Written by Administrator
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Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011

(Editor: This prayer by Baroness O'Cathain clearly presents the case to show that the Opt-in policy for Churches to offer Civil Partnerships will be trumped by the Equality Act as has happened time and time again on religious freedoms. Notice the cunning and deliberate lack of proper debate on the issue in the House of Commons.)

Motion to Annul 10.36 am 15 December 2011. Moved by Baroness O’Cathain

That a Humble Address be presented to Her Majesty praying that the regulations, laid before the House on 8 November, be annulled on the grounds that they do not fulfil the Government’s pledge to protect properly faith groups from being compelled to register civil partnerships where it is against their beliefs.

Relevant document: 43rd Report from the Merits Committee.

Baroness O'Cathain: My Lords, although I am a reluctant rebel today I am very grateful to the Government, and particularly to the Leader of the House, for scheduling the debate and for sticking to the policy of treating this as a matter of conscience. Conservative Back-Bench Peers have a free vote. In fact, all three main parties allowed a free vote when this issue was first voted on in March 2010. At that time the noble Baroness, Lady Royall, said that it raised,

“fundamental issues for religious organisations, and it is therefore right that they are considered as matters of individual conscience”.—[Official Report, 2/3/10; col. 1439.]

I am surprised that the Opposition are now whipping, but that is their decision.

The purpose of my Prayer is to address the widely held concerns that the regulations threaten religious freedom. The Merits Committee has drawn them to the special attention of the House, because of the concerns expressed to it. The House must decide whether we reject them and invite the Government to think again. The regulations are intended to create an entirely voluntary system for places of worship that wish to register civil partnerships. That is the

intention and I do not doubt the Government's sincerity, but senior lawyers advise that the interplay between the regulations and equality law could result in legal pressure on churches that do not want to register civil partnerships. That is what I want to address.

In no way am I trying to block these regulations as a means of opposing civil partnerships. I have seen some deeply unpleasant briefing materials and, indeed, have received many obnoxious letters which impugn my motives. I have absolutely no hidden agenda. My sole reason for this Prayer is to attempt to stop churches having their religious freedoms taken away by local authorities or by litigious activists. The House must not pass regulations that fail to fulfil the intention of the Government. The wishes of the noble Lord, Lord Alli, who I am glad to see in his place, should be honoured. He made it clear that he did not wish to see places of worship forced to register civil partnerships against their will.

In the run-up to this debate, there has been so much confusion that I particularly want to make it clear that we must not confuse the registration of civil partnerships in churches with the question of the redefinition of marriage. Marriage remains in law the union of one man and one woman for life, to the exclusion of all others; nothing said or done here today will have any effect on that. The issue is the impact of these regulations as drafted, which seek to allow civil partnerships to be registered—and I underline registered—in places of worship. It is not a question of voting against civil partnerships; it is a question of asking noble Lords to vote for the protection of religious freedoms.

The regulations were laid as a negative instrument on 8 November. Parliament has 40 days from that date to annul them, and that period runs out at the end of this week. Strangely, the coming-into-force date printed on the regulations was 5 December, so technically they are already in force. That date was the Government’s choosing. We still have time to vote them down. If my prayer is agreed today, the regulations will cease to have effect. However, applications by same-sex couples will not be jeopardised, as the local systems have not yet been established. This means that the Government have time to think again about how to implement the proposals, while ensuring that their intention—and I emphasise their intention—of protecting religious freedom is achieved.

The procedure for rejecting delegated legislation which I am invoking today was agreed by the House in July. If the House no longer wanted to have that power, it could have given it away or curbed it. I acknowledge that many noble Lords, especially on these Benches, are reluctant to vote down secondary legislation. According to the Library, we have done so three times in just over a decade—twice in 2000, on the GLA election expenses regulations, and again in 2007, on the casino regulations. I am sure that this is one such situation in which we should act. The

regulations are fatally flawed: they put religious freedom in jeopardy. It is always dangerous to take away freedom, but to do so using secondary legislation, which is subject to so little scrutiny, seems especially egregious.

The House of Commons had no opportunity to scrutinise these regulations. As a negative instrument, they did not qualify for the Delegated Legislation Committee. Edward Leigh, the Member for Gainsborough, tabled a Prayer to annul and tried to persuade the Government to set up a Committee, but this was denied. Thus, the sole responsibility for scrutinising these regulations lies with us. We have no opportunity to amend the regulations; if we had, I would have tabled an amendment. As a revising Chamber, we might have preferred that, but it is not an option. If we think that the Government's drafting is wrong, we must reject them. This is the only way of asking the Government to think again.

The regulations themselves do not force churches to register civil partnerships on their premises, but offer an opt-in system whereby faith groups wishing to register civil partnerships have the freedom to do so. The regulations contain this statement:

"Nothing in these Regulations places an obligation on a proprietor or trustee of religious premises to make an application for approval of those premises as a place at which two people may register as civil partners".

But I am afraid that this statement is meaningless, because it only protects against obligations in these regulations. A similar statement was inserted in the Civil Partnership Act by the amendment of the noble Lord, Lord Alli. However, it is not the regulations under the Civil Partnership Act that have the potential to place an obligation. The churches need protection not from the regulation under that Act, but from that under the Equality Act. Having protection under these regulations is like being given protective goggles on a construction site, when what you need is a hard hat—it is protection against the wrong thing.

Professor Mark Hill QC, a leading ecclesiastical lawyer, has produced a written legal opinion which makes the very serious claim that the regulations will result in,

"a curtailment of religious freedom", and will compel churches, "to secure approval for the registration of civil partnerships, despite their doctrinal objection".

This is serious. Professor Hill cites Section 149 of the Equality Act, “Public sector equality duty”, which requires all public bodies to have due regard to the need to eliminate discrimination. This duty applies to local authorities and to the registration officials who are housed and employed by them. These are the people with whom the churches have to deal when they apply for the licence to register marriages.

According to Professor Hill, local authorities could say that the public sector equality duty requires them to oblige churches to register for civil partnerships as a precondition of being able to register for marriage. It is blindingly obvious that a church which performs marriages, but refuses to perform civil partnerships, is discriminating. The church regards this as justified discrimination, simply by being faithful to its religious principles. However, the public sector duty is about eliminating all forms of discrimination. So you can see the problem. Some local authorities would claim that facilitating churches to register marriages, but not civil partnerships, will make them complicit in discrimination.

I know that the Government argue that marriage and civil partnerships are two separate systems, and that the local authority cannot make approval of one dependent on the other. Indeed, the final decision on approving premises for marriages rests with the Registrar General, while the decision over civil partnerships takes place locally. In both cases, however, the application has to be submitted through the registry office, housed at the local authority.

In a separate legal opinion, responding to the Government, Aidan O’Neill QC, a leading human rights lawyer at Matrix Chambers, states that it will be a relevant consideration for, and duty of, the relevant public authority to have regard to how any such approval might impact upon its attempt to eliminate discrimination. He states that although the Marriage Act 1949, which governs registration of churches, allows little discretion, the public authority would still be bound by the public sector equality duty. In order to avoid a conflict between the registration duties under the 1949 Act and the equality duty under the 2010 Act, Mr O’Neill says that a public authority could “read down”—which, as a non-lawyer, I take to mean “re-interpret”—the Marriage Act 1949 to make it compatible with the public authority’s positive obligations under the Equality Act. He suggests that a judicial review might even require it so to do.

It is certainly not difficult to imagine a local authority solicitor advising his chief executive that in all functions, including processing applications for churches for power to register civil partnerships and marriages, the local authority must eliminate discrimination. This would include processing applications only from those churches that also allow the registration of civil

partnerships. The application may never be referred to the Registrar General if the local authority applies a filter on the application at the initial stage.

The Church House briefing, which I think everyone has had, argues that because marriages and civil partnerships are different things, the law cannot be used to require a church to provide one just because it provides the other. However, Aidan O’Neill asserts that the equivalence between marriage and civil partnerships is a basic tenet of the Equality Act. The courts are unlikely to view them as two entirely separate services. They have already ruled, in the Ladele case, that being willing to register marriages, but unwilling to register civil partnerships, is discrimination. Mr O’Neill’s opinion, which I have made available to colleagues, shows how churches and denominations could be squeezed by combining the obligations of the Equality Act, the Human Rights Act, the European Convention on Human Rights, and EU law.

We cannot ignore the views of these two QCs. The willingness of Professor Hill and Aidan O’Neill to commit these opinions to writing proves that there are lawyers who are willing to argue these points in court. If there is any risk that these arguments might succeed and that churches could be deprived of the right to register marriage by politically correct local authorities, we must prevent it. We have to get it right first time. Last year the noble Baroness, Lady Royall, actually spoke against the amendment of the noble Lord, Lord Alli, because of the holes in the drafting. She said:

“Our preference would be to get this right from the outset”.—[Official Report, 2/3/2010; col. 1440.]

This is our last chance to get it right. We cannot put the churches in the legal firing line and sort it out later.

I received a copy of the Minister’s letter yesterday, which says that,

“if a successful legal challenge were ever brought, I would like to provide reassurance that the Government would immediately review the relevant legislation”.

I suggest that this is not good enough. We must get it tied down, guaranteed and cast-iron now.

The churches might win out in the end, of course, but why should they face the cost, the fear and the chilling effect of sorting out a legal mess created by Parliament? We know that some people would like to force churches to register civil partnerships. The chief executive of Stonewall said that right now faiths should not be forced to hold civil partnerships, although in 10 or 20 years' time that might change. Mike Weatherley, the Conservative MP for Hove, has more immediate plans: in a letter to the Prime Minister this year he called for churches that refuse to register civil partnerships to be banned from registering marriages. In a nutshell, this is what would happen if these regulations are not annulled.

We have watched the progress from permission to coercion before now. In 2003 we legalised joint adoption by same-sex couples; that was permissive. However, when the sexual orientation regulations were introduced, even though they were not specifically about adoption, it suddenly became compulsory for Roman Catholic adoption agencies to take part in same-sex adoptions. How permissive is that? As a result of the overlap between the permissive provisions and the obligations of equality law, all but one of the English Catholic agencies have either closed down or been secularised. Holes in the regulations must be plugged or someone somewhere will exploit them.

Officials at Church House are not concerned, of course—the Church of England does not have to apply to registrars to register marriages—but surely they ought to be concerned about other religious denominations and independent churches that rely on the good will of local authorities. I have had so many letters on this subject from churches that I did not even know existed. The secretariat of the Roman Catholic Church prefers the Government's interpretation of the regulations but admits that there is a risk. It says:

"If, of course, there were an opportunity for the Regulations to be revisited at this stage, then they should include … a statement explicitly to put the matter beyond doubt".

I reiterate that I am not talking about redefining marriage or about trying to unpick the Civil Partnership Act. I am talking about the particular mechanism that the Government have chosen to legalise civil partnership registration on religious premises. I accept that it is the Government's intention to introduce a voluntary regime that protects churches. I urge the Minister to agree to my Prayer, withdraw the regulations and go away to think again about whether the Government really have done enough to achieve this voluntary regime.

Aidan O'Neill QC argues that the only way to protect the churches is an amendment to the Equality Act. The Scottish Government, who are considering their own plans to allow religious civil partnership registration, have the same view. If leading QCs are not convinced, the Government have not provided reassurance despite their wish to do so. My Government need to go away and think again. I beg to move.