a bad faith point. What you are saying is that in this case, this is a subterfuge by the university authorities and the OIA, and in fact it is opposition to the substantive Christian views of your client and not really concerned as to the impact on social work clients. Yes?

MR DIAMOND: Well, yes, I mean----

LORD JUSTICE IRWIN: Did you plead that? Did you ever plead bad faith or subterfuge by those involved in the disciplinary process?

MR DIAMOND: We are -- we have challenged the reasoning of it, and it is on the content----

LORD JUSTICE IRWIN: That is a separate question.

MR DIAMOND: Well, we plead it on the content----

LORD JUSTICE IRWIN: That is a separate question.

MR DIAMOND: We plead it on the -- it is for the -- the skeleton argument discusses the guise of the changing arguments and the -- I mean, if I may perhaps put it another way from my learned friend's example, and I do not know if this sort of helps in any way. There seems to be an awful lot of focus on what was said in this case. It is simply views expressed which I am submitting are acceptable in the mainstream of our society that people disapprove of. Take an example, you are a Jewish couple dissatisfied with your late management services you are receiving. You Google the person helping you. You find out that they are a Parliamentary candidate for, let us say, the Labour Party with views on Hamas. My case is, well, one view is that that would clearly impact them. Can you imagine what this impact would have on Jewish people - those very strong political views you have done and those activities you have done. And the impact on Jewish people. What would they think? And that is why this matter falls within the purview of the court. It is a bigger question than what the professional body thinks or some -- it has got the freedom questions, and private life questions, and people's right to articulate that.

SIR JACK BEATSON: Can I just go back to my Lord's question? I have just pulled out the statement of facts and grounds, and, speaking for myself, but I will be grateful for any submission, I cannot see where the sham/subterfuge point is. There is arbitrary and unfair. There is breach of sections 13, 19, 26 of the Equality Act. There is breach of Articles 8, 9 and 10 and/or 14. A breach of Article 6. I do not see it, for myself, so I am just giving you the opportunity of saying where it is.

MR DIAMOND: Well, certainly if we -- I mean, the argument only came up to some extent at the judgment, but if we look at my skeleton argument for the Court of Appeal, obviously my skeleton sought to deal with this incredibly wide-ranging judgment, I submit all my principles were rejected, and the scope of it, and how it would apply. And ... (After a pause)

SIR JACK BEATSON: I am looking at your grounds of appeal. I do not see it there either. Skeleton argument.

LORD JUSTICE IRWIN: I had understood that your case all along was (see para.34 of your skeleton argument) that the complainant was hostile to your client's views.

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: The anonymous complainant. I had also understood that your submission was that the tribunals did not sufficiently distinguish between hostility to the views and the impact on clients of social workers, but I had not understood that you were saying there was a subterfuge, a conscious use of bad faith. I think, Mr Diamond, that is quite serious. If you are going to say that at any stage, saying it on your feet in the Court of Appeal for the first time is not right.

MR DIAMOND: Well, I think I have just expressed myself poorly. What came out in the first court is the correspondence and it is reviewed by the trial judge - hopes of diplomacy, etc. The burden was put on Mr Ngole to reconcile those differences, and we are simply saying that where there is a disagreement, there is not -- we are saying the burden should have been placed, on a proportionality analysis, on the university to seek reconciliation of the problem. I think that might be a better way of saying it.

LORD JUSTICE IRWIN: Well, if that is all you are saying, that is different. I understand that.

LORD JUSTICE HADDON-CAVE: I mean, that is not really subterfuge.

MR DIAMOND: No. Well----

LORD JUSTICE HADDON-CAVE: It is not subterfuge. That is an error, but it could be an honest error, it could be----

MR DIAMOND: Well, I apologise for that phrase----

LORD JUSTICE HADDON-CAVE: -- an unconscious error----

MR DIAMOND: -- but of course the trouble is if you say lack of insight, and that is never really developed other than he does not seem to realise the consequences of what he is doing, and you have seen the details of that conversation where there is clearly some engagement on "What can I say?", you either have to draw the conclusion they failed to discharge their burden of reaching some compromise or, alternatively, there was nothing that could have been said that would have been permissible. And whichever one it is, I do not know, but we say it must be one of those two.

LORD JUSTICE HADDON-CAVE: All right.

LORD JUSTICE IRWIN: I take it that constitutes a withdrawal of an allegation of bad faith?

MR DIAMOND: I apologise for saying it in such a way.

LORD JUSTICE IRWIN: This is a difficult enough area without that kind of suggestion.

MR DIAMOND: I ought to say I feel very conscious I have some uphill task in these cases, but that is why we feel there is a sort of important----

LORD JUSTICE IRWIN: Yes, well, we understand it is important, and we understand that you are in the position of appealing an adverse judgment.

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: We follow. You were actually dealing with a question of the linkage between what is said and the professional consequence of what is said.

MR DIAMOND: Yes.

LORD JUSTICE IRWIN: I think you broke off in the middle of an illustration, a Jewish couple who find their manager - I took it as manager in financial terms - supports Hamas. Well, that would mean that their hostility to him, discovering such an alliance or support, would be completely unconnected with his function for them.

MR DIAMOND: The example I gave, and again I apologise -- the example I gave perhaps the Jewish couple in marriage guidance counselling----

LORD JUSTICE IRWIN: Oh, I see, right.

MR DIAMOND: -- who are trying to develop the scenario given to you earlier. I mean----

LORD JUSTICE IRWIN: But, even so, marriage guidance, his views on Hamas would not be relevant -- how would that impact on his capacity----

MR DIAMOND: Well, I am just saying they may think he is hostile to Jewish people. I mean, I am just wondering how far do we say we can Google people's social/political views. "I object to them because I am a category of individuals who disagrees", whatever the social or political or religious issue is, and somehow that makes that person unable to discharge their professional abilities. As I said earlier, professionals do this every day, day in, day out. Judges do it every day, day in, day out. We have to get above whatever we think individually, and we apply the law or we do our jobs. That is how society works, and that is why we have a public/private divide.

LORD JUSTICE IRWIN: Yes. All right. Well, now, you have taken us to *Livingstone*, and you have dealt with the other -- two other authorities. Is there more authority that you think we should look at?

MR DIAMOND: I think just very briefly (because I may come back on something) if I could just maybe look at *Vogt v Germany*. That is just----

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: -- another relevant case, and then I will just do a short conclusion.

LORD JUSTICE IRWIN: What tab is that?

MR DIAMOND: That is 30. Again, your Lordships are no doubt over-familiar with this case. It is a case on the German Constitutional provision requiring political loyalty to the democratic

regime and you could not be a communist or a national socialist and be a public employee. It is a very long paragraph at paras.22 and 21. I will just say it -- I will summarise it because it is too long. But she is a fairly hard-core communist believing in dictatorship of the proletariat and has had an active membership in every single way. And she was dismissed from her job, and I just want to read 43, if I may:

> "The court reiterates that the right of the recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention."

Now, this is old hat of course. There is no right to employment, there is no right to be a professional. However, if your dismissal is premised on a Convention violation, not only is that reason not a legitimate aim, and we would criticise the learned judge on that, but, in addition to that, that brings in the Convention applicability. On the facts of Mr Ngole, it goes without saying the (inaudible) in Article 10 do not have application if the reality is you lose your employment.

Then para.52, we have the standard phrase of the European Court of the importance of freedom of speech, convincingly established, narrowly interpreted, restrictions, convincingly argued - all the points that I am labouring today before you, if I may be so bold to say. Then it goes on, whether there is a fair balance to be struck.

Then the actual reasoning begins at para.54. If I may just go 10 lines from the bottom, just above para.55, in mine it is about 10 lines, it starts: "Mrs Vogt had held senior posts in this party". So Mrs Vogt had senior posts in the party, she was very senior and active.

> "... whose objective at the material time had been the overthrow of the free democratic order ... and which received its instructions from the East German and Soviet communist parties. Even though no criticism had been levelled at the way she actually performed her duties, she had had, nevertheless, as a teacher, a special responsibility in the transmission of the fundamental values of democracy. Despite the warnings she had been given [we say no warnings here], the applicant had continually stepped up her activities within the DKP. [They had] no choice but to suspend her ..."

Then it goes the applicant disputed the necessity, it was a lawful party, the Communist party, and seen to be lawful under byelaw. And then it goes on about five lines below that:

> "From this point of view she had always been beyond reproach, both in the performance of her duties, in the course of which she had never sought to indoctrinate her pupils, and outside her professional activities, where she had never made any statement that could have been considered anti-constitutional. On the contrary, her activity within the DKP reflected her desire to work for peace both inside and outside the Federal Republic of Germany and to fight neo-fascism. She was firmly convinced that she could best serve the cause of democracy and human rights by her political activities on behalf of the DKP; requiring her to renounce that conviction on the ground that the State authorities held otherwise went against the very core of the freedom to hold opinions and to express them. In any event, the imposition of the heaviest sanction had been totally disproportionate."

Well, you actually have to do something wrong, in our submission. You cannot lose your job because of ideas and thoughts. Now, clearly, the ideas of Christianity -- actually, some people think the ideas of Christianity and Communism have got great similarity; both strive for the new Jerusalem on earth, in various forms, but both may, arguably, have failed to achieve those high standards. But, nevertheless, these are positive -- well, they are ideologies, and we would say that Mr Ngole had never done anything wrong. He had worked with same-sex couples, as his report has indicated, and he had always strived to act with full integrity. You cannot lose your job because of ideas. Now, this is going to sound -- this is counsel's submission, but -- if I may ... (After a pause) When we look at the proportionality of the most serious sanction, it is submitted that the court should ask itself: have you openly identified yourself when you engage on Facebook as a member, employee or staff member, or a student on a chat line? My bold submission would be only if you identify yourself should that be of any concern to any professional body, unless it is really exceptionally outrageous, or any employer.

SIR JACK BEATSON: Do you mean identify yourself as a university student or as a social worker, or just your name?

MR DIAMOND: Well, not by your name. If you say----

SIR JACK BEATSON: Very often people identify themselves by giving their name.

MR DIAMOND: I meant broader identification. If you obviously go on a social network, like Mr Smith actually had done, but it was not found so bad -- that he said: "I am employed by the Catholic Housing Association".

SIR JACK BEATSON: Right.

MR DIAMOND: And that gave -- but even then, Briggs J (as he then was) said that clearly -- well, he is speaking on behalf the trust, it was a private speech.

LORD JUSTICE HADDON-CAVE: Sorry, I do not understand this. If you posted something in the name of Paul Diamond on the web, it would not be very difficult for people to put two and two together that you were Paul Diamond, a barrister. Equally with a name like Haddon-Cave, people would identify the name with the role.

MR DIAMOND: Obviously our roles are different, you being a judge and me being----

LORD JUSTICE HADDON-CAVE: Indeed. But the point is the same one. As my Lord said: what do you mean by identify? A name is an identity.

MR DIAMOND: Well, if I expressed a political viewpoint, let us say in favour of the Labour or Conservative----

LORD JUSTICE HADDON-CAVE: It is not about that, Mr Diamond. I am just asking you a simple question. You are saying that identifying in your terms requires a person, who will be X, to identify with a particular firm or role. What I am suggesting to you is that it would be obvious to somebody going on the web that certain people are people who are well known or will be identified with that role anyway.

MR DIAMOND: I agree, and I am saying if you do not identify yourself formally as barrister or employee of Glaxo, or whatever, you are acting wholly in your private capacity. We cannot limit speech on the educational levels of third parties who do not like what you are saying. That is the heckler's veto. So what I am saying is for the proportionality test, has the person -- is he acting in his private capacity or is he identifying himself in some way where the employer might have an interest? He has said: "This product is rubbish and I work for this firm".

LORD JUSTICE HADDON-CAVE: So, just following on from that, you say that all the guidance that is given by the university, and indeed many professional bodies, that you must take care with what you put onto the web, Facebook, and so on -- that is all irrelevant, is it?

MR DIAMOND: No.

LORD JUSTICE HADDON-CAVE: Because it is your private life----

MR DIAMOND: I have not said that----

LORD JUSTICE HADDON-CAVE: -- or it is irrelevant if you do not identify yourself with the role.

MR DIAMOND: Unless there is something on there which is common consensus is scandalous, like a racist tirade, the court should have some linkage to the professional body's obligation. That is what all these other professional body deference cases are. They are all professional matters, not -- the only one on free speech is *Livingstone*, and I am arguing that Ngole follows in that vein. But, as I said, if it was something like I failed to file a judicial review

claim form within three months, that is a matter for the Bar Council. If I steal some money, that is a matter for the Bar Council. But if I enter politics or make some comment, I do not think that should be a matter for the Bar Council just because some people do not like it. So we say: is there identification of position? Is the person commenting as a private citizen? What is the status he is commenting in? What is the nature and the tone of the criticism? That should be taken into account. The frequency or continual breach of warnings. Is there a last straw scenario here? The nature of the employer, institution or university. If you look at Ngole's free speech, his first witness statement -- I will not take you to it now because time is pressing. But while this was going on, Sheffield University was in the press because they had Mr Soliman, an extremist Islamic preacher who talks about sex slaves in terms on the campus. In our society there are multiple values of free speech at stake, and it is not clear where the lines are drawn. The degree of forewarning and precision in the policy. Was it a matter of public debate or a topic of political engagement? Was the person responding to questions? Was there criticism? Was there insult? Is it a case of rashness? Was there any profanity, personalised attacks, rude, swearing violent, sexual innuendo or racism? Was there confidential personal information disclosed? And then overall, the chilling effect on freedom of speech.

Before I come to my conclusions, there is just one final matter, and we obviously have a case of -- we are submitting a case of apparent bias, and we just say in relation to Professor Marsh, we all know what the test is: whether a fair-minded and informed observer, having considered the facts, would conclude there was a real possibility of bias or predetermination or a closed mind. One of the issues of course, since the *Pinochet* cases, is whether a judge has an interest in the cause. In the *Locabail* decision, one of the judgments actually set aside was a Recorder barrister who had been very articulate in claiming causes. I do not know if you are familiar with that case, or should I take you to it? But the main decision that actually prevailed in that case -- most of the other cases were judged to be too far removed and their interest was *de minimis*. But one of the interests was that the barrister had written extensively on it, acted extensively on it, and had always supported the claimant, and there was a reasonable suspicion that the defendant was not going to get a fair hearing. We rely on that.

This is not a case about a Christian, a Muslim or a gay person *per se* on that basis alone, and that leads me into the final point, and I have been saying this throughout the hearing. We

obviously think Professor Marsh should have disclosed these matters, especially as this was a student who had made two objections previously. But the concern of the fair-minded person is not para.25 of *Locabail*, where they say, well, you know, if you are Christian or Muslim, we would never accept that as a ground. Of course we would never accept that as a ground. That is not the ground. The ground is her political activism in it. And just as we would expect someone, whatever their sexual orientation or religious faith is, to apply the law absolutely neutrally, including, if I may say, Judge Qureshi -- I keep going back to that, but that is a good example -- to apply the law accurately despite their religious dispositions or such thought. So Mr Ngole claims exactly the symmetry and benefit of that analysis, that, despite his personal views and convictions and belief in the Holy Bible, he can too, as the evidence shows, discharge his professional functions fairly and honourably and indeed professionally.

I think at that moment -- I think it is now ten to three. I know my learned friend will want to start.

LORD JUSTICE IRWIN: Yes. You have covered all the ground.

MR DIAMOND: I have covered the ground as best I can (inaudible) but I have done my -- I have covered the ground as best I can.

LORD JUSTICE IRWIN: Thank you very much.

MR DIAMOND: Thank you, my Lords.

LORD JUSTICE IRWIN: Yes, Ms Hannett.

MS HANNETT: My Lords, this case is a case about the university's decision, acting as a gatekeeper for the statutory regulator, the HCPC, that the appellant's fitness to practise was impaired. My Lords, the consequence of that was that he was removed from a professionally qualifying social work degree, and offered a place on a non-professionally qualifying social work degree. My Lords, that was taken for two reasons. First of all, because of the comments on the Facebook page, and by itself that action would not have resulted in the sanction imposed. My Lords, I will take you through the evidence on that in a moment. The second reason is because of the appellant's inability to appreciate why that conduct might be problematic, his indication that he would repeat such statements, including in the course of his social work practice. My Lords, I will say that this is a fact-sensitive decision and the context is critical. The relevant aspects of that context include the content of what was said, namely that it concerned comments on individuals' protected characteristics, sexual orientation. It is also relevant that it occurred in a specific type of profession, namely the

social work profession. And, as the judge accepted, social workers make front-line decisions about very intimate aspects of people's lives: their status as parents, referring them to, say, youth services, and so on. And in those particular fact-sensitive circumstances, in my submission, the judge's conclusion that the university's decision complied with Article 10 disclosed no error of law.

Now, my Lords, what this case is not about. First, it is not about whether the appellant can hold his religious beliefs. The university has been at pains throughout to say that holding profound religious beliefs is not in itself incompatible with the practice of social work. Social workers can of course hold Christian religious beliefs of the kind discussed by the claimant, and no doubt some do. My Lord, I want to be absolutely clear that the university's concern is about the manner of the expression of those views, not about holding those views himself. My Lords, what is also----

LORD JUSTICE IRWIN: So it is about the manner of expression, it is not about the expression?

MS HANNETT: No, my Lord, because----

LORD JUSTICE IRWIN: I mean, there is holding----

MS HANNETT: There is holding----

LORD JUSTICE IRWIN: Well, you heard what has been said.

MS HANNETT: There is holding, my Lord, and then there is manifesting or expressing.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: And again the university is not saying that there is a total ban on expressing those views. There may be contexts in which the expression of those views is appropriate. However, this was not one of those contexts.

My Lords, what it is also not about, contrary to my learned friend's submissions, is about a risk to other professions or other professionals. And again, my Lords, I repeat my initial submission, that fitness to practise decisions are intensely fact-sensitive and will always require examination of what is said, where it is said, the particular profession in question, and the individual's response to it, so their insight and their reflection, and I will come on to that in due course. But, my Lords, one cannot, in my submission, extrapolate from the particular, peculiar findings of this case any wider principles in the way that my learned friend has sought to do.

So, my Lord, those are my opening observations. Just by way of my road map and where I am proposing to go, I am going to start, if I may, by just addressing some of the factual points made by my learned friend. I hope to do that relatively briefly. Second, my Lords, I wish to say something about the role of the university, in particular the role that it plays in determining a student's fitness to practise. Third, I want to say something about the scope of Article 10 and in particular addressing a submission I think sometimes made and sometimes more hinted at by my learned friend about the way in which religious speech is to be protected under Article 10. Fourth, my Lords, to deal with prescribed by law - that is my learned friend's ground three. Fifth, legitimate aim - that is grounds four and five. Sixth, proportionality - that is ground number two. And, finally, apparent bias. My Lords, some of those will be much faster than others. It sounds a rather intimidating list of issues, but I hope it will not -- they will not all take as long as each other.

So, my Lords, just three points of fact that I wish to emphasise in opening. The first is the judge's finding in respect of the manner in which the Facebook posting made by the appellant might be viewed by those who use social work services. My Lords, if I could just ask you to turn up her judgment, it is at tab B, p.64y. Just to locate you in her judgment, it is when she is dealing with "prescribed by law" that she makes a particular finding of fact, in my submission, at paras. 90 to 91. My Lords, it is picking up the submission made by my learned friend Mr Diamond both below and before my Lords today about the multiple meanings of speech. She notes at para.90:

> "That is because religious speech is, in Mr Diamond's terms, capable of having 'multiple meanings'. It has to be construed objectively. A religious (or otherwise philosophically sophisticated) reader might be able to distinguish the theological plane on which the NBC postings operated as purely 'religious speech'. They might be able to supply from their own knowledge a wider benevolent Christian context, and conclude that the poster, in identifying himself with the Biblical texts, was an entirely trustworthy representative of a trusted profession. But the standards materials cannot realistically be interpreted on the assumption that that sort of reader can be counted on in real life. Perhaps that sort of reader is quite rare."

And then she says at para.91:

> "Public religious speech has to be looked at in a regulated context from the perspective of a public readership. Looked at objectively, the NBC postings are entirely capable of being read in a way which would make a fair-minded, even a sympathetic, reader at least wonder about how the poster would behave in the world of social work. More specifically, the standards materials have to be read as having a potential bearing on a situation in which public 'religious speech' can be read by actual or potential service users, or their wider circle.

> These are people who particularly need to trust the profession and its members, and who may very well be entirely unable to put a theological gloss on words such as 'abomination', 'detestable', 'wicked', 'hate' and 'judge'. The postings give no other easy cues for inferring a benevolent religious context or a personally empathetic poster."

My Lords, those are the judge's findings about the way in which the words on Facebook would be viewed by a reader.

My Lords, second, I just want to address the claimant's response to the university's concerns. My Lords, I say when you read the material as a whole, it is fair to note, first, that the claimant took the stance that professional standards did not apply to religiously-motivated speech. Second, he repeatedly said that he would say the same things again, make the same statements again. Third, it was clear that that might arise in the context of his social work practice. Fourth, in my submission, one searches in vain for language of compromise or finding a solution with which the university can live. Finally, my Lords----

LORD JUSTICE IRWIN: Sorry -- no, no, do finish your points, because I have a question when you have finished.

MS HANNETT: Of course. And, fifthly, my Lords, one also searches in vain for any understanding or appreciation of the effect that his statements might have on social work users. My Lord looks perplexed.

LORD JUSTICE IRWIN: No, I do not look perplexed. I just wondered if you have got to the end, I want to ask my question without interrupting you.

MS HANNETT: I have finished, my Lord.

LORD JUSTICE IRWIN: The question is: where does one find the university or the committee -- we have heard the submission that is made and we discussed it in terms of whether it was subterfuge, bad faith. It is not put that way, but it is put that the burden of proof was put on the appellant to take -- where do we find the university saying anything more than: "This is not against your religion but it is against the way you say it"? Where it is said how he might express his religious beliefs on a posting in a way that is not going to -- or perhaps you cannot be precise about it. But where do they suggest -- I mean, it may be that you have to have two to compromise.

MS HANNETT: I accept that up to a point, but, my Lord, what I do say, when one looks at the materials -- and I will just take you to that in due course, the immediate response from the appellant is that he will continue to express those views in public whenever he is called upon

to discuss sexual ethics, including in the context of his social work practice. My Lord, there is not any suggestion----

LORD JUSTICE IRWIN: I see that----

MS HANNETT: -- that he will refrain from doing that.

LORD JUSTICE IRWIN: Yes. I am not doubting -- I am not challenging your submission. I am asking whether there is anywhere where the university says: "You cannot do it like this, but you might be able to do it like that"?

MS HANNETT: Well, I think I have to accept, my Lord, that there is not a discussion of how that might be done in a public way. Because, in my submission, making those views publicly as a professional is likely always to be problematic.

LORD JUSTICE IRWIN: However expressed?

MS HANNETT: However expressed, my Lord. Well, the views as they -- on the very specific facts that you have before you, where there is an expression about both same-sex marriage and the morality of same-sex practice, my Lord, I say that is problematic for a social worker. My Lord, there are two points being made: not just that same-sex marriage is problematic, but that the same-sex sexual practice, and therefore by implication being in a same-sex relationship, is problematic, sinful, etc.

LORD JUSTICE HADDON-CAVE: So a social worker cannot express, let us call it, traditional Christian morality about homosexuality?

MS HANNETT: In public, my Lord, yes. Because, my Lord, as I have indicated, social work has a particular context. It has particular requirements to work with vulnerable service users. It is particularly important in social work that there is neither in fact discrimination on the grounds of protected characteristics, but there is perceived to be discrimination because of, for example, sexual orientation. Now, that does not say anything about what you might do in private in the context of a church, in the context of----

LORD JUSTICE HADDON-CAVE: Well, a church is public.

MS HANNETT: My Lord, I am so sorry, I meant -- I did not mean -- I meant on Facebook in a public forum which is effectively searchable by anybody at any time. So if I am, for example, a service user who comes along, Mr Ngole is assigned as my service user, if I Google his name, those are the views that come up.

SIR JACK BEATSON: I mean, so you -- and there was some discussion, I think, in response to questions from my Lords of Mr Diamond. Say he went to church and he was taking part in an event in church and somebody who was a service user or was about to be a service user came in, and something was said in church----

MS HANNETT: My Lord, I think the proportionality balance in those kinds of cases might be rather different. Again, I come back to the fact-sensitive nature of the analysis, and the context, if I may say so, is in a church, in the context of expressing religion, it is not in the context of participating in a social media debate and engaging a particular Registrar in America. One can see much more clearly that where one is participating in a church service, one is much more clearly manifesting one's religion or belief, and, again, I want to be quite clear, it is always going to be a fact-sensitive analysis, but one can see that in the circumstances such as my Lord has postulated, the balance would be rather different.

SIR JACK BEATSON: And if we go to my Lord's example of somebody taking a YouTube -- making a----

MS HANNETT: Yes.

SIR JACK BEATSON: Using their phone to record it, and then posting it on YouTube, then----

MS HANNETT: Well, that is different again, is it not, my Lord, because that is not necessarily the----

SIR JACK BEATSON: But it is not -- yes, it is-----

MS HANNETT: There may be a difference, again coming back to the fact-sensitive nature of the analysis. There may be a difference between the claimant actively participating in a broadcast to the world at large on YouTube in the context of his church, and the claimant participating in his church, and somebody else, unbeknownst to the claimant, videoing that and placing it on YouTube. They are slightly different situations, and the balance----

SIR JACK BEATSON: I am just trying to----

MS HANNETT: And, my Lord----

SIR JACK BEATSON: I am trying to get a sense of----

MS HANNETT: My Lord, I----

SIR JACK BEATSON: -- the way the fact-sensitivity works.

MS HANNETT: My Lord, I cannot shrink from the fact that these are difficult cases and on their facts they may well give rise to very difficult questions. But, my Lord, on the facts of this particular case, I say that I am very firmly within a decision that complies with Article 10.

LORD JUSTICE IRWIN: Well, just speaking for myself, I have dealt with a lot of -- this was a mature student, let us forget that. I have dealt with a lot of young people who have done a lot of silly things when they were young----

MS HANNETT: My Lord, again----

LORD JUSTICE IRWIN: -- and, for myself, I think what I would be very grateful for is the university's position on why, as it were, it was first time out. And I think you have started to say that by your two----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: Your two -- the two limbs to it.

MS HANNETT: Absolutely. And, again, I want to be very clear on my client's behalf, that when I take you through the evidence you will see it is made quite clear that had it just been a Facebook posting, with some engagement and acknowledgement by the appellant, this would not have resulted in the sanction that it did. It is the two things taken together: the Facebook posting and then the response to that Facebook posting and the university's investigation of those matters which caused the concern.

SIR JACK BEATSON: I am sorry to deflect you from your submissions.

MS HANNETT: Not at all, my Lord. Can I just take you through some of that material? My learned friend did take you through some of it, but I am afraid not the specific passages that I rely on. My Lords, you were taken to the interview on 11 November 2015. That is in the supplementary bundle at tab A, p.28. My Lords, I do preface what I was going to say, in view of what Lord Irwin said this morning, of course this is not a verbatim note.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: But it is the only note that we have of the hearing. And in particular my Lords were taken to the fairly chunky paragraph at the top of p.29 that begins "FN". My Lords, sorry, just to put this into some context of course this is when the university have discovered the Facebook postings, and this is the first----

LORD JUSTICE HADDON-CAVE: Well, they have not discovered it, somebody sent it to them.

MS HANNETT: Somebody sent it to them. This is the first discussion that they have had with the claimant about the contents on Facebook. So this is the initial first conversation that has been had. At the bottom of that paragraph, substantive paragraph, the appellant says - it is the last three lines:

> "I'd rather be kicked out rather than not follow the Bible. If asked for my views I will have to tell people my opinion. The Bible says it (homosexuality) is a sin. God doesn't hate gay people he views them as he would a liar in the same way."

Then DB puts the point to him that it is about working in professional practice.

LORD JUSTICE HADDON-CAVE: But he does not say there, does he: "Actually it is about the language that you use. You could use moderate language rather than extreme language".

MS HANNETT: No, my Lord, he does not, because I do not -- in my submission, I am not sure that is the vice, the problem. It is about the expression of those views. It is----

LORD JUSTICE HADDON-CAVE: What do you mean by "expression" of the views? Surely there is a difference between saying, as he does in the last three lines of that big paragraph, that the Bible says homosexuality is a sin -- there is a difference between that and saying: "Homosexuality is wicked and an abomination". A different expression.

MS HANNETT: I accept that. I accept that.

LORD JUSTICE HADDON-CAVE: And what one does not see when DB is talking, is: "Actually you can express views, religious views, but it is the language that you used which is" -- is that not the problem? You are saying it is not the problem?

MS HANNETT: Well, my Lord, it is part of the problem, but it is not, in my submission, the only problem.

LORD JUSTICE HADDON-CAVE: Indeed, but it is part of the problem, we do not find anything there about the university saying: "Actually, it is the extreme expression of it".

MS HANNETT: My Lord, I accept that. I accept that that is not in this part of -- in this interview.

LORD JUSTICE HADDON-CAVE: Is it anywhere?

MS HANNETT: My Lord, I do not think it is, but can I come back to my Lord on that point?

SIR JACK BEATSON: Can I just say I understood in our exchange that effectively you said the real problem is that he could not do anything in public, the particular context, working with service users, perception -- that there should not be a perception by -- I got the impression----

MS HANNETT: My Lord, quite, and I am sorry if I did not make it clear. I think----

SIR JACK BEATSON: That he could not say anything----

MS HANNETT: Well, my Lord, that is quite right, and that is so. I think my Lord, Lord Justice Haddon-Cave's point perhaps amplifies the mischief of this, because there are a number of layers of mischief. One of them is the very -- the content of the views expressed, namely that same-sex sexual relationships are immoral and sinful, but it is also the manner and the tone in which those were said, and, my Lord, I appreciate they are two slightly different points, but perhaps the second rather aggravates the first, if anything.

SIR JACK BEATSON: My question was designed to see whether as vanilla a phrase as you get, nevertheless would have concerned the----

MS HANNETT: Well, my Lord, that is my position.

SIR JACK BEATSON: Yes.

MS HANNETT: The mischief of it is actually -- to some extent it is of course about the language that was used and the hardness of the language used, but actually the mischief of it is the expression that there is something problematic, sinful, immoral about same-sex relationships, and the expression of that statement in a public forum. My Lord, that really is the mischief of it.

SIR JACK BEATSON: Yes, that is how I understood you to----

MS HANNETT: I am sorry, my Lord, if I was not entirely clear. There was then a further exchange between DB and FN, and just below the second hole punch, FN says at the beginning of the paragraph: "On Facebook is what I believe", and then he says, towards the end of that:

> "If you think 'Felix should have kept it in' - I won't keep it in. I don't feel I could have done better or let you down."

And then finally over the page, the top of p.30, he says in the second paragraph down:

> "I've had people come to me about same sex relationships. I tell them the love of God, they still come to me. They still come to me with my views. I don't discriminate, it's wrong. I'm a comfortable person for people to come to. I work with vulnerable people in same sex relationships, they still come to me."

So, in other words, the suggestion that he would express his views in the course of his work.

My Lords, the next statement from the claimant in the course of this process is the statement on p.35, which was a statement he put in for the fitness to practise hearing. My Lords, I think you have been taken through almost all of this. I do not want to repeat that. But can I just pick up para.6 -- para.8, I beg my Lords' pardon.

> "The meeting should consider my rights as a Christian, especially my rights to be able to share my Christian views when called upon to do so, without any fear of recrimination or reprisals."

And finally para.11:

> "I currently work with young people who have family members in same sex relationships. I have always been very supportive towards them at all times. Although this also includes truthfully representing the views of God whenever I am called upon to do so."

So, in other words, the suggestion that these are views that he may express in the course of his social work practice.

My Lord, finally, the appeal lodged by the appellant which is on p.42. My Lord, at para.11 on p.43, he says:

> "I have a religious right to express my views on sexual ethics; and it is wrong to threaten me to surrender my beliefs as a condition of staying on the course. This is like the Soviet Union or Nazi Germany."

A

So, my Lords, I say -- I have not read you out all of the passages that Mr Diamond took you to this morning. I do urge that those three documents in particular you read in full. But I say that a fair reading of those documents is a rejection by the appellant that the standard material applied to his religious speech; a number of statements that he would repeat the statements

B

made on social media, and that that repetition might potentially take place in the course of his social work practice.

My Lords, there then followed the university's decision, and just in the light of some of the

C

submissions made by my learned friend this morning, you have not been taken to the decision letter, so perhaps I can just do that now. They are in the core bundle at the very back, tab D. The first----

LORD JUSTICE IRWIN: Can you give me a page number, please?

MS HANNETT: I am so sorry, my Lord. It is 159.

D

LORD JUSTICE IRWIN: There are two pages 159 floating around.

MS HANNETT: There are a few errors in the bundle. What you should now have at 159 through to 160a is the decision letter of 8 February 2016.

LORD JUSTICE IRWIN: Right.

E

MS HANNETT: The three-page -- what it replaced was a two-page document, and it should be replacing your document that was previously at 159 to 160----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- with the document that is now 159 to 160a, and is dated 8 February. I am sorry about that, my Lords.

F

SIR JACK BEATSON: The other document seems to be something -- the other document with those page numbers seems to be something completely different.

MS HANNETT: Yes, it is, and you can safely put it -- I think it is also duplicated in the supplemental bundle, so you can -- it has been a couple of weeks now but, from recollection,

G

I think you can safely put it to one side. So that----

SIR JACK BEATSON: That is fine.

MS HANNETT: Yes. I am sorry, it was just that there was a couple of mistakes in the documents----

H

SIR JACK BEATSON: I looked at the most recent thing one got, and one would assume that was when people were starting to focus on the hearing.

MS HANNETT: Yes, as ever with these things. So, my Lord, what I am hoping that you are now looking at, at p.159 is a letter of 8 February, and this is the decision of the Fitness to Practise Committee, so the first committee that looked at it. This is a committee chaired by Professor Marsh. The first paragraph I would like you to look at is at the bottom of p.159: reaching its decision:

> "In reaching its decision, the Members of the Committee expressed serious concerns about the level of insight you had demonstrated with regards to the comments you posted on Facebook. The Committee were clear to point out that their decision is not based on your views but on your act of publicly posting those views such that it will have an effect on your ability to carry out a role as a Social Worker. Members were in agreement that this action was an extremely poor judgment on your part and had transgressed boundaries which are not deemed appropriate for someone entering the Social Work profession. It was their belief that this may have caused offence to some individuals."

Over the page, towards the bottom of p.160, the penultimate paragraph, halfway through:

> "Members acknowledged the comments presented by Mr Bosworth that at no time had you denied posting the information and during a meeting with the department had been honest about your position on the subject of this matter. However, in their opinion, there was no evidence presented to show that you would not refrain from presenting your views in this way in future."

And the last paragraph:

> "The Committee would like to make you are aware that serious consideration was given to all options open to them within the Fitness to Practise Regulations and especially with regards to whether you should be excluded from continuing on with a programme of study leading to professional registration."

And over the page, the conclusion that:

> "... you be excluded from further study on a programme..."

So that is the first decision. What you have, or you should have, immediately behind that is the letter of 31 March, p.161, which is a decision of the Appeals Committee, which sets out----

LORD JUSTICE IRWIN: Behind tab----

MS HANNETT: It should be 161 through to 165.

LORD JUSTICE IRWIN: Yes, I have that, and I have got----

MS HANNETT: Do you not have that one? I can probably find you a replacement.

LORD JUSTICE IRWIN: I got -- well, the forensic history of it does not matter----

MS HANNETT: No, no, no, let me see if I can----

LORD JUSTICE IRWIN: If you have got a spare copy, you have got a spare copy.

LORD JUSTICE HADDON-CAVE: This is "Completion of Procedures Letter". (After a pause)

MS HANNETT: My Lord, we all seem to be labouring under possibly a similar difficulty.

LORD JUSTICE IRWIN: One minute. I may have been looking in the wrong bundle. I have found it. I am very sorry.

MS HANNETT: No, I suspect that was my poor driving directions in terms of----

LORD JUSTICE IRWIN: No, I am surprised that I followed everything else from the wrong bundle.

MS HANNETT: I do not really want to (inaudible) but there it is.

LORD JUSTICE IRWIN: Right. 161.

MS HANNETT: 161, my Lord. So the committee sets out the provisions that it has applied. Over the page, the substantive part of their judgment commences in the third paragraph:

> "The Appeals Committee considered the first set of your postings via the use of social media ..."

You will recall there was some dispute that my learned friend took you through as to comments about the slave trade and the Holocaust. It is quite clear that only the first six pages of those Facebook posts were relied on by the Fitness to Practise Committee, and thereafter the Appeal Committee. So just those parts----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- that my learned friend took you to this morning.

> "Members accepted these to be public posts that appear to contain not only direct quotes but also your own personal views. The Appeals Committee were satisfied that the Faculty FTP Committee had been correct to determine that publicly submitting these posts had been inappropriate in the context of the professional standards set out in the HCPC's code of conduct. In coming to this view, the Appeals Committee were particularly conscious of the fact that you are a student on a Masters level programme that leads to a professional qualification which involves dealing with members of the public."

Just pausing there, my Lords, the two-year course involved two placements with the public as a student social worker. The appellant had completed one and was due to complete a second in the course of his second year.

LORD JUSTICE IRWIN: Yes.

MS HANNETT:

> "In addition, the Appeals Committee observed that throughout the FTP process (from the initial departmental investigation meeting to the Appeal hearing) you had failed to acknowledge the potential impact of your actions. You have not offered any insight or reflection on how your actions and public postings on social media may have negatively affected the public's view of the social work profession. Furthermore, you did not (in the context of comments posted on social media) appear to acknowledge or respect of relevance of the HCPC's code of conduct regarding professional behaviours and standards. These behaviours and standards are required by the HCPC in allowing students to register as social work professionals."

The following paragraph dismisses the appeal, and then the final paragraph on that page deals with sanction. Having upheld the decision of the Faculty FTP Committee that his fitness to practise was impaired, about halfway through that last paragraph, the sentence commencing:

> "Members also took full account of all the powers open to them under the University FTP Regulations and specifically whether it would have been reasonable for the Faculty FTP Committee to permit you to continue on your programme of study but with conditions in place, for example the appropriateness of issuing a warning or requiring a written undertaking from you. The fact that you had failed to take appropriate responsibility for, or show any insight into, the potential impact of your postings on social media and that you had no willingness to reflect on your actions in the context of the standards of behaviour required by the HCPC meant that, on balance, the Appeals Committee was satisfied that the Faculty FTP Committee's decision was proportionate."

My Lords, just to show you and make good the point that I made earlier, that it is quite clear that the university would not have imposed a sanction only in respect of the Facebook postings, can I just turn up the minutes of the Appeal Committee meeting, which is in the supplemental bundle, tab A, p.47.

LORD JUSTICE IRWIN: 47?

MS HANNETT: Yes, my Lord. Just over to the top of the page, p.48, the social work statement, that was taken from David Bosworth, who has been responsible for the investigatory interview that I took you to just now as part of my submissions. My Lords, we have been to this, but the bit I wanted to show you was the last part of the first paragraph, just by the first hole punch, where:

> "DB confirms no concerns with FN's behaviour prior to this and DB wanted to issue a warning and allow for a period of reflection. He had no choice but to refer to FFTP because FM addressing professional behaviour concerns. HCPC guidance dictates this approach."

And one sees a similar line being taken by Professor Marsh further down the page under the FFTP statement:

> "JM confirms they only took account of the first set of postings. JM says that the FFTP had wanted reassurance that FM would not post similar posts. FM said it was his human right to post what he wanted. JM confirmed it was not about his religious beliefs but how the postings were in the context of the HCPC guidance. JM appreciated this was a judgment call. JM confirmed that the Fitness to Practise Committee were concerned that FM had not, would not critically reflect on social media postings as he believed his human rights trumped professional behaviours requirement."

So, my Lords, in my submission, it is clear from that, that had the appellant taken a more constructive approach at the first hearing, things might not have progressed----

LORD JUSTICE IRWIN: Well, the strength of that at least depends on what was being put to him at the time. I have read this document before. I have to say for myself I wasn't clear that what was then being said to him was: "You cannot say what you believe in public". Now, is that what was being put to him? Or was it: "You cannot express it in a way that is difficult and would be misunderstood and involves language which might be thought inflammatory"?

MS HANNETT: Well, my Lord, in my submission, going back to the interview from the outset, in my submission, it was being said: "You cannot make these kinds of comments on social media", and that is problematic----

LORD JUSTICE IRWIN: But that wraps up two things. "Can you express your religious views of this kind on social media?", is one thing; "Can you say it in this way?", is another. So what was being put to him? (After a pause)

MS HANNETT: My Lord, to an extent, I accept that -- and just running my eye over the interview, I accept that it is not entirely clear from that. But, my Lord, whether it was: "You cannot express it in this way", or: "You cannot express them at all", the claimant's response was to say: "I will continue posting in this way on social media. I will continue to make these statements, and I will make those statements in the context of my social work practice", so----

LORD JUSTICE IRWIN: I understand that is what you say, but in order to interpret what he was saying, it is his case -- it has already been made clear by Mr Diamond that he understood this to be: "You cannot express your religious beliefs". Now, you need to be clear about what your case is. Was he being told that or was he being told: "Because you want to be a social worker, you cannot express them in Facebook and in this way"? So what was being put to him is really quite important. (After a pause)

MS HANNETT: My Lords, just going back -- can I just go back to the decision, if I may?

LORD JUSTICE IRWIN: Yes. This is before we get to the pastor and -- is it not? Because that is at a later stage that the----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: Yes. We need to see how it all started before we get to the second stage.

SIR JACK BEATSON: You are back to 159.

MS HANNETT: Yes, back to 159. My Lords, what one can see, just starting from the first letter, the Fitness to Practise Committee letter on p.159, what is being said is that it "is not based on your views but on your act of publicly posting those views". So, my Lords, coming back to the question, it is not being said that the language or the manner of the posting was problematic, it is saying the fact of posting them at all is problematic. In my submission, that is quite clear from the bottom paragraph on p.159.

LORD JUSTICE HADDON-CAVE: Where do we get that from the notes of the interview itself in the first bundle, pp.28 to 29?

MS HANNETT: I am sorry, bear with me. Just give me one moment. (After a pause)

LORD JUSTICE HADDON-CAVE: Sorry, it is the supplementary bundle, 28, 29. (After a pause)

LORD JUSTICE IRWIN: I am wrong, the pastor was there already, was he not?

MS HANNETT: I do not think he was at the first hearing----

LORD JUSTICE IRWIN: Well, if you look at p.159, the beginning of the second paragraph----

MS HANNETT: Yes, he was at the Fitness to Practise Committee hearing, he was not at the -- sorry, that was not quite clear.

LORD JUSTICE HADDON-CAVE: You rely on DB in the middle of that page, 29----

MS HANNETT: Yes, my Lord, I do, and----

SIR JACK BEATSON: I am sorry, where are we looking?

MS HANNETT: I am at p.29.

LORD JUSTICE IRWIN: 29.

SIR JACK BEATSON: 29.

MS HANNETT: Yes.

SIR JACK BEATSON: And it is DB

LORD JUSTICE HADDON-CAVE: Supplementary bundle.

SIR JACK BEATSON: Yes. Which of the DB ones? "The issue is working in a Professional Practice"?

MS HANNETT: Yes.

"I am not saying not to hold your beliefs, but this is about regulations to behave in a certain way. The comments are incongruous with values of the Social Work profession. This is about personal conduct ... professional conduct on social media ..."

A

And then the next passage:

"... HCPC code of conduct as they pertain to professional and personnel conduct."

B And then over the page----

SIR JACK BEATSON: And in a sense -- it is not a helpful comment, but, in a sense, because they are talking about the code of conduct and the -- "We are not worried about your beliefs but it is in terms of the code of conduct", one is then looking at a piece of paper rather than what you might be able to do or what you might not be able to do. The little discussion we had about if he was in a church and he was saying what he wanted -- from this, it seems that it is true that it is only about social media.

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MS HANNETT: Yes.

SIR JACK BEATSON: So, in a sense, you can go on that but ...

D MS HANNETT: Well, my Lord, of course that is the conduct -- the context in which----

SIR JACK BEATSON: Yes. No, no, it is not -- it is the context but, given that is the context, being told: "You cannot say this", then somebody can understand that as meaning you cannot express your religious views publicly. And yet the way the university's case is now put is it is much more nuanced. But if one looks at how it was there----

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MS HANNETT: Yes----

SIR JACK BEATSON: -- and of course this is not a verbatim note on that point----

MS HANNETT: No.

SIR JACK BEATSON: Their decision----

F MS HANNETT: But, my Lord, in fairness, it is the way that this came on. This concerned a particular piece of conduct.

SIR JACK BEATSON: Yes.

MS HANNETT: We are in fitness to practise proceedings and one has to look at the allegation

G that has been made and ask whether that specific allegation has implications on someone's fitness to practise.

SIR JACK BEATSON: I accept that. I just think that in terms of considering responsiveness, etc, if the understanding is: "You cannot do this at all in any context" -- you know, "It is not

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your Christian beliefs. You can believe what you want, it is just you cannot say that you believe it"----

LORD JUSTICE HADDON-CAVE: You cannot publicly post.

SIR JACK BEATSON: Well, my question is you publicly post -- is what this is about -- you invite us to say this is what this was about, and I should not be thinking that this would be understood as relating to him standing up in his church saying what he thinks.

MS HANNETT: Well, my Lord, that is one end of the spectrum, but of course what the claimant is also saying here quite clearly is that he will continue to express his religious viewpoints in any context----

SIR JACK BEATSON: Including in practice----

MS HANNETT: Whenever he feels the urge or the requirement to do so, including when he is practising in his -- in the context of social work. So I take my Lord's point but, with respect, there is not a discussion here about: "Can I do this in church?" The claimant is saying: "I will do it at any time, any circumstance of my choosing".

LORD JUSTICE IRWIN: Yes.

MS HANNETT: "Including in practice"----

LORD JUSTICE IRWIN: No, I----

MS HANNETT: In my submission, that is the real vice here. Now, it may be that there could or should have been a slightly wider context about doing it in church, but that really, in my submission, is a bit of a red herring here because----

LORD JUSTICE IRWIN: Well----

MS HANNETT: -- what he is saying is: "I will do it whenever I wish".

LORD JUSTICE IRWIN: He is, and that is on record and that is perfectly clear, and I follow that submission too. But the question is whether he is, so to speak, reacting in that way because the proposition to him is so stark, or he sees it as so stark.

MS HANNETT: Well, my Lord, again, I can only really say the same thing, that his response to the university's criticism is not to engage in a conversation of: "Well, I would like to do it in my church", or: "I will not do it on social media any more", those kinds of conversations that my learned friend appears to suggest should take place. That is not the response that came back. The response that came back is: "I will do it in any circumstance whenever I wish. You cannot apply professional standards to my religious (inaudible) speech, and I will also do it in the context of service use". In those circumstances, the kinds of detailed discussion about when or where it may be acceptable to make that -- make those statements would be rather difficult to untangle.

SIR JACK BEATSON: So you are really saying -- your submission really is that although the judge said that it was clear at the end that they were talking past each other, that actually they were talking past each other right from the beginning because of your three points: do not accept it is subject to this; will meet again -- will do it again----

MS HANNETT: My Lord, I am not sure I accept that the university was talking past the claimant. I think rather the claimant may have been talking past the university in the sense that he was not accepting any limitations being placed on the circumstances in which he would make his speech.

LORD JUSTICE IRWIN: Yes. Well, it could be said that as they were not suggesting a context, they were not suggesting any areas where he might make a speech.

MS HANNETT: Well, my Lord, (inaudible) repeat the submission, it arises in a particular context----

LORD JUSTICE IRWIN: That is why I say----

MS HANNETT: -- (inaudible) what was the point----

LORD JUSTICE IRWIN: -- that he is talking -- that they are each talking past each other in a sense. You will say, well, they are bringing the claim, it is -- I understand -- I understand the point that you are making.

LORD JUSTICE HADDON-CAVE: Are you saying the context was: "You cannot post these sorts of views on social media"?

MS HANNETT: Yes.

LORD JUSTICE HADDON-CAVE: That was the proposition?

MS HANNETT: Yes, and you cannot speak them freely when you may, for example, be in a social work context.

LORD JUSTICE HADDON-CAVE: And you cannot speak them freely in a social work context?

MS HANNETT: Exactly.

LORD JUSTICE HADDON-CAVE: Otherwise you can?

MS HANNETT: Well, my Lord, those circumstances have not arisen on the facts of this case, and I -- I can see that one has to test the proposition of how far this goes, but of course one also has to be conscious that the university is faced with a specific set of facts that had arisen, a specific response by the claimant, and the university had to engage with that.

LORD JUSTICE HADDON-CAVE: Going back to my earlier point, it is interesting about p.29, there is no discussion about more moderate language, because I now understand your case which is it was not necessary to have discussion about moderate language because, as far as

the university was concerned, or the FTP expression -- any vanilla expression of these views was *verboten* because of the social context----

MS HANNETT: In a public context.

LORD JUSTICE HADDON-CAVE: The social----

MS HANNETT: Because of the context.

LORD JUSTICE HADDON-CAVE: Yes, I see.

LORD JUSTICE IRWIN: Because of the social work context, you cannot post them on social media, you cannot speak them freely in public----

MS HANNETT: Well, my Lord, it rather depends what you mean by public.

LORD JUSTICE IRWIN: Well, you need to tell us what your case is.

MS HANNETT: Well----

LORD JUSTICE IRWIN: What is your case? What were the limits of what he was being told?

MS HANNETT: My Lord, I am not sure I -- with the greatest of respect, I am not sure that that is quite right, because the university is facing a particular factual context, something that has arisen here, and has to respond to that. There may be----

LORD JUSTICE IRWIN: You keep saying that, and I keep repeating to you, and I want your answer. He was responding to what the authorities were saying to him.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: He was in the weak position. You were in the strong position. You were the authority, he was a student.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: He is bound to be reacting to what you were putting to him. Now, we have the notes. We do not have a transcript, and we all understand that. But so far as you are able, I need to garner the propositions for what you say was being put to him, and properly put to him. Because if it was too far, then you would say so. And so far I have got: "You cannot express these views in any language. You cannot post them on social media". And I thought you had said then that he cannot speak them freely in public.

MS HANNETT: Well, no, my Lord, I think I have already accepted in my exchange earlier with my Lord, Lord Justice Beatson, about there may be other contexts which may be quasi-public, so, for example, in church.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: The context of Bible group or Bible study, where one can see the proportionality analysis may be different.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: And that different factors come into play. But to answer my Lord's question, that given a public forum, a newspaper article, for example, that would suffer the same vice, in my submission, as Facebook posts.

LORD JUSTICE IRWIN: Yes. What about preaching on the street?

MS HANNETT: Well, my Lord, that would also be problem -- well, my Lord, that comes back to the identification issue, does it not? Because of course one of the issues about Facebook is that one posts -- or at least here -- one does not necessarily have to, but here----

LORD JUSTICE IRWIN: He used his name.

MS HANNETT: -- he used his name----

LORD JUSTICE IRWIN: He used his name, yes.

MS HANNETT: So there was, in my submission, a linkage between his identity and his status as social worker. I appreciate that that linkage might not always be present, and that is an important linkage because of course the vice of all of this is bringing the profession of social work into disrepute.

SIR JACK BEATSON: He had -- this appellant has his name, Felix Ngole.

MS HANNETT: Yes.

SIR JACK BEATSON: For some of us that may seem like an unusual name, and so you may have that link. But say you are called John Smith.

MS HANNETT: Yes.

SIR JACK BEATSON: There is no necessary linkage in me posting as John Smith and you identifying me as a social worker.

MS HANNETT: Yes, I accept that, but, again, my Lord, in different -- there has to be a link, I accept that. There has to be some way in which one links the impact on the social work profession with the statements in public----

SIR JACK BEATSON: In a sense you----

MS HANNETT: -- because otherwise one does not get to----

SIR JACK BEATSON: In a sense, it was not as though this came up in your role as regulators, it was brought to your attention by somebody.

MS HANNETT: Yes.

SIR JACK BEATSON: It may be that universities rely on that and they cannot be expected to do anything more, but for somebody who perhaps knew him, I do not know, we have not----

MS HANNETT: Yes, when----

SIR JACK BEATSON: So if he knew him -- or he or she knew him, then of course having the name would identify him as a student social worker.

MS HANNETT: Yes. But, my Lord, I quite accept, my Lord, Lord Justice Irwin's point, that there must be some linkage, and I accept that circumstances where someone is preaching in public, for example, it is possible that that linkage is not present. But that is an important limitation on the extent of this application.

LORD JUSTICE IRWIN: Yes.

LORD JUSTICE HADDON-CAVE: Can you help us with your submissions on why it is that any expression on this view is *verboten* and demonstrates unfitness to practise? Just give us your propositions on that.

MS HANNETT: Yes, my Lord. That comes back to the legitimate aim effectively being pursued by this, and it is two-fold. First of all, that it is for the protection of public confidence in the social work profession. My Lords, I will take you in a moment to the text in the relevant order as being the critical aim that must be pursued by the HCPC when it carries out its professional regulatory role. But the second thing or the second factor is that those who access social work services both must be treated without discrimination but also must reasonably foresee that they will be treated without discrimination. I will take you to the case in a moment, but that is -- and I appreciate to some extent the second is a facet -- it is a specific facet of the first. My Lords, can I just take you to the role played by the university, which is the second (inaudible), if I may?

LORD JUSTICE IRWIN: Yes.

MS HANNETT: And it is slightly curious the way that the university regulates its practice, because of course the HCPC is the statutory regulator for social workers. That regulates social workers through the health and social work professions but the HCPC does not directly regulates students. What it does is operate a system of approval and accreditation of certain courses as capable of leading to registration on successful completion. And it entrusts the university with ensuring that students who are unfit to become social workers are not permitted to finish their----

LORD JUSTICE IRWIN: This is a common model that the educators -- it is the same in the legal profession.

MS HANNETT: Absolutely, yes.

LORD JUSTICE IRWIN: You cannot import them to be regulated by the relevant board or body.

MS HANNETT: No.

LORD JUSTICE IRWIN: So the educator has to make sure, with something of a lower threshold----

MS HANNETT: I accept that.

LORD JUSTICE IRWIN: -- that those who are coming into the profession and they are going to qualify, because there is no real gap between passing exams and qualifying and then being these professionals so----

MS HANNETT: I think, my Lord, I might not use the language of "lower threshold", I think I would use the language of "appropriately moderated" from the fact that one is dealing with a student and not somebody who is professionally regulated. Because of course there may be conduct that one -- I think the point is relatively clear. My Lords, can I just show you the 2001 order? It does not directly apply but, in my submission, the principle that is set out in Regulation 3 is one that the university must bear in mind when it is determining a student's fitness to practise.

LORD JUSTICE HADDON-CAVE: My fault. Could you give me the reference again, please?

MS HANNETT: I am sorry, I do not think I gave it to you, my Lord, because I was jumping ahead. Authorities tab 2, the main -- the red bundle of authorities. And, my Lords, Article 3, which is on p.5, subpara.(1) states that the Health and Care Professions Council is referred to in this order as "the Council'.

> (2) The principal functions of the Council shall be to establish from time to time standards of education, training, conduct and performance for members of the relevant professions and to ensure the maintenance of those standards".

And then over the page at subpara.(4):

> "The over-arching objective of the Council in exercising its functions is the protection of the public and the pursuit by the Council of its over-arching objective involves the pursuit of the following objectives - [and in particular]
>
> (b) to promote and maintain public confidence in the professions regulated under this order."

Subpara.(5) says:

> "In exercising its functions the Council shall have proper regard for (i) the interests of persons using or needing the services of registrants in the United Kingdom."

So, my Lords, that is the overarching framework. I do not think, my Lords, I need to take you through the rest of the order. I do not think it is controversial. I have set it out in some detail in my skeleton at paras.8 to 13, but I do not understand any of it to be in dispute. As my Lord has indicated, it is fairly common knowledge.

Just in terms of how fitness to practise is considered by universities, the case law, in my submission, establishes two broad propositions which track the consideration of fitness to

practise in the regulated professions themselves. The first is that the body considering fitness to practise is concerned with the reputation and standing of the profession itself, rather than the punishment of a professional, and that applies to students, albeit tempered to recognise that the students are entitled to a certain leeway and opportunity to learn from their experiences. And, second, that courts approach decisions of professional university tribunals concerning fitness to practise with a degree of deference. And that is because the question of whether or not a student is fit to practice is largely one of academic judgment taken by those who have some knowledge and expertise in the field.

My Lords, those principles are most conveniently set out in a recent decision of the Court of Appeal, *Thilakawardhana*, which is in the second bundle of authorities, not the blue one, the grey one, at tab 24. My Lords, this is a judicial review of the Office of the Independent Adjudicator of Higher Education, of its decision in respect of the reasonableness of the underlying university's decision on fitness to practise. My Lords, the underlying facts are set out at para.2 on p.226, to give some context. It is a medical student case. If I can just ask you to run your eye over para.2. (After a pause)

LORD JUSTICE IRWIN: This is familiar to me, as you will realise.

MS HANNETT: Yes. (After a pause) And then, my Lords, the grounds of review, again just for context, are at para.28 on p.231. It is fair to note that they do not include any----

SIR JACK BEATSON: I am sorry, I have lost the paragraph.

MS HANNETT: It is para.28, my Lord, on p.231. It is fair to note that those are conventional public law grounds rather than a Human Rights Act challenge. The general principles are set out at para.35 and on, on p.233. It is quite a long extract but it saves me from taking you back to anywhere else because it quite nicely condensed here. The first one -- it starts at para.35, as I have indicated, and sets out the principles in relation to the FTP regime, and says:

> "In common with other professions, the medical profession has procedures in place to address practitioners' fitness to practise, so seeking to protect the public, to uphold professional standards and to maintain public confidence in the profession. Furthermore and as with some other professions, medical students hoping to enter the profession are also subject to fitness to practise procedures."

And, my Lord, as you expressed in giving permission to appeal:

> "As a separate matter from the university disciplinary questions, the University Medical School, as with other medical schools, is entrusted by the General Medical Council to ensure that students are not unfit to practise medicine and,

if they are found to be unfit, they should not be permitted to continue their training through to registration."

A Again, as with the HCPC, one can see from the next paragraph that the GMC has no direct authority to deal with or advise upon individual cases of fitness to practise, and this point is made in the next paragraph. There is then a point about crossover. The point is then picked up at para.52 on "Authority":

B "First, where professional discipline is concerned - and, for these purposes, FTP comes within the rubric of 'professional discipline' - the relevant body is not primarily concerned with punishment, so that personal mitigation matters less than might otherwise be the case. Moreover, the reputation of the profession comes before the fortunes of any individual practitioner."

C And there is set out there an extract from the decision of the board in *Gupta*, which itself refers internally to a decision Sir Thomas Bingham in *Bolton v Law Society*, and that makes good that point. The next point in para.54 concerns reasons - that is not something that arises in this case. Over the page at para.55 the court notes:

D "... as is well-established, the Court approaches decisions of professional and university tribunals dealing with matters of FTP (or professional discipline) with deference, both as to findings of impairment to practise and as to sanction - though a Court can more readily depart from a tribunal's decision in a case where the misconduct in question does not relate to professional performance. The foundation for such deference is that professional and university tribunals are likely to be better attuned to the context than a Court and are, at the least, unlikely to have less insight as to the question/s in issue. Moreover, the

E professional or university tribunal may well have had the benefit of seeing and hearing from the practitioner or student in question. These propositions emerge clearly from the authorities which follow, taken in chronological order."

My Lords, he then takes -- Gross LJ then takes his course through *Bolton* initially which

F makes that point; *Higham* at para.57, which in particular -- where Stanley Burnton J (as he then was) make the point that fitness to practise is a matter of academic judgment; and at para.58 the court refers to *Raschid*, where:

G "... the two principles which are especially important in this jurisdiction: the preservation of public confidence in the profession and the need in consequence to give special place to the judgment of the specialist tribunal."

Then para.59, the reference to *Khan*, and the need to:

"... approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence."

H

Although there was an acknowledgement in the last -- in fairness, I should point out the last paragraph:

> "(c) a court can more readily depart from the committee's assessment of the effect on public confidence of misconduct which does not relate"----

SIR JACK BEATSON: Sorry, where are we? Oh, I see where we are.

MS HANNETT: Sorry, my Lord.

SIR JACK BEATSON: It is all right.

MS HANNETT: I jumped a couple just to----

SIR JACK BEATSON: Yes, all right.

MS HANNETT: -- try and take it a little faster.

> "... which does not relate to professional performance than in a case in which the misconduct relates to it ..."

My Lords, just for completeness I should note that *Bolton* is in the bundle of authorities at tab 3, and *Higham* is in the bundle of authorities at tab 8. I do not propose to take you to either of those because the relevant text----

LORD JUSTICE IRWIN: Yes, because it is all digested here.

MS HANNETT: It is nicely summarised there, my Lords. Just finally on this section, just in terms of the standards materials and what the judge called the standards materials and what they are, my Lords, I do not think I need to take you to them, but just to identify them for your notes. They were three-fold. First of all, the HCPC guidance for students, which is in the supplementary bundle at p.100 -- I beg your pardon, it is tab D, p.172.

LORD JUSTICE IRWIN: Which I think we have been shown part of.

MS HANNETT: You have.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: But not actually, now I come of think of it, the relevant standards that are applied. Shall I just turn those up? It is tab D, p.172.

SIR JACK BEATSON: The main bundle or the supplementary?

MS HANNETT: That is the main bundle, my Lord. Sorry, it is not that, it is supplementary 110.

LORD JUSTICE IRWIN: Supplementary, 110, thank you.

MS HANNETT: Just taking p.180, my Lords, it makes it quite clear that conduct outside your programme might be caught by the standards. Over the page, at p.182, the substantive standards are set out----

LORD JUSTICE IRWIN: Sorry, you have just got a little bit ahead of me.

MS HANNETT: I am sorry, my Lord.

LORD JUSTICE IRWIN: You said at 180, conduct outside the programme.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: Where is that to be found? I do not doubt we can find it but----

MS HANNETT: It is the top of p.180, the heading "Conduct outside"----

LORD JUSTICE IRWIN: Oh, I see. It is the heading, right. (Laughter). We were all looking for it.

MS HANNETT: And it is immediately after. It simply says that it is not just conduct----

LORD JUSTICE IRWIN: Yes, so it is all about that.

MS HANNETT: (Inaudible).

LORD JUSTICE IRWIN: Yes.

MS HANNETT: It may be wider than that. I am so sorry. And then p.182 is the heading "Guidance on conduct and ethics", and these are the standards that are -- the guidance that is set out by the HCPC for students. Just in terms of 1: 1 is not one that was relied on by the university and I do not propose to dwell on it but I just wanted to show you that the third bullet point under 1 provides that you should treat everyone equally, so a reflection of the importance of that principle----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- in the practice of social work. Then 3:

> "You should keep high standards of personal conduct [and again the point is made that]
>
> You should be aware that conduct outside your programme may affect whether or not you are allowed to complete your programme or register with us."

And then finally, on p.185 is 13, some of the standards that are said to have been breached.

> "You should make sure that your behaviour does not damage public confidence in your profession [and the two sub-bullet points]:
>
> • You should be aware that your behaviour may affect the trust the public has in your profession.
>
> • You should not do anything which might affect the trust that the public has in your profession."

LORD JUSTICE IRWIN: Because the ambit of this is so very wide - see 175 - these are necessarily very general----

MS HANNETT: Yes, my Lord.

LORD JUSTICE IRWIN: -- guidelines.

MS HANNETT: I accept that.

LORD JUSTICE IRWIN: They have to be, do they not?

MS HANNETT: I do not shrink from that. I accept that entirely.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: As, and I will say in due course, with very many professional----

LORD JUSTICE IRWIN: Sure. But then what one has to do is to look at what matters with each particular profession in mind, because----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: -- what might -- as Mr Diamond was saying, what might be relevant for a hearing aid dispenser is not going to be relevant for a social worker----

MS HANNETT: No.

LORD JUSTICE IRWIN: -- and *vice versa*.

MS HANNETT: That is precisely the point, and of course it is going to vary, and I accept that again entirely.

LORD JUSTICE IRWIN: Well, it has got to.

MS HANNETT: Different considerations will apply.

LORD JUSTICE IRWIN: Yes.

SIR JACK BEATSON: But there is also -- and I did not sense that this was at the forefront of the submissions on behalf of the appellant, but there is also the point about whether this was too unclear to be certain. Well, I have seen -- we have got what you have said in your skeleton, and he did not develop it.

MS HANNETT: No, my Lord. I will take a view overnight, but I may just take you to one of the authorities on that tomorrow, just to make that point. I was not entirely sure that that point was being abandoned, so I will see if anything needs be said about that. Can I just finish off the standards material, if I may, because----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: I said there were three things that the judge referred to as being encompassed within that expression, and that is the first. The second is the social media guidance, which is at p.188, an article published by the HCPC.

SIR JACK BEATSON: I am sorry, can you say the page again?

MS HANNETT: I am in the same section of the supplementary bundle on p.188, immediately after the----

SIR JACK BEATSON: Yes.

MS HANNETT: -- part we have been just looking at. The second paragraph, my Lords, states:

> "We will rarely need to take action over a registrant's use of social networking sites. We would only take action about a registrant using such a website if it

> raised concerns about their fitness to practice. For example, if we found out that a registrant had put confidential information about a service user in their blog or on their Facebook page."

A

Immediately underneath that, there is a paragraph that sets out relevant extracts from the HCPC code of practice. And then the third paragraph from the bottom provides:

> "You may use social networking sites to share your views and opinions. Again, this is not something that we would normally be concerned about. However, we might need to take action if the comments posted are offensive, for example if they were racist or sexually explicit."

B

LORD JUSTICE IRWIN: If you were reading that as a student, the natural reading of the language -- and this may be because it has got to be very general, but, "As long as I do not use offensive language, as long as I am not racist or talk filth, I will not be in the wrong".

C

MS HANNETT: Well, my Lord, I think I have to accept that this one-page guidance does not cover every circumstance----

LORD JUSTICE IRWIN: It is so general, yes.

MS HANNETT: -- in which social media -- people might use social media or where people -- people's use of social media may legitimately raise fitness to practice concerns. I think the point that I rely upon it for, and indeed the judge picked up on that - I will take you to it in due course - is that this is one example of a way in which it was made quite clear to the appellant that the use of social media may in itself----

D

LORD JUSTICE IRWIN: Oh, well, for sure, yes, that is very clear.

E

MS HANNETT: And then finally the third document that the judge referred to as being part of the standard material is the social work handbook, and that is in the same bundle but back in tab C at p.137. This is a document handed out to the students. I just want to pick up two points. On p.147, there is a heading -- sorry, I do not know about -- I hope your copies are a bit easier to read than mine. It is----

F

SIR JACK BEATSON: Is this "Basic Learning Expectations?

MS HANNETT: That is right, my Lord. It is not -- the quality of the text is not brilliant, I am afraid. I apologise for that.

LORD JUSTICE IRWIN: It is not too bad.

G

MS HANNETT: But on the far left hand column, just above the heading "What we ask of students", it is stated that any kind of discriminatory or oppressive language or behaviour should be avoided, and then on p.158, on the far right hand column of that page, about halfway down that column, "PLEASE NOTE" in capitals -- I am sorry. (After a pause)

H

LORD JUSTICE HADDON-CAVE: Can you give me first page reference again?

MS HANNETT: Certainly. 158.

LORD JUSTICE IRWIN: "PLEASE NOTE"----

MS HANNETT:

> "PLEASE NOTE: comments made by students on social networking sites have in the past been the subject of disciplinary proceedings: comments would be judged against University conduct expectations, Fitness to Practice regulations and relevant professional guidance standards."

So I do not put it any higher than this. There is material that was accepted to have been provided to the claimant which made it clear that fitness to practice issues might arise in the context of use of social media.

My Lords, I have one eye on the time. I was going to move on to the next topic, so I do not know whether my Lord wants to ----

LORD JUSTICE IRWIN: Well, I mean, I think we ... (After a pause) We can go on till half four or thereabouts, if that----

MS HANNETT: My Lords, I----

LORD JUSTICE IRWIN: Let us see----

MS HANNETT: If my Lords are content, then I am----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- certainly content. The next broad topic is just to make some observations about Article 10 and its application in this case. As I understand my learned friend's submissions, he accepts that Article 9 is not engaged, (inaudible) finding by the judge, but this is a case to be considered under Article 10. One of the submissions that is made to you -- certainly the suggestion that there was something about religious speech that ought to require or demand particular statutory protection of the courts. My Lords, in my submission, that proposition finds no basis in domestic or Strasbourg authorities, and can be dealt with, I think, most simply by looking at the decision in *Johns*, which is at the authority bundle at tab 16. My Lord, I pick up *Johns* because -- there are a couple of decisions. This is the last in the line of a series of cases which concerned action taken in the context of employment by those who held profound Christian religious beliefs and had beliefs of a similar nature to those held by the appellant, and concerned how the balance of those beliefs is to be struck where services are to be provided to those with a particular sexual orientation. My Lords, this followed on from the case of *Ladele* in the Court of Appeal, which is in the supplemental bundle at tab 2, and *McFarlane*, in this bundle of authorities at tab 14. I hope you will forgive me for taking this a little bit slowly because I am going to use it (in the same way that

I have just used the last case we looked at in the Court of Appeal) as a composite of all of those that have gone before. The case itself concerned the claimants who were members of a particular church who believed that homosexuality and sex before marriage was morally wrong. They applied to Derby City Council, the defendant in this case, who approved them as foster carers, but in the process of being assessed for that role concerns were expressed about their views on sexual orientation and in particular the compatibility of those views with the national minimum standards for fostering, which required those who provide fostering services to (inaudible). A slightly odd case in the sense that the local authority did not actually make a decision but, rather, the parties agreed to seek declaratory relief from the court, and one can see that the declaration being sought is on p.2094, the headnote at the very bottom, the sentence commencing:

> "In response to the court's request for the specific declaration sought, the couple asked for declarations *inter alia* that it was unlawful for Christians with strong religious beliefs concerning the morality of homosexuality to be considered unsuitable to be foster carers for this reason alone, or to be described as homophobes, and unlawful for the local authority to ask potential foster parents their views on homosexuality absent the needs of a specific child."

And we can see the competing declaration being sought by the local authority:

> "The local authority asked for a declaration that a fostering service provider might be acting lawfully if it decided not to approve the prospective foster carer who disapproved of homosexuality and who was unable to respect, value or demonstrate a positive attitude towards homosexuality and same-sex relationships."

My Lords, just picking the point up, if I may, at para.41, which is on p.2107 -- my Lords, I am sorry, I should have said this is a decision of the Divisional Court, Munby LJ and Beatson J (as he then was)----

SIR JACK BEATSON: I am sorry, remind me of the paragraph. It is 40?

MS HANNETT: 41 on p.2107, the court notes that:

> "Religion - whatever the particular believer's faith - is no doubt something to be encouraged but it is not the business of government or of the secular courts, though the courts will, of course, pay every respect and give great weight to the individual's religious principles. Article 9 of the European Convention [on the Protection of Human Rights and Fundamental Freedoms] after all, demands no less."

Then we can move over what follows, and just move down to 43:

> "However, it is important to realise that reliance upon religious belief, however conscientious the belief and however ancient and respectable the religion, can

> never of itself immunise the believer from the reach of the secular law. And invocation of religious belief does not necessarily provide a defence to what is otherwise a valid claim."

LORD JUSTICE IRWIN: Yes.

MS HANNETT: At para.45, the court notes that:

> "The present dispute is merely one of a number of recent cases where the tension has been between an individual's Christian beliefs and discrimination law as enacted by Parliament."

And it gives the two examples that I have already referred to, *Ladele* and *McFarlane*, and the court notes that they will return to those two cases later, indeed as will we. Just, my Lords, picking up -- I am going to skip over the next bit, which is an explanation of Article 9, to para.50, under the heading "Religion and the law: discrimination law". And the court refers to a decision before Laws LJ in *McFarlane* where my learned friend Mr Diamond mounted what Laws LJ described as a vigorous assault against the decision of the Court of Appeal in *Ladele*----

LORD JUSTICE IRWIN: Can I just ask? *Ladele* is not in the bundle, is it?

MS HANNETT: It is, my Lord. We put it in last night. It is in the supplementary bundle.

LORD JUSTICE IRWIN: Oh, it is there.

MS HANNETT: At tab 2.

LORD JUSTICE IRWIN: Thank you.

MS HANNETT: I am optimistic that I am going to avoid having to take you separately to *Ladele*.

LORD JUSTICE IRWIN: No, I just wanted it for my note, because I have been looking for it. Anyway----

MS HANNETT: Yes, of course, my Lord.

LORD JUSTICE IRWIN: -- para.50.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: *McFarlane*.

MS HANNETT: So, my Lords, at para.52, the court notes that in *McFarlane* the application was supported by a witness statement from Lord Carey of Clifton, the former Archbishop of Canterbury, and you can see it sets out an extract from it, so I just begin with the first part of that:

> "I wish to dispute that the manifestation of the Christian faith in relation to same sex unions is 'discriminatory' and contrary to the legitimate objectives of a public body. Further, I wish to dispute that such religious views are

equivalent to a person who is, genuinely, a homophobe and disreputable. I will deal with these two issues."

Which he then goes on to do. Then over the page to p.2111, in the same witness statement, Lord Carey notes that:

"It is, of course, but a short step from the dismissal of a sincere Christian from employment to a 'religious bar' to any employment by Christians. If Christian views on sexual ethics can be described as 'discriminatory', such views cannot be 'worthy of respect in a democratic society'. An employer could dismiss a Christian, refuse to employ a Christian and actively undermine Christian beliefs. I believe that further Judicial decisions are likely to end up at this point and this why I believe it is necessary to intervene now ..."

And the court noted:

"The similarity to what is being said here on behalf of the claimants will be noted."

And in response, Laws LJ said this -- it is quite a long passage, my Lords. I am going to ask you----

SIR JACK BEATSON: Shall we just read it?

LORD JUSTICE IRWIN: Shall we just read it to ourselves?

MS HANNETT: Yes, if you could read all the way through -- I am sorry it is such a long one, but it is all the way through until the end of 55, but it does obviate me having to take you----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- to the underlying source material, so I hope you will forgive me.

LORD JUSTICE IRWIN: We will do that.

MS HANNETT: Thank you, my Lords. (After a pause) So, my Lords, having set the context, the court then turns to consider the specific issues arising in this case, and you can see the manner in which the claim was being put at para.57. My learned friend Mr Diamond argued in particular that:

"... the defendant's position constitutes religious discrimination contrary to Article 9 of the Convention and that the defendant has advanced no compelling grounds to justify such discrimination."

We can pass over that. I just wanted to flag at para.69 the specific standard (inaudible) at the outset on the facts: what was the standard that was being applied by the local authority? That is set out at para.69. Standard 7 is entitled "Valuing diversity", and sets out a number of ways in which the fostering service must ensure that equality and diversity are protected. The court then goes on to consider, at 73 and on, the decisions in *Ladele* and *McFarlane*. It starts at para.54(sic), where it is explained (inaudible) the facts are set out:

> "... a registrar objected on religious grounds to 'gay marriage' and was disciplined by her local authority employer for refusing to conduct civil partnership ceremonies."

LORD JUSTICE HADDON-CAVE: 74?

MS HANNETT: Yes, my Lord. I am so sorry.

LORD JUSTICE IRWIN: 74.

MS HANNETT: I am so sorry. Paragraph 75, Sir Patrick Elias explains (inaudible) EAT before it went up to the Court of Appeal, why the direct discrimination claim failed, because the correct comparator -- because "another registrar who refused to conduct civil partnership work because of antipathy to the concept of same-sex relationships." More relevantly at para.76, the EAT then turned to consider the claim based on indirect discrimination, and what was the justification for any adverse effect arising in respect of Ms Ladele. Sir Patrick Elias stated in the indented paragraph:

> "In our judgment, if one applies the statutory test, the council was entitled to adopt the position it did. Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate - and in truth it was bound to be - then in our view it must follow that the council were entitled to require all registrars to perform the full range of services. They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff and the wider community."

Then, my Lords, at para.78, the court picks up Ms Ladele's appeal to the Court of Appeal, which was dismissed. And, again, in para.78, the indented paragraph is a quote from Lord Neuberger, again agreeing with the legitimate aim adopted by Islington in that case, and in particular he noted that:

> "Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job."

At 79 the court sets out the way in which *Ladele* cross-checks that against Article 9 of the European Convention rights, and says that:

> "... the Strasbourg jurisprudence on Article 9 supported the view that Miss Ladele's desire to have her religious views respected should not be allowed
>
> > 'to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community'."

He went on to set out the extracts from the Article 9 jurisprudence, and in particular that:

> "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing."

And there is reference to Grand Chamber in *Sahin v Turkey*, that:

> "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."

My Lords, that is *Ladele*. The court in *Johns* then went on to consider the case in *McFarlane*, and that concerned:

> "... a marital and couples counsellor employed by the well-known national provider of relationships counselling services was disciplined after objecting on religious grounds to providing psycho-sexual therapy (PST) to homosexual couples. His complaints of discrimination were dismissed by the EAT in a decision which post-dated the decision in *Ladele* but preceded the decision of the Court of Appeal in the latter."

Paragraph 81 initially concerns the direct discrimination claim. Over the page, on p.2120, the judge, the President of the EAT:

> "... addressed the contention that the Tribunal's approach involved an illegitimate distinction between the immediate conduct which led to the act complained of - the (perceived) unwillingness to counsel same-sex couples - and the religious belief of which that conduct was an outward and visible sign, noting counsel's argument that for religious belief to be effectively protected it is necessary to prevent discrimination on the ground not only that a belief is held but that it is manifested, the two being, it was said, inseparable."

And then explaining why that argument could not be accepted, he continued at para.18 -- and my Lords, again I do not propose to read it out, but it is really a repeat of what one saw in *Ladele*, explaining why religion or belief may not be the ground of an employer's action. Then in para.82, summarising the requirements of Article 9. At 83 the President explained why the indirect discrimination also failed, effectively because of applying the decision in *Ladele*. And para.84, an application for permission to appeal to the Court of Appeal was dismissed by Laws LJ, and that is the decision that you have in the bundle at tab 14. And then what follows is an explanation of the contents of the refusal of permission by Laws LJ. He dismissed the application that *Ladele* was decided *per incuriam*. In para.86 he held that *Ladele* was binding, and notes that:

> "To give effect to the applicant's position would necessarily undermine Relate's proper and legitimate policy."

And then this court in *Johns* noted as para.87:

> "We agree with Laws LJ. *Ladele* is, in our judgment, plainly binding upon us. It was also in any event, we would respectfully add, correctly decided."

A

And a note at para.88 that there is not any differences in the reasoning of the EAT and the Court of Appeal in *Ladele* and in *McFarlane*, and not their agreement with the principles that are there set out.

B

So, my Lords, the court then turns back to the specific issues, having summarised that body of case law in a very helpful way. It then goes back to the issues in question. The first issue that the court in *Johns* asks itself:

> "Are the attitudes of potential foster carers to sexuality relevant when considering an application for approval?"

C

And the answer, having gone through various parts of the guidance, and also the equality factors given at para.97, noting that:

> "... the various policies ... all go to emphasise the need to value diversity and promote equality and to value, encourage and support children in a non-judgmental way ..."

D

The paragraph goes on:

> "In these circumstances it is quite impossible to maintain that a local authority is not entitled to consider a prospective foster carer's views on sexuality, least of all when, as here, it is apparent that the views held, and expressed, by the claimants might well affect their behaviour as foster carers. This is not a prying intervention into mere belief [the expression that the judge used in her judgment]. Neither the local authority nor the court is seeking to open windows into people's souls. The local authority is entitled to explore the extent to which prospective foster carers' beliefs may affect their *behaviour*, their *treatment* of a child being fostered by them. In our judgment the local authority was entitled to have regard to these matters; indeed, if the local authority had failed to explore these matters it might very well have found itself in breach of its own guidance ..."

E

F

LORD JUSTICE HADDON-CAVE: Is that the test then? Might affect their behaviour, their treatment of the child?

G

MS HANNETT: Well, my Lord, I accept that this case is not exactly apt to the one that we have before us, but I rely on it really for a number of reasons. First of all, because it makes clear -- abundantly clear, in my view, that any argument that the content of speech derives some special protection because it is religious speech -- second of all, I say it is----

LORD JUSTICE HADDON-CAVE: Hang on a second.

H

MS HANNETT: I am sorry, my Lord. (After a pause)

LORD JUSTICE HADDON-CAVE: Yes, thank you.

MS HANNETT: It supports the proposition that public services are entitled to have as a legitimate aim that services are provided in a non-discriminatory manner. And I would say that it also supports the second aspect of that, that they are entitled -- sorry, my Lord, I am going too fast. (After a pause) That they are also entitled to have -- to ensure that service users have a reasonable perception that they would be treated without discrimination.

SIR JACK BEATSON: Well----

MS HANNETT: That goes further. I accept that, my Lord. That is pushing it on a bit.

SIR JACK BEATSON: Yes. Well, what you say is you are entitled to make that submission from the different points that are made in this case.

MS HANNETT: Yes.

LORD JUSTICE HADDON-CAVE: That does not come from *Johns*.

SIR JACK BEATSON: In my pre-reading, reminding myself of *Johns*, there they are entitled to explore the extent to which their beliefs may affect their behaviour and their treatment of a child. One has to do some analogising to get to this case.

MS HANNETT: Yes, I accept that. I accept that. I accept entirely that I do not have -- I have authority for the proposition that service users are entitled to require the legitimate aim that services are provided without discrimination, and one gets that quite clearly, in my submission, from *Ladele* and *Johns* and from *McFarlane*. I accept that the proposition that I am making is pushing the point a little further, and it is saying that the university was entitled to look at what the reasonable perception of a service user might be about the way in which services were delivered in the light of the comments made by the claimant on social media.

LORD JUSTICE HADDON-CAVE: Because it goes to trust.

MS HANNETT: Yes. And I accept that is not exactly what is said in *Johns*. I quite accept that, but I do say it is analogous.

LORD JUSTICE IRWIN: Because we should be clear that the university here specifically disavowed the conclusion, as I understood it, in respect of this appellant, that he would in fact discriminate----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: -- in the course of his----

MS HANNETT: My Lord, it did. I have to accept that. My Lords, I just want to say -- I am conscious it is half past. Just in case there are any particular aspects of *Johns* before I turn it

away -- that I can just send you probably on your way with -- I think probably another paragraph just to note really.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: Issue (2), religious discrimination, 98 and 102 to 103. And that is really the court in *Johns* applying the propositions that one gets from *Ladele* and *McFarlane* to the specific issue of religious discrimination here. If it is not discrimination, then how does that fit with Article 9? We say it is entirely compliant with Article 9: see 102, 103.

LORD JUSTICE IRWIN: Well, we can read those for ourselves.

MS HANNETT: Precisely, my Lord, just -- I just wanted to finish *Johns*, and then I can----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: That is done. I am sorry it took an awfully long time but I----

LORD JUSTICE IRWIN: No, no, no. It is----

MS HANNETT: But the consequence of that is we do not need to go to *McFarlane* or *Ladele*.

LORD JUSTICE IRWIN: Good. And are we still on track for----

MS HANNETT: Yes, my Lord, I think so. I will take (inaudible) accordingly, in the light of where we have got to. And I have noted my Lord's indication of finishing by noon tomorrow.

LORD JUSTICE IRWIN: Thank you very much.

(4.45 p.m.)

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IN THE COURT OF APPEAL (CIVIL DIVISION) No. C1/2017/3073
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
(Rowena Collins Rice)
(Sitting as a Deputy Judge of the High Court)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 13 March 2019

Before:

LORD JUSTICE IRWIN

LORD JUSTICE HADDON-CAVE

SIR JACK BEATSON
(Sitting as a Judge of the Court of Appeal)

B E T W E E N :

THE QUEEN
(ON THE APPLICATION OF)
FELIX NGOLE Appellant

- and -

UNIVERSITY OF SHEFFIELD Respondent

HEALTH AND CARE PROFESSIONS COUNCIL Intervener

MR P. DIAMOND (instructed on a direct access basis) appeared on behalf of the Appellant.

MS S. HANNETT (instructed by Pinsent Masons LLP) appeared on behalf of the Respondent.

THE INTERVENER was not present and was not represented.

P R O C E E D I N G S

I N D E X

(10.49 a.m.)

LORD JUSTICE IRWIN: Yes.

MS HANNETT: My Lords, we finished yesterday on the discussion of Article 10, whether or not religious speech was a particular category of people requiring some additional protection and certainly, in my submission, *R (Johns*), the authority that I showed you, and in particular the extract of Laws LJ in *McFarlane* addresses that point.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: My Lord, I was then going to move on to the fourth issue this morning, which is prescribed by law. I am going to take this relatively lightly, if I may, given that my learned friend Mr Diamond has not pushed the point in his oral submissions. My Lord, the case law makes clear that the European Court has accepted that the law that confers a degree of discretion or flexibility is not necessarily (inaudible) the requirement of legal certainty. Indeed, what the authorities show, in fact, is that in the field of professional discipline flexibility is viewed - or a degree of flexibility is viewed as a virtue. My Lord, to make good that submission can I just show you the judgment of Singh J, as he then was, in *R (Pitt)*, which is in the authorities' bundle, the brown one, or grey one, at tab 23. (After a pause) My Lord, it is not the grey one. I am so sorry. It is the slightly----

LORD JUSTICE IRWIN: Oh, the small one.

MS HANNETT: The slightly smaller one. I guess "number 2" would be more helpful.

SIR JACK BEATSON: You are assuming that we are all not colour-blind.

MS HANNETT: Well, it looks brown. I looked at again and thought it was brown.

LORD JUSTICE HADDON-CAVE: Well, maybe we are all colour-blind!

MS HANNETT: Brown-grey perhaps I should say. I am sure that is a matter on which we will disagree. My Lords, the issue arising in the case is summarised by Singh J at para.1 which is on p.227 of the authority. It was a challenge by the claimant who were two pharmacists and members of Pharmacists and also members of the Pharmacists' Defence Association who sought to challenge the Standards for Pharmacy Professionals which would have been adopted by the defendant, the General Pharmaceutical Council due to have come into effect on 1 May. So, it was a prospective - a new regime of professional regulations adopted by a third party that was sought to be challenged.

At para.8 and on Singh J sets out the relevant legislation which, like the 2001 order, is an order made under Section 20 of the Health Act. It has some similarities as one can see at para.13, that the overriding objectives are similar, although I should note, to be fair, that it is Part 6 of the order which deals with misconduct and is not materially dissimilar to the one that we have and, in particular, our order does not have that which we can see in the last paragraph, 15, provision that "... fitness to practice may be regarded as impaired by reason of the matters arising 'at any time'." So, it is a little bit different but broadly speaking not a dissimilar regime, if I can put it like that.

The new standards are set out in para.19 and 21 over the page. At 19 one can see that the standards are required to be met at all times. That point has been touched upon on occasions across these proceedings, that conduct "outside of work can affect the trust and confidence of patients and the public in pharmacy professionals". Then the standards are set out in a little bit more detail in 21 - what is meant by "a professional manner", and it includes, for example, "people receive safe and effective care when pharmacy professionals: are polite and considerate", for example. That is the context.

At para.31 on p.229 Singh J sets out the first issue: "Are the Standards ultra vires?" My Lords, that does not quite go to the points that I introduced, but I just wanted to show you this because it does touch upon an issue arising in this case. You can see the way it was put by the claimants in para.31. "... that the Council has no power to set standards of politeness on pharmacy professionals in their private lives..." and that those go beyond the power of regulation conferred on the Council. You will note that the claimant in that case also relied on the decision of Collins J in *Livingstone* at the end of para. 31.

There is a comment from Mr Singh, over the page on 36, on p.230: "I do not accept those submissions on behalf of the Claimants." He notes that "... the claimants' interpretation ... is simply wrong." He notes generally that:

> "... the Standards are ... intended to give the conduct of pharmacy professionals in a practical way; they are not addressed primarily to lawyers. The relevant obligation in the Standards is to behave appropriately at all times."

Then he notes, at para.38,

> "38... there may be occasions which occur outside normal working hours and perhaps in a context which is completely unrelated to the professional work of a

pharmacist which may be relevant to the safe and effective care which will be provided to patients. For example, if a pharmacy professional engages in a racist tirade on Twitter, that may well shed light on how he or she might provide professional services to a person from an ethnic minority."

He notes at para.43 the express statutory obligations on the Council, as here, to promote and maintain "public confidence in the pharmacy profession and of promoting and maintaining professional standards of conduct." My Lords, that is the way we address the suggestion that the standards intrude too far into his personal life. I appreciate that it is not exactly on all fours to our situation but I think there is some helpful guidance that one gets from that.

The second issue, which does go to a point that I introduced as my submissions, starts at para.25. that is: are the standards unlawful on the grounds of uncertainty. At para.45 he notes:

"45. Quite properly and understandably the Claimants submit that they, and others in their profession, should know what standards they need to adhere to. This is so not least because they have to make a declaration from time to time that they comply with those standards. On their behalf Mr Hislop submits that the new Standards have introduced an unacceptable degree of uncertainty and on that ground are unlawful."

At para.46 he said:

"46. The difficulty with this submission is that, as Mr Hislop himself accepts, '[t]his is not an area in which an absolute precision can be looked for"

-and he cites the decision of *Roylance.*

"47. Indeed I would suggest that any attempt to provide absolute precision would be undesirable given the context, which is regulation of a profession in the public interest. One cannot legislate for all circumstances in advance. There needs to be sufficient flexibility so as to protect the public interest as new factual situations arise."

Then at 48, he notes:

"48. ... However, it is frequently the case that there will be a standard set for a professional person or body such as that they must not bring their profession 'into disrepute.' As I have mentioned, there is already such a requirement in the context of pharmacy in the current version of the Standards. Such a general standard is usually thought to be necessary in order to retain the flexibility needed to protect the public reputation of a profession."

At 49 he makes a reference to delegated legislation and at para.50 he notes the decision of the European Court of Human Rights in *Sunday Times v United Kingdom*, which for your note is in the authorities' bundles at tab 27. At para.51 he concludes:

"51. In my judgment, it is not arguable that the new Standards are void for uncertainty."

SIR JACK BEATSON: Something has been troubling me about this. I do not want to delay you, but there are lots of cases on the imposition of criminal offences where certainty is also quite important----

MS HANNETT: Yes, my Lord.

SIR JACK BEATSON: -- where, I mean *Stadlin(?)* and *Tajani(?)* - the cases on demonstrating in the place in Wiltshire where they had cruise missiles - and my impression is that this is in regulatory context and this is obviously on point, but it is generally recognised that in all these general standards, you must do your best but that in many cases you need ruled(?) standards, in public order legislation, for example.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: So, is there a greater need for certainty in regulatory matters than there is in the criminal law, or a lesser degree?

MS HANNETT: Well, I think, taking this judgment in analogy with *Sunday Times*, my position would be, my Lord, that there is of course a baseline minimum flexibility to comply with the conventional standards, but there is an acknowledgement by Singh J in this case that actually one needs to go with flexibility, and indeed flexibility is desirable as there may be a myriad of different ways in which a professional may have their fitness to practice impaired and may have brought the profession into disrepute. It simply is not possible to legislate for all of those certainties in the parts, and of course a regulator as to do best by promulgating guidance the like, but it is simply impossible to apply that degree of precision in advance.

LORD JUSITCE HADDON-CAVE: My Lord's point I think is, to help you, that in the criminal law it is said you are not allowed to cause alarm and distress----

MS HANNETT: Yes.

LORD JUSTICE HADDON-CAVE: It is not defined in any particular way because there are a myriad of different ways in which that might occur.

MS HANNETT: My Lord, indeed.

SIR JACK BEATSON: I raise this only because I have seen in *McEldowney v Forde,* which is a case which was one of the very, very few cases when at common law, something was held to be uncertain. I would expect that there would be lots of cases involving these sort of crimes about unreasonable behaviour, alarm and distress, fear----

MS HANNETT: One would think that they probably are----

SIR JACK BEATSON: -- but we do not see them, do we?

MS HANNETT: No. My Lord, I haven't done that because simply----

SIR JACK BEATSON: I am not criticising you for not bringing them. I am just trying to put this in context. In other words, if it does not happen in crime, it is not surprising----

MS HANNETT: Yes.

SIR JACK BEATSON: -- that it does not happen here. I am not making a hostile point.

MS HANNETT: No, no. My Lord, I am sorry. I am not keeping up with you. If my Lord is meaning to say that the approach in the Regulation is not out of step with the approach taken in crime, my Lord, I think that must be right.

SIR JACK BEATSON: Okay. Well, I do not want to delay you.

LORD JUSTICE IRWIN: Well, I think the point may even be amplified because we are not dealing with someone who is in an established professional position; we are dealing with a student.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: And by the very measure of the fact that the relevant guidance document affects a whole range of professions because it is tailored to education establishments thinking of fitness for future practice for students across a range of occupations, it is hard to see how that would be boiled down into very specific regulation and precise structures.

MS HANNETT: No, quite.

LORD JUSTICE IRWIN: It does not mean it is any more comfortable for the student.

MS HANNETT: No.

LORD JUSTICE IRWIN: Because everyone is dealing with generality----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: -- and principle.

MS HANNETT: My Lord, that, I think, goes to a point that the judge makes which I will take you to in due course, that that does mean that as in all areas of professional regulation, the regulators place a certain degree of responsibility on the registrant or the prospective registrant to satisfy themselves that their conduct meets with the standards.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: That, I think, is an inevitable feature of having a fairly general set of standards. My Lords, can I just briefly show you how the judge dealt with this?

SIR JACK BEATSON: Have you finished with *R (Pitt)*?

MS HANNETT: I think I have. I am going - Sorry just to be clear - in the core bundle and to the judgment. She starts this point prescribed by law at para.70 at p.64. At paras.73 and 74 she notes my learned friend's reliance on the cases of *Livingstone* and *Smith*, which my learned friend took you to yesterday. She concluded, in respect of these cases, at para.74, that

> "Put at its highest, though, these cases can be analogous only. They concern the interpretation of particular codes and their application in particular circumstances. In both respects they are a long way - textually, factually and in policy terms - from the circumstances of the present case."

If I just pause there to add a couple of points on that; my learned friend did take you to it yesterday. In my submission, neither case helps you at all. I will just explain why. In relation to *Smith*, it concerns an employment context, not a regulated profession.

Second, the particular words used were different - for your note, at para.4 of the judgment. My learned friend did take you to this and I think it is in the abstract. In that case, the claimant made comments about same sex marriage taking place in churches. There was not a more general impugning of morality and sexuality.

Third, it is quite clear that the judgment also turns on the particular provisions of the contract itself and, finally, turns on the particular findings of fact made by the judge in that case, namely that no reasonable person would think that Mr Smith's comments were made on behalf of the trust, and no reasonable person would be caused to think ill of the trust as a result of the comments made. My Lord, in my submission, the case is in a different factual context and also very much its own peculiar facts.

As to *Livingstone*, again a very different regulatory regime. My Lords, in that case Colling J was concerned with a local authority code of conduct. One can immediately see that very different policy imperatives underpin the manner in which one regulates elected politicians than professionals. So, for example, aspects of freedom of expression may be thought to be significantly more important in that context and, of course, elected politicians are subject to election and removal if their opinions are not----

SIR JACK BEATSON: Do you mean politicians have got more freedom of expression than the rest of us?

MS HANNETT: Well, no, my Lord. What I am saying is when we are considering how one regulates the conduct of elected politicians, when one is conducting a proportionality

assessment.... Let us say, for example, in the case of Mr Livingstone where he was subject to discipline for the comments that he made, when one is determining whether or not any sanction imposed upon him breaches Article 10, and one is looking at the proportionality balance in the context of an elected politician, the way in which one weighs the factors may be very different to the context of a regulated profession.

LORD JUSTICE IRWIN: In a sense, competitive views and sometimes controversial views are the stuff of life and the discipline on the politician is whether they command support from the public.

MS HANNETT: My Lord----

LORD JUSTICE IRWIN: You have got to allow them to----

MS HANNETT: Precisely so. Precisely so. So, the regulatory imperatives one can see are completely different to the context of regulation of social workers, when one is primarily concerned with the protection of the public and the promotion of maintenance of public confidence in that profession.

One will recall yesterday my learned friend took you to the passages where Colling J concluded that one could not conflate the actions of the man with the action of the office. Again, in my submission, that immediately highlights the distinction between that context and this one where there is reams of authority to show that one professional's personal behaviour may well reflect up on the profession as a whole and the importance of maintaining the reputation of the profession and so forth. So, in my submission ,those cases really do not take you any further. Sorry, that was a slight diversion from what the judge said. I just wanted to amplify her finding in that respect.

My Lords, her conclusion on the applicability of those cases, you can see in para.77. She says in terms that the court has to look at the particular facts of this case.

> "That must include looking at the specific provisions of the standards materials and their applicability to Mr Ngole's specific course of conduct."

In other words rejecting look at other cases, other factual contexts, nor does she derive any particular conclusion on the facts of this case. My Lords, she then looks at *R (Pitt)* which I have just taken you to, and then at para.81 she makes the point that I have just made to you:

> "81. The acceptability - indeed the necessity - of a measure of flexibility in the setting as well as the application of professional standards can be understood in regulatory contexts in a further way. Typically, professional standards require a

measure of personal responsibility to be taken for conforming to the ethos of the profession. A degree of self-regulation is expected, rather than an attitude of mechanical rule conformity. Professional standards also exist in systems which may require expert evaluation of them, and provide procedures and discretionary decision-making processes to apply them."

She notes the decision of Lord Dyson in *R (Core Issues Trust)*, which really again repeats the made by Singh in *R (Pitt)* that the European Court has accepted that a degree of flexibility in the circumstances being both necessary and desirable. I am sort of slightly glossing over it. I am just picking up the key points but all of it really goes to what I am saying. At para.83 and on she dealt with and rejected my learned friend's submission----

LORD JUSTICE IRWIN: Before you go to 83, do you want to say anything about 82 because there is what I for myself thought a rather interesting passage. It begins two-thirds of the way through that paragraph:

"On the face of it, these require a measure of personal responsibility to be taken for general conformity to the ethos of the profession..."

Now, that is a completely anodyne statement in one way, but here it is capable of having very particular consequences.

MS HANNETT: Yes, and I suppose what----

LORD JUSTICE IRWIN: How far can that go?

MS HANNETT: Well, my Lord, I suppose what she is referring to here, of course, (inaudible) professional goes back to the 2001 order, the overarching aims which the Council must promulgate in regulating the profession. Of course, the ethos of the profession was always going to be a contextual matter.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: And really I think what she is - I suppose what she is seeking to say there is that there may be certain important principles or aspects of the profession which one has to comply with as part of signing up for the profession. One can think of all kinds of examples of that - an example, I suppose, of being a judge, being even-handed and have----

LORD JUSTICE IRWIN: Well, that is not general conformity to an ethos; that is a prime obligation on a judge. It did strike me, reading that, that we are getting beyond necessary flexibility so that particular facts can be reflected.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: And at least on the face of the language into something much woollier; that if that were carried through it might be taken to mean you have got to sign up to what the consensus outlook is.

MS HANNETT: I think in fairness to the judge, I do not think it is meant in.... Though when one reads that in the context of what follows, she is.... In the context of what she says as a whole, I suppose, in the judgment, she is.... I have already taken you to the observations she makes about the nature of the social work profession; that it is a front line profession dealing with people in very vulnerable positions.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: One very important aspect of the ethos of the profession, certainly that (inaudible) the policy of the university advances is the important of ensuring that service provision is provided without discrimination. So, one might say, for example, that is not part of the ethos of the profession. I do not think----

LORD JUSTICE IRWIN: Well, it is a legal obligation.

MS HANNETT: It is; I accept that, but----

LORD JUSTICE IRWIN: You see, she links it with the section. So, not merely are we talking about something that is quite generally in the way it is expressed, but it does appear to be an important part of her thinking that you must sign up to a view, must be held responsible for general conformity to the ethos and because of its impact, its perception. That is a bit removed from anything we have seen anywhere else.

MS HANNETT: My Lord, I think in the context, if I can take you - I am not sure if she.... I appreciate it may not be maybe widely expressed, but I think what she is seeking to accentuate there is not that one has to sort of sign up to some set of beliefs that have to be signed up to by a member of the profession. Of course, it is about, I suppose.... "Ethos" I think there is seeking to catch it in the way in which you behave, rather than the way in which you think because of course what she then goes on to talk about is personal conduct in public. So, she is linking it to conduct. She is not linking it to a belief system or a set of thoughts. My Lord, I take the point, but I think when one puts it in the whole context of the judgment, I do not think she is seeking to go as far as my Lord suggested.

LORD JUSTICE IRWIN: Right.

MS HANNETT: So, my Lord, that is 82. 83 and 84 - I do not need to read you through them - and in 85 she deals with the submissions that the HCPC guidance was too vague, and rejects it. At 86 she makes the point, my Lord, that I think I made to you a few moments ago that it

is not possible, in the context of professional guidance, to legislate for every eventuality. I accept that.

So, skipping over a little bit because it is quite detailed, but one then can pick it up at paras.90 and 91. I think you were taken to those passages already. This is where she accepts that Facebook postings may be read as a potential user, by the way in which those Facebook postings were read. Then her conclusions are at 92 to 94. Sorry, 92 to 93. Perhaps I could just ask you to read those two, so she ties up the proceeding passages.

LORD JUSTICE HADDON-CAVE: (After a pause) She focuses, the judge in para.91, on the particular language used, extreme language of "detestable", "wicked" and "abomination". She is not dealing there with - since what I understand to be your basic point, which is that any expression of the view, religious or otherwise, that homosexuality was acceptable (inaudible) How do we approach the judgment given what we understand your position to be, because the judge does not appear to have approached it on that basis?

MS HANNETT: Well, my Lord, I think in those passages she is dealing with the specific submission made by Mr Diamond, which starts at para.89, that that is religious speech, and then, at 90, that that has multiple meaning. I think while I appreciate she is focusing on the language there, I think that is dealing with a specific point that is being made to her. I do not think she is confining, in my submission, her reasoning to the nature of the language. One simply cannot read the remainder of her judgment in that way.

LORD JUSTICE IRWIN: Well, as she reaches her absolute conclusion in 93, she is still talking about religious speech.

MS HANNETT: Yes, she is, my Lord, but in fairness to the judge that may well have been because during much of the discussion below, it was concerned with this speech being immunised in some way from the ordinary requirements of professional regulation because it was religious in favour. In my submission, she certainly was not confining her judgment to the manner in which the words were used; she was also addressing----

LORD JUSTICE IRWIN: If we were against you on that specific point----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: -- if we did feel, just to simply test where we might be, you should not over-read this, if we were to conclude that the judge was focusing on the way those views were expressed, where would that take us? Would it mean that in your view she was wrong because the true objection on the part of those who reached the decision below was as to substance, not expression. Where would that take us?

MS HANNETT: My Lord, on the premise that she was wrong, I am not quite sure....

LORD JUSTICE IRWIN: My Lord has put to you that it looks as if, from some of the expressions in the judgment, that what she understood to be the objection was the way these views were expressed----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: -- rather than the fact that they were expressed at all in a way that could be linked to the----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: Now, if that is right, she has come at the review process----

MS HANNETT: Yes.

LORD JUSTICE IRWIN: -- on a misunderstanding.

MS HANNETT: If that is right, my Lord, and we will go on to deal with the way in which you test proportionality in a moment, but if that is the approach that my Lord takes - that the university's underlying decision was wrong, you must then of course look at the proportionality balance again----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- on the basis that the judge herself erred in the way that she struck that balance.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: So, in a way, it would be as though you were taking the decision effectively from scratch, if that is the conclusion that you reach about the balance that should be struck. I would have to accept that that would be an error of principle in the approach----

LORD JUSTICE IRWIN: Because you are quite clear that the objection taken and for which you argue is as to the substance of the views, not merely the expression.

MS HANNETT: The whole - it is the expression of those views.

LORD JUSTICE IRWIN: But not the manner of the expression.

MS HANNETT: No, the manner is----

LORD JUSTICE HADDON-CAVE: Expressing them at all.

MS HANNETT: Yes.

LORD JUSTICE HADDON-CAVE: So, where is the best bit in the judgment where you say she has grappled with that proposition, and endorse it?

MS HANNETT: Well, that is quite clear when one goes on to look at "legitimate aim" because the legitimate.... I am literally going to deal with that next, because "legitimate aim", in my submission, is entirely premised on the way in which I put the case because the legitimate

aim would make very little sense, bluntly, if one was then only concerned with the language and the rhetoric that is used as opposed to the expression of the views at all. My lords, may I turn on to "legitimate aim"----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: That is the beginning of the fifth issue. The legitimate aim, my Lord, is set out - at least it is shown in my skeleton argument at paragraph.... Actually, my Lords, I am so sorry, perhaps the easiest way to show you is just to take you to the judgment. It is para.98 of the judgment where the judge sets out the legitimate aim relied on - page 64AA. I accept that the second, to some extent, is really a facet of the first. It is slightly more - it is one focused element or goes to the first. The first comes directly from Article 3 in the 2001 order. I do not understand that aspect of "legitimate aim" to be disputed; the second aspect of it my learned friend has taken objection to. The importance of that, my Lord, is two-fold. It is both that service users will not be discriminated. Again, I imagine that is uncontroversial. It was pointed out to me that----

LORD JUSTICE IRWIN: Well, the case has not been put on that basis.

MS HANNETT: No. That is the law. It is the perception part that is----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- pushing, I accept - is pushing beyond the authorities that I showed you yesterday which, in my submission, make it completely clear that that is a legitimate aim, it is taking the point further, and I accept that. But I say it is important when one is looking at public confidence in the profession that service users do not reasonably perceive that they may be treated with discrimination. I give you a couple of examples in my skeleton argument at 49, just to try and illustrate the point. If a social worker who expressed, using public - similar to those expressed by the appellant, undertook a parenting assessment of a lesbian mother, for example, perhaps in the course of care proceedings. On the basis of those public pronouncements, she might reasonably have concerns that she would not be treated even-handedly and assessed on her parenting capacity alone. One might say the same thing about an adoption assessment or any other circumstances in which social workers make intimate personal decisions about individuals' lives. Similarly, the other example I gave you is say, for example, a social worker acting as a youth worker; a young gay man approaches him. On the basis of those postings that young gay man may legitimately and reasonably hold doubts about whether or not he would be sign-posted on to LBGT specific services.

LORD JUSTICE IRWIN: Examples are legion where people with homosexual orientation, bisexual orientation or any of the other long list of initials that we now get, might be brought

into unwilling or involuntary contact with a social worker who has power over their lives in all sorts of ways.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: That must be obvious. Now, what if the relevant posting had been: I understand my obligations as a social worker involving completely even-handed and non-discriminatory, even in respect of people whose lifestyle - of whose lifestyle I profoundly disapprove for these reasons. Leviticus etcetera. So, we have gone from language which may be hostile, but to an express of the views of the individual social worker, or student, which explicitly acknowledge the need to treat the person even-handedly and without discrimination. And I am able to do so; I have done so. All of that is spelled out.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: Now, that challenges your base----

MS HANNETT: I am not sure that it does because I have been careful, I hope you note, to say "reasonable exception" and there must be some basis on which a service user may hold exception and not be treated even-handedly, because of course it cannot - it is no part of my case at all that a gay service user could object to a family Christian social worker on the basis that they might hold these kinds of views. There has to be some reasonable basis for it. That really is the issue here, my Lord, that there have been public pronouncements made, which the judge accepted may give rise to concern in the minds of a reasonable reader as to how that social worker would behave in practice - and that is the mischief here, my Lord.

SIR JACK BEATSON: But the problem is, is it not, that in a construct in the laboratory of the courtroom, for example, we can say: well, it would not be reasonable to fear discrimination because actually if you require something to be put in a boiler-plate exemption - I am a social worker but - da, da, da, da - that is not an effective case of saying you cannot raise this at all on social media.

MS HANNETT: My Lord, I think that is my starting point.

SIR JACK BEATSON: Well, I know. I know, I know. But it is----

MS HANNETT: But my Lord to come back----

SIR JACK BEATSON: Let us assume.... You are a member of a learned profession. I do not know the Bar rules well enough but there are any things that you are prohibited from saying in public.

MS HANNETT: My Lord, I think probably racism.

SIR JACK BEATSON: Racism is in the law. It is against the law.

MS HANNETT: Of course, but so----

SIR JACK BEATSON: But the key point here is the clash between a religious belief and the provisions in the Equality Act.

MS HANNETT: Yes.

SIR JACK BEATSON: I mean, in a sense----

MS HANNETT: Yes, and my Lord, I accept that that is a policy. We accept that is the position and I do not shrink from that, but I say in the context of this particular profession - not every professions because one can perfectly well imagine that there are other professions where this may be perceived not to be a problem - surveying, for example, or something very off the.... Social workers make intimate decisions about people and their relationship with each other, and they do that.... I do not need to go through the types of examples that I am referring to. They form judgments on people's relationships and their interactions with each other, and there is some peculiar about that that means that saying that you find someone's lifestyle immoral or sinful in public - you can see the service user may well legitimately then have concerns about how that person is dealt with in the decision-making process.

LORD JUSTICE IRWIN: What if the service user is the parent of an infant school teacher? What if we are talking about health visitors? What if we are talking about a counsellor? It is all the same, is it not? This is not going to be.... If you are right----

MS HANNETT: My Lord, can I----

LORD JUSTICE IRWIN: -- holding this----

MS HANNETT: It isn't----

LORD JUSTICE IRWIN: If expressing these views in public for a social worker cannot be done, then there would be many other professions with the same----

MS HANNETT: There may well be, my Lord, but I do ask us to focus on social work. There is something particular about social workers in the role that they play, for example in care proceedings, adoption proceedings - very significant decisions in people's lives where, as I say, they are forming judgments about that person and relationships that they form with each other. I accept entirely that we might say the same thing about some other professions, but in my submission, actually probably there are only a handful of professions that have the same kind of decision-making and intimate decision-making as one sees with social workers.

LORD JUSTICE HADDON-CAVE: Well, speaking for myself, I am not sure about that. The Bobby on the beat may have to make judgments and report.

MS HANNETT: Yes.

LORD JUSTICE HADDON-CAVE: Counsellors. My Lord is right, that the implications of this could be very broad, if you are right, and can have a chilling effect, to use the word neutrally, on a whole lot of public expression of religious and other views.

MS HANNETT: My Lord, if we go back to the beginning, and I did try to say that in any case the proportionality assessment will always be fact-sensitive and one would always have to look at what was said, who was saying it, what was the context, what was the profession and their explanation for that. I do accept that this does have potentially some wider implications but I think some care has to be taken and one always has to deal with fact-sensitive analyses and proportionality in any given situation.

LORD JUSTICE IRWIN: That must be right, particularly when you are looking at a given expression of views, but that must be right.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: But you do not need to know specific facts of interactions to see that this has implications beyond----

MS HANNETT: I accept that, my Lord.

LORD JUSTICE IRWIN: There are going to be a range of professions and if your basic proposition is right here, then others will test it in those other professions, no doubt.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: But it will be hard to make a distinction between social work, health visiting, counsellors, maybe police officers, teachers - particularly of teachers of those around the age of puberty. There is going to be a whole range of other groups who, if you are right, will be told by their professions, backed up by the courts: you simply cannot express biblical views about homosexuality in a way that can be linked to you.

MS HANNETT: My Lord, I accept that. I accept that. In those cases where their professional responsibilities have the kind of decision-making that we are talking about here, and are analogous to this.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: So, I do think there is something peculiarly sensitive about the work that social workers do.

SIR JACK BEATSON: Doctors and nurses, barristers, solicitors.

MS HANNETT: I am not sure I would accept all of those categories, my Lord. I think one does have to focus on the specific example that is before us.

LORD JUSTICE IRWIN: We have got to look at this one.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: But we would be foolish not.... Well, we have agreed, have we not? We may disagree about which examples down the line----

MS HANNETT: No, no. No, I am not, but I think I would just come back to the thing that I opened by saying: it is always a fact-sensitive analysis and there is something particular about social workers that is of particular importance.

SIR JACK BEATSON: It is the dealing with vulnerable people and then making decisions which have public effect.

MS HANNETT: Indeed.

SIR JACK BEATSON: My GP and my practice nurse make decisions about what medicine I might get.

MS HANNETT: Yes, they do, my Lord.

SIR JACK BEATSON: But I think I understand the point.

MS HANNETT: Yes.

LORD JUSTICE HADDON-CAVE: People dealing with unemployment benefits, police officers, interviewing individuals.

MS HANNETT: One would always have to look at.... I am slightly reluctant to extrapolate out too much because one would always have to look at exactly what the individual is doing in the context of that. What we do know about social workers is we understand the types of decision that they make.

LORD JUSTICE HADDON-CAVE: But the proposition is that anybody in public service dealing with vulnerable people and making intimate judgments about their lives and relationships might be affected by this decision.

MS HANNETT: Where there is.... Where a reasonable.... Where a service user would have a reasonable concern about the way in which they act. Of course, that reasonable concern will always depend on what is said and so on and so forth. Again, you come back to the fact it is fact-specific. But broadly, I accept that.

LORD JUSTICE IRWIN: Reasonable perception: I think you will probably come on to this, but it is there at this point in the judgment. Reasonable perception itself is quite a broad range because whereas nine out of ten might not perceive, the tenth perception might be a reasonable one. It is within the range of reasonableness.

MS HANNETT: My Lord, I think any - in my submission----

LORD JUSTICE HADDON-CAVE: You submit; you submit.

MS HANNETT: I am sorry, I started to say that and I corrected myself. I apologise.

SIR JACK BEATSON: I never thought it was (inaudible)

LORD JUSTICE IRWIN: Sometimes that is true.

LORD JUSTICE HADDON-CAVE: And we do not discriminate between one side and the other. We make that clear.

(Laughter)

MS HANNETT: My Lord, in respect of that, the regulator is entitled to say - to take an objective approach to say that----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- objectively speaking would a reasonable service user, on the basis of what is being said, take that view? I quite accept my Lord's point that one has to take an objective approach here.

LORD JUSTICE IRWIN: The objective exercise is to say: would it be a reasonable perception on the part of some of those in the category affected.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: The objective view would not, in the ordinary way, using that phrase, would not have to say all would think that they might be affected or disadvantaged.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: It would only be... It is "within the range of reasonable views". So, it is quite broad.

MS HANNETT: Again, that would be a judgment that the regulatory body or a university standing in its shoes would be quick to take, with its peculiar knowledge of social work, social worker users----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- and so on and so forth. My Lord, just turning to the way the judge dealt with this, if I may, I have taken you to para.98 where she records the legitimate aims advanced by the university.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: At paras. 100 through to 103 she sets out passages from *Ladele* and *Eweida*, in the European Court of Human Rights. That is paras.101 and 202. For your note, it is in the bundle of authorities at tab 36 - and *R (Johns)* at para.103. She notes, at para.104,

> "104. These cases are interesting because they are about the supportive delivery of services to a diverse public. *Ladele* and *McFarlane* were about a clear intention to treat LGBT people differently, which is not suggested in the present case. Johns was about the extent to which the expression of beliefs might affect future behaviour. They are not cases about mere speech as such. None of them is exactly like the

present case (although the parallels with Johns are considered further below). They are helpful to the present case because they support the legitimacy of aims directed at ensuring that, in using public services, everyone's experience is that diversity of sexual orientation is treated purely professionally, with dignity and without the intrusion of the personal views of service providers which do not support those objectives."

Then at para.105 she notes that,

"105, In *McFarlane* and *Johns* the service users were in a particularly vulnerable position, comparable to the position of social work service users. ... In the present case, it was accepted that Mr Ngole had not in fact acted in a discriminatory way in relation to LGBT people. In the light of the content and tone of the NBC postings, the general reader, and also the University, was at least entitled to wonder whether he might. That appears to be the most likely context of the challenge made to Mr Ngole in the early stages of the FTP process."

LORD JUSTICE IRWIN: But they never did make that assessment.

MS HANNETT: No.

LORD JUSTICE IRWIN: Indeed, they never made an assessment of that point, did they?

MS HANNETT: No, my Lord. I accept that.

LORD JUSTICE IRWIN: This whole case has been conducted on the assumption that that could not have been made out, though in fact there was not an assessment of whether that was made out.

MS HANNETT: No. My Lord, I note that that was despite statements by the appellant that----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- he had - would - reflected religious views in official service.

LORD JUSTICE IRWIN: Well, he said: I have some - I have had in my past placement - I had occasion to be responsible for those who are homosexual.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: I did not discriminate; I would not discriminate. I will not refrain from expressing my views if I am asked to.

MS HANNETT: He said that does include using - reflecting my views if asked, yes.

LORD JUSTICE IRWIN: Yes. But the process of examining his fitness for future practice never actually went to the point of saying: now, let us look at all that and assess whether we accept it or not. They just accepted it and moved on to the perception limb.

MS HANNETT: Yes, but they accepted it in the context of what was being said, my Lord, which was that he would not refrain from repeating the statements, and indeed would not refrain from making those statements in the context of his social work practice.

LORD JUSTICE IRWIN: Yes, but that is not an assessment of whether he would act in a discriminatory way.

MS HANNETT: Well my Lord, I do not accept that. Of course if one is dealing with a gay person and in the course of dealing with that gay person, you say to the gay person: I find same-sex conduct immoral, improper and it is against the Bible, and you make that statement to the person in the course of service delivery----

LORD JUSTICE IRWIN: You think that is discrimination?

MS HANNETT: That is certainly potentially discrimination.

LORD JUSTICE IRWIN: Is it? On what basis?

MS HANNETT: Harassment perhaps.

LORD JUSTICE IRWIN: Harassment?

MS HANNETT: My Lord, in the context of having service delivery, you are being told by.... You are a gay person arriving at the----

LORD JUSTICE IRWIN: Of course, if a gay person comes in the door and he says, "I think you're gay and I think what you do is an abomination", that might be harassment.

MS HANNETT: Exactly, my Lord.

LORD JUSTICE IRWIN: But that is not what we are talking about, is it? He said, if he was asked his views, he would not hide them. He would express them.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: That is not.... Anyway, your case is not made on the basis that he----

MS HANNETT: No, but, my Lord, I think one has to view this in the context of what was being said by Mr Ngole in the course of the investigatory process.

LORD JUSTICE IRWIN: Well, only if the conclusion, after an assessment was made, was: we think that whatever he says he will act in a discriminatory way. That would be a different basis for the whole decision here.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: That was never done.

MS HANNETT: No. I accept that that is not the basis on which the decision was made.

LORD JUSTICE IRWIN: So, in what way can you rely upon what he says he would do in the absence of such an assessment?

MS HANNETT: My Lord, if I can take you back to the decision letter, if I may, that is where....

LORD JUSTICE HADDON-CAVE: Which page is that?

MS HANNETT: My Lord, it is on page - it starts on page 159 and runs through to 164.

LORD JUSTICE HADDON-CAVE: Thank you.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: My Lord, the first decision is at p.159, one sees in the bottom paragraph----

LORD JUSTICE IRWIN: Yes.

MS HANNETT:

> "... not based on your views but on your act of publicly posting those views such that it will have an effect on your ability to carry out [your] role as a Social Worker."

So, there is a linkage. I accept the reasoning is not developed, but there is a linkage between posting those views and the carrying out of the role. Over the page, on p.162, is the appeal decision. Again, they say in terms, half-way through that paragraph, that Mr Ngole had:

> "... failed to acknowledge the potential impact of your actions. You had not offered any insight or reflection on how your actions and public postings on social media may have negatively affected the public's view of the social work profession."

So, again linking the posting with his ability to carry out the profession. I accept entirely they did not go on to say that he would act in a discriminatory way. My Lord, that is why I am putting the case in the way that I am.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: But the mischief is the public concern about the way in which he has acted.

LORD JUSTICE IRWIN: I understand that. My whole point on this question is----

MS HANNETT: Sorry.

LORD JUSTICE IRWIN: You put your basis on perception, because that is what they expressed; that was the basis of the decision. But there was never an assessment that said: we think in fact he will be driven to act----

MS HANNETT: I accept that.

LORD JUSTICE IRWIN: -- in a discriminatory way, and had there been one, that would be a wholly different decision to review.

MS HANNETT: I accept that.

LORD JUSTICE IRWIN: So, we cannot assume from the concern that he might act in a discriminatory way because of what he says he was saying. We cannot assume that he would.

MS HANNETT: No, my Lord. I am so sorry if I was not clear about that. I hoped I had been at pains throughout to say that the university has never said----

LORD JUSTICE IRWIN: Yes.

MS HANNETT: -- and I made that clear in my skeleton argument, and if I have not made it clear on my feet, then I apologize. I hope I have been quite clear to differentiate between----

LORD JUSTICE IRWIN: You have been extremely clear. I am sorry. I am not trying to be difficult.

MS HANNETT: No, no. Not at all. My Lord, it is very important I understand the thinking.

LORD JUSTICE IRWIN: Just for the moment, I am dispelling any doubt.

MS HANNETT: The distinction is a very important one. I am sorry if I was not continuing to make that completely clear.

SIR JACK BEATSON: I have a question but I do not want to stop you.

MS HANNETT: I did not have anything further to add.

SIR JACK BEATSON: Right. So, let me see if I understand the submissions. However politely and moderately a conservative religious biblical view about same-sex relationship is expressed in the context of social work where the social worker is dealing with vulnerable people, or even if it is expressed not in that context but so that it becomes public, that could be perceived as discriminatory.

MS HANNETT: My Lord, it is. Yes.

SIR JACK BEATSON: And reasonably perceived as discriminatory.

MS HANNETT: Yes, my Lord. Yes.

SIR JACK BEATSON: That is what this comes down to.

MS HANNETT: My Lord, I do accept that there may be distinction between.... In my submission, the mischief really about this case is about the expression of concern about same-sex practice. It is about same-sex relationships. I accept that there may be a different debate to be had about same-sex marriage, whether a same-sex marriage should be conducted in church, and one can see that there are slightly different points.

SIR JACK BEATSON: Yes.

MS HANNETT: The mischief in my submission here is not the absolute precise analysis(?); it is the expression of concern about the morality and legitimacy of same-sex relationships. That is the mischief.

SIR JACK BEATSON: I have understood that.

MS HANNETT: Yes.

SIR JACK BEATSON: It is just that we are on very fine distinction----

MS HANNETT: I accept that.

LORD JUSTICE IRWIN: We need to clarify that.

MS HANNETT: And I hope again - I am sorry, I do keep repeating it but I hope not in an annoying fashion, but these are always going to be fact-sensitive decisions and, my Lord, for example, in *R (Pitt)* Singh LJ (as he then was) said in terms assessments of proportionality around fitness to practice are intensely fact-sensitive decisions.

SIR JACK BEATSON: I mean *R (Pitt)* was a challenge to the rule in a sort of abstract.

MS HANNETT: Yes, it was, and he said it in that context.

SIR JACK BEATSON: So, in a sense, you know, it is not these people being rowdy in the pub one Saturday night, and that is in public, and then being kicked out of their profession or whatever. It is a pressure group----

MS HANNETT: Yes.

SIR JACK BEATSON: -- or a group of concerned professionals.

MS HANNETT: I would make the point only because I accept that Singh J made that point in response to a submission that he should determine whether or not the new standards breached the applicant's Convention rights in the abstract, and that is not remotely appropriate. But, my Lord, the point, in my submission sounds good more widely because what he was saying is: one cannot view this in the abstract. One always has to look at the specific underlying facts.

LORD JUSTICE HADDON-CAVE: Would Mother Theresa have fallen foul of the proposition that my Lord has just put to you?

MS HANNETT: My Lord----

LORD JUSTICE IRWIN: We have made you spokesman for all sorts of people!

MS HANNETT: (Laughter)

LORD JUSTICE HADDON-CAVE: It is a genuine question.

MS HANNETT: My Lord, I can see that. I apologize for giggling.

LORD JUSTICE HADDON-CAVE: Not at all.

SIR JACK BEATSON: Thinking is not allowed, but giggling is not bad.

MS HANNETT: Giggling is apparently acceptable in the Court of Appeal. My Lord, we have to go back to the context again. We are a regulated profession. Albeit a profession and the standards that one signs up to when one enters the profession, and in those circumstances Mother Theresa was.... My Lord, one cannot single out individuals. The proposition that I am making applies across the board. I have to accept that, and the difficulty that one comes back to again - a point that I made at the outset - is that the university is most certainly not

saying that holding profound religious views is inconsistent with an approach of a social worker. No doubt many people hold profound religious views and act as a social worker. The difficulty is expressing those views in public in the circumstances as I have said where----

LORD JUSTICE HADDON-CAVE: The proposition is that she would not have been able to say to her flock of many: this is actually a sin.

MS HANNETT: Well, you will remember we had some discussion yesterday about the context, and I was at pains to say there may be context in which the appellant can express his views where the proportionality balance may be struck differently. So, for example, in the church in a bible study session and so on and so forth.

LORD JUSTICE HADDON-CAVE: Yes, but----

MS HANNETT: So there are always.... Again, it is not, and again I hope I was at pains in asserting yesterday to (inaudible) on this expression - it is about understanding. There may be contexts in which because of your status as a social worker it is not acceptable to say those in public.

LORD JUSTICE IRWIN: Well, I was thinking overnight about what you submitted on that and it does bear on my Lord's question. It is clear that somebody here searched the internet deliberately, found these postings and passed them anonymously to the university, or anonymously as far as the appellant is concerned. Now, that is a much more remote and obscure way of determining what Mr Ngole said than if he preached in his local church, once he was qualified, in a small city or a large town. He would much more readily and immediately be identified if he did preach on Leviticus and on this issue, even in a church. That would be around Kettering or Northampton or Winchester in no time. So how does the distinction----

MS HANNETT: That may or may not be the case, and again I suspect----

LORD JUSTICE IRWIN: Well, let us assume it is the case; he has posted to Winchester and he does so preaching in the relevant church; his views will be known; his role will be known; his identity will be known. In that instance, even if he is called John Smith, not Mr Ngole.

MS HANNETT: Yes.

LORD JUSTICE IRWIN: So, how does your distinction stack up?

MS HANNETT: Your Honour, it would entirely depend on the facts and the regulator would have to look at the facts and take a view. The fact that it is done in a church would take us straight back into Article 9, manifestation of religion and belief, and I suppose one would then.... The regulator in those circumstances would have to determine whether or not specific

facts of that balanced against the much more focused manifestation of the appellant's religion or belief.

LORD JUSTICE IRWIN: But in what sense would that expression, if discovered, produce to any lesser degree a reasonable perception - quote/unquote?

MS HANNETT: My Lord, I think in my submission it would because one is of course talking about preaching in a church on the one hand and publishing one's views on Facebook on the other. There is, in my submission, something qualitatively different about those two things - as I said, not least the proportionality balance that has to be done. In the case of a church situation, one is of course balancing these things, and it might be open to the regulator to conclude that the importance of religious expression in those circumstances outweighed any damage to the profession.

LORD JUSTICE IRWIN: That simply is another way of saying different considerations apply, but not saying that the reasonable perception would be any different. Why would the reasonable exception of the potential user of the social worker be any different if there was a direct expression----

MS HANNETT: I accept that.

LORD JUSTICE IRWIN: -- in church?

MS HANNETT: I accept that but in saying that when one comes to look at the.... What we are doing is - what the university was doing is looking at whether or not fitness to practice is impaired.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: The court then is looking backwards at that and determining whether or not there has been a breach of the Convention right.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: In the context of posting expression on Facebook when it is in the context of Article 10, one has to weigh.... One is weighing the freedom of expression rights of the appellant against the Community rights, as it were, of maintenance of confidence in the social work profession. In my submission, in this context the answer the university has arrived at is compatible with those Convention rights. I accept entirely that there may be different circumstances where that balance leads to a different outcome. To answer my Lord's question, that is not because the perception of the social work user is any different, but it is the balance that one then strikes at the end that is different.

SIR JACK BEATSON: Our discussion and the examples of course are driven by the context of this case, and the context of this case is the manifestation of the expression of a religiously

based view. And yet you say, and you point to authorities and the judge said: this is not an Article 9 case.

MS HANNETT: Yes.

SIR JACK BEATSON: In a sense is the discussion of it in the way we are discussing it, really treating it like a sort of crypto Article 9 case? You say, well if it is not, and it does not fulfil the *Williamson* etcetera, and then we are in Article 10

MS HANNETT: Yes.

SIR JACK BEATSON: And that is different.

MS HANNETT: Yes. My Lord, perhaps against, my Lord, what I was endeavouring to say is that there may be cases that one - that land squarely within Article 9, and the Article 9 balance is different because as I endeavored to show you yesterday, in *R (Johns)* it is quite clear that speech generally under Article 10 does not attain some special status or quality because of its religious flavour. So, my Lord's point, if I may say so, is well made, that if we are in Article 9, if the action in question is falling squarely within Article 9, the balance may be differently struck.

SIR JACK BEATSON: Let us stick with Mother Theresa, as she seems to be a neutral figure in this. If Mother Theresa was doing something analogous in her Facebook posts, or whatever, we would not be - she would be a person of sincere and profound religious beliefs, but she would be - it would be a freedom of expression case. And then the question would be whether whoever regulated the place in Calcutta that she operated from had similar rules, and whether they were valid. But, yes.

MS HANNETT: Yes.

SIR JACK BEATSON: I think, speaking for myself, Mr Diamond - of course it is very important this is expression based on profound belief, but it is still freedom of expression rather than----

MS HANNETT: Yes. Exactly right, my Lord. And that does have consequences for the way that one addresses that in a way that may be a little different if we were in a different context, in an Article 9 context. My Lord, I was going to just take you through - and I am just slightly conscious of the time----

LORD JUSTICE IRWIN: Yes. We have asked lots of questions.

MS HANNETT: Not at all, my Lord. Perhaps if I can just give you the passages that I was going to take you to in respect of "legitimate aim".

LORD JUSTICE IRWIN: Yes.

MS HANNETT: Because, my Lord, I think we have largely covered many of the points the judge canvassed. The paragraphs I was going to take you to are the ones.... 104, 105, 107 to

108, and then 110 to 111. My Lords, I was then going to turn to the sixth issue, which is proportionality. In my skeleton argument it is 52 to 67. I just wanted to say four broad and I think fairly basic propositions about the approach to the proportionality balance.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: The first is the test on proportionality is the four-stage approach set out in, amongst other judgments, *R (Tigere)* and that is in my skeleton argument at para.32.

LORD JUSTICE IRWIN: At?

MS HANNETT: Paragraph 32.

LORD JUSTICE IRWIN: 32, thank you.

MS HANNETT: The second is that the judge at first instance must make her own assessment of proportionality. Authority for that proposition is FB, paras.3 and 34, and that is authority 11. Third----

LORD JUSTICE IRWIN: Hang on a second.

MS HANNETT: I am sorry, my Lord. I cannot see your pen, my Lord. That makes it a little harder than typing.

LORD JUSTICE IRWIN: It would be much faster on the computer. Okay.

MS HANNETT: Third, the approach that I took you to yesterday in *Ghiletchi (Moldova)* informs the proportionality analysis conducted under Article 10. You will recall that that is the case in which the Court of Appeal had cited previous authority to the effect that courts give considerable deference to fitness to practice decisions by universities and regulators. In particular, that was because fitness to practice is a question of academic judgment and academics or regulators are best placed to determine whether or not somebody is fit for practice, not least as they have often seen the (inaudible). I say that applies in similar fashion to the proportionality analysis and that this is an example of the type of decision in which the courts have given - attached special weight to the judgment or assessment of the decision-maker, in the same way as *R (Lord Carlile)* is authority for that proposition, and the *West London* other authorities.

Finally, when considering proportionality on appeal, the test for this court is whether the judge erred in principle or was wrong in reaching the conclusion which she did, and that is the decision *R v Chief Constable of Greater Manchester*. That is in the authorities at tab 25, per Lord Carnwath at 61. In other words, proportionality balance is not to be judge afresh unless----

LORD JUSTICE IRWIN: Unless there is an error of principle, or an error - yes.

SIR JACK BEATSON: So, the difference of opinion in the earlier case that it raised (inaudible) at trial----

MS HANNETT: Yes.

SIR JACK BEATSON: -- is now resolved.

MS HANNETT: Yes.

SIR JACK BEATSON: The minority is catered, because there were members of the minority sat with Lord Carnwath.

MS HANNETT: Yes. That is a decision, I think, from June, July 2018.

SIR JACK BEATSON: Yes.

MS HANNETT: So, my Lords, turning to the approach of the judge behind the *R (Tigere)* approach, on rational connection the judge held that there was a rational connection between the aims relied on and the decision of the Appeal Committee. For your note, my Lords, that is 120 to 126. I do not understand that to be the subject of dispute, and so I am not going to turn that up.

On less intrusive measure, so that is *R (Tigere)* test three the appellant of course concluded - the university, of course, concluded that the sanction that fell short of removing the appellant from his course would not meet the aims advanced. I took you in some detail through documents in respect of that yesterday. You will recall that that was in the end rather less about the Facebook postings than the response that was expressed to them. My Lord, that aspect of the university's case was accepted by the judge, if I can just show you that.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: It starts at para.127 of the judgment which is p.64HH of the judgment.

LORD JUSTICE IRWIN: I am sorry? 64HH?

MS HANNETT: Yes, my Lord. At para.127 she notes my submission, but I will just repeat it to my Lords, that Facebook postings alone may not have resulted in the sanction. I will skip over a little to para.135 - I think all of this is relevant really and we can therefore----

LORD JUSTICE IRWIN: We will re-read it all.

MS HANNETT: It is quite a long section, so I am just picking up the most important points. A t 135 the judge accepted that - half-way through that paragraph the fitness to practice panel put its proceedings:

> "... on the footing of a full review [of his fitness to practice] including a student's health, behaviour and attitudes and how these may impact on their ability to practise

in the given profession... That is properly in the nature of FTP proceedings; fitness to practice needs to be looked at in the round."

Then, my Lord, she sets out the witness statement - or the evidence given by the Chair of the FTP Panel at para.136. For my Lords' note, that is a summary - I do not propose to take you to the underlying material - but that is a summary of the first witness statement of Professor Marsh at paras.40 to 43, which is in the supplementary bundle, tab B, 87 to 88. My Lords, that also reflects the evidence that was given by Professor Morris in her witness statement at paras.13 to 16 which is also in supplementary bundle tab B, at p.113, and Dr Fairclough at paras.10 to 13, also in the supplementary bundle at p.119 and on.

LORD JUSTICE IRWIN: Sorry, Fairclough is.... Just give me the Fairclough references.

MS HANNETT: Fairclough is paras.10 to 13, my Lord, supplementary bundle, pp.119 to 120.

LORD JUSTICE IRWIN: Thank you.

MS HANNETT: My Lord, the judge at that point summarizes the concerns that were expressed by Professor Marsh, but also, not recorded there, also the other members of the.... I am not quite sure, my Lord. It is part of that last sentence of that paragraph where she notes that the other witness statements show that conclusion.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: The judge then notes the decision - the proceedings of and the decision of the Appeals Committee at paras.137 and 138, and then notes, at 139, that

"139. By the time Mr Ngole refers his case to the OIA therefore, either members of the University's teaching staff, six of them in a formal decision making capacity, and with a broad range of educational and professional experience and perspective, had had an opportunity to review Mr Ngole's record, and to discuss with him in person his professional competence and awareness, and the extent of his insight into his professional responsibilities as a prospective social work registrant. Their assessment was unanimous."

She then sets out in the following paragraphs the university's submission to the OIA, which goes on forward to para.145. She notes the appellant's response to that submission at para.146. Then she summarizes the view taken by the OIA in paras.147 to 149. My Lord, just for your note, the OIA decision is in the bundle, tab A at 53-66. I should probably be clear about what my submissions is in respect of the OIA decision. It is broadly supportive of the university's position. I accept entirely that the OIA is not a court of law and does not make determinations on breaches of Convention rights. So, it is a fact that I do not rely on it as really pointing my Lords one way or another.

LORD JUSTICE IRWIN: Not on the law, no.

MS HANNETT: Quite. Then, my Lords, at paras.150 to 151 she records her view (at para.150) that there were components. "The specific components of that decision which were said to be a matter of professional evaluation were..." - and then she lists them. All those matters which she says engaged professional judgment of the Fitness to Practice Panel and the Appeals Committee. Then she notes, at para.151, that

> "151. It was the consistent evaluation of every professional involved in this case, from the University investigators up to and including the OIA, that Mr Ngole's general fitness to practice..."

LORD JUSTICE IRWIN: That repeats the passage you read to us before.

MS HANNETT: It adds on the OIA point, my Lord. I accept that. Then para.156. She directs herself to the degree of scrutiny or deference, and I use the word advisedly, noting her concerns about.... She is directing herself as to the weight really to be given to the university's judgment when undertaking a proportionality balance.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: She then, at 157, notes the severity of the sanction and accepts that it was indeed severe. She rejected, in fact - there was a proposition of the OIA that it was not career-ending because it could not take away a career that he had in fact had, and she rejects that in terms.

LORD JUSTICE IRWIN: Yes. Well, speaking for myself that seems to me to be - yes.

SIR JACK BEATSON: Blindingly obvious.

MS HANNETT: I suppose the point is that when she is looking at the effect on Mr Ngole, she accepts the full extent of that.

LORD JUSTICE IRWIN: Yes.

SIR JACK BEATSON: Yes. She is finding that the OIA.... It seems to be right - a tick-box approach.

MS HANNETT: She then sums up really, at paras.160 to 162 - perhaps if I can just ask my Lords to read that. I have already accepted the university's case that given what transpired, there was not a less intrusive sanction that could be imposed. I would just ask my Lords to read that. (After a pause) My Lords, that passage of her reasoning discloses no error or law either to the degree of deference that she has displayed to the institution decision-making of the university or indeed to the conclusion that she reaches.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: My Lord, she then goes on to deal with overall fairness - *R (Tigere)* test four. She calls it "overall fairness". The *R (Tigere)* language is slightly different, but ultimately what she is doing here is showing that the balance has been struck in the right place as between the rights of the appellant on the one hand, and the nature of----

LORD JUSTICE IRWIN: This is a stand back.

MS HANNETT: A stand back. Is this really the right decision and when looking at it overall. Has this balanced appropriately the Article 10 rights of the appellant on the one hand and the competing interests of the Community on the other, articulated by the university? She explains precisely that, my Lords, in para.163, that that is what she is embarking upon on a section of her judgment. At para.166 she emphasizes the importance of freedom of expression and emphasizes at the end of that paragraph that she attaches "real weight to the judicial observations to that effect which Mr Diamond put before the court."

At para.167 she has regard to the fact that Mr Ngole was a student when these events took place, and notes in his favour that of course this was the first cause for concern that the university had had from the appellant. She then noted, at 169, the initial concern of the university was the Facebook postings, but then at 170 noted that what then became a rather larger issue was

> "... the apparent refusal of the student to take an active interest in that concern about perception. He seemed either to deny the possibility of such a perception or to deny that it should be taken seriously. He also seemed to think that the fact that he was exercising his personal freedoms on a matter of religious speech meant that his behaviour was in effect none of the University's business."

She then notes at para.171 the potential for escalation. At para.175 she notes - again, I am so sorry. I am jumping over paragraphs because I cannot take them all, but ----

LORD JUSTICE IRWIN: Of course.

MS HANNETT: I am trying to pick out the ones I thought were the most important. 175.

> "This particular student, in common with other trainee professionals, had personal responsibilities as well as rights. These included committing to living his life not only according to his faith but also according to his professional ethos and discipline. Professional discipline, rightly, sits relatively lightly on its members outside the workplace, but it is never entirely absent where conduct in public is concerned. There, it always requires attention to the perceptions of others, especially those most directly interested in the performance of professional functions."

She goes on to say at para.176:

> "176. There are choices available in the use of religious speech, and professional discipline can guide those choices. Like other choices about how freedoms are exercised, they need to be exercised responsibly where they can affect others. Free religious speech, like other free speech, is not an exception. It can affect other people, for good or ill. Choices about it need to be exercised responsibly. Religious speech like the NBC postings can, as Mr Diamond said, 'confuse the secular mind'. That is something with which professional practitioners working with secular minds have a responsibility to deal."

Then, my Lord, at paras.177 and on she deals with the point about compromise, and notes the comments made by Pastor Omooba in the Appeals Committee hearing, and notes

> "Mr Diamond suggested that the University was not helping achieve that. He asked rhetorically what diplomacy would have looked like. The student complained that no-one told him what sort of religious speech and Bible quotations were allowed and which were not. But trainee professionals might be expected to show they could think that through for themselves; to work out the impression that might be given in the wider world; to take personal responsibility for it; to work through to a professional solution; and if in doubt to take a balanced and consultative approach. A mature student, moreover, might be expected to do so more confidently and independently than a student new to adulthood."

My Lords, she then deals with the religious speech having multiple meanings and notes, a third of the way into that paragraph,

> "Social workers have to deal with how people will actually react to it in real life, and express themselves accordingly. That is not about a 'blanket ban', or about stifling religious speech or about denouncing faith; it is about seeing the world as others see it, and making the connection between what you say and the provision of public services in sensitive and diverse circumstances. Trainee social workers have to satisfy their supervisors that they understand this, and are if necessary working hard at it. That requires a reflective and proactive response to concerns being raised (the development of 'autonomous and reflective thinking' is an HCPC SET expectation..."

Those are the standards, you will recall, set by the HCPC.

"... A reactive and defensive response is likely only to amplify those concerns. It was reasonable to expect a student whose career was at stake to have gone further to show that he understood the questions and had some reassuring answers."

My Lords, she concludes - and I will not read it out - but she concludes, at paras.179 to 181 by saying that ultimately the balance had been struck in the right place in this case.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: My Lord, just in response to the submission of my learned friend, it is quite clear that in that passage of her judgment one does not detect any deference for special weight given to the University's judgment. I quite readily accept that one does see that when she is looking at less intrusive needs. In this passage of her judgment, in my submission, she strikes that balance herself, and stands back and looks at the process as a whole.

My Lord, there were a number of authorities relied on by the appellant in his skeleton argument, which I have summarized in my skeleton argument at para.64. You were taken, I think, to *Sandown* by my learned friend, *Smith* and *Livingstone* and others. In my submission, none of those cases will help you or assist in the exercise that this court has to undertake, not least because none of them, apart from one which I will deal with in a moment, concerns the professional context.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: And very many of them concern factual contexts that are very far removed from this one.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: The only case that I have noted at para.65 concerning regulation of a profession is *Vogt v Germany*. For the reasons I have set out there, and I do not think I need to take my Lords through it - the facts are very different.

LORD JUSTICE IRWIN: That is the communist teacher case.

MS HANNETT: Yes. And in particular because it is quite clear from both the Commission's decision and the court's judgment that there is no allegation that her views where known to pupils, or could have become known to them if they had any productive repercussions on her actual teaching activities.

My Lord, unless there is any further assistance I can give you in respect of those grounds, those are my submissions in respect of the human rights aspects of the claim. My Lord, there is then the bias ground.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: I am conscious I am slightly trespassing beyond my noon hour.

LORD JUSTICE IRWIN: You must deal with this if you want to.

MS HANNETT: I think, my Lord, this is actually a rather important point in fact because the claimant - the appellant, I am so sorry - complains that the decision of the university was tainted by apparent bias because the membership of the Fitness to Practice Committee included Professor Marsh who is a gay woman, who has participated in some fairly limited activities associated with her sexual orientation.

The legal principles, my Lord, are summarized in my skeleton argument at 69 through to 71. My Lord, I think it is just worth turning up the decision of *Locabail* just to see the examples of where apparent bias may be made out. You will see the circumstances are extremely limited. *Locabail* is at authorities' tab 4. My Lord, the context is set out at para.1 on p.471 in the internal numbering - the judgment of the Court of Appeal, Lord Bingham, Lord Woolf, and Sir Richard Scott.

> "The applications have been listed and heard together because they raise common questions concerning disqualification of judges on the grounds of bias."

I do not think we need to look at the facts; they are set out in the head note. I am going to skip over almost all of the judgment and just zoom in on the bits that I wanted to show you, given the time. I should just note, my Lords, at para.16 there the court is applying "a real danger of bias" which pre-dates the decision of the House of Lords in *Gunduz*. My Lord, in my submission, I do not consider that detracts from the passage that I want to show you which is at para.25. The court says:

> "25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge."

So, that is the starting point. They then go on to say: "Nor, at any rate ordinarily, could an objection be soundly based on..." - various matters that include previous political associations; or membership of social or sporting or charitable bodies; ... or extra-curricular utterances..." So, my Lords, it is quite clear from this that the circumstances in which a judge ought to recuse him or herself for apparent bias are extremely limited. They go on to give

some examples, but they are really circumstances in which the judge had previously addressed a particular view about the issues arising in the case. One can see that at letter F of that passage. In terms of the narrative----

LORD JUSTICE IRWIN: Sorry, forgive me.

MS HANNETT: I am looking at my Lord, Lord Justice Haddon-Cave.

LORD JUSTICE IRWIN: Oh I see.

MS HANNETT: Sorry, I am trying to----

SIR JACK BEATSON: That is talking about extreme and unbalanced terms in the course of the hearing.

MS HANNETT: Yes. My Lords, the point is that sexual orientation alone is not enough. If one is to find apparent bias in this case from the fact of Professor Marsh's sexual orientation plainly is insufficient. There has to be something else, and as for what the something else is alleged to be in this case, one can see that most conveniently from the claimant's skeleton argument at para.58. My Lords, in my submission, those fall significantly short of matters that conceivably could be said to meet the test in *Porter v Magill*, as amplified by *Locabail*. Not least - and I repeat really what I set out in para.77 of my skeleton argument; those are the types of activities one would expect to see any gay professional person, for a period of their lives, engaging in. One can make the same point about a female judge, a gay judge and so on. I suppose there would be likely activities that one may engage in if one has an interest in feminist matters, sexual orientation - whatever it might be. That is broadly the conclusion reached by the judge in her judgment.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: In any event, there are three further reasons really why this part of the appeal is hopeless. The first is that she sat on the Fitness to Practice Committee. Any procedural unfairness, which is denied, would of course have been cured by the decision of the Appeal Committee. The second is that Professor Marsh was one member of a three person panel which reached a unanimous decision. Again, in those circumstances even to he extent that apparent bias was made out, it does not, in my submission, taint the decision of the whole panel.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: And finally, there is not any appeal against the judge's conclusion that the application to amend the statement of facts and grounds was a late arrival in terms of the grounds of judicial review - permission to seek judicial review was sought in the course of

the hearing - was in the judge's view hopelessly delayed. She reaches that decision at paras.186 and 198.

LORD JUSTICE IRWIN: 86 and 198.

MS HANNETT: 186.

LORD JUSTICE IRWIN: 186 and 198.

MS HANNETT: 198, my Lord, yes.

LORD JUSTICE IRWIN: Thank you.

MS HANNETT: That aspect of the finding is simply not engaged at all. My Lord, may I just have a moment?

LORD JUSTICE IRWIN: Yes.

MS HANNETT: Unless I can assist further, those are my submissions.

LORD JUSTICE IRWIN: Thank you very much indeed. Yes. Mr Diamond.

MR DIAMOND: My Lord, I will not be too long. If I might just present the case for Mr Felix Ngole, I do not think there is much need to go over the evidence.

My Lords, you have heard the starkness of the propositions put to Mr Ngole by the university and you can, of course, believe what you want but you cannot say it - and that was extreme with some of the answers, in my submission, in particular even a newspaper article written in a mainstream newspaper, possibilities of preaching in churches will come up in the future, even bible studies - and those cases will come up in the future if we do not draw the parameters now. It was extreme stuff and you cannot say it and it would catch Mother Theresa.

I think what I want to say though is some statements on behalf of Mr Felix Ngole where he believes he has not been fully reflected. He relies on his appeal notice where he says sometimes he feels they have been talking past each other. He said in one of his appeal notices to the OIA he feels that we are talking past each other and that the university does not want to reach a compromise. That is his position; it has always been his position. His position is he wants to reach a compromise. He sought to explore it. He wants to be loyal and true to his religious beliefs and express them. He is a church leader. When he said, "I can't hold it in" I have been told (it is not in the report) that was in response to a question that when he meets his new church groups he genuinely believed he could not express any form of Christian faith, and he has no intention of speaking and insulting people. He is a decent human being and it was a response to a question, if someone asks a question, he would like to

answer according to the circumstances and the vulnerability of the person, but he is a man of integrity and principle and he would answer sensitively and honestly, but sensitively as well. He is a normal adult human being.

A

We simply say this serious attempt at compromise, Pastor Omooba's attempts to intervene, the diplomacy - they have been insufficient for the learned judge to simply put all the burden on this vulnerable student.

B

The next point I would like to make is the win-win situation. It is the case for Mr Felix Ngole that homosexual individuals have a right to live their lives with dignity - with respect and dignity. Some of my submissions on the meaning of religion.... Unfortunately religious liberty is seen as in some quarters as no more than some form of code for discrimination, intolerance or Christian supremacy. That is not the position of Mr Ngole. Our position is that Christians likewise want to live their lives with dignity as members of society. They want to follow the holy scriptures and live their faith with the lease unnecessary interference in their religious practice, and their private lives and religious discussions. I submit that Article 9 satisfies that. Everybody supports non-discrimination on the grounds of sexual orientation and religion, although we have some difficulties when lifestyles are included in those non-discriminatory parameters. So, a balance is needed between these two groups.

C

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The submission on this side is to urge a win-win; that both sides live their lives with dignity. This is a case, unfortunately, where the boot is on the other foot and it is actually Mr Ngole receiving the blows. We say there is a world of difference between the denial of service, the loss of a livelihood, feeding your own family - thought it is not in the file, I can tell you he is suffering greatly economically at the moment - and the knowledge, and living with the knowledge, that some people hold views that disapprove of your lifestyle. That is a balance that needs to be borne under the proportionality test.

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The court has the reasons; the reasons for their decision are clear, and the court must accept their reasons. You cannot express these views publicly. There is no way of gilding the lily on this. We say that is wrong in law. We say that is chilling and fails a win-win test. Had this decision-maker opposed the manner rather than the substance of the email correspondence, this case would have panned out very differently. You cannot come up with a bad decision by the Fitness to Practice Panel and then the Appeal Committee, instead

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of containing, in our submission, the illegality, accuse Mr Ngole of failing to respond to their own illegality inappropriately.

A

On the list of professional disciplinary cases most of them fall into very traditional well understood categories where we would accept someone has behaved inappropriately; *Bolton*, a solicitor failing a client account; *Saunders* and *Heesom*, openly abusive counsellors; *Higham*, serious behavioral problems - and, I am not going to pronounce it, but my Lord will know the case of the Sri Lankan student, but clear threats of violence made to another student. People can clearly see that. The cases we submit that deal closer to this, of course, are *Livingstone*, a free speech case, and the *R (Remedy)* perhaps, where Sir Liam Donaldson, as a responsible chief medical officer, his failed implementation of those health reforms was not a matter that brought his professional conduct as a doctor into disrepute, and even *R(Pitt)* itself, an *in abstraco* review, accepted the court had the ultimate say under the Human Rights Act.

B

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Regarding the legal case - I am not going to go back and discuss cases that are a few years old - the court has moved on, not least in the *Reeder*(?) case itself and the balances of proportionality analysis. The European Union itself has now had six judgments on Article 10, which is equivalent to Article 9 of the Convention on the Charter of Fundamental Rights. And we have recently had the *Ashes Bakery* case in Northern Ireland which is in the tabbed bundle where the issue of free speech - I do not like same-sex marriage; I am not going to make a cake in support of it - was wholly distinguished. Free speech to say: I disapprove, I do not like it, I am not going to engage with it; no service was denied to the purchaser by reason of his sexual orientation. The two are distinct and the two should not be merged.

D

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I ought to say I have not said anything giving a special privilege to religion. I am not arguing any special privilege to any form of religion, any class of religion; nor would I argue that you can do anything in the name of religion. It is a distinct feel that (inaudible) needs a sympathetic understanding. The holy scriptures are an old and venerable book. Terms like "sin" and "judgement" sit uneasy in the modern secular mind, but as said those words have a role to play in the life of a religious adherent, and the scope is now to find a common compromise.

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Finally on the biased ground, our submission is that actually there is a very powerful

symmetry between Mr Ngole's position and Professor Marsh. Both have tweeted, blogged and expressed a view. One has expressed a view on one lifestyle choice; another has expressed a view on another lifestyle choice. One's expression of the view means they are perceived to be discriminatory - perceived not to be able to discharge a responsibility. Not that that was ever looked into in Mr Ngole's case, but that was enough to give a perception. If your blogs and strong proposition in favour of the cause should make Mr Ngole's position open to review, surely the reasonable observer must have a similar perception that justice would not be seen to be done. So, either private views do potentially affect your treatment of someone or they do not, and if they do not affect Professor Marsh's treatment, they will not affect Mr Ngole's treatment in his work.

In conclusion, the case of *Locabail*, the court, and of course we adhere wholly to para.25, your Lordships will be aware in that judgment - I will only take you to it if you want me to, my Lords - they discuss the case of *Timmins v Gormley*. If I can just summarize it for you, para.75, the learned Recorder was a "prolific writer" and a respected editor of **Kemp and Kemp**. 76: he wrote four articles in which the bias was suggested, the first in "**The Lawyer**" of 21 June. He took in those articles a very strong pro claimant position. In paragraph 89:

> "We have, however, to ask, taking a broad common sense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leant in favour of the claimant..."

The judges have given leave on that case solely on the (inaudible) in *Locabail*. So, we are not challenging Professor Marsh for anything to do with any personal characteristic. It is related to the same criteria applied to Mr Ngole, and indeed there is form.

SIR JACK BEATSON: "And indeed there is form."? I did not hear.

MR DIAMOND: No. We simply - her previous statement, not on any personal characteristics is what I meant to say.

SIR JACK BEATSON: I thought you said: "And there is form".

MR DIAMOND: No, no, no. I think I probably did mispronounce.

SIR JACK BEATSON: You mispronounced.

MR DIAMOND: Finally we say Mr Ngole had a right to a proper hearing before the Fitness to Practice Panel and a proper hearing before the Appeal Panel. Finally, if there is any.... We have appealed the bias point. It is in the skeleton argument. If there is any need for any....

the learned judge refused to accept the amendment. If there is any need for any oral application to amend or include it, I so do, but we say it was by per chance in a case like this that Mr Ngole was Googling homosexual issues and the University of Sheffield, not for Professor Marsh, her name came up on that. It was filed before the trial. There was plenty of time to deal with it and there was no detriment. In fact, we would submit that Professor Marsh should have disclosed that at the hearing, and we have seen the track record of Mr Ngole----

LORD JUSTICE IRWIN: You said there was no detriment but that it was filed before the trial.

MR DIAMOND: It was filed in August or something.

LORD JUSTICE IRWIN: You say the trial.

MR DIAMOND: The first instance trial, after the judicial review claim form but it came to----

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: -- attention between the----

LORD JUSTICE IRWIN: Before the judicial review.

MR DIAMOND: Before the actual judicial review before the learned judge.

LORD JUSTICE IRWIN: Right.

MR DIAMOND: So we say there was no prejudice on that.

LORD JUSTICE HADDON-CAVE: You suggest, Mr Diamond, an equiparation between Mr Ngole's position, perception of him, that he should not be judged for his views; equally, you would not with the Professor. But you have just said that Mr Ngole was Googling the Professor and found - Googling and found these activities which have led him to lodge a complaint about her sitting. Is there not a tension there between those two propositions?

MR DIAMOND: Well, I think firstly he was not Googling her. He was actually Googling more generally "Sheffield University", and she came up. I think the tension only is - and the case for Mr Ngole is, and it is the case for freedom, is that people can hold private views, articulate private views and actually campaign, socially and politically where they want to, and unless there is an impact on the work, this preserves freedom for as many people as possible.

LORD JUSTICE HADDON-CAVE: Why does that then not apply to the Professor? You said she is biased.

MR DIAMOND: Well, I think what I would say----

LORD JUSTICE HADDON-CAVE: Or there is a perception of bias. So, how does that----

MR DIAMOND: Well, my argument to this court is not that we want to go down that route, either Professor Marsh and Felix can both have a private life and articulate social and

political and religious goals, and divorce their private views from their professional lives - and Professor March did conduct the hearing fairly; or, if private views do potentially affect how you would treat someone, she might fail the apparent bias test on her own criteria. We would urge on this court... I have stressed this case from the beginning has got wider implications----

SIR JACK BEATSON: Does it matter whether she failed it on her own criteria? The question of apparent bias in the *Locabail* case is something for us to determine. Many people come before these courts and fail in some way to match up to some (inaudible) I do not understand this. It is an argument I have heard in other contexts, but very rarely in these buildings here. I mean, I can see the lay perception that: I am being done down because have expressed my beliefs in public. This person is taking part in public activities related to her personal beliefs and life, but I mean we have to get that into a legal context. That is why they have got you to represent them and they are not doing it themselves, so that we get it into a legal framework. I am not quite sure I understand the legal framework.

MR DIAMOND: I think the difficulty of submitting it.... There is a fall-back, of course to preserve Mr Ngole's position. The position submitted that there is a public/private divide in this case, our position is that Professor Marsh can take an active role in the promotion of LGBT rights; likewise Mr Ngole can articulate his views. That is why I said there is a win-win situation that has been created by this court. Both sides----

SIR JACK BEATSON: I see. So, it is not a point in support of your bias argument; it is going to win-win?

MR DIAMOND: Well, I am falling back on that and obviously I want Mr Ngole to win so I do not want to let go of it in my duty as counsel.

SIR JACK BEATSON: Well, we will not go into that but your duty as counsel has wider contexts too.

MR DIAMOND: Yes. But I think what I would say is *Locabail* does show that if you are active in a cause, the role of a judge is so sensitive and justice must be seen to be done, that there can be a reason in such a case as that to have unease about the nature of the judgment, especially in a case like this with such stark propositions and positions placed towards a person----

LORD JUSTICE IRWIN: Your proposition looks as if underneath this is a way to characterize bias of Ms Hannett that any person who was then themselves homosexual and expressed that in ways that are quite normal, would bring apparent bias. What is the basis for the apparent bias? Why should a gay person not sit on this Tribunal?

MR DIAMOND: Well----

LORD JUSTICE IRWIN: They are not being asked to decide whether the bible is right or wrong, and your client is not being judged by whether the bible is right or wrong. So, what is the basis of the bias?

MR DIAMOND: Well, the basis of the bias is simply the commitment to a cause, just like the Recorder did in that case. He was committed to a cause of claimants' promotion, and the clients rightly felt there would be an unconscious switch. I mean, I think my main point was the win-win situation. We are actually seeking to argue that as adults we need to be adult in this. We need to find a compromise between these competing teams and somehow both sides need to accept that people have different views.

LORD JUSTICE HADDON-CAVE: But you cannot have it both ways. You said that on this proposition Mr Ngole can run this bias point, and have effectively said with the Professor there is a sense of unease because of the Professor's activities and what she has demonstrated and said publicly. The flip side of that is why should not a service user have unease about what Mr Ngole has said in public? Do not the two stand or fall together?

MR DIAMOND: They do and I will----

LORD JUSTICE HADDON-CAVE: And your client has brought a bias case, apparent bias, perception of bias, apparently on precisely the same basis as he has said should not be made against him.

MR DIAMOND: I can see that and I am doing that - I submit that as a lawyer. As my wider implication, this case, we say that individuals should be able to live their private lives. We have to create a society where.... There is conflict in society. We do not have the sort of.... The ethos of the profession you have to show a zeal to the governance policies and aims. We need - I am urging on this court common sense. Preserve Mr Ngole's rights. Let him have a career. Let people have private lives. I would urge on this court its firm judgment to put the boundaries down for future perspectives and that will be the direction I would urge us to go on. If it does not go in that direction, there will be the church case coming up; there will be something.... You are attending a fundamentalist church; you are going to a Mosque. What do they believe? We want to look into their beliefs. I do not see why religion should be singled out. In fact, in the *Ashers Bakery* case there is a post-script at the end where they discuss the parallel *Masterpiece Cakeshop* case in Colorado which simultaneously went on to the Supreme Court where this baker refused to bake a cake, and it was very different from the British case. The British case took the free speech approach. Free speech does not impact discrimination. I submit that is a vote for freedom! It is one thing to have downstream laws

saying you cannot discriminate in the provision of housing and employment; it is another thing to say that in having upstream laws, you cannot disagree in a political forum in private life. But we endorse - I submit that is the correct approach. But the approach of the US Supreme Court was they actually struck it down because of the *animus* of the prosecutor. First they singled out Christian viewpoints for not making cakes; that other people did not have to make cakes. From my understanding it is the secondary case that the Commissioners had derogatorily described the Christian baker as derogatory.

Both of those cases, I submit, preserve the freedom of free speech or the British version, and the American version focuses very much on the respect needed. If Article 9 is to mean something, the language of discrimination, demean, derogatory - and I tried to say that extremely badly on my first day - sits ill with people who simply want to give a message and expound their beliefs, and people do change their minds. The purpose of Article 10, freedom of speech, is to change people's minds. "Proselytism" comes from the Greek word "proselytize", which simply means "to come over". It simply means you want to convert. Both of those are about the changing of minds, and that is why it is so important that people are free to change their minds.

LORD JUSTICE IRWIN: Yes.

MR DIAMOND: Can I help you any further, my Lords?

LORD JUSTICE IRWIN: Well, thank you very much, Mr Diamond, and to Ms Hannett.

MS HANNETT: My Lord, I am sorry to rise. May I just make one very short point? My learned friend referred to the case of *Ashers* but his thinking was not in reply to anything that I have said.

LORD JUSTICE IRWIN: Yes.

MS HANNETT: Can I deal with that? I am not going to make any submissions. I just wanted to point you to foot note 3 of my skeleton argument on p.19 where I set out why that does not help in this case.

LORD JUSTICE IRWIN: All right. We will look at that. Foot note 3. Thank you. Now, the lawyers will understand but so that it is clear for everyone, the court will take time to consider the conclusions and hand down a written judgment in due course. It will initially come under embargo to the two sets of lawyers, as will be normal, merely to correct minor factual errors or typographical errors, not for distribution or outside comment at that period. It is very important in these cases that during that period there is no further transmission until the final version is handed down. When it is handed down, there will be no need for the

attendance of any parties. That will be done very rapidly, and we would ask that counsel then agree an order on the basis of the decision that is reached. So, thank you again for your assistance. We will rise now having completed the hearing.

(12.55 p.m.)

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