Neutral Citation Number: [2021] EACC 1.

IN THE ARCHES COURT OF CANTERBURY
On appeal from the Consistory Court of the Diocese of Coventry
In the matter of an Application for a Faculty for a memorial in the Churchyard of St Giles, Exhall, Diocese of Coventry

Caroline Newey	**Appellant**
London Branch of Conradh na Gaeilge	**Intervener**
Caroline Daly	**Amicus Curiae**

Judgment

1. INTRODUCTION

1.1 The church of Jesus Christ is arguably the most international, multi-ethnic, multi-cultural, multi-lingual body on the planet. That is one of its glories and strengths. Reflecting that noble reality in all its facets should be a universal ambition in all the church's work and ministry, however challenging it may be upon occasion to implement it practically, even in respect of memorialisation of the dead and pastoral support to the bereaved.

1.2 This is an appeal against the decision of Stephen Eyre QC, Chancellor of Coventry Diocese, by which he granted a Faculty for the erection of a memorial but subject to a modification of the proposed design in one particular. We held a hearing in the Church of St-Mary-le Bow on 24th February 2021 and announced our decision to allow the appeal on that day, but reserved the giving of reasons, which are now set out in this Judgment. The proceedings were broadcast via a zoom link, to enable the many people who have expressed interest in this case, including the press, to follow the proceedings, despite the need to limit numbers present in the church for public health reasons. This was an innovation. In order to explain the legal basis for this feature, the Dean issued a Note and Directions to the Parties, which is annexed to this judgment.

1.3 The Appellant, Mrs Caroline Newey, applied on 2nd July 2019 for permission to introduce a memorial into the St Giles' Meadow part of the churchyard of St Giles, Exhall. Although an ancient parish dating back to the twelfth century, these days, Exhall is a suburb of the Coventry conurbation. The person to be commemorated was Margaret Keane, Mrs Newey's mother, a resident of the parish, who died on 29th July 2018.

1.4 The memorial was to be of grey honed limestone and decorated with a Celtic cross. The proposed wording, in white lettering, was: "IN LOVING MEMORY OF MARGARET KEANE. 31st JANUARY 1945 – 29th JULY 2018. AGED 73 YEARS. IN ÁR GCROÍTHE GO DEO" ("the Petition Inscription").

1.5 Because the memorial did not wholly conform to the specifications set out in the Chancellor's Churchyard Regulations, the incumbent of St Giles correctly advised Mrs Newey that she did not have delegated authority to permit it and that it would be necessary for her to apply to the Chancellor for a faculty. In principle, the introduction of any item into a consecrated Church of England churchyard requires a faculty but it is conventional for Chancellors to make schemes of delegation, usually by means of what are termed

"Churchyard Regulations", although they have no legislative status. At that date, the Coventry Churchyard Regulations were silent on the matter of non-English language in inscriptions.

1.6 Accordingly, Mrs Newey presented a Petition for Faculty on 3rd October 2019. The Diocesan Advisory Committee had, as normal, conveyed its advice on the Petition to the Chancellor; it had made it clear that it did not support the Petition on the basis of the form of the cross proposed, rather than in connection with the inscription. The family's statement in support of the faculty petition uses the terminology of *"refusal"* but it is important to understand that all that the incumbent had – rightly – decided was that the form of the proposed memorial did not fall within the category of those in respect of which she had delegated authority to grant permission.

1.7 Since the aspect of the proposed memorial which took it outside the parameters of the Churchyard Regulations was the form of the Celtic Cross, which would stand proud of the headstone and incorporate the symbol and motto of the Gaelic Athletic Association ("GAA"), the statement in support of the petition focussed on explaining the rationale for using that symbol and including the GAA badge within it. Understandably, the family's supporting statement for the Petition provided explanation and background about the cultural and community significance of the GAA, as well as the role which Mr and Mrs Newey had played in the Coventry and, indeed, British and Northern Irish branches of that organisation, but did not address the question of the Irish language inscription. There is no doubt about the major and positive role which Mrs Newey had in the cultural life of the Irish community in Coventry and beyond, nor about the appropriateness of memorialising that contribution. The Chancellor recognised this at [10] of the Judgment, where he said:
"The Coventry Churchyard Regulations make it clear that churchyards and burial grounds should not aim for characterless uniformity and that memorials which record and celebrate the achievements and lives of the person being commemorated are to be welcomed. It is clearly right that the memorial to Mrs. Keane should record and celebrate her Irish heritage and her dedicated community service through the GAA. It is for that reason that the inclusion of a Celtic Cross bearing the GAA symbol is appropriate."
We note that the GAA symbol includes three words in the Irish language: "Cumann Lúthchleas Gael". Counsel for the Intervener confirmed that these words mean: "Gaelic Athletic Association".

1.8 On 13th February 2020, the Chancellor issued the following directions (amongst others):
"It may assist the Petitioner to know the aspects of the matter which are currently causing me concern though I emphasise that this is a provisional assessment and that any final conclusion will await consideration of such further representations as the Petitioner chooses to make. I am entirely satisfied that it is appropriate for the memorial to celebrate Mrs Keane's Irish heritage and her involvement in the GAA. In the light of that I am satisfied that a memorial bearing an image of a Celtic cross modified by inclusion of the GAA wording and image would be appropriate. However, I am not currently persuaded that it is appropriate to mark those matters by a cross projecting from the body of the headstone as opposed to an engraving on the headstone of the same image. I would welcome Mrs Newey's submissions as to why the proposed structure rather than an engraved cross bearing the same wording and image is said to be appropriate.

I am also satisfied that it is appropriate for the memorial to bear the words 'in our hearts forever' but I am currently not persuaded that it is appropriate for this message to be only in Erse rather than in English (or perhaps in both). I would welcome Mrs Newey's submissions as to whether there would be any good reason why the message should not be expressed in both languages."

1.9 The Appellant replied to these directions by email and letter dated 27th February 2020, stating that the family were content for the cross to be engraved rather than protruding from the headstone. Ms Gallagher QC, in her oral submissions on behalf of the Appellant, described this as a "difficult decision" for the family. On the language point, Mrs Newey said:
"Thank you again for your consideration and satisfaction that the memorial bear the words 'in our hearts forever', however the family are still of the view that this should remain only in Erse. We are uncomfortable with adding a translation underneath, so as not to overcomplicate or condense the memorial, the statement in Erse only is not a political statement, nor is it designed to alienate others, it is simply in honour of both my mother's and my father's native tongue. We believe it is in keeping with the inclusion of the G.A.A memorial and those who come to remember our mother and one day our father will all understand its meaning. We feel it would not be appropriate for Gaelic names to require English translation and as such, the same applies to final messages inscribed from loved ones."
The Appellant[1] and the Intervener[2] have explained that the term *"Erse"*, used by the Chancellor in expressing his provisional view and therefore adopted by the Appellant in her response, is inaccurate and that the proper way to describe the native language of Ireland is *"the Irish language", "Irish"* or *"Gaeilge"*. Accordingly, in this judgment, we have adopted the accurate terms.

1.10 In the same correspondence, Mrs Newey confirmed that she consented to the Petition being determined on the basis of written representations. Ms Gallagher QC stated that the warning in the letter of 7th February about the costs implications of an oral hearing had had a "chilling effect" on the family. The decision not to avail themselves of such a hearing has clearly caused them some anxiety in hindsight. We do not consider that the Registrar's letter was inappropriate in this regard; it is important for petitioners to understand the implications of seeking an oral hearing in such circumstances. We would note, however, that such a hearing should not need to be complex or require legal representation; moreover, it does give the opportunity for useful clarification, both for the chancellor in determining a petition and for a family in understanding what the cause of any concern might be and addressing it as fully as they can.

2. THE DECISION OF THE CHANCELLOR

2.1 The judgment was dated 6th May 2020. By letter dated 13th May 2020, the Diocesan Registrar communicated the Chancellor's decision to Mrs Newey. She enclosed a copy of the faculty which the Chancellor had directed should be issued[3]. The faculty authorised the Works or Proposals described in the Schedule as follows:

[1] Skeleton Argument on behalf of the Appellant [19]
[2] Skeleton Argument on behalf of the Intervener [20]
[3] The original faculty under seal was to have been issued once the Covid-19 lockdown ended and allowed the Registry to re-open.

*"**To permit:***
The installation of a memorial to the late Margaret Keane at 2nd plot on 2nd row from the left hand side of the burial ground when looking towards the road. To be made of Celtic grey honed limestone in an organic rough-hewn headstone shape with a Celtic cross measuring 14 inches high x 9 inches wide on the top left side incised into the body of the memorial and not protruding from it with the Gaelic Athletic Association emblem in the centre of that cross showing the word "EIRE" in a central Celtic cross measuring 3.5 inches in diameter and a harp in the exact centre with the Gaelic words "Cumann" "Luth" "Chleas" and "Jael" surrounding it. The measurements of the memorial to be 27 inches wide x 30 inches high x 3 inches deep on a base measuring 30 inches wide x 3 inches high x 12 inches deep with an inscription in white Times New Roman font to read "In Loving Memory of MARGARET KEANE 31st Jan. 1945 – 29th July 2018 Aged 73 Years IN AR GCROITHE GO DEO IN OUR HEARTS FOREVER" and a single flower vase to be flush in the base on the right hand side."

2.2 In his judgment, the Chancellor summarised the facts, noting at paragraph 2 that:
"Margaret Keane and her husband were both born in the Irish Republic but had made their life in the United Kingdom. They remained proud of their Irish heritage and were active in the work of the Gaelic Athletic Association both in Coventry and nationally. This was important public service to the Irish community in the United Kingdom and formed a major part of Mrs. Keane's life and of her work for others.
3) The petition sought a faculty for a memorial stone with a rough-hewn top bearing an inscription stating that it was in loving memory of Margaret Keane and giving her dates of birth and death. There was to be Celtic Cross containing at its centre the emblem of the Gaelic Athletic Association. The proposal was that the cross should not be incised but instead should project from the side of the headstone. The inclusion of a Celtic Cross incorporating the GAA emblem is intended to recognise and celebrate Mrs. Keane's Irish heritage and her community service through the GAA.
4) In addition to those elements it was proposed that the memorial should bear the words "In ár gcroíthe go deo" in Irish Gaelic. The phrase can be translated as "in our hearts forever"."

2.3 Having dealt with the form of the Celtic cross, the Chancellor moved on to consider the language question in the remainder of the judgment. He said:
"11) The question of the inclusion of words in a language other than English has caused me rather greater difficulty. As the Regulations note at [34]: '...it is to be remembered that the memorial will be read not just by those who knew the deceased in question but by those who did not.' Indeed, the message conveyed to those who did not know the deceased is in many ways more important than the message being given to those who did know him or her.

12) As a consequence regard must be had to the message which an inscription conveys to those who did not know the person being commemorated. An inscription which is incomprehensible to such persons is unlikely to be appropriate.

13) Questions of language can raise intense feelings. It is apparent here that the use of the Irish language is a matter of great importance to Mrs. Keane's family. Mrs. Newey says that the use of that language without translation is not a political statement but is a recognition of Mrs. Keane's identity and is to 'honour ... [her] native tongue'. However, it is apparent that the Petitioner and her family believe that the words in Irish Gaelic should be allowed to stand

alone and that a translation should not be required. This is an implicit assertion as to the importance and standing of that language.

14) I have considered the approach taken by Ellis Dep Ch in Re St Peter & St Paul, Nutfield [2018] Ecc Swk 1. The Deputy Chancellor there permitted the inclusion of the word 'Tangnefedd' on a memorial. That is a Welsh word having associations with heavenly peace and is often found on memorials in Welsh churchyards. The Deputy Chancellor noted the struggles which the Welsh language had faced for recognition and concluded that its inclusion on the memorial was a 'fitting memorial'.

15) There were a number of particular features which were present in the Nutfield case which are not present here. There the issue was in respect of a single word. Moreover, the Deputy Chancellor noted at [8] that although the parish was in the Southwark diocese it had various links to Wales and had a tradition of having Welsh incumbents. The Deputy Chancellor regarded this as strengthening the case for the use of an untranslated Welsh word.

16) The proposal in this case is not just for the inclusion of a single word but for a short phrase which the reader will immediately realise is conveying a message. However, it is a message which will be unintelligible to all but a small minority of readers. In those circumstances it is not appropriate for it to stand alone without translation. I make it clear that in saying this I am not in any sense adjudicating on the relative merits or standing of English and Irish Gaelic as languages. The situation would be likely to be wholly different if I were having to make a decision as to a memorial in the Irish Republic. However, the situation which I have to address is of a memorial in English-speaking Coventry. Should I permit an inscription which will be incomprehensible to almost all its readers? Not only would the message of the inscription not be understood but there is a risk of it being misunderstood. Given the passions and feelings connected with the use of Irish Gaelic there is a sad risk that the phrase would be regarded as some form of slogan or that its inclusion without translation would of itself be seen as a political statement. That is not appropriate and it follows that the phrase "In ár gcroíthe go deo" must be accompanied by a translation which can be in a smaller font size.

17) Accordingly, the petition for the memorial as originally sought is dismissed. However, I authorise the issuing forthwith of a faculty for a memorial of the same shape, size, and stone type bearing an incised Celtic Cross incorporating the GAA emblem and bearing in addition to the proposed inscription a translation of the phrase "In ár gcroíthe go deo."

3. THE APPEAL

3.1 The Chancellor granted permission to appeal out of time but refused the substantive application. Accordingly, Mrs Newey renewed her application and, by Order dated 18th August 2020, the Dean granted permission to appeal on two of the three pleaded grounds and on the basis of other compelling reasons.

3.2 The permitted grounds set the scope for the hearing and this judgment. They are, in short:

Ground 1 – unjustifiable exercise of discretion / unfairness.

Ground 2 – other compelling reasons, namely:

(i) the subject of non-English inscriptions on memorials has not been considered by the Arches Court or the Chancery Court;

(ii) England is a multi-ethnic and multi-cultural society; for a significant minority of families who choose burial in an Anglican churchyard, the English language may not be the natural or complete form of expression and / or of ceremonial expression;
(iii) the issue of non-English words on memorials is therefore likely to arise in future cases;
(iv) questions of the approach to intelligibility and suitability of a Christian memorial in a Church of England churchyard are important matters of principle which the Court of Arches should consider, including in relation to the European Convention on Human Rights.

3.3 Notice of the Appeal was lodged on 1st September 2020. On the Human Rights point, the Notice goes a little further than the permission, in that the Appellant argues that her Human Rights were not only engaged, but that the Chancellor acted in a manner inconsistent with those rights, notwithstanding the reservation expressed in the Order granting permission to appeal on that ground. Ms Gallagher QC made it clear, in the introduction to her submissions, that she was putting her client's case on the basis, primarily, of the common law and Article 14 of the European Convention on Human Rights ("the Convention") and that submissions on Articles 8 and 10 would therefore be quite short. We bear in mind that, as emerged in the submissions on Article 10, a fuller exploration would necessarily have required the citation of even more authorities. This observation should not be taken as any criticism of the efforts of all the counsel in the appeal, for which we are immensely grateful.

3.4 Pursuant to Rule 27.8 of the Faculty Jurisdiction Rules 2015, the Court of Arches has the same powers as the Consistory Court and powers to set aside or vary any judgment, order or decree of that court and/or to order a new hearing. The Notice of Appeal did not state the remedy sought by the Appellant, but her counsel in their Skeleton Argument invited the Court to set aside the Judgment of the Chancellor and vary the Faculty dated 13th May 2020 by removing the requirement for the English translation of the inscription *"In ár gcroíthe go deo".* In previous cases where the Appeal Court has redetermined a faculty petition[4], it has sat in the church in question. In this case, the Dean did not consider it necessary to do so, since the issues raised do not call for a site visit and the Appellant's Witness Statement includes relevant information about other memorials in the churchyard; all counsel, when asked, indicated that they were content for the Court to redetermine the petition, in the event that the Appeal were to succeed, without the need for a site inspection.

4. GROUND 1 – THE SUBMISSIONS OF THE PARTIES

In summary, the Appellant submitted:

4.1 The reasoning of Eyre Ch was flawed in a number of respects, such that the decision overall amounted to an unreasonable exercise of his discretion. In particular, the judge erred both in his conclusions at the following paragraphs, and in the findings he reached based on those conclusions:

(i) that the inscription would be *"incomprehensible"* to persons who did not know Margaret Keane (paragraph 12);

(ii) his conclusions regarding the case of Nutfield being distinguishable (paragraph 15);

(iii) that the Irish phrase *"will be unintelligible to all but a small minority of readers"* in *"English-speaking Coventry"* (paragraph 16);

[4] See In re St John the Baptist, Penshurst, Court of Arches, [2015] unreported – see 17 Ecc LJ 394.

(iv) *"Given the passions and feelings connected with the use of Irish Gaelic there is a sad risk that the phrase would be regarded as some form of slogan or that its inclusion without translation would of itself be seen as a political statement"* (paragraph 16);
which assertions were unsupported by any evidence and / or based on the outdated prejudiced notion that the Irish language is associated with Irish dissident republicanism. Subsequent evidence has demonstrated that it is at least arguable that a sizeable minority in Coventry may understand the phrase or at least recognise the language, especially when coupled with the Celtic Cross and the GAA symbol.

4.2 The Appellant had no opportunity to rebut the Chancellor's objections, not having been made aware of them prior to the issuing of the judgment. Ms Gallagher QC did not argue that there had been procedural irregularity, but she was at pains to explain that the family had been concerned about the cost of seeking an oral hearing, taking seriously the information in the Registrar's letter about the implications of not agreeing to a determination on the papers. Mrs Newey had not addressed the particular objections raised in the judgment to the use of the Irish language in her written response to the Chancellor because she had been unaware of those particular points. What she said was:

"Thank you again for your consideration and satisfaction that the memorial bear the words 'in our hearts forever', however the family are still of the view that this should remain only in Erse. We are uncomfortable with adding a translation underneath, so as not to overcomplicate or condense the memorial, the statement in Erse only is not a political statement, nor is it designed to alienate others, it is simply in honour of both my mother's and my father's native tongue. We believe it is in keeping with the inclusion of the G.A.A memorial and those who come to remember our mother and one day our father will all understand it's meaning. We feel it would not be appropriate for Gaelic names to require an English translation and as such, the same applies to final messages inscribed from loved ones.
The use of only Erse is a representation of their immigration narrative, their cultural identity and their assimilation into English society and indeed the Parish. When speaking with my father regarding this matter, I asked why the Irish language was important to them, and he states that 'it is part of his identity' a marker for 'Irishness'. I suppose it's fair to say that language is not only a vehicle of interaction and intercommunication; it is also vehicle of symbolic value."

4.3 The rationale of the need for intelligibility should be considered in the light of the ready availability of technology and applications providing translations to visitors to churchyards, as recognised in Nutfield.

4.4 The Chancellor's reasons for distinguishing Nutfield were legally flawed.

4.5 An inconsistent approach is exhibited in Exhall churchyard because there is an untranslated phrase in Welsh on another memorial reading, *"Yn calonnau am byth cerddwch yn wasted a Duw"*, which, according to the Church's records, means, *"In our hearts forever. Always walk with God."*

4.6 The Chancellor's judgment is at odds with the reasoning set out in the three other consistory court judgments dealing with non-English wording (Re St Mary the Virgin, Eccleston [2017] ECC Bla 4, Nutfield and the later case of Re St Mary, Woodkirk [2020] ECC Lee 3).

4.7 In her oral submissions on behalf of the Appellant, Ms Gallagher QC sketched something of the history of Irish migration to Great Britain, informing the Court, in particular, of the prominent role of Irish people in Coventry, including Margaret Keane and her husband Bernard ("Bernie") Keane, who met in Coventry at the GAA. A recent exhibition put on in Coventry, called "Irish heart, Coventry home", she said, really encapsulated Margaret's life, as well as the lives of the many other people who had also emigrated in the 1950s and made their lives in Coventry. In 2018, Margaret received the prestigious international award of the GAA.

4.8 Ms Gallagher QC adopted the arguments of Mr. Moloney QC on behalf of Conradh na Gaelige i Londain. In particular, she stressed, as did the Society's material, the long history of the Irish language in England, including Coventry, and the role of Irish speakers in the conversion of England to Christianity. She also referred to the role and recognition of the language in the Good Friday Agreement and emphasised that it is the first language of the Republic of Ireland, its other official language being English and a protected language in Northern Ireland.

4.9 An important part of the context is also the fact that the Keanes had reserved a double grave plot in the churchyard and that, in considering carefully the design of Margaret's headstone, the family, including Bernie, did so in the knowledge that, in the fullness of time, the memorial would be a joint one to both Margaret and Bernie. The length of time taken to resolve the question of the memorial has caused distress to the family and, particularly, to Bernie, who feels acutely the sadness of not having achieved a permanent and fitting memorial to his beloved wife. We were therefore asked, if possible, to make our decision known as soon as possible, even if our written judgment had to follow afterwards. Accordingly, we announced our decision to allow the Appeal at the end of the hearing and now set out our reasons in this judgment.

4.10 Included in the court bundle was a Parish Statement from the incumbent of St Giles, the Revd Ms Gail Phillip, explaining that the Parochial Church Council ("PCC") had not objected to the petition. This decision had not been unanimous, but the difference of opinion related to the form of the cross initially proposed, rather than the inscription, which had occasioned no concern. She said that no objections were raised by the PCC to the use of the Irish language. The incumbent also pointed out in a later letter exhibited to Mrs Newey's Witness Statement that there are headstones in the churchyard with inscriptions in Welsh, Hebrew and Latin. The Welsh inscription includes the words "Yn ein calonnau ni am byth", which means "In our hearts forever"; there is no translation of this phrase, nor of the second part of the inscription which speaks, in Welsh, of the deceased walking with God.

4.11 Ms Gallagher QC relied upon Hill Ch's observations in the recent case of Woodkirk at [11], where he said:
"It should also be noted that the legal right to be buried in a Church of England churchyard is not restricted to English-speaking Anglicans. On the contrary, every parishioner and every

person dying in the parish is entitled by law to be buried in the parish churchyard or burial ground if there is one, regardless of whether they are a member of the Church of England or even Christian. This right is the corollary of the minister's duty to bury under Canon B 38 para 2. It extends to those whose names are entered on the church electoral roll of a parish at the time of their death: Church of England (Miscellaneous Provisions) Measure 1976, s 6(1). See M Hill, Ecclesiastical Law (Fourth edition, Oxford University Press, 2018) at para 5.53. One of the features of a Church by law established is that its civic functions are not confined to its members (howsoever defined) but extend to the population as a whole. This is particularly the case in relation to marriage and burial. It is unsurprising that with a mixed economy of burials, there are likely to be legitimate demands for an inclusive approach to what is written on headstones, and in what language. I incline to the view that the Church of England should lean towards generosity and expansiveness, provided that proposed inscriptions are not contrary to Christian teaching and doctrine."

She said that this principle forms the "legal backdrop" for consideration of the common law rationality and Human Right proportionality parts of her client's case, although she recognised that there is no right to erect a memorial over a grave.

4.12 It was drawn to the Court's attention that the Chancellor had amended the Coventry Churchyard Regulations in November 2020, adding a new requirement that *"any application for an inscription wholly or in part in a language other than English should be referred to the Chancellor through the Registry. The Chancellor will in such cases normally require an application to be made for a faculty."* These words did not appear in the 2019 version of the Regulations which was in force when Mrs Newey made her faculty petition.

4.13 Developing her Grounds of Appeal, Ms Gallaghger QC submitted that any Churchyard Regulations and faculty decisions must be Human Rights Act compliant. In this case, however, her first Ground of Appeal was founded on the common law and her submission was that the decision of Eyre Ch amounted to an unreasonable exercise of his discretion.

4.14 Under Ground 1, Mr Moloney QC, on behalf of the Intervener, Conradh na Gaeilge i Londain, adopted the Appellant's submissions and supplemented them, in particular with regard to arguments founded on the Equality Act 2010 ("EA 2010"). Further, pursuant to the Dean's Directions, the Secretary of the Society, Oisín Mac Conamhna, provided a Witness Statement which contained much useful contextual information about the Irish language, its relationship to other languages of the British Isles, the role of Irish people in the conversion to and development of Christianity in Great Britain, of the particular association between Coventry and Irish people and data relating to the prevalence of the speaking, understanding and learning of the Irish language in the Republic of Ireland, Northern Ireland, England and amongst the Irish diaspora worldwide. Of course, none of this material was available to the Chancellor, but we have found it of great assistance in apprehending and determining the issues in this appeal.

4.15 Mr Moloney QC submitted that the decision of Eyre Ch to refuse permission for an untranslated inscription in Irish on Mrs Keane's headstone was directly discriminatory on grounds of the protected characteristics of race and/or ethnicity, contrary to the terms of EA 2010.

4.16 Specifically, he said that the Appellant has been discriminated against to her detriment on the grounds of race by virtue of the decision that an Irish language inscription on her mother's headstone must be translated into English in order for it to be permitted, in circumstances where inscriptions in other languages on other gravestones in the same graveyard, and in other Church of England graveyards, are not so translated. This, he submitted, constitutes discrimination in the provision of a public service, within the ambit of section 19(1), read with section 31(3) EA 2010. Alternatively, it falls within section 29(6) of that Act.

4.17 Having considered the Comments of the Amicus Curiae, the Intervener further submitted that all churches are *"service providers"* for the purposes of EA 2010 and that, whilst sections 29 and 149(1) EA 2010 do not apply to the exercise of a judicial function, the ecclesiastical courts should generally give effect to rights arising under the Act : see the decision of the Court of Arches in Re Holy Trinity, Eccleshall [2010] 3 WLR 1761.

4.18 Further, the prohibition on racial discrimination is a peremptory norm of customary international law to which the Consistory Court and the Arches Court must have regard and which they must uphold in their judgments.

5. GROUND 2 – THE SUBMISSIONS OF THE PARTIES

In summary, the Appellant and the Intervener submitted:

5.1 In refusing to include the wording without an English translation, the Chancellor acted in a manner inconsistent with the European Convention on Human Rights, Articles 8 and / or 10, alone and / or in conjunction with Article 14, in violation of s.6 Human Rights Act 1998 ("HRA 1998"). No argument was pursued orally under Article 9 (freedom of religion).

5.2 Ecclesiastical courts are public authorities pursuant to s.6(3) HRA 1998 : see Re Crawley Green Road Cemetery, Luton [2001] Fam 308 at [6] and Re Durrington Cemetery [2001] Fam 33 at p.37A; as such, it is unlawful for the Consistory Court, and the Court of Arches, to act in a manner incompatible with a Convention right.

5.3 As to Articles 8 and 10 (guaranteeing the right to private family life and to freedom of expression), the correct test to be considered by a court in ruling on the lawfulness of an interference with those rights in the context of burials, and of rules about the marking of burial plots specifically, was considered in recent years by the Divisional Court of the High Court in two cases; they are R (Adath Yisroel Burial Society) v Inner North London Senior Coroner [2018] EWHC 969 (Admin); [2018] 3 WLR 1354 at [93-99] and R (Ul Huq) v. Walsall Metropolitan Borough Council [2019] EWHC 70 (Admin) at [98-99].

5.4 In Adath Yisroel Burial Society, in reasoning adopted in Ul Huq, the court underscored that where a public authority purports to place limitations on the Convention rights in question, those limitations will only be lawful if the following requirements are satisfied.

"(1) The limitation must be 'prescribed by law'. ... (2) The limitation must be necessary in order to serve one of the legitimate aims set out."

5.5 For the purposes of Article 8, the exhaustive list of *"legitimate aims"* capable of justifying an interference with the rights to private and family life, are set out in Article 8(2) as follows:
(a) the interests of national security, public safety, or the economic well-being of the country;
(b) the prevention of disorder or crime;
(c) the protection of morals; or
(d) the protection of the rights and freedoms of others.

5.6 Article 10(2) allows for an interference with Article 10 rights, only where necessary for:
(a) the interests of national security, territorial integrity or public safety;
(b) the prevention of disorder or crime;
(c) the protection of health or morals;
(d) the protection of the reputation or rights of others;
(e) the prevention of the disclosure of information received in confidence; or
(f) the maintenance of the authority and impartiality of the judiciary.

5.7 None of the Chancellor's reasons for refusing to allow an Irish only inscription constitutes one of the exhaustive legitimate aims on which basis it would be permissible to interfere with the Appellant's rights under Articles 8 or 10.

5.8 Article 14, providing for the enjoyment of Convention rights without discrimination on any ground, including race, language, national or social origin, association with a national minority or other status, was violated. Ms Gallagher QC, in her written and oral submissions, recognised that, in the event that the Court finds that there was a breach of Article 14, it may not be necessary to decide the stand-alone Article 8 and Article 10 issues, so Article 14 was addressed first. Mr Moloney QC sought to supplement, rather than replicate the Appellant's submissions, so he relied on but did not seek to expand Ms Gallagher QC's submissions on Article 14, the focus of his submissions on discrimination being the 2010 Act.

6. COMMENTS OF THE AMICUS CURIAE ON THE ORIGINAL SKELETON ARGUMENTS ON BEHALF OF THE APPELLANT AND THE INTERVENER

6.1 As recognised by Hill Ch in Woodkirk, the context for consideration of the approach to intelligibility and suitability of a Christian memorial is one in which there is a legal right to burial in Church of England churchyards applicable to a very wide category of persons.

6.2 There is no right to erect a memorial over a grave without either the permission of a Chancellor pursuant to a faculty or the permission of the incumbent where the Chancellor has delegated authority to the incumbent to grant permission for memorials under Churchyard Regulations.

6.3 There is no statutory basis for the creation of Churchyard Regulations.

6.4 The caselaw discloses two competing approaches to applications for a faculty where there is non-compliance with relevant Churchyard Regulations, the one to require *"exceptional", "powerful" or "substantial"* reasons for departure, the other simply to ask whether the proposed memorial is *"suitable"*. Hill Ch summarised the caselaw in Re St John the Baptist, Adel [2016] ECC Lee 8.

6.5 Ms Daly's comments include a helpful summary of the approach to inscriptions taken in all the diocesan Churchyard Regulations in England, the standard Regulations in force in the Church in Wales and the secular Local Authorities' Cemeteries Order 1977.

6.6 In addition to the cases of Nutfield and Woodkirk, a non English language inscription was considered in Eccleston, in which the following Irish words were authorised by faculty: *"Roses Gaelige in ghairdin mbe'arla"* (sic – the Appellant points out in her Updated Skeleton Argument[5] that there was a typographical error in the judgment and that the phrase should read *"Roses Gaeilge in ghairdin mBéarla"*) – *"Irish Roses in an English Garden".*

6.7 There is a further consistory court decision on Article 8 : Re St Mary the Virgin, Burghfield [2012] PTSR 593 where Bursell Ch, referring to the secular case of Jones v. The United Kingdom (Application no. 42639/04), held that Article 8 was not engaged where the subject matter of the proceedings was the removal of unauthorised graveside edgings and ornaments.

6.8 The Amicus Curiae submitted, in reliance on the principle of drawing a distinction between private and public spaces articulated by Baroness Hale in R (Countryside Alliance) v. Attorney General [2007] UKHL 52, that the nature of a churchyard is such that a memorial designed to commemorate a much loved deceased family member is located in a public space on what is likely to be a permanent basis and noted that the European Court of Human Rights in Jones and the Consistory Court in Burghfield have held that Article 8 rights were not engaged in the context of photographs and ornaments *"on the basis that the relevant decisions did not impinge on the applicant's relational or personal sphere in the manner or degree necessary to give rise to an interference engaging Article 8."*

6.9 She further submitted that, having regard to the caselaw set out in the Skeleton Arguments and her own Comments, the Appellant had not explained the specific basis upon which it is said that the decision of the Chancellor to permit the requested Irish inscription but to require an English translation impacted upon the Appellant's personal or relational sphere such that it constituted an interference engaging Article 8 rights.

6.10 No direct authority on engagement of Article 10 by reason of a restriction placed upon the content of a gravestone inscription has been found and the case of Sükran Aydin and others v. Turkey (49197/06) was distinguished as involving a total prohibition on the use of Kurdish coupled with criminal sanctions.

6.11 The Amicus Curiae noted that the Intervener did not address the exceptions to the application of s.29 EA 2010 and, specifically, s.31(10) and Schedule 3, para.3, disapplying s.29 in relation to *"a judicial function".*

7. ISSUES FOR DETERMINATION

7.1 Was the decision of the Consistory Court, in all the circumstances, including the Chancellor's stated reasons for requiring an English translation and the provisions and objectives of the Equality Act 2010, an unlawful exercise of the Chancellor's discretion?

[5] Para 75

7.2 Was the Appellant's petition within the ambit of Arts 8 and / or 10? If so, did she suffer discrimination / fail to receive equal treatment within the terms of Art 14?

7.3 And/or were the Appellant's rights under Articles 8 and 10 of the European Convention on Human Rights engaged? If so, were they interfered with? If so, was the interference justified, proportionate etc?

7.4 What factors and principles should Chancellors take into account and apply:
(a) when making schemes of delegation (commonly known as *"Churchyard Regulations"*) and;
(b) when determining faculty petitions,
respectively, concerning inscriptions in languages other than English?

7.5 We address these questions below.

8. ISSUE 1 - Was the decision of the Consistory Court, in all the circumstances, including the Chancellor's stated reasons for requiring an English translation, and the provisions and objectives of the Equality Act 2010, an unlawful exercise of the Chancellor's discretion?

8.1 As Ms Gallagher QC made clear in her submissions, Ground 1 of the Appeal was based on the common law principle that the exercise of a judicial discretion must not be unreasonable, in the legal sense of that word. This was, essentially, a rationality challenge, akin to the public law concept of Wednesbury unreasonableness – a decision which no reasonable tribunal could have reached.

8.2 Demonstrating unreasonableness of this kind, such as to establish that a decision was legally flawed, is a high hurdle. The Court on appeal will not set aside the judgment of a Chancellor simply because it might have reached a different conclusion as to how to exercise the discretion to grant or withhold a faculty and / or, as here, as to the terms upon which a faculty was to be granted.

8.3 We are satisfied that the Appellant and the Intervener have overcome that high hurdle.

8.4 In order to assess the reasonableness of a judicial decision, it is necessary to consider, not only the result, but also the reasoning of the tribunal, whether it was based on evidence and the overall proportionality of the decision. If the reasons disclose legal flaws, or the result is so disproportionate as to defy rational justification, then the decision will be legally flawed.

8.5 At first blush, the result of the Chancellor's decision may not appear to be in the class of those which are legally flawed in the sense set out in the above paragraphs. The Appellant was granted her wish insofar as she was permitted to include on the memorial the Petition Inscription. That permission was tempered by the requirement for an English translation. The Appellant and her family considered the suggested arrangement to be visually less pleasing because it would, they felt, crowd the memorial. More fundamentally, they also considered that such an imposition undermined their strong desire and purpose to articulate a message in the Irish language, as a tribute and message to Margaret Keane from her loving family and as an expression of her Irishness. They recognised that Irishness had been the wellspring of much of what made her a unique human being, a heritage which she and they had shared and

would, in the hearts and minds of the family, continue to share even after death. The Chancellor acknowledged in his judgment the importance of the family's Irish heritage and the significance of that heritage for Margaret Keane's life and public service. It is clear, from paragraphs 9, 10 and 13 of the Judgment that he had it in mind.

8.6 Nonetheless, the Chancellor voiced a concern about the use of Irish words untranslated in his preliminary observations and then developed this concern in the Judgment.

8.7 Pausing there, it is instructive to ask, as Turner Ch did in argument, *"What is a monument over a grave? What is it there to do?"* Answering his own question in the terms of the Church of England's Churchyards Handbook, he said: *"To honour the dead, to comfort the living and to inform posterity."* None of the counsel disagreed with this formulation and we endorse it as a usefully pithy statement of the purpose of such monuments which we have used to inform our consideration of Ground 1, as well as aspects of the Human Rights issues. We commend the summary to chancellors and to all others involved in the consideration of memorials within the faculty jurisdiction.

8.8 Taking the first and third of those purposes in particular, it is not irrational, in itself, to consider the intelligibility of a proposed memorial. Petchey Ch raised such a concern at an early stage in consideration of the petition in Nutfield. He adopted a procedure which clearly alerted the petitioners to his concerns and the reasons for them and invited further representations. They asked for the opportunity to address the points at an oral hearing and the petition was, at that point, transferred to the Deputy Chancellor. Ms Gallagher QC said that she could not fault that way of proceeding; it had been fair and enabled those petitioners to understand the points which they had to meet. Before considering the process adopted in relation to Mrs Newey's petition, we take the opportunity to endorse Petchey Ch's approach with regard to reservations about a proposed memorial generally, enjoying, as it does, the merits of transparency and fairness. It is, of course, a matter for individual chancellors in individual cases to judge whether, having made preliminary observations, they have thought and said so much as to require them to recuse themselves and transfer the matter to a deputy; cases are likely to vary, but it is a wise course for a judge in such circumstances conscientiously to ask him or herself the question.

8.9 Here, Mrs Newey's response to the Chancellor's preliminary concerns negatived any political motivation or desire to alienate others and explained her choice in ways which readily fall into the three purposes of memorialisation articulated in the Churchyards Handbook, although neither she nor the Chancellor referred to that publication. In spite of this, the Chancellor clearly had fundamental concerns about the likely effect of the memorial and this assessment found expression in paragraph 16 of the Judgment. Given Mrs Newey's stated position in her response, this is the passage which has caused her the greatest sadness along with her family and the wider Irish community represented by the Intervener. The Chancellor's view that there was *"a sad risk that the phrase would be regarded as some form of slogan or that its inclusion without translation would of itself be seen as a political statement"* was not founded on any evidence before him. The parish had not objected, nor had anyone else, on these (or any other) grounds and the petitioner had expressly stated that the family's intentions were apolitical. Paragraph 16 of the Judgment, however, makes it clear that the Chancellor foresaw such difficulties as a result of his conclusion that the phrase on

the headstone would be *"unintelligible to all but a small minority of readers…in English speaking Coventry."* Again, this conclusion was not based upon evidence. The Dean permitted evidence to be adduced by the Intervener of the history and status of the Irish language and of the Irish community within England generally and Coventry in particular and this material was of assistance to the Court. The Intervener's evidence establishes that there are more than 5 million second or third generation Irish residents in England and that, at the 2011 census, c.1.1% of residents of England were born in Ireland, with over twice that proportion of Irish born Coventry residents; the cultural life of Coventry reflects this statistic in many ways, including the holding of regular Irish language classes in the City. Mr Mac Conamhna, the Intervener's witness, also gave evidence of the wide international take-up of opportunities to learn Irish online and of the ready availability of accurate online translations of the phrase "In ár gcroíthe go deo". Had the Chancellor voiced his precise concerns, the family would have had the chance to assemble evidence on these historical, societal and linguistic matters. Either the fears about politicisation were in the Chancellor's mind at the time of his original comments but were not fully articulated, or they manifested themselves later. In either case, having regard to the overriding objective stated in Rule 1 of the Faculty Jurisdiction Rules 2015 for faculty petitions to be dealt with fairly and proportionately (amongst other things), it would have been desirable for Mrs Newey to have been aware of them when deciding whether or not to agree to a determination without a hearing.

8.10 As paragraph 17, which begins *"Accordingly…"* makes clear, the reasoning in paragraph 16 was fundamental to the decision to dismiss the petition as originally sought and require translation of the inscription. The sentiments expressed in the Judgment, which were not founded on evidence, seem to us to run so strongly counter to the reality of twenty first century Britain, a multi-cultural society with ready access to the internet as a source of instant translation, and the cultural make-up of Coventry, as to have crossed the boundary from the realm of a permissible exercise of discretion into the territory of unreasonableness in the legal sense of that term.

8.11 Turning to consider the relationship of the Judgment to other consistory court decisions, the Judgment dealt with Nutfield at paragraphs 14 and 15, set out above. The Chancellor was not bound by the judgment of a consistory court and naturally there were differences between the cases. However, his reasons for distinguishing it underline and presage the reasoning in paragraph 16, specifically in relation to the Irish language, the nature of Coventry and the propensity for the phrase to be misread as a political slogan, conclusions which we have found were not properly open to him. To that extent, his treatment of Nutfield does not add to the Appellant's argument. It is, however, significant that there is a Welsh language memorial in the churchyard at Exhall which includes longer phrases in a non-English language (one of them identical in meaning to In ár gcroíthe go deo); we presume that the Chancellor was unaware of this fact but it reinforces the unevidenced nature of the relevant reasoning and highlights the disproportionate result. The Amicus Curiae, Ms Daly, also helpfully drew the Court's attention to the decision of Bullimore Ch in Eccleston on the point of language as well as wider issues relating to Churchyard Regulations. In that case, a family of Irish heritage were permitted the inscription "Roses Gaelige in ghairdain mbe arla" (*sic*[6]) "Irish Roses in an English Garden", the Chancellor commenting that *"someone 'without the Gaelic', but with a*

[6] See paragraph 6.6 above

little imagination, would, I believe nonetheless gather the thrust of the inscription, even if mystified by the final word." Nothing turns on the fact that this judgment was not referred to by Eyre Ch in this case; he was not assisted by counsel, as we have been, but what the case does illustrate is another example, like Nutfield and the very recent decision in Woodkirk, of a case in which a different approach was taken to the question of intelligibility. The existence of these decisions and the presence of Welsh, Latin and Hebrew inscriptions in the Exhall graveyard strengthen the impression that the decision in this case was disproportionate and wholly attributable to the flawed reasoning in paragraphs 16 and 17 which we have ruled upon above.

8.12 We accept Mr Moloney QC's submissions, based on the remarks (albeit *obiter*) of this Court in Eccleshall at 1787C-D to the effect that, whilst the public sector equality duty under what is now the Equality Act 2010 does not apply to the exercise of judicial functions, the consistory courts *"should generally give effect to"* that duty, namely to eliminate, amongst other things, discrimination as prohibited by or under the Act. The Court was there dealing with discrimination by reason of physical disability and our attention was drawn to the routine consideration of such matters in petitions for reordering and related matters, which is also in line with our experience. There is no reason why this approach should be confined to that form of potential discrimination and racial equality of treatment is just as important.

8.13 We also accept Mr Moloney QC's submissions, that Dzieziak v. Future Electronics Ltd UKEAT/0270/11/ZT and Kelly v. Covance Laboratories Ltd UKEAT/0186/15/LA, employment cases in which the appellants had been unreasonably prohibited from speaking in their native languages when at work, establish that there can be racial discrimination when different rules are imposed in respect of different languages. We also accept that such discrimination may be direct when linked to racial origins. Whether or not there is discrimination in any particular case will be a question of fact. The Chancellor did not ask himself whether his decision would give effect to the public sector equality duty in line with the dictum in Eccleshall, which is unfortunate, since that step would have introduced a sense check as to the effect of the decision and the Chancellor's underlying reasons. We endorse the approach of the Court of Arches in that decision and stress the importance of applying it as a matter of principle in relation to all potential classes of discrimination, including, but not confined to physical disability.

8.14 We are not persuaded by Mr Moloney QC's further submission to the effect that the decision falls foul of s.29 EA 2010 because we find it difficult to regard the grant or withholding or imposition of terms upon a faculty for a memorial by the consistory court as the provision of a "public service", especially since the Act expressly excludes judicial functions from the scope of S.29 (see S.3 and Schedule 3 Part 1).

8.15 Turning to the substance of the discrimination charge, we find that the effect of the Chancellor's decision was to discriminate directly against the Appellant on the basis of her race. Evidence of this may be found in paragraphs 16 and 17, as we have said; an assumption seems to have been made that viewers of the inscription, realising that it was in Irish, would conclude that it was a political slogan, which we have found not to be based upon evidence or any other rational footing. The requirement for translation was, therefore, based upon Irishness, a racial characteristic. It is in this context that the presence in Exhall churchyard of

other memorials bearing untranslated languages, including Welsh - another language of the British Isles - Latin and Hebrew, and the different approaches in the earlier cases of Nutfield and Eccleston, are important because they aggravate the impression that the decision was entirely based on racial matters. Putting it at its lowest, the decision did not give effect to the public sector equality duty as required by the Court of Arches in Eccleshall and, as we have said, the reasoning in the Judgment simply compounds the error rather than providing good reasons for departure from the Eccleshall general principle.

8.16 For all these reasons, we have reached the conclusion that the Judgment was unreasonable, flawed in the legal sense and should not stand. Accordingly, we allowed the Appeal on Ground 1. The Parties and the Amicus Curiae were content that, in the event that we found one or more of the Grounds made out, we should redetermine the petition. Ms Gallagher QC made clear that her client had no objection to a condition requiring the provision of an English translation in the parish record and we announced our decision to allow the Appeal and to grant a faculty for the erection of the memorial in the terms sought, subject to that condition. We wish to make it clear that, in reaching this decision, we have not taken into account comment in the Press and elsewhere which followed the decision of the Chancellor. We have, accordingly, not had regard to or relied upon some of the materials of this nature in the Court Bundle and we wish to remind all with an interest in such matters, inside and outside the Church of England, of the need for restraint in commenting on court cases which have not reached final determination.

9. Was the Appellant's petition in the ambit of Arts 8 and/or 10? If so, did she suffer discrimination / fail to receive equal treatment within the terms of Art 14?

9.1 Article 14 of the Convention provides as follows: *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

9.2 Ecclesiastical courts are public authorities pursuant to s.6(3) HRA 1998; as such, it is unlawful for them to act in a manner incompatible with a Convention right. This principle has been accepted in the Consistory Court decisions in Re Crawley Green Road Cemetery, Luton [2001] Fam 308 at [6] and Re Durrington Cemetery [2001] Fam 33 at p.37A, is plainly right and we endorse it.

9.3 Article 14 confers a parasitic right which only comes into play when a set of circumstances is within the "ambit" of one or more of the Articles. The operation of Article 14 does not require a breach of one of the other Articles to be made out, merely that it is *"linked to or (as it is usually described) within the scope or ambit of one or other of them"* as Lord Wilson explained in Mathieson v. Secretary of State for Work and Pensions [2015] 1 WLR 3250, paragraph 17. He said:

"Mr Mathieson does not need to establish that the suspension of Disability Living Allowance amounted to a violation of Cameron's rights under either of those articles: otherwise article 14 would be redundant. He does not even need to establish that it amounted to an interference with his rights under either of them. He needs to establish only that the suspension is linked to, or (as it is usually described) within the scope or ambit of, one or other of them. How can a public authority's action be within the scope of an article without

amounting to an interference with rights under it? Carson v. UK (2010) 51 EHRR 369 provides an example. There the Grand Chamber of the European Court of Human Rights explained at para 63-65 that Article 1 to the First Protocol did not require a contracting state to establish a retirement pension scheme but that, if it did so, the scheme fell within the scope of A1P1 and so had to be administered without discrimination on any of the grounds identified in article 14."
Etherton MR in Smith v. Lancaster Teaching Hospitals NHS Foundation [2018] 2 WLR 1063, paragraph 56 said that the question insofar as ambit is concerned is whether the connection or link between the facts and the provisions of the Convention conferring substantive rights is *"more than merely tenuous"*.

9.4 Notwithstanding the Parties' primary Human Rights submissions being based upon Article 14, we heard detailed submissions on whether or not Articles 8 and / or 10 had been infringed and / or violated. We deal briefly with those submissions below, noting here that the questions are not straightforward. It is clear, from consideration of the submissions on Articles 8 and 10, that the issues before us are certainly within the ambit of those Articles, since the Appellant's chosen inscription involved questions in respect of which the connection with those rights was *"more than merely tenuous"*. As Ms Gallagher QC conceded, there is no right to erect a memorial over a grave: see Re Woldingham Churchyard [1957] 2 AER 323 at 324B. Applying the principle enunciated by Lord Wilson, however, if the Church of England provides a scheme whereby permission for such memorials may be granted, it must be administered without discrimination on any of the grounds identified in Article 14.

9.5 Next, we must consider whether there was discrimination in respect of one of the relevant factors and, if so, whether it was justified. We were provided with many examples of discrimination on grounds of racial or national origin but none was directly analogous to this case. In our opinion, the essence of the principle is stated in the case of Carson v. UK, paragraph 61 as follows:
" …in order for an issue to arise under art.14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."
Elias J in AM (Somalia) v. Secretary of State for the Home Department [2009] EWCA 634, paragraph 34, put it even more simply: *"like cases should be treated alike and different cases differently"*. We realise that similarity of treatment in relation to the form of memorials can present practical problems for chancellors because of lax past practice on the part of incumbents or changes in policy brought about by revisions to Churchyard Regulations, but this case demonstrates the importance of ensuring that when difficult decisions need to be made, as a result of which individual petitioners may be disappointed, chancellors must ensure that they do not arrive at results which are discriminatory in terms of the protected characteristics under the Convention or the EA 2010. The exercise of judicial discretion is a matter for judges, but the law requires them to consider questions of discrimination in the context of both domestic and Convention legislation and make sure that decisions are justified and proportionate.

9.6 Our findings under Ground 1 – unreasonableness at common law and discrimination within EA 2010 - mean that we must also find that the Chancellor's decision breached Article 14. Expressing this finding in the terms of the Human Rights caselaw, our earlier findings mean: first, that it is impossible to identify any legitimate aim being advanced by the decision, since the conclusions about adverse societal effects were unsupported by evidence and / or were inherently based on race; second, that there was no rational connection between the Chancellor's concerns and the requirement for English translation, since the concerns were not based on evidence; even if there had been a legitimate aim and a rational connection, concerns over lack of intelligibility were capable of being met by ready public access to translations via the internet; and the balance struck was unfair, having regard to the lack of actual harm and the effect upon the Appellant and her family who had given evidence in the response letter of what the Petition Inscription meant to them. Therefore the Appeal succeeds under Article 14 which was the primary head argued by the Appellant and Intervener within Ground 2.

10. Were the Appellant's rights under Articles 8 and 10 of the European Convention on Human Rights engaged? If so, were they interfered with? If so, was the interference justified, proportionate etc?

10.1 Article 8 provides as follows:

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

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

10. 2 Art. 10 provides as follows:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

10.3 Although many cases under these provisions were addressed in argument, it must be noted at the outset:

(i) that there is no previous Human Rights case, religious or secular, in which freedom of linguistic expression has been considered in relation to gravestones;

(ii) that, in the time allotted for the hearing of this case, in which the four counsel for the Appellant and the Intervener were appearing *pro bono*, they stressed that it was not possible

to cite every potentially relevant decision under these Articles and that they had therefore been selective; submissions on these articles were necessarily constrained by time;
(iii) that the Parties' Human Rights cases were put principally on the basis of Article 14.
We have found in favour of the Appellant and the Intervener on Ground 1 and under Article 14. Bearing in mind the limitations set out in (ii) and (iii), what follows in relation to Articles 8 and 10 is not essential to our decision and we have dealt with the issues arising under these articles quite briefly, principally in order to extract some principles of decision making which we hope will be of assistance to chancellors faced with similar questions in future and when considering their Churchyard Regulations in the light of this judgment.

Article 8

10.4 The first question is whether Article 8 is engaged in the determination by the court of a petition for a memorial over a grave. Our finding that the exercise has more than a tenuous link with the right to family and private life sufficient to engage Article 14 does not mean that we have found that Article 8 was engaged or infringed.

10.5 The essential question arising from caselaw is whether the function of memorialisation in a churchyard is sufficiently within the private space protected by Article 8 or whether the public element takes it outside this protection. The Amicus Curiae drew the Court's attention to R (Countryside Alliance) v. Attorney General [2007] UKHL 52, a case on very different facts (hunting ban) but where Baroness Hale helpfully encapsulated the issue as follows: *"116. ...Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view. Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them. But that falls some way short of protecting everything they might want to do even in that private space; and it certainly does not protect things that they can only do by leaving it and engaging in a very public gathering and activity."*

10.6 Ms Daly submitted that Baroness Hale draws a distinction between the private space, either physical or psychological, within which individuals can develop and relate to others around them, and public activities, whereby Article 8 ECHR does not protect things that individuals can only do by leaving their private space. Ms Gallagher QC did not seek to challenge Baroness Hale's formulation, accepting in argument that the Court needs to make a judgment as to where gravestones fall on the public / private spectrum, but she did submit that the cases demonstrate the fact sensitive nature of the issue.

10.7 Before considering some of the earlier cases, none of which is exactly in point, we return to the agreed threefold purpose of a grave memorial: to honour the dead, comfort the living

and inform posterity. When a headstone is erected in a Church of England graveyard, these purposes are being carried out in a location to which members of the public have access. The public will comprise all comers, including faithful regular and occasional worshippers at the church, other families whose relatives are buried in the graveyard and other visitors. The last category might comprise a great many people in an historic city, or hardly any in a remote rural location, and may also fluctuate over time as the importance and shape of places wax and wane with development, depopulation and other long term social changes. The three purposes remain over time but may, themselves, vary in intensity; thus, comforting the living will perhaps be dominant in the minds of a bereaved family when the headstone is erected but informing posterity may become more important once the immediate generation of bereaved has, itself, passed and future generations may be inspired more by respectful curiosity to find some expression of the lives of their own and other peoples' ancestors. The first purpose infuses the other two and must be considered in the Christian context of the setting of a Church of England graveyard. Christians honour the dead because of our belief in the unique importance of every living and departed soul to God who created men and women in his own image and redeemed them in the person of the incarnate Son of Man, Jesus Christ. Therefore the public context is Christian, even if, for some families seeking faculties (not the family in this case) they do not approach the matter from a Christian perspective. The territory is sensitive and clergy and chancellors have the difficult task of reconciling legal principle with personal wishes in a public context which is distinctively Christian. In particular, decision makers need to have an eye to the longer view and the public realm in ways which may be less apparent to a family caught up in their bereavement.

10.8 There are four cases which come closest to the subject matter before us.

10.9 The case of Re St Mary the Virgin, Burghfield [2012] PTSR 593 concerned an application for a faculty for the removal of unauthorised graveside ornaments and edgings used to fence off graves. The faculty was granted despite opposition from two of the families affected. The Chancellor relied upon Jones v UK (Application no. 42639/04, 13 September 2005) in finding that neither Article 8 nor Article 9 was engaged. He said, at paragraph 18:
"The majority of reported cases considering the application of the European Convention on Human Rights in churchyards have been in relation to petitions for exhumations: see Re Durrington Cemetery [2001] Fam 1; Re Crawley Green Road Cemetery, Luton [2001] Fam 308. However, Jones v United Kingdom (application no. 42639/04) before the European Court of Human Rights was concerned with a question of a memorial, although in a local authority cemetery. In that case Mr Jones complained that his rights under Articles 8 & 9 had been breached when the Halkyn Community Council refused him permission to place a memorial in its cemetery which incorporated a photograph of his daughter. In declaring Mr Jones' application inadmissible the court stated in relation to Article 8: 'The Court would observe that the exercise of Article 8 rights of family and private life pertain, predominantly, to relationships between living human beings ... There is no right as such to obtain any particular mode of funeral or attendant burial features. In the present case, the Court recalls that the applicant's daughter was buried in a cemetery owned and managed by a burial authority. The regulations applicable to the cemetery required prior approval of all headstones and memorials. Notwithstanding the applicant's personal preference for the addition of a photograph to the headstone and the fact that other burial authorities apparently gave permission for such features, the Court does not find that the refusal of permission in this case can be regarded as

impinging on the applicant's personal or relational sphere in such a manner or to such a degree as to disclose an interference with his right to respect for his family or private life…….'

19. In my view it is equally clear, and for similar reasons, that neither Article 8 nor 9 is engaged."

10.10 Ms Gallagher QC pointed out that Jones was only an admissibility decision. She did not argue that it had been wrongly decided although she suggested that today the European Court might well decide the case under paragraph (2) rather than (1) of Article 8. We express no view on that point. As the Amicus Curiae said, when asked whether the Court should regard Jones as out of date, we do not have to decide that question as this is not a photograph case. She submitted that writing is inherently different and it may be an expression of community belonging in a way that a photograph is not. There are other considerations relating to photographs and we must stress that we make no ruling about photographs on graves as this is a separate and complex question which should be considered, if necessary, in the context of a photograph case.

10.11 A more modern, fully argued case is Ghai v Newcastle City Council [2009] EWHC 978 (Admin), in which the Claimant submitted that the prohibition on his desire to have an open air cremation amounted to an interference with his right to respect for private and family life under Article 8. Having found that Article 8 *"may afford protection to certain funeral arrangements"* or a *"right to have a burial or cremation take place in a specific way"* Cranston J found that the prohibition did not engage Article 8 for several reasons, including the following:
"138... Cremation by an open air pyre has a public character, taking place outside and in daylight. The prohibition against the burning of human remains outside a crematorium is in place to ban cremations taking place in public in situations where they are likely to cause offence to others. As Baroness Hale has explained Article 8 does not protect things that an individual can only do by leaving private space and engaging in a public activity. As such, cremation by means of an open air pyre lies outside the private sphere of a person's existence protected by Article 8. ...
141. In any event, working from general principle it seems to me that in some circumstances the respect accorded to private (and indeed family) life in Article 8 can extend to aspects of funeral arrangements. That is because they are so closely related to a person's physical, psychological or familial identity. Legislative regulation could impact so significantly on the personal or relational sphere that it constitutes an interference which engages Article 8. In this case, however, Article 8 does not extend its protection to this claimant's wish to have an open air funeral pyre. That is because it involves his stepping outside those spheres. The manner in which it would be conducted would mean that it was no longer private or familial. The description which the claimant and others such as Dr Ballard paint is of a wide circle of mourners participating. The event would assume a public character and as such would not attract Article 8 protection."

10.12 In R (Ul Haq) v. Walsall Metropolitan Borough Council [2019] EWHC 70 (Admin) the Defendant burial authority had refused permission for the claimant to erect a four-inch raised marble edging around his father's grave in a municipal burial ground. The request arose from the Claimant's religious belief that the grave was sacrosanct and that stepping on it was an

offensive act that must be prevented. The claimant challenged the burial authority's cemetery policy on the basis that it constituted a breach of Articles 8 and 9 ECHR. In respect of Article 8, the claim was made on the basis that the Defendant's refusal to permit his father's burial in his favoured manner *"according to his moral, religious and familial views"* amounted to an unjustified interference with his Article 8 rights. The Claimant accepted that the arguments under Article 8 overlapped considerably with the arguments under Article 9, and the judgment focussed on Article 9. The High Court rejected the claim and found that as the intervention with Article 9 rights was justified, it followed that there was no breach.

10.13 Drawing together what can be gleaned from these cases, we note the statement in Jones that there is no legal right as such to obtain any particular mode of funeral or attendant burial features. This accords with the domestic ecclesiastical caselaw. As Cranston J recognised in Ghai, however, the Jones statement does not provide an automatic answer to the Article 8 question and the public / private sphere judgment is nuanced and fact sensitive. On the facts in that case, he found that the claimant's proposal stepped outside the private space and involved public activity.

10.14 Ms Gallagher QC submitted that this case involves a public expression of a private wish and she relied on the case of Peck v. The United Kingdom 36 EHRR 41, a case on extraordinary and wholly different facts concerning the publication of CCTV footage of the applicant attempting to commit suicide in a town centre location. She placed more reliance on cases concerning traditional ways of life but these decisions were not before the Court. Her point, however, related to the cultural aspect of the particular expression sought in this case.

10.15 As we have said, it is not necessary for the Court to reach a definitive ruling as to whether Article 8 was engaged in this case and we do not do so. What follows are our thoughts, having heard some, but not full, argument on the point. On balance, we consider that the erection of a memorial over a grave in a churchyard which is a public place and likely to remain so in perpetuity is an activity in which the grieving family chooses to make a public statement about their deceased relative. The point is to communicate something about the essence of the person whom they have lost to present and future generations within the dignified communal setting of a churchyard. The feelings behind the details of the memorial will be intensely personal, but will always include an element of wanting to celebrate the life of the deceased within the space which the family shares with wider society. The public significance of memorials, including 'private' ones, is gaining recognition, for example, in ecclesiastical and secular decisions about memorials of one sort or another which are "contested" in the context of contemporary concerns about racial justice: see Re St Margaret, Rottingdean [2020] ECC Chi 4.

10.16 We note the interesting decision of the Israeli Supreme Court in Jerusalem Community Funeral Society v. Lionel Aryeh Kestenbaum (1991) 46(2)PD 464, which Mr Moloney QC drew to our attention. The Court stated that *"A gravestone is not a public structure, but is primarily a symbol connecting the living with the dead"* and, accordingly ruled that the appellant was permitted to inscribe his wife's name in English, rather than Hebrew script. This case was decided under domestic Israeli law rather than the Convention and concerned a secular cemetery in a different cultural, as well as legal, context.

10.17 We conclude that the better view is that the regulation of headstones in churchyards is an activity that is beyond the purview of Article 8 but in reaching this conclusion we are not saying that Ms Gallagher QC's points about cultural identity go unaddressed. Article 14, as we have already held, applies to the process of determination to secure recognition of cultural identities and protection of the characteristics of race, national origin, and minority or other status, amongst other things.

Article 10

10.18 Here again, there are no directly analogous cases. It is established that the protection of Article 10 extends to written, as well as spoken words. Beyond that, Ms Gallagher QC described the issue of gravestones in argument as "a jurisprudential blank slate". We observe that nearly all the cases cited and included in the extensive bundle of authorities involved more extreme facts where communication was prevented or stopped: destruction of books (Handyside v United Kingdom (1976) 1 EHRR 737); restraint of publication in contempt of court (Sunday Times v. United Kingdom (1979) 2 EHRR 245 – the thalidomide case); Kurdish language play banned (Ulusoy v. Turkey (Application No. 34797/03, 3 May 2007); criminalising election addresses in Kurdish (Sükran v. Turkey (Application No. 49197/06, 22 January 2013); refusal of Kurdish language newspapers to Kurdish prisoners (Yurtsever v. Turkey (Application No. 14946/08, 20 January 2015). The only case which was, arguably less extreme was Sinkova v. Ukraine (Application No. 39496/11, 27 February 2018) where the applicant was prosecuted for broadcasting a "performance" as an environmental protest, in which she fried an egg over the Tomb of the Unknown Soldier; it was, apparently, not disputed that her conviction amounted to an interference with her right to freedom of expression, but it was found to be justified and reconcilable with her freedom of expression. In answer to the point about the generality of cases involving more extreme forms of interference, Ms Gallagher QC said that the authorities cited do not convey the full breadth of the caselaw on Article 10. Whilst we do not doubt that, we note that in this case, the Chancellor permitted Mrs Newey to include her chosen Irish words; the intrusion (to use a legally neutral word) was more limited than a total ban or a requirement for English only and the degree of intrusion, it seems to us, must be relevant to the question of whether or not there has been, in law, an interference. Ms Gallagher QC vigorously contended that it is fundamental to the consideration of Article 10 in the caselaw that any interference in relation to the form of communication prima facie amounts to an interference for the purposes of Article 10 but the cases cited do not deal with partial or qualified interferences and are therefore distinguishable. She said that there had been prejudicial interference because the Chancellor's version would dilute the family's message. She also raised in oral argument the further point of the financial ramifications of including more words, although we note that this objection was not raised at the time nor in the pleadings.

10.19 In the circumstances, where there was some curtailment of argument and where it is not necessary to reach a concluded determination on Article 10, we do not intend to make a ruling on the point. Once again, to the extent that there are concerns about the protection of expressions related to protected characteristics, we reiterate that Article 14 supplements the domestic law principles set out under Ground 1.

11. What factors and principles should Chancellors take into account and apply:
(a) when making schemes of delegation (commonly known as *"Churchyard Regulations"*) and;
(b) when determining faculty petitions,
respectively, concerning inscriptions in languages other than English?

11.1 We turn, finally, to attempt to draw together the principles derived from our reasons above and from the work undertaken by the Amicus Curiae in particular in relation to Churchyard Regulations. We were very grateful to Ms Daly for her comprehensive research of the Regulations across the English Dioceses and the Welsh Regulations.

11.2 We start by considering what "Churchyard Regulations" are and how they should be used in decision-making.

11.3 The cases reveal different approaches to Churchyard Regulations. Hill Ch in St John the Baptist, Adel said:
" The nature and purpose of Churchyard Regulations do not seem to be fully understood. As their full title makes plain, they are an instrument of delegation pursuant to which the discretion to permit the introduction into churchyards of certain categories of memorial is devolved from the chancellor to the parish priest. Parochial clergy have delegated authority to allow memorials which fall within the certain specified categories; but they are perfectly at liberty, should they wish, to decline to permit a memorial even though it complies with the Regulations. However, if a priest purports to permit the introduction of a memorial which does not comply with the Regulations, the permission will be a nullity. See by way of example, Re St Mary's, Wath [2015] ECC Lee 8, where an order was made for the removal of kerbstones introduced without authority."

11.4 We agree with and endorse that statement of principle, only adding the qualification that if a parish priest declines to permit a memorial which is in compliance with the Regulations in place for the churchyard or diocese, then he or she should have proper reasons for doing so and it is essential, in particular, not to infringe Article 14 by discriminating against particular applicants on any of the protected grounds. We return to this matter below

11.5 Hill Ch also discussed the approach to determining faculty petitions for departures from the categories of memorial permitted by Churchyard Regulations. He noted differing approaches in the judgments of the consistory courts of a number of dioceses, with some treating their regulations as requiring exceptional circumstances to be demonstrated by a petitioner seeking to introduce a memorial which went outside the scope of delegation authorised by the relevant regulations. He favoured the approach of McGregor Ch in Re St John's Churchyard, Whitchurch Hill (Oxford Consistory Court, 31 May 2014) para 16, as follows: *"As is the case with any petition, the burden of proof lies on the petitioner to show why a faculty should be granted to authorise the particular proposal set out in the petition."* Hill Ch continued, at paragraph 7, saying: *"The terms and content of the Churchyard Regulations will, of course, be a relevant factor – often highly relevant and doubtless on occasion determinative. But they will be one of the constellation of infinitely variable factors which the court must consider on a case-by-case basis."*

11.6 A similar approach was taken by Bullimore Ch in St Mary the Virgin Eccleston who approached the suitability of the memorial *"on its own merits, the only constraint being the inability of the court to permit something which is contrary to, or indicative of any departure from, the doctrine of the Church of England in any essential matter"*. In St Mary, Kingswinford Mynors Ch said at paragraph 47, that mere non compliance with standards can *"never be of itself the only basis on which to oppose a faculty petition……It is thus necessary to consider whether the particular memorial in question is inherently desirable, or at any rate not undesirable, whether or not it complies with the standards."*

11.7 A rather different approach has been taken in other cases (see e.g. Re St Paul, Rusthall [2016] ECC Roc 2 and Re St Mary, Prestwich [2016] ECC Man 1) where it has been said that there needed to be a *"powerful reason"* for approving departures from the Churchyard Regulations.

11.8 We consider that the right approach is the merits-based one. Clearly, any Regulations in place for the parish or diocese concerned will be part of a matrix of relevant considerations, but we do not think that consideration of a faculty petition should start with a presumption against allowing a memorial outside the parameters of the Regulations, for the reasons articulated in the first instance judgments cited in paragraphs 11.5 and 11.6 above.

11.9 When framing Regulations for parishes or dioceses and when determining applications to clergy and faculty petitions to chancellors, it is essential to ensure that the Convention principles of fairness, equality and proportionality are followed. These principles accord with the approach of domestic law, as set out under Ground 1.

11.10 Specifically with regard to written inscriptions, most of the Regulations which the Amicus Curiae brought to the Court's attention focus on ensuring that content is not inimical to Christian doctrine and is in other ways seemly. None of the counsel argued that this was contrary to legal principle in a consecrated Christian churchyard.

11.11 Very few of the Regulations take any particular line with regard to inscriptions in languages other than English. This may reflect the fact that there are, in fact, many historical precedents, as the cases cited in this judgment and the churchyard at Exhall demonstrate. As was observed in argument, the letters R.I.P. stand for requiescat in pace – a Latin phrase meaning Rest in Peace; not everybody will know what those letters signify, but the meaning could be easily discovered by using the internet or asking the incumbent. Greek and Hebrew are sometimes found on older memorials, including at Exhall, and might present more of a challenge in terms of researching meanings but the Court heard that digital technology allows this to be done, even though few people nowadays, including incumbents, are likely to be fluent in these languages. The non Anglo-Saxon tongues of the British Isles clearly crop up in churchyards – three have featured in reported decisions and the photographic evidence from Exhall. Many English residents will not have been fortunate enough to learn these languages at school, but, as we discovered from the Intervener's evidence and the Nuthall judgment, translation materials and information about such languages generally are readily available on the internet. Intelligibility is, as we have said, a relevant consideration, not least because it is important that the minister or chancellor being asked to approve an inscription should understand the proposed words so as to ensure that they meet proper requirements in terms

of conformity with the Christian faith and general suitability and this might justify some procedural step, such as the submission to the determining authority of a verified translation; but we consider that a rule or presumption against expressions in non English languages as a matter of principle is likely to fall foul of Article 14 and not be justifiable within Articles 8 (2) and 10 (2) in the event that those Articles were engaged in a particular case (a matter on which have not expressed a concluded view in this case). Abiding by the principles set out in Articles 8(2) and 10(2), however, should ensure that Regulations do not contravene Article 14 or EA 2010. Similarly, these principles should set the tone for consideration of individual faculty petitions, which need to be considered in a spirit of alertness to avoiding discrimination, in accordance with the dictum of this Court in Eccleshall.

11.12 We suggest that chancellors review their Churchyard Regulations with these principles in mind. Specifically with regard to Coventry diocese, we note that the Regulations approved in November 2020 require all foreign language cases to be determined by the Chancellor. There may be justifiable procedural reasons for this provision but it should be reviewed, especially from the perspective of whether it amounts to indirect discrimination under EA 2010 or Article 14. The issue may be posed rhetorically: if, for example, a proposed inscription "Yr arglwydd yw fy mugail" or "Dominus pastor meus est" had to be the subject of a faculty petition, with the associated fee and delay, whereas a prosposal for "The Lord is my shepherd" did not, how would this result be justifiable and proportionate, since they mean the same and are drawn from Scripture and Christian tradition?

11.13 This section of our judgment is not essential to the determination that the Appeal be allowed but is intended to be of assistance to chancellors, clergy and all others involved in administering the faculty jurisdiction in relation to memorials in consecrated churchyards.

12. CONCLUSION

12.1 For the reasons set out under Ground 1 and Ground 2 (Article 14) above, we allowed the Appeal and gave directions for the issue of a faculty permitting the erection of the proposed memorial without a condition for an English translation of the Irish phrase on the memorial, but subject to an agreed condition that such a translation should be entered in the parish record. The faculty was granted subject to a small correction to the Irish inscription which was sought by the Appellant on the day after the hearing, such that the approved inscription shall read:

INÁR GCROÍ GO DEO

Morag Ellis QC, Dean of the Arches
Chancellor Turner QC
Chancellor Arlow

16 June 2021

Ecclesiastical Jurisdiction and Care Churches Measure 2018 S.15(3)

In the Arches Court of Canterbury

In the matter of an Application for a Faculty for a memorial in the Churchyard of St Giles, Exhall, Diocese of Coventry

Caroline Newey	**Appellant**
London Branch of Conradh na Gaeilge	**Intervener**
Caroline Daly	**Amicus Curiae**

PROCEDURAL NOTE AND DIRECTIONS FOR HEARING

1. I have directed that the hearing of this appeal shall take place live at the Church of St Mary le Bow. The numbers permitted to attend have been limited to: the advocates, their instructing solicitors, the Appellant with one supporter and two representatives of the Intervener. Also present will be three judges, the Deputy Provincial Registrar, his clerk, the Rector of St Mary-le-Bow and one member of technical support staff. All those attending the hearing should wear face coverings when they are not speaking and people should sit in such a way as to allow at least 2m space between them. If oral instructions need to be taken, I shall facilitate that by means of a short adjournment, enabling this to be done outside, out of earshot of the rest of the Court, without having to resort to whispering, which, inevitably, brings people's faces undesirably close.

2. In deciding upon these arrangements, I carefully balanced the strong wish of the Appellant for the hearing to take place in person and the public health situation caused by the Covid-19 pandemic in the context of the overriding objective set out in Part 1, Rule 1.1 of the Faculty Jurisdiction Rules 2015 ("FJR"). In particular, given the uncertainty as to when normal social and business arrangements will be able to resume, and having regard to the objective in Rule 1.1(2)(d) to deal with cases expeditiously and fairly, I do not regard it as acceptable for the hearing of this appeal to await an uncertain date when normal arrangements for the disposal of court business will return. It has taken some time to find a date which is convenient for all the judges and counsel in the case and I refrained from imposing a date which might have been inconvenient for some, since both the Appellant's and Intervener's Counsel are acting pro bono.

3. I am aware that there is public interest in this case. In normal circumstances, it is likely that members of the press and possibly others might have wished to attend. All members of the public would have been entitled to do so and Court of Arches hearings being rather rare, it is not unusual for lawyers and others with an interest in ecclesiastical law to wish to follow the proceedings in court. In principle, it is desirable for there to be public attendance at any form of legal proceeding which does not need to be held in private for good reasons, such as protecting the welfare of children or other vulnerable people. As has been recognised on many occasions, open justice is a fundamental constitutional principle of this country. I consider that principle to be embraced in the statement of the overriding objective contained within Rule 1.1 because it is an important part of dealing with cases justly, subject to any particular circumstances arising in specific cases.

4. In principle, I therefore consider it desirable to facilitate the public in following the hearing by technological means, subject to appropriate safeguards.

5. The FJR contain a number of relevant provisions:

   a) Rule 1.4 (2), requires the court to engage in active case management including, *"(i) making effective use of technology".*

   b) Part 12 Conduct of Hearings, includes Rule 12.1 as follows: *"Subject to the provisions of this Part and the overriding objective, hearings are to be conducted as directed by the court."*

   c) Part 18 The Court's Case Management Powers, Rule 18.1 provides, so far as relevant:

   "(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or by any other enactment or any powers it may otherwise have.

   (2) Except where these Rules provide otherwise, the court may –

   (e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication……..

   (o) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective……..."

6. These powers of case management, contained in legislation, are wide ranging and reflect the nature of the faculty jurisdiction, which is, in many respects, quite different from secular civil proceedings. The FJR 2015 were made in exercise of the powers conferred by the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 but are now deemed to have been

made under S.83 of the 2018 successor Measure, which provides as follows, so far as relevant:

"(1)The Rule Committee may make rules for carrying into effect the relevant provisions; and for this purpose "relevant provision" means a provision of any of the following—

(a)Parts 1, 3 and 4 and this Part of this Measure (subject to subsection (6));

(b)the Ecclesiastical Jurisdiction Measure 1963;

(c)the Clergy Discipline Measure 2003;

(d)the Care of Cathedrals Measure 2011;

(e)the provisions referred to in section 4(1) of the Safeguarding and Clergy Discipline Measure 2016 (appeal against suspension).

(2) Rules under subsection (1) may in particular (so far as the following matters are not regulated by a relevant provision or by rules under section 4 of the Church of England (Legal Aid) Measure 1994) make provision for—

(a)regulating the procedure and practice (including the mode and burden of proof and admissibility of evidence) of an ecclesiastical court; ……..

……

(j)the fixing of the time and place of a hearing or trial and the notification of the parties; ……..

(7) In subsection (2)(a) and (b), "ecclesiastical court" means a court, disciplinary tribunal, commission or committee provided for in a provision referred to in subsection (1)(a) to (d); but subsection (2)(a) and (b) does not apply to a court of appellate jurisdiction in so far as rules made by the Judicial Committee of the Privy Council provide for the matters in question in the case of that court.

……..

(9) Rules under this section—

(a)must be laid before the General Synod, and

(b)may not come into force unless approved by the Synod, whether with or without amendment.

(10) If the Business Committee of the General Synod decides that the Synod does not need to debate rules under this section, the rules are deemed to be approved by the Synod without amendment unless notice is given by a member of the Synod in accordance with its Standing Orders that—

(a)the member wishes the rules to be debated, or

(b)the member wishes to move an amendment to the rules."

7. Section 94 of the Measure provides, so far as relevant:

"(1) Each of the following powers is exercisable by statutory instrument—

……..

(d)the power to make rules under section 83;

……..

(2) The Statutory Instruments Act 1946 applies—

(a)as if the regulations, rules or order concerned had been made when approved by the General Synod, and

(b)as if this Measure were an Act of Parliament providing for the instrument containing the regulations, rules or order to be subject to annulment in pursuance of a resolution of either House of Parliament."

8. Measures are passed by the General Synod. Subject to Parliamentary approval and Royal Assent, such Measures *"shall have the force and effect of an Act of Parliament"*: see s.4 Church of England Assembly (Powers) Act 1919.

9. S.41 Criminal Justice Act 1925 provides as follows:

Prohibition on taking photographs, &c., in court.

"(1) No person shall—

(a)take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the

court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b)publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof;

and if any person acts in contravention of this section he shall, on summary conviction, be liable in respect of each offence to a fine not exceeding fifty pounds.

(1A) See section 32 of the Crime and Courts Act 2013 for power to provide for exceptions.

(2) For the purposes of this section—

(a)the expression "court" means any court of justice (including the court of a coroner), apart from the Supreme Court;

(b)the expression "Judge" includes . . . , registrar, magistrate, justice and coroner:

(c)a photograph, portrait or sketch shall be deemed to be a photograph, portrait or sketch taken or made in court if it is taken or made in the court–room or in the building or in the precincts of the building in which the court is held, or if it is a photograph, portrait or sketch taken or made of the person while he is entering or leaving the court–room or any such building or precincts as aforesaid."

10. Section 9 of the Contempt of Court Act 1981 provides, so far as relevant, as follows:

"9 Use of tape recorders.

(1) … it is a contempt of court—

(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;

(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;

(c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

(1A) In the case of a recording of Supreme Court proceedings, subsection (1)(b) does not apply to its publication or disposal with the leave of the Court.

(2) Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted—

> *(a) may … be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave …*

…

(4) This section does not apply to the making or use of sound recordings for purposes of official transcripts…

(5) See section 32 of the Crime and Courts Act 2013 for power to provide for further exceptions."

11. These provisions have been subject to general amendment over the years by inclusion of a power of dispensation to be exercised by Order laid before Parliament by the Lord Chief Justice, pursuant to the Crime and Courts Act 2013, and the exemption from the provision of the Supreme Court. The Lord Chief Justice has made a number of Orders, arranging for judicial sentencing remarks to be live streamed from Crown Courts and there is a regular programme of Court of Appeal cases which are made available in this way. The Supreme Court streams all its cases live. Most recently, time-limited amendments have been made by the Coronavirus Act 2020 in respect of a further wide range of secular courts. None of those amendments has dealt with the ecclesiastical courts.

12. Recent decisions of the secular courts have held that general public streaming and broadcasting of proceedings are inconsistent with s.41 of the 1925 Act and s.9 of the 1981 Act: see R (oao. Finch v. Surrey County Council [2021] EWHC 170 (QB) and R (Spurrier) v Secretary of State for Transport [2019] EWHC 528 (Admin); [2019] EMLR 2016. Finch concerned the unlawful broadcast of a case where limited streaming was lawfully taking place under the Coronavirus Act 2020 and the Court's Practice Direction. The Court followed Spurrier in construing *"photograph"* to include moving images, referring to a case in which unlawful streaming from outside court of parties to a serious criminal trial had been held to be as a contempt of court[7] and a case of misuse by a technician employed by one of the parties of limited streaming of a libel trial authorised under the Coronavirus Act[8]. Spurrier was a pre-Covid case where the Court was requested to allow broadcasting, apparently by means of live streaming, of judicial review proceedings in which there was widespread public interest. The judges expressed sympathy with the merits of the proposition, but regarded *"this court"* as absolutely prohibited from allowing it; they were unpersuaded by arguments to the effect that

[7] A-G v. Yaxley-Lennon [2019] EWHC 1792 (QB*)*

[8] Gubarev and Webzilla Ltd v. Orbis Business Intelligence Ltd and Christopher Steele [2020] EWHC 2167

no actual recording would be made because of the transient nature of the images broadcast and that, as it would be the court, rather than anyone else, who engaged in the broadcast there would therefore be no relevant *"person*" involved. They affirmed the power of the court to permit transmission of the proceedings in another courtroom designated by the judge, noting that this was fairly regularly done; that solution, of course, is much less useful in the context of the current pandemic and is of little or no relevance to ecclesiastical courts, where the convention, in the case of consistory courts, is for hearings to take place in the churches in question, for good practical reasons. These reasons include matters distinctively fundamental to the faculty jurisdiction: firstly, the convenience that those most interested in the proceedings can easily attend and secondly, the ability (usually exercised) of the court effectively, to enjoy the advantages of being on the spot by holding the hearing at the church, churchyard or other consecrated place which has come into question and which itself lies within the protective faculty jurisdiction of the court.

13. None of the cases referred to above has considered the specific statutory powers of the ecclesiastical courts to regulate their own proceedings under the FJR and the judges in Spurrier expressed their conclusion in terms of *"this court"*[9]. Doubtless the emphasis was used in order to point the distinction between the Administrative Court (pre-Coronavirus Act 2020) and those courts where exceptions had been made, and I do not suggest that the judges had the ecclesiastical jurisdiction in mind; but that is the point – the secular caselaw, naturally, does not consider ecclesiastical jurisdiction at all. Hickinbottom LJ, giving the judgment of the court in Spurrier, emphasised the fact that Parliament had, through the provisions of the 1925 and 1981 Acts, prohibited the use of sound or video recording for publication. As noted above, however, Parliament, by approving the Ecclesiastical Jurisdiction Measures, which are of equal status to Acts of Parliament, has, granted the Church the power to regulate its courts. The FJR are accorded equivalent status to a Statutory Instrument which has been subject to Parliamentary annulment process.

14. The only relevant reported case concerning an ecclesiastical court is In Re St Andrew's Heddington [1978] Fam 121. There, HHJ Ellison Ch. decided, without having heard argument on the point, not to permit broadcasting of a consistory court hearing by the BBC, on the basis that the church, when in use for the purposes of a consistory court, was a *"court of justice"* and that the proposal would be in breach of S.41 of the 1925 Act. The Court of Arches is not bound by that decision. Nevertheless, I, similarly, consider it clear that the Court of Arches is a *"court of justice*". That is not, however, the end of the matter because the ecclesiastical courts have, since the nineteenth century, when certain jurisdictions passed to the secular courts, administered ecclesiastical jurisdictions which are entirely their own. One particular

[9] Op.cit. para.31

practical aspect of this is the lack of a fixed abode for ecclesiastical courts, notwithstanding the fact that the Court of Arches, by long tradition, sits in the church of St Mary le Bow; the FJR recognise this because Rule 11.3 Time and place of hearing, requires (rather than simply enables) directions to be given for the place, as well as date and time of any hearing. Fundamentally, one of the distinctive features of the faculty jurisdiction, to which I have alluded above, is its linkage with consecration, the effect of which is to place buildings and land within what has always been properly regarded as the protective jurisdiction of the ecclesiastical courts. This distinctive feature infuses the substantive and procedural law governing the jurisdiction and the enabling Measure and FJR give the courts very wide powers to facilitate the exercise of this jurisdiction. These points were not deployed in Heddington and the Chancellor expressly acknowledged in his judgment that he had had limited access to relevant legal materials. The decision is, in any event, distinguishable on its facts in several important respects. Firstly, the broadcasting would not have been at the instance of the consistory court, rather, it seems that the BBC happened to be making a programme about the village at the time and wanted to cover this unusual event. Secondly, and flowing from the first point of distinction, the recording would have been made by *'persons'*, namely BBC staff, as in the recent case of Finch, rather than by the court itself, via its functionaries. Thirdly, the recording would have been made and then broadcast in a programme which would, in principle, have continued to exist in perpetuity as a separate entity, rather than simply acting as a means for properly interested persons, as it were, to be brought virtually into court in order to witness the transient events of the hearing. Finally, the then applicable Ecclesiastical Jurisdiction Measure and Rules were not considered in the judgment.

15. The power, set out in paragraph 13 above, granted by the Ecclesiastical Jurisdiction Measure to the Rule Committee of General Synod to make Rules for the ecclesiastical courts, including the appellate courts of the jurisdiction, is extremely broad. Whilst the secular legislation through which S.41 of the 1925 Act has been modified has not addressed the ecclesiastical courts, Church primary legislation has enabled the FJR to provide comprehensive modern procedures to enable the ecclesiastical courts to carry out their distinctive work effectively. The procedural scheme includes express provision for and encouragement of *"effective use of technology"* and a power to *"hold a hearing …by telephone or by using any other method of direct oral communication".*

16. What I propose in this case is to make effective use of technology, as enjoined by Rule 1.4 of the FJR, in order, effectively, to allow people to be virtually transported into the church when it is being used as an ecclesiastical court. The technology in question would be *"made use of"* by the Court, in pursuance of the Overriding Objective. Whilst the people thus enabled to follow the proceedings would be unable to communicate themselves, there would be direct

oral communication with them via the technology employed, thus the important public element of holding a hearing would be achieved by this method, in accordance with Rule 18 (2) (e).

17. I have already directed that there shall be a live broadcast of the hearing. I now give further detailed directions as follows:

    a. The proceedings shall be filmed by up to two employees of Winckworth Sherwood LLP.

    b. The proceedings will be broadcast via a zoom webinar link. Those wishing to view the hearing should apply by email to the Deputy Provincial Registrar (doliver@wslaw.co.uk) for details of the link by 2pm on Tuesday 23 February.

    c. The link provided will allow viewing of the hearing only. The microphones and cameras of those accessing the link shall be disabled and there shall be no 'chat' function via the link.

    d. The proceedings will only be available as a live stream for the important purpose of allowing the press and the public to witness it - they shall not be recorded and saved for future viewing or broadcast.

18. For the avoidance of doubt, I make it clear that any attempt to download, photograph or record any part of the transmission will be, prima facie, regarded as a contempt of Court. The facility is simply to enable interested members of the public to watch and listen to the proceedings as they would if they were physically present in court. There is no prohibition on taking notes.

MORAG ELLIS QC
DEAN OF THE ARCHES
17 FEBRUARY 2021