

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK
IN THE MATTER OF THE CONSECRATED SECTION OF PUTNEY VALE CEMETERY
AND IN THE MATTER OF A PETITION BY DONG HONG

JUDGMENT

1. This is a petition dated 15 October 2014 by Mr Dong Hong. It seeks permission for the exhumation of the remains of Tich Trinh Hong from Plot 162 (Block 8) in Putney Vale Cemetery to enable their re-interment within Plot 279 (Block 13) in that Cemetery, both plots being within consecrated sections of the Cemetery. I should say at once that I have decided to grant this petition. I set out my reasons below.
2. In August last year I granted three petitions by Mr Kiet Kham Hong for the exhumation of the remains of his grandmother, Thuc-Bich Tran, his father Vinh Hong and his brother, Thuan Kiet Hong from a consecrated plot in Putney Vale Cemetery. This was on the basis that the remains of his father and his brother had been interred by mistake in the grave of his grandmother; and that to remedy that situation for all three sets of remains to be re-interred elsewhere. The mistake had been that the interment of the remains of his father and his brother had been conducted according to Vietnamese Buddhist rites whereas they should have been conducted according to Chinese Buddhist rites. How this came about and the detailed facts are contained in my judgment dated 6 August 2014.
3. Mr Dong Hong is the uncle of Mr Kiet Kham Hong. The present petition relates to the remains of his father, Tich Trinh Hong, who was the husband of Thuc-Bich Tran. Thuc-Bich Tran died in 1993; Tich Trinh Hong had pre-deceased her, his remains being buried in the Cemetery on 22 November 1982. At the time last year that I granted the three petitions of Kiet Kham Hong, I was unaware that Tich Trinh Hong's remains had also been interred in a consecrated plot in Putney Vale Cemetery. In the context of the present petition I have been assured that there are no other family members whose remains are interred in Putney Vale Cemetery. All Mr Hong's family support the present petition.
4. The reasons for the present petition are different to the reasons for the petition which I granted last year. They are stated by Mr Hong to be as follows:

I am the oldest son of my deceased father Mr Tich Trinh Hong, who passed away over 30 years ago. According to our Vietnamese tradition and culture, the eldest son of the family will have to carry out the exhumation of the deceased father's body 10 years after it was first buried, and then to re-bury it. This is to show respect to the deceased father, all the deceased's close relatives of the family and the ancestor. The surviving family, the children and grandchildren of the deceased will receive blessing from the ancestor bringing them good health and luck from generations to the next generation. I, being the eldest son of the family, have the responsibility to carry out the exhumation of my deceased father. I have bought a grave space in Putney Vale Cemetery to rebury him next to my deceased mother and this will be the greatest respect that I can show to my deceased parents and ancestor.

5. Although it is obviously very different from the Christian tradition of burial as practised in this country, I am satisfied that exhumation after 10 years is a part of Vietnamese tradition and practice. In this connection I have a letter from a priest at the Linh Son Temple at Upper Norwood. I am not clear whether the Chinese burial tradition might be different in this regard but I am satisfied in the present case that the petition is brought in good faith and reflects the Petitioner's beliefs and those of his family. It would have been possible to hold a hearing to discover more about the background to the matter but I consider that this would involve disproportionate costs being incurred.
6. Two obvious questions arise in the light of the justification put forward by Mr Hong. First, why were Tich Trinh Hong's remains interred in the consecrated part of Putney Vale Cemetery in the first place if it was intended that they should be exhumed after 10 years? If inquiry had been made it would readily have become apparent that (to put it no higher) obtaining permission for such exhumation would not have been straightforward. Second, if exhumation after 10 years was the tradition that the family wished to observe, why didn't they apply for such permission in about 1992?
7. What seems to have happened is that the issue that arose last year in respect of the exhumation and re-interment of the remains of three family members has led the family to reconsider the position as regards the interment of the remains of Tich Trinh Hong. After raising these two points with Mr Hong, he has responded:

I have had many sleepless nights after receiving your letter. It's bad that I overlooked the matter many years ago back in 1982. It's worse that I am trying to do it after knowing that I had overlooked the matter but unable to do it without the necessary permission.

Being the eldest son of the family, I had/have the duties to help out, look after and raise the family. The death of my younger brother Vinh Hong last year has triggered me the thought of doing all the important things when I am still alive. Vinh died of a heart attack without any sign of illness.

I am 66 years old. Whilst I am still physically and mentally fit to carry out this traditional custom, I sincerely hope that you will kindly consider giving me the permission so that I can carry out this very important thing – traditional custom for the reburial of my father.

8. It seems to me that this case can be categorised as one of mistake. I do not think that it can really be said that there was an operative mistake which obtained in 1982. Nonetheless I think that it is apt to say that in 2014 the family appreciated that a mistake had been made by interring the remains of Tich Trinh Hong in consecrated ground. This is because the effect of the legal principle that exhumation be permitted only exceptionally might mean that they were unable to exhume the remains. If, in these circumstances, they were unable to exhume the remains, they would be unable to observe a religious practice which in good faith they wished to observe.
9. The sort of mistake that says *If I knew then what I know now, I wouldn't have done such-and-such* is not the weightiest sort of mistake on which to rely. Moreover it could be applied to all "change of mind" cases - and the Court of Arches has made it clear that a simple change of mind is not a sufficient justification for exhumation (see paragraph 36 (iii) of *In re Blagdon*

*Cemetery*¹). However what I have described as a mistake in this case does afford a reasonable answer to the two questions that I pose at paragraph 6 above.

10. In saying this, I am not of course necessarily saying that it is a **sufficient** basis. In the present case there is a further aspect. The position is that if the family are unable to exhume the remains, they will be unable to observe a religious practice which in good faith they wish to observe.

11. Before I consider the matter further, I note that it will be seen at once that the question of whether to permit exhumation in these circumstances engages, on the face of it, both Articles 8 and 9 of the European Convention on Human Rights. The Convention is given the force of law in England by the Human Rights Act 1998.

12. Article 8 provides:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

13. Article 9 provides:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

14. In *In re Blagdon Cemetery*, the Court of Arches considered that Article 8 was not engaged in an exhumation case. Since *In re Blagdon Cemetery* was decided, in *Dodsbo v Sweden*² the European Court of Human Rights considered the lawfulness of a decision under Swedish law to refuse permission for exhumation engaged Article 8 (although the Government of Sweden had conceded this). In *In re St Andrew's Church, Alwalton*³, Jones Dep Ch considered Article 8 was engaged in an exhumation case. In the Scottish case *C v Advocate General of Scotland*⁴, the Court of Session held that an act which resulted in a person's body being interred in a place not of his widow's choosing engaged her Article 8 rights. My own view is that in cases

¹ [2002] Fam 299.

² (2007) 45 EHRR 22.

³ [2012] PTSR 479.

⁴ 2012 WLT 103.

of this kind, Article 8 rights are engaged and that the Court of Arches, if it had to consider the matter again would hold that they were.

15. As regards Article 9, in *In re Durrington Cemetery*⁵, it was held that Article 9 was engaged where the petition was for the exhumation of a Jew who had been buried in consecrated ground and made by his Jewish relatives to achieve his reburial in a Jewish burial ground. In *In re Crawley Green Cemetery*⁶ Article 9 was held to be engaged where a humanist had been buried in consecrated ground. In *In re Blagdon Cemetery*, the Court of Arches evidently would have preferred to categorise these as cases of mistake⁷ but did not say that those cases were wrong.
16. In cases where Articles 8 and 9 are engaged, cases like *Dodsbo* indicate that the limitations or justifications contained in the second part of each article are to be given a broad interpretation; moreover, as Jones Dep Ch pointed out in *In re St Andrew's Church, Alwalton*⁸, the state has a wide margin of appreciation in cases of this kind.
17. It seems to me that consideration of petitions for exhumation with reference to the European Convention is potentially circular: if the Chancellor is minded to refuse permission because he has not identified exceptional circumstances he will have the basis for saying that such a decision is justified on the basis of the limitations contained in Articles 8 (2) and 9 (2). Further, a Chancellor might say in any particular case that he would have given permission irrespective of whether the petitioner was able to rely on Articles 8 and 9.
18. It is trite to say that the European Convention already embodies principles and approaches that are often embodied in the common law, and a consistory court – that is, a court administering the law of the church – can, of all bodies, be expected to respect freedom of conscience and religious belief. In this particular case what has troubled me is that - cutting across whatever merits the case may otherwise have - Tich Trinh Hong was voluntarily buried in the consecrated part of Putney Vale Cemetery and it has proved to be a satisfactory resting place for over 30 years. If refusing to permit exhumation did not impact upon the expression of the family's religious beliefs, the case would not be a strong one. What Article 9 (and it is Article 9 which is most pertinent in this case because it is that which addresses the manifestation of religious belief) does is to emphasise that the "norm" is non-interference with the manifestation of religious belief. Even though the general justification for exhumation may be weak, it seems to me that there must be a clear justification for interfering with this particular manifestation of religious belief. It is unattractive to say to a Buddhist that the manifestation of his religious belief must be curtailed because of the need to sustain the principle of the permanence of Christian burial; and in the context of this case, Article 9 serves to emphasise why this should be so. In terms of whether this might create a precedent, it seems to me that to grant a faculty in the present case will only be a precedent for other

⁵ [2001] Fam 33

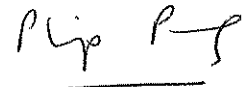
⁶ [2001] Fam 308.

⁷ See paragraph 36 (iii) at p309B. Interestingly, if there was a mistake in *In re Durrington Cemetery*, it was the sort of "weak" mistake that I have identified in the present case.

⁸ [2012] PTSR 479.

cases where someone can say that a refusal to permit exhumation will interfere with the manifestation of religious belief. There ought not to be many such cases because if the family of someone who has died have religious objections to him or her being interred in a Christian burial ground one would expect those objections to be identified at the time of burial. In this context I note that in *In re Crawley Green Road Cemetery*, the Petitioner, who was seeking the exhumation of the remains of her deceased husband, did not know that the plot in which his ashes were buried was consecrated. She and her husband were humanists and her husband had had a humanist funeral. Although her principal reason for seeking the exhumation and re-interment of her husband's remains was because she had moved elsewhere, her secondary reason was that it would be "hypocritical" for his remains to remain there interred. One might perhaps have thought that a humanist might have no objection to being buried in consecrated ground but if (as appears) on realising her mistake, she did indeed want her husband's remains to be re-interred elsewhere for reasons relating to religious beliefs (which evidently do include humanism), then one can see that Article 9 does justify exhumation to allow such exhumation and re-interment to proceed.

19. In the present case, unless permission for the exhumation of Tich Trinh Hong's remains be permitted, Mr Hong and his family will be unable to manifest their religious beliefs. Although the right to manifest such beliefs is not an unfettered one, I do not think the general arguments which otherwise strongly support the maintenance of the principle of the permanence of Christian burial in consecrated ground should prevail to prevent that manifestation. Finally, I note that the re-interment is to be into consecrated ground. It might perhaps be happier if it were into unconsecrated ground, but I can see that whether it be consecrated or not is now a matter of indifference to Mr Hong and his family, there being no foreseeable possibility of the further exhumation of Tich Trinh Hong's remains.



PHILIP PETCHEY
Chancellor

26 October 2015

