RELIGIOUS DECISION-MAKING AND THE CAPACITY OF CHILDREN IN THE UNITED KINGDOM

Javier García Oliva

Helen Hall[12]

Resumen.

En Derecho inglés y galés, los derechos de los padres para tomar decisiones en nombre de sus hijos concluyen cuando un niño o una niña obtiene una comprensión suficiente para tomar una decisión relevante de manera autónoma. Este artículo examina cómo este principio ha sido aplicado por los tribunales (la Corte Europea de Derechos Humanos y los órganos judiciales británicos) en relación con cuestiones religiosas e indaga qué factores un niño o una niña necesita ser capaz de comprender y considerar, a fin de conseguir una capacidad decisoria autónoma en este contexto. ¿Emerge de la jurisprudencia nacional y europea un análisis coherente, y es la metodología judicial actual un medio efectivo de proteger los derechos de los niños?

Abstract.

In English and Welsh law, parental rights to make decisions on behalf of children terminate when a child attains sufficient understanding to make the relevant decision autonomously. This article examines how this principle has been applied by the courts (the European Court of Human Rights and UK courts) in relation to religious matters and asks what factors a child needs to be able to comprehend and consider, in order to achieve autonomous decision making capacity in this context. Does a consistent approach emerge from domestic and European case law, and is the current judicial methodology an effective means of protecting the rights of children?

Palabras Claves

Niños – Religión – Capacidad – Competencia Gillick

Keywords

Children – Religion – Capacity – Gillick Competence

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[1] Dr Javier García Oliva is a Senior Lecturer in Law at the University of Manchester and a Research Associate at the Centre for Law and Religion, at Cardiff University. Rev'd Dr Helen Hall is a priest in the Church in Wales and a solicitor (non-practising).

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Index

1. Introduction

Commentators have cited religious upbringing as one of the areas of growth in faith based litigation in the United Kingdom over recent decades.[3] There is also now a substantial body of Strasbourg case law on this topic.[4] Yet despite this, authors like Lauglaude[5] correctly observe that there is often little or no focus on the religious freedoms of the children at the centre of these disputes. The welfare needs and best interests of the children are considered at length, but the rights based discussion tends to revolve around the adult parties.

A dismissive treatment of children's religious freedom does not sit easily with Article 12 (1) of the United Nations Convention of the Rights of the Child (UNCRC),[6] which requires State Parties to '*assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child*'. Neither is it in harmony with Article 9 of the European Convention on Human Rights (ECHR), which is not subject to any age qualification. Courts in the United Kingdom have accepted that persons under

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3 RIVERS, J., "The Secularisation of the British Constitution", Ecclesiastical Law Journal, vol XIV, 2012, pp 371-399, 385.

4 Por ejemplo: Hoffman v Austria Court Application 12875/87 (1993); M M v Bulgaria Commission Application 27496/95; Palau-Martinez v France Court Application 64927/01; FL v France 31956/02 (2006); M and another v Romania (App No. 29032/04) [2011] ECHR 29032/04; Vojnity v Hungary (App No 29617/07) [2013] ECHR 29617/07

5 LANGLAUDE, S., The Right of the Child to Religious Freedom in International Law, Martinus Nijohff, Leiden y Boston, 2007, p220.

6 United Nations Convention on the Rights of the Child 1989, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20/11/1989.

eighteen may bring claims based on Article 9, for example in the context of disputes about school uniform and religious dress or symbols.[7] Therefore, the acknowledgment that children have independent Article 9 rights, at least in certain circumstances, is difficult to reconcile with a failure to adequately address these rights in litigation on religious upbringing.

However, it is also undeniable that recognising and protecting the religious freedoms of children is an even more complex challenge for courts and other State bodies than safeguarding the liberty of adult citizens in the realm of religion, conscience and belief. Commentators have recognised that parents and children both have a stake in decision making about religious education and upbringing.[8] Adults have the right to hold and act upon beliefs which external observers might perceive as irrational or harmful, and which might even result in their early death; the classic example being those refusing conventional medical treatment on spiritual grounds.[9] In fact, pursuant to the ECHR, the freedom to manifest an individual's religion or belief may only be limited to the extent which is:

'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'.[10]

States have neither a duty nor the right to protect an adult from the consequences of his or her religious or ideological beliefs.[11] In contrast, children are in a very different position: their cognitive capacity, understanding and sense of identity are all still in the process of formation. They will also be physically, emotionally and economically dependent upon their adult carers, to varying degrees and according to their developmental stage, from the complete dependency of a newborn infant to the emerging independence of the

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7 For example, R (SB) v Governors of Denbigh High School [2007] 1 AC 100

8 GARCIA OLIVA, J, "The Denominational Teaching of Religion in Spanish State Schools", M. Hunter-Henin (ed), Law, Religious Freedoms and Education in Europe, Asghate, Farnham, 2011, p 191.

9 Re T (Adult Refusal of Medical Treatment) [1993] Fam 95

10 ECHR Art 9(2)

11 R (on the application of Jenkins) v H M Coroner for Portsmouth and South East Hampshire [2009] EWHC 3229 (Admin)

late adolescent. These factors mean that children are not able to make the same range of genuinely autonomous choices as adults, and render them vulnerable and in need of protection. Consequently, in the United Kingdom, public authorities have both international[12] and domestic[13] obligations to protect minors and safeguard their welfare.

As Petchey[14] argues, the best interests of a child may sometimes conflict with the child's expressed desires, and the right of the child to have his or her welfare protected may necessitate overriding his or her wishes:

'*in an appropriate case, what may appear to be the rights of the child may be trumped by his parents or the state asserting that they or it knows best. The rights of the child are ensured by not allowing him to make his own decisions*'.[15]

However, striking the balance between freedom and protection is by no means straightforward. The field of children's rights raises a plethora of complex legal, ethical and social questions, inevitably beyond the scope of this article. Our focus is on a very particular issue. As will be discussed below, when a child attains sufficient understanding of a given matter, he or she is deemed 'Gillick competent' in UK law and has the right to exercise autonomous, adult decision-making powers in respect of the issue in question. We examine how the courts have applied this principle in relation to religious decision making, and ask whether the current approach is consistent and effective in relation to children's rights.

Although the discussion explores the dilemmas from a UK perspective, it would be impossible to conduct a meaningful analysis without taking into account the wider European context. Furthermore, the interplay between the national and international backdrop enables the insights to flow in both directions. Many of the conclusions

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[12] United Nations Convention on the Rights of the Child 1989, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20/11/1989.

[13] Children Act 1989

[14] PETCHEY P."Legal Issues for Faith Schools in England and Wales",Ecclesiastical Law Journal , vol X, 2008, pp 174-190, 186

[15] Ibid

reached have implications not just for the United Kingdom, but for all Convention States.

2. Gillick Competence and Parental Responsibility

The law involving children and decision-making is governed primarily by the Children Act 1989 and the *Gillick*[16] line of cases. The statutory position is that the rights, duties, powers, responsibility and authority to make decisions in relation to a child are conferred by parental responsibility[17] and the Act sets out in whom parental responsibility vests.[18] In the ordinary course of events, everyday decisions about a child's life, including religious education and observance, are made by the people who have parental responsibility.

Most matters can be dealt with by any party with parental responsibility acting unilaterally. However, there are a small number of special and serious issues (including permanent sterilisation, name change and ritual male circumcision) which always require either unanimous agreement amongst the holders of parental responsibility or a court order.[19]

In the event of a serious disagreement, the parties with parental responsibility may apply to a court for a decision and in any judicial determination the welfare of the child must be the paramount consideration, in accordance with the legislation.[20] Whilst United Kingdom courts expressly acknowledge that a parent's Article 9(2) right to manifest belief extends to raising children in keeping with his or her personal faith or world-view, the welfare of the child and conflicting Article 9 rights of other parties with parental responsibility are recognised as legitimate reasons to limit this manifestation.[21]

This is in conformity with Strasbourg case law, and in consequence, there is no human rights difficulty with upholding the welfare of the

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16 Gillick v West Norfolk and Wisbeach Area Health Authority [1985] 3 All ER 402

17 The Children Act 1989 s.3

18 Ibid s2

19 Re J (Specific Issue Order: Religion: Circumcision) [2004]

20 Ibid s1(1).

21 Re J (Specific Issue Orders: Child's Religious Upbringing And Circumcision) 2000 1 FLR 571 CA per Butler-Sloss LJ 577

child as the paramount consideration.[22] We would endorse this as wholly appropriate: the conflicting Convention rights of citizens must inevitably be balanced whenever there is a clash[23] and it is necessary for States to protect those too young to safeguard their own interests.

But a further layer of complexity is added to the statutory position by the decision of the House of Lords in *Gillick,*[24]and the subsequent authorities which developed from it. In *Gillick,* the House of Lords ruled that the parental right to make decisions on behalf of a child terminates, if and when the child achieves sufficient intelligence and understanding to make the decision for him or herself.[25] Whether the child has achieved such capacity will be a question of fact.[26] Although *Gillick* concerned the capacity to consent to medical treatment, the principles laid down apply to decision-making in other spheres. As Adhar and Leigh[27] observe, the doctrine of Gillick competence operates in relation to questions of faith, just as it does in other fields.

'Gillick competence' is, by its very nature, decision specific. A child will have the capacity to understand simple decisions involving no serious risk or long term consequences before he or she has the capacity to make more dramatic life choices. For instance, an eight year old with no skin allergies is likely to be Gillick competent to decide whether or not to have washable face paint applied for a play or a party. However, the average eight year old would probably not be Gillick competent to decide whether to change schools or undergo a major surgical procedure.

The decision-making spectrum adds both flexibility and complexity, and means that parental responsibility and Gillick competence will almost always coexist for school-age children. There will be some matters which the child is competent to decide, and over which the

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22 Por ejemplo FL v France 31956/02 (2006)

23 Eweida and others v United Kingdom [2013] ECHR 48420/10 para 106

24 Gillick v West Norfolk and Wisbeach Area Health Authority [1985] 3 All ER 402

25 Ibid per Lord Scarman 423

26 Ibid

27 ADHAR, R., & LEIGH, I., Religious Freedom In The Liberal State, Oxford University Press, Oxford, 2005, p 204 (N.B. there is now a 2013 edition of the publication, but the page numbering here refers to the 2005 edition).

parents no longer have authority, whilst other more difficult questions will still be governed by parental responsibility, because the child has not yet attained capacity in respect of them. Once a child has achieved Gillick competence to decide an issue, parental responsibility terminates *with regard to that particular issue.* In *Axon,*[28] the applicant unsuccessfully sought a declaration that medical professionals were not obliged to keep confidential advice and treatment given to persons under sixteen years of age on contraception, sexually transmitted infections and abortion. Silber J rejected the contention that the parent had any Article 8[29] right to involvement in such decisions in respect of Gillick competent minors, and such rights would not continue, once the child had achieved capacity to decide about these matters independently.[30]

This case also illustrates that Convention rights vested in parents will not prolong parental responsibility or suppress Convention rights vested in competent children. Harris argues that the *Axon* principle should transfer to other contexts, specifically sex education.[31] In his view, a parent's statutory right to withdraw a child from sex education would in theory give way to the independent Article 8 right of a Gillick competent minor to decide upon the matter for him or herself (although he acknowledges the complexity of the practical outworking of this in the real world).

We submit that Harris' analysis is the correct one in light of the reasoning in *Axon* and *Gillick,* and these judgments demonstrate that parental responsibility exists for the benefit of children, rather than for benefit of parents. In both cases, the courts resisted allowing parental responsibility to be used as a means for parents to retain control over the choices of minors with the capacity to appropriately weigh their own decisions. Once a child has achieved Gillick competence in

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[28] R (on The Application Of Sue Axon) v The Secretary Of State For Health (The Family Planning Association: intervening) [2006] EWCA 37 (Admin)

[29] Article 8 ECHR: Right to respect for private and family life

[30] R (on The Application Of Sue Axon) v The Secretary Of State For Health (The Family Planning Association: intervening) [2006] EWCA 37 (Admin) per Silber J- paras 125-135

[31] HARRIS, N., "Playing Catch-Up in the Schoolyard? Children and Young People's 'Voice' and Education Rights in the UK", International Journal of Law, Policy and Family, vol XXIII (III), 2009, p 331.

respect of an issue, there is no need for parental authority to continue, particularly in circumstances where the continuation of this authority would effectively undermine the child's independent rights.

We also suggest that Harris' reasoning would apply equally to other articles, including Article 9. On this basis, the regime of parental responsibility and Gillick competence in UK law theoretically provides a positive framework for ensuring that children with capacity to make decisions about their religious practise and education are free to do so, whilst protecting those still lacking such capacity. However, there is a sting in the tail to this conclusion. The concept of Gillick competence only assists children at the centre of religious upbringing cases if: a) the question of competence is actually addressed; and b) if it is addressed in a consistent and constructive manner. Consequently, it is necessary to examine the authorities to determine whether or not this is in fact the case.

3. Two lines of authority: disputes about religious upbringing and the assertion of religious freedoms

It is fair to highlight that there is a striking bifurcation in the case law relating to children and religion. On the one hand, there are decisions which concern disputes about religious upbringing (ordinarily arising in the context of a conflict between parents with opposing faith positions), and on the other, there are decisions relating to the assertion of religious freedoms by individual children against a school or other State institution. A marked difference in judicial approach between these two categories of case, both within domestic and Strasbourg jurisprudence, is clear, but both lines of authority are instructive in the present context.

3.1 Disputes about religious upbringing

The Strasbourg case law on religious upbringing has almost exclusively concerned custody disputes, where one of the parents has belonged to a minority religion. In *M.M. v Bulgaria,*[32] the applicant mother argued that the domestic courts effectively required her to end her involvement with the Warriors of Christ group, if she wanted to regain her child. The Commission found that she had an admissible

[32] M.M. v Bulgaria, Commission Application 27496/95 (decision 1996)

complaint based upon infringement of her Article 9 rights, but a full hearing did not take place because an amicable settlement was achieved.

In *Hoffman v Austria,*[33] the mother was a Jehovah's Witness and intended to bring her children up in accordance with the principles of her faith. The court was not persuaded that the domestic courts had established that this justified treating her differently from the father, who was not a Jehovah's Witness, and concluded that there was a breach of Article 8 (right to respect for private and family life), in conjunction with Article 14 (freedom from discrimination in relation to Convention rights). The court reached the same conclusion on very similar facts in *Palau-Martinez v France:*[34] the mother's commitment as a Jehovah's Witness was not in itself sufficient evidence that the children would suffer from harm in her care or under her influence.

In contrast, in *FL v France*[35]and *Deschomets v France,*[36] the court was satisfied that the restrictions which domestic courts had placed on the applicant mothers (a member of the Raelian movement in *FL* and a Brethren lady in *Deschomets*) were acceptable. Both decisions concerned mothers who were permitted to have custody of their children, but had their freedom to expose them to their respective faiths and practises limited. In *FL* the limitation of the applicant's Article 8 and 9 rights was justified on the basis of the children's welfare needs, and the same conclusion was reached in relation to Article 8 in *Deschomets* (Article 9 was not addressed by the court).

Hill, Sandberg and Doe[37] observe that a judicial requirement for parental faith practises to be moderated provides a viable alternative to depriving a religious father or mother of residence, or even access to, his or her children. This is a valuable insight, as it is important to bear in mind that the aim of the courts is not to identify winners and losers, but to discern a course which respects the rights of all parties, whilst keeping the welfare of the child paramount.

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33 Hoffman v Austria, Court Application 12875/87 (1993)

34 Palau-Martinez v France, Court Application 64927/01 (2003)

35 FL v France Court Application 61162/00 (2005)

36 Deschomets v France 31956/02 (2006)

37 HILL, M. SANDBERG, R., & DOE, N., Religion and Law in the United Kingdom, Walters Kluwer Law & Business, The Netherlands, 2001, paras 455-462.

Two further cases, *M and another v Romania*[38] and *Vojnity v Hungary,*[39] affirmed the same fundamental point as the French cases: mere membership of a denomination is unlikely to be sufficient basis for concluding than an individual is less able to parent a child safely than someone from a different faith background.

All things considered, the overall pattern which seems to emerge is that furthering the best interests of minor children will be a legitimate and sufficient reason to restrict parental freedoms pursuant to Articles 8 and 9, but any restriction must be justified and proportionate on the facts.[40] However, the possibility that independent Article 8 and 9 rights vested in the children themselves, might also have been at stake, seems unfortunately to have been largely overlooked. Langlaude[41] rightly adopted a critical stance towards the adult-centred approach to rights in these cases, and we would endorse her criticism.

It might justly be argued that any adequate assessment of welfare and best interests will necessarily include a consideration of the child's religious and cultural needs and environment,[42] but we would suggest that it is not sufficient to simply state that children's religious rights are subsumed within a global welfare assessment in cases which revolve around religious issues. The court should consider whether or not the situation engages any Article 9 rights vested in the child, in the same way that it considers whether any Article 9 rights of the adult parties are involved. In both cases, promoting the welfare of the child may justify limiting those rights. However, there would be greater transparency if the court were to acknowledge that such rights were engaged, and explain the justification for any restriction imposed. In the recent case of *Eweida,*[43] the ECtHR signalled its clear preference in an employment context, for courts finding Article 9 rights to be engaged and examining whether any interference was justified, over

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38 M and another v Romania (App. No. 29032/04)-[2011] ECHR 29032/04

39 Vojnity v Hungary (App. No. 29617/07)-[2013] ECHR 29617/07

40 EDGE, P., Legal Responses to Religious Difference, Kluwer Law International, Netherlands, 2002, p 287

41 LANGLAUDE, S., The Right of the Child to Religious Freedom in International Law, Martinus Nijohff, Leiden y Boston, 2007, p 220.

42 Re G (children) [Education: Religious Upbringing] [2012] EWCA Civ 1233 per Munby LJ para 27

43 Eweida and others v United Kingdom [2013] ECHR 48420 paras 83-84

the alternative route of simply holding that there was no engagement, and therefore, no interference. The policy argument[44] behind this was ensuring that Article 9 rights were not set aside without due judicial attention, and would apply equally strongly in family law cases.

Why have the Article 9 rights of children been so frequently overlooked in these cases? Are the children involved presumed to lack decision-making capacity in relation to religious matters, and therefore, not regarded as possessing independent Article 9 rights? If so, on what basis is this lack of capacity being presumed? Is the age of the child the determinative factor? That would be problematic, as different children develop at different rates and not all decisions require the same level of cognitive capacity and emotional sophistication.

Or was parental conflict a key point? Arguably, in many cases, it would be emotionally abusive and damaging to place a child in the position of final arbitrator between two warring parents. Given the probable serious consequences for a child's familial relationships, sense of identity and emotional well-being, achieving Gillick competence in these circumstances would require a high level of maturity and sophistication. Is there an underlying presumption that the majority of minors will not cross the Gillick competence threshold in this scenario? If so, it would be helpful if this presumption were open and explicit.

Furthermore, there is the additional point that a lack of decision-making capacity need not *necessarily* equate to a lack of Convention rights. If Article 9 rights are not engaged independently for non-competent minors, then this position should be expressed and supported with judicial reasoning. It would also have to be reconciled with the assertion of religious freedoms line of authority discussed below, in which children have been regarded as possessing Article 9 rights as individuals. Were those children considered competent, and

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[44] SANDBERG, R., Law and Religion, Cambridge University Press, Cambridge, 2011, pp 89-99 and GARCIA OLIVA, J. and CRANMER, F. "Education and Religious Symbols in the United Kingdom, Italy and Spain: Uniformity or Subsidiarity?, European Public Law, 2013, p 574.

if so, on what basis were they different? Or is competence not in fact a sine qua non for the existence of Article 9 rights?

A similar, but no more illuminating picture, emerges from the domestic cases on religious upbringing. Again, the focus is on child welfare and adult religious rights, largely to the exclusion of children's religious rights. In *Re J*,[45] a five year old boy was the subject of a dispute about circumcision between his estranged parents, a nominally Anglican mother and a Turkish Muslim father. The Article 9 rights of the parents were not determinative, and the Court of Appeal found that on the facts of the case it was not in J's best interests to undergo the procedure.[46] Because the operation involved small, but nevertheless measurable medical risk in addition to some pain, there had to be clear demonstrable benefits to the child in order to deem it to be in his best interests. Because J was experiencing an essentially secular upbringing in England, the procedure would not allow him to identify himself with his peers, as it would in Turkey. In fact, it would mark him out as different; it would not be a shared rite of passage with contemporaries and it would not take place in the midst of a joyful family celebration, as it would have done in his father's cultural context. On the contrary, his mother, as his primary carer, would find the operation a stressful time and would struggle to explain and present it all in a positive light. Also J's age meant that he was old enough to be distressed by the experience of circumcision, but too young to comprehend the reason for his being subjected to discomfort; effectively, the worst of all possible worlds in developmental terms.

Given that the governing domestic legislation requires the welfare of the child to be the paramount consideration of the court in its decision-making,[47] it is both proper and to be expected that welfare should be at the heart of judicial deliberations in these cases. In addition, at the age of five, J was in no position to comprehend the physical, social, cultural and religious issues involved with circumcision, and as a result, there could have been no realistic prospect of his having Gillick

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[45] Re J (Specific Issue Orders: Child's Religious Upbringing And Circumcision) 2000 1 FLR 571 CA

[46] Ibid per Thorpe LJ pp 571-576

[47] Children Act 1989 s1(1)

competence to decide for himself. However, neither of these factors would have precluded the court from exploring the Article 9 dimension of the case as far as J was concerned. For instance, did he have an Article 9 right not to have a religious position effectively imposed upon him by the court as an organ of the State, when there was no parental consensus as to what this should be? Are there any child centred Article 9 implications of ordering an initiation rite into a particular faith, when no serious harm will result from deferring this until the child is able to make an informed choice?

Evans[48] has criticised the Strasburg jurisprudence for failing to make clear where the boundaries lie between the rights of the child to protection and self-determination, on the one hand, and parental rights to make choices about religion and education, on the other. She raises the question of how Article 9 rights vested in the child might relate to these dilemmas (for example, asking about the possibility of the child asserting an Article 9 right to be involved in religious practises or life-style choices, which the State authorities have deemed harmful to minors). Not only do we suggest that Evans' point is wholly valid, we would argue that Re J is evidence of national courts falling into the same trap. If the ECtHR examined the Article 9 rights of minors more thoroughly in these cases, the practise would trickle down to domestic fora.

The case of *Re S*[49] also involved circumcision, although there was an interesting difference in the approach of the court. Whilst the Article 9 rights of the children were still not addressed, the issue of Gillick competence did raise its head. The facts were more complicated, and concerned a mixed faith marriage between a Muslim woman and a Jain man. Before having a family, the pair agreed that any children would grow up experiencing the best elements of both faith traditions, and this was indeed what happened for a time when they had a son and a daughter. However, the parents eventually separated in acrimonious circumstances; the mother wanted both of the children to be brought up as full members of the Muslim community, and argued

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[48] EVANS, C., Freedom of Religion under the ECHR, Oxford University Press, Oxford, 2001, p 158.

[49] Re S (Specific Issue Order: Religious Circumcision) [2004] EWHC 1282 (Fam)

that neither she nor they would be accepted unless the boy was circumcised.[50] The father, in contrast, maintained that mutilation of the body was strictly forbidden in his faith tradition. If S were to undergo the procedure, he would be unable to participate in Jain sacraments and would find it virtually impossible to find an arranged marriage within his father's community.[51]

Once again, it was found not to be in the child's best interests to be circumcised, especially since favouring one parental religion over the other, when the children had previously been exposed to both, would be to deprive them of half of their religious and cultural heritage.[52] However, the court made a striking pronouncement in addition to this welfare finding. Evidence had been presented to the effect that circumcision was not an absolute requirement within the mother's branch of Islam until the age of thirteen, and it was held that by that point, S would in all probability be Gillick competent to decide the matter for himself.[53]

Unfortunately, the court did not set out any reasoning behind its assertion, or explain the factors which S would have to be able to understand and weigh in order to achieve Gillick competence in this regard. We suggest that it was a surprising conclusion for a court to reach. We do not question that it might be reasonable to suggest that the average thirteen year old could properly understand and make a judgment about the physical risks inherent in circumcision. However, medical considerations were by no means the only relevant issues which S would have needed to process, and finding that a very young teenager would have the cognitive, emotional and social maturity to permanently choose not only between two religions, but two sides of his family, whilst risking lifelong estrangement in the process, is somewhat harder to justify.

As Cave and Wallbank[54] argue, the willingness of adults to provide information and facilitate decision-making will drastically affect the

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[50] Ibid para 2
[51] Ibid para 17
[52] Ibid para 83
[53] Ibid
[54] CAVE, E., & WALLBANK, J., "Minors' Capacity to Refuse Treatment: A Reply to Gilmore & Herring", Medical Law Review, Vol XX (III), 2012, p 423.

chances of a minor achieving and exercising the capacity to make a truly autonomous choice. Although they were discussing the medical arena, the same fundamental considerations would apply in a faith setting. Whether a minor had his or her options explained carefully and neutrally, and then received support in thinking them through would be a significant factor in attaining capacity. The truth is that adults most intimately involved with S would be his immediate family, and would in all probability have a strong desire for him to elect to follow their preferred faith pathway. Consequently, the information and incentives which they would be inclined to provide might be more targeted at achieving this objective, than facilitating a free choice and inevitably, this context would drastically reduce S's chances of achieving Gillick competence.

Such an apparently casual judicial approach to finding Gillick competence is not, in our view, an effective formula for furthering children's rights or promoting welfare. To place a decision in the hands of an individual without capacity to assess and understand all of the implications involved is not empowering that person or enabling them to make an informed choice.

Neither is *Re S* the only case in which UK courts have shown a surprisingly willingness to find a vulnerable child Gillick competent without presenting robust reasons in support of this. In *Re C*,[55] a county court judge considered the case of a ten year old girl who wished to be baptised into the Church of England. She was from a Jewish family, but her parents were divorced and her father had become an Evangelical Anglican. He had taken her to the 'New Wine' church festival, and it was following this that C wished to be baptised. Her father supported this desire, but her mother and both sets of grandparents were opposed. The judge's findings were somewhat contradictory. On the one hand, he appeared to find her competent to make an informed choice, stating that C demonstrated:

'*a sufficient degree of maturity and understanding to make a properly informed decision*'[56]

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[55] In the Matter of C-Between A Mother (Applicant) and A Father (Respondent) Before his Honour Judge Platt (May 2012)

[56] Ibid para 61

and yet, at the same time he proceeded to make an order about her baptism, attaching various conditions to it. In our view, there are a number of worrying aspects about both the decision and the reasoning underpinning it.

Firstly, if C was truly Gillick competent to decide the matter, then it was not for either the court or her parents to override her wishes in relation to UK law. Secondly, there was no explanation of what factors C needed to comprehend and process in order to demonstrate her 'maturity and understanding'. Presumably, she would need to understand the possible long term impact which her choice would have upon family relationships and community ties, as well as something of the doctrinal differences between the two faiths to which she had been introduced. This would be challenging for any child of ten, but especially so for one dealing with ongoing family trauma. Again, the point which Cave and Wallbank[57] make about adult facilitation of decision-making would be relevant. C was surrounded by adults with strong opinions and vested emotional interests, and consequently, neither of her parents was necessarily equipped or inclined to support a truly autonomous choice.

In addition to the stress of the divorce, C had had to deal with her father becoming engaged to one woman, breaking off that relationship and subsequently marrying another, all in the space of two years.[58] Clearly, C had been required to process a lot of changes within her immediate family circle; initially, her father leaving the parental home, and then being introduced to first one prospective stepmother and then another.

Furthermore, it is interesting that in concluding that C was in a position to make a mature and informed decision about baptism, Judge Platt went against the recommendation of the Cafcass[59] officer, who

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[57] CAVE, E., & WALLBANK, J., "Minors' Capacity to Refuse Treatment: A Reply to Gilmore & Herring", Medical Law Review, Vol XX (III), 2012, p 423.

[58] Ibid para 24

[59] The Children and Family Court Advisory and Support Service: this was set up under the provisions of the Criminal Justice and Court Services Act 2000, with a remit to: safeguard and promote the welfare of children; give advice to the family courts; make provision for children to be represented; and to provide information, advice and

had advised that taking this step should be deferred for several years.[60] The judge's justification for this departure was that the officer had raised no specific concerns about C's maturity. She presented as a bright, articulate child who had expressed a consistent desire over some time and supported it with age appropriate reasons.[61]

With all due respect to the judge, none of these matters are directly relevant in answering the question of whether C had attained Gillick competence to make an informed and autonomous choice. There was no dispute about C's intelligence, or that she lacked maturity, *for a ten year old girl.* But that does not equate to finding that she was in a position to fully understand and balance the issues which Christian baptism raised in her very particular and complex circumstances, e.g. the implications for her developing sense of social and cultural identity and divided family loyalties. A bright ten year old might express a consistent desire to marry her favourite pop-star or Formula 1 racing-driver, and give wholly age appropriate reasons for this, but that would hardly suggest that she was Gillick competent to enter into an adult relationship.

Although decisions of county courts are not binding, they may be cited as persuasive authority and *Re C* arguably provided a less than ideal template for decision making in religious upbringing cases. The judge appeared to conclude that the child was Gillick competent, but without setting out thorough and consistent reasons for this finding. Furthermore, despite this apparent finding of capacity, the judge still proceeded to exercise decision-making powers on C's behalf. To sum up, *Re C* is a confusing and perhaps ill-fitting piece in the current jigsaw of authority on children's rights and religion.

Viewing the picture of religious upbringing cases as a whole, there are both commendable and concerning elements. It is clear and settled law that the wishes, interests and even Convention rights of parents will not detract from the welfare principle in making decisions for

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support to children and their families. It operates independently of the courts, social services, education and health authorities and all similar agencies.

60 In the Matter of C-Between A Mother (Applicant) and A Father (Respondent) Before his Honour Judge Platt (May 2012) para 61

61 Ibid para 63

children without capacity.[62] However, the issue of whether children may actually have capacity is frequently not addressed, and questions about potential Article 9 rights vested in children are not considered in the course of deliberations on welfare. The few cases in this area which do deal directly with Gillick competence provide no guidance as to what factors a child would need to understand and process in order to achieve capacity in this regard. Both *Re S* and *Re C* appear to have potentially placed considerable burdens on children, without setting out clearly why the courts concluded that they were mature enough to bear them.

3.2 Assertion of Religious Freedom

The second group of cases concern children seeking to assert religious liberties in their own right, generally in an educational context. In *Dogru v France,*[63] both the ECtHR and the French government accepted, without question, that an eleven year old girl was capable of manifesting a religious belief under Article 9(2). The case concerned a pupil who was expelled from school for refusing to remove her Islamic head-covering during physical education lessons. Although the applicant's claim was unsuccessful, the issue of whether she could assert Article 9 rights was taken for granted.

The same has been true in cases brought before the UK courts in relation to religious dress, symbols and uniform,[64] which raises an interesting question: is it necessary for an individual to have an understanding of the religious belief which they are manifesting?

The answer to this is by no means straight-forward, as it is possible to coherently argue the point both ways on the basis of case law. On the one hand, as has already been noted, both Strasburg and domestic courts have accepted Article 9 based claims from children without applying any test of capacity. Respected commentators, such as

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[62] Re T and M (Minors) (1995) ELR 1; Re P (A Child) [1999] All ER (D) 449; Re D (Care Order: Declaration of Religious Upbringing) [2005] NI Fam 10 See also HILL, M. SANDBERG, R., & DOE, N., Religion and Law in the United Kingdom, Walters Kluwer Law & Business, The Netherlands, 2001, paras 455-462.

[63] Dogru v Franc (App no 27058/05) [2008] ECHR 27058/05

[64] R (SB) v Governors of Denbigh High School [2007] 1 AC 100; *R v Playfoot (A Child) v Millais School Governing Body* [2007] EWCH (Admin) 1698

Sandberg and Leigh, have also been prepared to address these cases without raising the issue of capacity.[65]

However, there are some generally applicable threshold requirements for beliefs which may be manifested under Article 9(2), laid down by the House of Lords in *Williamson*.[66]

'*The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem*'.

Therefore, although this test relates to the *belief,* rather than the believer, if an individual lacks the capacity to hold beliefs which are serious and on fundamental problems, logically they cannot rely upon such beliefs, as the foundation for an Article 9(2) claim. The Article only protects conduct which is a 'manifestation' of belief,[67] and if a person is not able to form the requisite type of belief, then his or her actions cannot amount to a manifestation. The unpalatable implication of this conclusion, however, is that not only would young children be excluded from the protection of Article 9(2), but mentally incapacitated adults would similarly be denied its benefits. This interpretation also arguably leans towards favouring as normative religions with a focus upon orthodoxy, rather than orthopraxy.

The complexity of the position is illustrated by one response to the recent Köln circumcision case.[68] The circumcision of a four year old boy on religious, rather than medical grounds, was found to be unlawful, on the basis that he could not consent to the bodily harm, and it was not in his best interests. The religious beliefs of his parents could not provide a justification for irreversible harm to the child.

In the wake of a storm of protest from religious groups, the German government acted swiftly to amend the Civil Code to clarify that ritual

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65 SANDBERG, R., Law and Religion, Cambridge University Press, Cambridge 2011, pp 190-194; LEIGH, L., "New Trends In Religious Liberty and the European Convention On Human Rights", Ecclesiastical Law Journal, Vol XII, pp 266-279.

66 R v (Williamson and Others) v Secretary of State for Education and Employment [2005] UKHL 15 per Lord Nicholls para 23

67 Ibid para 32

68 BOHLANDER, M. Oxford Journal of Law and Religion (2013) 2(1):217-218 1 Apr 2013 Amtsgericht Köln (County Court of Cologne) Judgment no 528 Ds 30/11 and Landgericht Köln (District Court of Cologne) Judgment no 151 Ns 169/11

circumcision remained lawful in Germany. Nevertheless, commentators like Günzel,[69] still drew some important reflections from the case. In Günzel's view, it was significant that if the case had stood unchallenged, parents would have lost the right to opt to have their son circumcised in accordance with their faith.[70] But it was also a material consideration that children would lose the right to participate and enter into their familial and cultural faith community, as restricting parental faith practises inevitably diminishes a child's religious upbringing.[71]

Günzel's point is a powerful one, and it is undeniable that the development of religious identity is frequently fostered more by doing and belonging than by abstract learning. But it is interesting, and we would suggest correct, that she did not tie a child's right to participation in family religion to Article 9(2). It could certainly be argued that undergoing circumcision is a manifestation of an individual's religious belief. In fact, in the case of an adult convert, it is clear that electing to be circumcised would satisfy the requirements for a 'manifestation' of belief for the purposes of Article 9(2).[72]

However, in the case of a baby or toddler, being subjected to a procedure or participation in a rite, when they are unable to consent, analysing the situation in terms of parents manifesting their religious belief is more realistic. This is in no way a negative characterisation, and it is wholly uncontroversial that the ECHR gives parents the right to direct the religious upbringing of their children, as well as actively involving them in the practise of their faith.[73] Furthermore, the First Protocol Article 2 right to education has inbuilt protection for parental religious and philosophical convictions, as a guard against State indoctrination.[74] Very few people would question the appropriateness of these safeguards in a democratic society, and we would certainly

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[69] GÜNZEL, A., "Nationalization of Religious Parental Education? The German Circumcision Case", Oxford Journal of Law and Religion , vol II (I), 2013, pp 206-209.

[70] Ibid 208

[71] Ibid

[72] Eweida and others v United Kingdom [2013] ECHR 48420/10 paras 45-46

[73] Kjelsden, Busk, Madisen and Pedersen v Denmark [1976] 1 EHRR

[74] EVANS, C., Freedom of Religion under the ECHR, Oxford University Press, Oxford, 2001, p 46.

not be among them. But given that parental freedom to do this is already protected by Articles 8 and 9, there is no need to give applicants a second bite of the cherry, by allowing them to use attributed Article 9 rights vested in their child as a means of asserting their interests.

It is important not to lose sight of the context of litigation over religious upbringing. Public authorities in the UK (and other Convention States) will not *initiate* involvement in the religious upbringing of children, unless there is grave abuse or neglect. In the UK, the necessary threshold is that the child has suffered or is at risk of suffering "significant" harm, and this harm must be the result of parental care not being what a "reasonable" parent would be expected to give.[75] Mercifully, these cases are rare in a faith context[76] and the overwhelming majority of decisions being discussed in this article are *not* drawn from this public sphere.

In other words, the religious upbringing cases are not, generally speaking, examples of the State entering uninvited into family life. They are cases in which parents have been unable to resolve disputes and have asked the courts to adjudicate, leaving the State courts unable to refuse jurisdiction.[77] Likewise, the assertion of religious freedom cases are instances of parents or children seeking to manifest their faith in a particular manner in some public context, like a classroom, and seeking a determination about the balance of freedoms in the public world.

We would not wish to be misinterpreted as suggesting that parents should not be entirely free to make whatever faith and life-style choices they see fit for their families, provided always that minor children are not suffering harm or neglect. As Browning[78] points out, in most jurisdictions, and certainly in Europe, it is an accepted

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[75] The Children Act 1989 s31 (2)

[76] HILL, M. SANDBERG, R., & DOE, N., Religion and Law in the United Kingdom, Walters Kluwer Law & Business, The Netherlands, 2001, paras 455-462.

[77] Re G (children) (Education: Religious Upbringing) [2012] EWCA Civ 1233 per Munby LJ para 92

[78] BROWNING, D., "Family Law and Christian Jurisprudence", An Introduction to Christianity and Law, Ed WITTE, J., & ALEXANDER F. (eds), Cambridge University Press, Cambridge, 2008, pp 177-178.

principle of secular family law that it is the role of the State to uphold, rather than disrupt the family unit, wherever possible. In our view, this is appropriate.

Highly distinguished authors like Adhar and Leigh,[79] argue along similar lines to Browning in making a powerful case against the recognition of independent rights to religious liberty vesting in minors, proposing that in the absence of family discord, the rights of children ride in tandem with the rights of their parents:

'*The danger of occasional abuses of their authority by some parents seems to us to be outweighed by the harm that the introduction of the right to religious autonomy would bring. The cure is worse than the disease. Undermining of family integrity and parental authority would result*'.[80]

Whilst we accept the importance of supporting, rather than shaking the bonds which tie families together, the case, despite being thoroughly presented by Adhar and Leigh, does have a number of difficulties:

1) Children who are Gillick competent in respect of a religious decision already have an independent right to religious liberty guaranteed by Article 9. Parental authority cannot oust Article 9 rights of competent minors in the United Kingdom, or we would submit, other Convention States.

2) It is by no means clear that depriving competent minors of religious liberty would not do more to damage than to protect family integrity. Coercion is not, in most cases, an effective means of strengthening human relationships.

3) There is a practical, factual problem with the assertion that child and parental rights to religious liberty ride in tandem. Children are individual human beings and not extensions of parental identity.

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[79] ADHAR, R., & LEIGH, I., Religious Freedom in the Liberal State, Oxford University Press, Oxford, 2005, p 208.

[80] Ibid

For all of these reasons, we would suggest that the Article 9 rights vested in parents are not coterminous with Article 9 rights vested in children, and it is not desirable to treat them as such.

If parents wish to assert their freedom to dress a non-competent child in a particular manner, or to otherwise manifest their religious beliefs through decisions about upbringing and education, then there are quite properly mechanisms within the ECHR to protect this. Likewise, if a minor forms a mature belief, then he or she has the same independent Article 9(2) freedom to manifest this, as any other citizen. And it would be no surprise if a teenager arrived at an individual belief in the faith of his or her family and wished to bring an Article 9 claim defending the right to manifest it. Parental and child Article 9 rights may often be in harmony, but this is not invariably the case.

Especially complex are cases like *Dogru v France*[81] (discussed above), which involve pre-adolescents. Here the boundary between parents asserting their right to direct their child's upbringing and the child's own independent assertions can be very hard to discern. In this particular case, an eleven year old was clearly able to articulate her belief and chose to defy her teachers when her parents were not physically present. But this in and of itself does not demonstrate that she was making mature, informed choices and was free from pressure and manipulation. As discussed above in relation to religious upbringing, and as observed by Petchey,[82] the rights of a child are not always best served by deferring to his or her expressed desires. The exercise of choice, which is neither informed nor autonomous, is not a form of liberation or empowerment, and may run counter to an individual's true best interests.

But equally, and in our view crucially, the fact that some minors are incapable of making autonomous decisions in relation to certain matters would be a very poor reason to exclude all non-adult citizens from the ambit of Article 9. Until there has been greater judicial consideration of the question of capacity and Article 9 both by

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[81] Dogru v Franc (App no 27058/05) [2008] ECHR 27058/05

[82] PETCHEY P."Legal Issues for Faith Schools in England and Wales" , Ecclesiastical Law Journal , vol X, 2008, pp 174-190, 186.

domestic tribunals and the Strasbourg Court, it is hard to predict how these issues might play out in the context of litigation.

For all these reasons, where applicant minors are seeking to assert their Article 9 rights, a strong case could be made for some test of capacity. If the people driving the litigation are the adult parents or guardians of the child, then they have their own Article 9 freedoms and it is appropriate that they rely on them. Clearly, if the litigation is a bid to assert adult choices in respect of a child, then it should be argued on this basis. In contrast, where the child is genuinely in a position to make independent choices, then it is crucial that he or she should enjoy the protection of Article 9 on the same basis as any other citizen.

So, if the matter turns on the capacity of the child to make informed choices, then in a UK context this leads back to Gillick competence. We are again faced with the question: what does it mean to be Gillick competent with regard to religious decision making?

4. Gillick Competence and Religion: Lessons from medical and best interests cases

As discussed, the courts affirmed the importance of the concept of Gillick competence in the religious sphere in both *Re S*[83]and *Re C*;[84] yet failed to provide much constructive guidance about how it should operate in this context. How should this test be applied in relation to religious decision-making? We suggest that there are insights to be drawn from both the medical arena, and the case-law on best interests decision-making, which taken together could form a basis for a workable concept of Gillick competence in faith based cases.

4.1 Lessons from the Medical Arena

The *Gillick*[85] case itself concerned the capacity of children to give consent to medical treatment, but in subsequent cases considerable controversy arose around the capacity of minors to refuse clinical

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[83] Re S (Specific Issue Order: Religious Circumcision) [2004] EWHC 1282 (Fam)

[84] In the Matter of C-Between A Mother (Applicant) and A Father (Respondent) Before his Honour Judge Platt (May 2012)

[85] Gillick v West Norfolk and Wisbeach Area Health Authority [1985] 3 All ER 402

intervention, especially when doing so would have potentially serious and even fatal consequences.

In *Re R,*[86] Lord Donaldson MR stated obiter, that even where a child was capable of consenting to treatment, his or her *refusal* could still be overridden by a valid consent.[87] At first sight this appears to contradict the dicta of Lord Scarman in *Gillick*, and has been much criticised by commentators.[88] However, we consider that Lord Donaldson's statement can be interpreted in a way which is consistent with *Gillick,* and which sheds some useful light on consent and competence in religious matters.

Macfarlane[89] argues that Lord Donaldson's analysis is incorrect, and that a court could not overrule the decision-making capacity of a competent young person for the following reasons:

1) There has been a general move in case law away from a paternal and protectionist approach towards a rights-based evaluation in respect of each child.
2) This movement is in harmony with Articles 5 and 12 and of the UNCRC.[90]
3) The individual rights based approach draws on the flexible and sophisticated scheme for assessing capacity, which is set out in the Mental Capacity Act 2005.[91] Whilst the Act is not directly applicable, it is a legitimate way of understanding the common law test for capacity which applies to children (i.e. the *Gillick* test)
4) The Mental Capacity Act 2005 draws no distinction between the capacity to refuse and the capacity to consent.

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86 Re R (A Minor) (Wardship Consent to Treatment) (1992) Fam 11

87 Ibid

88 MACFARLANE, "Mental Capacity: One Standard For All Ages", Family Law, 2011, p 479.

89 Ibid

90 UNCRC Article 5- (Parental Guidance)-Governments should respect the rights and responsibilities of families to direct and guide their children so that, as they grow, the learn to use their rights properly. Article 12-(Respect for the views of the child): When adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account.

91 Mental Capacity Act 2005. This is the statute which governs decision making on behalf of adults whose capacity is limited or compromised.

5) Rejecting Lord Donaldson's approach to capacity and adopting one which mirrored the statutory scheme for adults would enable a court to create one standard for evaluating capacity irrespective of age. This would be much more in tune with the organic development of capacity described by Lord Scarman in *Gillick*.

The primary flaw with McFarlane's interpretation is, arguably, his analysis of the Mental Capacity Act 2005. Capacity is defined by the legislation as being (like the common law *Gillick* test for minors) decision specific. To state that the Act draws no distinction between the capacity to consent and the capacity to refuse treatment underestimates the very sophistication which he praises. It is actually entirely possible that an adult could be found to have capacity to consent, but not to refuse treatment under the statute.

In mounting a partial defence of Lord Donaldson, Gilmore and Herring[92]argue that in relation to children, differing levels of understanding are required depending upon the course of action contemplated. Capacity to consent to treatment simply requires an understanding of the treatment and its consequences, whereas refusal requires an understanding of the consequences of refusal. These may be very different, and the latter may be far more involved and complex than the former. Gilmore and Herring cite the example of applying a plaster to a cut, understanding having a plaster put over a graze is a different matter from understanding all about septicaemia and infection.

Cave and Wallbank[93] add a further gloss to the Gilmore and Herring analysis, rejecting the interpretation that medical decisions are ordinarily a straightforward binary choice to accept or refuse. For Cave and Wallbank, the issue is whether or not a minor understands "the decision" and the range of options before him or her, in a holistic sense.

We submit that this is correct, and that both Gilmore and Herring and Cave and Wallbank bring a valuable offering to the table. Whatever

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[92] GILMORE S., & HERRING J., "No is the hardest word: consent and children: autonomy", Child and Family Law Quarterly, 2011, p 31.

[93] CAVE, E., & WALLBANK, J., "Minors' Capacity to Refuse Treatment: A Reply to Gilmore & Herring", Medical Law Review, Vol XX (III), 2012, p 423.

test of understanding is being applied, capacity will inevitably vary depending on the issues which must be understood in order to make an informed choice. This is an especially helpful insight when it comes to assessing decision-making capacity in relation to faith matters. Capacity will always depend upon understanding the implications of a particular decision for a particular child.

4.2 Lessons from the best interests cases

But this still leaves the question of what kind of factors and implications a child must be able to take on board if he or she is to be deemed competent to make an autonomous and informed choice about faith issues. We would suggest that the cases in which the courts have sought to make a best interests determination on faith matters provide a useful basis for assessing this, even though they do not in general deal with the application of Gillick competence.

In *Re G,*[94] the Court of Appeal considered the factors which a court must bear in mind when making a welfare determination about the best interests of a child. The decision to be made was a poignant one. Both parents came from an Ultra-Orthodox Jewish background. The mother gave evidence that she had reluctantly entered into an arranged marriage and sacrificed her dream of going to university in order to meet parental and community expectations. Alongside having and caring for five children, she managed to obtain an Open University degree and became an English teacher, but from her perspective the marriage was an unhappy one. Eventually, she decided that she wanted a divorce and a less narrow life for herself and her children. She wished to remain an Orthodox Jew, but not within the Ultra-Orthodox Charedi community. Furthermore, she wanted her children to pursue an educational path which would give them the option of tertiary studies and professional careers if they so chose.

In contrast, the father was happy within his Ultra-Orthodox life, and did not wish his children to be removed from the only social and cultural environment they had ever known. If the mother's wishes prevailed, there was a high chance that the children would become estranged from much of their family and community.

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[94] Re G (children) (Education: Religious Upbringing) [2012] EWCA Civ 1233

There was no doubt that both were loving and exemplary parents and in the end, it was decided that in these particular circumstances the best interests of the children would be most effectively served by them living with their mother and going to the schools which she had chosen. Part of the rationale was that it would be easier for them to return to the Charedi community if they later wished, than to choose to depart from it if that was the sole world they had experienced. But that was simply the outcome on the facts and another similar case might have the opposite conclusion. The decision is a good illustration of the complexity of these cases, and just how many factors must be balanced in making an informed decision. Munby LJ stated that the conclusion about welfare and best interests must be reached:

'*taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare consideration. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach*'.[95]

The court also stressed that medium and long term considerations must be borne in mind, where decisions have implications for a child's future, as well as his or her present.[96] Furthermore, the repercussions which any choice might have for the child's family and other relationships would also be another significant factor.[97] When acting as a judicial parent, the court must look at the situation in a holistic manner, and ask what any proposed course of action might mean for the child in question in his or her unique circumstances

This useful analysis is not an innovative one, but a summary of the position, as it has evolved from earlier case law. It very much reflects

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[95] Ibid per Munby LJ para 27
[96] Ibid para 26
[97] Ibid para 30

the approach of Thorpe LJ to best interests in Re J,[98] and Thorpe LJ's stance has received some criticism from commentators.[99] In making a welfare determination, he regarded the actual impact of religious practise on the child to be far more significant than abstract doctrinal ideas held by parental faith groups. This was entirely in keeping with the Strasbourg case law and domestic legislation, but Jivraj and Herman argued that a lack of focus on parental understanding and belief, where minority cultures are concerned, has resulted in an inherent prejudice in favour of underlying Western values. However, in our view, it is very difficult to substantiate this criticism on the facts of Re J or to reconcile it with the wording of the Children Act 1989.[100]

The court in Re J[101] approached both parental religions in the same way. The fact that J was born to a Muslim father and the significance which this had to his faith community carried as much weight as the fact that he was born to an Anglican mother. In neither case was the doctrinal status of the child in terms of parental religion treated with as much gravity as the child's actual experience of that faith and its day to day impact upon his life. It is difficult to see how making the decision upon any other basis could have been compliant with the Children Act 1989,[102] as the text explicitly requires the court to consider the effect of the proposed order on the child and to make his or her welfare the paramount consideration.

Bradney[103] makes a parallel point to the one raised by Jivaj and Herman. He suggests that although religious beliefs are irrelevant in themselves, and courts will not make value judgments between faiths or ideologies, the social practises stemming from beliefs have been very significant in disputes over custody. He cites the Victorian case

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98 Re J (Specific Issue Orders: Child's Religious Upbringing And Circumcision) 2000 1 FLR 571 CA

99 JIVRAJ, S., & HERMAN D., "It is difficult for a white judge to understand: Orientalism, Racialisation and Christianity in Child Welfare Issues", Child and Family Law Quarterly, 2009, p 283.

100 Children Act 1989

101 Re J (Specific Issue Orders: Child's Religious Upbringing And Circumcision) 2000 1 FLR 571 CA

102 Ibid s1

103 BRADNEY, A., Law and Faith in A Secular Age, Routledge Cavendish, Abingdon, 2009, pp 116-118.

of *Besant,*[104] in which a mother was denied custody of her daughter, not because of her atheism per se, but because of the impact that this, then shocking, position had on her social status. Bradney argues that the essential principle of Besant still applies, but that courts now dress it in more sophisticated clothing:

'*Those who hold religious opinions that are contrary to the mainstream traditions of the day continue to be disadvantaged in any dispute over the custody of their children*'.

At one level, there is significant truth in Bradney's assertion. If a parent wishes to adopt a lifestyle which will limit his or her child's ability to operate within mainstream society, then they may suffer in a best interests comparison with a parent, whose position would give the child greater opportunities for development. But again, any alternative conclusion would place parental religious choices above the child's welfare.

It is also true that the best interests determination is more sophisticated than Bradney seems to acknowledge, and it is by no means inevitable that the desires of the parent closest to 'mainstream' society will prevail. In Re G, the court was clear that the judgment was a difficult one and with slightly different facts could well have gone the other way. In other circumstances, the children's family relationships and cultural heritage, combined with the benefit of continuity, might well mean that the wishes of the parent offering a narrower sphere of life would be preferred in the final analysis.

Authors like Morris[105] have supported the judicial method of highlighting the significance of family and societal context when making a welfare determination in religious upbringing cases. Arguably, this strategy also makes more sense in terms of recognising individual religious freedoms. Edge[106] argues, convincingly, that determining the *content* of religious beliefs is deeply problematic for courts, and that the most appropriate approach is to simply focus on the beliefs of the parties before the court.

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[104] Re Besant (1879) 11 ChD 508, p 513

[105] MORRIS, G., "Family-Conflicting Views", New Law Journal, vol CLXII, p 984.

[106] EDGE, P., "Determining Religion in English Courts", Oxford Journal of Law and Religion, Vol I (II), 2012, p 402 .

'One way forward is to focus on the individual in order to determine the content of their beliefs. This strategy would treat the content of acknowledgely authoritative texts, the statement of acknowledged members of a religious hierarchy and even the beliefs of acknowledged co-religionists, as simply evidence to answer the fundamental question- what does the individual before the court believe?'[107]

In a family law context, this insight is particularly helpful. In reality, the question is never 'what would it mean for a child to be brought up as a Roman Catholic or a Muslim or a Hindu?' There is such a variety of practise and understanding, within both religions and denominations, as to render enquiries couched in such general terms of little use. Neither is it even as simple as asking 'what would it mean for a child to be baptised or wear a hijab or keep to a strictly Kosher diet'?

The more helpful questions will always be: what will it mean for *this* child to be brought up in the relevant faith, as understood by the particular caregivers, family and faith group? What impact will the proposed decision have upon him or her in the widest, most holistic sense?

These are the factors which a court would need to weigh up in making a best interests determination on the child's behalf and we would suggest that a child would need to demonstrate an awareness of the same factors in order to achieve Gillick competence. In other words, to be able to comprehend and assess what the likely consequences of any given course of action would be, not just in the short term, but in relation to future opportunity and development. In order to have capacity, a child would need to show a realistic appreciation of what the decision would potentially mean, the risks and benefits, physically, emotionally, socially, educationally, spiritually and otherwise.

So, for example in Re C,[108] the child would have had to have shown an understanding of more than just the physical aspects of the baptism ceremony with water and holy oil and sacred words. In order to be

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[107] Ibid 419

[108] In the Matter of C-Between A Mother (Applicant) and A Father (Respondent) Before his Honour Judge Platt (May 2012)

Gillick competent on this basis, we suggest that C would have needed to appreciate how choosing to be baptised might affect her relationship with her mother, grandparents, friends and wider community. She would have had to have understood and accepted the risk that she might change her mind and (justly or otherwise) resent her father for having influenced her. She would also have needed to have accepted the possibility that all of her relationships, attitudes and beliefs might radically change during the course of her teenage years. An informed decision-maker would have needed to consider whether she was being driven by a desire to retain her father's love or approval, to rebel against her mother or simply be the centre of everyone's attention for a while in the midst of a painful situation and feuding adults, all of which would be a huge challenge for a vulnerable child of ten.

Admittedly, this approach is setting the bar for Gillick competence very high. But Lord Scarman set a high threshold in Gillick itself.

"there is much that has to be understood by a girl under the age of 16 if she is to have legal capacity to consent to such treatment. It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions, especially her relationship with her parents; long-term problems associated with the emotional impact of pregnancy and its termination; and there are the risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate. It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed on the basis that she has at law capacity to consent to contraceptive treatment."[109]

In essence, in any sphere, a child must demonstrate a realistic understanding of the consequences and possible consequences of a given course of action, and the risks and benefits involved, in order to show Gillick competence.

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[109] Gillick v West Norfolk and Wisbeach Area Health Authority [1985] 3 All ER 402per Lord Scarman p 242

However, it should be noted that not all circumstances are as difficult as those of Re C. The fewer complicated factors to be weighed, the greater the chance of a child attaining Gillick competence. It is by no means a standard which can never be met, but will always depend upon the child and the decision in question. The judicial deliberations in the welfare cases shed some light on the kind of factors which young people would need to be able to take into account and process in order to meet the standard.

5. Conclusions

The concept of Gillick competence within UK law should in theory provide a mechanism for both protecting and liberating minors. It allows those who have a mature and sufficient understanding of a given issue to exercise independent decision-making powers in the same way as any other citizen. Whilst at the same time, it restricts autonomous decision-making to young individuals who are genuinely able to comprehend and evaluate all that the decision in question entails.

However, it is regrettable that at present, the concept of Gillick competence is often neglected in the judicial deliberations of UK courts. In cases of dispute amongst families about religious upbringing, judges tend to assume lack of capacity on the part of minor children and simply make welfare based judgments. Occasional exceptions are found at the opposite end of the spectrum, when Gillick competence is ascribed to a child without a thorough analysis or explanation of this finding.

A presumption of capacity also appears to be an issue in the case law on the assertion of religious freedoms. Admittedly, it is a complex and controversial point as to whether capacity is required for the exercise of Article 9 rights, but we would argue that a capacity test could and should usefully be applied in this context. If parents wish to assert their right as parents to direct their child's life in accordance with the tenets of their faith, then the Convention provides a basis for them to do so (particularly with recourse to Articles 8 and 9). Claims brought by child applicants should be on the basis of the applicant's own beliefs and we suggest that Gillick competence provides a means of assessing if a child has capacity to decide independently whether or not they wish to manifest a religious belief. It does not involve

weighing the validity of the doctrine or belief, but gauging the child's understanding of the context in which the decision to manifest is being made and the impact which the manifestation will have on his or her life.

Whether Gillick competence is being discussed in relation to religious upbringing or assertion of religious freedoms, the guidance from cases on best interests provides a helpful framework for examining whether a child has attained the necessary level of understanding to make the relevant decision independently. These cases set out the kinds of factors which a court should take into account when arriving at a welfare determination, and the question is whether a child could comprehend and balance these same factors, although not of course, whether they would reach the same conclusion as a court. In fact, a child with capacity is free not to act in his or her own best interests.

Some would claim that it is unusual for academic lawyers to wish that judges had more to say. However, with regard to the capacity of children for decision-making in religious matters, the basic framework in place is sound and what is arguably needed is greater judicial discussion and application of that framework.

It is also striking that the questions raised are by no means confined to the United Kingdom. It is true that other jurisdictions may adopt different mechanisms for assessing the capacity of minors, but the question of how best to give a voice to children in religious disputes is a universal one. Furthermore, the common framework of the ECHR means that the application of Article 9 to children should be a recurrent question, as should the interplay between child and parental Article 9 rights. The lack of guidance from Strasburg in this area is a problem for the domestic courts of the UK, but it also leaves other national tribunals in a similar position. In *Eweida,*[110] the ECtHR affirmed the importance of Article 9 and freedom of religion, conscience and belief in a democratic society. Surely the application of this right to some of the most vulnerable members of society and the citizens of the future should not be overlooked.

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[110] Eweida and others v United Kingdom [2013] ECHR 48420/10