

## **Ghai v Newcastle City Council (2010)**

### **Abstract.**

In Ghai, the central concern was whether a Hindu who sought open-air cremation could be accommodated by the English law governing cremation. In the lower court, the judge had found that English law did not allow the type of open-air cremation Ghai was requesting, and that his religious rights were not infringed by this prohibition. In the Court of Appeal, the Court dealt with the case quite differently, taking a clarification of Ghai's particular religious needs as the basis for resolving the argument not by recourse to fundamental religious rights, but by a particular interpretation of the statutory term "building". Ghai won his case, in that open-air cremation of a particular type meeting his religious needs is not prohibited under cremation law.

### **Facts of the case.**

Ghai was a Hindu who wished to be cremated in accordance with his religious beliefs. He wrote to his Council, Newcastle City Council, asking for land away from the city to be dedicated "for traditional open air funeral pyres". The Council replied that it was not possible to do this, due to the law regulating cremation. Ghai sought a judicial review of the Council's refusal to grant his request. When the case was first heard, by Cranston J, he found against Ghai on the basis that the law on cremation did not allow open air cremation, and that Ghai's religious rights under Article 9 of the European Convention on Human Rights were not violated by this law (the judgment of the lower court can be read at <http://www.bailii.org/ew/cases/EWHC/Admin/2009/978.html> ). Ghai appealed against the decision of Cranston J.

### **The cause of action or claim involved in the case.**

In the written documents prepared before the Court of Appeal hearing, Ghai persevered with his main argument before Cranston J. He argued that his wish for open air cremation was a manifestation of religion under Article 9 of the European Convention on Human Rights. If that was so, then the Human Rights Act 1998 should be used to interpret the law on cremation so as to avoid violating his Convention rights.

The law on cremation in England and Wales is governed by the Cremation Act 1902. This act defines a crematorium, gives burial authorities the power to establish and maintain them, limits where crematoria may be built, and allows government to make detailed Regulations under the Act for their operation and inspection. Under the 1902 Act, it is a criminal offence to contravene these regulations, or "to procure to take part in the burning of any human remains except in accordance" with these Regulations and the Act (s.8). The current law requires cremation to occur in a specially equipped building (Cremation Act 1902 s.2).

### **Summary of judgments.**

Judgement was given by Lord Neuberger (referred to in the judgment by his office of Master of the Rolls), with the other two judges agreeing entirely with him. Interestingly, the Court of Appeal decided the case without engaging with the arguments which had been put before Cranston J, and in the formal documents of the appeal. Instead, they identified a factual nuance which had not been considered by Cranston J, and upon which they were prepared to decide the case. Cranston J had proceeded on the assumption that Ghai required his cremation to be in the open air, that is, not within any structure. As Ghai's counsel confirmed to the Court of Appeal, however, his religious needs would be met if "the cremation process took place within a structure, provided that the cremation was by traditional fire, rather than using electricity, and sunlight could shine directly on his body while it was being cremated" (para. 3). Could it be that this requirement could be met without contravening the law on cremation?

The Court of Appeal considered that the only difficult issue was whether a structure which accommodated Ghai's beliefs would constitute a "building" under the Cremation Act 1902 s.2. The Court of Appeal considered evidence that, taken together, they saw as showing the sort of structures in which Hindu cremations took place in India: "such cremations occur within a structure which is substantial in its extent, solid in its structure, and relatively permanent in nature. The structures all have a solid roof, supported on columns and without walls, although in many of the structures shown in the photographs the columns rest on plinths or low walls, and are connected by a low surrounding balustrade" (para.18) The Court of Appeal recognised that this did not answer the question of whether this sort of structure would meet Ghai's religious needs, but he indicated to the Court that any of the structures considered would in fact meet his needs.

The Secretary of State argued that a structure could only be a "building" under the Cremation Act if it was "an inclosure of brick or stonework, covered in by a roof". This argument was based on three strands – case-law on the usual meaning of the word "building" as interpreted by the courts; the need for having a simple and clear meaning for the word, as breach of the Act could constitute a crime; and the need to ensure that cremations could not be seen by the general public.

On the first point, the Court of Appeal recognised that precedents showed good starting points for understanding the word "building", but found that the word needed to be interpreted in context (para.22), and that the definition put forward, even as an attempt to explain the common meaning of the word, was deficient – excluding for instance wooden chalets, bandstands, and the Pyramids (para.25). Accordingly, the precedents cited on the meaning of the word were not seen as decisive.

On the second point, the Court of Appeal were unpersuaded that the possibility of a prosecution for a minor offence concerned with breach of regulations should drive the process of interpreting how the regulations should be interpreted. In passing, however, the Court rather mischievously put forward a different principle of interpreting criminal legislation – that statutes should be interpreted to give a narrow meaning to a crime. In this case, that would suggest a broad definition of building, to reduce the instances when the regulations were contravened.

On the third point, the Court of Appeal considered the history of the English law on cremation, and agreed that there was evidence in the late 19<sup>th</sup> century that early attempts to create the law were partly due to a feeling that public cremations were contrary to public decorum and decency (para 28). It was much less clear, however, that the legislation as eventually enacted had preserving public decorum as a strong objective (para. 29-30). Even if it did, this would not justify a narrow reading of building, as “it would be perfectly possible to carry out a cremation away from public gaze in a building with substantial openings in the walls” (para. 31).

Having rejected a narrow definition of “building”, the Court of Appeal looked at the broader context of the Act itself, and concluded that “provided it is relatively permanent and substantial, so that it can properly be said to have been ‘constructed’, and provided it could normally be so described, a structure will be a ‘building’ within the Act” (para. 34). Accordingly, the Court of Appeal concluded that a structure which accommodated Ghai’s wishes could be a crematorium under the legislation; and then invited the parties to consider whether this resolved the dispute.

The appeal ended there, but it is worth noting that this did not automatically provide Ghai with a crematorium allowing him to carry out his funeral in the way he desired. In order to build a structure meeting his needs, Ghai would need to select a suitable venue meeting the legal requirements for siting of crematoria, and secure planning permission – the latter not flowing automatically from the Court’s decision that this sort of structure would be acceptable under the Cremation Act.

### **Commentary on the impact on the decision on the law.**

This is obviously an important decision in relation to the potential legality of a practice associated, for some members of some religions, with one of the key ritual moments in religious life – the disposal of a human corpse. The case confirms that, in the right circumstances, a structure open to the air can be a lawful crematoria.

*Ghai* is one of those unusual, but by no means unique, decisions where significance is to be found not only in what the court decided, but in what they avoided deciding. The Court of Appeal, at a late stage in the proceedings, engaged with the narrow, and technical, issue of what a “building” was for the purposes of the Cremation Act 1902. In defining this term, the Court made some use of the legislative history of the Act, and some use of decisions from other areas of law, but ultimately emphasised the importance of the normal meaning of the term. They then applied it to criteria drawn from Hindu practice in India, but with the confirmation of Ghai that such practice would satisfy his individual religious needs, to conclude that a crematoria meeting his needs could be constructed within the parameters of the existing Cremation Act. The Court of Appeal did not engage with the question of whether Ghai had a fundamental right under Article 9 of the European Convention for his body to be disposed of in a particular way, or whether if he did, a restriction on this right could be justified by reference to some broader interest of the type outlined in Article 9(2). It was possible to resolve the case in favour of Ghai, and individuals sharing similar religious beliefs in relation to cremation, without engaging with broader issues of religious rights. Courts can frequently choose whether to explain their decision in relation to a broad

concept, or a narrow concept – here they choose to generate a precedent on the meaning of “building”, rather than an understanding of religious rights under Article 9 of the ECHR and the Human Rights Act. By doing so they avoid either endorsing, or rejecting, the detailed discussion of just this issue which had been carried out by Cranfield J at the initial hearing of the case. Was the Court of Appeal feeling cautious in relation to religious rights? If so, it is a caution which for decades was shared by the European Court of Human Rights itself, which frequently preferred to deal with religious cases on other grounds.

The decision is also interesting for how the courts have gone about working out what the religious interests of Ghai actually are. In the Court of Appeal, Lord Neuberger spent some time looking to Hindu practice in India to help resolve a legal dispute in Newcastle – a striking instance of globalisation – but he was keen to emphasise the individual believer by checking that this practice would be Ghai’s practice, had he the choice. In the lower court, however, Cranfield J, in his very long judgment, spent much more time considering a range of sources on ‘Hinduism’: accepting evidence from a government expert, a Professor of Veda at Banaras Hindu University, and a UK consultant anthropologist with a specialism in Indic faith communities. The government expert, a UK specialist in death and bereavement in the British Hindu communities, stressed heterogeneity in the Hindu communities, but sought to draw upon a number of interviews with Hindus, including pundits, in formulating a view of the beliefs of the majority of British Hindus. Reference was also made to a brief report by the head of the Hindu Priest Association; and to a body of academic literature. Additionally, Cranfield J considered evidence from the Hindu Council, The Hindu Forum and National Council of Hindu Priests UK. In other words, the discussion of what Hindus believed was summarised at length by Cranfield J before he moved to consider what the religious rights of Ghai required.

### **Formal Particulars.**

Citation: Ghai, R (on the application of) v Newcastle City Council & Ors [2010] EWCA Civ 59 (10 February 2010), <http://www.bailii.org/ew/cases/EWCA/Civ/2010/59.html>

Court: Court of Appeal (Civil Division), before the Master of the Rolls Lord Neuberger, Moore-Bick LJ and Eder LJ.

Parties: The Crown, on the application of Ghai (appellant); Newcastle City Council and Others (respondent). Unusually, the case had a number of other parties: the Secretary of State for Justice, Ramgharia Gurdwara Hitchin, the Alice Barker Welfare and Wildlife Trust, the Equality and Human Rights Commission, and the Hindu Merchants Association. These additional parties were able to put arguments to the court.

Date of judgment. 10 February 2010.

### **Authorship details**

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Accepted for Commentary, 9/12/2010; added to the Commentary, 13/12/2010.