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Canon John Rees
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Your ref: VJHR/lth/05.5553/19093/13

Dear Canon Rees

THE REVEREND RICHARD COEKIN v THE LORD BISHOP OF SOUTHWARK

Thank you for your letter dated 18 May 2006 and for a copy of the draft Report of the Right Reverend the Lord Bishop of Winchester, both of which I received by email on 19 May 2006.

You have specifically not invited observations on the text of the draft Report, and I will refrain from doing so. In contrast, you have kindly invited me to address specific points to the Bishop of Winchester before he submits his Report to the Most Reverend the Lord Archbishop of Canterbury. The purpose of this letter is respectfully to make certain specific observations, on behalf of Mr Coekin.

Before doing so may I thank the Bishop of Winchester, the Vicar-General and yourself for the manner in which the hearing of the appeal was conducted and for the speed at which the Report has been prepared. May I also confirm that copies of the draft Report have been made available to Mr Coekin and his legal advisers and to no-one else.

The issues dealt with at paragraphs 24 – 29 (“Issues of Procedural Fairness”) and 30 – 37 (“The Merits of the Appeal”) of the draft Report are matters which Mr Coekin (through his legal advisors) was generally afforded an opportunity to address at the hearing on 2 and 3 May 2005¹. It is therefore gratifying to read

¹ I have used the word “generally” advisedly because, for example, the issues surrounding Canon B43, addressed at paragraphs 33 and 34 of the draft Report, were only coherently developed for the first time at the hearing by the Vicar-General. They had not been

that the Bishop of Winchester has found in Mr Coekin's favour on these issues, to the effect that (1) that the procedure leading up to the Bishop of Southwark's decision to revoke Mr Coekin's licence was seriously flawed and (2) that summary revocation of Mr Coekin's licence was inappropriate.²

Unfortunately, the same is not true of the additional matters dealt with at paragraphs 39 and 40 of the draft Report. These are matters which Mr Coekin has never been invited to address, either in his correspondence with the Bishop of Southwark, or in the pleadings, or at the hearing. Given the history of this matter, this is regrettable. The specific points this letter addresses arise out of these entirely new matters.

Five specific points are made. They are made on the assumption that the Archbishop will accept the advice of the Bishop of Winchester contained in the draft Report. Each should of itself lead to the decision of the Archbishop being reviewed by the High Court³, and the requirement of undertakings being set aside.

First, neither party has ever sought to suggest that it would or might be appropriate relief for the Archbishop to order that the revocation of Mr Coekin's licence be cancelled on condition that he gives written undertakings as to his future conduct. This course was not suggested by either party, either in the pleadings or at the hearing. As a consequence, a number of issues raised by the suggestion were not explored or tested in the pleadings or at the hearing. The issues which were not explored or tested include the Archbishop's jurisdiction under Canon C12(5), the question whether the relief would be legally appropriate in the circumstances of this case and the question whether the relief would be factually appropriate in the circumstances of this case. An additional consequence of the fact that the relief was not canvassed in the pleadings or at the hearing is that the width of the proposed conditions was not subjected to careful, or any, analysis and testing. Each of these failures of itself amounts to

addressed or even foreshadowed in the correspondence between the Bishop of Southwark and Mr Coekin and, as a consequence, like church planting were entirely irrelevant to the appeal. They had also not been addressed in the appeal pleadings. The "Response of the Respondent" did allege that "*if the ordination was not and did not purport to be a Church of England ordination then it was in breach of Canon 43.*" However, this was an allegation concerning the legality of the ordination, to which Canon B43 is irrelevant. Consequently, the point being made by reference to Canon 43 was not understood. Further, Canon B43 was not even referred to in the Skeleton Argument served on behalf of the Bishop of Southwark and the issue received only the most tangential of references. It is fair to say that the issue only gained any prominence during closing submissions at the appeal hearing in response to questions raised by the Vicar-General.

² In the light of these findings, Mr Coekin asks for an order that the Respondent pay the costs incurred by him personally (i.e. £3,000) in bringing this appeal.

³ This assumes, of course, that the decision of the Archbishop will be taken on review by Mr Coekin.

procedural unfairness contrary to the second of the principles of natural justice and will result in the requirement of the undertakings being set aside.

Secondly, I respectfully suggest that the Bishop has been (and, in turn, the Archbishop will be) wrongly advised that "*one course open to me is to recommend that the revocation should be cancelled on terms that [Mr Coekin] gives written undertakings to the [Bishop of Southwark] as to his future conduct*" (see paragraph 39 of the draft Report). Having concluded (rightly, I respectfully suggest) that the summary revocation was inappropriate, it is not open to the Archbishop to make the cancellation of the revocation conditional on written undertakings from Mr Coekin, whether in the terms specified at paragraph 40 of the draft Report or at all.

The jurisdiction afforded the Archbishop by Canon C12(5) is threefold: to "*confirm ... the revocation of the licence*", to "*vary ... the revocation of the licence*" or to "*cancel the revocation of the licence*". Of those three options, the Archbishop must select whichever is just and proper. Where the summary revocation has been found to be both flawed and unjustified, it is not just and proper to confirm the revocation. Nor is it just and proper to vary the revocation, since varying the revocation assumes that the revocation should stand, albeit on different terms. The only other option is to cancel the revocation, which is just and proper where the revocation was both flawed and unjustified. The Canon grants no jurisdiction to attach terms or conditions to the cancellation of an inappropriate revocation.

The advice given to the Bishop of Winchester involves the implication of new words into Canon C12(5) so that it reads "*... the archbishop may confirm, vary or cancel the revocation of the licence on such terms as he considers just and proper; ...*". The implication of these new words is unnecessary to make sense of the Canon and cannot be justified.

These contentions are consistent with the judgment and decision of the Most Reverend the Lord Archbishop of York in ***Brown v The Bishop of Carlisle***. In that case the Archbishop of York, in the exercise of his power to "*vary ... the revocation of the licence*", made the revocation subject to directions which he considered appropriate. It would not have been open to him to impose directions if he had concluded that the revocation was inappropriate.

As the Archbishop lacks the jurisdiction under Canon C12(5) conditionally to cancel the revocation of Mr Coekin's licence, any requirement of the undertakings would be set aside by the High Court on review.

Thirdly, even if, contrary to the above, the Archbishop does have jurisdiction conditionally to cancel the revocation of Mr Coekin's licence, it is not legally appropriate to do so in the circumstances of this case.

The legal powers, duties and responsibilities which Bishops and priests in the Church of England owe *inter se* have been developed over hundreds of years. A

balance has been struck which enables each to perform his duties efficiently and effectively, but which at the same time restrains each from overreaching himself. The duties and responsibilities of a priest to his Diocesan Bishop are encapsulated, in particular, within the concept of canonical obedience which the former undertakes to the latter. The concept of canonical obedience provides both the content of and the limits to the duty. Thus, a Bishop can legally require a priest within his Diocese to do that which the Canons require and to refrain from doing that which the Canons forbid. He would be overreaching himself, however, to insist on more, and the law will not enable or permit him to do so.

If the undertakings set out at paragraph 40 of the draft Report are undertakings which the Bishop of Southwark is permitted by Canon to require of Mr Coekin, then they are legally unnecessary. Mr Coekin has previously given an undertaking of canonical obedience and he has repeated the undertaking in the context of this appeal.

On the other hand, if the undertakings set out at paragraph 40 of the draft Report are undertakings which Canon law does not authorise the Bishop of Southwark to require of Mr Coekin, then they are legally inappropriate. Requiring them of Mr Coekin would upset the balance of the relationship between a priest and his Bishop, a balance which has developed over hundreds of years, and would accordingly be legally unjustifiable.

The Bishop of Winchester specifically declined to reach a conclusion on the scope of the duty of canonical obedience in the context of this appeal. He declined to reach a conclusion despite hearing detailed and unchallenged argument on behalf of Mr Coekin as to its true scope and effect. He is not and cannot be criticised for having declined to reach a conclusion on the matter. It was his right to decline to reach such a conclusion. However, having declined to do so, he is now not in a position to form a view whether the undertakings set out at paragraph 40 of the draft Report are undertakings which Canon law would authorise the Bishop of Southwark to require of Mr Coekin. Accordingly, the Bishop of Winchester has not considered whether Canon Law permits him to require the undertakings of Mr Coekin, or whether those undertakings would be a legally inappropriate encroachment of the freedoms which Canon Law affords Mr Coekin as a priest. In those circumstances, he cannot reasonably require the undertakings.

If the Bishop of Winchester had reached a conclusion on the scope of the duty of canonical obedience, he would (I suggest) also have concluded that neither undertaking is legally appropriate or defensible. The Canons do not forbid, nor do they give to a Diocesan Bishop power to forbid, the "involvement" of a priest without his express authority (1) in ordination services within the area of a Diocese or (2) in the ordination of persons of whatever Christian Church to serve within the area of the Diocese. Nor do the Canons require priests "*strictly to abide by all general or specific directions given by* [his or her Diocesan Bishop]

concerning church planting or mission initiatives" or empower Bishops to require it. The powers of Bishops in the Church of England are not unfettered.

It is inappropriate to require undertaking (ii) for yet further reasons, *inter alia*:

- (1) At an interlocutory stage in the appeal, the Bishop of Winchester decided (correctly) that a detailed enquiry into Mr Coekin's church planting activities was irrelevant to the appeal and would be inappropriate. The Bishop of Winchester's reason for reaching this conclusion is identified at paragraph 7 of the draft Report: this area of dispute has "*no immediate relevance to the appeal*". As a consequence the topic was avoided at the hearing ("*Both the Appellant and the Respondent have ... exercised restraint in avoiding those topics which I had ruled to be irrelevant*". See paragraph 9 of the draft Report). Technically, the Bishop of Southwark conceded the point. In these circumstances, it cannot be legally appropriate for the Archbishop to make the cancellation of the revocation of Mr Coekin's licence conditional on undertakings by Mr Coekin as to his future church planting activities. As the Bishop of Winchester has found and the Bishop of Southwark has conceded, Mr Coekin's church planting activities are irrelevant. The cancellation of the revocation of his licence cannot be made dependent upon an undertaking in respect of irrelevant future conduct.
- (2) There was no detailed enquiry into Mr Coekin's church planting activities at the hearing of the appeal. Accordingly, there is no basis in law for any suggestion that Mr Coekin has done anything improper or in breach of canon law in this regard, and there can be no legal basis for requiring of him in the future that he "*strictly abide by all general and specific directions given by the Bishop of Southwark concerning church planting or mission initiatives*".

Fourthly, even if requiring an undertaking as a condition of cancelling the revocation of a priest's licence could be justified in law (and, for the reasons given above, I respectfully suggest it cannot), it could only ever be justified on the basis of a finding of fact to the effect that the priest had acted in breach of Canon Law. Further, it could only justifiably require the priest to undertake to desist from the same breach or breaches in the future. It could not justifiably require the priest to desist from different or unrelated conduct.

Dealing in turn with each of the undertakings which it is said Mr Coekin "*ought properly to give*":-

- (1) The Bishop of Winchester has not found that, by the part he played in the ordinations, Mr Coekin acted in breach of canon law. He has found that the service of ordination was conducted in breach of canon law, because it was not a lawful act of worship in a Church of England parish church. He has also found Mr Coekin bore some (unspecified) degree of responsibility for "*the resultant breach of Canon Law*" (at the same time as finding that

Mr Coekin's "complicity" in a breach of Canon Law was not such as to make summary revocation a proportionate outcome). However, the findings fall short of a finding that Mr Coekin acted in breach of canon law. Without such a finding there is no factual basis for the suggestion that Mr Coekin "*ought properly to give*" undertaking (i). The question, what has Mr Coekin done that makes the undertaking appropriate, is not answered, nor is it capable of a satisfactory answer.

- (2) As regards undertaking (ii), there was no admissible evidence before the Bishop of Winchester which gave any credence to the allegations of church planting made by the Bishop of Southwark in his pleading. Once again, the question, what has Mr Coekin done that makes the undertaking appropriate, is not answered and it is not capable of a satisfactory answer.

Accordingly, there are no findings of fact which could make it appropriate to impose either undertaking.

The principles of natural justice are also relevant in this context. There is no finding that Mr Coekin has "stepped out of line" in relation to his church planting activities. Nor has Mr Coekin ever been given the opportunity to defend himself against the allegations contained in the Bishop of Southwark's pleading in relation to church planting, all of which allegations he denies. At the direction of the Bishop of Winchester, the allegations have simply never been explored. In those circumstances, it is contrary to the principles of natural justice to proceed as if Mr Coekin has somehow "stepped out of line" (when, in fact, he has not) by requiring an undertaking in relation to his church planting activities. To require such an undertaking would be contrary to natural justice and unfair.

Fifthly, the undertakings are drafted in unjustifiably wide terms and lack clarity, and would be reviewable for both these reasons. For present purposes, it will suffice to give only a few examples. Many more could be given.

- (1) The undertakings are unlimited in time.
- (2) The undertakings will continue in force even if Mr Coekin ceases to hold office in the Diocese of Southwark.
- (3) Assume Mr Coekin becomes involved in ecumenical collaboration with a local Romanian Orthodox man who is soon to be priested, and assume further that Mr Coekin is invited to attend and read a lesson at the ordination. The undertakings would enable the Bishop of Southwark to refuse to permit Mr Coekin to do so.
- (4) The Bishop of Southwark could give a direction to Mr Coekin concerning "church planting" or "mission initiatives" which required Mr Coekin to act in breach of Canon Law, and Mr Coekin would be obliged to comply with the direction.

- (5) The Bishop of Southwark could give a direction to Mr Coekin concerning "church planting" or "mission initiatives" outside the Diocese of Southwark, for example in the Diocese of London, which required Mr Coekin to act contrary to an express agreement reached between Mr Coekin and the Bishop of London or contrary to an express right or licence conferred by the Bishop of London upon Mr Coekin.
- (6) The phrases "involvement in", "church planting" and "mission initiatives" lack clarity. The lack of clarity could lead to endless, undesirable future disputes.
- (7) It would not be proper (indeed, it would be quite improper) to require Mr Coekin strictly to abide by all directions given by the Bishop of Southwark concerning "*church planting*" and "*mission initiatives*". For example, it would be quite improper for the Bishop of Southwark to direct that Mr Coekin desist from all future church planting initiatives. It would be equally improper for the Bishop of Southwark to direct that Mr Coekin desist from speaking at or participating in outreach events, from running Alpha courses or from opening a centre for drug or aids orphans. The undertakings as currently drafted permit the Bishop of Southwark to give these directions.

It is also instructive to view the result of the appeal in the round. On the one hand, the Bishop of Southwark has been found to have overreached himself, but is required to give no undertakings as to his future conduct. On the other hand, Mr Coekin has not been found to have overreached himself, yet is required to give undertakings as to his future conduct. One may be forgiven for concluding that the parties' respective successes are not reflected in the result.

Finally, the pastoral consequences of the undertakings should not be overlooked. Imposing the undertakings is likely to have a negative, rather than a positive, effect on the future relationship between the Bishop of Southwark and Mr Coekin. As Mr Coekin made clear at the hearing, he earnestly desires to be at peace with the Bishop of Southwark. Further, his oath of canonical obedience stands. If the relationship between them is to be re-built, it will need to be re-built on prayer, discussion and trust, not on unreasonable, unjustifiable and unilateral undertakings. As I have already said, the Church of England has carefully, over centuries, achieved a balance between the legal powers, duties and responsibilities which Bishops and priests owe *inter se*. These have proved sufficient in the past and there is no basis for thinking that they will prove insufficient in the future.

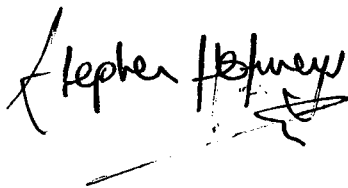
In conclusion I should say that there are also matters addressed in the earlier paragraphs of the draft Report with which Mr Coekin would take issue, and there are a number of contentions advanced at the hearing which have not been addressed in the draft Report. Mr Coekin reserves the right to raise hereafter any and all contentions which are open to him.

Of particular relevance to the issues concerning paragraphs 39 and 40 of the draft Report raised above is the conclusion at paragraph 29 of the draft Report which was to the effect that a breach of natural justice in the context of an appeal under Canon C12(5) does not of itself call for the appeal to be allowed as of right. With respect, the conclusion is wrong in law and paragraph 106 of the Judgment in **Brown** provides no support for it⁴. Canon C12(5) does not and cannot remove the effect which a breach of natural justice has in law. Where a discretionary decision is made in breach of natural justice, the decision is void as a matter of law.

I thank you for the opportunity to make these observations on behalf of Mr Coekin. I am sorry to have to burden you with further submissions, but paragraphs 39 and 40 of the draft Report raise fundamental issues, including as to the scope of the Archbishop's jurisdiction under Canon C12(5) and as to the considerations which, as a matter of natural justice, the Archbishop may properly take into account. It would be unfortunate if the second stage of the procedure laid down by Canon C12(5) unwittingly turned out to be as flawed as the first.

I would, of course, be very happy to clarify or amplify any aspect of this letter should the Bishop of Winchester wish me to do so.

Yours sincerely



STEPHEN HOFMEYR QC

Cc Nigel Seed QC

⁴ Paragraph 106 of the Judgment in **Brown** was directed to a different point, namely, the contention that an appeal under Canon C12(5) is limited to a review. The Archbishop of York correctly held that an appeal under Canon C12(5) is not so limited. On any view paragraph 106 is not authority for the proposition that a breach of natural justice in the context of the revocation of a licence under Canon C12(5) does not *per se* render the revocation void.