



ADF INTERNATIONAL

Date: 25 March 2021

Re: **Reverend Dr William J U Philip & Others [2021] CSOH 32**

Executive Summary

1. On 24 March 2021, the Outer House of the Court of Session (Scotland) handed down the opinion of Lord Braid in the case **Reverend Dr William J U Philip [2021] CSOH 32**, a judicial review of the closure of places of worship in Scotland in response to Covid-19.
2. The petitioners were Reverend Dr William Philip and 26 others of various Protestant denominations, plus an additional party, Canon Thomas White, a Roman Catholic priest, who was supported by ADF UK.
3. There were two legal issues before the court: the extent to which the Scottish Ministers had constitutional powers to restrict the right to worship; and whether the church closures from January 2021 constituted an unjustified infringement of Articles 9 and 11 of the European Convention on Human Rights (hereafter, '**ECHR**'). The court held that the Covid-19 Regulations in Scotland, to the extent that they required closure of churches in Scotland, constituted a disproportionate interference with the constitutional and ECHR rights of the petitioners and additional party. The judge granted a declarator with the immediate effect of voiding and nullifying the offending regulations.

a) Background

4. On 6 January 2021, Scottish Ministers laid the [Health Protection \(Coronavirus\) \(Restrictions and Requirements\) \(Local Levels\) \(Scotland\) Amendment \(No 11\) Regulations 2021 \(SSI 2021/3\)](#) (hereafter, the "**Regulations**") before the Scottish Parliament, using power conferred by [section 49 of the Coronavirus Act 2020](#) (passed by the Westminster Parliament). The Regulations came into force on 8 January 2021 and were approved by resolution on 20 January 2021. They required the closure of churches in Scotland and created a criminal offence for opening or assembling in a place of worship for the purpose of worship.
5. Whilst the Scottish Government had announced, subsequent to the lodging of the petition, that churches could reopen on 26 March 2021, Lord Braid, considered the importance of ruling on the issues before him, noting that the measures were still in place on the day of the hearing, the fact of previous church closures, and potential future lockdowns.

6. The petitioners sought three orders. First, that the closure of churches and the criminalisation of public worship was unlawful. Second, that the Regulations – which removed a previous exemption allowing church attendees to go to a place of worship – should be removed. Third, that it should be lawful for a person living in a ‘Level 4’ area to leave their place of living to attend a place of worship.
7. It was the petitioners’ collective argument that the Christian faith required the physical gathering together of believers for prayer, evangelism, participation in communion, and administration of baptism. They argued that they could not exercise their beliefs fully using virtual means. The additional party added that the essence of the Roman Catholic faith necessarily required physicality and that there was a specific ‘Catholic detriment’ without church gatherings. The two legal arguments submitted were that the Regulations were *ultra vires*, contravening the historic freedom of the church in Scotland to practice religion and maintain church autonomy; and that the Regulations were also unlawful as a disproportionate infringement of the ECHR under Article 9 (freedom to manifest religious beliefs) and Article 11 (freedom of peaceful assembly).
8. The Scottish Ministers rejected the claims of the petitioners, arguing that the interference to the ECHR rights by the Regulations was a necessary and proportionate measure in response to the risks posed by the new variant of Covid-19, and were therefore acceptable as restrictions.

b) The Decision of the Court

9. Lord Braid first reviewed the Regulations, which had been amended in relation to church buildings in Scotland on multiple occasions since the start of the pandemic. Local Level Regulations required places of worship in a Level 4 area to be closed, which included every area in mainland Scotland, unless to be used for certain specified purposes. A person living in a Level 4 area was not permitted to leave that area for attending a place of worship, and contravention of the Regulations was a criminal offence carrying the punishment of a fine or fixed penalty notice.
10. Lord Braid outlined the risks of Covid-19 which underpinned the Regulations – the potentially fatal respiratory disease caused by the highly transmissible severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pathogen. He noted that group activities in indoor settings with poor ventilation and numerous people packed together were particularly high risk. In making decisions relating to the Covid-19, the Scottish Government’s had relied on clinical evidence, expert advice, and a balanced assessment of the risks. At paragraph 33, he outlined information relating to a new variant, with increased transmissibility.
11. The Scottish Government had received medical advice in December 2020 that this new variant showed ‘clear justification’ for strong measures, including the swift closing down of many premises. The First Minister gave a statement to the Scottish Parliament on 4 January 2021 announcing the re-introduction of lockdown restrictions and the closing of places of worship, including for private prayer.

12. In paragraph 19, Lord Braid contrasted the absolute closure of churches for public worship under the Regulations to the closure of “listed businesses”, including cinemas and conference centres, for reasons requested by the health board or the Courts and Tribunal Service for remote jury trials. He also contrasted the closure of churches to open premises deemed essential, including food retailers, pharmacies, funeral directors, and bicycle shops.
13. In paragraph 21, the judge affirmed that although the Regulations permitted churches to be physically open for specified purposes, which included funerals, commemorative events, or to broadcast an act of worship over the internet, they were closed for their primary purpose – worship. Although the Regulations did not aim to criminalise worship *per se*, they had that effect.
14. The impact that the church closure had on the petitioners was assessed. Referring to the evidence provided by the parties, the judge accepted that the Protestant impact centred upon the importance of physically congregating to undertake corporate worship; communion; baptism; and congregational ministering through spiritual gifts. As regards to the Roman Catholic impact, he accepted that the Eucharist Celebration during public Sunday Mass and confession were of particular importance – being essential to the faith and only able to be administered by a priest in person. Lord Braid noted that Canon law set out these conditions. At paragraph 61, the judge accepted that on-line platforms did not provide suitable means for the petitioners to worship in accordance with their faith; it was “*worship-lite*”. The Scottish Ministers did not dispute that the party’s beliefs were genuinely and sincerely held.

Legal Issue 1: the constitutional issue

15. In consideration of the first legal issue, Lord Braid assessed the petitioner’s claim that the restrictions raised the constitutional issue of being ‘beyond’ the competence of Parliament by infringing the division of authority between church and state. At paragraph 65, he outlined the legislation cited by the petitioners, starting with the General Assembly Act 1592 and the subsequent constitutional embedding of public theology within Scots law, This traced the independence of church from civil authority interference in the Protestant church tradition. Counsel for the petitioners also cited the Church of Scotland Act 1921, which placed “matters spiritual” within the ambit of the Church.
16. The Scottish Ministers rebutted these constitutional arguments, claiming that the historic Acts of Parliament mentioned by the petitioners conferred power and jurisdiction on the Church for ecclesiastical and spiritual matters alone. Lord Braid heard that it was for the state to regulate civil matters, which included health and safety law and included the Coronavirus Regulations which aimed to reduce the incidence and transmission of the virus.
17. In analysis of the two arguments, Lord Braid accepted that there was a constitutional right to worship but rejected the petitioner’s proposition that any inference with the right to worship, no matter how proportionate, is beyond the powers of the state. At paragraph 81, he stated that the question of whether the Regulations interfered with the constitutional

right, notwithstanding their primary purpose being the protection of health, would be so if the interference is not proportionate.

18. In coming to this conclusion, he quoted Lord Reed in reference to Blackstone's *Commentaries on the Law of England* – that civil liberty comprises “*natural liberty so far as restrained by human laws...as is necessary and expedient for the general advantage of the public*”. In answering the ECHR issue, he would answer this constitutional issue.

Legal issue 2: the ECHR issues

19. In reference to section 6 of the Human Rights Act 1998, the Scottish Ministers were under a legal duty not to act in a way that was incompatible with ECHR rights. The judge rejected the petitioner's assertion that the right to freedom of religion or belief was to be paid in higher regard compared to other Convention rights; he asserted instead that any unjustifiable interference with the right would amount to the Ministers not paying particular regard to it as with other Convention rights. Lord Braid acknowledged that the UK had not designated any derogations from the Convention.
20. The petitioners submitted that the Regulations constituted a disproportionate interference with Article 9 of the ECHR – the right to manifest religion. They argued that the Scottish Ministers ought to have a narrow margin of appreciation in restricting this right under ECHR grounds, and cited various European cases in support. Since other activities or businesses were not banned and churches were able to operate with better health protection measures than supermarkets, the banning of the fundamental right of worship was disproportionate, they argued. Counsel for additional party added that based on the lack of data from the medical advisor, Professor Leitch, the science did not require the closure of churches.
21. The Scottish Ministers argued the opposite – that a wide margin of appreciation was to be enjoyed in limiting Article 9 rights, and that the political decision ought not to fall within the scope of the court. They argued that there been insufficient time in Europe for a ‘European consensus’ on the matter to have emerged.
22. In weighing up these arguments, Lord Braid accepted that the scope of Article 9 rights were undeniable and had been interfered with. He also accepted the petitioners' submissions that there was no alternative means for them to manifest their religion, by reference to Lord Bingham's comments in [R \(SB\) v Governors of Denbigh High School \[2007\] 1 AC 100](#).
23. He next went on to consider whether the interference with Article 9 ECHR was proportionate. At paragraph 97, he outlined the following three stages to determine whether the restrictions were justified as required by Article 9(2):

A. Prescribed by law

24. Outlining that the Regulations had to have a basis in domestic law and be accessible and foreseeable to the persons concerned, Lord Braid said this had been satisfied. The Regulations were sufficiently clear and precise, and the respondents had been entitled to urgently pass them in light of the dangers posed by the variant.

B. *Pursue a legitimate aim*

25. The petitioners and judge were in agreement that, in pursuing public health and preservation of life, the Regulations pursued a legitimate aim.

C. *Necessary in a democratic society in the interests of public health*

26. Lord Braid said that this was the core issue in the case. The parties accepted that proportionality was to be assessed by a four-stage approach from [Bank Mellat v Her Majesty's Treasury \(No 2\) \[2013\] UKSC 39](#). In this judgment, Lord Reed explained how the structured and analytical approach to considering proportionality differed from the European Court of Human Rights, and Lord Braid noted that this meant that it was for the Scottish Court of Session to rely more on this structured analysis than to lean more heavily on the European margin of appreciation doctrine.

Four stages were outlined at paragraph 100.

i. *Whether the objective being pursued is sufficiently important to justify the limitation*

27. This matter was not in dispute; the protection of life and preservation of health was sufficiently important.

ii. *Whether the measure is rationally connected to the objective*

28. Lord Braid quoted Lord Reed's assessment that rationality was a causal test, based on common sense and logic. The margin of appreciation held by the decision-maker was achieved when the measure was rationally connected to its objective if implementation can reasonably be expected to achieve the objective. The court could not substitute itself for the decision-maker. Although the petitioners criticised the manner in which the Scottish Ministers had made the decision, including by showing that the medical data used to justify the reasoning was not justified, Lord Braid affirmed that it was not irrational of the respondents to conclude that the Regulations would achieve the aim of reducing the spread of the virus. The measures were therefore rational.

iii. *Whether a less intrusive measure to achieve the object could have been used*

29. Here, at paragraph 104, the judge summarised the 6-stage approach of the Court of Appeal in [R \(FACT\) v Environment Secretary \[2020\] 1 WLR 3876](#). The decision-maker's discretion relied on the context, facts and circumstances at the time and the measure would be disproportionate if the protection from it could be attained equally well by less restrictive measures. The respondents agreed that the burden of proof was with the decision-maker.
30. In weighing up whether the respondents had a wide or narrow margin of appreciation and the case law presented by both sides, Lord Braid considered the question to be finely nuanced. In review of the facts and evidence, he noted that the Scottish Ministers had been relying on misinformation about the number of people who attended church, so the impact

of the restrictions was higher than accounted for. He also drew comparison between some indoor assemblies at paragraph 114, which illustrated how the church closures were not justified when compared to the continued use of cinemas as jury centres, which might “*be thought to carry more risk*”.. He assessed that “*there is at the very least an implicit acceptance by the respondents that meeting indoors can be safe if suitable mitigation measures are adopted*”.

31. Lord Braid, at paragraph 115, concluded that the respondents had failed to show that no less intrusive means than the Regulations could address the aim of preserving public health. He said it had not been demonstrated that places of worship needed to close, if they employed effective mitigation measures and had good ventilation to admit a limited number of people for communal worship. The necessity of banning private prayer had also not been demonstrated. In fact, Lord Braid considered that “*the reasons which were given for that recommendation being insufficient to withstand even the lowest degree of scrutiny*.” The Regulations were therefore not a proportionate interference with Article 9 ECHR.

iv. Whether the measure had a proportionate effect, in balance of the rights and objectives

32. Lord Braid nonetheless went on to consider the fourth stage “*in case [he is] wrong I the conclusion just reached*.” This test looked at the balancing act between the severity of measures verses the benefits secured by the measures. Lord Braid repeated the view that the risk was low, and that it was unclear how the blanket church closure materially reduced the risk. He noted, at paragraph 212, it was “*impossible to measure the effect of those restrictions on those who hold religious beliefs. It goes beyond mere loss of companionship and an inability to attend a lunch club*”. The penalty of up to £10,000 for individuals seeking to manifest their beliefs was also “*a not insignificant penalty*”.
33. In reaching the same conclusion to the third stage, Lord Braid concluded that there had been a disproportionate interference with Article 9 ECHR. The under-playing of the importance of Article 9 in comparison with other activities, coupled with the blanket ban on all forms of worship, led him at paragraph 126 to conclude that even if some enforced restriction on the right was justified, the Regulations themselves had a disproportionate effect.

c) Conclusion

34. On both the constitutional and ECHR issue, Lord Braid concluded that the Regulations constituted a disproportionate interference with the petitioner’s right under Article 9.
35. The proportionality test used differed to the test used by the European Court of Human Rights – it was a structured approach, applying the approach of Lord Reed in *Bank Mellat*. Whereas other indoor venues, such as cinemas, were open for some uses when suitable risk assessments had been undertaken, it was disproportionate that churches were closed for communal worship and private prayer.
36. The judge delivered a declaration that the Regulations are unlawful in so far as they purport to require the closure of churches in Scotland; and the said declarator was to take immediate effect.