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Judgment: approved by the Court for handing down
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY MARK WILLIAM JOHN PARSONS FOR JUDICIAL REVIEW

Before: Carswell LCJ, Nicholson LJ and Campbell LJ

CARSWELL LCJ

[1] The appellant Mark William John Parsons applied in 2001 to join the Police Service of Northern Ireland (PSNI). He passed successfully through the several stages of assessment, examination and vetting and was deemed to be qualified for appointment. He was notified, however, that he would not be accepted, because of the operation of section 46(1) of the Police (Northern Ireland) Act 2000 (the 2000 Act), which requires the Chief Constable to appoint from the pool of qualified applicants an even number of persons of whom one half are to be persons who are treated as Roman Catholics. The appellant, being of the Protestant faith, was not among those so treated. All 154 Roman Catholic qualified applicants were appointed, but only the first 154 in merit order of the 399 qualified non-Catholics. The appellant was outside this latter tranche who were appointed. He brought an application for judicial review, claiming that section 46(1) of the 2000 Act was incompatible with the provisions of the European Convention on Human Rights. Kerr J dismissed the application and the appellant appealed to this court.

[2] The genesis of the 2000 Act was the report of the Independent Commission on Policing in Northern Ireland (the Patten Commission). One of the central recommendations of the Commission was that a special method of recruitment of police officers should be adopted, in order to attempt to increase the number of Catholics serving in the force. The recommendation, which was accepted by the Government and enshrined in the 2000 Act, was that for some years the new intake of officers should comprise 50% Catholics and 50% Protestants or others.

[3] The Chief Constable of PSNI is, by section 39 of the 2000 Act, responsible for the appointment of police trainees. Section 46(1), the subject of challenge in the present appeal, reads:

> "46.-(1) In making appointments under section 39 on any occasion, the Chief Constable shall appoint from the pool of qualified applicants formed for that purpose by virtue of Section 44(5) an even number of persons of whom –
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> (a) one half shall be persons who are treated as Roman Catholic; and
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> (b) one half shall be persons who are not so treated."

Regulations made under section 44(5) provide for the constitution of a pool of qualified applicants. The appointment scheme is that applicants for acceptance as trainees have to pass medical tests and have various assessments. Those who are assessed as attaining a sufficiently high level are ranked as qualified applicants and are placed in order of merit.

[4] By section 46(8) the methodology to be applied in determining whether candidates are to be treated as Roman Catholic is that contained in the Fair Employment (Monitoring) Regulations (Northern Ireland) 1999. Under Schedule 2 of those regulations applicants are asked to state whether they are Protestant or Roman Catholic or neither. They are not obliged to answer that question, and if they do not, the Chief Constable is entitled to resort to the "residuary method" of determining the community to which they belong. That method, prescribed by Regulation 11 and Schedule 3, is to use other information provided by them in order to ascertain with which community they have a connection. The type of information is specified in Schedule 3 and includes such matters as surname, address, schools attended and clubs and sporting and leisure interests.

[5] The recruitment exercise in which the appellant took part attracted some 7843 applications. An initial selection test reduced the number to 1809, who then underwent an assessment. 884 candidates remained after this stage, and they then were given various tests, including medical examination, physical assessments, a firearms handling test and a vetting procedure. At the conclusion of this 553 applicants, including the appellant, were ranked as qualified and placed in merit order.

[6] The pool of candidates was then divided into two groups, those who were treated as Catholic, who numbered 154, and the remaining 399, who

were treated as other than Catholic. All 154 Catholics were accepted and offers of appointment were made to them. An equal number of 154 out of the 399 non-Catholics was accepted.

[7] The appellant was ranked at number 514 in merit order in the whole group of 553 applicants and at number 370 in the group of 399 non-Catholics. It was agreed that of the 39 candidates in the pool as a whole ranked below him, 10 were in the Catholic category and so were accepted. We were not informed whether the Chief Constable would have appointed more than 308 trainees if not restricted by the 50:50 rule. The manpower shortage in the PSNI is, however, a matter of common knowledge and there must be a reasonably strong inference that if he could have appointed more trainees he would have done so. Since the appellant was qualified for appointment, he therefore lost the chance of appointment by reason of the 50:50 rule.

[8] He cannot invoke the anti-discrimination provisions in the fair employment legislation, since the 50:50 rule is statutory and the Government obtained an exemption to cover it in the EU Directive 2000/78/EC. Before the judge he relied on Article 14 of the Convention, but the judge rejected his argument and counsel did not put forward any submission in this court based on Article 14. He disclaimed any desire to comment on the policy behind the Patten Report, the Act or the 50:50 rule – nor shall we make any such comment – and concentrated his argument on the compatibility of section 46(1) of the Act with Article 9 of the Convention.

[9] Article 9 reads as follows:

> **"Article 9**
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> *Freedom of thought, conscience and religion*
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> 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.
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> 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."

The freedom to manifest one's religion – which is not in issue in the present case – is qualified in the respects set out in Article 9(2), whereas the freedom to hold or change a set of personal religious beliefs, commonly referred to as the *forum internum,* is not so qualified. The European Court of Human Rights stressed in its judgment in *Kokkinakis v Greece* (1993) 17 EHRR 397 at paragraph 31 the importance of freedom of thought, conscience and religion as one of the foundations of a "democratic society" within the meaning of the Convention. In *R (Williamson) v Secretary of State for Education and Employment* [2003] 1 All ER 385 at paragraph 94 Rix LJ summarised the dichotomy between the *forum internum* and the *forum externum*, freedom to manifest a religious belief, in the following terms:

> "In terms of what has been described as the forum internum these freedoms are absolute. Thus the qualification introduced by art 9(2) relates only to the freedom to manifest one's religion or belief and not to the opening words of art 9(1). The right to manifest one's religion or belief, although qualified under art 9(2), is an inevitable extension of the absolute freedoms, since the right to believe would be worth little without a right to act on that belief … However, it is when beliefs are acted upon that they begin to impinge upon other people: hence the need to qualify the right to manifest, so that a proper balance may be maintained in a democratic and pluralist society."

When a court is dealing with an unqualified right the claimant has only to establish facts showing that the public authority has failed to comply with the terms of that particular right. There is no obligation upon the court to examine whether the interference with the Convention right can be justified by the public authority: Clayton & Tomlinson, *The Law of Human Rights*, paragraph 6.88.

[10] Mr Shaw QC on behalf of the appellant submitted that the State had committed a breach of his absolute right of freedom of religion under Article 9(1) in the following manner:

(a) The inquiry into his beliefs, inherent in the PSNI appointment process, was an unwarranted invasion of his private territory, and in itself constituted a breach of his rights.

(b) The Chief Constable's use of the results of the inquisition into the religious identity of applicants to discriminate against persons not treated as Catholic and confer disadvantage upon them solely on the basis of their religious identity constituted a further breach of Article 9(1).

(c) The disadvantage to persons not treated as Catholic operates as an incentive to acquire the advantageous Catholic status and a consequential disincentive to maintain their own religion.

(d) Accordingly, section 46(1) of the 2000 Act which has this effect is incompatible with the Convention right conferred by Article 9(1).

[11] The judge rejected this argument in paragraphs 23 and 26 of his judgment:

> "**[23]** … The applicant is not constrained in any way from holding his religious belief. True, in the particular circumstances that he finds himself, he would have been offered a post had he been Catholic, but that cannot amount, in my opinion, to a restriction on his freedom to hold to his Protestant faith. The nature of the right was well expressed in the joint judgment of Mason ACJ and Brennan J in the Australian High Court case of *Church of the New Faith v Commissioner For Pay-Roll Tax* (1982) 154 CLR 120, 130 where they said: -
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> > "Freedom of religion, the paradigm freedom of conscience, is the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint."
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> Mr Parsons is perfectly free to believe and act in accordance with his belief without legal restraint.
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> **[26]** In the present case the applicant has not been refused employment because he is a Protestant. He was not offered a post because he did not score sufficiently highly within the category that would have allowed him access to appointment. The action taken against him was not designed to restrict his religious freedom; it was because of his failure to achieve the required results in the various tests and assessments for appointment to the position that he sought. While it is true that others who scored less highly were appointed, this is because they had an

> attribute that he did not possess *viz* their Catholic status. That does not mean that the applicant's freedom to practise his religion or to adhere to the faith that he has espoused is diminished. The respondent has placed no constraint on that freedom. I am satisfied therefore that no violation of article 9 arises in this case."

[12] Mr Shaw submitted that the judge had failed to make a sufficiently clear distinction between the internal and external *fora,* a criticism which also could be made of the authorities which he cited in his judgment. He correctly found that the appellant would have been offered a post had he been a Catholic, but was in error in finding that this did not amount to a restriction on his freedom to hold on to his Protestant faith.

[13] The American jurisprudence draws a distinction between freedom to believe and freedom to act (see, eg, *Cantwell v Connecticut* (1940) 310 US 296 at 303-4), though some commentators have pointed out the difficulty in drawing a clear distinguishing line. Criticisms have been advanced of the decisions of the ECtHR on the ground that they have failed to recognise or make clear the distinction: see such works as Evans, *Freedom of Religion under the European Convention on Human Rights* (2001) paragraph 5.3.1. Whether or not such criticisms are justified, it is undeniably difficult to find in any of the Court's decisions any definition of the limits of the *forum internum* or the State acts which would infringe the right.

[14] In support of his thesis Mr Shaw cited a work by Bahiyyih G Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Protection* (1996), in which she put forward a number of suggestions of unlawful State interference with religious belief which fall short of systematic brainwashing, including:

- discrimination on the basis of having, or not having, a certain religion or belief;
- proscription of membership of certain religions or beliefs under law;
- coercion to reveal one's religion or belief or to have it revealed without one's consent; and
- use of threat of physical force or penal sanctions to compel individuals to adhere to their religious or other beliefs and congregations, to recant their religion or belief or to convert.

He relied particularly on the first and third of these in support of the appellant's claim.

[15] On the facts of the case there was no coercion upon applicants to reveal their religion if they did not choose. If they did not do so, the assignment of them to one religious category or another was carried out by an oblique

method, which does not involve any compulsion on the applicants themselves to give any information about their religion. We do not accept that the mere making of an inquiry about a person's religion constitutes an infringement of a Convention right. If it did, every monitoring exercise would involve a breach of Article 9, as would every inquiry by a church school about the faith of parents of prospective pupils. We cannot believe that this is so.

[16] The major theme of the argument put forward on behalf of the appellant was that the operation of the 50:50 rule in the appointment process tended to coerce or induce candidates to abjure their faiths and adhere to the Roman Catholic religion. This, it was argued, was an interference with the freedom of the non-Catholics to maintain their religion and so brought about a breach of Article 9. The authorities examined by the Court of Appeal in the *Williamson* case do not support the proposition that any and every disadvantage imposed upon the adherents of a religion will constitute a breach of Article 9. It is necessary to determine the extent of the coercion or inducement which a complainant must establish before it can be said that a breach has taken place.

[17] Counsel on each side cited several decisions of the ECtHR and the European Commission of Human Rights, which give varying amounts of assistance in deciding the present issue. *Kokkinakis v Greece* (1993) 17 EHRR 397 was a clear case of interference with the complainant's freedom to manifest his religion. He was a Jehovah's Witness who was convicted and fined for proselytism contrary to Greek law. The Court held that the law prohibiting such proselytism was not protected by Article 9(2), since it was a disproportionate means of achieving a legitimate aim, that of ensuring the peaceful enjoyment of the personal freedoms of all those living in Greek territory. The decision does not help us to determine the bounds of the protection given in respect of the *forum internum.*

[18] The judge referred to two decisions of the Commission, *Konttinen v Finland* Application No 24949/94 and *Stedman v United Kingdom* (1997) 23 EHRR CD 168. In *Konttinen v Finland* the applicant became a Seventh Day Adventist and commenced to observe one of their tenets, that its members must not work on the Sabbath, between sunset on Friday and sunset on Saturday. He absented himself on a number of occasions from his work on the state railways before the end of his Friday shift, contrary to the rules of his employment, in order to comply with this requirement. He was dismissed and claimed that his dismissal was in breach of Article 9(1). The Commission dismissed the complaint as manifestly ill-founded. It found that he was not dismissed because of his religious convictions but for having refused to respect his working hours. Having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regarded this as the ultimate guarantee of his right to freedom of religion. *Stedman v United Kingdom* involved a similar dilemma. The

applicant refused to work on Sundays because of her religious beliefs and was dismissed. The Commission declared the application manifestly ill-founded, on the same ground as in *Konttinen's* case, that she was free to resign from her employment. There was no discussion of Article 9(2) in either case, and the Commission appears to have treated them as coming within the *forum internum,* on the basis that the applicants' freedom to maintain their own religion was not infringed to an extent which constituted a breach of Article 9.

[19] The appellant relied on the Commission's decision in *Thlimmenos v Greece* Application No 34369/97. The applicant was a Jehovah's Witness who had refused to serve in the Army and was sentenced to imprisonment. That conviction was not in issue in the application, on limitation grounds. The applicant subsequently sought to become a chartered accountant. He was successful in his examinations, but the Chartered Accountants' Board refused him admission to the profession because of the conviction and the Board's decision was upheld by the Council of State. The Commission considered the refusal to accept the applicant disproportionate. It also held that those who drafted the rules could have foreseen that the consequence would be that no Jehovah's Witness could become a chartered accountant. Their failure to make a distinction between those who convicted of refusing to serve in the armed forces on religious grounds from persons convicted of other felonies was, in the absence of an objective and reasonable justification, a breach of the applicant's right not to be discriminated against in the enjoyment of his right to manifest his religion.

[20] Mr McCloskey QC for the respondent relied on *Kalac v Turkey* (1997) 27 EHRR 552, which concerned a judge advocate in the Turkish air force who was compulsorily retired for breaches of discipline and infringing the principle of secularism. He was charged in particular with membership of a fundamentalist Muslim sect and participation in unlawful fundamentalist activities. The ECtHR held that there had not been a breach of Article 9(1). Its reasoning appears in paragraphs 27 to 31 of its judgment:

> "27. The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia,* freedom to manifest one's religion not only in community with others, in public and within the circle of those who faith one shares, but also alone and in private. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.

> 28. In choosing to pursue a military career Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians. States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.
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> 29. It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practices his religion. For example, he was in particular permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.
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> 30. The Supreme Military Council's order was, moreover, not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude. According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.
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> 31. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 since it was not prompted by the way the applicant manifested his religion."

The reasoning of the Court is criticised by Clayton & Tomlinson, *op cit*, page 973, on the ground that it would have been more appropriate to determine the issue by reference to the exception contained in Article 9(2) rather than to hold that there had not been a breach of Article 9(1). Rix LJ echoed this criticism in *Williamson's* case at paragraph 198, but went on to say:

> "Nevertheless, this decision does demonstrate, albeit on its own special facts, that in considering whether there has been an interference with rights protected under art 9, the European Court of Human Rights will consider whether subject to any voluntarily

> accepted limitation, the complainant remains essentially free to exercise his rights of religion."

The decision in *Kalac v Turkey* and that in *Stedman v UK* were the foundation for proposition (b) formulated by Arden LJ in *Williamson's* case at paragraph 262 of her judgment:

> " … a person who can take steps which will avoid any conflict between his beliefs and those acts which he claims interfere with those beliefs, or voluntarily accepts a regime which leads to such a conflict, cannot complain of an interference with his freedom to manifest his beliefs."

Thlimmenos v Greece is in accord with this thesis, since the restriction was held to be disproportionate.

[21] We would refer also to the decision of the Court in *Buscarini v San Marino* (1999) 30 EHRR 208. The applicants were elected to the legislature of San Marino, and were obliged before taking their seats to swear an oath on the Holy Gospels. They objected to doing so, on religious grounds, but complied under protest, since they would otherwise have lost their seats. The Court held that there had been a breach of Article 9. It considered whether Article (2) provided a defence, so treating the case as one of manifesting religion, possibly because it was presented as one of being required publicly to profess a particular faith (see paragraph 30 of the judgment). Treating the case as one of manifesting rather than under the *forum internum* is criticised by Ms Evans, *op cit,* pages 73-4. Whether or not the Court was right to do so, however, the decision does not afford us any significant amount of assistance in deciding this case, as one which comes within the *forum internum,* or in determining what will constitute a breach of the right to hold and maintain a religious belief.

[22] The decision in *Williamson's* case turned on the extent of the general right of freedom of religion contained in Article 9(1). The subject matter of the case was the right of parents to have corporal punishment administered to their children in school and the compatibility of section 548(1) of the Education Act 1996, which prohibited it. The foundation for the parents' wish was their religious belief, based on certain Biblical texts. The Court of Appeal dismissed the claim. Although the reasons given by the members of the court differed, the majority held that section 548(1) was not incompatible with the applicants' Article 9 rights. The decision on appeal did not turn on the application of Article 9(2), which was not relied on by the Secretary of State. The judge in the court below had held against him on a submission based on Article 9(2). Notwithstanding the fact that it was a case based on manifestation of religion (paragraphs 206 and 218), counsel did not advance

any argument upon that provision before the Court of Appeal: see paragraphs 110-11 of the report. The decision of the majority accordingly turned on the width of the right conferred by Article 9(1) to hold or manifest one's religion or, as we put it in argument in this case, the content of the bundle of rights contained in each of those concepts. The conclusions reached by Rix LJ and Arden LJ are capable of applying to each. Both accepted that the right was not unrestricted, but it had to be established that it was interfered with in a material way. Rix LJ expressed this in paragraph 202 of his judgment:

> "This then is a rather ambivalent collection of authorities, but even so there is a consistent thread running through them to the effect that it is not enough to show that a right protected under art 9(1) is theoretically in play unless it can also be shown that that right has been interfered with in some material way. In judging what is material the European Court of Human Rights will apparently have regard to any limitations which the complainant has voluntarily accepted. And it will not be bound to take the complainant's protestations of interference at face value if on an objective assessment they do not amount to anything material."

Arden LJ stated in paragraphs 262-3 of her judgment:

> "[262] I have expressed the view above that the Strasbourg organs have sought to draw a balance between different sections of society by placing a restrictive interpretation on the scope of the qualified right conferred by art 9(1). The authorities show that this has been done, so far as relevant to this appeal, by holding: (a) that a person does not 'manifest' his beliefs by practice when he performs acts which are motivated by his beliefs but do not 'actually express' those beliefs (*Arrowsmith v UK*); and (b) that a person who can take steps which will avoid any conflict between his beliefs and those acts which he claims interfere with those beliefs, or voluntarily accepts a regime which leads to such a conflict, cannot complain of an interference with his freedom to manifest his beliefs (see for example *Kalaç v Turkey* (1997) 27 EHRR 552 and *Stedman v UK* (1997) 23 EHRR CD 329).
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> [263] These are distinct lines of jurisprudence but they are interconnected and interwoven in the case

> law. They are not unified by any express organising principle but, as I see it, there is a common thread. As I read his judgment, Buxton LJ shares that general approach. In my judgment, the common thread in these separate lines of jurisprudence is the need to balance the interests of those holding religious beliefs on the one hand with the interests of those who do not hold those beliefs (or who hold other beliefs) on the other hand. It is of the essence of a pluralist society that no group should have dominance over any other group (see above). I do not intend to suggest that all the case law cited to us is capable of consistent analysis in terms of the propositions I have set out above, but in my judgment they support those propositions for the reasons given below. Accordingly, the right to freedom of thought, conscience and religion cannot be relied upon as automatically justifying immunity from generally applicable laws."

[23] We respectfully agree with this reasoning and conclusion of Rix and Arden LJJ, which accords with those which we have reached on the principles to be applied. These may be encapsulated in the following propositions:

(a) It cannot be said that any act by which a complainant is disadvantaged because of his adherence to a particular religion constitutes an invasion of freedom to hold that religion for the purposes of Article 9(1).

(b) There is a breach of Article 9(1) only when a certain level of disadvantage is reached (cf Rix LJ's judgment in *Williamson's* case at paragraph 193). That may occur when belonging to his religion is made so difficult for a complainant that in consequence of the acts complained of he is in effect being coerced to change his religion, eg if adherents of a certain religion were barred from all or substantial areas of work (as in *Thlimmenos v Greece*). This would comprehend the second and fourth of the suggestions advanced by Ms Tahzib which we have cited, but restrictions on the lines of the first and third would constitute a breach of Article 9(1) only if the invasion of freedom were sufficiently substantial.

(c) That point is not generally reached when the complainant has a choice, which it is reasonable for him to exercise, whereby he is enabled to avoid the adverse consequences of the act or circumstances complained of and still maintain his own religion, eg by taking up other employment open to him.

[24] On the facts of this case it may be contended that the disadvantages imposed on the appellant in seeking appointment as a police trainee because he was not a Catholic tended to make him consider abandoning his own religion. He was, however, free to seek and engage in other employment and no case has been made that his failure to obtain appointment as a trainee police officer had a very substantial effect on his career or employability. We therefore consider that those disadvantages were not such as to involve a breach of his Article 9 rights. It follows that section 46(1) of the Act is not in our opinion incompatible with the appellant's rights under Article 9(1) of the Convention, and we must dismiss the appeal.