



Neutral Citation Number: [2020] EWHC 2096 (Admin)

Case No: CO/4609/2019

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/07/2020

**Before :**

**MRS JUSTICE EADY DBE**

**Between :**

**THE QUEEN (on the application of KATE  
HARRISON AND OTHERS)**

**Claimants**

**- and -**

**SECRETARY OF STATE FOR JUSTICE**

**Defendant**

**-and-**

**(1) LINCOLNSHIRE COUNTY COUNCIL  
(2) SOMERSET COUNTY COUNCIL  
(3) KENT COUNTY COUNCIL**

**Interested  
Parties**

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**MS GALLAGHER QC and MR MCQUITTY (instructed by PHOENIX LAW) for the  
Claimants**

**MR O'BRIEN and MS GREENLEY (instructed by GOVERNMENT LEGAL  
DEPARTMENT) for the DEFENDANT**

Hearing dates: 7-8 July 2020  
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**Approved Judgment**

**Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am on Friday 31 July 2020**

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## **MRS JUSTICE EADY:**

### **Introduction**

1. A wedding is not only an event of personal significance for the couple concerned; it has legal implications such that there is a wider public interest in preventing sham and forced marriages, in confirming that those who seek to marry are legally free to do so, and in ensuring there is certainty as to when a marriage has taken place. The legal recognition of a marriage by the state is a matter of considerable importance and this claim concerns the requirements laid down under English law that provide for that recognition. The Claimants are humanists who complain that the legal recognition of different forms of religious wedding ceremony under English law does not similarly extend to weddings carried out in accordance with their humanist beliefs; they contend that this gives rise to an unjustified discrimination in the exercise of their rights under the European Convention on Human Rights (“ECHR”) and thus breaches the Human Rights Act 1998 (“the HRA”).
2. Permission to apply for judicial review was granted by Mrs Justice Steyn on the sole ground whereby the Claimants contend that English law breaches their rights under article 14, taken together with articles 8, 9 and/or 12 of the ECHR. The Claimants – six couples who identify as humanists - have submitted statements in support of their claims, but also rely on evidence from other humanists and from expert witnesses, who speak more generally about the role and celebration of marriage by humanists and by those who hold various religious beliefs (the comparators relied on by the Claimants).
3. The Defendant resists the claim, contending that the system of marriage permitted under English law provides the Claimants with a legally recognised, non-religious ceremony that is sufficiently capable of accommodating their wishes and beliefs. He submits that any difference between that which is permitted and the recognition of humanist marriages sought by the Claimants does not satisfy the requirements for a claim of discrimination contrary to article 14 ECHR. In defending these proceedings, the Defendant primarily relies on the evidence given in (and exhibited to) the statement of Mr Barcoe, Deputy Director of Family Justice Policy at the Ministry of Justice, but has also submitted a statement from Ms Tighe, of the General Register Office for England and Wales (“the GRO”), the entity that oversees the civil registration of marriages.
4. The remedy sought by the Claimants in this claim is in the form of declaratory relief; specifically, they seek a declaration that the legislation providing for the legal recognition of marriage in England violates their rights under the HRA, and a declaration of incompatibility pursuant to section 4 of the HRA. The Defendant disputes the Claimants’ claim that there has been any violation of their rights, arguing that, even if there is any difference in treatment between the Claimants and their religious comparators, the measures under challenge are objectively and reasonably justified, not least given ongoing consideration of reform in this area of social policy.

### **Marriage According to English Law**

5. The history of the statutory regulation of marriage in England is summarised in *A v A* [2013] Fam 51 at paragraphs 42-52, and by the Court of Appeal in *Akhter v Khan*

[2020] 2 WLR 1183 at paragraphs 32-39. That history explains how we arrived at the current position, which is primarily set out within the Marriage Act 1949 (“the 1949 Act”). Within the 1949 Act, there is separate provision for the solemnization of marriage according to the rites of the Church of England (see Part II) and for solemnization of marriages in naval, military, and air force chapels (Part V); otherwise, legal recognition is provided by Part III of the 1949 Act, requiring authorisation by a superintendent registrar.

6. Within Part III, for opposite-sex couples, section 26(1) provides as follows:

“(1) The following marriages may be solemnized on the authority of two certificates of a superintendent registrar—

(a) a marriage of a man and a woman, in a building registered under section 41, according to such form and ceremony as the persons to be married see fit to adopt;

(b) a marriage of any couple in the office of a superintendent registrar;

(bb) a marriage of any couple on approved premises;

(c) a marriage of a man and a woman according to the usages of the Society of Friends (commonly called Quakers);

(d) a marriage between a man and a woman professing the Jewish religion according to the usages of the Jews;

(dd) a qualifying residential marriage;

(e) a marriage of a man and a woman according to the rites of the Church of England in any church or chapel in which banns of matrimony may be published.”

7. I note at this stage that all the Claimants are in opposite-sex relationships; I have, therefore, not included references to the statutory provisions relating to same-sex couples. It is also convenient to observe here that the reference to “qualifying residential marriage” at section 26(1)(dd) is to a marriage where one or each of the marrying couple is housebound or detained; it is, again, not a situation relevant to any Claimant.

8. For all marriages authorised by certification by a superintendent registrar, under Part III of the 1949 Act, specific preliminary formalities must be met, for example, as to prior notification of the marriage under section 27. Subject to these legal preliminaries, however, by sub-paragraphs (c), (d) and (e), section 26(1) provides for legal recognition of marriages according to the rites of the Church of England and to the usages of Quakers and Jews. Amongst other things, that will mean Anglican, Quaker and Jewish weddings will be legally recognised notwithstanding that no state official – in the form of a registrar employed by the relevant local authority - is present at the ceremony.

9. Section 26(1) also provides a gateway for the legal recognition of marriages that adopt the form and ceremony of other religions; this is provided by sub-paragraph 26(1)(a), by means of the registration of places of religious worship. That is made apparent by section 41, which allows for the registration of buildings for these purposes in the following terms:

“(1) Any proprietor or trustee of a . . . building, which has been certified as required by law as a place of religious worship may apply to the superintendent registrar of the registration district in which the building is situated for the building to be registered for the solemnization of marriages therein.”

10. For religious groups other than Anglicans, Quakers or Jews, section 44(2) of the 1949 Act provides that, where a certified place of worship has been registered under section 41 (and once duplicate marriage register books have been supplied by the Registrar General, see section 44(4)), marriages may be solemnized in that building in the presence of an authorised person and without the presence of a registrar (section 43 explains how those responsible for the relevant place of worship might authorise a person for these purposes). Moreover, whilst certain declarations must be included within the ceremony (section 44(3), (3A)), and the doors of the registered building must remain open (section 44(2)), by section 44(1) it is otherwise allowed that the form of ceremony adopted may be as the participants see fit, subject only to the consent of those presiding over the place of worship.
11. For marriages under section 26(1)(b) and (bb) – often referred to as ‘civil marriages’ - separate provision is made. Specifically, whether the marriage takes place in a register office (section 26(1)(b)), or on approved premises (section 26 (1)(bb)), it is a legal requirement that both a superintendent registrar and a registrar are present.
12. Thus, for the purposes of section 26(1)(b), solemnization of marriage in a register office, section 45 provides:

“(1) Where a marriage is intended to be solemnized on the authority of certificates of a superintendent registrar, the persons to be married may state in the notices of marriage that they wish to be married in the office of the superintendent registrar or one of the superintendent registrars, as the case may be, to whom notice of marriage is given, and where any such notices have been given and the certificates have been issued accordingly, the marriage may be solemnized in the said office, with open doors, in the presence of the superintendent registrar and a registrar of the registration district of that superintendent registrar and in the presence of two witnesses, and the persons to be married shall make the declarations and use the form of words set out in subsection (3) or (3A) of section 44 in the case of marriages in registered buildings in the presence of a registrar.

(2) No religious service shall be used at any marriage solemnized in the office of a superintendent registrar.”

13. Similarly, for the purposes of section 26(1)(bb), solemnization of marriage on approved premises, section 46B provides:

“(1) Any marriage on approved premises in pursuance of section 26(1)(bb) of this Act shall be solemnized in the presence of—”

(a) two witnesses, and

(b) the superintendent registrar and a registrar of the registration district in which the premises are situated.

...

(3) Each of the persons contracting such a marriage shall make the declaration and use the form of words set out in section 44(3) or (3A) of this Act in the case of marriages in registered buildings.

(4) No religious service shall be used at a marriage on approved premises in pursuance of section 26(1)(bb) of this Act.

14. The Marriages and Civil Partnerships (Approved Premises) Regulations 2005 (“the 2005 Regulations”), made pursuant to section 46A of the 1949 Act, lay down the requirements for local authority approval of premises for the solemnization of marriages in pursuance of section 26(1)(bb). It is apparent that a very wide variety of premises have been approved (examples given in Mr Barcoe’s statement in these proceedings include an aquarium, a castle, a library and a casino), but they must fulfil the requirements set out in schedule 1 of the 2005 Regulations and any reasonable requirements set by the local authority. Most relevantly, they must not (without specific approval) be religious premises (schedule 1, paragraph 4(a)) and, whilst they can include outdoor sites, the solemnization of the marriage must take place beneath a “permanently immovable structure” (see regulation 2(1)).
15. The requirements for the registration of marriages (addressed at Part IV of the 1949 Act) essentially mirror the provision made for solemnization (see section 53).
16. In *Getting Married: A Scoping Paper* (published by the Law Commission on 17 December 2015; the “Scoping Paper”), the Law Commission summarised the different legal routes to marriage under the 1949 Act, as follows (with references to the relevant statutory provisions added in square brackets):

“(1) A religious route into marriage where Anglican preliminaries are followed by an Anglican ceremony [Part II of the Act].

(2) A civil route into marriage where civil preliminaries are followed by a civil ceremony either in a register office or on approved premises. [Part III, section 26(1)(b) and (bb)]

(3) A mixed route into marriage where civil preliminaries precede one of four types of religious ceremony [also Part III,

section 26(1)(a), (c), (d) and (e)]. The ceremony can be: (a) “according to the usages of the Jews” [sub-paragraph (d)]; (b) “according to the usages of the Society of Friends” (Quakers) [sub-paragraph (c)]; or (c) “such form and ceremony” as the parties wish, in a place of religious worship registered for the solemnization of marriage [sub-paragraph (a)]; or (d) “according to the rites of the Church of England” [sub-paragraph (e)].”

17. This helpful summation gets to the heart of the Claimants’ claim in these proceedings. Setting to one side the different provisions made for Anglicans and other religious groups (not the subject of challenge before me), they object that the law offers only one route to a legally recognised marriage to humanists – the civil route at (2) above. For religious groups, however, the hybrid route (route (3)) is also available and offers a means by which those who wish to manifest their religious beliefs through the ceremony of marriage can do so in a way that is legally recognised by the state. The failure to extend this option to humanists is central to the complaint made in this case.

## **Humanism**

18. The Claimants all identify as humanists. They are supported in their claim by Humanists UK, a registered charity, founded in 1896 as the Union of Ethical Societies, incorporated in 1928 as the Ethical Union, and changing its name in 1967 to the British Humanist Association (which remains its registered name). The charitable activities of Humanists UK are stated as being to promote humanism and to support and represent people who seek to live good lives without religious or superstitious beliefs; they provide educational resources on humanism and humanist funerals, marriages and other ceremonies, and they campaign against discrimination on grounds of belief.
19. Mr Copson, Chief Executive of Humanists UK and a witness for the Claimants, states that Humanists UK has some 85,000 members and supporters and over 70 local and special interest affiliates. As for those who might hold humanist beliefs, Mr Copson says that, in a YouGov poll commissioned by Humanists UK in 2018, 6% said they were non-religious and identified themselves as ‘humanist’ (as opposed to other descriptors such as ‘atheist’ or ‘agnostic’) and 25% identified as non-religious and choose answers to multiple-choice questions that aligned with humanist beliefs.
20. As for what those beliefs are, in his first witness statement, Mr Copson describes humanism and humanists in the following terms:

“4. Humanists are people who shape their own lives in the here and now, because we believe this is the only life we have. Humanism is a non-religious worldview and humanists are therefore either atheists or agnostics. We adopt a naturalistic outlook, believing that, in the absence of an afterlife and any discernible purpose to the universe, human beings can act to give their own lives meaning by seeking happiness in this life and helping others to do the same. We make sense of the world through logic, reason, and evidence, and base our ethical decisions on reason, empathy, and a concern for human beings

and other sentient animals, always seeking to treat those around us with warmth, understanding, and respect.” (see Mr Copson’s first witness statement in these proceedings)

21. Mr Copson also exhibits the World Humanist Congress Amsterdam Declaration 1952 (“the Amsterdam Declaration”) which sets out the “*fundamentals of modern, ethical humanism*”, stating that humanists believe in the democratic principle as applied to all human relationships; in the world-wide application of the scientific method; in the dignity of all humans and the right of the individual to the greatest possible freedom of development compatible with the rights of others; in personal liberty as an end that must be combined with social responsibility; and humanism is described as a “*way of life, aiming at the maximum possible fulfilment, through the cultivation of ethical and creative living*”. The Amsterdam Declaration was updated in 2002, essentially reaffirming those principles.
22. It is not in dispute that humanism has been afforded equal status to the major world religions in many aspects of public life in the United Kingdom. In this regard, examples given by Mr Copson include education, healthcare, public broadcasting and remembrance; more specifically, humanist marriage has been given legal recognition in Scotland, Northern Ireland and Jersey. The Defendant accepts that humanism is a recognised belief system, with a number of core beliefs, albeit he observes that the principles laid down in the Amsterdam Declaration emphasise that “*humanism is un-dogmatic, imposing no creed upon its adherents*” and that, in his evidence in these proceedings, Mr Copson explains that Humanists UK “*advances free thinking*” (see paragraph 7 of Mr Copson’s first statement).

### **Marriage and Humanism**

23. Although the Defendant accepts that humanism is a recognised belief system, it is contended that the core beliefs of humanism do not include a belief in marriage. In this regard, the Defendant observes that no definition of humanism refers to marriage, and that humanism does not impose a moral or other obligation on its adherents to marry, or to use a particular ceremony if they do so. The Defendant contrasts this with the position in respect of religious beliefs, where marriage is said to be an inherent and obligatory part of the religion in question; the Defendant contends that this distinction is reflective of the fact that ceremony and communal expression of belief is also a more significant part of religion than it is of humanism.
24. There is a dispute between the parties in this respect, both as to the relevance of the distinction drawn by the Defendant and as to its accuracy. The Claimants have adduced evidence from Professor Woodhead (Distinguished Professor of Religion and Society at Lancaster University), who suggests that marriage can be seen to have a rather ambiguous position within Christian belief and practice; and they point to the fact that some religions appear to maintain a more neutral position in respect of marriage, for example Buddhism. The Claimants further contest the Defendant’s suggestion that communal practice constitutes an essential difference between religions and humanism, submitting that is not borne out, in particular, in relation to what might be described as rite of passage ceremonies (see both the evidence of Professor Woodhead and the statements of Dr Lee (Senior Research Fellow in Religious Studies at the University of Kent)). More generally, the Claimants point out that the distinction between the different forms of marriage recognised by English



law that lies at the heart of this case does not depend upon the establishment of the existence of a belief in marriage; this is a point to which I return below, when addressing the question whether the circumstances of the Claimants can be said to be analogous to those of their comparators and when considering issues relevant to justification.

25. As for the way in which humanists see marriage, the Defendant draws attention to a document entitled “*Humanist perspective: Families and relationships*” (produced in 2016, by the British Humanist Association, the name by which Humanists UK was then known), in which it is stated:

“Many humanists approve of the idea of marriage; many others believe that marriage is not necessarily an essential part of a good relationship. They therefore also approve of cohabitation (unmarried couples living together). .... A couple should not, however, feel forced to get married if it is not something they wish to do. People should be free to make mutually agreeable decisions about how they wish to live their lives without interference or pressure from others. ...”

26. Whilst acknowledging that humanist wedding ceremonies are carried out by Humanists UK, the Defendant does not accept that there is evidence that Humanists UK considered themselves to have “*usages*” any earlier than December 2014, when a document entitled “*Usages for humanist marriages*” was produced. The Defendant further notes that humanist weddings can take a “*wide variety of forms*” and are “*entirely individually crafted*” (both phrases used in Mr Copson’s first witness statement).
27. The evidence adduced by the Claimants gives a rather fuller picture, however, with Mr Copson explaining that by 1908 the West London Ethical Society was performing a kind of marriage ceremony in accordance with a book of ethical rituals, and that there is evidence of ethical societies performing marriages into the 1960s and 1970s. When the Ethical Union became the British Humanist Association, it seems that a need was identified for explicitly humanist ceremonies to continue this earlier, ethical society model, and Humanists UK have continued to perform weddings (and other ceremonies marking significant life events, including baby namings and funerals), with some 260 celebrants who carry out over 1,000 humanist marriage ceremonies in England and Wales each year (according to information from the Office of National Statistics, this makes Humanists UK the fifth largest provider of religious or belief-based wedding ceremonies, after the Church of England, the Roman Catholic Church, the Church in Wales and the Methodist Church). As for the “*Usages*” document, Mr Copson explains that this was created at the prompting of Government officials shortly after the passage of the Marriage (Same-Sex Couples) Act 2013, but was compiled from existing sources; it contained nothing new but brought together the long-standing customs and practices of humanist weddings into a document bearing a title long used in marriage law and repeated in the relevant legislation.
28. Celebrants, such as Ms Zena Birch (Chair of the Humanist Ceremonies Board), have also given evidence explaining how humanist weddings can be a celebration of humanist values. It is Ms Birch’s evidence that ceremonies that mark significant life events, including marriage, enable humanists to express their beliefs in a meaningful

way. Specifically, Ms Birch (to whose statement the document “*Usages for humanist marriages*” is attached) points to the connections between the usages for humanist wedding ceremonies and the humanist beliefs of the participants. For example, the ceremony must include a preamble from a trained and accredited Humanists UK celebrant that gives a brief but explicit description of humanist beliefs (see “*Usages for humanist marriages*” point 2. c.), and that celebrant will be required, often over several months, to get to know the couple and to devise a ceremony that is individual to them, reflecting the value humanism places on the individual person (“*Usages for humanist marriages*” point 1). The marriage can occur in any location that is important or meaningful to the couple (“*Usages for humanist marriages*” point 2. b.) and it is explicitly stated that a humanist ceremony will reflect humanist beliefs:

“2. a. ... Humanists believe that, in the absence of ultimate meaning and purpose to the universe, it is human beings that create and sustain meaning. At no time is this more evident than in rites of passage. Humanist ceremonies are distinguished by (i) being individually personalised to be meaningful to the couple involved and (ii) containing no acts of religious worship.”

29. Although, therefore, it is accepted that the humanist marriage ceremony will offer great flexibility to participants, as Ms Birch explains this is, of itself, something that is seen as being a manifestation of humanist belief in the individual’s freedom of choice.

### **The Claimants**

30. Having addressed the relationship between humanism and marriage in general terms, I now turn to the particular circumstances of the Claimants. The claim is brought by six couples, as follows: Ms Kate Harrison and Mr Christopher Sanderson (“Couple One”); Ms Victoria Hosegood and Mr Charli Janeway (“Couple Two”); Ms Capella Rew and Mr Daniel Meakin (“Couple Three”); Ms Jennifer McCalmont and Mr Finbar Graham (“Couple Four”); Ms Frances Greaney and Mr Deiniol Worsley Davies (“Couple Five”); and Ms Lucy Penny and Mr Dan Bradley (“Couple Six”).
31. Couple One. Ms Harrison and Mr Sanderson live in Lincolnshire and are in their late 60s; they have been together for some 14 years. Both are members of Humanists UK and they wish to have a humanist marriage in an outdoor location of personal significance, conducted by an accredited humanist celebrant. They do not want to have a civil marriage, nor do they want to be married by, or have to invite, any state official to their wedding. In particular, Ms Harrison - who has been a humanist since she was at university, is accredited by Humanists UK as a celebrant and pastoral carer, and is part of the Chaplaincy team at Lincoln University - considers the securing of equality with those who hold religious beliefs to be a manifestation of her humanist belief and is not prepared to compromise by entering into marriage without that equality of treatment. Ms Harrison strongly refutes the Defendant’s suggestion that any distinction can properly be drawn between the importance of marriage to humanists and those of religious faith, explaining “...*ceremonial acts are of crucial importance to me and represent a tangible expression of my humanist beliefs and values*”. That statement is borne out by Ms Harrison’s personal history: her children had humanist naming ceremonies and her son was given a humanist funeral when he died; something that she also intends for herself.

32. Couple Two: Ms Hosegood and Mr Janeway live in Kent and had planned to marry in a humanist wedding on 12 September this year but, due to the Covid-19 pandemic, have postponed their plans and are due to celebrate their humanist marriage on 4 September 2021. Both Ms Hosegood and Mr Janeway are supporters of Humanists UK and Ms Hosegood is a member. If their humanist marriage is not legally recognised, they are considering undertaking a separate civil ceremony but consider that this belittles the vows that they will take in what they are clear will be their *real*, humanist, wedding.
33. Couple Three: Ms Rew and Mr Meakin are supporters of Humanists UK who live in Somerset. They had a humanist marriage on 31<sup>st</sup> August 2019, conducted in an outdoors ceremony by a humanist celebrant. They have not yet had a civil ceremony, in the presence of a registrar, and their marriage is, therefore, not legally recognised.
34. Couple Four: Ms McCalmont and Mr Graham are also supporters of Humanists UK and had planned to marry on 30 July 2020, although their plans have recently changed. Ms McCalmont and Mr Graham live in Northern Ireland and could have had a legally recognised humanist marriage there (humanist marriages are legally recognised in Northern Ireland, following the decision of the Court of Appeal of Northern Ireland in the case of *Smythe, Laura, an Application for Judicial Review* [2018] NICA 25) but wish to marry in a location in Devon that has particular significance to them.
35. Couple Five: Ms Greaney and Mr Worsley Davies live near Chester and married on 5 October 2019 in a humanist ceremony; both are supporters of Humanists UK and object to the fact that they had to also undertake a civil wedding for their marriage to be legally recognised. Ms Greaney and Mr Worsley Davies underwent their register office ceremony in Chester, the day before their marriage, and describe it as “*impersonal*”, with the registrar repeatedly mispronouncing Mr Worsley Davies’ name.
36. Couple Six: Ms Penny and Mr Bradley, who come from Merseyside, are also now married, having had a humanist wedding ceremony on 28 December 2019. Ms Penny is a supporter of Humanists UK and explains that she has identified as an atheist and humanist from a young age; Mr Bradley similarly identifies as a humanist. Due to the lack of legal recognition of their humanist marriage, Ms Penny and Mr Bradley also underwent a civil ceremony; in their case this took place in the register office in St Helen’s Town Hall, immediately after their humanist wedding and Ms Penny describes this as being a negative experience, not least as the registrar who was presiding over the occasion described it as “*your real ceremony*”.
37. Although the Defendant has not accepted that marriage by humanist ceremony can be described as “*intimately linked*” to the humanist belief system or forms a “*sufficiently close and direct nexus*” with humanist beliefs, it is conceded that, on the evidence before the court, the particular cases of each of these Claimants do fall within the ambit of article 9 ECHR (see further, below).

### **Legislative Developments and Consideration of Reform**

38. By section 14 of the Marriage (Same Sex Couples) Act 2013 (“the 2013 Act”), it is provided that, in relation to “*Marriage according to the usages of belief organisations*”:

“(1) The Secretary of State must arrange for a review of—

(a) whether an order under subsection (4) should be made permitting marriages according to the usages of belief organisations to be solemnized on the authority of certificates of a superintendent registrar, and

(b) if so, what provision should be included in the order.

(2) The arrangements made by the Secretary of State under subsection (1) must provide for the review to include a full public consultation.

(3) The Secretary of State must arrange for a report on the outcome of the review to be produced and published before 1 January 2015.

(4) The Secretary of State may by order make provision for and in connection with permitting marriages according to the usages of belief organisations to be solemnized on the authority of certificates of a superintendent registrar.

(5) An order under subsection (4) may—

(a) amend any England and Wales legislation;

(b) make provision for the charging of fees.

(6) An order under subsection (4) must provide that no religious service may be used at a marriage which is solemnized in pursuance of the order.

(7) In this section “belief organisation” means an organisation whose principal or sole purpose is the advancement of a system of non-religious beliefs which relate to morality or ethics.”

The Defendant is the relevant Secretary of State for these purposes.

39. In accordance with the requirement that the review include a full public consultation, (section 14(2)), on 26 June 2014, the Ministry of Justice issued a consultation paper, *Marriages by Non-Religious Belief Organisations*. The primary aim of the consultation was explained as being to seek views on whether there was a substantial case for permitting legally valid marriage ceremonies for those of humanist belief and potentially other non-religious belief. In explaining the purpose of the review and providing an overview of current arrangements, the consultation paper explained as follows:

“The law on the solemnization of marriage in England and Wales is governed by the Marriage Act 1949 (the 1949 Act). The 1949 Act provides for religious marriage ceremonies (marriage according to the rites and ceremonies of the Church of England and the Church in Wales; the usages (religious customs) of the Jews and Society of Friends (Quakers); and marriage according to the rites of any other religion in their place of worship that has been registered for the purpose) and civil marriage ceremonies (marriages solemnized in the presence of a superintendent registrar and registrar in a register office or premises approved for the purpose such as a stately home or hotel). In most cases, the place in which a marriage takes place is central to its legal validity.

At present, the British Humanist Association (BHA) cannot marry couples in a legally valid humanist ceremony in England and Wales. They currently may carry out ceremonies in line with humanist beliefs but these do not have legal force and if the parties wish to be legally married they must do so in a ceremony which complies with the provisions of the 1949 Act (such as a civil ceremony by a registrar). The BHA is campaigning for the law to be changed to allow humanist celebrants to conduct legally valid marriage ceremonies in England and Wales. Since June 2005, under section 12 of the Marriage (Scotland) Act 1977, the Registrar General for Scotland has granted temporary authorisation to certain humanist celebrants to conduct legally recognised marriages. The Marriage and Civil Partnership (Scotland) Act 2014 broadens the “religious” category of marriage to “religious or belief” and so will place humanist and any other belief bodies on the same footing as religious organisations. During the passage of the Marriage (Same Sex Couples) Act 2013 a number of amendments were tabled to allow the British Humanist Association, and potentially any other non-religious belief organisation, to solemnize marriages. In listening to and acknowledging the level of support for and issues raised concerning belief marriages within the Parliamentary debates in both Houses, the Government accepted that the issue should be looked at further.”

40. The response to this consultation was positive: when asked “*Is there a substantial case for a change in the law to establish non-religious belief ceremonies as a third type of legal ceremony, alongside religious and civil ceremonies, for getting married in England and Wales?*” 95.4% said “yes”. The Government decided, however, not to proceed with reform at that stage, considering that a number of difficult questions remained in ensuring that the implementation of any reform was fair to all and did not create any new anomalies in the law - see the Government’s response of 18 December 2014. In particular, the Government identified a key difficulty in relation to where belief marriages might take place. As has been seen, the “*Usages for humanist marriages*” document produced by Humanists UK places emphasis on the couple’s

freedom to choose a location for their wedding that is of personal significance to them. Acknowledging this preference, and the fact that (unlike potential religious comparators) humanists did not tend to own or use buildings that could then be “registered”, the Government considered this gave rise to a particular difficulty that was not capable of immediate resolution through the order-making power permitted under section 14(4) of the 2013 Act. Simply extending legal recognition to marriages carried out “*according to the usages of Humanists UK*” would give rise to yet further differences in treatment between different religious and non-religious belief groups and a change to the law - such that legal recognition depended upon the registration of a celebrant rather than a building - raised yet wider issues, in particular as to the safeguards that would need to be put in place. The position was different in Scotland (where humanist marriages had been given legal recognition), as the law there allowed for the registration of individual celebrants, but the Government noted that safeguarding concerns had also been raised in that jurisdiction.

41. In setting out its conclusions, the Government explained as follows:

“71. Having carefully considered the full range of responses and issues raised through the consultation, and the complex issues associated with any option for change, we have come to the conclusion that to make such changes would not be straightforward and would have implications for marriage solemnization more broadly.

72. It is the Government’s view therefore that in order to make a decision on whether to take forward the specific proposal to permit legally valid marriage ceremonies for those with non-religious beliefs, it is necessary to carefully consider the legal and technical requirements concerning marriage ceremonies and registration and the range of relevant equality issues. To this end the Government will ask the Law Commission if it will begin as soon as possible a broader review of the law concerning marriage ceremonies.

...

75. Marriage is one of our most valued and important institutions which also affects people’s legal rights and status. It is important that we take the time and approach to get this right.”

42. In accordance with this statement of the Government’s intent, the Law Commission was duly asked to carry out an initial scoping study, exploring the issues that would need to be considered before proceeding to public consultation on options for reform. On 17 December 2015, the Law Commission issued its Scoping Paper, concluding:

“1.50 As a result of the work carried out during the scoping phase of the project, we have concluded that there is a clear need for reform. We agree with the Government’s conclusion following its consultation on marriage by non-religious belief organisations that there is no simple solution that would solve

the range of problems with the law that we have identified. In particular, ... the answer cannot be simply to exercise the order-making power contained in section 14(4) of the Marriage (Same Sex) Couples Act 2013 to enable non-religious belief organisations to solemnize marriages. That is not to say that the law should not be reformed to accommodate marriages by non-religious belief organisations; but any steps to do that need to take place alongside a broader updating of the law of marriage that seeks to address a number of long-standing problems.

1.51 We consider that the problems in the current law can appropriately be addressed by a full Law Commission reform project, which would enable us to consult in detail on options for reform before making recommendations to the Government. The next stage of the work would be a consultation phase, during which we would seek views on specific proposals for reform. We have concluded that the scope of that consultation should be broad. ...”

43. By letter of 11 September 2017, the Minister of State for Justice responded to the Law Commission, stating that he had concluded that: *“now is not the right time to develop options for reform to marriage law”*, albeit he was *“not ruling out the option of further work in this area in a future programme of work”*.
44. Subsequently, in October 2018, the Government announced that it had asked the Law Commission to propose options for a *“simpler and fairer system”* of marriage, and, in June 2019, the Government announced that the Law Commission would conduct a fundamental review of the law on how and where people can legally marry in England and Wales.
45. The Law Commission’s review – entitled *“Weddings Project”* - commenced on 1 July 2019. The terms of reference explain that five principles will underpin recommendations for reform, as follows:
  - “(1) Certainty and simplicity;
  - (2) Fairness and equality;
  - (3) Protecting the state’s interest;
  - (4) Respecting individuals’ wishes and beliefs; and
  - (5) Removing any unnecessary regulation, so as to increase the choice and lower the cost of wedding venues for couples.”
46. It is stated that the Law Commission will make recommendations regarding (relevantly for present purposes):
  - “(1) ...

(2) How the law should be reformed to enable marriage ceremonies to take place in a wider range of venues, including outdoor locations, at sea, and on military sites;

(3) How the law should be reformed in relation to who can solemnize a marriage and how it could be reformed to enable a wider range of persons to solemnize a marriage. This will include how marriage by humanist and other non-religious belief organisations could be incorporated into a new or revised scheme, and how provision could be made for the use of independent celebrants, but the Law Commission will not make recommendations as to whether the groups who can solemnize marriages should be expanded;

(4) What content is either required or prohibited as part of a wedding ceremony;

(5) How marriages should be registered, and by whom

...”

47. The Law Commission’s review is ongoing. In giving evidence for the Defendant, Mr Barcoe explained that the Law Commission was due to publish its consultation paper in April 2020, but this date was under review due to the Covid-19 pandemic; the updated information taken from the Law Commission’s website states that the public consultation will be launched in September 2020. Acknowledging that the Law Commission’s terms of reference make clear that it will not be making recommendations as to whether, as a matter of policy, new groups should be allowed to conduct legally binding weddings, Mr Barcoe observes that it was made clear in the Scoping Paper that it would be unsuitable for the Law Commission, as an independent law reform body, to consider social policy issues such as this. Nonetheless, he emphasises that the Law Commission will be considering how marriage by humanist and other non-religious belief organisations could be incorporated into a revised or new scheme.
48. This is a point to which I return when considering justification, but I note that the Claimants consider the Defendant’s position to be inadequate. They observe that the Law Commission’s terms of reference do not include the question of principle - whether the current regime is discriminatory - and object that the Government still sees the treatment of humanist marriage as within its gift, not a matter of right for those who hold humanist beliefs.

### **The Challenge in these Proceedings**

49. In these proceedings, the Claimants seek judicial review of the failure of the Defendant to provide for state recognition of humanist marriages under English law; specifically, the Claimants seek:



- (1) Declaratory relief to the effect that the impugned legislation (the 1949 Act) violates the Claimants' HRA rights, protected by article 14 ECHR.
  - (2) A declaration of incompatibility in respect of the 1949 Act pursuant to section 4 of the HRA, to the effect that the impugned legislation is not compatible with the Claimants' rights under article 14 ECHR, taken together with articles 8 and 9.
50. Although the Claimants do not seek any mandatory order – recognising that the precise language used to give the legal recognition they seek cannot be a matter for the court – their desired goal is to be legally married via a distinctively humanist form of marriage, according to the usages of Humanists UK, and without the attendance of state officials at their weddings (see paragraph 1 of the Claimants' Skeleton Argument).
51. In bringing this claim, the Claimants complain of discrimination in the enjoyment of their right to a private and family life (article 8) and to freedom of belief (article 9). They initially also complained of discrimination in respect of their article 12 right to marry, but that is no longer pursued.
52. Article 8 ECHR provides for the right to respect for private and family life in the following terms:
- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
53. Article 9 relates to freedom of thought, conscience and religion, providing:
- “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
  2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”
54. By article 14 it is provided that:
- “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any

ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

55. To determine the claim, it is common ground that I must first decide whether there has been discrimination that the Defendant has failed to justify. That, in turn, requires me to consider the following five questions (as identified by Lord Steyn at paragraph 42, *R (S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196):

“(1) Do the facts fall within the ambit of one or more of the Convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the prescribed grounds under article 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?”

I consider each of these points below, albeit I address questions (2) and (4) together.

## ***Ambit***

### *The Parties' Submissions*

56. It is common ground that article 14 ECHR does not give rise to a freestanding right to freedom from discrimination but prohibits discrimination in the enjoyment of rights under the ECHR; to have recourse to article 14, the discrimination in question must fall within the ambit of another ECHR right (see per Lord Kerr of Tonaghmore JSC at paragraph 16 and *R (oao Steinfeld) v Secretary of State for Education* [2020] AC 1 SC).
57. In the Detailed Grounds of Defence, it was contended that the facts of this case did not fall within the ambit of any of the articles of the ECHR relied on by the Claimants. On the basis of the evidence filed relating to the individual Claimants, however, the Defendant now accepts “*that the facts as they relate to the Claimants in this case fall, just, within the ambit of article 9 of the ECHR ...*” (paragraph 35, Defendant’s Skeleton Argument).
58. Notwithstanding this concession, it is common ground that I must make my own findings on the question of ambit: (i) because the extent of the connection with the underlying rights relied on is material to the other questions I need to answer, in particular as to justification; and (ii) because no such concession is made in respect of article 8 ECHR.
59. The parties do not, however, agree as to the approach I am to adopt in determining this question. For the Defendant, reliance is placed on guidance provided by the House of Lords in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, where Lord Nicholls held that:

“14. ... the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the EC)HR makes in each case what in English law is often called a “value judgment”.”

60. The Defendant also refers to the speech of Lord Bingham of Cornhill in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, holding that the term “ambit” denotes:

“13. ... a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed. This calls, as Lord Nicholls said in *M*, at para 14, for a value judgment. The court is required to consider, in respect of the Convention right relied on, what value that substantive right exists to protect.”

61. The Defendant further references the Judgment of Arden LJ (as she then was), in *R (Steinfeld) v Secretary of State for Education* [2018] QB 519 CA, where (referring back to Lord Bingham’s phrase “*personal interest close to the core of such a right*”), she held that:

“61. ...The core of a right is ascertained by identifying the values at stake. It means that the Convention is only concerned with disputes about discrimination which are “of moment” and not peripheral issues.”

62. The Claimants contend that they are not required to demonstrate that the subject matter of their complaint goes to “*the core of a right*” under either article 8 or 9: where the state provides a positive measure falling within the scope of an ECHR right (here, the recognition of certain forms of marriage under section 26 of the 1949 Act), it must do so without discrimination (see paragraphs 22-29, *Petrovic v Austria* (2001) 33 EHRR 14). As Sir Thomas Etherton MR explained in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] 2 WLR 1063, CA, at paragraph 42:

“It is also well established and common ground that, even where the state is under no obligation to provide a particular measure in order to comply with its obligations under article 8, if it does provide a particular measure which does fall within the ambit of article 8, it must provide the measure without discrimination in compliance with article 14. There are numerous Strasbourg authorities to that effect, in which the positive measure is described as a “modality” of the right conferred by the substantive provision of the Convention. ...”

63. In *Smith*, having reviewed the domestic case-law on ambit, the Master of the Rolls summarised the approach to be adopted, at paragraph 55:

“... where, as here, the claim is that there has been an infringement of article 14, in conjunction with article 8. The claim is capable of falling within article 14 even though there has been no infringement of article 8. If the state has brought into existence a positive measure which, even though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8, the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question.”

64. This passage was cited with apparent approval by Lord Kerr in *In re McLaughlin* [2018] 1 WLR 4250 SC (albeit that Lord Kerr observed that “*core values*” – a concept derived from domestic law – might give rise to too restrictive a test).

*Ambit - Discussion and Conclusions*

65. The present proceedings concern a measure that the state has chosen to introduce. As is apparent from the evidence (see the Law Commission’s Scoping Paper at paragraphs 3.28-3.29 and the discussion at paragraph 74 of Mr Copson’s first statement), signatories to the ECHR have adopted different approaches to the legal recognition of marriage: some only recognise civil marriage ceremonies, some allow for recognition of civil, religious and humanist marriage, and some just for civil and religious marriage. If the legal recognition of marriage is a modality of the exercise of rights guaranteed by article 8 or article 9 (and it is not suggested that any different approach should be taken where the underlying right is provided by article 9 rather than article 8), I agree with the Claimants: the question is not whether that measure goes to the core of the right, it will fall within the ambit of that right if it has a more than tenuous connection with the core values it seeks to protect.
66. The measure in issue in this case is the legal recognition of religious marriages under sub-section 26(1)(a), (c), (d) and (e) of the 1949 Act; it is the Claimants’ primary submission that, to the extent the state has failed to extend such recognition to humanist marriages, this gives rise to a more than tenuous connection with rights guaranteed under article 9 ECHR.
67. I have summarised the parties’ respective positions on the evidence relating to humanism and marriage, above. As the Defendant has observed, not all humanists will consider it is necessary to manifest their beliefs through marriage and not all of those who marry by way of a humanist ceremony will be humanists (although, as the Claimants have pointed out, those are observations that could also be made about many who hold religious beliefs or who undergo a religious marriage). The Claimants object that (save in exceptional circumstances) it is not for the state to determine what principles and beliefs are to be considered central to any religion or belief, or to assess the legitimacy of such beliefs or the ways in which they are expressed (*Kovalkovs v Latvia* [2012] ECHR 280, at paragraph 60; *Eweida and ors v United Kingdom* (2013) 57 EHRR 8, at paragraph 81). For the Defendant, however, it is submitted that these principles cannot serve to prevent the state from considering

what the particular beliefs are, particularly where necessary in order to assess whether there has been discrimination between different religious or belief groups. Where, moreover, the court is required to rule on a reviewable question of public law, which involves it considering the content of religious beliefs, it is not only not prohibited from doing so but is required to do so (see the discussion at paragraphs 17-31 *BXB v Watchtower Bible and Tract Society of Britain* [2020] 4 WLR 42).

68. To the extent that it is therefore necessary for me to consider the content of humanist beliefs relevant to marriage, I am satisfied that the evidence shows that, for many who hold those beliefs, the ceremonies that mark significant life events, such as marriage, provide a close and direct link to the beliefs of the participants such as to amount to a manifestation of those beliefs. The evidence of witnesses such as Ms Birch, and of the Claimants themselves, makes clear that for many humanists such ceremonies are not simply motivated or influenced by their beliefs; rather, there is an intimate link with the humanist belief system; in particular, in the way in which couples prepare for their wedding with their celebrant, in the statements made during the ceremony and in the emphasis on individual freedom of choice.
69. In my judgment, that evidence would establish the necessary connection between humanist marriage and humanist beliefs to amount to the manifestation of those beliefs for article 9 purposes (see *Eweida v UK* (2013) 57 EHRR 8 at paragraph 82). The Claimants do not, however, have to go so far; they merely have to establish that the conduct of a humanist marriage falls within the ambit of article 9; it is clear to me that it does. In this respect I entirely concur with the conclusion reached by the Court of Appeal of Northern Ireland in the case of *Smyth, Laura, an Application for Judicial Review* [2018] NICA 25 (also involving a challenge to a failure to extend legal recognition to humanist marriages), where it was held:

“[41] ... the issue in this case is not whether there has been an interference with the freedom to manifest one’s view but rather whether the conduct of a humanist wedding ceremony by a humanist officiant has a sufficiently close and direct nexus with humanist beliefs to be within the ambit of Article 9. It is not concerned with whether the BHA [British Humanist Association] has espoused a particular view about the marriage ceremony as an expression of belief but rather whether the facts of this case demonstrate that the ceremony satisfies the necessary connection.

[42] We are inclined to agree with the learned trial judge that such a ceremonial act is a direct expression of the respondent’s humanist beliefs and satisfies the test for manifestation of belief but we are entirely satisfied that the conduct of a humanist wedding ceremony by a humanist wedding officiant for a person holding humanist views is within the ambit of that Article. ...”

70. The focus of the Claimants’ case has been on article 9 ECHR; whilst reliance is also placed on article 8, the Claimants’ submissions have not addressed this alternative case in any depth. That, it seems to me, reflects the rather weaker ground the Claimants are on in this respect. The measure in issue in this case gives legal

recognition to particular marriage ceremonies but (in contrast to the position in *R (oao Steinfeld) v Secretary of State for Education* – see as addressed in the Court of Appeal, at [2018] QB 519 paragraphs 62 and 147) is otherwise unconcerned with the status of the Claimants’ relationships. The Claimants’ complaint is not of a denial of their right to a private and family life: they acknowledge that they are able to enter into marriages that have legal recognition, their complaint is that they cannot do so through the ceremony that manifests their humanist beliefs. On this alternative case, I therefore agree with the Defendant: the Claimants have not demonstrated a more than a tenuous connection with the core values protected by article 8 ECHR.

### ***Difference of treatment and analogous position***

#### *The Parties’ Submissions*

71. There is a significant dispute between the parties as to whether there is a difference in treatment arising from the measure in issue in this case. Even if there is such a difference, the Defendant contends it is because the Claimants are not comparing like with like: they are not in an analogous position to their religious comparators.
72. The Claimants make their comparison with members of *all* religious groups; although the outcome they seek is put in terms of recognition of marriage “*according to the usages of Humanists UK*” (Claimants’ Skeleton Argument at paragraph 38) - which echoes the language used in respect of Quakers and Jews (section 26(1)(c) and (d) of the 1949 Act) and is similar to the “*rites of the Church of England*” (section 26(1)(e)) – the Claimants make a principled objection to the legal recognition afforded (albeit in different ways) to *all* forms of religious marriage ceremonies as compared to humanist marriages. The Claimants further object to the consequences that flow from that general difference of treatment, summarised as follows.
73. First, in contrast to Anglicans, Quakers and Jews, or those who marry in a registered building (i.e. other religious marriages), humanists who (consistent with their beliefs) do not marry according to a religious ceremony, must have a civil marriage under the direction and control of state officials (the superintendent registrar and registrar), that being the effect of sections 45 and 46B of the 1949 Act (in argument, this was referred to as the “*unwanted guests*” point). For those getting married in a registered building, a registrar is only required to be present until duplicate marriage books have been supplied to an authorised person (normally a priest or other religious official), see section 44 of the 1949 Act. There is no such requirement in respect of Anglicans, Quakers or Jews.
74. Second, the “*unwanted guests*” come at a price: in contrast to the solemnization of religious marriages, humanists who have a civil marriage ceremony will have to pay the relevant fees for the attendance of the required state officials (on Mr Barcoe’s evidence, this is currently £46 for a registrar at a register office (there is no separate fee for the superintendent registrar), or the fee set by the local authority for the attendance of the superintendent registrar and registrar at a civil wedding on approved premises).
75. Third, marriages according to the usages of Quakers and Jews are not subject to any requirement as to venue (albeit the evidence before me is that Quakers will marry in a Friends’ Meeting House); in contrast, humanists who undergo a civil marriage

ceremony must use either a register office or approved premises (the latter specifically requiring that solemnization of the marriage take place under a physical structure (regulation 2(1) of the 2005 Regulations).

76. Fourth, there is greater freedom afforded in respect of religious marriage ceremonies, which may be conducted according to the rites of the Church of England (section 26(1)(e)), or to the usages of Quakers or Jews (section 26(1)(c) and (d)), or for other religious weddings: “*according to such form and ceremony as those persons [getting married] may see fit to adopt*”, subject to the consent of those presiding over the place of worship in question (section 44). No such provision is made for humanist marriages.
77. Fifth, the registration of a religious marriage can be carried out by the person who (in effect) conducted or facilitated the marriage (section 53); for humanists who undergo a civil wedding, the marriage must be registered by the registrar who witnesses the solemnization of that marriage.
78. The Defendant disputes that there is any, or any significant difference in respect of the ECHR rights in play between the Claimants and their chosen comparators.
79. In respect of the “unwanted guests” point - the objection that civil marriages must be under the direction and control of state officials – the Defendant initially sought to suggest that this might be overcome by the appointment (possibly on a temporary basis) of humanists (including Humanists UK celebrants) as registrars. Having reflected, during the course of the hearing, on the difficulties that would arise in this regard, this point was not pursued. The Defendant did, however, assert that a civil wedding could incorporate the “usages” of a Humanists UK ceremony, conducted by a Humanists UK celebrant, provided the superintendent registrar and registrar were present (these “unwanted guests” did not have to carry out the ceremony).
80. There was some dispute as to whether this was correct as a matter of practice. As the Claimants have observed, guidance issued by the GRO in 2016/17 stated that “*there must be a clear break between the civil ceremony and any other blessing or commemorative event*”; which suggests that a humanist, legally recognised civil wedding could not be one, continuous event. It is, however, the Defendant’s public position (as confirmed in this litigation, and supported by the statement of Ms Tighe, from the GRO) that there need be only one ceremony, which can incorporate humanist elements and can be conducted by a humanist celebrant, provided this is in the presence of a superintendent registrar and registrar. That, it seems to me, is a position that is entirely consistent with the requirements of the 1949 Act.
81. Although the Defendant accepts that participants in such a wedding will have to pay a fee for the attendance of the state officials concerned (and it is not suggested that this is *de minimis*), it is pointed out that religious marriages will generally involve far greater costs, whether by way of a fee to marry in the building concerned, or other costs associated with the particular religion, and/or in respect of a fee for the authorised person who will officiate. The Claimants counter, however, that such costs are also incurred for humanist civil marriages, where a fee will be paid for the celebrant, and there will be additional costs (which may be significant) if the wedding takes place on approved premises. The difference, the Claimants point out, is that they must also pay for the state officials, who attend the wedding as unwanted guests.

82. As for the objection that there is greater “control” over civil marriages, the Defendant contends this is really a complaint as to form rather than substance. Section 26(1) of the 1949 Act provides for state oversight by the superintendent registrar for both religious and non-religious marriages; that might take a different form in different cases (it is accepted that there is specific, separate treatment of Anglican, Quaker and Jewish marriages) but the overarching supervision of the state in all cases is provided by the requirement for preliminary formalities to be met (for example, the notification requirements under section 27) and there are specific requirements for the registration of places of worship.
83. Similarly, as for the complaint regarding venue, given the wide range of approved premises permitted, the requirement that the solemnization of the marriage take place under a permanently immovable structure need not prevent the ceremony taking place in a location of the participants’ choosing. In any event, religious marriages would generally also have to be constrained by this requirement (either because that was required by the particular religion – as was the case with Anglican and Quaker marriages – or because the marriage would be solemnized in a registered building). Only marriages according to the usages of Jews might not have to be solemnized under a physical structure, although, even then, the Defendant points out that the couple will generally be married under the Chuppah - a canopy used in Jewish wedding ceremonies to represent the couple’s new home. For completeness, I record that the Claimants do not accept this point; relying on the evidence of Rabbi Romain in these proceedings, they note that the Chuppah, which is not a permanent immovable structure (indeed, it may simply be a sheet, held over the couple), is not a legal requirement of a Jewish wedding).
84. More generally, the Defendant points to the freedoms afforded to the Claimants (and other humanists) to have a marriage ceremony, conducted by a humanist celebrant, that accords with their beliefs, which may be held in one of a wide choice of venues. To the extent that the Claimants are able to point to any difference of treatment, the Defendant contends they are not comparing like with like. Unlike humanism, marriage – as with other forms of ceremony and communal expression - is generally a core part of, and intimately linked to, the beliefs of the Claimants’ religious comparators; it forms part of the practice of those religions in a way that is not true of humanism.
85. The Claimants object to this characterisation of the difference between humanist and religious belief but, more fundamentally, say it is entirely irrelevant to the difference of treatment of which they complain, observing that English law lays down no requirement that marriage, or ceremony, is intimately linked to religious belief, or that either should form part of the practice of a religion before it can obtain the necessary authorisation under the 1949 Act. In argument, the Claimants point to the apparently neutral position of Buddhism towards marriage and they draw attention to the Aetherius Society – a religious movement that is stated to profess that “*the Master Jesus, the Lord Buddha, Sri Krishna, St Peter, Confucius, Lao Zi and Moses, to name a few, were in fact extra-terrestrial in origin*” being among the “*Cosmic Masters ... from civilizations, ancient beyond conception, which exist on higher planes of existence on other planets in our solar system*” who revealed themselves to a London taxi driver in the 1950s (see the Claimants’ Skeleton Argument at paragraph 86) – which is able to legally marry its adherents under the 1949 Act (it has a building in



Warrington registered for this purpose, although there is no evidence that any marriage has been solemnized there), albeit there is no indication that marriage has any particular significance for this religion.

86. The Defendant does not accept that the Claimants' references to Buddhism or to the Aetherius Society in argument provide evidence that can serve to undermine the more general point made: the Claimants must prove their case on discrimination and the Defendant submits that the evidence does not establish that they are in an analogous position to their religious comparators.

*Difference of Treatment and Analogous Position – Discussion and Conclusions*

87. The right under article 14, not to be discriminated against in the enjoyment of rights guaranteed under the ECHR, is violated when, without objective and reasonable justification, the state treats differently persons in analogous situations, or fails to treat differently persons whose situations are significantly different (see *Thlimmenos v Greece* [2001] 31 EHRR 15, at paragraph 44); as Elias LJ put it in *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634, at paragraph 34:

“Like cases should be treated alike, and different cases treated differently. This is perhaps the most fundamental principle of justice. If defendant A is sentenced to a harsher sentence than equally culpable defendant B that is universally perceived to be unfair. Conversely, if A is sentenced to the same sentence as more culpable defendant B, that is also unfair. The sentences themselves may be harsh or lenient, but that is not the source of this particular injustice or unfairness. It is the unjust differentiation in the first case, and the unjust failure to make a differentiation in the second, which constitutes the unfairness. This is so whatever the reason for making, or failing to make, the differentiation.”

88. Whether or not there has been a relevant difference in treatment thus requires an understanding of the circumstances of those who are being compared. In the present case, it is helpful to undertake this assessment by considering together both the question whether there has been a difference of treatment (question (2)) and that of analogous position (question (4)).
89. The right in issue is that guaranteed by article 9 ECHR - to manifest religion or belief - and it is clear that, under English law, there are differences in how people are able to manifest their religion or belief through marriage. I note, in passing, that there are differences in treatment for those holding different religious beliefs: Jews and Quakers are treated differently to Anglicans and yet further differences arise in respect of other religious groups. To some extent this might be said to reflect the differences in the beliefs of the different religions – different cases being treated differently – but, whether or not that is so, this is not an issue I am required to determine in these proceedings. The Claimants' complaint is of the difference between the legal recognition of a religious ceremony solemnizing a marriage, *without* (once initial authorisations have been given in certain cases) a registrar and superintendent registrar being present, and the lack of such recognition given to a humanist ceremony in the same circumstances. At a superficial level, this can be

characterised as the “unwanted guests” problem (with the consequential additional costs entailed); more fundamentally, however, this gives rise to a difference in how the law treats the manifestation of religious and other beliefs through the ceremony of marriage.

90. The Defendant contends that this is not a relevant difference because the ceremony of marriage has a significance for adherents to particular religious beliefs, which is not the same for those who hold humanist beliefs. In addressing the question of ambit, however, I have already found that for many humanists the ceremonies that mark significant life events – including marriage - provide a close and direct link to the beliefs of the participants such as to amount to a manifestation of those beliefs. The position of such a humanist (which would include each of the Claimants in this case) is directly analogous to the position of a person holding a religious belief who similarly wishes to manifest that belief when they enter into marriage.
91. More generally, as the Claimants have observed, the legal recognition of religious marriage ceremonies under English law is not made dependent on a link being shown between marriage and a particular religious belief. The need to compare like with like – the requirement that complainant and comparator are in analogous positions – must refer to circumstances that are material to the treatment in issue. Although the 1949 Act lays down a number of requirements before certain religious marriage ceremonies can be legally recognised (for example, in respect of the registration of a place of worship, see section 41), there is no requirement that the religion in question must be shown to place any particular significance on marriage. The examples relied on by the Claimants are merely illustrations of a point that is made good by the legislation in issue: the distinctions that the Defendant seeks to draw in these proceedings are not distinctions made within the 1949 Act.
92. That said, it is right to note that marriage ceremonies that take place in a register office or on approved premises (which should not be religious premises, see schedule 1, paragraph 4(a) of the 2005 Regulations), are subject to the requirement that no religious service shall be used (see sections 45(2) and 46B of the 1949 Act). Does that mean that those who wish to manifest their religious beliefs through marriage are thus placed in a different position to those who do not? In my judgment that question must be answered in the negative. The state has chosen to make separate provision for the legal recognition of religious marriage ceremonies; in so doing, it places trust in those authorised by the religions in question to officiate over such ceremonies. While couples who hold humanist beliefs may be able to manifest those beliefs through a ceremony conducted by a humanist celebrant and according to the usages of Humanists UK (I am proceeding on the basis that the Defendant is correct in his characterisation of what is allowed in practical terms), that celebrant – who will, consistent with the emphasis humanism places on the individual person, have got to know the couple and devised a ceremony that is individual to them (see the evidence set out at paragraph 28 above) – will not be an authorised person for the purposes of the solemnization of the marriage, or able to register the marriage, and that ceremony will not, of itself, be given legal recognition absent the presence of officials who need have no connection with humanism.
93. Comparing like with like, the humanist couple who wish to have a marriage ceremony that manifests their belief, in the same way as a religious couple might do, are thus treated differently: unlike their religious comparators, the conduct of their marriage

ceremony, according to their humanist beliefs will not be legally recognised absent the supervisory presence of state officials.

94. That is the difference of treatment at the heart of this claim, and I am satisfied that it is a difference of substance, not merely one of form. Although many of the consequences of that difference - such as the additional costs involved - do not give rise to such a fundamental point of principle, they also represent differences of treatment between the Claimants and their comparators that are more than *de minimis*.

### ***Prescribed ground***

95. Although article 14 ECHR does not specifically identify “belief” as a prescribed ground, the Defendant accepts that it must fall under the category “other status”. It is thus common ground that this question is to be answered in the affirmative.

### ***Justification***

#### *Approach*

96. At this stage, the burden of proof shifts to the Defendant to demonstrate that the difference in treatment established by the Claimants is objectively justifiable. In determining the question of justification under article 14 ECHR, the court is required to apply a fourfold test, as explained by Lady Hale, in *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, at paragraph 33:

“It is now well-established in a series of cases at this level, beginning with *Huang v. SSHD* [2007] UKHL 11, [2007] 2 AC 167, and continuing with *R (Aguilar Quila) v SSHD (AIRE Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621, and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community.”

97. In assessing whether justification has been shown, the assessment of the balance struck requires justification not of the measure in issue but of the difference in treatment between one person or group and another; see per Lord Bingham of Cornhill in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at paragraph 68 and, for a more recent iteration of the point, per Lord Kerr of Tonaghmore JSC at paragraph 42 *R (oao Steinfeld) v Secretary of State for Education* [2020] AC 1):

“To be legitimate, ... the aim must address the perpetration of the unequal treatment ...”

98. As for the standard that is to be applied, for the Defendant it is submitted that, in assessing proportionality in this case, the test is properly to be characterised as raising the question whether the measure is “*manifestly without reasonable foundation*”; that, the Defendant contends, is correct because the context is one involving issues of social policy, see *Carson v United Kingdom* (2010) 51 EHRR 13, in which the ECtHR held (at paragraph 61) that:

“The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment .... The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation” (see *Stec and Others v the United Kingdom* [GC], no. 65731/01 and 65900/01, §52, ECHR 2006-VI).”

99. As the Defendant observes, this is a test that has been adopted in domestic case-law with approval; thus in *DA v SSWP* [2019] 1 WLR 3289 SC, Lord Carnwath (with whom Lord Reed and Lord Hughes agreed, and with whom Lord Hodge also agreed in relevant part (see paragraph 125)) held (see paragraph 118) that the “manifestly without reasonable foundation” test is:

“used as a means of allowing the political branches of the constitution an appropriately generous measure of leeway when assessing the proportionality of measures concerning economic and social policy.”

See further, *R (TP) v SSWP* [2020] EWCA Civ 37 at paragraph 159 (in the Judgment of Sir Terence Etherton MR and Singh LJ) and *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502.

100. Where, as here, the protected characteristic or status in issue was not “*one of the suspect grounds*” - that is, race, sex or sexual orientation - it was also clear that the test to be applied would be less onerous, see *R (Carson) v SSWP* [2006] 1 A.C. 173 at paragraph 57; *DA v SSWP* [2019] 1 WLR 3289 at paragraph 114; *R (TP) v SSWP* [2020] EWCA Civ 37 paragraph 161 (Judgment of Sir Terence Etherton MR and Singh LJ); and *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 paragraph 76.
101. Accepting that this is not a case involving a “suspect ground”, the Claimants nevertheless disagree that the relevant standard is that of “manifestly without reasonable foundation”. They note that that was a test laid down at international level, where signatory states need to be afforded a margin of appreciation. Moreover, in the case of *JD and A v United Kingdom* (ECtHR Applications Nos 32949/17 and 34614/17) (24 October 2019) at paragraph 88, the ECtHR had made clear that, whilst there is a wide margin of appreciation in the context of general measures of economic or social policy, such measures must not violate the prohibition of discrimination as

set out in article 14 and must comply with the requirement for proportionality, observing:

"Hence, in that context the Court has limited its acceptance to respect the legislature's policy choice as not 'manifestly without reasonable foundation' to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct inequality...".

102. There is a helpful discussion of the evolution and application of the “manifestly without reasonable foundation” test in *R (oao Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, at paragraphs 121-141 of the Judgment of Hickinbottom LJ (Henderson and Davies LJJ also agreeing with this analysis), concluding as follows:

“140. The manifestly without reasonable foundation criterion, as used domestically, is derived from the Strasbourg court, which, as I have already indicated ..., generally shies away from formalism. Properly construed, in my view, the criterion cannot simply apply to some cases where there is an issue of justification in respect of a measure involving an element of social or economic policy separated from other cases by a bright line. No such line can sensibly be drawn: the degree of social and economic policy involved in any measure will be infinitely variable. In my view, the criterion simply recognises that, where there is a substantial degree of economic and/or social policy involved in a measure, the degree of deference to the assessment of the democratically-elected or -accountable body that enacts the measure must be accorded great weight because of the wide margin of judgment they have in such matters. The greater the element of economic and/or social policy involved, the greater the margin of judgment and the greater the deference that should be afforded. That is, for obvious reasons, particularly so when that body is Parliament. However, if the measure involves adverse discriminatory effects, that will reduce the margin of judgment and thus the degree of deference. That will be particularly so where the ground of discrimination concerns a core attribute such as sex or race. That, in my respectful view, explains Baroness Hale's observation in *Humphreys* ...: she could not have meant that, where some element of social or economic policy is concerned, that simply "trumps" any degree of discrimination.

141. If that analysis is right, whether seen in terms of the application of the manifestly without reasonable foundation criterion or simply in terms of the usual balancing exercise inherent in the assessment of proportionality, the result should be the same ....”

103. This passage from the Judgment of Hickinbottom LJ is not only binding on me, I respectfully agree with that analysis. Having thus clarified the approach I should adopt, I now turn to its application in this case.

*Legitimate Aim and Rational Connection*

104. In seeking to demonstrate that the difference in treatment between the Claimants and their religious comparators is justified, the Defendant relies on the following three matters as constituting legitimate aims (see the Detailed Grounds of Defence paragraphs 56-58).
105. First, it is said that the aim of the system of marriage under English law (in broad terms, providing for (i) marriage ceremonies for those of a variety of religious beliefs, and (ii) civil marriage ceremonies for those wishing to marry by a non-religious ceremony) “*is to recognise the special place of marriage and of particular marriage ceremonies to the religions in question*” (Detailed Grounds of Defence, paragraph 56).
106. Second, by not amending the law so as to create a separate category of marriage ceremony for those wishing to marry “*according to the usages of Humanists UK*”, it is said that the Defendant is pursuing the legitimate aim of avoiding the introduction of (i) further complexity into an already complex marriage system, and (ii) a new species of discrimination as between (a) humanists and members of religions who are restricted to their registered place of worship, and (b) humanists and non-humanists who marry by civil marriage ceremony. (Detailed Grounds of Defence paragraph 57)
107. Third, the Defendant contends that it is a legitimate aim not to wish to reform the law in a piecemeal fashion when there are further issues arising in this area of social policy (presently being considered by the Law Commission). In this regard, the Defendant submits that the present context is one in which the Government and then Parliament should be allowed time to “*reflect on what should be done when one is considering how to deal with an evolving societal attitude...*” (see the Supreme Court’s Judgment in *Steinfeld*, at paragraph 36).
108. In respect of the first aim thus identified – to recognise the special place of marriage, and of particular marriage ceremonies, to the religions in question – the Claimants object that this cannot be legitimate. The UK state is not obliged to give any special legal rights or privileges to religious groups in respect of marriage (see *Savez Crkava “Riječ Života” v Croatia* (2012) 54 EHRR 36 at paragraph 56). The only obligation (imposed by article 12 ECHR) is that the state must recognise the right of men and women of marriageable age to marry and found a family according to national law; choosing to provide - in piecemeal and largely arbitrary fashion - a patchwork quilt of additional rights and privileges, but only for religious groups, does not represent the pursuit of any legitimate aim.
109. On this point, I agree with the Claimants. First, because the “aim”, as stated, amounts to nothing more than a statement of the discrimination of which the Claimants complain: without any further investigation as to the content of the beliefs held regarding marriage, this objective could only privilege religious attachment over the traditions and beliefs of those who adhere to other, non-religious belief systems. Second, because there is no rational connection between the way in which English

law recognises marriage and the stated objective. Although the piecemeal development of the law in this regard need not be fatal to the establishment of a legitimate aim – the test is objective; the aim need not have been expressly articulated at an earlier stage – it must be possible to see that it is an aim pursued by the measure in question, there must be some rational connection between the two. Under English law, religious groups are afforded the right to conduct religious marriages without the need to demonstrate the “special place” of marriage, or marriage ceremonies, within that religion; there is no rational connection between the requirements for the legal recognition of religious marriages and any “special place” that the marriage ceremony may, or may not, hold for any particular religion.

110. As for the second and third aims identified, the Claimants object that the continued denial of legal recognition for humanist marriages cannot be legitimate if this results in the continuation of unlawful discrimination against humanists: it is no defence to plead that the system is already discriminatory and no answer to rely on a possible risk of some new, hypothetical discrimination as justification for the very real adverse impact already suffered by the Claimants. As for the amendment to the law that would be required, the Claimants say this is already provided by section 14(4) of the 2013 Act, by which Parliament has given the Defendant the power to amend the law to permit marriages according to the usages of belief systems.
111. In my judgment, if the second aim identified by the Defendant – not to introduce further complexity and any new forms of discrimination into English law relating to marriage – is to have any legitimacy, it can only be as a preamble to the third aim – that of undertaking any reform on a wholesale, rather than piecemeal, basis. Otherwise, as the Claimants have observed, the Defendant would be seeking to justify the continuation of an established discriminatory difference of treatment, as between humanists and their religious comparators, on the basis that the remedy sought – providing legal recognition of marriages *according to the usages of Humanists UK* - might not address other differences in treatment. Acknowledging that the removal of discrimination may be complex cannot, of itself, make a failure to address that discrimination a legitimate aim; it cannot be open to the Defendant to simply sit on his hands because taking steps to address a discriminatory difference in treatment impacting upon one group may give rise to issues relating to others.
112. All that said, these are considerations that give relevant context to the Defendant’s stated desire to consider any reform on a wholesale, rather than piecemeal, basis – the third aim identified by the Defendant. The question then effectively becomes whether the Defendant has established a legitimate aim in taking time to consider the appropriate solution as part of a wider reform of the law in this regard?
113. Giving the Judgment of the Supreme Court in *Steinfeld* (which concerned a challenge to the Government’s failure to extend civil partnerships (open to same-sex couples) to different sex couples), Lord Kerr of Tonaghmore JSC dismissed the argument that the Government’s desire for time to consider the question of reform amounted to a legitimate aim, holding (see paragraph 42):

“... The respondent does not seek to justify the difference in treatment between same sex and different sex couples. To the contrary, it accepts that that difference cannot be justified. What it seeks is tolerance of the discrimination while it sorts

out how to deal with it. That cannot be characterised as a legitimate aim.”

114. In rejecting the conclusion reached by the Court of Appeal on this point, Lord Kerr acknowledged that in *Walden v Liechtenstein* (Application No 33916/96) (16 March 2000) the ECtHR had held that a refusal to quash a discriminatory law could be justified as equivalent to a temporary stay pending rectification by primary legislation. In *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, Lord Hoffman had described this decision as “puzzling” (see paragraph 62), but had allowed:

“62. ... I can quite understand that if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider appropriate for making a change. Up to the point at which that time is exceeded, there is no violation of a Convention right. But there is no suggestion in the report of *Walden v Liechtenstein* that the discrimination between married couples was ever justified and I find it hard to see why there was no violation of Convention rights as long as the old law remained in place.”

115. Unlike *Steinfeld*, the present case does not involve a challenge to a relatively new change in the law that has introduced a difference of treatment; the discrimination of which the Claimants complain is long-standing, although the catalyst for their claim is the more recent power afforded to the Defendant under the 2013 Act (or, more specifically, his failure to exercise that power). While there has plainly been a very real change in social attitudes towards marriage (and see the discussion at paragraphs 1.22-1.27 of the Law Commission’s Scoping Paper), it is difficult to say that this is discrimination that has only gradually and recently lost its historic justification: on the evidence before me, marriages in accordance with ethical, non-religious rituals (as laid down by the predecessors to Humanists UK) date back to the early twentieth century; there is force behind the Claimants’ complaint that reform is long overdue.

116. That said, there is evidence to support the Defendant’s position that this is not an area where reform can properly be undertaken in a piecemeal fashion. If legal recognition is to be afforded to marriages conducted according to the *Usages for humanist marriages*, that may well give rise to questions as to whether wider reforms are necessary (most obviously in relation to current requirements as to the place where a wedding may be solemnized). In this regard, I am bound to note that the Law Commission concurred with the Government’s view, that reform was needed on a wholesale, rather than piecemeal, basis, concluding (see paragraph 1.50 of the Law Commission’s Scoping Paper):

“... the answer cannot be simply to exercise the order-making power contained in section 14(4) of the Marriage (Same Sex Couples) Act 2013 to enable non-religious belief organisations to solemnize marriages. That is not to say that the law should not be reformed to accommodate marriages by non-religious belief organisations; but any steps to do that need to take place



alongside a broader updating of the law of marriage that seeks to address a number of long-standing problems.”

(and see the fuller citation at paragraph 42 above)

117. I remind myself that the Claimants’ challenge is to the Defendant’s continuing failure to provide for state recognition of humanist marriages, notwithstanding the power afforded to him under section 14(4) of the 2013 Act. Any omission on the Defendant’s part has, however, to be seen both in the light of the Government’s considered response to the *Marriages by Non-Religious Belief Organisations* consultation in 2014 (see the summary at paragraphs 40-41 above) and the conclusions reached by the Law Commission. Given, in particular, the recommendations made in the Law Commission’s Scoping Paper, I am prepared to accept that the Defendant has demonstrated a legitimate aim in seeking to address this issue as part of a wider reform. Moreover, the measure adopted – essentially to maintain the existing differences in treatment arising from the 1949 Act until that reform takes place – is rationally connected to that aim.

#### *Less Intrusive Means*

118. If I am right in my conclusions on legitimate aim and rational connection, the next question is whether the measure adopted does no more than would be necessary to accomplish the aim in question?
119. On this point, the Claimants contend that an alternative, less discriminatory measure is already provided to the Defendant by means of the power afforded him under section 14(4) of the 2013 Act. The difficulty with that objection is that it does not engage with the Law Commission’s conclusion (acknowledging the difficulties identified in the Government’s response to the 2014 consultation) that this power is not, of itself, able to address the issues raised if any reform be limited to the legal recognition of marriage according to non-religious belief systems.
120. That said, I am concerned that there have been delays in the Defendant’s response. In 2017, the explanation for taking no action was stated to relate to other pressures in the family justice system (see the letter from the Minister of Justice of 11 September 2017), but there must be a question as to whether the Defendant could have mitigated against the continuing discriminatory impact of the law by moving more quickly. This is something that seems to me to be relevant when considering the final question identified in *Tigere*: whether the Defendant has demonstrated that a fair balance has been struck, allowing for the degree of deference due in matters of social policy?

#### *Fair Balance*

121. On a claim pursuant to article 14 ECHR, it is for the court to determine whether the difference in treatment is justified. That said, where – as here - the decision under challenge clearly relates to a matter of social policy, the court must afford a measure of latitude to the democratically elected, and duly accountable, primary decision maker. I have, however, found that there is a continuing discriminatory impact upon those who seek to manifest their humanist beliefs through marriage - something that amounts to more than falling “*just, within the ambit of article 9 of the ECHR*” (to use the language of the Defendant’s concession) – and that will reduce the margin of

judgment, and, therefore, the degree of deference, to be allowed. Whilst article 9 ECHR is a qualified right, and the discrimination in issue is not on one of the “suspect grounds” (race, sex or sexual orientation), the deference to be afforded to the Defendant in this area of social policy does not simply trump questions of discrimination.

122. As I have found, the discrimination suffered by the Claimants is real: the difference of treatment they experience in seeking to manifest their humanist beliefs through the ceremony of marriage is a matter of substance, not merely one of form. The only question is whether that discriminatory treatment can be justified by the Defendant’s stated concern to address this as part of a wider reform of the law of marriage in this country, albeit there remains no certainty as to when that law may be changed so as to remove the adverse impact of which the Claimants complain.
123. The Claimants are entitled to question the Defendant’s response, both in terms of the time taken and given the position adopted in these proceedings: the denial of any difference in treatment is unlikely to have given the Claimants confidence in the Defendant’s commitment to reform. That said, since October 2018, the Government has returned to this issue and has asked the Law Commission to undertake a review of the law on how and where people can marry. The Law Commission’s work has been delayed due to the Covid-19 pandemic but there is no reason to think that the public consultation exercise will not take place later this year.
124. The Claimants complain that the Law Commission has not been asked to consider the question whether or not the current law on marriage discriminates against those who adhere to a non-religious belief system but that, of course, has been the question at the heart of these proceedings and, contrary to the Defendant’s case, I have found that – subject *only* to the question of justification – the present law gives rise to article 14 discrimination in the Claimants’ enjoyment of their article 9 rights.
125. On one view, the aim pursued by the Defendant – not to engage in piecemeal change in this area – might be seen as seeking tolerance of on-going discrimination while a decision is made as to how to reform the law of marriage in more general terms; an argument rejected as demonstrating objective justification in *Steinfeld*. There is, however, a difference between the two cases. In *Steinfeld*, remedying the discrimination was straightforward - the immediate extension of civil partnerships to different sex couples, see per Lord Kerr at paragraph 50 – and the aim pursued by the Government related not to that discrimination but to the desire to take time to evaluate the future of civil partnerships in more general terms. In the present case, the Government has identified concerns as to the potential consequences of addressing one area of unequal treatment without doing so as part of a more general reform. Specifically, in relation to the treatment of humanist and other non-religious belief marriages, particular issues were identified relating to the location where the ceremony might take place and/or as to the potential registration of celebrants; these were matters seen to potentially give rise to new species of discrimination if reform was only undertaken on a piecemeal basis. The legitimacy of those concerns was acknowledged by the Law Commission’s Scoping Paper, which also recommended that any reform be undertaken on a wholesale basis. While such concerns could not justify the taking of no action – the deference due to the Defendant cannot simply trump the discrimination identified in this case - they do demonstrate why this is a

more nuanced area of social policy and one that engages a wider range of community interests than just those identified in these proceedings.

126. In this regard, it seems to me that the observations made by the Court of Appeal in *R (oao McConnell and anor) v Registrar General for England and Wales* [2020] EWCA Civ 559 are apposite, identifying two particular considerations that will arise in social policy cases such as this:

“81. ... The margin of judgement which is to be afforded to Parliament in the present context rests upon two foundations. First, there is the relative institutional competence of the courts as compared to Parliament. The court necessarily operates on the basis of relatively limited evidence, which is adduced by the parties in the context of particular litigation. Its focus is narrow and the argument is necessarily sectional. In contrast, Parliament has the means and opportunities to obtain wider information, from much wider sources. It has access to expert bodies, such as the Law Commission, which can advise it on reform of the law. It is able to act upon draft legislation, which is usually produced by the Government and often follows a public consultation exercise, in which many differing views can be advanced by members of the public. Both Government and Members of Parliament can be lobbied by anyone with an interest in the subject in hand. The political process allows legislators to acquire information to inform policy decisions from the widest possible range of opinions. ... If there is to be reform of the complicated, inter-linked legislation in this context, it must be for Parliament and not for this Court.

82. The second foundation is that Parliament enjoys a democratic legitimacy in our society which the courts do not. In particular, that legitimises its interventions in areas of difficult or controversial social policy. That is not to say that the courts should abdicate the function required by Parliament itself to protect the rights which are conferred by the HRA. The courts have their proper role to play in the careful scheme of the HRA, as Lord Bingham emphasised in *A v Secretary of State for the Home Department*, at para. 42. In appropriate cases that can include making a declaration of incompatibility under section 4 in respect of primary legislation where an incompatibility between domestic legislation and Convention rights has been established and the interpretative tool provided by section 3 does not provide a solution. Democratic legitimacy provides another basis for concluding that the courts should be slow to occupy the margin of judgement more appropriately within the preserve of Parliament.”

127. Although the Claimants emphasise that the challenge in the present case is focused on the Defendant’s failure to exercise the power already afforded him by Parliament, I do not consider that gives rise to a material distinction in this regard. The conclusion reached by the Government was that the order-making power granted by section 14(4)

of the 2013 Act would not be sufficient given the wider reform needed. That conclusion was informed after public consultation, and has been endorsed by the Law Commission after it had carried out its own scoping exercise. In contrast, my decision inevitably has to be reached on the basis of relatively limited evidence and argument, as adduced by the parties in this particular litigation; it seems to me that the observations made in *McConnell* are undoubtedly relevant to my assessment.

128. The Claimants' challenge is to the Defendant's failure to extend legal recognition to humanist marriages. That failure has, however, to be seen in context. This is an area of social policy where a margin of judgment is properly to be allowed. Although that does not mean that taking no action would be justified, or that the balance might not shift over time, addressing the differences in treatment identified by the Claimants would not be straightforward and this justifies the aim of considering the appropriate remedy as part of a more wholesale reform. Although I may deprecate the delay that has occurred since 2015, I cannot ignore the fact that there is currently an on-going review of the law of marriage in this country that will necessarily engage with the wider concerns that have been raised. Given these circumstances, at this time, the Defendant has demonstrated that a fair balance has been struck between the individual rights of the Claimants and those of the broader community.

### **Conclusion**

129. Returning to the questions identified in *R (S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196, for the reasons explained, I find: (1) that the facts of this case fall within the ambit of article 9 ECHR; (2) there is a difference of treatment in respect of that right between the Claimants and others put forward for comparison; (3) this difference is on a prescribed ground under article 14 ECHR; (4) the Claimants' comparators are in an analogous situation; but (5) the Defendant has demonstrated a legitimate aim in seeking to address differences in treatment as part of a wholesale reform of the law of marriage and, given the on-going review, has - at this time - established that a fair balance has been struck between the individual rights of the Claimants and wider community interests.
130. The claim is therefore dismissed. The parties are to endeavour to agree any outstanding points and submit a Minute of Order accordingly. If any matter cannot be resolved, concise written submissions are to be lodged within 7 days of the handing down of this Judgment and the court will then decide the matter on the papers.