Neutral Citation Number: [2018] EWHC 969 (Admin)

Case No: CO/372/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2018

Before :

LORD JUSTICE SINGH
and
MRS JUSTICE WHIPPLE

- -

Between :

The Queen on the application of **(1) Adath Yisroel Burial Society** **(2) Mrs Ita Cymerman**	**Claimants**
- v -	
HM Senior Coroner for Inner North London	**Defendant**
and	
Chief Coroner of England and Wales	**Interested Party**

- -
- -

Mr Sam Grodzinski QC, Mr Khawar Qureshi QC and Mr Benjamin Tankel (instructed by **Asserson Law Offices**) for the **Claimants**
The Defendant in person
Mr Jonathan Hough QC (instructed by the Government Legal Department, on behalf of the Chief Coroner of England and Wales) for the **Interested Party**

Hearing dates: 27-28 March 2018

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Judgment Approved

Lord Justice Singh :

Introduction

1. This is the judgment of the Court, to which both of its members have contributed.

2. In this claim for judicial review the Claimants challenge the lawfulness of a policy, which was adopted by the Defendant, who is the Senior Coroner for Inner North London, on 30 October 2017 to the following effect:

> "No death will be prioritised in any way over any other because of the religion of the deceased or family, either by the coroner's officers or coroners."

This has been described at various times by the Defendant as being a "cab rank rule" and "an equality protocol".

3. Permission to bring this claim for judicial review was granted by Holman J on 31 January 2018.

4. The First Claimant, which is not a body corporate, is a charitable organisation responsible for managing and facilitating the burials of a large proportion of the orthodox Jewish population in Inner North London. It operates as part of the Adath Yisroel synagogue, which is a registered charity. It was founded almost a century ago and is staffed by unpaid volunteers. It has over 5,000 members, most if not all of whom will be affected by the Defendant's policy.

5. The Second Claimant is a 79 year old orthodox Jewish woman who lives within the administrative area of the Defendant. She has expressed serious concerns, based on her religious beliefs, about the impact of the policy on her: see her witness statement dated 7 March 2018.

Standing

6. Initially this claim was brought by the First Claimant only. However, on 8 March 2018 permission was granted by Singh LJ to amend the claim so as to include the Second Claimant. The application to amend was made out of "prudence", since it was recognised that the First Claimant might not have standing as a "victim" to rely on the Convention rights within the meaning of the Human Rights Act 1998 ("HRA"): see section 7(3) and (7). The application was made with the consent of the Interested Party and without objection from the Defendant.

7. On behalf of the Claimants it is submitted that both have standing to bring this claim for judicial review, at least in relation to those grounds of challenge which rely on purely domestic law principles of public law, since they have "sufficient interest" in the matters to which the claim relates: see section 31(3) of the Senior Courts Act 1981. No suggestion was made by the other parties that that was wrong. Although standing goes to the Court's jurisdiction and jurisdiction cannot be conferred by consent, we are satisfied that the Claimants do have standing to bring this claim for judicial review in relation to those grounds which rely only on domestic law principles of public law.

8. It is further submitted that, even if the First Claimant is not entitled to rely on the Convention because it does not qualify as a "victim" under section 7(7) of the HRA, the Second Claimant can properly claim to be a victim of the policy for Convention purposes, given in particular her age and where she lives. It does not matter that a person is not an actual victim. It is clear both from the language of the HRA (in particular section 7(1) and (3)) and from the jurisprudence of the European Court of Human Rights on Article 34 of the Convention that a person can be a victim even though their rights have not yet been violated, provided they "would" be a victim.

9. It is submitted on behalf of the Second Claimant that she is "personally and directly affected" by the policy. That is the test for whether a person is a victim under both

Article 34 of the Convention and section 7(7) of the HRA, which expressly cross-refers to Article 34. The principles which govern the meaning of "victim" in this context were discussed in more detail by Singh J in *R (Pitt and another) v General Pharmaceutical Council* [2017] EWHC 809 (Admin); (2017) 156 BMLR 222, at paras. 52-67.

10. In the present case we are not persuaded that the First Claimant has standing to rely on Convention rights in this claim but we are satisfied that the Second Claimant does, since she qualifies as a "victim".

The Claimants' Grounds of Challenge

11. The Claimants advance the following grounds of challenge to the Defendant's policy:

    (1) Breach of Article 9 of the Convention. The Chief Coroner, who has been joined to these proceedings as an Interested Party, submits that, as a matter of public law and quite apart from the HRA, the Defendant's policy is unlawful on the grounds that it fetters her discretion and it is irrational. On behalf of the Claimants, Mr Sam Grodzinski QC adopts the Chief Coroner's submissions on fettering and irrationality as part of his case on Article 9 and joins with Mr Jonathan Hough QC in inviting the Court to determine those issues, even though they were not raised in his original grounds of challenge.

    (2) Breach of Article 14 read with Article 9.

    (3) Indirect discrimination contrary to section 19 of the Equality Act 2010.

    (4) Breach of the public sector equality duty ("PSED") in section 149 of the Equality Act.

12. We are satisfied that it is in the public interest that we determine all issues arising on the facts of this case in a single judgment. We are not however persuaded that the issues of fettering and irrationality, raised by the Chief Coroner, fit conveniently within the Claimants' ground relating to Article 9. We therefore take the issues in the following order:

    (1) fettering of discretion;

    (2) irrationality;

    (3) breach of Article 9;

    (4) breach of Article 14, read with Article 9;

    (5) indirect discrimination under the Equality Act; and

    (6) the PSED.

The Defendant's Position

13. For the purpose of these proceedings the Defendant has said that she intends to maintain a "neutral" stance. She has not been represented before this Court.

However, she has filed various documents with the Court, including Detailed Grounds, an Addendum to her Detailed Grounds and a skeleton argument. In those documents, the Defendant says that she wishes to explain the reasons for adopting the policy and to make this Court aware of certain operational detail about her office. We will consider her reasons in greater detail below.

14. The Defendant was present throughout the hearing. After the Claimants' submissions had finished, she was asked by the Court whether she would like to say anything but declined that opportunity. However, after the Claimants' reply, she asked for a brief opportunity to be heard, which she was granted. In so far as what she said in her brief oral statement amounted to fresh evidence, which had not been previously served on the other parties, we were invited to ignore it by Mr Grodzinski. We confirm that nothing in our decision turns on any fresh evidence, if that is what it was, adduced at that stage of the hearing.

15. The Chief Coroner's skeleton argument has helpfully included legal arguments that would have been available to the Defendant had she been represented before the Court. We are particularly grateful to Mr Hough (in both his written and in his oral submissions) for fairly drawing attention to those arguments that could be made in defence of the Defendant's policy as well as making submissions on behalf of the Chief Coroner himself.

The Chief Coroner's Position

16. The Court has had the benefit of both written and oral submissions by Mr Hough on behalf of the Chief Coroner. The Chief Coroner considers that the Defendant's policy is unlawful, in that it apparently imposes a fixed rule that a coroner or coroner's officer may never treat a task in one case as especially urgent in order to satisfy a strongly held and sincere desire of the family of a deceased person to have the person's body released quickly on religious grounds.

17. In particular the Chief Coroner submits that:

    (1) The policy is over-rigid and involves the Defendant fettering her discretion to take expedited decisions with regard to the needs and interests of particular families.

    (2) In context, the policy is not capable of rational justification.

    (3) Applied strictly, the policy would infringe Article 9 rights or be discriminatory under Article 14.

18. However, the Chief Coroner is not persuaded by the Claimants' arguments by reference to the Equality Act and does not agree with those submissions.

Coroners and Their Work

19. The office of Coroner has a long history and has a primarily territorial jurisdiction. The coroner service in each area is organised locally and funded by a designated local authority. There are presently 89 coroner areas. The Inner North London area includes the administrative areas of four London boroughs: Camden, Hackney,

Islington and Tower Hamlets. There may also be an Area Coroner and there will usually be a number of Assistant Coroners, any of whom may exercise the powers of a Senior Coroner in investigations of deaths. All the Coroners for an area are appointed by the responsible local authority and hold office on terms agreed with that authority: see Sch. 3 to the Coroners and Justice Act 2009 ("CJA").

20. According to the information helpfully provided on behalf of the Chief Coroner, in the latest available statistics (for 2016), the number of deaths in England and Wales reported to Coroners was 241,211 (46% of all registered deaths). Coroners ordered post-mortem examinations ("PMEs") in 86,545 cases (36% of those reported to them). Coroners opened inquests in 38,626 cases and recorded conclusions in 40,504 inquests.

21. Once a death has been notified to the Senior Coroner of the relevant area, he or she must first decide whether an investigation should be opened. Enquiries may be made to determine whether the statutory criteria for opening an investigation are met, and those enquiries may include a PME (usually a full autopsy but sometimes a scan). After a Coroner has made the decision to open an investigation, he or she may only conclude it without an inquest hearing if a PME held after the investigation has commenced reveals the cause of death to be natural and shows that an inquest is unnecessary.

The Legal Framework Relating to Coroners' Investigations

22. Section 1 of the CJA provides:

> "(1) A senior coroner who is made aware that the body of a deceased person is within that coroner's area must as soon as practicable conduct an investigation into the person's death if subsection (2) applies.
>
> (2) This subsection applies if the coroner has reason to suspect that –
>
> (a) the deceased died a violent or unnatural death,
>
> (b) the cause of death is unknown, or
>
> (c) the deceased died while in custody or otherwise in state detention.
>
> …
>
> (7) A senior coroner may make whatever enquiries seem necessary in order to decide –
>
> (a) whether the duty under subsection (1) arises
>
> … "

23. Section 4 of the CJA provides for a procedure whereby a Coroner who has commenced an investigation under section 1 may discontinue it. If a PME under

section 14 reveals the cause of death before the Coroner has begun holding an inquest and the Coroner does not think it necessary to continue the investigation, he or she may discontinue it: see section 4(1). In those circumstances no inquest is held: see section 4(3)(a).

24. Section 5 of the CJA governs the matters to be ascertained in a Coroner's investigation. Subsection (1) states that the purpose of an investigation is to ascertain who the deceased was; and when, where and how he/she came by his/her death. Where an inquest is held section 10 requires the Coroner or jury to make a determination answering those questions.

25. Section 14 governs PMEs and provides as follows:

> "(1) A senior coroner may request a suitable practitioner to make a post-mortem examination of a body if –
>
> (a) the coroner is responsible for conducting an investigation under this Part into the death of the person in question, or
>
> (b) a post-mortem examination is necessary to enable the coroner to decide whether the death is one into which the coroner has a duty under section 1(1) to conduct an investigation."

26. Subsection (5) of section 14 provides that:

> "A person who makes a post-mortem examination under this section must as soon as practicable report the result of the examination to the senior coroner in whatever form the coroner requires."

27. Section 15 of the CJA gives a Coroner who needs to request a PME the power to order the body to be removed to a suitable place within or outside his/her area. That section clearly proceeds on the basis of a presumption that the Coroner has the legal right to possession of the body for the purposes of an investigation.

28. That legal right to retain the body for an investigation was recognised by the Divisional Court in *R v Bristol Coroner, ex parte Kerr* [1974] QB 652, at pp.658-659. Lord Widgery CJ accepted the view that:

> "the coroner's authority over the physical control of the body arises as soon as he decides to hold an inquest, and lasts at common law until the inquest itself is determined."

29. However, as Mr Hough points out, those comments now need to be seen in the light of the provisions of the CJA which created the concept of a Coroner making initial enquiries and opening an investigation before deciding whether to hold an inquest.

30. Section 43 of the CJA empowers the Lord Chancellor to make regulations for regulating the practice and procedure at, or in connection with, investigations under Part 1 of the CJA and for other matters which are specified in that provision. The relevant regulations are the Coroners (Investigations) Regulations 2013 (SI 2013 No. 1629) ("the Regulations").

31. Regulation 7 provides that:

> "A coroner may delegate administrative, but not judicial functions, to coroner's officers and other support staff."

32. Regulation 4 provides that:

> "A coroner must be available at all times to address matters relating to an investigation into a death which must be dealt with immediately and cannot wait until the next working day."

33. Regulation 20 provides that:

> "(1) A coroner must release the body for burial or cremation as soon as is reasonably practicable.
>
> (2) Where a coroner cannot release the body within 28 days of being made aware that the body is within his or her area, the coroner must notify the next of kin or personal representative of the deceased of the reason for the delay."

34. Regulation 21 provides that:

> "(1) A coroner may only issue an order authorising the burial or cremation of a body where the coroner no longer needs to retain the body for the purposes of the investigation. …"

<u>The Practicalities of a Coroner's Investigation</u>

35. As will be apparent from the statistics to which we have referred earlier, the majority of deaths in England and Wales are not notified to a Coroner at all. Deaths are usually notified if a clinician or some other person (for example a police officer) considers that the cause of death may have been unnatural or violent, or that the cause is unclear.

36. We have been assisted by evidence filed on behalf of the Chief Coroner which includes witness statements from three Senior Coroners from various areas around the country: Mr Rebello, Senior Coroner for Liverpool and the Wirral; Professor Leeming, Senior Coroner for Manchester West; and Mr Smith, Senior Coroner for

Stoke-on-Trent and North Staffordshire. Although practice will vary between Coroner Areas, the common experience appears to be as follows.

37. The notification of a death and associated papers will first be considered by a Coroner's officer, who will prepare a short report for the Coroner to consider the case. The process of preparing that report may involve some enquiries being made by telephone to discover more about the death or the deceased person.

38. A Coroner will then review the officer's report and the file to decide what steps should be taken. If he or she decides (either at the outset or after some enquiries) that no further investigation is needed (i.e. that the cause of death is clear and was natural), he or she will complete a Form 100A, giving notice of the intention not to proceed further and so facilitating the registration of the death.

39. The Coroner may decide that a PME is required, either to determine whether to commence an investigation or to decide whether to continue an investigation which has been commenced. In that case a PME will be arranged by the Coroner's officer with a pathologist.

40. If the PME allows the cause of death to be established such that further investigation is not required, the Coroner will complete a Form 100B. Again, the completion of that form enables the death to be registered.

41. The body of the deceased person will usually be released to the family for burial or cremation either after a Coroner has decided that a PME is unnecessary; or after a PME has been performed and the pathologist does not require the body any longer. A certificate allowing disposal of a body by burial can then be issued. Such a certificate is issued not by the Coroner but by the Registrar under the Births and Deaths Registration Act 1926.

42. As will be clear from the terms of Regulation 7 of the Regulations, a Coroner may delegate administrative but not judicial functions. Accordingly, while the handling of enquiries may be delegated to Coroner's officers, decisions as to whether to order a PME and whether to conclude the enquiries or investigations (by completing either a Form 100A or Form 100B) are judicial decisions and, as such, must be taken by a Coroner.

43. It will be apparent that deaths can be notified to the Coroner's office throughout the working day and will often have been notified overnight.

44. It will also be obvious that, during the working day, a Coroner will have a number of demands on his or her time. There will be reports to review, and decisions to be made relating to whether further enquiries are necessary. There may well be hearings to conduct. There will be other work associated with inquests as well as with the management of the office more generally.

The Defendant's policy

45. The Defendant's policy was contained in a letter dated 30 October 2017 to solicitors representing the First Claimant, with whom the Defendant had been corresponding in relation to a particular death. In that letter, she said that she had "devised a protocol for the future to ensure that the bereaved whose loved ones fall within the remit of HM Coroner for Inner North London are treated fairly, and the best use is made

overall of the inadequate resources that have been placed at my disposal". A five point protocol was then set out. Paragraph 1 of that protocol is now under challenge. As we have recorded earlier, it stated that "no death will be prioritised in any way over any other because of the religion of the deceased or family, either by the coroner's officers or coroners".

46. The Defendant suggests that in practice she does not apply the policy as rigidly as might appear to be the case on its face. In particular, in her Detailed Grounds, her Detailed Grounds Addendum and her letter of 3 January 2018 she said that the policy operated in ways that were different in practice. Nevertheless, the difficulty is that the policy as promulgated on 30 October 2017 says what it says on its face. Other people are entitled to rely upon what it says and to regulate their affairs accordingly. This is important not only for members of the public but also for those who have to apply the Defendant's policy, namely her own officers.

47. We therefore agree with Mr Grodzinski that this Court must consider the policy as it was published, drawing on *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd and another intervening)* [2012] UKSC 13; [2012] PTSR 983, at para. 18, where Lord Reed JSC said:

> "policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context".

48. Further, as Lang J noted in *R (MP) v Secretary of State for Justice* [2012] EWHC 214 (Admin), at para. 184, there is a "danger in not spelling out that a policy is to be applied flexibly". If the Defendant intended the policy to be operated in a flexible manner, that needed to be expressed. It was not so expressed. The policy we must consider is one, therefore, which on its face excludes prioritisation of deaths for religious reasons, at any stage of the coronial process.

49. The Defendant's explanation for her policy is set out in her Detailed Grounds, with some amplification in the Detailed Grounds Addendum, in correspondence and in her skeleton argument. She has signed those documents personally and we accept that they contain the Defendant's case on the facts. We set out the main points of that case in the following paragraphs.

50. The Defendant's particular concern was that Jewish families represented by the First Claimant were being prioritised over other families by her coroner's officers. As she explains in her Detailed Grounds, this was a practice she wished to stop:

> "8. My team and I have a statutory duty to perform and within its structure we try to help families. We endeavour to accommodate each one. However, what I have described to the [First] Claimant in person and in writing, is the significant negative impact that prioritisation of one sector of the community above others has had upon the families of those other deceased. It is my experience over twelve years as coroner that queue jumping places those who are pushed back further in the queue at a material disadvantage."

51. The Defendant's experience of being a Coroner for 12 years led her to conclude that all families wished to have an early decision from the Coroner as to what steps, if any, would be necessary in relation to the death of their family member. She considered that the policy would ensure fairness for all families within her area:

> "…some families accept a delay to time of funeral … but what causes most distress for all families is a delay in decision making and notification of that decision. … Families want to be notified that the coroner's office has been apprised of the circumstances of death. They also want a decision to be made quickly about whether there are further enquiries to be made, whether the deceased must undergo an examination, or whether quick release for funeral is possible. And all families want to be notified immediately of the decision" (Detailed Grounds, para. 10-11).

52. In formulating the policy, she had taken into account Articles 9, 14 and 8 of the Convention. She stated that her approach "reflects my best attempts to consider the rights of all those who are within my jurisdiction" (Detailed Grounds at para. 17). She took the Equality Act into account, including sections 19 and 149.

53. She was assisted by guidance issued by the Chief Coroner (then HHJ Peter Thornton QC) on 1 May 2014 which stated at para. 30:

> "It is important to state that all Coroners in England and Wales are obliged to act within the scope of the current law which must be applied equally and consistently for all. *The law does not allow the Coroner to give priority to any one person over another.* Nevertheless, Coroners are always sensitive to the needs of certain faith groups. They are committed to providing as complete a service to the public (including release of bodies for early burial) as they are able to within the limits of available resources." (Emphasis added)

54. In light of these various sources of law, guidance and her own experience, the Defendant devised the policy which accorded with her understanding that she was not permitted to give priority to any one person over another:

> "I have made this decision to apply the law as I understand it and as clarified by the former Chief Coroner" (Detailed Grounds at para. 24).

55. She rejected the First Claimant's proposition that she should operate a system of "triaging" deaths. That was because she lacked the resources to implement such a system; she said that a system of triage would cause delay for all because the coroner's officers would be diverted from the substantive work necessary to progress the cases to decision-making by the need to conduct the triage (Defendant's Detailed Grounds at paras. 27-31) The "pinch point" in her office was not at the point that the coroner scrutinised the death, but before that stage, when the coroner's officers were preparing reports into the deaths for the coroner to consider (para. 43).

56. In response to the Chief Coroner's Detailed Grounds, the Defendant filed an Addendum to her Detailed Grounds in which she took issue with the Chief Coroner. In that Addendum, the Defendant quoted the Chief Coroner's initial support for her position, and suggested that her "equality protocol" was applied across the board so that "no sector of the community is prioritised; none is put ahead at the expense of others who are then left behind; no death is elevated as more important than others" (see para. 28). (This was, of course, to suggest that her policy was broader than it appeared on its face by precluding prioritisation for any reason, not just on religious grounds. We will return to this point.) Later in that Addendum she stated that cases of organ donation and homicide investigation would be prioritised, notwithstanding her policy, see para. 43.

The impact of the policy

57. There is evidence before the Court that the average time between a death and burial or cremation is now some 15 days: HC Debates, 3 May 2016. This has been made possible by advances in cold storage and embalming techniques. It would appear that many families in this country are now content for a funeral to be delayed, not least because it may enable members of the family to travel from long distances in order to attend the funeral: see the report of the All-Party Parliamentary Group for Funerals and Bereavement after its Inquiry into delays between death and burial or cremation (December 2015), paras. 20-21.

58. However, there is plenty of evidence before the Court (which has not been disputed by the Defendant) that for certain faith groups, in particular the Jewish faith and the Muslim faith, it is very important that a funeral should take place as soon as possible, ideally on the day of death itself: see, by way of example, the Second Claimant's witness statement, para. 5. This principle is so important to Jewish people that it is quite common for a close relative, such as a child of the deceased person, to miss the funeral of their parent if, for example, they are abroad when their parent dies: see the witness statement of Dayan Shulem Friedman, para. 5. (A Dayan is a Jewish judge, a position which Dayan Friedman has held for over 40 years).

59. It is important to make clear that the Claimants are not seeking in the present proceedings to secure any dispensation from the general law of the land. As Dayan Friedman explains, at para. 7 of his witness statement:

> "It is a principle of Jewish law that the law of the land must be obeyed. Where the Coroner has jurisdiction there is no suggestion that such jurisdiction should not be respected and of course Jews must comply, along with all British citizens, with the requirements of the law. However where delays can be avoided, it is incumbent on Jews to take what steps they reasonably can to try to ensure that they do comply with Jewish law and belief to bury a person promptly after death."

60. The evidence before the Court includes a letter from the Chief Rabbi (Ephraim Mirvis) to the Lord Chancellor (David Gauke MP) dated 23 January 2018, which states that, where "the fastest possible burial is denied to a Jewish family, it can cause a great deal of pain at a time when they are already grieving."

61. The Court also has before it a witness statement by Mr Jonathan Arkush, who is the President of the Board of Deputies of British Jews. At para. 6 he states:

> "I have discussed [the Defendant's] decision with both lay and religious leaders within the community and have found that her decision has caused widespread concern. Indeed I can recall few communal issues which have arisen during my nine years as President and Vice President of the Board which have caused such widespread alarm and distress amongst so many within the community. People have told me that [the Defendant's] decision never to give any priority to faith deaths, makes people feel that they are or will be deliberately forced, by a public official, to break their deeply held religious beliefs and practices."

62. The Court also has evidence before it about the impact of the policy on members of the Muslim community in this country. That evidence includes a witness statement by Mufti Abdur-Rahman Mangera, in which he states, at paras. 5-6:

> "5. Under Islamic law there is an important principle that a dead body should be buried as quickly as reasonably possible, and ideally on the same day of death. Hence, our prophetic traditions even show burials taking part on the very night of the death of an individual. This is done to fulfil the rights of the body and allow them to move on to the next stage of their life as quickly as possible. Hence, there is explicit discouragement of delaying a burial that is found within the prophetic tradition.
>
> 6. Muslims see this as an important law and people seek to obey it strictly. Where for any reason this cannot be complied with, then the close family with responsibility for ensuring speedy burial will invariably feel very considerable anguish. Not only are they often emotionally vulnerable anyway because of their recent loss, but also they are particularly anxious to do what they can for the body of their loved one and also of course to maintain the tenets of their deeply held religious beliefs."

63. The Court also has before it a press statement dated 25 January 2018 from the Muslim Council of Britain, which states:

> "The Muslim Council of Britain shares the concerns raised by the Mayor of London, Sadiq Khan and the Board of Deputies of British Jews in relation to delays in the release of bodies post mortem."

<u>Other Deaths Requiring Urgent Decisions</u>

64. There is also evidence before the Court of other deaths where an early decision from the Coroner is required within a very short time frame, for reasons which are not religious. Two such instances are acknowledged by the Defendant (Addendum to the Detailed Grounds, para. 43), namely deaths where organ donation is sought, and deaths where a homicide investigation is underway.

65. We have already referred to the Defendant's evidence that families generally wish to have an early decision from the coroner. Mr Hough accepted this during the course of argument. The Defendant has long experience as a Coroner and her views are informed. We accept what she says in this respect. Indeed, we consider that what she says is obviously right: when a family member dies, it is natural for those left behind to wish to know as soon as possible whether the death is to be investigated, and if so, what the nature of those investigations will be and on what timescale.

66. For some families, the loss of a loved one will cause acute distress, and will mean that a swift decision from the Coroner is particularly desirable. The evidence before us referred, as an example of this type of case, to deaths of children in hospital where the parents seek to have the body moved as soon as possible from the hospital mortuary to a children's hospice "sunset room"; as a matter of ordinary humanity, Coroners would wish to deal with such requests as soon as possible, even if that meant inconveniencing other families who were also waiting.

67. The Defendant was keen to stress to us that the instances where the Coroner will be under pressure to give a decision quickly are many and different. In some cases, that pressure will come from families or others. In other cases, the families may be quiet, but the Coroner or Coroner's officer may become aware that the particular death is causing an unusually deep level of distress to those left behind, so that as a matter of ordinary compassion an early decision would be desirable.

68. The Defendant recognised, as do the Claimants in their Grounds and as did Mr Hough in oral argument, that in many cases where a person has dealings with the Coroner in the aftermath of the death of a family member, that person's rights under Article 8 of the Convention, which protects the right to respect for private and family life, will be relevant. That submission does not require further development in the present context. The point is simply this: any determination of the order in which deaths are to be dealt with and, specifically, any decision as to whether one death should take priority over others, may well be a complex task which involves balancing different rights and interests within the resources available to the particular Coroner.

69. That leads us to two final conclusions in this context. The first is to reject the First Claimant's suggestion that it was only seeking prioritisation where it would not cause material disadvantage to others. Where resources are scarce, which appears to be the case for this Defendant and indeed for other Coroners (a point accepted by the Chief Coroner at para. 43 of his Detailed Grounds), the reality is that the prioritisation of one case may well have some material effect on or disadvantage to others. The Chief Coroner suggested that it was not correct to speak of others being "disadvantaged" in this context, because that word presupposed that all families attach precisely the same urgency to the release of a body (para. 15 of his Response), but it is not at the point of release of the body that the pinch point occurs, at least not for this Defendant. At the point of initial allocation of reported deaths to coroner's officers for initial investigation and reporting, the prioritisation of one death may very well lead to delays for other deaths which are also awaiting initial decisions.

70. Secondly, we agree with the Claimants and the Chief Coroner that, at the other end of the scale, there should be no rule of automatic priority for those seeking expedition on religious grounds. That is not what the Claimants were seeking, and that is not what the Chief Coroner envisages. Whatever policy is adopted must be flexible, in order to be able to accommodate the range of possible situations and pressures on a Coroner.__

The role of the Chief Coroner

71. It is important to note that each coroner is an independent judicial officer. The Chief Coroner, which is a post that was created by Parliament in the CJA, has no power to direct any individual coroner on how he or she should perform his or her judicial functions. However, he can give guidance which is not formally binding on Coroners, but which we understand to be conventionally observed by them (we have already referred to para. 30 of the Chief Coroner's guidance dated May 2014).

72. The present Chief Coroner (HHJ Mark Lucraft QC) was appointed in October 2016.

73. Before the Defendant promulgated her policy on 30 October 2017, she had sent her letter in draft to the Chief Coroner. He indicated his approval of the letter. He added that he was "in favour of us respecting faith deaths" but that "all deaths are important and should always be treated equally."

74. In his response to the Defendant's Detailed Grounds Addendum, at paras. 5-7, the Chief Coroner explains that, when he originally approved the Defendant's letter of 30 October 2017 in draft, he understood that the issue was whether Coroners ought as a fixed rule to ensure that deaths from certain faith communities were considered before all others. His view then, and now, was that such a rule would not be appropriate. Later, after receiving the papers in this case and seeing details of the Claimants' arguments and after taking advice, he reached the position which he has taken in these proceedings.

75. On behalf of the Chief Coroner Mr Hough submits that the Defendant's policy is unlawful in certain respects. He also accepted at the hearing before us that the guidance given by the previous Chief Coroner (in particular the passage which we have emphasised in para. 30, quoted above) is wrong, certainly if that sentence is read in isolation and taken out of context.

76. Against that legal and factual background we turn to each of the six issues raised in this case.

Issue (1): Fettering of Discretion

77. It is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers.

78. The principle was stated in the following way by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex p. Venables* [1998] AC 407, at pp.496-497:

> "When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised

> on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.
>
> These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases: see *Rex v. Port of London Authority, Ex parte Kynoch Ltd.* [1919] 1 K.B. 176; *British Oxygen Co. Ltd. v. Board of Trade* [1971] A.C. 610. But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful … ."

79. As will be apparent from that passage, the principle usually applies where the source of a discretionary power is legislation. The position is different where the source of the power is the Royal prerogative and not legislation: see *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014] 1 WLR 2697. An issue therefore arises as to how the Coroner's powers to devise policies such as that under challenge in this case should be classified.

80. In the main judgment in *Sandiford*, Lord Carnwath and Lord Mance JJSC said, at paras. 60-62:

> "60. The issue which divides the parties is, in short, whether there exists in relation to prerogative powers any principle paralleling that which, in relation to statutory powers, precludes the holder of the statutory power from deciding that he will only ever exercise the power in one sense.
>
> 61. The basis of the statutory principle is that the legislature in conferring the power, rather than imposing an obligation to exercise it in one sense, must have contemplated that it might be appropriate to exercise it in different senses in different circumstances. But prerogative powers do not stem from any legislative source, nor therefore from any such legislative decision, and there is no external originator who could have imposed any obligation to exercise them in one sense, rather than another. They are intrinsic to the Crown and it is for the Crown to determine whether and how to exercise them in its discretion.

> 62. In our opinion, in agreement with the Court of Appeal, this does have the consequence that prerogative powers have to be approached on a different basis from statutory powers. There is no necessary implication, from their mere existence, that the state as their holder must keep open the possibility of their exercise in more than one sense. There is no necessary implication that a blanket policy is inappropriate, or that there must always be room for exceptions, when a policy is formulated for the exercise of a prerogative power. In so far as reliance is placed on legitimate expectation derived from established published policy or established practice, it is to the policy or practice that one must look for the limits, rigid or flexible, of the commitment so made, and of any enforceable rights derived from it."

81. As that judgment noted, the point is well illustrated by the decision of the Court of Appeal in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213. In particular, Mummery LJ said, at paras. 191-193:

> "191. I agree with Elias J that the authorities do not assist the case advanced by Mrs Elias on this point. The analogy with statutory discretion, as in the *British Oxygen* case [1971] AC 610, is a false one. It is lawful to formulate a policy for the exercise of a discretionary power conferred by statute, but the person who falls within the statute cannot be completely debarred, as he continues to have a statutory right to be considered by the person entrusted with the discretion. No such consideration arises in the case of an ordinary common law power, as it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be. If there are no exceptions the decision-maker is under no duty to make payments outside the parameters of the scheme. The consequence of the submission made on behalf of Mrs Elias would create problems by requiring every individual case falling outside the scheme to be examined in its individual detail in order to see whether it would be regarded as an exceptional case.
>
> 192. *Ex p Bentley* [1994] QB 349 was decided on the basis that the Secretary of State had fettered his discretion under a misunderstanding as to the scope of the powers available to him. This is not a case of fettering discretion under a misunderstanding of the scope of a discretion exercisable according to individual circumstances. Like *R v Criminal Injuries Compensation Board, Ex p Lain* [1967] 2 QB 864, *In re W's Application* [1998] NI 19 and the *ABCIFER* case [2003] QB 1397 itself, this is a case of a policy decision to exercise a common law power. The intervention of statute was not required. With regard to the compensation scheme it was

> necessary to formulate what Mr Sales called 'bright line' criteria for determining who is entitled to receive payments from public funds. Subject to the race discrimination point the criteria implement the policy or the compensation scheme. They are not a fetter on an existing common law discretionary power to decide each application according to the circumstances of each individual case. In my judgment, there was nothing unlawful (subject again, of course, to the race discrimination point) in using common law powers to define a scheme to be governed by rules, to make specific provision for general criteria of eligibility and for exceptions and in then refusing to apply different criteria or, by way of exception, to consider or grant applications from those not falling within the published criteria.
>
> 193. The Secretary of State has not unlawfully fettered an existing relevant ordinary common law power (or prerogative power) nor has he acted arbitrarily nor under a mistake as to the nature and scope of his powers by rejecting or refusing to consider or reconsider Mrs Elias's application as exceptional on the basis of the circumstances of her internment or of the appalling consequences of it for her or of her very strong close links with the UK."

82. In our view, the decisions in *Elias* and *Sandiford* are distinguishable from the present case for three reasons.

83. First, they concerned the powers of the Crown and, in particular, the Royal prerogative. The present case does not concern the powers of the Crown or the Royal prerogative. It does concern the powers of a Coroner, including such powers as Coroners still have under the common law: see *Ex p. Kerr* (above). It is the common law itself which is the source of the power to retain the body of a deceased person. It is therefore the common law which sets out the limits of that power and the principles which govern its exercise. In our view, those principles include the principle against fettering of discretion.

84. Secondly, even in the context of the prerogative it was emphasised by Mummery LJ in *Elias*, at paras. 192-193, that the Secretary of State in that case had not unlawfully fettered "an *existing* common law power" (emphasis added). What happened in *Elias* was that the Secretary of State had decided to set up an entirely new scheme for *ex gratia* compensation to be paid to certain persons who had been interned by the Japanese in the Second World War. The terms of the new scheme were what they were; the Claimant in that case was not entitled to complain that those terms should have been different and should have permitted of exceptional cases which fell outside those terms to be considered as well. In the present case, by way of contrast, there was an existing common law power, as shown by the decision in *Ex p. Kerr*.

85. Thirdly, and in any event, the present context is one where at most there is only a residual common law power. Most of the functions which are exercised by a Coroner in the present context derive from legislation, which we have summarised earlier. For example, the Coroner exercises statutory powers when she makes preliminary enquiries relating to death (under section 1(7) of the CJA); when she decides whether

to discontinue an investigation (under section 4); when she orders a PME (under section 14); or when she has the body moved for the purposes of a PME (under section 15). Furthermore, as we have seen in summarising the legislative framework, the Coroner's ability to retain the body of the deceased person is limited in time by legislation: regulation 20 of the Regulations.

86. In those circumstances we conclude that the power being exercised by the Coroner in this case was akin to a power derived from statute. The principle against fettering a discretion applies in the present context.

87. Furthermore, we have come to the clear conclusion that the policy as promulgated by the Defendant on 30 October 2017 breaches that principle. It does constitute an unlawful fetter on the Coroner's decisions as to when and how to exercise her various statutory powers and for how long to retain custody of a body. As both the Claimants and the Interested Party have submitted to this Court, the policy as formulated imposes a blanket rule that, in taking those decisions, the Coroner will not take into account the circumstances of any individual family where they have a religious basis. As formulated the policy would prevent the Coroner taking into account a relevant consideration, contrary to the above principles of law. This would be so even where there would be limited – or even no – effect on her other work.

88. We also accept the submission made by Mr Hough on behalf of the Chief Coroner that if, as stated in the Defendant's Addendum to her Detailed Grounds, her position in fact is that she would not expedite the handling of any one death over another for any reason particular to the deceased or his/her family (even where that reason is not based on a religious faith), then the defect in the policy remains. It is still over-rigid in that it would preclude the Defendant from taking any account of the individual circumstances of a particular case at all.

Issue (2): Irrationality

89. The Defendant accepts that some cases must be given priority. She gives the examples of deaths which are the subject of homicide investigations and organ donations: see para. 43 of her Detailed Grounds Addendum.

90. Accordingly, even on the Defendant's own express position, the policy which she has adopted is not in truth a "cab rank" policy. Not every case is in fact dealt with by her office in strict chronological order.

91. The question which then arises is whether the policy is capable of rational justification. On its face, it precludes taking into account representations which have a religious basis and it thereby singles out religious beliefs for exclusion from consideration. There is no good reason for this exclusion. It is discriminatory and incapable of rational justification.

92. If, on the other hand, it precludes taking into account any individual circumstances of any kind, whether or not based on a religious faith, there again is no reason for that absolutist stance and so again the policy is incapable of any rational justification.

Issue (3): Article 9

93. Article 9 of the Convention, which is set out in Sch. 1 to the HRA, provides as follows:

> "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and 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.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

94. In *Eweida v United Kingdom* (2013) 57 EHRR 213, at paras.79-81, the European Court of Human Rights emphasised the importance of the rights set out in Article 9, as follows:

> "79. The Court recalls that, as enshrined in art.9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> 80. Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of art.9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in art.9(1), freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practise in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions. Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in art.9(2). This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

> 81. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance. Provided this is satisfied, the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed."

95. As is apparent from that passage, there are several things of importance to note about the terms of Article 9.

96. First, it does not protect only freedom of religion. It protects freedom of all thought (including the beliefs of those who have no religious faith) and freedom of conscience.

97. Secondly, the first right set out in Article 9 (the right to freedom of thought, conscience and religion) is an absolute one. The second right (freedom to change religion or belief) is also absolute. However, the third right (freedom to manifest one's religion or beliefs) is not absolute but can in principle be subject to limitations.

98. Thirdly, as para. (2) of Article 9 makes clear, for those limitations to be lawful the following requirements must be satisfied:

(1) The limitation must be "prescribed by law". In the present case, Mr Grodzinski does not suggest that the policy is not prescribed by law in this sense. Clearly the Defendant has the power in principle to adopt a policy.

(2) The limitation must be necessary in order to serve one of the legitimate aims set out: in particular reliance can be placed by the Defendant in the present context on "the protection of the rights and freedoms of others."

99. For a limitation on a fundamental right such as this to be "necessary", it must satisfy the principles of proportionality, which are well established in the case law both of the European Court of Human Rights and of our own courts under the HRA. It is now well established that the following four questions have to be addressed:

(1) Is the legitimate objective sufficiently important to justify limiting a fundamental right?

(2) Are the measures that have been designed to meet it rationally connected to that objective?

(3) Are they no more than are necessary to accomplish it? and

(4) Do they strike a fair balance between the rights of the individual and the interests of the community?

100. In the present case there is no dispute that the right to manifest religion is in play. There is no dispute, and the evidence before this Court clearly establishes, that it is a requirement of both the Jewish and the Muslim faiths that burial of the deceased should take place as soon as possible. The evidence makes it clear that many, if not all, members of those faiths believe that burial should take place on the same day and, for that reason, sometimes even close members of the family may not be able to

attend the funeral. They would prefer their loved one to be buried in accordance with their beliefs rather than delay the funeral.

101. There is also no dispute in the present case that the policy adopted by the Defendant interferes with the right to manifest religion which is protected by Article 9. As we have mentioned, no issue is taken on behalf of the Claimants that the interference is not "prescribed by law" nor is there any issue that the policy serves a legitimate aim, in particular the protection of the rights and freedoms of others, for example those who may have an urgent need for a decision from a Coroner but who do not have a particular religious faith. This may be so, for example, if organ donation is required.

102. Before we address the question of proportionality, which lies at the heart of the issue which arises under Article 9, we would emphasise the phrase "in a democratic society", which appears in para. (2) of Article 9 as it does in many of the Convention Rights. In *R (British Broadcasting Corporation) v Secretary of State for Justice* [2012] EWHC 13 (Admin); [2013] 1 WLR 964, at para. 49, Singh J (giving the judgment of the Divisional Court) said:

> "… These words … are not superfluous. The framers of the Convention, arising as it did out of the ashes of European conflict in the 1930s and 1940s, recognised that not everything that the state asserts to be necessary will be acceptable in a democratic society. The jurisprudence of the European Court of Human Rights has frequently stressed that the hallmarks of a democratic society are pluralism, tolerance and broad-mindedness …"

103. It is not necessary in this case to consider each of the four proportionality questions separately and in turn. The fundamental difficulty with the Defendant's policy is that it does not strike a fair balance between the rights concerned at all. Rather, as a matter of rigid policy, it requires the Coroner and her officers to leave out of account altogether the requirements of Jewish and Muslim people in relation to early consideration of and early release of bodies of their loved ones.

104. Sometimes there will be good reason why a Coroner or his/her officers are not able to turn a case around as quickly as members of the family would wish, even if they rely upon their religious beliefs to make a case for expedition. There may well be other demands on the Coroner or her officers. There may be other cases which are more urgent. They may not have anything to do with a person's religious beliefs, for example if a homicide investigation needs to be facilitated as quickly as possible or there is a need for an organ donation.

105. However, these issues of prioritisation are not unique to the present context. For example, any court which has to consider the listing of cases may need to grant expedition for some cases for good reason. If an issue will become academic unless the Court hears it quickly or if the case concerns the interests of a young child, it may well warrant expedition. This will inevitably have an adverse effect on other cases which are waiting in the list but which are not so urgent. Similarly, in a hospital accident and emergency department, some patients will require urgent treatment, which will mean that others may have to wait longer. In one sense, it could be said that a strict "cab rank" is not being complied with. However, we anticipate that

reasonable people in society would not regard that as "queue jumping" or otherwise unfair.

106. In this context we have also been assisted by the evidence to which we have referred from three Coroners in other areas in the country. Although it is right to observe that one of those areas (Stoke-on-Trent and North Staffordshire) does not have large Muslim or Jewish communities (as the area of Inner North London does), the other two areas (Liverpool and the Wirral and Manchester West) do. From their evidence and from Mr Hough's submissions it is clear that it is perfectly possible for Coroners to have a practice or policy which does not have the rigid effect of the Defendant's policy. For example, Mr Rebello (Senior Coroner for Liverpool and the Wirral) states in his witness statement, at para. 24:

> "We will, where possible, prioritise cases where the family have need for the early release of a body for any reason, be it secular or religious".

107. This also underlines the point that what Article 9 requires is not that there should be any favouritism, whether in favour of religious belief in general or in favour of any particular religious faith, but that there should be a fair balance struck between the rights and interests of different people in society. The fundamental flaw in the present policy adopted by the Defendant is that it fails to strike any balance at all, let alone a fair balance.

108. In this context we should refer to one suggested justification for the Defendant's policy: that it would be unlawful for her to prioritise some cases over others because this would constitute discrimination contrary to the Equality Act. We accept the submission advanced by Mr Grodzinski that that is incorrect. As he submits, section 158 of that Act permits what is called in the side note "positive action" in certain circumstances as follows:

> "(1) This section applies if a person (P) reasonably thinks that –
>
> …
>
> (b) persons who share a protected characteristic have needs that are different from the needs of persons that do not share it …
>
> (2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of –
>
> …
>
> (b) meeting those needs
>
> …"

109. Before leaving this topic we would stress that section 158 does not concern what is sometimes called "positive discrimination"; it is more limited and concerns only what

the legislation calls "positive action". In general "positive discrimination" is unlawful under the Equality Act. Therefore, as a matter of domestic law, prioritisation of some deaths for religious reasons would not be unlawful; to the contrary, it would be consistent with section 158.

110. That position is mirrored in Convention jurisprudence. The point can be well illustrated by the decision in *Jakóbski v Poland* (2012) 55 EHRR 8. In that case the applicant was serving a prison sentence in Poland. He adhered strictly to the Mahayana Buddhist dietary rules and requested a vegetarian diet for that reason. This was not provided for him. The prison authorities stated that they were not obliged to prepare special meals for prisoners on the basis of religious belief as a matter of Polish law and that to do so would put excessive strain on them. The application before the court succeeded under Article 9. For that reason the Court did not consider it necessary to address separately the right to equal treatment in the enjoyment of Convention rights in Article 14 (to which we return below).

111. However, in our view, the case of *Jakóbski* is a good illustration of the principle of equality at work in cases of this kind. What on its face looks like a general policy which applies to everyone equally may in fact have an unequal impact on a minority. In other words, to treat everyone in the same way is not necessarily to treat them equally. Uniformity is not the same thing as equality.

112. In light of these observations, it can be seen that the Coroner's understanding that the law would not allow her to give priority to one person over another (Detailed Grounds, at para. 24 and see above) was misguided. To the extent that her understanding derived from para. 30 of the Chief Coroner's guidance of May 2014, that guidance was also incorrect, as Mr Hough now accepts.

Issue (4): Article 14

113. Article 14 is also one of the Convention Rights which are set out in Sch. 1 to the HRA. It provides that:

> "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." (Emphasis added)

114. The principle of equality is one of the most fundamental in a democratic society and is certainly one of the most cherished rights in the Convention and the HRA. As Baroness Hale of Richmond put it in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, at para. 132: "Democracy values everyone equally even if the majority does not."

115. The kind of society which is envisaged by the Convention and the HRA is one which is based on respect for everyone's fundamental rights, on an equal basis. As we have seen earlier, it is a society which is characterised by pluralism, tolerance and broad-mindedness. It regards democracy as being a community of equals. The late Lord Steyn put it thus in a lecture he gave in 2001:

> "It is a fundamental tenet of democracy that both law and Government accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which should be applied without fear or favour. Law's necessary distinctions must be justified but must never be made on the grounds of race, colour, belief, gender or any other irrational ground."[1]

116. It is well established that the principle of equality in Article 14 requires that:

> "Like cases should be treated alike and different cases treated differently. This is perhaps the most fundamental principle of justice." See *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634, at para. 34 (Elias LJ).

117. Although the principle of equality requires like cases to be treated alike, it is not always sufficiently appreciated that it also requires that different cases should be treated differently. This is established in the jurisprudence of the European Court of Human Rights. In particular, in *Thlimennos v Greece* (2001) 31 EHRR 15, at para. 44, the Court said:

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons who situations are significantly different."

118. As Laws LJ explained in *R (MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (Admin), at para. 38:

> "Where the discrimination is indirect – where a single rule has disparate impact on one group as opposed to another – it is the disparate impact that has to be justified. With *Thlimennos* discrimination, what must be justified is the failure to make a different rule for those adversely affected."

119. That passage also highlights an important point of equality law which must not be overlooked. It is that, in a discrimination case, what has to be justified is not only the underlying measure but the discrimination: see *A v Secretary of State for the Home*

[1] Lord Steyn, 'Human Rights: the Legacy of Mrs Roosevelt' [2002] Public Law 473, at pp.481-482, quoting his earlier paper: 'Common Law; Common Values: Common Rights: Common Law Principle for the 21st Century', London, 17 July, 2001.

Department [2004] UKHL 56; [2005] 2 AC 68, at para. 68 (Lord Bingham of Cornhill).

120. The point is further illustrated by the decision of the European Court of Human Rights in *Jakóbski*, to which we have already referred. Even if the policy in this case could have been justified under Article 9 (which it cannot, for reasons which we have already set out above), it is very difficult to see what justification there could be for the discrimination involved.

121. Two possible justifications were mooted at the hearing before us for the Court's consideration.

122. The first is the need for a "bright line" so that the policy is easy to understand and administer. We do not underestimate the importance of clarity in the policy, not least because it has to be applied on a day to day basis, often under difficult circumstances, by the Defendant's officers. There may be a number of urgent cases which have been notified to the Coroner's office overnight. It is at that point that there may be what the Defendant describes as a "pinch point", in other words before a file or report ever reaches her desk for a judicial determination.

123. However, we are not persuaded that this amounts to sufficient justification for the discrimination involved. We bear in mind that, even on the Defendant's own case, the policy is not a strictly chronological one, so that some cases will have to be given priority even if they are not first in time, for example if there is a need for an organ donation. We also bear in mind that the evidence before the Court shows that Coroners in other areas do not adopt the strict policy which the Defendant has adopted for her area and this does not seem to cause undue difficulties.

124. The second possible justification is that the Defendant's resources are limited. That is no doubt true. It is well known that the finances of public authorities have been under great strain in the last decade. However, resources are always finite and they must be allocated in a way which is not discriminatory. Limits on resources may explain why it is not possible to help a particular family to achieve expedition (whatever the reason for their request for expedition, whether or not it is based on a religious belief) but they cannot justify discrimination of this kind, which means that certain reasons for a request for expedition (religious ones) are excluded from consideration altogether.

125. In our view, therefore, the policy violates the principle of equal treatment in Article 14.

Issue (5): Indirect Discrimination Under the Equality Act 2010

126. The Claimants submit that the policy discriminates in an unlawful way contrary to the Equality Act 2010. In particular they rely on the concept of "indirect discrimination" in section 19 of that Act. Section 19, so far as material, provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.[2]

[2] The protected characteristics include religion and belief: section 4.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

…"

127. Section 19 itself is not a provision which makes anything unlawful. Rather it sets out one of the "key concepts" which are to be found in Part 2 of the Act. In order to ascertain whether a particular act is made unlawful by the Act, one has to go to some other, operative provision in the Act. So far as is relevant in the present case the Claimants rely upon section 29 of the Act.

128. Section 29, so far as material, provides:

"(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B) –

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

…

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination … ."

129. Section 31(3) provides that:

> "A reference to the provision of a service includes a reference to the provision of a service in the exercise of public function."

130. Accordingly, Mr Grodzinski submits that the policy falls within section 29(1), read with section 31(3); alternatively, if he is wrong about that, it falls within section 29(6).

131. Both section 29 and section 31 appear in Part 3 of the Act, which concerns services and public functions.

132. Enforcement of the relevant provisions is dealt with in Part 9 of the Act. Section 113 provides that proceedings relating to a contravention of the Act must be brought in accordance with that Part: see subsection (1). By virtue of section 114 of the Act, jurisdiction to determine a claim relating to (among others) a contravention of Part 3 is conferred on the County Court.

133. However, section 113(3) provides that subsection (1) does not prevent a claim for judicial review. Accordingly, the High Court retains its normal jurisdiction to consider a claim for judicial review and such a claim can include a ground of challenge which is based on an alleged breach of Part 3 of the Equality Act.

134. This does not mean that a claim for judicial review is the only way in which the relevant part of the Act can be enforced against a public authority. Unusually, the Act confers power on the County Court to grant any remedy which could be granted by the High Court either (a) in proceedings in tort; and (b) on a claim for judicial review: see section 119(2). Therefore, the County Court could in principle consider a ground of challenge such as that raised in the present case and, if the ground were made out, that Court could grant a remedy which would otherwise only be available on a claim for judicial review.

135. All that said, Mr Grodzinski is entitled to submit, as he does, that a claim for judicial review is not excluded by the terms of the 2010 Act.

136. In the circumstances of this case, we have reached the conclusion that this Court not only has jurisdiction to consider this complaint but should do so. First, permission to bring this claim for judicial review has already been granted and did not exclude arguments based on this ground of challenge. Secondly, this is not a typical discrimination case of the sort which would be better suited to determination in the County Court: for example where there are disputed issues of fact and live evidence will need to be tested in cross-examination. Thirdly, there is already a claim for judicial review before the Court: it would be highly undesirable for a part of the claim to have to go to another Court. Fourthly, there is a considerable if not complete overlap between this ground of challenge and the ground based on Article 14, which is properly before this Court on a claim for judicial review. For all those reasons we consider it right for this Court to determine this ground of challenge on its substantive merits.

137. Mr Grodzinski fairly acknowledged at the hearing before us that this ground of challenge does not add anything materially to his ground based on Article 14. Nevertheless, since the point was argued before us and because Mr Hough raised a potentially important ground of objection to this part of the case, we will deal with it, albeit briefly.

138. The objection which Mr Hough takes to this ground of challenge is that the policy does not fall within the terms of the definition of indirect discrimination in section 19. In particular, Mr Hough submits that the policy is not one that puts or would put persons with whom B shares the characteristic "at a particular disadvantage" when compared with persons with whom B does not share it: see section 19(2)(b). Mr Hough submits that everyone was subjected to the same policy and therefore the Second Claimant (who for this purpose can be taken to be B within the meaning of section 19) is not put and would not be put at a particular disadvantage when compared with persons who do not share the protected characteristic that B has (being of the Jewish faith).

139. We do not accept that submission. It is well established in the field of discrimination law that a person is entitled to invoke not only an actual comparator but what is described as a hypothetical comparator. That much is also made clear by the express language of the Act: "would put …".

140. In our view, the Second Claimant is entitled to compare her position to that of a hypothetical comparator, namely a person who does not have her religious belief (perhaps, for example, because she is a Christian). That person would be able to comply with the strict requirements of her faith in a way which the Second Claimant is not able to do. In our view, that does put B at a "particular disadvantage when compared with persons with whom B does not share" the protected characteristic.

141. We would also observe that the approach we take is consistent with the approach to interpretation which should generally be taken in the field of social legislation such as the Equality Act. In order to give effect to the will of Parliament, such legislation should be given a broad and generous interpretation so as to give full effect to its underlying purposes. The argument based on indirect discrimination under the Act is in essence the same argument as based on *Thlimennos* under Article 14. It would be surprising and unfortunate, in our view, if the answer were different and, in particular, if the answer depended on a technical reading of the language of the 2010 Act.

142. We conclude therefore that the Claimants are entitled to rely on the concept of indirect discrimination in section 19 of the Act.

143. Since the issue of proportionality which arises under section 19(2)(d) is in essence the same issue as arises under Articles 9 and 14 of the Convention, for the reasons we have already given, there is also a breach of section 29 of the Equality Act 2010 in this case.

Issue (6): the Public Sector Equality Duty

144. Section 149 of the Equality Act 2010 is headed "Public Sector Equality Duty" and subsection (1) provides as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

145. The principles applicable to the PSED are well established. They were recently summarised by Briggs LJ (as he was) in *Hackney LBC v Haque* [2017] EWCA Civ 4; [2017] HLR 14 at paras. 20-23, noting in particular that it was held that "the concept of due regard is to be distinguished from a requirement to give the PSED considerations specific weight. It is not a duty to achieve a particular result…" (at para. 23).

146. The Claimants argue that the Defendant failed, in formulating her policy, to have due regard to the needs of Jewish or Muslim members of the local community, and in this way, she breached the PSED. The Claimants point, in particular, to the lack of an equality impact assessment, and consultation with those communities in advance of the Defendant's adoption of the policy.

147. Further, the Claimants contend (and in this respect they are supported by the Chief Coroner) that if the policy is itself found to be discriminatory against members of those communities, it must follow that the Defendant has failed to have due regard to the need to eliminate discrimination as required by section 149(1). So, they argue, she has breached the PSED. In advancing this argument, the Claimants rely on *R (Hussain and Rahman) v Secretary of State for the Home Department, G4S and Liberty intervening* [2018] EWHC 213 (Admin), where the Secretary of State conceded a breach of the PSED by her failure to have due regard to the discriminatory impact of the night "lock in" at Brook House immigration removal centre (see paras. 2 and 42). Holman J held that the Minister's failure to discharge the PSED meant that she was likely to be disadvantaged or disabled in demonstrating justification, unless and until she had properly thought about it (see paras. 57-60, citing *R (Coll) v Secretary of State for Justice, Howard League for Penal Reform intervening* [2017] UKSC 40; [2017] 1 WLR 2093).

148. However, as the Court underlined in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at para. 26, the duty is essentially a procedural one. The fact that we have found the Defendant's policy to discriminate unlawfully against those with certain religious beliefs does not, in and of itself, lead us to the conclusion that the Defendant breached the PSED. That would be to conflate the outcome or content of the policy with the process by which that policy is arrived at, which is precisely what Briggs LJ warned against in the extract from *Haque* referred to above. We therefore reject the submission that the discriminatory effect of the policy in and of itself demonstrates a breach of the PSED: it does not.

149. We recognise, of course, that in this case the discriminatory effect of the policy was misunderstood by the Coroner. That misunderstanding was generated, at least in part, by her misapprehension that the law did not allow her to give priority to any one person over another.

150. Nonetheless, it is very clear from the various materials submitted by the Defendant that she was acutely aware of the impact her policy might have on certain minority religious communities within her area, even if she did not recognise that impact as discriminatory as a matter of law. Specifically, the Defendant states in her Detailed Grounds:

> "42. I was especially aware of the impact upon the [First] Claimant who, as the organisation which had been hitherto prioritised, was the group likely to feel the greatest impact when all were treated as equal. I was very aware of their religious wish for early burial.
>
> …
>
> 45. I did not act immediately. I considered the matter for a further week, and then I settled upon the conclusion that I had been moving towards for several months … it was up to me as the Senior Coroner and leader of the service to make the judicial decision to realign the service in the fairest way possible. Hence the equality protocol."

151. We conclude that the Defendant did have "due regard" to her public sector equality duty. This ground of challenge therefore fails.

The Framework for a Lawful Policy

152. In her Detailed Grounds, at paras. 24-26, the Defendant requests that the Court should give guidance about various situations that she says that she has encountered and which she is likely to encounter in the future. By way of example, she asks, when there are several families all seeking priority on religious grounds, in what order should they be prioritised? For example, would orthodox be ahead of non-orthodox, practising ahead of non-practising; Jew ahead of Muslim or vice versa?

153. This was a request which the Defendant repeated when she made brief oral submissions at the end of the hearing before this Court.

154. However, as the Defendant acknowledged in other parts of her Detailed Grounds (and indeed in oral submissions to us) it is inappropriate for this Court to give the sort of advice which the Defendant seeks. This is not because the Court wishes to be unhelpful. It is rather for good constitutional and practical reasons.

155. First, the Court does not normally answer hypothetical questions which may arise in the future and which may depend crucially on what the precise facts of a particular case are. That is not the method of the common law. It is also not the approach taken to human rights cases. In *Brown v Stott* [2003] 1 AC 681, at p.704, Lord Bingham of Cornhill said:

> "The case law shows that the Court [European Court of Human Rights] has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. *Ex facto oritur jus*.[3] The Court has also recognised the need for a fair balance between

[3] "The law arises out of the facts."

> the general interests of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention … "

156. It would be perilous, in our view, for this Court to attempt to anticipate the precise circumstances of individual cases which may or may not arise in the future.

157. The other consideration is this. It is not for the Court to substitute its own view for that of the public authority whose policy decisions are challenged here. That is a matter for the relevant public authority to which those functions have been entrusted by Parliament. Although it is an important part of this Court's function to review the legality of whatever decisions or policies the Coroner has made in the past, what policy she should have for the future is essentially a matter for her.

158. Mr Hough suggested that a flexible approach should be taken whereby Coroners seek to organise the handling of investigations into death and decisions on release of bodies in a fair and efficient way which takes account of representations and special needs of individual families, and which enables cases to be expedited where appropriate. We would agree with that general approach.

159. Mr Hough told us that the Chief Coroner was intending to issue new guidance on the issues raised in this case, once judgment had been given by this Court.

160. We can pull together the legal threads of our judgment in the following way:

(1) A Coroner cannot lawfully exclude religious reasons for seeking expedition of decisions by that Coroner, including the Coroner's decision whether to release a body for burial.

(2) A Coroner is entitled to prioritise cases, for religious or other reasons, even where the consequence of prioritising one or some cases may be that other cases will have to wait longer for a decision. It is not necessary that all cases are treated in the same way or in strictly chronological sequence.

(3) Whether to accord one case priority over another or others is for the Coroner to determine. The following further points apply:

a) It is in principle acceptable for the Coroner to implement a policy to address the circumstances when priority will or may be given, so long as that policy is flexible and enables all relevant considerations to be taken into account.

b) The availability of resources may be a relevant consideration in drawing up that policy or in making the decision in any individual case but limitations on resources does not justify discrimination.

(4) It would be wrong for a Coroner to impose a rule of automatic priority for cases where there are religious reasons for seeking expedition.

161. We would add this important rider. Any decision reached by a Coroner in an individual case, assuming that all relevant matters are taken into account, will be subject to a "margin of judgement". Mr Grodzinski fairly accepted this at the hearing before us. This means that the Court will not second guess the Coroner just because his or her decision is not to the liking of a particular family or others. Anyone seeking to challenge a decision of the Coroner on grounds that the Coroner has breached

Convention rights will have to demonstrate that a Coroner has exceeded the margin of judgement which is afforded to him or her by the law.

162. We hope that, with appropriate advice from others, including the Chief Coroner, and perhaps after consultation with relevant bodies in the community, the Defendant can draft a new policy which meets the needs of all concerned, including protection of the legal rights of all members of the community. With appropriate good will on all sides and what Mr Hough at the hearing called "applied common sense", we are hopeful that a satisfactory solution can be found in this sensitive area.

Conclusion

163. For the reasons we have given this claim for judicial review succeeds on all grounds apart from that based on the public sector equality duty.

164. We will (i) grant a declaration that the current policy is unlawful; and (ii) issue a quashing order to set aside the current policy.