Neutral Citation Number: [2012] EWHC 175 (Admin)

Case No: CO/7755/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2012

Before :

MR JUSTICE OUSELEY

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THE QUEEN ON THE APPLICATION OF

NATIONAL SECULAR SOCIETY	**1st Claimant**
MR CLIVE BONE	**2nd Claimant**

-v-

BIDEFORD TOWN COUNCIL	**Defendant**

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Mr D Wolfe and Ms Claire Darwin (instructed by **DAC Beachcroft Solicitors**) for the **Claimants**
Mr J Dingemans QC and Mr T Poole (instructed by **Aughton Ainsworth Solicitors**) for the **Defendant**

Hearing dates: 2nd December 2011

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Approved Judgment

MR JUSTICE OUSELEY :

1. Bideford Town Council is a Parish Council in Devon, a local council under the Local Government Act 1972. Public prayers are said at full meetings of the Council, which are held in public and monthly, and on two other annual special occasions, but not at committee meetings or extraordinary meetings. They are thought by some to have been said at the Town Council's meetings since the era of Queen Elizabeth the First. Minutes first record prayers at Council meetings in 1941. Prayers are not recorded in the minutes in the 1970s; but they are recorded again in 1988, and have continued to be said at the full Council meetings ever since. There are a number of other Councils in Devon and probably elsewhere which hold prayers at the start of their Council meetings.

2. This practice is challenged by the National Secular Society, which campaigns for the separation of religion from public and civil life. It decided to take up the case following complaints by the second Claimant, Mr Bone, a Liberal Democrat former Bideford Town councillor, whose motions to stop prayers being said were rejected by the majority of councillors on two occasions. He had to be joined as a Claimant in order for Human Rights Act arguments to be mounted, since the National Secular Society could not be a "victim" for the purposes of the Human Rights Act, whereas he could.

3. The challenge claims that the practice breached the prohibition on religious discrimination in the Equality Act 2006, and the replacement "public sector equality duty" in the Equality Act 2010: it discriminated indirectly against persons, such as Mr Bone, who had no religious beliefs, and it was not justifiable under those Acts. The practice interfered with Mr Bone's right not to hold religious beliefs under Article 9 ECHR, and not to be discriminated against for that lack of belief under Article 14. It was also outside the powers of s111 Local Government Act 1972. The Council said that no councillor was made to attend that part of the meeting; they could choose to stay and not participate; there was no discrimination or none of any substance, and it was justified as providing a fitting start to the Council's deliberations, one to which the members had democratically agreed. No statutory authority was required, but if it were, the language of s111 LGA 1972 was amply wide enough to cover it.

The facts

4. The Town Council has 16 members for the four wards of the 16000 population of Bideford. They are summoned to the full meetings of the Council by letter from the Town Clerk. The same modestly formal style is used routinely: "You are hereby summoned to attend a meeting of Bideford Town Council to be held in the Council Chamber…for the purpose of transacting the following business." The letter then sets out the agenda. The first item is "Prayers by [a local named clergyman]". The second item is the taking of apologies for absence, deliberately second, so that those who do not wish to attend prayers are not marked as absent. These are meetings which the public are entitled to attend by the Public Bodies (Admissions to Meetings) Act 1960, as the letter of summons says. The minutes of the meetings commence with the list of those present; the first item minuted is "Prayers", followed by apologies for absence.

The Council's Standing Orders, made under Schedule 12 paragraph 42 of the Local Government Act 1972 for the regulation of its proceedings, make no specific reference to prayers in the order of business. One of the items is "Other business specified in the agenda issued with the summons to attend the meeting."

5. Mr McLauchlan, the Town Clerk, describes what happens in his witness statement. I quote**:**

> "A full Council meeting starts with everyone being asked to stand whilst the Mayor enters the Chamber. Once the Mayor is in his place he will ask everyone to sit. The offering of prayer is at the invitation of the Mayor after he has formally opened the meetings. The mayor will then introduce the invited Minister and he/she will then proceed to offer prayers. Councillors and members of the public are not expected to participate in prayer and are free to leave the Council Chamber during the saying of prayers. During prayers Councillors are seated.
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> The prayer offered is a prayer led by a Christian Minister from one of the local churches. In all there are about 8 Christian churches in Bideford and each have, at one time or another, been invited to say prayers.
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> The prayer time normally takes about 2-3 minutes. After the prayers have been said and the person leading the prayers has left the Chamber, apologies are taken. For those who do not wish to stay in the Chamber during prayers they are able to come back into the Chamber during the time prayers have finished and apologies are taken."

6. The invited ministers come from all the local denominations; Quakers have also been invited for reflection.

7. Mr Bone said that there was usually a short homily, followed by a prayer for the Council and its deliberations, sometimes ending with the Lord's Prayer, in which those present were asked to join. All prayers ended "Amen". No attempt was made to make it clear that Councillors who did not wish to participate could withdraw.

8. There had been no objection to the practice until Mr Bone was elected in 2007. He made no complaint for 9 months, and then in January 2008 he proposed a motion that prayers cease: it was a tradition no longer appropriate, which could deter some from seeking office, contrary to equality policies. His motion was defeated by 9 votes to 6, with 1 abstention. He withdrew a similar motion in March 2008, but in September 2008 put forward another motion which would have replaced prayers with "a short period of silence". This was defeated by 10 votes to 5. A campaign by humanists and the National Secular Society then ensued. This litigation is part of that campaign.

9. Mr McLauchlan explained why the Council had adopted and continued this practice:

> "I believe that the saying of prayers is a valuable part of any full Council meeting. For some it is to seek guidance and help on the matters on the agenda to be discussed. For others it is a time of quiet reflection and contemplation. It enables all of us to focus on the matters at hand and that we are there to serve the local community as best we can. It is a privilege and responsibility to be an elected member and it is good to remember that we are not there to serve our own interests but the interests of the people of Bideford."

10. He could see no advantage or disadvantage to any Council member or member of the public from the practice. It was part of the traditional role which Christian churches played on many occasions in the country's public life. He saw this litigation as part of a wider threat to the participation of the Christian churches in other ceremonial and public memorial occasions.

11. Mr Bone is not a Christian, and does not wish to participate in or even to be thought to be associated with acts of religious observance. He regards "the introduction of religious observances into civic life" as "inappropriate and needless; it discriminates against those holding different beliefs, or no beliefs at all, and causes upset, embarrassment, distress and inconvenience." Even if Councillors were told "politely" that they could withdraw, "it would still be unacceptable because they ask for divine guidance and affirm Christian belief." He thought that the seeking of such guidance could undermine confidence in the Council, and that there was some emphasis on being a Christian which excluded others. There was no evidence that the saying of prayers had advanced decision-making or a sense of community among members or the wider Bideford public.

12. He felt that he either had to participate in the prayers, or to leave the chamber immediately after the Mayor entered, which he would find "embarrassing and inconvenient…especially so because the press and public attend most meetings." So he remained, feeling "embarrassed and awkward." He did not wish to arrive late. He felt excluded from the role of Mayor, since the Mayor is expected to participate in an annual civic service. He is aware of Bideford people who would wish to stand for election as councillors but do not do so because of this practice of holding prayers. He decided not to stand again because of this practice.

The nature of the issue

13. I think it important that the narrow scope of the issue before me be explained. The issue is solely about whether prayers can be said as a part of the formal business transacted by the Council at a meeting to which all Councillors are summoned. It is quite wrong for the Defendant to suggest that the Claimants would be introducing a bar on acts of worship *before* the meeting, thus hindering the exercise by Councillors who wished to pray of their right to do so.

14. The Claimants object to the fact that the saying of prayers is a part of the Council's business, to which all Councillors are summoned. It is on the agenda of business to be transacted, and its transaction is minuted. The Claimants do not object to Councillors saying prayers together, led by a cleric, just before the Council meetings begin, but Councillors would not be formally summoned to that gathering. They accept that these gatherings could be held in public, on Council premises, even in the Council Chamber, as part of the Council's dealing with its property. Mr Wolfe accepted that the Council meetings could be adjourned for the purpose of holding such a gathering, but it would not take place as part of the Council's business. The Claimants had no objection either to some short period of quiet contemplation or reflection as part of the Council meeting, in which members would prepare themselves in their own ways for the public duty ahead; those who wished to do so could pray silently, and, it follows to my mind, could use the same prayers as each other in silent communion. The Claimants' objection was to the fact that there was a religious component to the formal Council business. They regarded what they suggested as a modest degree of change, which did not detract from the individual Councillor's freedom of religion.

15. But to the Council, an important aspect of the tradition was that prayers were indeed said as part of the meeting, and not in some gathering beforehand. This small element of Christian observance, at the outset, put Councillors in mind of their public duties, reflecting the way in which Christianity and Judaeo-Christian values permeate our society, and the role of the established Church as part of the fabric of national life. Besides, those who did not wish to participate were free not to do so, either by leaving or by sitting silently through prayers. They would not be marked as absent, if they left, since attendance was not taken until after prayers.

16. Although it is possible that there is an element of the tactical concession in the stance taken by the Claimants, which might be rejected in another case, I do think that if the Claimants are right in their arguments here, they are also right that the practices which they have accepted could replace those stopped would be lawful.

17. The Defendant saw success for the Claimants as threatening a range of other occasions, traditional, ceremonial, military or civic, national or local, in which a religious element, usually through the Christian Church, plays its part; and there are elements in what the Claimants have said at various times which suggest distaste for, and a campaign against, such a role. But I am not concerned with those circumstances. Nothing before me persuaded me that if the Claimants were right in their arguments here, they would inevitably succeed in any other particular aspectsof their campaign, so that I should reach a conclusion other than the one to which I have come.

18. As the prayers at Bideford Town Council were always Christian, or occasionally Quaker led, the same arguments would apply to the effect on persons of other religious beliefs as well as those who had no beliefs. Indeed, the same arguments would apply were the prayers of another religion to be said at the meetings of other Councils to the discomfort of Christians, members of other religions, or of those who had no religious beliefs at all.

The Local Government Act 1972 and vires

19. The duties of Parish councillors and the way in which a Parish Council must conduct its business are laid down in the Local Government Act 1972. S99 and Schedule 12 Part II govern the meetings. There have to be at least 4 meetings a year. One third of the membership represents a quorum. Issues are decided by simple majority vote. The names of those present have to be recorded and minutes have to be kept. Paragraph 10(2) requires notice to be given of the meeting, a summons to attend has to be sent to the members by the proper officer, and it must specify "the business proposed to be transacted". The Schedule is silent about prayers. S85 contains the duty to attend meetings of the authority, failing which, after a period, the absentee ceases to be a member.

20. S111 (1) of the LGA 1972, which applies to Parish Councils, provides:

> "(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions."

21. Although this argument was put third and very shortly in the order of submissions by Mr Wolfe, I regard it as the logical and crucial starting point. It is clear that the saying of prayers takes place, and is intended to take place, as part of the formal business of the Council: the letter of summons makes that clear, as do the agenda and the minutes. Prayers take place after the meeting is formally opened. There are penalties associated with regular non-attendance at meetings, which show that attendance at Council meetings is part of the duties of a Councillor. Attendance at meetings is necessary for a Council to discharge its business as a local democracy, and is one task which the electorate would normally expect of its Councillors. I do not regard the point at which apologies for absence are taken as of significance: absence may not be noted, but it remains absence from the formal meeting. The Council accepts that the formal meeting has begun before apologies are taken.

22. There is no specific statutory power to say prayers or to have any period of quiet reflection as part of the business of the Council. I do not accept Mr Dingemans' suggestion that saying prayers is an act of such a nature that it does not require statutory authority, even by reference to s111 of the 1972 Act. That provision is, as his later note showed, the basis for all the implied powers which a Council might wish to exercise; the word "functions" in s111 "embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions." See Lord Templeman in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 at p29F. S111 is the statutory expression of the powers implied by common law for corporations. Even if an act could fall into a category outside s111 but for which no statutory authority was required at all, saying prayers would not be one of them: it can be controversial, the importance attached by the

Council to saying prayers as part of the meeting means that it cannot be treated as a trivial matter. The Council has on two occasions by a majority voted to retain public prayers at its full meetings. But that does not give it power to do what it has no power to do.

23. S111 requires the prior identification of the function to which the acts in issue are incidental. The purpose of the meetings is to transact the business of the Council, which business is made up of the various express and implied functions, duties and powers, which it possesses. The question therefore is whether saying prayers "is calculated to facilitate, or is conducive or incidental to the discharge of any of their functions." Although there is scope for a wide interpretation to be given to those words, the courts have set their face against an interpretation which would cover the incidental to the incidental, see for example *R v Richmond LBC ex p McCarthy & Stone (Developments) Ltd* [1992] 2 AC 48. The language also requires an objective standard or test: it is not a question of whether the Council reasonably considers that a particular act would facilitate or be conducive to or incidental to the discharge of its functions. "Calculated" does not mean "thought likely by the Councillors", but requires an objective judgment of what is likely to facilitate the discharge of functions.

24. That said, I would accept that the reasoned view of elected Councillors in that respect would often be very persuasive. I do not doubt that the Councillors who voted for the continued saying of public prayers believe, or are prepared to accept, that the practice facilitates or is conducive or incidental to the transaction of business, and do so for reasons of belief and support for tradition, as summarised by Mr McLauchlan. I am sure that his experience as Town Clerk has equipped him to understand and express accurately what motivates the Councillors in this respect. I have, however, come to the conclusion that s111 does not permit the public saying of prayers as part of the formal meeting of the Council, as an incident of the transaction of its business.

25. There is a contradiction at the heart of the Council's position. It has made the prayers part of the formal business of the Council, yet it says that Councillors, summoned to its meetings, are not obliged to be present for this incident to the transaction of business nor to participate in it. I do not think that what falls within the scope of s111, as an incident to the transaction of the business of the meeting, can then be regarded as such that attendance for it is unnecessary or optional, in distinction from all other business. In effect it is treated as being outside the scope of the meeting. I do not see that it can be calculated to facilitate the transaction of business or any other functions if, for it to take place at all, it is necessary to give Councillors the choice not to attend. Nor can it be conducive to the transaction of business or to the exercise of any functions, if it does not matter if Councillors attend or not. If the Council does not regard it as business for which attendance is summoned, then it should not be on the agenda. If it regards it as business to which the summons applies, it cannot make attendance for it optional on the grounds that participation could be objectionable to some Councillors. No such arrangement would be necessary for a few minutes silent reflection.

26. This is reflected in the point that, having summoned Councillors to attend a meeting at which there is a religious component, the Council makes attendance for that religious part optional. This is because it recognises that Councillors, of whatever

religion or none, may not wish to attend prayers as part of a political meeting, where decisions are to be made about civic matters, however non-partisan its meetings may be. It respects that view. It has arranged matters so that Councillors need not attend and will receive no adverse attendance record if they do not. But it turns the Council meeting from one in which all Councillors are entitled to participate equally on all matters, qualified equally through being elected, into a partial gathering of those Councillors who share a particular religious outlook, or who are indifferent to it or, as in the case of Mr Bone, too embarrassed to leave in public. That cannot satisfy s111. The same objection does not apply to a few minutes silent reflection on the duties ahead, which each can observe in their own way.

27. I do not see that it can be calculated to facilitate, or br conducive to or incidental to formal public Council deliberations as a whole, for the majority to include as part of their formal deliberations a ceremony from which some absent themselves or feel themselves to be excluded, perhaps under protest or in resentment. The majority acknowledge such response or feelings to be ones which it is right to accommodate; such feelings are in that sense a reasonable response to the course of action preferred by the majority. I appreciate that the saying of prayers may cross party lines, but I cannot see that it would be different from incorporating some other form of religious or secular but potentially divisive ceremony, such as the singing of a political party's song, into the meeting.

28. Those reasons apply where there is a minority vote against the practice but would not apply to a unanimous vote in its favour. However, there are two other reasons why the practice is in my view beyond the power of the Council.

29. I have no difficulty in understanding how a few minutes quiet reflection at the outset on the better performance of the forthcoming public duty may assist Councillors to perform better, but the task for the Council is to show that it is the specifically religious character of prayers, in public and in the formal part of the meeting, which advances the transaction of Council business, and the performance of the underlying functions. I have no difficulty in accepting that some Councillors believe that it helps them and those who do not believe in God but for whom prayers may be offered. However, even quite a wide interpretation of s111would still require the Court to take a view about the extent to which public prayers in the formal Council meeting were likely to facilitate, or be conducive to or incidental to, the performance of the Council's functions. That is not a view which the Court should form, let alone when some are disturbed in the performance of their duties by just such public prayers. It is not for a Court to rule upon the likelihood of divine, and presumptively beneficial, guidance being available or the effectiveness of Christian public prayer in obtaining it. S111 cannot be construed so as to impose such an obligation on the Court.

30. As a general point, although I deal separately with the question of discrimination and human rights, I do not think that the 1972 Act, dealing with the organisation, management and decision-making of local Councils, should be interpreted as permitting the religious views of one group of Councillors, however sincere or large in number, to exclude or, even to a modest extent, to impose burdens on or even to mark out those who do not share their views and do not wish to participate in their expression of them. They are all equally elected Councillors.

31. This conforms with what Laws LJ said in his reserved judgment on the permission application in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872 at paragraph 22.

> "The precepts of any one religion, and belief system, cannot, by force of their religious origins, sound any louder in the general law than the precepts of another. 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 for such a belief's content in the name only of its religious credentials. Both principles are necessary conditions for a free and rational regime."

32. That passage was approved by Munby LJ and Beatson J in *R (Johns) v Derby City Council* [2011] EWHC Admin 375.

33. Accordingly, I have come to the view that the Council has no power to hold prayers as part of a formal Council meeting, or to summon Councillors to a meeting at which such prayers are on the agenda.

Discrimination

34. The relevant discrimination provisions in the Equality Act 2006 are no longer in force but were applicable at the time when the action was commenced and for most of the time when the practice complained of was occurring. They were repealed with effect from 1 October 2010, and replaced by the public sector equality duties in s149 of the Equality Act 2010 and the discrimination provisions in s19. Much of the argument was directed to the 2006 Act.

35. S45 of the 2006 Act dealt with direct and indirect discrimination. The Claimants rely only on indirect discrimination. S45 (3) provided:

> "(3) A Person ("A") discriminates against another ("B") for the purposes of this Part if A applies to B a provision, criterion or practice-
>
> (a) which he applies or would apply equally to persons not of B's religion or belief,
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> (b) which puts persons of B's religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),

> (c) which puts B at a disadvantage compared to some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances), and
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> (d) which A cannot reasonably justify by reference to matters other than B's religion or belief."

36. "Religion" includes a reference to a lack of religion; s44.

37. By s52, it was made unlawful for a public authority exercising a function of a public nature to do any act which constituted discrimination. The meetings at issue are unquestionably within the scope of that duty. Certain bodies and certain activities are expressly exempted from this. The two Houses of Parliament were exempted.

38. Mr Wolfe for the Claimants put some weight on s52(4)(k)(iii) which stated that the section did not apply to action in relation to "acts of worship or other religious observance organised by or on behalf of an educational institution (whether or not forming part of the curriculum." This, he argued, implied that such acts were covered by the section in other circumstances. The School Standards and Framework Act 1998 s71 enables pupils not to receive religious education and not to attend religious worship in certain circumstances. This, argued Mr Dingemans QC for the Defendant, was why the exemption in the 2006 Act was there and no wider inference could be drawn from its presence.

39. S19 of the 2010 Act deals with indirect discrimination; there are differences between the wording of s19 of the 2010 Act and s45 of the 2006 Act. I set out s19:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

40. The word "particular" in relation to disadvantage is to be noted in s19 (2)(b), and the language in (d) of proportionality in relation to a justified aim.

41. Mr Wolfe accepted that the predicate for his submissions on discrimination is that his submissions on vires are wrong, and that it is lawful under the 1972 Act to have a formal Council meeting at which prayers are part of the business to be transacted. And that can only be on the basis that they are calculated to facilitate or are conducive to or incidental to the carrying out to the Council's functions, even though not all Councillors wish to attend or, if present, to participate in them; and the Councillors can arrive after or leave for that part of the business without penalty nor is any record kept of any non-attendance.

42. That rather confirms my view that the practice is not lawful since the premise that a Councillor is free to absent himself or to ignore the business in hand is a half-truth; it ignores the role which he plays as an elected Councillor and which his electorate is entitled to expect him to play, without dispensation or special arrangements to accommodate his religious beliefs or lack of them.

43. The claim was based on indirect discrimination and not on direct discrimination. Applying the framework of s45 of the 2006 act, it was not at issue but that the saying of prayers was a practice covered by the Act. Mr Wolfe submitted that it was applied equally to anyone who attended a meeting of the full Council, whatever their belief or lack of belief. The Claimants contended that it put persons who shared Mr Bone's lack of belief at a disadvantage compared to at least some others, and put Mr Bone at a disadvantage compared to at least some who did not share his lack of belief. The Council could not reasonably justify this nor had they done so by reference to matters other than Mr Bone's lack of religious belief. Having to make a choice, visible with embarrassment or disturbance in public, was a disadvantage.

44. Using the framework of s19(2) of the 2010 Act, Mr Bone contended that he, and others who shared his lack of religious belief, would be put at a particular disadvantage when compared to those who did not share that lack of religious belief, and that the Council could not show it to be a legitimate aim proportionately pursued. The Council had not applied its mind to what its legitimate aim might be or to what was a proportionate means of achieving it. What Mr MacLauchlan said in his witness statement was not adopted by the Council, and came after the challenge anyway, as an attempt to justify what had not been properly considered as required by the duty in s149. The Council had rejected the Claimants' suggestions that prayers take place in the Council Chamber or elsewhere in the Town Hall before the meeting was opened.

45. The Defendant contended that the practice was not applied to Mr Bone, since he was free to stay or go. He suffered a disadvantage in the way he described but that was not a disadvantage within the Act since it was too slight. The disadvantage suffered by Mr Bone was no more than that he had to choose either to leave the meetings, with whatever embarrassment or inconvenience that might cause to him, or to stay passively, while others participated in prayers which he was under no obligation to join. He was no more disadvantaged than someone whose beliefs were not

compromised by the prayers but who did not wish to participate. In reality, it was Mr Bone, who was requiring the adoption of a practice which reflected what he himself wanted along with others who had no religious beliefs, discriminating against those who wished to observe the practice of saying prayers in the meeting because of their religious beliefs or acceptance of traditional practices.

46. The practice was legitimate or reasonably justified in a society which did not observe a strict separation of Church and State, and proportionate since it facilitated the rights of those who wished to pray, promoted the well-being of the Councillors and a sense of social cohesion and community. It facilitated the Council's functions. Prayers were not offered at Committee meetings, Councillors were free not to participate, whether they stayed or not, and a cross-section of religious views within Bideford were invited, including Quakers who offered quiet reflection.

47. The first question is whether the practice is applied to Mr Bone, since he may leave or stay at his choosing. This requires the practice to be carefully defined. I use the short hand of "saying prayers" elsewhere in the judgment but that should not obscure the true nature of the practice. It is not simply saying prayers; it is saying prayers as part of the formal business of the Council which he is summoned to attend. Mr Dingemans accepted, in para. 37 of his skeleton argument, that the practice was applied to Mr Bone but in oral argument, contended that it was not, on the ground that Mr Bone was free to go, as were any others who, for whatever reason, wished to do so. If he chose to stay, he could choose not to participate, and did not do so through his mere presence.

48. On the predicate necessary for the discrimination arguments, this practice is not in my judgment applied to Mr Bone. I accept that he is free to arrive after or depart before the start of prayers, in the sense that the Council accepts his entitlement to make a personal choice to go or stay, and if to stay not to participate, and applies no constraints or disapproval to his decision either way. I find it surprising though that Mr Bone says he did not know he was free to go or stay, and not participate.

49. As I have said earlier however, I find the concept of a Councillor being free, as the Defendant implies, to come and go during formal business an odd one. How can it satisfy s111 if it is not a practice applied to him as to all Councillors even if his fellow Councillors do not make him stay or seek to apply any penalty or disapproval to him were he to go, or stay and not participate? But on the premise that s111 permits the practice, it is one which he can opt not to attend or to participate in. I do not think that the practice of saying prayers is applied to someone who can choose whether or not to stay. It is not applied to him simply because he has to make a choice about it.

50. The main argument focussed on disadvantage and particular disadvantage. Mr Dingemans did not contend that Mr Bone was not one of a group or pool who experienced similar circumstances or who would potentially do so, in so far as it was necessary to identify such a group. I have reservations about Mr Wolfe's argument on this score, but express no concluded view: the extent of local or national non-belief does not advance the issue; the desire of the electorate that he attend Council meetings cannot logically help support, on the premise on which I am examining these issues, an argument that business should not be facilitated in this way; nor can the mere fact that some Councillors may feel "uncomfortable" or vote against the practice create a

disadvantaged group. A lack of willingness to stand because of the practice and complaints from some members of the public may not establish group disadvantage as opposed to disparate bodies who simply dislike the practice.

51. Turning to disadvantage on the basis that there is a group which shares or would share the same circumstances, the second question is whether those who share Mr Bone's lack of religious belief, and Mr Bone, are or would be put at a disadvantage through the practice of saying prayers, by comparison with those whose beliefs are not compromised by willing presence during or participation in the observance of prayers.

52. I accept Mr Dingemans' argument that there has to be a certain threshold, albeit not a high one, before a set of circumstances can be described as a disadvantage or a particular disadvantage. These are ordinary words, however, to be applied without undue analysis or with undue sensitivity. I accept that the analysis in *R (Watkins-Singh) v the Governing Body of Aberdare Girls' High School* [2008] EWHC 1865(Admin), [2008] ELR 561 is correct but could be misinterpreted so as to lead to an inappropriately high standard. There is no requirement for exceptional disadvantage; see "particular" as emphasising not exceptional, but specific or identifiable and more than objectively insignificant. I accept that *Eweida v British Airways plc* [2009] IRLR 78, EAT, and [2010] EWCA Civ 80, [2010] IRLR 322 shows that disadvantages can exist from seemingly quite small distinctions, such as the prohibition on wearing a religious symbol outside a civil uniform.

53. The fact that someone may be hostile to a practice does not mean that its observance puts him at a disadvantage. Mr Bone sought election to a public position where he can expect and must have accepted that his views and beliefs might be the more open to public observation, and reticence about public knowledge of what might be regarded as personal matters has less significance than for a private individual. This has nothing to do with whether Mr Bone, or those of like views would be eligible for election to the office of Mayor; his concern about a wider range of civic functions at which there would be a religious element does not rise for consideration here.

54. He is not compelled to participate. The disadvantage he asserts to himself, and to other Councillors whose lack of religious beliefs might lead them to feel compromised by being present during the saying of prayers, is that of either arriving after prayers, or staying in silence, ignoring what goes on around them but perhaps seeming inadvertently disrespectful, or leaving, disturbing their papers and concentration just before the substantial business begins, with a degree of public embarrassment since the press and public are usually present. This seems to me it is of no real significance. I would not regard it as a disadvantage for these purposes.

55. I see very little difference between that and the arrangements made for those who do not wish to attend an act of corporate worship in schools, but who nonetheless have to be found somewhere to go under supervision, or who have to leave the classroom in which a lesson in religious education, in which they do not participate, is about to take place. S52(4)(k)(iii), and its specific exemption from the Act for religious worship in schools, seems to me more relevant in that respect than as showing that prayers in public meetings, which Councillors were free to attend or not, were discriminatory. (I see little weight to be attached to the provision itself in that respect since this was an

obvious topic to dealt with by specific statutory provision, and the 1998 Act made specific provision for pupils not to attend in certain circumstances.)

56. I also see very little difference in that respect between what he experienced as a Councillor and rejects, and an informal gathering of like-minded Councillors meeting, which he would accept, held shortly beforehand in the Council Chamber, but not closed to the public, which out of courtesy he leaves while setting out his papers, or remains in quietly reading but perhaps with a degree of embarrassment. Were the meeting to be adjourned for the purpose of prayers, which Mr Wolfe acknowledged could not be objected to, the same disadvantage of departure under the public gaze, or staying without participation, would arise, either for him or for those leaving for the purpose of prayers. Of course, I accept that there is a constitutional difference, and I attribute importance to that when considering vires, but the predicate for the consideration of the discrimination argument is that there is no statutory bar to that practice.

57. If the Council is entitled to have public prayers at its formal meetings, contrary to my first conclusion, they are also an optional part of the lawful conduct of Council meetings and business of the Council to which Mr Bone was elected, and by the rules of which he has to abide. It is he who is seeking that a lawful but optional practice, chosen here by the majority of Councillors, which is the way in which such decisions are lawfully made, should be stopped to accommodate his particular lack of beliefs. His beliefs or lack of them have in fact been accommodated, and he would be seeking something more than a dispensation or special rule to accommodate him. He is seeking that others abandon a practice, lawfully chosen, which it is lawful for them to choose, so that he does not have to make any accommodation for them, but they do for him. I do not see that the feelings of discomfort or exclusion which he has, and which he says are shared by a number of other actual or possible Councillors in the minority on this issue, should be regarded as a discriminatory disadvantage when its elimination would prevent the degree of comfort or composure which the majority seek being achieved, merely substituting one set of uncomfortable feelings for another.

58. It seems to me that the Claimants' arguments are close to the situation which would have existed if in *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, [2010] IRLR 211, the registrar who objected to undertaking any part in civil partnership ceremonies, had not merely been permitted to opt out but had succeeded in preventing such ceremonies being undertaken by others because it embarrassed her to be singled out. Likewise if an accommodation on religious grounds is made by a shop so that an employee does not have to handle a product such as alcohol, but which requires that employee to ring for another to conduct the sale, it would be extraordinary if the practice of selling alcohol was regarded as being applied to the first employee, or applied to his or her disadvantage such that the practice had to stop, because the accommodation marked out the employee for having particular religious views. Of course, this perception depends on it being Mr Bone who is being accommodated because he is free to leave the meeting while prayers are said. This depends upon the saying of prayers in those circumstances being lawful under s111 of the 1972 Act, which I do not accept.

59. I do not think that the analysis is advanced by debating whether or not those who do have religious beliefs but do not want to participate in the prayers, if any, are treated in the same way, so that any difference in treatment is not discriminatory on religious grounds. I think that sidesteps rather than grappling with the issue.

60. If the practice is lawful under the 1972 Act, but imposes a disadvantage on Mr Bone and others such as to require justification, and has to be shown to be a proportionate means of meeting a legitimate aim, the Council has in my view shown that it meets that requirement. The judgment on that issue requires a starting point which I do not accept is correct. However, without it, the arguments on the issue of lawfulness and discrimination become confusingly entangled. The saying of prayers has to be taken of itself to be an act, calculated to facilitate the conduct of the Council's business, conducive to it or incidental to it. Members are entitled to opt for their inclusion in the formal meetings of the Council for that reason. That itself provides the basis for the justification of the practice, its legitimate aim.

61. What Mr MacLauchlan sets out in his witness statements is no more than an elaboration of the way in which the saying of prayers is seen by him to fit within s111 of the 1972 Act. There is no great difference between part of the justification for prayers, that is mental preparation for public service, and the justification which the Claimants accept for having a short period of quiet reflection before as part of the meeting.

62. I do not accept Mr Wolfe's argument that that should be seen as an explanation not endorsed by members, and as an illegitimate rationalisation after the event for a practice which might never have been justified on that basis. Of course, he is right to say that the courts have been vigilant to prevent that sort of reasoning becoming an excuse for not fulfilling various equality duties, including those now in s149 of the 2010 Act; see for example *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 per Mummery LJ at paragraphs 129-132. In most circumstances, what has been provided here would fail such a test. However, the starting point is that s111 provides the basic justification for the practice. Mr MacLauchlan, because of his position and the time he has occupied it, would know how the Councillors in the majority had expressed themselves in the course of the two debates on just this issue, and what their views were as vouchsafed on other occasions. This was not an issue which reared its head shortly before this action began, hitherto unconsidered or ignored. Nor is there anything surprising or original or simply convenient about the reasons, such as to cause doubt as to whether they were the true reasons in fact. The reasoning does not involve any statistical work which earlier consideration could have caused to be examined differently.

63. Mr Wolfe also contended that the practice could not be a proportionate means of achieving the aim, even if it were legitimate, since the same aim could be achieved by either a short period of quiet reflection at the start of the meeting or by prayers for those who wished to participate in them before the meeting. I would regard that as a strong point in his favour, and it certainly supports my view that s111 does not permit prayers to be said as part of the formal meeting. But, once it is accepted that prayers can be a lawful part of the meeting, fulfilling the requirements of s111, it is difficult to see how alternatives, which either involve no prayers or none in the formal meeting, can meet that aim at all.

64. Whether seen as part of the justification or as moderating steps which go to proportionality, the fact that absences are not recorded until after prayers, that there is no compulsion to stay during them or to participate, all contribute to the conclusion that if justification is required, what is done here justifies or is a proportionate means of attaining the legitimate ends espoused by the majority. These have to be balanced against what is at worst a fairly marginal disadvantage suffered by Mr Bone, the alternative to which is that the majority experience a roughly equivalent disadvantage. Both are debating over the extent to which a belief or none can be manifested as part of the business of a Council meeting. Mr Bone believes that none should be and not only because he has no religious beliefs; the others believe that they are entitled to manifest them because they hold them to be relevant to the business in hand, or, if they have no very clear or firm beliefs as is not unusual in this area, because they represent a tradition which they are content to maintain. There is force in Mr Dingemans' argument that it is Mr Bone who is trying to force his lack of observance on those who prefer the alternative course, and not vice versa. The points which I make in paragraphs 56-57 are also relevant to the reasonableness of the justification for the practice and the proportionality of the way in which it is implemented.

65. Mr Wolfe challenged the evidential basis for the Council's view that the saying of prayers was likely to facilitate the conduct of Council business: a number of Councillors were opposed to the practice; a substantial minority of UK residents had no religion, and most Bideford residents did not attend regular Sunday worship, although there was little evidence of other religions in Bideford. There was no evidence that saying prayers facilitated the conduct of business.

66. I am not sure that that is a contention which, of its nature, can be proved or disproved by forensic evidence. It would have been interesting were the Council to produce it; I expect that its source and probative force would have been debatable. But the sense of public duty performed for others and not for self, and adherence to a long-standing local tradition supported by most elected Councillors, are sufficiently evidenced in Bideford by what Mr MacLauchlan says.

67. There is no evidence of general or significant objection by the voters of Bideford to the practice, however personally indifferent to the practice of any religion. I accept that the practice of saying prayers is capable of generating real hostility from those who are not adherents of the religion invoked. Hostility towards non-participants or non-co-religionists would be strong evidence of real disadvantage; and where that is so, it is difficult to see that it could be justified or a legitimate aim proportionately pursued. But, although that has occurred elsewhere, it has not occurred in Bideford. That risk, however, rather supports my conclusion about what s111 of the 1972 Act, applicable generally throughout England and Wales, permits. I do not see the potential for it as sufficient to amount to a disadvantage here though. Obviously, some Councillors disagree that this is an appropriate practice, as no doubt do some Bideford residents, but I do not consider that their disagreement with its usefulness under s111 can be taken of itself as showing that the contrary view as to its usefulness is wrong. This evidential point may go to s111 in the first place, but if my conclusions on that are wrong, there is simply a division of view as to its usefulness resolved democratically.

Articles 9 and 14 ECHR

68. Article 9 ECHR holds that "everyone has the right to freedom of thought, conscience and religion." Freedom to manifest religious beliefs, which includes public worship, is "subject only to such limitations as are prescribed by law and are necessary in a democratic society… for the protection of the rights or freedoms of others."

69. Article 14 requires Convention rights to be secured without discrimination on the grounds of religion, political or other opinion.

70. S13 of the Human Rights Act 1998 requires a court, where the determination of any question under the Act might affect the exercise by a religious organisation of the rights under Article 9 to have "particular regard to the importance of that right."

71. Mr Bone and the Defendant each claim that it is the stance of the other which threatens to breach these Articles. Mr Bone contends that the practice of saying prayers at the start of the meeting infringes his freedom of religion, thought and conscience, and his right not to be associated with any religion. It is not disputed that Article 9 protects the right not to hold religious views. It discriminates against him on the grounds of his lack of religion because it is for that reason that he is treated differently by the Council from the way in which it treats those other Councillors who do have a religious belief. The Council must show that the discrimination can be objectively and reasonably justified, and discrimination on religious grounds is one of those where the court should scrutinise the asserted justification with especial care; *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1AC 173.

72. As Lord Hoffmann said in *R(SB) v Governors of Denbigh High School* [2006] UKHL15, [2007] 1 AC 100, para 50, "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing"; nor does Article 9 protect every act motivated by religious belief.

73. The Defendant contends that it is the freedom of religious expression of the majority of Councillors which is threatened, and that there is no discrimination against Mr Bone. It accepted that Article 9 included the right not to hold or practise a religion. Mr Bone, and any Councillor, could stay or leave during prayers without penalty; there was no interference with his views or compulsion in them. There is no requirement that a reason for leaving be given; some may not wish to participate in a religious meeting in a Council meeting or in public. It was different from the situation in *Buscarini v San Marino* [2000] 30 EHRR 208, where elected MPs could not take their seats unless they took the oath which referred to the Holy Gospels.

74. The starting point, again, is that, contrary to my first conclusion, there is no statutory bar on the practice of saying prayers as they are currently said. Mr Bone is free to stay or leave during prayers. It is in accordance with the law. It is not discriminatory, or to the extent that it is, it is justified. I cannot see that his freedom of religion, thought or conscience is infringed by the degree of embarrassment he feels, which is no more than is inherent in the exercise by the others of their freedom to manifest their religious beliefs, and his freedom to stay without participating or to leave. It is their freedom which would be infringed were he right; that limitation is not prescribed by

law - on the hypothesis that there is no restriction in the LGA 1972. S13 of the Human Rights Act is relevant here.

75. I do not accept Mr Dingemans' argument that because Mr Bone had chosen to stand for election to a Council which had this practice, he had accepted the burden of its continuance until he could change it by democratic vote, as if elected office were akin to the civil partnership registrar whose job required her to do what her religious beliefs forbad, where the terms of the former did not have to be changed to accommodate the dictates of the latter; *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, [2010] IRLR 211. This fails to recognise that becoming an elected representative is more than just a job for a politician; it is the fundamental right of the electorate to choose whom they wish to represent them in the body to which they have elected him. If it is an interference with the right not to hold religious views, or if it is an unnecessary or unjustifiable interference or act of discrimination, this cannot be treated as a case of voluntary submission.

76. I do not accept Mr Dingemans' argument that the requirements of a pluralist state meant that preventing prayers in a Council meeting breached Article 9. Pluralism does not mean that one religion is entitled to manifest itself on such occasions.

77. I derived no assistance one way or the other from *Lautsi v Italy* App 30814/06 18 March 2011, in which the routine presence in state school classrooms of a crucifix, which was not used for worship, religious instruction or as an expression of allegiance, was held not to contravene Article 9. It was a passive and traditional national symbol in Italian state schools. That does not help on the question of whether communal prayers in the business meetings of elected members is an infringement of Article 9.

78. This case appeared also to provide some support for the notion that secularism falls within Article 9. I do not need to resolve this issue, because it arose from a misapprehension as to the Claimant's case. He is a secularist; others who may call themselves humanists may share some of the same aims. But it is not as a secularist or because of his views on secularism that the Claimant asserted a breach of Article 9 or discrimination. His case is put simply on the basis of discrimination against and interference with his right not to hold or to have to manifest religious beliefs.

79. However, the notion that the question of whether prayers can be said at a Council meeting should turn on whether an elected member's human rights are infringed, balancing the rights of others, suggests strongly to me that the true answer to their lawfulness is to be found in a proper construction of s111 of the 1972 Act.

Conclusion

80. The saying of prayers as part of the formal meeting of a Council is not lawful under s111 of the Local Government Act 1972, and there is no statutory power permitting the practice to continue. If it were lawful, the manner in which the practice is carried out in the circumstances of Bideford does not infringe either Mr Bone's human rights nor does it unlawfully discriminate indirectly against him on the grounds of his lack of religious belief.