

A

Chichester Consistory Court

*In re Durrington Cemetery*

2000 June 5

Hill Ch

B

*Ecclesiastical Law — Faculty — Municipal cemetery — Disinterment — Deceased of Jewish faith — Burial in 1981 in municipal cemetery to enable wife to visit grave — Wife moving to Australia — Deceased's relatives wishing to reinter body in Jewish cemetery — Whether freedom of religious practice relevant consideration — Whether faculty for exhumation to be granted — Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), art 9<sup>1</sup>*

C

The first petitioner's brother, a practising Jew, died in 1981. His widow, who was not Jewish, arranged for him to be buried in the municipal cemetery, where she was able to visit his grave, in ground consecrated according to the rites of the Church of England. Several years later she moved to Australia. The petitioners, representing the interests of the deceased's Jewish relatives, sought a faculty permitting his remains to be exhumed for reinterment in a Jewish cemetery. The widow did not oppose the petition.

On the petition—

D

*Held*, granting a faculty, that, although a faculty would not normally be granted where there had been such a long delay since burial and where the body was to be reinterred in unconsecrated ground, there were exceptional factors justifying its grant, namely that the delay was attributable to a dignified and principled restraint on the part of the deceased's orthodox Jewish relatives out of respect for his widow while she continued to live in the area and visit her husband's grave, that the petition was not prompted by any improper motive and that in view of the similarity of Jewish and Christian beliefs on burial there was no theological objection to the deceased's reinterment in a Jewish cemetery; that, moreover, the court was entitled to take into account the religious pluralism of modern society and that to refuse to permit the exhumation might amount to a denial of the right of the deceased's Jewish relatives to freedom of religious practice and observance under article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953); and that, in the circumstances, there was good and proper reason for disturbing the deceased's remains (post, pp 35F–H, 36C–D, E–F, 37C–E, F–G).

E

*In re Christ Church, Alsager* [1999] Fam 142 considered.

The following cases are referred to in the judgment:

*Christ Church, Alsager, In re* [1999] Fam 142; [1998] 3 WLR 1394; [1999] 1 All ER 117

*Church Norton Churchyard, In re* [1989] Fam 37; [1989] 3 WLR 272; sub nom *In re Atkins* [1989] 1 All ER 14

G

*Lake Cemetery, Isle of Wight, In re* (unreported) 23 April 1999, Portsmouth Const Ct  
*St Hugh, Bermondsey, In re* (1999) 5 Ecc LJ 390

## PETITION

H

By a petition dated 20 December 1999 the petitioners, Rachel Katsch, the sister of the late Mr Saunders, and Moshe Leib Stuart, the administrator of the Federation of Synagogues Burial Society, petitioned for a faculty to have the remains of the late Maurice Saunders exhumed from Durrington Cemetery, Worthing, West Sussex, for reburial in Rainham Jewish Cemetery. The matter was dealt with on written representations, pursuant to rule 25 of

<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art 9: see post, p 37B.

the Faculty Jurisdiction Rules 1992 (SI 1992/2882). The petition was unopposed. A

The facts are stated in the judgment.

*Cur adv vult*

5 June. HILL Ch handed down the following judgment (by post). By a petition dated 20 December 1999, the petitioners seek an order for the exhumation of the remains of Maurice Saunders, deceased which lie buried in Durrington Cemetery, Worthing, West Sussex, in order that they might be reinterred in Rainham Jewish Cemetery, Essex. This requires consideration of the application of the recent decision of the Chancery Court of York in *In re Christ Church, Alsager* [1999] Fam 142 and of the Human Rights Act 1998 which, with effect from 2 October 2000, will be directly justiciable in this as other courts. As a result, this judgment is more detailed than it might otherwise be. B C

Maurice Saunders died on 7 November 1981. On 17 November his body was buried in a municipal cemetery at Durrington in ground which had been consecrated in accordance with the rites of the Church of England. I understand that the burial was carried out by a minister of the United Reformed Church. Mr Saunders was Jewish. He had been a member of the Bridgend Synagogue in South Wales and its secretary for some 14 years. On moving to London, he became a member of the Caversham Road Synagogue in Camden where he served as a member of its religious burial society. D

Mr Saunders married outside the Jewish faith. His widow made the arrangements for the burial. It is suggested in the written submissions which I have received on behalf of the petitioners that this was done without reference to Mr Saunders's orthodox Jewish relatives who were not informed of his death. I am not required to make a finding on this matter for the purposes of this application and decline to do so. I am, however, satisfied that out of deference to Mr Saunders's widow who continued to reside in Worthing and to visit her late husband's grave, the Jewish relatives declined to make any application for exhumation until now. E

More recently Mr Saunders's widow emigrated to Australia where she now resides. Accordingly, the Jewish relatives wish to effect what had been their intention since they learnt of Mr Saunders's burial, namely the exhumation of his remains and their burial in a Jewish cemetery in accordance with Jewish law. F

I come now to the petition itself. The petitioners are Rachel Katsch, the sister of the late Mr Saunders, and Moshe-Leib Stuart, the administrator of the Federation of Synagogues Burial Society. When first presented, the petition was inadequately supported by evidence and I therefore issued directions. With the concurrence of the petitioners I am dealing with this matter on written representations pursuant to rule 25 of the Faculty Jurisdiction Rules 1992. G C

Mr Saunders's widow has no objection to the exhumation, nor does Worthing Borough Council which is responsible for Durrington Cemetery. A Home Office licence was granted on 18 November 1999. The Burial Society of the Federation of Synagogues has given its consent to the reinterment of Mr Saunders's remains in Rainham Jewish Cemetery, Upminster Road North, Rainham, Essex. All this has been confirmed in correspondence. The only bar to the exhumation which remains is the absence of a faculty, the grant or refusal of which is a matter for this court. H

A I have been greatly assisted by a submission prepared on behalf of the petitioners by Dayan Rabbi Bernard Berkovits, an ecclesiastical judge of the Beth Din (Court of Jewish Law) of the Federation of Synagogues. I should like to pay tribute to the thoroughness, economy and sensitivity of that submission. I referred the matter to the Archdeacon of Chichester, the Venerable Michael Brotherton, and I am grateful to him for his prompt response to the theological issues raised in this petition and for obtaining the views of the Council of Christians and Jews.

B The law of the Church of England in relation to exhumation was recently reviewed and articulated in *In re Christ Church, Alsager* [1999] Fam 142. That was a decision of the Chancery Court of York which is the appeal court for the northern province. Although not a binding precedent in the common lawyer's understanding of stare decisis, it is a decision to which this court will give the highest regard. The judgment of Sir John Owen, Auditor, in which the other judges of the court concurred, sought to provide the following guidance to assist the Consistory Court in determining applications such as these, at pp 148–149:

D “(1) Once a body or ashes have been interred in consecrated ground, whether in a churchyard or in a consecrated section of a municipal cemetery, there should be no disturbance of the remains save for good and proper reason. (2) Where a mistake has been made in effecting the burial, for example a burial in the wrong grave, the court is likely to find that a good reason exists, especially when the petition is presented promptly after the discovery of the facts. (3) In other cases it will not normally be sufficient to show a change of mind on the part of the relatives of the deceased, or that the spouse or another close relative of the deceased has subsequently been buried elsewhere. Some other circumstance must usually be shown. (4) The passage of time, especially when this runs into a number of years, may make it less likely that a faculty will be granted. (5) No distinction is to be drawn between a body and cremated remains, except in so far as the processes of decay may affect a coffin more than a casket containing ashes and may also affect the sensibilities of a congregation or neighbours. (6) It is immaterial whether or not a Home Office licence has already been obtained.”

E In this instance, a number of factors militate against the grant of a faculty. Some 18 years have passed since Mr Saunders's body was buried. The process of decay is doubtless well advanced. The desire now expressed by the Jewish relatives is at variance with that of Mr Saunders's widow who made the arrangements for her late husband's burial. Against this, however, I have to take into account that the delay is fully explained. This is not the case of a change of mind by surviving relatives but of a dignified and principled restraint on the part of Mr Saunders's orthodox Jewish relatives out of respect for his widow. I am satisfied on the evidence placed before me that the relatives have always desired that Mr Saunders be buried in a Jewish cemetery in accordance with Jewish laws and customs. It might well be thought that their deference is a matter for admiration and not criticism.

H I certainly do not regard this as a family feud, which might amount to an improper motive and thus argue against the grant of a faculty as discussed by the Auditor in *In re Christ Church, Alsager*, at p 149.

I also consider that, to the extent that I am able to form any view of a deceased's intentions, it is more likely than not that Mr Saunders would have

wished to be buried in a Jewish cemetery. The evidence indicates a serious commitment over many years to the practice of the Jewish faith and to its administration. As Dayan Berkovits rightly points out in his submission, there is no indication that Mr Saunders ever expressed a desire to be buried in a Christian cemetery. He asserts, with some force in my view, that the presumption must be that Mr Saunders retained his Jewish identity. A

With regard to the state of Mr Saunders's remains, the second petitioner, Moshe Leib Stuart, has made inquiries of Messrs H D Tribe, the original undertakers, and of Mr Ian M Rudkin, the registrar of the cemetery. It seems to be the case that Mr Saunders was buried in a good quality coffin although not one of solid wood and that with the effluxion of time there would only be skeletal remains. None the less, Mr Stuart is of the opinion that, based upon the experience of the Burial Society of the Federation of Synagogues of which he is administrator, this would not pose a problem. I have no hesitation in accepting this evidence. B C

One factor which has troubled me is that, amongst more detailed guidance given by the Auditor in *In re Christ Church, Alsager*, it is stated, at pp 149–150: “In normal circumstances if there is no intention to reinter in consecrated ground this will be a factor against the grant of a faculty.” It is axiomatic that the Jewish cemetery where it is proposed that the remains of Mr Saunders be reinterred is not consecrated according to the rites of the Church of England. It is, however, instructive that Dayan Berkovits makes reference to the judgment of my distinguished predecessor, Judge Quentin Edwards QC, Ch in *In re Church Norton Churchyard* [1989] Fam 37, 40, in which the chancellor quoted from *Wheatly on the Book of Common Prayer* (1858): D

“The phrase of ‘commit his body to the ground’ implies that we deliver it into safe custody and into such hands as will safely restore it again. We do not cast it away as a lost and perished carcass; but carefully lay it in the ground, as having in it a seed of eternity. . . .” E

Dayan Berkovits, in his submission to this court stated “although this reflects Christian doctrine, it is equally valid in the Jewish Faith”. The similarity in teaching as to the permanence of burial and the rejection of the concept of “portable remains” is of significance and it is underscored by the absence of theological objection on the part of the Archdeacon of Chichester and the Council of Christians and Jews to what is proposed in the petition. F

I also have regard to *In re Lake Cemetery, Isle of Wight* (unreported) 23 April 1999, a decision of Aglionby Ch in the Portsmouth Consistory Court, where a faculty was granted for the exhumation of the remains of a person of the Jewish faith from consecrated ground in one municipal cemetery for reinterment in the unconsecrated part of another. As a further example of the manner in which the consistory court now takes account of religious pluralism, see *In re St Hugh, Bermondsey* (1999) 5 Ecc LJ 390, which concerned depictions of aspects of the Hindu, Buddhist and Muslim religions and which cited the Church of England's Board of Mission publication *Communities and Buildings, Church of England Premises and Other Faiths* (1996) In my opinion, the fact that it is proposed that Mr Saunders's remains be reinterred in a Jewish cemetery according to Jewish law takes this petition outside the “normal circumstances” as discussed by the Sir John Owen, Auditor in *In re Christ Church, Alsager* [1999] Fam 142. H

A Finally, I do not think it proper to dispose of this matter without reference to the wider context under the Human Rights Act 1998. This Act will come into force on 2 October 2000. Section 6(1) imposes upon all courts, which includes the consistory court, a duty to act in a manner compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). In keeping with the practice which is developing in both the criminal and civil jurisdictions of the secular courts,

B I propose to consider the impact of the Convention as if the 1998 Act were already in force.

Article 9 of the Convention provides:

“Everyone has the right to freedom of thought, conscience and religion; this right includes . . . freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

C Whilst mindful of the emergent jurisprudence of convention rights, it would not now be appropriate to speculate so long after his death as to those of Mr Saunders. I have, however, sought to consider elsewhere in this judgment what his wishes were likely to have been. None the less, without wishing to make any definitive statement of general application, it seems to me that in the facts of the present petition, this court would be seriously at risk of acting unlawfully under the Human Rights Act 1998 were it to deny the freedom of the orthodox Jewish relatives of the late Mr Saunders to manifest their religion in practice and observance by securing the reinterment of his cremated remains in a Jewish cemetery and in accordance with Jewish law. As the Archdeacon of Chichester stated in his letter to this court, “in view of the importance for Jews to be buried in a Jewish burial ground it seems to me highly appropriate [that he be so buried]”.

D To return to *In re Christ Church, Alsager* [1999] Fam 142, 149, Sir John Owen, Auditor sought to formulate a question which a chancellor should ask himself in all cases where an order for exhumation is sought:

“Is there a good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large? If there is he should grant a faculty. If not, he should not.”

F In my opinion, for the very particular reasons relied upon by the petitioners in their commendably moderate and restrained submissions and set out at some length in this judgment, this is a case where exhumation would be regarded as acceptable by right thinking members of the Church at large. Indeed were a faculty not to be granted, this would be regarded by right thinking members of the Church of England, of the Jewish faith, and of the public at large as a gross denial of justice. I therefore order that a faculty pass the seal.

G In accordance with the established practice of the consistory court, the costs of this petition shall be borne by the petitioners, such costs to be assessed in the first instance by the registrar. The faculty shall be subject to the usual conditions and shall not be implemented until the order for costs has been satisfied in full.

*Order accordingly.*

Reported by JESSICA GILES, Solicitor