

2011

Are Christians Fit to Be Parents and Guardians—The Case of *Johns v. Derby City Council*

Robert J. Araujo S.J.

Loyola University Chicago, School of Law, raraujo@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Family Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Araujo, Robert J., *Are Christians Fit to Be Parents and Guardians—The Case of *Johns v. Derby City Council**, 2 *Intl. J. Jurisprudence Fam.* 285 (2011)

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

ARE CHRISTIANS FIT TO BE PARENTS AND GUARDIANS? THE CASE OF *JOHNS V. DERBY CITY COUNCIL*

*Robert John Araujo, S.J.*¹

I. INTRODUCTION

On February 28, 2011, the High Court of Justice, Queen’s Bench Division, issued its decision in the case of *Eunice and Owen Johns v. Derby City Council*. The court considered at length the case of an evangelical Christian couple who had previously served and desired to serve again as foster parents (or *carers*, as they are called in the United Kingdom) but whose application had not been acted upon favorably by the relevant administrative body.² In refusing to grant relief, the High Court, while relying primarily on procedural grounds,³ expounded at length on the doubts raised about the couple’s views on homosexuality, concluding that “the attitudes of potential foster carers to sexuality are relevant.”⁴

The court’s decision raises the fundamental question of the status of the freedom of religion and the educational role of parents in the context of family life. By pressuring Mr. and Mrs. Johns to sympathize with, endorse, or approve homosexuality, the state would force them to compromise or even deny the tenets of their Christian faith dealing with human nature, the mores of human sexuality, and God’s design for the human person. Supporters of the court’s decision will point out that the court did not negate religious liberty, but simply indicated that religious freedom is a “qualified” right.⁵ But the qualification is based not on neutral principles but on legal standards reflecting partisan perspectives.⁶

The court went so far as to state that religious freedom is a qualified right and “will be particularly so where a person in whose care a child is placed

¹ John Courtney Murray, S.J., University Professor, Loyola University, Chicago.

² Case No: CO/4594/2010. The UK Equality and Human Rights Commission was an intervener. [2011] EWHC 375 (Admin.).

³ The court noted that the Johns’ application had not been formally rejected: “The defendant has taken no decision and there is likely to be a broad range of factual contexts for reaching a particular decision, the legality of which will be highly fact-sensitive.” *Id.* at ¶ 107.

⁴ *Id.* at ¶ 109.

⁵ See *id.* at ¶ 102.

⁶ These points will be discussed later on in this article.

wishes to manifest a belief that is *inimical* to the interests of children.”⁷ This is an astounding implication: that adherence to Christian values is inimical to the interests of children. This conclusion is particularly breathtaking when one considers that it is not only the right, but the obligation of parents—whether foster parents or otherwise—to educate and to instruct their children in morality and social responsibility according to their best lights. This court has implied that those best lights may not include the light of faith. In short, the *Johns* decision undermines the fundamental rights and obligations of parents to instruct and educate the children God has entrusted to their care.

In *Johns*, the court undermined these rights and obligations, central to the notion of the family as seen both by Christian faith and the Western civilization that has grown from Christian soil—rights and obligations normally given the full protection of the law—in the service of an agenda that can make no such cultural claims and purported rights that have only the most questionable legal foundation.

To put it somewhat differently, the court has indicated that children, in order to be properly educated and nurtured, must be raised in an environment that is not merely sympathetic to the claims and interests of the members of the homosexual community and their actions, but is affirmatively supportive of them.

II. THESIS OF THIS ARTICLE

The primary aspect of the court’s decision that I address in this paper is that it failed to follow the applicable law of nations. It ignored some important treaties; it relied—in a partial and ill-considered way—on others; and throughout it omitted to take account of the circumstance that, like the United States,⁸ the United Kingdom is a dualist system where treaty making and ratification of treaties may require an additional step before the treaty becomes domestic law. In the context of the United Kingdom, Parliament’s sovereignty is supreme; therefore Parliament must enact domestic legislation before a ratified treaty becomes incorporated into the law of the land.

The *Johns* court completely overlooked the treaty law that would otherwise be applicable in this case. In this age when international law is often relied upon to help direct judicial decision making, the court did not acknowledge that the United Kingdom is a party to both the International

⁷ *Id.* (italics added).

⁸ While Article 6 of the U.S. Constitution states that treaties are the supreme law of the land, decisions such as *Medellin v. Texas*, 552 U.S. 491 (2008), may require additional legislation beyond the Senate’s ratification of a treaty.

Covenant on Civil and Political Rights (ICCPR)⁹ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁰ Both of these covenants protect religious liberty and the rights of parents in rearing and educating their children, or children entrusted to their care, on the basis of the parents' or guardians' moral and religious beliefs.

Article 18(4) of the ICCPR requires that States parties "have respect for the liberty of parents and, when applicable, legal guardians [such as the Johnses] to ensure the religious and moral education of their children in conformity with their own convictions." Article 13(3) of the ICESCR presents an almost identical requirement "to ensure the religious and moral education of their children in conformity with their [the parents'] own convictions." Neither of these covenants mentions homosexuality in this context. The justifications for these provisions are found in the working papers of the Universal Declaration of Human Rights (UDHR),¹¹ which show that the drafters of the declaration knew that they had to preserve the rights of parents regarding the moral and religious education of their children, which had first been compromised and then eviscerated by National Socialism.¹²

With the knowledge that religious liberty and related parental rights are at stake in this case, the doctrines of the Catholic Church are relevant and completely congruent with the principles espoused in the covenants. In 1965, one year before the ICCPR and the ICESCR were finalized, the Second Vatican Council, in *Dignitatis Humanae Personae*, the Declaration on Religious Liberty, stated, in harbinger fashion:

Parents, moreover, have the right to determine, in accordance with their own religious beliefs, the kind of religious education that their children are to receive. Government, in consequence, must acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of

⁹ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (Mar. 23, 1976), available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>

¹⁰ G.A. Res. 2200 (XXI), 993 U.N.T.S. 3 (Jan. 3, 1976), available at <http://www.un-documents.net/icescr.htm>

¹¹ G.A. Res. 217 (III), U.N. Doc. A/810 at 71 (1948), available at <http://www1.umn.edu/humanrts/instree/b1udhr.htm>

¹² Professor Johannes Morsink presents a cogent consideration of the UDHR working papers in his book *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT* 263–269 (2000). In particular, his discussion of the rights of parents in the context of Article 26(3) demonstrates how the drafters of this provision wanted to prevent states, as did National Socialism, from removing from parents and guardians the rights and responsibilities for determining the religious and moral education their children would receive.

this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly. Besides, the rights of parents are violated, if their children are forced to attend lessons or instructions which are not in agreement with their religious beliefs, or if a single system of education, from which all religious formation is excluded, is imposed upon all.¹³

Additionally, in 1983, the Pontifical Council for the Family issued the Charter of the Rights of the Family, and it had this to say about the issues found in the *Johns* case:

- a) Parents have the right to educate their children in conformity with their moral and religious convictions, taking into account the cultural traditions of the family which favor the good and the dignity of the child; they should also receive from society the necessary aid and assistance to perform their educational role properly.
- b) Parents have the right to freely choose schools or other means necessary to educate their children in keeping with their convictions. Public authorities must ensure that public subsidies are so allocated that parents are truly free to exercise this right without incurring unjust burdens. Parents should not have to sustain, directly or indirectly, extra charges which would deny or unjustly limit the exercise of this freedom.
- c) Parents have the right to ensure that their children are not compelled to attend classes which are not in agreement with their own moral and religious convictions. In particular, sex education is a basic right of the parents and must always be carried out under their close supervision, whether at home or in educational centers chosen and controlled by them.¹⁴

If a Catholic family were to find itself in the same situation as the Johnses, their claims would be supported by the principles of *Dignitatis Humanae Personae* and the Charter of the Rights of the Family, and find resounding support in the covenants. At this point, it is necessary to understand the factual foundation of the *Johns* case and the legal dispute that arose from it.

III. FACTS AND BACKGROUND

In 2007, the Johnses, who had previously served as foster parents, applied to be short-term foster parents once more and met with officials from the

¹³ Second Vatican Council, *Dignitatis Humanae Personae* (Decree on Religious Liberty), n. 5, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html

¹⁴ Pontifical Council for the Family, *Charter of the Rights of the Family* (1983), art. 5, http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html

appropriate public authority. During their meetings with the civil authorities, the agency officials expressed concerns about the Johnses' views on homosexuality.¹⁵ This was not an issue that had been discussed in the past nor was it considered in previous screenings. The disagreement between the couple and the officials began when the religious beliefs of the Johnses, who are Pentecostal Christians, were discussed. In accordance with their Christian beliefs, Mr. and Mrs. Johns maintained that sexual relations other than those within a marriage between one man and one woman are morally wrong.¹⁶

Mr. and Mrs. Johns expressed their opposition to homosexuality in these words: it is "against God's laws and morals."¹⁷ They elaborated upon their sexual mores by explaining that their position was founded on their Christian religious convictions and beliefs. Mrs. Johns further indicated that they could not support children who were "confused" about their sexuality. The hearing officer who conducted the assessment interviews noted that Mrs. Johns had "mentioned a visit she had made to San Francisco, in relation to it being a city with many gay inhabitants. She commented that she did not like it and felt uncomfortable while she was there."¹⁸

In her report the hearing officer stated:

I expressed my concerns regarding their views on homosexuality and said that I felt that these did not equate with the Fostering Standards where they related to the need to value diversity,¹⁹ address a child's needs in relation to their sexuality, enhance the child's feeling of self-worth and help the child to deal with all forms of discrimination.²⁰ I emphasised the need for carers to value people regardless of their sexual orientation. [Mrs. Johns] responded by saying that she could not

¹⁵ *Eunice and Owen Johns v. Derby City Council*, Case No: CO/4594/2010, [2011] EWHC 375 (Admin.) (2011) (High Court of Justice, Queen's Bench Division) ¶ 3. The numbers appearing in parentheses designate the numbered paragraphs of the High Court's decision.

¹⁶ *Id.* ¶ 4. Previously, their religious views, including those on sexual mores, had not precluded the couple from being approved to serve as foster parents, and they had so served from August 1992 to January 1995. *Id.*

¹⁷ *Id.* ¶ 6.

¹⁸ *Id.*

¹⁹ An examination of the standards used by the state in the *Johns* case reveals that the meaning of the term *diversity* is elusive.

²⁰ The court saw no need to distinguish between unjust and just discrimination. Not all discrimination is unjust, but some is. Licensing agencies discriminate when they deny an unqualified person from receiving a privilege that requires demonstration of competence, but this discrimination is not unjust. Schools discriminate among students when different grades are assigned based on the quality of academic performance, but this discrimination is not unjust.

compromise her beliefs, but that she did value people as individuals and would be able to support a young person on that basis. [Mrs. Johns] informed me that her nephew, who lived in the U.S., is gay, and that she has been to stay with him and his partner, and had not treated them any differently from anyone else (¶ 7).

In addition, the hearing officer presented four scenarios in which she asked the Johnses whether they could support a child in any of the following contexts:

Context 1: Someone who is confused about his (or her) sexuality and may be gay;
Context 2: A child who is being bullied in school regarding sexual orientation;
Context 3: A child who bullies others regarding their sexual orientation; and,
Context 4: Someone in their care whose parents are gay (¶ 7).

In the first context, Mrs. Johns stated that she would support any child. She did not offer any explanation as to how she would go about this. When Mr. Johns was asked this question, he responded by saying that he would “gently turn them round.” In the second context, Mrs. Johns said she would give reassurance and tell the child to ignore it. In response to the third context, Mrs. Johns stated that she did not know what she would do. In the case of someone whose parents are gay, she believed that it would not matter, and that she would work with anyone (¶¶ 7–8).

The officer stated in her report that she believed Mrs. Johns’s responses were “somewhat superficial”; moreover, the officer thought that Mrs. Johns downplayed how her strong religious beliefs would affect her work with children (¶ 7). But the record also demonstrates that Mrs. Johns had assured a social worker that she would never impose her beliefs on a child or denigrate the parents for their lifestyle or sexual orientation (¶ 7). In regards to Mr. Johns’s responses, the hearing officer thought “particularly revealing” his statement about turning the child around (¶ 8). In other words, the hearing officer viewed as problematic any effort on his part in trying to assist a child away from homosexuality or homosexual inclinations.

The court noted that during the six assessment sessions conducted by the hearing officer, the issue of how the couple’s religious convictions would affect their care for children was often discussed. The Johnses indicated that a child might need to come to church services (¶ 9). Both the officer and the Johnses understood that this might limit “which children could be placed with them” (¶ 9).²¹ In accordance with the regulatory scheme, the civil authorities informed

²¹ The court noted elsewhere that in the case involving a Muslim child, it would be understandable if the child were only placed with a Muslim couple (¶ 95). If this is the case with Muslims, it would follow that Christian children be placed with Christian

Mrs. Johns as early as August 2007 that the current application to serve as foster parents faced “difficulty” in “the light of their views on sexuality.” They were then told that they could “withdraw their application” (¶ 9). If this were a tipping of the hand designed to reveal the outcome of their application, the Johnses were not deterred, because they requested that their application proceed to the next level of assessment, that is, the Fostering Panel (¶ 9).

During this stage of the review, an official from the Fostering Panel informed the couple that their views on same-sex relations “did not equate with the Fostering Standards which require carers to value individuals equally and to promote diversity” (¶ 10).²² The court, however, did not discuss what constitutes “diversity.” The Fostering Panel officer noted that Mrs. Johns “felt that her beliefs would not affect how she was able to care for a young person, and stated that we were really saying that they could not be foster-carers because they are Christians” (¶ 10). It was then entered in the official records that, “The department needs to be careful not to appear to discriminate against them on religious grounds. The issue has not arisen just because of their religion as there are homophobic people that are non-Christian. The ability to promote diversity is the main issue” (¶ 11). With the greatest of transparency and honesty, Mrs. Johns stated that, “I will not lie and tell you I will say it is ok to be a homosexual. I will love and respect, no matter what sexuality. I cannot lie and I cannot hate, but I cannot tell a child that it is ok to be homosexual. Then you will not be able to trust me. There has got to be different ways of going through this without having to compromise my faith” (¶ 11). Mrs. Johns’s sincere expression would ultimately be rejected.

At this point the Fostering Panel erroneously assumed that the Johnses would be withdrawing their application (¶ 12). But the Johnses notified the panel in February 2008 of their intent to proceed with their application (¶ 12). In presenting their notification, the couple raised their concern that the civil authorities considered the couple’s Christian perspective on sexual orientation would likely prohibit their being foster parents again; consequently, Mr. and Mrs. Johns registered their unease (¶ 12).

However, the civil authority subsequently informed the Johnses that their application had been reinstated and that the previous negative recommendation was not based on the couple’s religious beliefs (¶ 13). The Johnses then wrote a letter to the Derby City Council asking to be informed about “whether in Derby City Council’s view, ‘Christians,’ holding our views on sexual ethics, as a section of the public, are suitable persons for fostering children”

couples; however, the court did not make this observation or acknowledge this connection.

²² Fostering standards are quoted and cited in note 34, *infra*, and accompanying text.

(¶ 14). In another letter, the Johnses asked for clarification of whether the standards for foster parents would lead to the conclusion that “Christians and other faith groups who hold the view that any sexual union outside a marriage between a man and a woman is morally reprehensible are persons who are unfit to foster” (¶ 15). The Johnses were troubled that they could “only adopt if we compromise our beliefs regarding sexual ethics” (¶ 15). The civil authority responded by stating that it had no policy “which states that Christians can only foster if they compromise their beliefs on sexual ethics” (¶ 15).

An assessment report was then prepared on the revived application and acknowledged that the couple are “kind and hospitable people, who would always do their best to make a child welcome and comfortable”; nevertheless, the report further stated that their “views on same sex relationships, which are not in line with the current requirements of the National Standards, and which are not susceptible to change, will need to be considered when panel reaches its conclusion” (¶ 16). This latter statement was something of a smoking gun in that it implies that compliance with the standards may well require sympathy with homosexuality.

The Fostering Panel concluded that it would not decide on the application but would defer a decision (¶ 17). In April 2010, the Secretaries of State for Health and for Communities and for Local Government were informed of the Johns application and were invited to intervene; however, they declined to do so (¶ 18). But the Equality and Human Rights Commission (hereinafter, the Commission) notified the parties of its intention to intervene in September 2010 (¶ 18).

A hearing on the Johns application was held on November 1, 2010, before the High Court (¶ 19). The court noted the uniqueness of the case because there was no lower decision to review—only “a decision to defer a decision” (¶ 21). The court asserted that neither party had filed evidence addressing the legal issues associated with the application (¶ 22). Nonetheless, the court was of the opinion that the intervening Commission, by supplying certain documents, had filed evidence regarding “the impact of views opposed to, and disapproving of, same sex relationships and lifestyles on the development and well-being of children and young people, including gay and lesbian children and young people” (¶ 23). This evidence included more than two hundred pages of documentation consisting of:

“Social exclusion of young lesbian, gay, bisexual and transgender (LGBT) people in Europe,” written by Judit Takács on behalf of ILGA–Europe (the European Region of the International Lesbian and Gay Association) and IGLYO (the International Lesbian, Gay, Bisexual, Transgender, Queer Youth and Student

Organisation) and published with the support of the European Commission—The European Union against discrimination in April 2006, and “Young lesbian, gay and bisexual (LGB) people,” a briefing for health and social care staff written by Dr Julie Fish as part of the Department of Health’s Sexual Orientation and Gender Identity Advisory Group’s work programme and published by the Department of Health in 2007 (¶ 23).

At this point, it is important to take stock of the orientation of this literature on orientation, i.e., whose perspective it represents or reflects. Counsel for the Johnses characterized this evidence as “highly controversial” and provided other research material, “much of it apparently emanating from North America” (¶ 24). In essence, the Johnses did the same thing that the intervening Commission had done. Curiously, the court stated that it was not in any position to evaluate “any of this material”; moreover, there was no need, in its opinion, to do so (¶ 25).

Since both parties stated that they were seeking a declaration from the court regarding the Johns application (¶ 26), the court requested that each party formulate a text of the declaration that they were, respectively, seeking (¶ 27). The Johnses presented a declaration containing four elements (¶ 27):

[1.] Persons who adhere to a traditional code of sexual ethics, according to which any sexual union outside marriage (understood as a lifelong relationship of fidelity between a man and a woman) is morally undesirable, should not be considered unsuitable to be foster carers for this reason alone. This is a correct application of the National Minimum Standards 7 “Valuing Diversity.”

[2.] Persons who attend Church services at a mainstream denomination are, in principle, suitable to be foster carers.

[3.] It is unlawful for a Foster Service to ask potential foster carers their views on homosexuality absent the needs of a specific child.

[4.] It is unlawful for a public authority to describe religious adherents who adhere to a code of moral sexual ethics, namely: that any sexual union outside marriage between a man and a woman in a lifetime relationship of fidelity is morally undesirable, as “homophobic.”

The declaration sought by the civil authority included the following request (¶ 28):

A fostering service provider may be acting lawfully if it decides not [to] approve a prospective foster carer who evinces antipathy, objection to, or disapproval of, homosexuality and same-sex relationships and an inability to respect, value and demonstrate positive attitudes towards homosexuality and same-sex relationships.

The intervening Commission was of the view that these requests for a declaration were inappropriate as no decision had yet been made by the civil authorities and the need for additional information about the background of the applicants might still exist; moreover, it would be difficult to formulate any useful declaration that would help the parties and other public authorities addressing the issues that were presented in the Johns application (¶ 29).

Acknowledging the concerns that both the Commission and the court had in granting a declaration, the court, notwithstanding its “misgivings about the exercise of the jurisdiction to consider whether to grant any (and if so what) declaratory relief” (¶ 107), ultimately issued a conclusion and order on February 28, 2011. It decided the case by stating that it would issue no order but would deny the claimants permission to appeal (¶ 109).

The practical result of this denial of an appeal was to reject the application of Mr. and Mrs. Johns to serve once again as foster carers. In denying permission to appeal, the court stated that “contrary to the submissions on behalf of the claimants, our conclusions [are] that the attitudes of potential foster carers to sexuality are relevant when considering an application ...” (¶ 109). The court stated that the Johnses were “clearly protected against direct and indirect discrimination based on their religious beliefs. [But] [t]he question is whether the treatment of their application by the defendant is because of their stance on sexuality or sexual orientation or because of their religious beliefs” (¶ 98).

By distinguishing between matters of religious belief and stances on sexuality and sexual orientation, the court denied the possibility that the two matters can be related. In fact, they are inextricably related and must be considered, to use a phrase of Mrs. Johns, in the light of “God’s laws and morals” (¶ 6). The two matters might be separate and distinct for the court, but they surely were not for Mr. and Mrs. Johns.

IV. ISSUES/MATTERS CONSIDERED BY THE HIGH COURT

In its opinion, the court focused its attention on several important matters: the relevance of the Fostering Standards; the role of religion in life and the law; the question of discrimination; the good of and for children; and the overarching questions dealing with equality. At the outset of its consideration of the law, the court offered a critical observation:

[W]e emphasize that this case is, in our judgment, at the very outer limit of what could be an appropriate exercise of our jurisdiction. In the event, and for the reasons we give below, this is not, however, a case in which we are prepared to grant the claimants permission to apply for judicial review (¶ 31).

The court first considered the role of religion in several contexts. Undoubtedly, the judges recognized the important roles that religion has in both public and private life. It then noted that it did not doubt the sincerity of Mr. and Mrs. Johns regarding the views they hold; but the judges concluded that the couple's religious beliefs had little to do with the legal issues (¶ 32). As the court stated,

We are simply not here concerned with the grant or denial of State "benefits" to the claimants. No one is asserting that Christians (or, for that matter, Jews or Muslims) are not "fit and proper" persons to foster or adopt. No one is contending for a blanket ban. No one is seeking to de-legitimise Christianity or any other faith or belief. No one is seeking to force Christians or adherents of other faiths into the closet. No one is asserting that the claimants are bigots. No one is seeking to give Christians, Jews or Muslims or, indeed, peoples of any faith, a second class status. On the contrary, it is fundamental to our law, to our polity and to our way of life, that *everyone* is equal: equal before the law and equal as a human being endowed with reason and entitled to dignity and respect (¶ 34).

Returning to the matter of the relation between religion and homosexuality, the court suggested that various religious communities and persons express different opinions about the propriety of same-sex relationships (¶ 35). The court also proffered its views about the role of religion in society and public life by claiming that the relationship is not well understood but that the United Kingdom is "a democratic and pluralistic society" and is "a secular state and not a theocracy" (¶ 36).

The court then presented an overview of the relationship between religion and the legal system in British life. In the context of the common law, the court recalled the country's national history was "part of the Christian west," but it concluded that, due to "enormous changes in the social and religious life of our country over the last century," British society is now "pluralistic and largely secular" (¶ 38). While the judges acknowledged their sworn duty to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will," they also declared that their obligations are exercised in a dominion where "the laws and usages of the realm do not include Christianity, in whatever form" (¶ 39). This is an interesting assertion in view of the fact that the realm has a state church. Of further significance is the fact that the law of this very realm, the Act of Settlement of 1701, places religious requirements and limitations on who may wear the crown and who the sovereign may not marry on the basis of religion. Nevertheless, these secular judges asserted that, "The aphorism that 'Christianity is part of the common law of England' is mere rhetoric; at least since the decision of the House of Lords in *Bowman v Secular Society Limited*

[1917] AC 406, it has been impossible to contend that it is law” (¶ 39). This is a whimsical explanation of the relationship between religion and the state.

The court then moved on to a consideration of Article 9 of the European Convention on Human Rights (ECHR),²³ which is a part of the law of the United Kingdom as it is a member of the European Union. In this context, the court noted that “a secular judge must be wary of straying across the well-recognised divide between church and state” (¶ 41). However, major issues await in the fabric of this statement when it is made by judges who are legal officials of a state with an established church and who preside over a legal system that prefers or permits certain religions over others, as the Act of Settlement demonstrates. It is therefore difficult to understand the court’s statement that:

The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect. And the civil courts are not concerned to adjudicate on purely religious issues, whether religious controversies within a religious community or between different religious communities (¶ 41).

It is one thing to state that the civil authorities will not “intervene in matters of religion” or religious communities (¶ 42), but it is quite a different matter to assert that the civil authorities are indifferent to religion. Yet the court admitted that religion and religious belief do not “immunise the believer from the reach of the secular law. And invocation of religious belief does not necessarily provide a defence to what is otherwise a valid claim” (¶ 43). The court identified one area in which religion would be under particular scrutiny, that is, religious practices “contrary to a child’s welfare” (¶ 44). Here the court likely had in mind the religious views of the Johnses on sexuality and sexual activity.

Returning to Article 9 of the ECHR, we need to recall its content:

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.*

²³ European Convention on Human Rights, Sept. 21, 1970, 213 U.N.T.S. 222 [hereinafter ECHR], available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf

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.²⁴

It is pertinent to note here that these provisions parallel those of the UDHR (Article 18)²⁵ and the ICCPR (Article 18).²⁶ Of course, what these and all other provisions in these texts fail to do is to provide a mechanism on how to adjudicate between competing claims when religious rights compete with other rights also expressly stated in these texts. The UDHR and the ICCPR, along with other human rights instruments, do not provide a solution to competing claims. But I would suggest a mechanism here that is established on the natural law tradition. This mechanism is founded on the principles that the human person is intelligent and has the capacity to comprehend the intelligible reality that surrounds all members of the human family. It would be this combination of intelligence (established on objective reason) and the comprehension of the competing claims that are asserted in this conflict that would be most useful in determining which claims might take precedence when claims conflict.

In its assessment of the application of Article 9, the court asserted that the ECHR protects only “religions and philosophies” that are “worthy of respect in a ‘democratic society’ and are not incompatible with human dignity” (§ 47).²⁷ The standard for making the determination of what is and what is not worthy of respect in a democratic society is ambiguous at best. While

²⁴ *Id.*, art. 9 (italics added).

²⁵ UDHR, *supra* note 11.

²⁶ ICCPR, *supra* note 9.

²⁷ Here the court cites *Campbell and Cosans v. United Kingdom* (No 2) 4 EUR. HUM. RTS. REP. 293 ¶ 36 (1982). The competing claims in *Campbell and Cosans* dealt with the use of corporal punishment administered to children in state schools in Scotland. In this case the court found that the parents of the disciplined children had and exercised views

that relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general.

The philosophies in *Campbell and Cosans* under scrutiny were those dealing with the propriety of corporal punishment. The “philosophy” in the *Johns* case deals with religious beliefs that pertain to the moral upbringing of children. It cannot be said that human rights instruments are protective of corporal punishment, but it cannot be denied that they are protective of religious beliefs and the rights of parents and guardians to raise children in accordance with these beliefs and the moral outlooks that they contain.

hastening to add that the religious beliefs of the Johnses are “clearly worthy of respect” (¶ 47), the court further acknowledged that a person’s manifestations of religious belief are simultaneously subject to the “overriding qualification” of subsection 2 of Article 9. The court claimed to protect religion in the context that it is “forbidden” to evaluate the validity of religious beliefs; however, the court was compelled to state that it must remain above all else neutral and impartial in such matters (¶ 48). In this regard, it quoted one European decision holding that the freedom of thought, religion, and conscience is “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” (¶ 49).²⁸ Interestingly, the European court did not include religious believers in this part of its discussion—only atheists, agnostics, skeptics, and the unconcerned were mentioned. Christians like Mr. and Mrs. Johns were not.

The *Johns* court then addressed religious matters in the context of discrimination law. The substance of this segment of the court’s opinion focused on the opinion in *McFarlane v. Relate Avon Limited*²⁹ (a case brought by a relationship counselor dismissed from his post for refusing to counsel same-sex couples on sexual matters because of his Christian beliefs), quoting Judge Laws in that case, who asserted that

judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as disreputable, nor have they likened Christians to bigots. They administer the law in accordance with the judicial oath, without fear or favour, affection or ill will (¶ 53).

Judge Laws continued:

In a free constitution such as ours there is an important distinction to be drawn between the law’s protection of the right to hold and express a belief and the law’s protection of that belief’s substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian’s right and every other person’s right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society. The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused

²⁸ *Moscow Branch of the Salvation Army v. Russia*, 44 EUR. HUM. RTS. REP. 912, ¶ 57 (2006).

²⁹ [2010] EWCA Civ 880, [2010] IRLR 872 (Court of Appeal, Civil Division).

by Christianity, not because of its religious imprimatur, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty. The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy, and the liturgy and practice of the established church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer who is alone bound by it; no one else is or can be so bound, unless by his own free choice he accepts its claims.

The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion, any belief system, cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law, but the State, if its people are to be free, has the burdensome duty of thinking for itself.

So it is that the law must firmly safeguard the right to hold and express religious beliefs. Equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime (§ 55, italics added).

The *Johns* court simply added, “We respectfully and emphatically agree with every word of that” (§ 55). The rationale of Judge Laws is problematic, as is the *Johns* court’s reliance on it. But an immediate problem of Judge Laws’ position begins to surface: while he recognizes the right to express religious belief on the one hand, he disavows this right on the other when he asserts that religious expression is not protected because the belief itself is based on “religious precepts.” Rhetorically, I ask, on what other basis would religious beliefs be based other than on “religious precepts”? But I do not stop here, for it becomes clear that Mr. McFarlane’s religious beliefs reflect a reasoned and objective understanding of the nature and the essence of the human person that takes stock of the complementarity of the sexes. Judge Laws’ decision upon which the *Johns* court relies is devoid of this recogni-

tion. The position taken by Mr. McFarlane is not a “subjective opinion” as Judge Laws contends, for it is based on the facts of the human sexes that determine their complementarity. While Judge Laws recognizes the importance of protecting religious belief on the one hand, he disavows that protection on the other with the spurious claim that the religious belief is devoid of anything other than religion. In short, his rationale leads to the inescapable conclusion that the right of religious believers and the protections that are to be accorded to them may exist in principle but not in fact.

But there are further weaknesses in Judge Laws’ rationale that need to be pointed out here and that undermine the reliance of the *Johns* court on his argument. While claiming that religious belief may be established on some truth, Judge Laws asserts that “the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society.” Clearly, he has forgotten how the Fifth through Tenth Commandments of the Decalogue have had an impact on virtually every legal system of the world. Yet he assumes the “truth” of the beliefs of the same-sex couple and their understanding of human nature, which is subjective. He does not subject these beliefs to the same scrutiny that he applies to the rights of religious believers whose views are clearly protected under the applicable juridical instruments. If, as he suggests, the “truth” of the religious believer “lies only in the heart of the believer who is alone bound by it,” how can it then be claimed that the beliefs surrounding same-sex relations must be honored by Mr. McFarlane even though he holds contrary views?

Judge Laws offers no answer, but he rationalizes his perspective with the claim that the “promulgation of law for the protection of a position held purely on religious grounds cannot ... be justified.” Why? His defense of this position is that the religious view is an irrational one that prefers “the subjective over the objective.” If that is the case, which it is not when one considers that Mr. McFarlane’s religious views on human sexuality reflect the objective reality of the complementarity of the sexes, Judge Laws should see that those who insist on the acceptability and preference for same-sex relations, in fact, base their position on the subjective rather than the objective. To demonstrate this, one need only consider the subjective standard adopted by a plurality of the U.S. Supreme Court in *Planned Parenthood v. Casey*,³⁰ when Justices Souter, O’Connor, and Kennedy declared that the heart of liberty “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³¹ If the skeptic were to point out that *Casey* was a case dealing with abortion access rather

³⁰ 505 U.S. 833 (1992).

³¹ 505 U.S. at 851.

than same-sex relations, it must be recalled that *Casey* was pivotal to the decisions that did deal with the protection of same-sex relations in *Lawrence v. Texas*³² (the decriminalizing of same-sex sodomy) and *Goodridge v. Department of Public Health*³³ (the legalization of same-sex marriage in Massachusetts). It is patent that by linking the “legitimacy” of same-sex relations to a liberty based on a subjective standard, Judge Laws has justified his view on the “irrational” because his rationale ultimately prefers the subjective over the objective.

Judge Laws further asserts that the religious perspective is “also divisive, capricious and arbitrary.” But if the divisive, capricious, and arbitrary are factors for consideration in important judicial reasoning, one must apply these concerns uniformly and consider the perspective that advocates the legitimacy of and preference for same-sex relations. Are they not also divisive, capricious, and arbitrary? Judge Laws is correct when he states that “we do not live in a society where all the people share uniform religious beliefs.” No particular religion can “by force of [its] religious origins, sound any louder in the general law than the precepts of any other.” If one voice did predominate, then it would be, recalling his words, “theocratic” and “autocratic.” But when the religious voice is purged from the public square because it is religious, and is then replaced with a particular view about human sexuality to which the religious perspective must conform, is that not also autocratic?

It was at this point that the High Court framed and addressed the issues it identified regarding the claims of Mr. and Mrs. Johns and the counterclaims of the state. The issues the court identified were these: (1) Are the Johnses’ Christian beliefs dealing with human sexuality relevant or not to their ability to serve as foster parents? (2) Does the position of the civil authority defendant constitute religious discrimination contrary to Article 9 of the ECHR? (3) Related to the previous issue is the possibility that a “majority of

³² 539 U.S. at 573–574 (2003), “The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”

³³ 440 Mass. at 312 (2003), “We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’” *Lawrence v. Texas*, 539 U.S. 558, 567 (2003), quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992).

the population” would be unreasonably excluded from fostering if they hold beliefs about human sexuality that coincide with the beliefs of the Johnses (¶ 57).

The court then considered the framework of the laws and regulations dealing with foster parents and bearing on the *Johns* case. In particular, it concluded that the Fostering Services Regulations had particular relevance. Regulation 27(2) required that the government agency consider the prospective foster parents’ “religious persuasion, and ... capacity to care for a child from any particular religious persuasion” and their “racial origin ... cultural and linguistic background and ... capacity to care for a child from any particular origin or cultural or linguistic background” (¶ 65).

Compare this to the court’s statement in ¶ 95 that under the Equality Act 2010 “a Muslim family could agree to foster only Muslim children.” If a Muslim couple could do this, what would prevent a devout Christian couple like the Johns from doing the same, i.e., foster a Christian child who may have been reared with the moral upbringing shared by Mr. and Mrs. Johns? If accommodation can be made for a Muslim family, it should also be made for a Christian family. If the court refused to do this, its decision would be unreasonably and unjustly discriminatory.

The court also acknowledged the relevance of the National Minimum Standards for Fostering Services published by the Secretary of State for Health under section 23 of the Children Act 1989 and section 23 of the Care Standards Act 2000.³⁴ These are considered to be minimum standards rather than “best possible” practice (¶ 68). The court identified the following standards as being relevant to the *Johns* case:

7.1 The fostering service ensures that children and young people, and their families, *are provided with foster care services which value diversity and promote equality.*

7.2 Each child and her/his family have access to foster care services which *recognise and address her/his needs in terms of gender, religion, ethnic origin, language, culture, disability and sexuality. ...*

7.3 The fostering service ensures that foster carers and social workers work cooperatively to *enhance the child’s confidence and feeling of self-worth. ...*

³⁴ Here and throughout, the court’s references are to standards then in effect. See Department of Health, Fostering Services: National Minimum Standards: Fostering Services Regulations 12 (2002), <http://www.crin.org/docs/fostering%20services%20national%20minimum%20standards.pdf>. The relationship between the National Minimum Standards and the Fostering Service Regulations is discussed at p. vii of the Department of Health document. See Fostering Services Regulations 2002/57, Part IV Approval of Foster Parents (version in force from 2002 to 2011), available on Westlaw.

7.5 The fostering service ensures that their foster carers support and encourage each child to develop skills to help her/him to deal with all forms of discrimination ... (¶ 69, italics added).

Applicable provisions from standard 8 include:

8.1 Local authority fostering services, and voluntary agencies placing children in their own right, ensure that each child or young person placed in foster care is carefully matched with a carer capable of meeting her/his assessed needs. For agencies providing foster carers to local authorities, these agencies ensure that they offer carers only if they represent appropriate matches for a child for whom a local authority is seeking a carer.

8.5 Placement decisions consider the child's assessed racial, ethnic, religious, cultural and linguistic needs and matches these as closely as possible with the ethnic origin, race, religion, culture and language of the foster family (see ¶ 69).

Additional norms cited by the court include: the Statutory Guidance on Promoting the Health and Well-Being of Looked-After Children. The relevant provisions appear in paragraphs 6.1.2 and 6.1.5 of the Practice Guidance, under the heading "Promoting healthy relationships and sexual health." These provisions require that children "gain the self esteem and skills needed to develop loving, respectful and safe relationships." In this regard, support for teenage sexual health should be provided to all young people "regardless of their sexual orientation or preference and should not be affected by" the "personal views" of those who supervise them (¶ 70). Moreover, the standards require that children and young people "are entitled to clear, relevant, age appropriate information which is accurate and non-judgmental." Further, children and young people "can be helped to develop a positive attitude to sexual health and well being" by "exploring and challenging attitudes, values and beliefs" (¶ 70). In overview, these regulations do not appear to support the teaching and maintaining of traditional sexual mores espoused by Christians like the Johnses. Moreover, they appear to reinforce protection of sexual promiscuity that is engendered by exaggerated autonomy. These standards do not assist children in understanding the distinctions between right and wrong, good and evil, true and false, or virtue and vice.

The relevance of highlighting these regulations goes to the heart of this essay, for they address a fundamental issue: the nexus between family life and education. The relationship of family life and the education that takes place within it is assuredly related to the welfare of children—what is appropriate and what is not; what is "inimical" and what is not. What is good and what is bad for the welfare of children is at the center of the dispute between the parties and the intervener. Indeed, standards will have to apply to the selec-

tion and appointment of foster parents. However, it would be logical to conclude that the standards can be interpreted and applied in light of international standards cited in this essay that also have the welfare of parents, guardians, and children simultaneously in mind. We must not forget that the Johnses wished to care for the children placed in their custody in a manner that reflected Christian morality. And this approach to providing guardianship of young people is protected by international standards that respect the views of people like Mr. and Mrs. Johns.

In the context of this issue, the court found an opportunity to question the role of religion in children's welfare by considering two other British cases. These were *Islington London Borough Council v. Ladele*, [2009] EWCA Civ 1357, [2010] 1 WLR 955, and *McFarlane v. Relate Avon Limited*, [2010] EWCA Civ 880, [2010] IRLR 872.³⁵ In *Ladele*, a registrar had objected on religious grounds to perform same-sex marriages. She was disciplined by the local authority for refusing to perform civil partnership ceremonies. Her religious discrimination complaint was dismissed. The court in *Johns* finds persuasive the *Ladele* finding that

if [the registrar] had been willing to carry out the ceremony ... then no further action would be taken against her. She would then have been doing what was required of her. *She could have kept her objection to same sex relationships, and there would have been no action taken against her merely because that was her view.*

This is further supported by the fact that no action was taken against another employee who shared the same religious views but who accepted a different role which did not place her in this dilemma. Had the council's objection been to the belief itself, then logically she should have been disciplined anyway. We can see no real evidence which begins to justify an inference that the claimant was subjected to disciplinary action because of her beliefs rather because she insisted on giving effect to those beliefs by refusing to participate in civil partnership work. ... However, the issue is not ... a matter of giving equal respect to the religious rights of the claimant and the rights of the gay community. It is whether, given the legitimate aim, the means adopted by the council to achieve that aim were proportional (§ 75, italics added).

In short, the *Ladele* decision points out that one can be discriminated against on religious grounds, but it would be impermissible to discriminate on the grounds of beliefs and practices of those who are of same-sex orientation. It is crucial to understand that religious belief and its practice were sacrificed

³⁵ The descriptions of the *Ladele* and *McFarlane* cases that follow, and quotations from those cases, are as presented by the court in the *Johns* case, and the citations refer to paragraphs in the *Johns* case.

when the court in *Ladele* failed to make the connection between the complainant's religious belief and her being punished for wanting to protect it in her public life. Surely there were other officials who could have performed the same-sex ceremony? When it comes to religious views, it seems that they are to be held privately and are subject to restriction or denial when exercised in a public fashion, especially when religion comes in conflict with sexual mores; moreover, the religious perspective, specifically the Christian one, does not appear to be appropriate for educating other members of society, especially children. This conflict and concern go to the heart of the matter in the *Johns* case.

The Court of Appeal dismissed the appeal in the *Ladele* case, Lord Neuberger stating:

Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished (¶ 78).

Again, we see that a tribunal misunderstands the nature of how moral perspectives can be informed by religious beliefs. Moreover, we see that some courts view religious belief and practice as an essentially private matter that cannot extend into a person's public life in the society in which people like Ms. Ladele live. Yet, specifically with regard to Ms. Ladele's religious rights under Article 9 of the ECHR, Lord Neuberger stated that they were "qualified" and that her wish to have her religious beliefs respected could not override the public authority's concern "to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community" (¶ 79). Of course this attitude begs the question of whether members of the homosexual community must have an equal respect for members of the heterosexual and religious communities. More importantly in the context of public authorities, including tribunals, it would be essential to conclude that the institutions of the servant state, including its courts, must also accord equal respect to the heterosexual and religious communities. But in the context of the cases relied on by the *Johns* court, this is not the case.

Nevertheless, the case of the Johnses extends beyond the question of respect. It goes to the heart of a specified group of rights that involve the protection of religious persons and the rights they must be able to enjoy, including the moral education and environment they offer to children legitimately in their care.

The *McFarlane* case involved a publicly employed marriage counselor who was disciplined for objecting, on religious grounds, to provide “psychosexual therapy” (PST) to homosexual couples (¶ 80). The outcome of this case was similar to that in *Ladele*. In *McFarlane*, the court denied that there was actionable religious discrimination in that, “the reason why the Claimant was treated as he was was not because of his Christian faith but because of his perceived unwillingness to provide PST counselling to same-sex couples, and thus—this being the other side of the same coin—that he was treated in the same way as any non-Christian who had evinced such an unwillingness” (¶ 81). As in *Ladele*, the *McFarlane* court made a distinction between the private religious belief and the public manifestation of it by concluding that the employee does not have an unqualified right to manifest religion; accordingly, there are some circumstances in which manifestation may be protected but there are other situations where it is not (¶¶ 81–82). The difficulty in accepting this judicial rationale is this: by what standard is the court’s rationale to be applied; i.e., how can a claim of religious discrimination be upheld as meritorious? Under what circumstances will the religious rights protected by law be upheld and when will they be sacrificed?

The High Court in *Johns* then turned to the question about the views of applicants on human sexuality (¶ 90). The Johnses asserted that that their views on sexuality are not a legitimate fostering concern and that the only legitimate fostering concern by which they are bound is the protection of the welfare of the child (¶ 90). However, the court expressed the view that the sexuality and sexual orientation of children—albeit *in abstracto*—is of relevance when making foster parent assignments. As the court stated, “If children, whether they are known to be homosexuals or not, are placed with carers who ... evince an antipathy, objection to or disapproval of, homosexuality and same-sex relationships, *there may well be a conflict* with the local authority’s duty to ‘safeguard and promote’ the ‘welfare’ of looked-after children” (¶ 93, italics added).

Here, it is relevant and *imperative* to point out the distinction between “there may well be a conflict” and “there is a conflict.” The court did not take stock of this crucial distinction, rather, it continued with this remarkable claim:

While as between the protected rights concerning religion and sexual orientation there is no hierarchy of rights, there may, as this case shows, be a tension between equality provisions concerning religious discrimination and those concerning sexual orientation. Where this is so, Standard 7 of the National Minimum Standards for Fostering and the Statutory Guidance indicate that it must be taken into account and in this limited sense the equality provisions concerning sexual orientation should take precedence (§ 93).

The court did not explain how there was a substantive tension—that is, conflict—between the religious rights of the Johnses and their ability to provide loving care to any child who was placed with them.

However, the court went out of its way to take stock of the public authority's emphasis on

the need to value diversity and promote equality and to value, encourage and support children in a non-judgmental way, regardless of their sexual orientation or preference. That duty does not apply only to the child and the individual placement, but to the wider context, including the main foster carer, a child's parents and the wider family, any of whom may be homosexual. In these circumstances it is quite impossible to maintain that a local authority is not entitled to consider a prospective foster carer's views on sexuality, least of all when, as here, it is apparent that the views held, and expressed, by the claimants might well affect their behaviour as foster carers. This is not a prying intervention into mere belief. Neither the local authority nor the court is seeking to open windows into people's souls. The local authority is entitled to explore the extent to which prospective foster carers' beliefs may affect their *behaviour*, their *treatment* of a child being fostered by them (§ 97).

Upon considering the language of the court, then, it appears that attempting to use the vehicle of education properly to form children, their consciences, their actions, and their reason so that they are equipped to distinguish right from wrong, good from bad, is not necessarily appropriate if this kind of education interferes with the drive to “encourage and support children in a non-judgmental way, regardless of their sexual orientation or preference.” Instruction in virtue is out; a questionable form of education that promotes exaggerated autonomy is the objective. The love and education that Mr. and Mrs. Johns were prepared to provide (and had offered in the past) did not suit the new standard of loving care and the means of education that supports it.

The court then delved into the question of what is religious discrimination and whether it existed in this case. The court opined that Mr. and Mrs. Johns are protected against direct and indirect discrimination against their religious beliefs (§ 98). The substance of the conflict over religious issues concerned the distinction between (1) their views on sexuality and sexual orientation and

(2) their religious beliefs (¶ 98). For the court, the two were separate rather than intertwined. On this score, the court failed to comprehend the very matter that defined Mr. and Mrs. Johns as solid citizens who cared for their neighbor. It was incapable of acknowledging that the Johnses' views on sexuality were inextricably related to and grounded upon their religious beliefs—beliefs held by many co-religionists who identify with the moniker *Christian*. The court disposed of the religious freedom questions in this fashion:

If the defendant's treatment is the result of the claimants' expressed antipathy, objection to, or disapproval of homosexuality and same-sex relationships it is clear, on authorities which bind us, namely the decisions of the Court of Appeal in *Ladele* and *McFarlane*, that it would not be because of their religious belief. Moreover, the defendant's treatment of the claimants would not be less favourable than that afforded other persons who, for reasons other than the religious views of the claimants, expressed objection to, or disapproval of, homosexuality and same-sex relationships contrary to the National Minimum Standards for Fostering and the defendant's various policies (¶ 99).

In taking stock of the civil authority's attitude on the relationship and tension between religious beliefs and views on human sexuality, the court asserted that *requiring* respect *and* positive attitudes towards homosexuality and same-sex relationships is *not* indirectly discriminatory against persons holding certain religious beliefs (¶ 101). Furthermore, legislation and the accompanying regulatory schemes “amount to a justification” (¶ 101). So, how does this perspective score with reliance upon the Johnses' claims under Article 9 of the ECHR?

The court stated that Article 9 provides only a “qualified” right to maintain and exercise religious belief. Hence, interference with religious practices in spheres of employment and other areas are easily justifiable (¶ 102). In particular, the court concluded that this “will be particularly so where a person in whose care a child is placed wishes to manifest a belief that is *inimical* to the interests of children”³⁶ (¶ 102). Why and how such manifestation of religious, Christian belief is inimical to the interests of children is neither explained nor justified. The court defended its position by asserting that “there is no right to foster” (¶ 103). Relying on material that it knew was “not strictly evidence,” the court opined that a child or young person who is homosexual or is doubtful about his or her sexual orientation “may experience isolation and fear of discovery” if the foster parent to whom this child is

³⁶ Italics added. For this proposition the court cited *R (Williamson) v. Secretary of State for Education and Employment*, [2005] A.C. (2nd series) 246.

assigned “is antipathetic to or disapproves of homosexuality or same-sex relationships” (§ 106). But it would be reasonable to assume that the officials who make the assignment would have the responsibility of screening not just prospective foster parents but also the children who will be the subjects of the appointments the officials make. In this regard, it would also be reasonable to assume that these officials would have to make many decisions based on the information available to them that an assignment of a child to a particular foster parent or parents would be a good match for the parents *and* the child. The fact that potential foster parents, for example, the Johnses, may actually help a child better understand human nature and the essence of being a person was immaterial to the court’s consideration. What matters is whether the child will be entrusted to the care of those who agree that homosexuality—or any sexual relations other than those between a married man and woman—is right and proper.

It was not, the court indicated, material or relevant as regards these crucial legal issues to determine if the perspective that fosters and promotes homosexuality is supported by competent research. The court insisted that such matters were “not the point”—but it *was* the point to conclude and assert that “attitudes to homosexuality and same-sex relationships of a person who has applied to be a foster carer” are a reasonable and appropriate inquiry (§ 106). Whether there is any indication or suggestion that a child is homosexual or is inclined to homosexuality or has any strong views on sexuality was not, apparently, material to the court. What is material is that the child be exposed to homosexuality in a sympathetic and embracing fashion. As the Johnses could not agree with this position because of their Christian beliefs, they were found to be unacceptable candidates for foster caring. Of course this again begs another question: who *would* be acceptable?

V. AN EVALUATION OF THE COURT’S OPINION

As was mentioned in Section II above, the court did not address several critical issues from international law that having a bearing and application on the *Johns* case. Here I contend that the High Court’s inability to consider the import of the international instruments to which the United Kingdom is a party resulted in the sort of injustice that the ICCPR and the ICESCR were promulgated to prevent. As previously mentioned, the UDHR, the ICCPR, and the ICESCR recognize the rights of parents—including those charged by the law to be guardians of children—in the context of education dealing with religious and moral matters. These were precisely the rights that the Johnses sought to exercise. Although the United Kingdom is a party to the ICCER and

the ICESCR—the juridical means for implementing the UDHR—their provisions are not part of the United Kingdom’s internal law.

What do these texts say about parents’ rights? Let us begin with Article 26(3) of the UDHR, which states that, “Parents have a prior right to choose the kind of education that shall be given to their children.”³⁷ This language is amplified and explicated by the ICCPR which states in Article 18(4) that “States Parties ... undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”³⁸

Article 13(3) of the ICESCR similarly states that

States Parties ... undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.³⁹

In both cases, these provisions protect the non-derogable rights⁴⁰ of parents to ensure the religious and moral education of the children entrusted to their care. This is precisely the right that the Johnses attempted to exercise but were prevented from exercising. The denial of their rights arose from the preference the authorities gave to matters of sexual orientation over religious liberty and parental authority.

As was mentioned in Section IV above, the *Johns* court stated:

While as between the protected rights concerning religion and sexual orientation there is no hierarchy of rights, there may, as this case shows, be a tension between equality provisions concerning religious discrimination and those concerning sexual orientation. Where this is so, Standard 7 of the National Minimum Standards for Fostering and the Statutory Guidance indicate that it must be taken into account and in this limited sense the equality provisions concerning sexual orientation should take precedence (¶ 93).

However, it is clear from the action taken that the court and the public authorities involved in the *Johns* case did in fact establish a hierarchy of rights and gave precedence to one over the other, a precedence that is in conflict with the law of nations to which the United Kingdom is a party even

³⁷ UDHR, *supra* note 11.

³⁸ ICCPR, *supra* note 9.

³⁹ ICESCR, *supra* note 10.

⁴⁰ ICCPR, art. 4, *supra* note 9; ICESCR, art. 5, *supra* note 10.

though the covenantal language is not incorporated into its domestic law. The public authorities involved in the *Johns* case, including the High Court, could have easily identified an obligation to respect parental rights and responsibilities in accordance with the principles contained in the Vienna Convention on the Law of Treaties (Vienna Convention), which provides an accurate and authentic understanding and application of international legal instruments *based on the principle of good faith*.⁴¹

The provisions of international law dealing with parental rights and responsibilities begin with and are built upon the principle of the Universal Declaration of Human Rights that the family is the natural and fundamental group unit of society and is entitled to be protected by society and the State.⁴² This principle is essentially duplicated in the ICCPR⁴³ and the ICESCR.⁴⁴ Moreover, the UDHR also acknowledges that parents have the prior right to choose the kind of education that shall be given to their children.⁴⁵ The ICCPR builds on this point and further elaborates that States have a duty to respect the liberty of parents (or legal guardians) to ensure that the religious and moral education of their children is in conformity with the parents' convictions.⁴⁶

⁴¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (January 27, 1980), available at <http://www1.umn.edu/humanrts/instr/viennaconvention.html>. Article 26 of the treaty, which bears the heading "Pacta sunt servanda" (Agreements must be observed), states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In the section dealing with interpretation of treaties, Article 31 specifies that treaty interpretation is also to be conducted in good faith. The United Kingdom ratified the Vienna Convention on the Law of Treaties on June 25, 1971.

⁴² UDHR, *supra* note 11.

⁴³ ICCPR, art. 23.1, *supra* note 9. ("The family is the fundamental group unit of society and is entitled to protection by society and the State.")

⁴⁴ ICESCR, art. 10.1, *supra* note 10. ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.")

⁴⁵ UDHR, art. 26.3, *supra* note 11.

⁴⁶ ICCPR, art. 18.4, *supra* note 9. The ICESCR, art. 13(3), *supra* note 10, reflects these points by stating that the duty of the State also includes respecting the liberty of parents to send their children to schools (as long as they conform to the minimal educational standards of the State) other than those established by public authorities and to ensure the religious and moral education of children in conformity with the parents' convictions. In addition, the U.N. Convention on the Rights of the Child, art. 5, acknowledges that States parties "shall respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise

For the High Court in the *Johns* case, it should have been essential that these juridical texts be appreciated together and simultaneously considered and applied in accordance with the principles of treaty application contained in the Vienna Convention. Adherence to these principles would have contributed to fidelity to the law and reduced the likelihood of international responsibility for breaches of the law. Good-faith compliance requires this. Moreover, application of these principles would have protected the legitimate interests and rights of good people like the Johnses, for whom these texts were promulgated.

As one works through the text of the Vienna Convention, it becomes apparent that its drafters had in mind a functional and pragmatic approach to applying international legal texts. It asserts the fundamental and universal obligation that any instrument is to be read in good faith.⁴⁷ Even the most clever, resourceful explanation that complies with other principles—such as giving precedence to sexual orientation matters that are not covered by the ICCPR or the ICESCR—should fail if it is not proffered in the context of good faith. Good faith in the *Johns* case means recognizing not only the rights of this couple as religious people but as guardians who have the further right of instructing the children entrusted to their care in a fashion that reflects the parents' moral concerns.

Upon applying these principles to the issues under investigation, including the international responsibility of the United Kingdom, it can be seen that laws designed to protect parental rights in the education and moral upbringing of children are consistent with the objectives of promoting human rights, as enshrined in completely unambiguous human rights instruments. The decision in *Johns* substantially interferes with and frustrates the protection of the legal interests of parents—something to which the United Kingdom publicly committed when it ratified the ICCPR and the ICESCR.

The observation about good faith raises the related question as to what the UDHR, the ICCPR, and the ICESCR mean to the citizen of the international community. The plain or ordinary meaning of the provisions addressing parents' rights, liberties, and duties is that parents do have rights and responsibilities regarding their children. Ignoring these provisions would not be consistent with the ordinary meaning of the applicable texts and would impair the valid interests of parents. When one studies the working papers, the *travaux préparatoires*, of the UDHR, it becomes unmistakable that the objectives and intention of Article 26.3 of the UDHR, as further reflected in

of the child of the rights recognized" by the CRC. 1577 U.N.T.S. 3, 47 (Sept. 2, 1990), available at <http://www2.ohchr.org/english/law/crc.htm>

⁴⁷ See note 41, *supra*.

Article 18.4 of the ICCPR and Article 13.3 of the ICESCR, were drafted to avoid situations like those of Nazi Germany in which the State and the controlling political party, but not the parents, determined how children were to be educated and reared.⁴⁸ In short, parents have and retain this prior right that is consistent with the best interests of their children, and this right of parents is guaranteed by the rule of law.

If the High Court had acknowledged the state's duty to respect the rights of the Johnses in their application to become foster parents once again, the decision would have been consistent with a good faith application of the UDHR, the ICCPR, and the ICESCR based on the plain meaning of their language as well as their goals and underlying motivations.

VI. CONCLUSION

The adoption of the principles designed to protect the international rights of parents in educating children, particularly in the realm of moral and religious matters, would have reinvigorated important principles underlying the noble work of the international legal community as defined by law. Respect for these principles also would have substantially contributed to real diversity, a value to which the court in *Johns* gave mere lip service.

In addition, the *Johns* decision raises grave questions about the propriety of courts actually deciding cases that they say they are not deciding, but in fact decide in the abstract. By essentially deciding the case, the court exercised jurisdiction in a fashion that bodes ill insofar as what it has said about important issues may have a chilling effect when couples like Mr. and Mrs. Johns learn that the rights of religious freedom will be given, at best, secondary consideration when compared to rights dealing with "sexual identity" or "sexual autonomy."

Furthermore, perhaps without intent, the *Johns* court has minimized the significance of fundamental rights identified and guaranteed under international law by marginalizing the religious and parental concerns of the Johnses. This decision is a component of a growing body of jurisprudence in which authentic and legitimate religious belief and the exercise of this belief are considered unacceptable by those who hold power of the state and the culture that the state promotes.

I have labored to show a way in which the United Kingdom and other members of the international legal community can prevent violations of their

⁴⁸ MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 159 (2001); MORSINK, *supra* note 12.

acknowledged international responsibility when it comes to the rights of parents and guardians in educating children. What is needed is fidelity to the mandates contained in all applicable law and insurance that these norms are incorporated into applicable domestic law—for this is where their meaning will become manifest. With this consideration in mind, the ability of the members of the international legal community to be true to their noble mandates can be strengthened. Through a respectful and objective use of the foundational texts, states such as the United Kingdom have the best chance of accomplishing the many dignified goals that they were established to realize. But by ignoring these texts and their faithful meaning, they put at risk the rule of law and vitiate rights designed to protect the fundamental unit of human society.