

Ref: MOR10086

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 24/10/2016

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**APPEAL BY WAY OF CASE STATED FROM A DECISION OF THE PRESIDING
DISTRICT JUDGE (CIVIL)**

Between:

GARETH LEE

Plaintiff/Respondent;

And

COLIN McARTHUR, KAREN McARTHUR AND

ASHERS BAKING COMPANY LIMITED

Defendants/Appellants

Before: Morgan LCJ, Weatherup LJ and Weir LJ

MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal by way of case stated from a decision of District Judge Brownlie whereby she found that the appellants directly discriminated against the respondent on the grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations (NI) 2006 ("the 2006 Regulations") and on the grounds of religious and political belief contrary to the Fair Employment and Treatment (NI) Order 1998 ("the 1998 Order"). Mr Scofield QC appeared with Professor

McCrudden and Ms Crowther for the appellants, Mr Allen QC for the respondent and the Attorney General appeared with Ms Tremlett.

Background

[2] The respondent is a gay man and is associated with an organisation called QueerSpace which is a volunteer led organisation for the lesbian, gay, bisexual and transgender ("LGBT") community in Northern Ireland. There has been discussion in the Northern Ireland media as to whether the Assembly should introduce legislation, similar to that in England, Wales and Scotland, which would enable same-sex couples to marry. Motions calling for the introduction of same-sex marriage in Northern Ireland have been debated in the Assembly on four separate occasions and on each occasion the motion has been defeated. The last vote occurred on 2 November 2015 and although the motion achieved a majority of one it was defeated under the Petition of Concern mechanism in the Assembly.

[3] The third appellant, Ashers Bakery, is a limited company. It does not have any religious objectives in its Memorandum and Articles of Association although it is common case that its name derives from a passage in the Bible, Genesis 49:20: "*Bread from Asher shall be rich, and he shall yield royal dainties*". The first and second appellants are directors of the company. They are Christians who oppose the introduction of same-sex marriage as they believe that it is contrary to God's law.

[4] Ashers Bakery provides a customised cake making service. If the customer provides the bakery with a picture, that image can be scanned and put onto the cake. There are two members of staff trained to use the computer system and to place the icing on the cake. At the beginning of week commencing 4 May 2014 the respondent came to the third appellant's Royal Avenue premises in Belfast and made a general enquiry about ordering a cake. He was shown a leaflet by the second appellant showing various celebration cakes for birthdays, football teams, businesses and Halloween. The respondent said that he was from a small voluntary group and wanted a cake with a logo on it. The second appellant told him that if he brought the logo in it could be scanned and put on the cake. There was no other discussion about the content of the logo or the nature of the respondent's group.

[5] The respondent wanted the cake for a private event on Friday 17 May 2014 to mark the end of 'Northern Ireland Anti-homophobic Week' and to mark the political momentum towards same-sex marriage legislation. On 8 or 9 May 2014 he returned to the premises and placed an order with the second appellant for a customised cake for the event. The details of the type of cake and colour of icing were taken and the respondent then gave the third appellant an A4 sheet with a colour picture of 'Bert

and Ernie' (the logo for QueerSpace) with the headline caption, "Support Gay Marriage".

[6] On Monday 12 May 2014 the second appellant, after discussion with the first appellant and her family, telephoned the respondent indicating that the order could not be fulfilled as the bakery was a "Christian business" and that she should not have accepted the order. The appellants accept that the order was cancelled because of their religious beliefs as they are opposed to a change in the law regarding gay marriage which they regard as sinful. The respondent was given a refund and he was able to secure a similar cake from another outlet in time for the event.

The proceedings

[7] After an exchange of correspondence between the Equality Commission for Northern Ireland and the appellants in which the appellants rejected a request to provide an acknowledgment that there had been a breach of equality laws and to make a modest payment of damages to the respondent a Civil Bill was issued on 6 November 2014 claiming damages for breach of statutory duty in and about the provision of goods, facilities and services.

[8] The following are the relevant provisions of the 2006 Regulations:

"3. –(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if-

(a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons...

(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other....

5. –(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services-

(a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in

the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person seeking belongs to a section of the public) to other members of that section....

23. –(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

(2) Anything done by a person as agent for another person with the authority of that other person shall be treated for the purposes of these Regulations as done by that other person as well as by him."

[9] The corresponding provisions of the 1998 Order are as follows:

"3. - (1) In this Order "discrimination" means-

(a) discrimination on the ground of religious belief or political opinion..

and "discriminate" shall be construed accordingly.

(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order... if-

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons...

28. - (1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services-

(a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section.

36. - (1) Anything done by a person in the course of his employment shall be treated for the purposes of this Order as done by his employer....”

[10] The case came on for hearing before the Presiding District Judge, Judge Brownlie. She accepted that the first and second appellants had a Christian belief which was genuinely and sincerely held. The appellants were not, however, a religious organisation and could not avail of the specific exemption for such organisations in Regulation 16 of the 2006 Regulations. They conducted a business for profit. For the reasons set out by her the judge concluded that the appellants had the knowledge or perception that the respondent was gay and/or associated with others who were gay. She considered that what the respondent wanted the appellants to do would not require them to promote or support gay marriage which was contrary to their deeply held religious beliefs

[11] She did not take issue with the submission that the appellants would have supplied a cake without the message “support gay marriage” and would also have refused an order from a heterosexual customer whose order included the same message as that sought by the respondent. Having examined the authorities she said at paragraph [42]:

“...it is my view that, if a comparator is required, the correct comparator is a heterosexual person placing an order for a cake with the graphics either “Support Marriage” or “Support Heterosexual Marriage.”

What is required is proof of a factual matrix of less favourable treatment on the ground of sexual orientation and not the motive. I regard the criterion to be “support

for same sex marriage” which is indissociable from sexual orientation. There is also an exact correspondence between the advantage conferred and the disadvantage imposed in supporting one and not the other.”

[12] The judge determined that the appellants cancelled the order as they opposed same sex marriage for the reason that they regarded it as sinful and contrary to their genuinely held religious beliefs. Same sex marriage is inextricably linked to sexual relations between same sex couples which is a union of persons having a particular sexual orientation. The respondent did not share the particular religious and political opinion which confined marriage to heterosexual orientation. This amounted to direct discrimination contrary to Regulation 5(1) of the 2006 Regulations. She addressed indirect discrimination in the following terms:

“If I had not reached a finding of direct discrimination but found there was indirect discrimination, I would have concluded that there was no justification.”

[13] In relation to the claim for discrimination on the ground of political opinion, the judge noted the 1998 Order did not provide a definition of political opinion. The judge adopted the analysis contained in the authorities (see McKay v Northern Ireland Public Service Alliance [1994] NI 103) that political opinion means opinion relating to the policy of government and matters touching upon government. In light of the ongoing political debate as to whether the Assembly should legislate on same-sex marriage, the judge found that the respondent’s support for same-sex marriage was a political opinion.

[14] She considered the appropriate comparator to be the same as that used in the sexual orientation claim. The judge said that the relevant criterion was again “support for same-sex marriage” which, in the context of the political debate ongoing in Northern Ireland at the time, was indissociable from the political opinion of those who supported it. Moreover, there was an exact correspondence between the disadvantage imposed for supporting gay marriage and not doing so. The judge concluded that the second and third named appellants disagreed with the religious belief and political opinion held by the respondent with regard to the change in law to permit gay marriage and, accordingly, they treated him less favourably by refusing to provide him with the service sought. In those circumstances the appellants had directly discriminated against him.

[15] Even if she had been persuaded that the appellants had not been aware of the respondent’s religious belief and/or political opinion, the judge said that the appellants nevertheless discriminated against him by treating him less favourably on

the grounds of their own religious beliefs and political opinion (see Ryder v Northern Ireland Policing Board [2007] NICA 43). The judge further said that if she had not reached a finding of direct discrimination but of indirect discrimination, she would have found it to be unjustified.

[16] She then considered the application of the Human Rights Act 1998. The second and third named appellants had a Christian belief which was genuinely and sincerely held. Article 9 was engaged. The manifestation of that belief was circumscribed by Article 9(2). In the present case those limitations were prescribed by law in the form of the 2006 Regulations and the 1998 Order with the legitimate aim of prohibiting discrimination against a minority group because of the beliefs of a majority group on the basis of a protected characteristic.

[17] Having considered the authorities in relation to the application of the proportionality test and the balancing exercise necessary with regard to Article 9 ECHR, the judge considered whether she was required by section 3 of the Human Rights Act 1998 to read down the relevant legislative provisions so as to include, in addition to the exemption already contained in Regulation 16, reasonable accommodation for the manifestation of the appellants' beliefs.

[18] In rejecting that approach, the judge adopted the approach of Lady Hale in Bull v Hall [2013] UKSC 73. She determined that the relevant anti-discrimination provisions were necessary in a democratic society and were a proportionate means of achieving the legitimate aim of protecting the rights and freedoms of the respondent. To do otherwise would be to allow a religious belief to dictate what the law is. The first and second appellants were entitled to continue to hold their genuine and deeply held religious beliefs and to manifest them, but this must be done in accordance with the law and that included not manifesting them in the commercial sphere if the manner of doing so was contrary to the rights of others.

[19] In relation to the appellants' argument that Article 10 ECHR prevented them from being compelled to express the respondent's view or appear to give support to it, the judge cited Gilberg v Sweden [2012] ECHR 41723/06 in which the Grand Chamber held that the negative right to freedom of expression must be addressed in the circumstances of the given case. Having made the finding of fact that the appellants were not required to support, promote or endorse the respondent's viewpoint, the judge went on to find that, in any event, the anti-discrimination provisions in the relevant legislation were a proportionate interference permitted under Article 10(2).

The questions

[20] The case stated initially included the following questions:

(a) Was I correct as a matter of law to hold that the appellants had discriminated against the plaintiff directly on grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations (NI) 2006?

(b) Was I correct as a matter of law to hold that the appellants had discriminated against the plaintiff directly on grounds of religious belief or political opinion contrary to the Fair Employment and Treatment (NI) Order 1998?

(c) Was I correct as a matter of law to hold that, had I not considered the case to give rise to direct discrimination on any of the above protected characteristics, alternatively I would have held that the same amounted to indirect discrimination contrary to either the 2006 Regulations and/or the 1998 Order which was not justified by the defendants?

(d) Was I correct as a matter of law to hold that it was not necessary to read down or disapply the provisions of the 2006 Regulations or the 1998 Order to take account of the appellants' protected right to hold and manifest their genuinely held religious belief that marriage is, according to God's law, between one man and one woman, pursuant to Article 9 ECHR?

(e) Was I correct as a matter of law to hold that if Article 10 ECHR was engaged, the prohibitions in the 2006 Regulations and the 1998 Order were within the permissible limitations and should not be read down?

(f) Was I correct as a matter of law to hold that the first named appellant was not entitled to protection as a result of the rights under Article 9 and/or 10 ECHR?

A further question in the following terms was added:

(g) Was I correct as a matter of law (that is to say, did I act without any evidence, upon a view of the facts which could not reasonably be entertained, irrationally and/or perversely) in finding that the Defendants "*did have the knowledge or perception that the Plaintiff was gay and/or associated with others who are gay*" (at paragraph [39] of my judgment) in light of the reasoning contained in my judgment.

[21] We can deal briefly with two of these questions. It is common case that there was no material which would have enabled the judge to come to a conclusion on indirect discrimination and in any event she made no finding of indirect discrimination in her judgment despite the terms of the case stated. This was always

presented as a direct discrimination case and we do not, therefore, intend to answer question (c).

[22] Secondly, although it is clear that the judge spent some time explaining her conclusion that the appellants had knowledge or perception either consciously or unconsciously that the respondent was gay or associated with others who were gay she did not rely on that finding in her conclusion. At paragraph [43] of the judgment the judge found that the appellants cancelled the order as they opposed same sex marriage. She made no finding that the order was cancelled because the respondent was perceived as being gay. We do not accept Mr Allen's submission that we should in some way read her judgment as if she had so found. If she had come to that view it was the most straightforward case of direct discrimination and that would undoubtedly have been plainly expressed by her. We conclude, therefore, that the finding was not material to her determination and that we do not need to answer the question at (g).

The appellants' submissions

[23] The appellants submitted that this was not a case about the supply of the cake but rather a case about the slogan, "Support Gay Marriage" on the cake. The judge accepted that the second and third appellants had genuine deeply held religious beliefs and the question was whether they were entitled to hold and manifest those beliefs in the commercial sphere. They would have supplied a different cake to the respondent and would have refused to supply the same cake to a heterosexual person.

[24] The judge identified a heterosexual person ordering a different cake as the comparator. She changed both the sexual orientation of the person and the message. That was an inappropriate comparator. The true comparator was a heterosexual person seeking the same cake. That comparator would have been treated no differently. There was, therefore, no less favourable treatment. The criterion identified by the learned trial judge at paragraph 42 of her judgement was "support for same-sex marriage". The judge held that this criterion was indissociable from sexual orientation. She stated that there was an exact correspondence between the advantage conferred and the disadvantage imposed. That was clearly wrong. Many heterosexual people support gay marriage and some gay people oppose gay marriage.

[25] Mr Scofield accepted that there was an established line of cases supporting the principle of associated discrimination. Many of those cases were reviewed in English v Thomas Sanderson Blinds Ltd [2008] EWCA Civ 1421 where by a majority that court concluded that the appellant succeeded in a claim for harassment on the

grounds of sexual orientation when he had been repeatedly tormented as being gay when his workmates knew that he was not. It was submitted, however, that in each case there was clear evidence of discrimination on a prohibited ground in the actual service or conditions of employment that the discriminator provided. In this case an objection to gay marriage was perfectly lawful and not analogous to discrimination.

[26] At paragraph 43 of her judgement the judge correctly stated that the appellants cancelled the order as they opposed same-sex marriage because they regarded it as sinful and contrary to their genuinely held religious beliefs. The appellants accepted that support for same-sex marriage is related to sexual orientation but the fact that the message included sexual orientation “in the mix” is not enough to establish direct discrimination on the grounds of sexual orientation. Direct discrimination required a difference of treatment of persons as distinct from a difference of treatment in relation to an inanimate object such as a cake. The motivation for the difference in treatment was not relevant. The appellants drew support for their position from paragraph 4.7 of “Getting Equal”, the paper published by OFMDFM proposing the 2006 Regulations, which stated that in direct discrimination cases courts will usually consider how an individual with a different sexual orientation would have been treated in the same circumstances.

[27] In determining the issue of political and religious belief discrimination the judge relied on the observations of Girvan LJ in Gill v Northern Ireland Council for Ethnic Minorities [2001] NIJB 289 and Kerr LCJ in Ryder v Northern Ireland Policing Board [2007] NICA 15 for the proposition that she could take into account the political or religious opinion of the appellants. Mr Scofield submitted that such an approach was wrong in principle as the focus of Article 3(2) of the 1998 Order was on the characteristics of the person the subject of the alleged discrimination and the comparator provisions in the remainder of that Article supported that approach. In this case the appropriate comparator was a person with a different political message. There was no finding in respect of such a comparator. He also relied upon section 45 of the Equality Act 2006, now repealed, which specifically excluded reliance on the religion of the alleged discriminator in the religious discrimination provisions of that Act.

[28] The appellants also contended that Redfearn v Serco [2006] EWCA Civ 659 supported the proposition that discrimination on the prohibited grounds was based on the characteristics of a person. That was a case in which an employee in a company providing transport services for a public authority was elected as a BNP councillor. The majority of the passengers were Asian as were a minority of the workforce. The company dismissed the employee on the basis that he presented a risk to health and safety. At paragraph 36 of the decision Mummery LJ analysed

discrimination “on racial grounds” in the context of the Showboat Entertainment Centre Ltd v Owens [1984] ICR 65 line of authorities by reference to the characteristics, real or imagined, of individuals or those with whom they associated. It was submitted that this supported the submission that discrimination had to involve some difference of treatment based on some real or imagined personal characteristic.

[29] The second submission flowing from Redfearn concerned the breadth of the causal connection contemplated by the phrase “on racial grounds”. In Redfearn the court accepted that the circumstances in which the decision was taken to dismiss included racial considerations but the fact that a relevant racial consideration was a circumstance leading up to his dismissal did not lead to the conclusion that he was dismissed on racial grounds. Similarly the fact that sexual orientation was “in the mix” did not lead to the conclusion that the refusal to make the cake was on the grounds of sexual orientation.

[30] A further point made on behalf of the appellant concerned the interpretation of Article 5(1)(b) of the 2006 Regulations. That provision prohibits the provider of services from “refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public”. It was submitted that this request for a polemical message was a request for goods and services outside what was normal for this business. It was acknowledged that this point was not argued in this way below and there was an application to amend the notice of appeal to reflect that.

[31] If, contrary to his submissions, the court came to the conclusion that the application of the 2006 Regulations in the 1998 Order gave rise to discrimination on the grounds of sexual orientation or religious or political opinion Mr Scoffield submitted that the rights of the appellants under Articles 9 and 10 of the European Convention on Human Rights must be taken into account and consideration given to whether the legislation should be read down to accommodate those rights pursuant to section 3 of the Human Rights Act 1998 (the 1998 Act).

[32] The trial judge rejected that submission but it was contended that she was in error first, because she failed to recognise an important difference of fact in that this was a promotion/compelled speech case engaging Article 10 of the Convention. Secondly, if the appellant’s argument on sexual orientation discrimination was correct then this was a case in which the rights under Articles 9 and 10 were to be balanced against the right to political opinion or religious belief of the respondent. In

rejecting the appellant's case on this issue the trial judge relied heavily upon the decision in Bull v Hall but that case was not concerned with either of those matters.

[33] Article 9 ECHR protects the right to freedom of thought, conscience and religion.

"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."

[34] Those freedoms are not limited to private acts of religious worship or collective acts by the organisation. They include the commercial sphere. Mr Scoffield submitted that if individuals were forced to provide goods with which they profoundly disagreed this was the antithesis of democracy. The refusal to bake the cake was the manifestation of a religious belief. Freedom of conscience was separately protected and had not been adequately reflected in the judge's reasoning.

[35] Article 10 of the Convention protects freedom of expression.

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[36] The appellants argued that they had a negative right not to be compelled to express themselves which had been accepted by the ECHR in Gillberg v Sweden (2012) 34 BHRC 247. In support of this submission the applicant relied upon a

number of authorities from the USA and Canada. The judge failed to take on board that even if the third appellant was not identified as the source of the cake in conscience the first and second appellants would know that they had contributed. Mr Scoffield relied upon the concept of the "advocacy of the messenger" suggested in the Fayette Circuit Court case of Hands on Originals Inc v Lexington Fayette Urban County Human Rights Commission.

[37] The judge found that the appellants were not required to promote or endorse any viewpoint. Mr Scoffield submitted that for the respondent this was a simple commercial transaction but for the appellants it was a betrayal of faith. Objectively the cake promoted gay marriage and clearly the appellants believed that it did so. They were entitled to respect for this belief. Requiring them to print or bake something in which they did not believe is not how compelled speech works.

[38] The judge was clearly heavily influenced by what she saw as the parliamentary balance struck by the legislation. Where ECHR rights are at issue the function of the courts is to strike the balance between competing rights paying due respect to the legislature. It is of significance that the Select Committee on Northern Ireland Affairs criticised the implementation of the 1998 Order. The committee noted that the Order was not first published as a proposal and did not consider that the procedures used in that case provided for adequate parliamentary scrutiny. The judge appears not to have realised that the 2006 Regulations were passed during a period when the Assembly was suspended. They were passed by negative resolution and there was no statement of conformity with the ECHR. Accordingly the degree of respect for Parliamentary judgement should be modified.

[39] The Attorney General made separate submissions on direct discrimination on the various statutory grounds and the role of the Convention in protecting the appellants which largely supported those of Mr Scoffield. In particular he contended that this was a case in which the appellants were compelled on pain of civil liability to articulate views hostile to their religious and political views. They were protected from such coerced speech by Article 10 ECHR and that was supported by some of the case law on Article 11. The respondent did not have an Article 8 right in this case as this was a commercial transaction in which the state was not involved. If there was direct discrimination on any of the alleged grounds that would call into question the constitutionality of the provision on which the finding was made.

The respondent's submissions

[40] The core submission advanced by Mr Allen was that the legislature and government had determined how the conflict of rights arising in this appeal should be resolved and formulated rules that worked in the commercial sphere. Where

there had been careful consideration of such issues by politicians the courts should be cautious about intervening. He contended that the appellants had widened the case in an attempt to focus on issues of forced speech and promotion or advocacy. He submitted that such a submission was not open on the evidence. He maintained that the jurisprudence from the United States was conflicting (see State of Washington v Arlene's Flowers 19 December 2014).

[41] The respondent submitted that "Support Gay Marriage" could be described as a slogan or message. It had real content for a large proportion of the gay community who would like to achieve that status. It was an important message and entitled to due respect. After the first instance judgement Ashers indicated that it would change its offer and provide this service only for birthday cakes. It was accepted that there was nothing discriminatory about that but it was submitted that if the offering was wide the business was compelled not to discriminate in the way it carried it out.

[42] The respondent contended that the message "Support Gay Marriage" was a statement of association with those of same-sex orientation. The statement was concerned with a class of persons which was uniquely of gay sexual orientation that wanted to have a civilly recognised union. That association was sufficient. The appellant sought to draw support from the decision of the Ontario Superior Court of Justice in Brockie v Ontario (Human Rights Commission) 222 DLR (4th) 174. The appellant was a printer who refused to print letterheads, envelopes and business cards for an organisation representing the interests of gays and lesbians. He relied on the Canadian Charter of Rights and Freedoms to argue that he should not be required to do so as he regarded sexual conduct as sinful. He appealed an order that he should provide the services and pay damages of \$5000. On appeal the court confirmed the original order but added a rider that for the future separate consideration had to be given to any requirement that conveyed a message proselytising and promoting the gay lesbian lifestyle which ridiculed his religious beliefs since that might be held to be in direct conflict with the core elements of his religious beliefs. Mr Allen contended that this decision in fact supported the principle that discrimination can be established as a result of the refusal to provide the message.

[43] The appellants contended for conscience clauses that would excuse them from liability. Mr Allen submitted that such an approach was opaque leading to judge introduced exceptions inconsistent with legal certainty. In commercial activity legal certainty was of the first importance. He placed particular emphasis on the consultation paper "Getting Equal" proposing the 2006 Regulations circulated in July 2006. That document indicated that the 2006 Regulations were intended to address the experience of lesbians and gay men who had been limited in their right of access

to essential services and the opportunity to play a full role in society because of their sexual orientation.

[44] The consultation document went on to say that the government did not intend to provide an exception from the prohibition on sexual orientation discrimination to allow businesses to limit access to their goods and services on the basis of an individual customer's actual or perceived sexual orientation. Providing a general exception of that sort would allow businesses that might currently discriminate against gay customers to continue that practice. Although the consultation document recognised the need for exemptions from the Regulations for religious organisations it was indicated that these would need to be clearly defined and limited to activities closely linked to religious observance or practices that arose from the basic doctrines of the faith. It was specifically indicated that activities provided by an organisation related to religion or belief, or by a private individual who had strongly held religious beliefs, where the sole or main purpose of the organisation offering the service was commercial were not to be exempt.

[45] It was submitted that the wider the offering the more difficult it is to make a human rights argument to protect a decision not to honour a contract or accept a contract. It was, of course, possible to limit the extent of the offer and if this was not indirectly discriminatory then human rights issues were unlikely to arise. The suggestion that it was impossible to rely on the religion and belief of the discriminator in determining the reason for the discrimination was not supported in any way by the legislation.

[46] The leaflet which the respondent had picked up on his first visit to the cake shop demonstrated various celebration cakes including a Halloween cake, birthday cakes and cakes celebrating the achievements of teams or businesses. It was common case that the range of cakes was very wide. On some of the cakes the Ashers brand had been inserted. There were a number of restrictions within the terms and conditions published on the internet for the supply of such cakes and although there was some discussion in the course of the hearing about blasphemous material we accept that the restrictions did not impinge on this order. No case was made at first instance that this order was outside the normal range of the offer and there was no basis for allowing an amendment to introduce that issue at this stage.

[47] The evidence was that the insertion of the Ashers brand was a choice made by the business in relation to those activities which they particularly supported. Mr Allen relied upon this to assist him in asserting that this was not a case in which Ashers was being forced to associate itself with a particular speech act. There were many examples of printers providing election posters and other political statements

none of whom could be said to be associated with the particular message. To provide the cake with the message was not forced speech because there was an offer to the public at large that Ashers would, subject to their terms and conditions, transfer an image onto the cake if requested to do so.

Consideration

Context

[48] The bare facts of this case might not suggest that it is a matter of any great moment. The respondent ordered a cake with the message "Support Gay Marriage" from the appellant bakers. Some days later they cancelled the order and refunded the cost. The respondent thereafter obtained a suitable replacement cake from another supplier. Those bare facts engage, however, the crucial issue of the manner in which any conflicts between the LGBT community and the faith community in the commercial space should be resolved within this jurisdiction.

[49] Northern Ireland has a large and strong faith community. The commitment to religion is fulfilled not just by regular worship but informs every aspect of the manner in which those of faith conduct their lives. Many of those are people who have played an active part in commerce and taken on leadership roles within the commercial world. It is plainly of importance to this jurisdiction that such people should continue to contribute to the well-being of the Northern Ireland economy and that there should be no chill factor to their participation.

[50] The LGBT community has endured a history of considerable discrimination in this jurisdiction. Homosexual acts in private between consenting males were criminalised until 1985. The effect was to diminish the participation of gay people in many aspects of our community life. Those who were gay were reluctant to expose their sexuality and some were subjected to blackmail and other intimidation. The potential for conflict between the rights of the LGBT community and the religious community has unfortunately long been a feature of public debate in Northern Ireland and it is notable that in Dudgeon v UK (1981) 4 EHRR 149 the ECHR recorded that the strongest opposition to the decriminalisation of homosexual acts between consenting males came from the religious community. It is obviously of importance that the LGBT community should feel able to participate in the commercial life of this community freely and transparently. All of this sets the context for this appeal.

Normality

[51] As appears at paragraph [30] above the appellant submitted that the request for a cake with the particular message on it did not fall within Regulation 5(1)(b) of the

2006 Regulations on the basis that the request for a cake with a polemical message was not a refusal to provide goods or services in the same manner as was normal for other members of the public. Essentially that point rested on the argument that the request in this case was so unusual that it did not fall within the services advertised by the third appellant.

[52] The submission depended on the interpretation of the offer made by the appellant company. There were limitations within the terms and conditions but they were not such as to exclude a cake of this type. There was nothing in the examples of cakes that would have suggested any such exclusion and the two conversations between the respondent and the second appellant when the enquiry was made and the cake was ordered did not lead to the conclusion that there was any such limitation. We do not accept, therefore, that the evidence supported the submission that the order placed on this occasion lay outside the normal range of products offered. There was, therefore, no proper basis upon which to allow the proposed amendment of the notice of appeal on this issue.

Direct Discrimination on the grounds of sexual orientation

[53] Shamoon v Chief Constable [2003] UKHL 11 was a case in which there was an allegation of direct discrimination on the grounds of sex in which the statutory provisions mirrored those in this case. Lord Nicholls giving the lead judgement indicated that the statute contained essentially a single question: did the claimant, on the prescribed ground, receive less favourable treatment than others? He noted that there had been a practice on the part of tribunals to consider first whether the claimant received less favourable treatment than the appropriate comparator and secondly whether that was on the relevant prescribed ground. Where the identity of the relevant comparator was a matter of dispute this could give rise to needless problems and sometimes the less favourable treatment issue could not be resolved without at the same time deciding the reason why issue.

[54] Bull v Hall [2013] UKSC 73 was a case in which the Supreme Court had to deal with the distinction between direct and indirect discrimination. The respondents were civil partners who booked a double bedroom for two nights in a private hotel. The hoteliers were devout Christians and so only provided double bedroom accommodation to heterosexual married couples. Accordingly they declined to honour the booking and the respondents found alternative accommodation at another hotel.

[55] Lady Hale gave the majority judgement and she relied on the opinion of Advocate General Sharpston in Bressol v Gouvernement de la Communité Française [2010] 3 CMLR 559 at 56:

"I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification."

The majority concluded that the concept of marriage being applied by the appellants was the Christian concept of the union of one man and one woman. Regulation 3 (4) of the relevant statutory provision was interpreted as providing that people who are married and those who are civil partners are to be regarded as similarly situated. The criterion applied by the appellants was that the legal relationship between the couple, civil partnership, was not that of one man and one woman, a criterion indistinguishable from sexual orientation. The discrimination was, therefore, direct.

[56] Lady Hale considered that Advocate General Sharpston was building on the opinion of Advocate General Jacobs in Schnorbus v Land Hessen [2000] ECR I-10997 at paragraph 33:

"The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected."

[57] Mr Allen accepted that this is not a Bressol case where the comparator was another person receiving the same service but rather submitted that this was a case of associative direct discrimination. Associative direct discrimination has been long recognised in domestic jurisprudence as evidenced by English v Thomas Sanderson Blinds Ltd to which reference was made at paragraph 25 above. Mr Scoffield submitted that in order to establish direct discrimination it was necessary to establish some protected personal characteristic and that such a characteristic could not be established by a difference in treatment in respect of a message on a cake.

[58] We do not accept the latter part of that submission. The benefit from the message or slogan on the cake could only accrue to gay or bisexual people. The appellants would not have objected to a cake carrying the message "Support Heterosexual Marriage" or indeed "Support Marriage". We accept that it was the use of the word "Gay" in the context of the message which prevented the order from being fulfilled. The reason that the order was cancelled was that the appellants would not provide a cake with a message supporting a right to marry for those of a

particular sexual orientation. That was the answer to the “reason why question” that Shamoon said should be asked. There was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community. Accordingly this was direct discrimination.

The Human Rights Arguments

[59] There was no serious dispute that the structure of the 2006 Regulations was to make it unlawful for a person to discriminate on the grounds of sexual orientation in the provision of goods, facilities or services to the public. The Regulations made specific provision in Regulation 16 for organisations relating to religion or belief so as to ensure that such organisations should not find that certain specified activities were rendered unlawful. The structure implemented the proposal to outlaw sexual orientation discrimination in the provision of goods and services in Northern Ireland set out in “Getting Equal”. That document expressly stated that it was not acceptable for someone to be discriminated against in the provision of goods and services because of their sexual orientation.

[60] It was submitted, however, that in light of the impact upon the Convention rights of the appellants it was necessary either to read down the provisions of the 2006 Regulations so as to respect those rights or alternatively to disapply the provisions of the 2006 Regulations on the basis that they were incompatible with the appellants’ Convention rights.

[61] The first Convention right in play is the right to freedom of thought, conscience and religion and the qualified right to manifestation of those beliefs protected by Article 9 ECHR. The striking of the balance between the prohibition of discrimination on the grounds of sexual orientation in the provision of goods, facilities and services and the protection of religion, belief and conscience was considered in Bull v Hall. It was accepted in that case that the policy of refusing a double bedroom to unmarried couples was a manifestation of the hoteliers’ religious beliefs. The importance to be attached to that right in a democratic society was acknowledged by the Supreme Court relying on the following passage in Bayatyan v Armenia (2011) 54 EHRR 467:

“The Court reiterates that, as enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make

up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.”

[62] As in Bull v Hall it is clear that the limitation on the Article 9 rights of the appellants is in accordance with law and pursues a legitimate aim being the rights of the respondent under the 2006 Regulations. The issue is whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. On that issue there were four matters considered by Lady Hale with whom the rest of the Supreme Court agreed.

[63] First, in that case the less favourable treatment found by her was between those who had entered into a civil partnership and those who had married. Because same-sex couples could enter into a mutual commitment which was the equivalent of marriage the suppliers of goods, facilities and services had to treat them in the same way. The appellants correctly pointed out that there was no legal provision for same-sex marriage in this jurisdiction and that what was at stake here was the ability within the commercial sphere to obtain a service which the customer could use to express support for a change of the law.

[64] Secondly, in that case there was a difference of treatment between same-sex couples and married couples. Allowing people to discriminate on that basis because of religious belief would be a licence to discriminate because they disagreed with the law. The same argument can be made in respect of the provision of a service in this case. To prohibit the provision of a message on a cake supportive of gay marriage on the basis of religious belief is to permit direct discrimination. If businesses were free to choose what services to provide to the gay community on the basis of religious belief the potential for arbitrary abuse would be substantial.

[65] Thirdly, the 2006 Regulations themselves describe how the conflicts arising in this case are to be resolved. The existence of strongly held religious beliefs was well-known to those proposing the Regulations. The form of the Regulations strongly suggested that the purpose was to go no further than the specific provisions in Regulation 16 in catering for those religious objections.

[66] Fourthly, it was recognised that the hoteliers were free to manifest their religion in many other ways but in particular they could change their offer in order to respect

those beliefs. The court found that they were free to continue to deny double bedrooms to same-sex and unmarried couples provided that they also denied them to married couples. In the same way it was open to the appellants to amend their offers so as to ensure that they continued to provide birthday cakes and other specified cakes of this nature which did not give rise to potential conflicts. On behalf of the Equality Commission Mr Allen indicated that there was no objection to this course provided that there was no indirect discrimination. We will return to that issue.

[67] In this case the appellants contended that there was an additional factor in that this was a case of forced speech and engaged the appellants' rights under Article 10 ECHR. It was not suggested that there was any approbation of the message on the face of the cake and the trial judge concluded that what the respondent wanted did not require them to promote or support gay marriage. There is no challenge to that conclusion directly in the questions before us and in any event we consider that the conclusion was undoubtedly correct. The fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either.

[68] The appellants relied, however, on the Canadian case of Brockie v Ontario Human Rights Commission [2002] 22 DLR (4th) 174 to which we have already referred at paragraph [42] above. The appellant in that case was asked to print letterheads, envelopes and business cards for a company which represented the interests of gays and lesbians. He refused to do so because he believed that sexual conduct was sinful and that he should not assist in the dissemination of information intended to spread the acceptance of a gay or lesbian lifestyle. He appealed against an order that he had directly discriminated on the grounds of sexual orientation, requiring him to pay damages and ordering him to provide the printing service that he provided to others.

[69] The Ontario Divisional Court upheld the order in relation to past conduct but noted that the objectives of the anti-discrimination provisions must be balanced against the appellant's right to freedom of religion and conscience. It concluded that the order as to future conduct might require the appellant to produce material that conveyed a message proselytising or promoting the gay and lesbian lifestyle or ridiculing his religious beliefs and that such material might reasonably be held to be in direct conflict with the core elements of the appellant's religious beliefs.

[70] We consider that this case is of limited assistance. First, there was no statutory background comparable to the 2006 Regulations where the legislature had struck a balance between the competing rights. Secondly, the reference to proselytising or

promoting the gay and lesbian lifestyle appears to suggest a context where the appellant would have been associated with the message. That is not this case. Thirdly, there was nothing required in this case which in any way would have ridiculed the deeply held religious beliefs of the appellants. Fourthly, there was nothing in that case to suggest any consideration of the breadth of the offer. Even on the appellants' case the issue of forced speech only arose because the appellants chose to provide a wide offer.

[71] We conclude that there is nothing in this case arising under Article 10 of the Convention which does not already arise under Article 9. The essence of the complaint under the latter article is the requirement to provide a message with which the appellants disagreed because of their deeply held religious beliefs. In the commercial sphere that is what the absence of direct discrimination can require, depending upon the offer. For the hoteliers in Bull v Hall the relevant Regulations similarly required them to provide a double bed to a couple in a civil partnership despite their strongly held religious beliefs.

[72] The proportionality assessment in this case points firmly to the conclusion that the 2006 Regulations should be interpreted in accordance with their natural meaning. The structure of the Regulations, the need to protect against arbitrary discrimination, the ability to alter the offer and the lack of any association of the appellants with the message all point that way. The arguments advanced by the parties at the hearing focused almost exclusively on the position under the 2006 Regulations. The same principles apply in relation to the issues under political and religious discrimination but in light of the way that the argument developed at the hearing and the focus on the issue of discrimination on the grounds of sexual orientation we do not intend to deal separately with the questions arising on those grounds.

Constitutional point

[73] In light of our conclusion it is necessary to address the constitutional point raised by the Attorney General.

[74] Further to the intervention of the Attorney General for Northern Ireland on 3 March 2016 the Court issued first of all a Devolution Notice pursuant to Schedule 10 paragraph 5 of the Northern Ireland Act 1998 and Order 120 of the Rules of the Court of Judicature (Northern Ireland) 1980 and secondly a Notice of Incompatibility of Subordinate Legislation under Order 121 Rule 3 A of the Rules (rather than section 5(1) of the Human Rights Act 1998 and Order 121 Rule 2 as stated in the Notice).

[75] The Devolution Notice stated the 'devolution issue' to be:

(1) Whether, in light of the prohibition of discrimination on the grounds of political opinion or religious belief contained in section 24(1)(c) and (d) of the Northern Ireland Act 1998, there was power to make, confirm or approve Regulation 5 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006; and

(2) Whether, in light of the prohibition in section 17 of the Northern Ireland Constitution Act 1973 on discrimination against any person or class of persons on the grounds of religious belief or political opinion, Article 28 of the Fair Employment and Treatment (Northern Ireland) Order 1998 is void.

[76] The Notice of Incompatibility of Subordinate Legislation stated the respondent's claim of discrimination by the appellants in refusing to supply goods, facilities and services, contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Fair Employment and Treatment (Northern Ireland) Order 1998 and noted the contention of the appellants that the respondent's claim violated the appellants' rights under Articles 9, 10 and/or 14 of the European Convention on Human Rights as being contrary to the religious beliefs and/or political opinions of the first and second appellants. The appellants invited the Court to read down the provisions of the 2006 Regulations and the 1998 Order in a manner which was compatible with those Convention rights, under section 3 of the Human Rights Act 1998 or, if that was not possible, to disapply the relevant provisions of the 2006 Regulations and the 1998 Order.

[77] The Attorney General contends that the operation of the 1998 Order in the present case is contrary to the anti-discrimination provisions in section 17 of the Northern Ireland Constitution Act 1973 and that the operation of the 2006 Regulations in the present case is contrary to the anti-discrimination provisions in section 24 of the Northern Ireland Act 1998.

[78] Provision for non discrimination in legislation was included in the founding of Northern Ireland by the Government of Ireland Act 1920 where section 5(1) provided a non discrimination clause in these terms - "In the exercise of their powers to make laws under this Act, the Parliament of Northern Ireland shall not make a law so as, directly or indirectly, to impose any disability or disadvantage, on account of religious belief" *Calvert's Constitutional Law in Northern Ireland* at page 255 refers to the remotest antecedents of section 5(1) in toleration clauses in early Anglo-Irish treaties and the Toleration Act of 1688. Parallels were drawn with the First Amendment of the Constitution of the USA as section 5 also included a clause

prohibiting the establishment of religion and a clause protecting freedom of religion. As to whether section 5 sought to erect a wall between Church and State or merely to prevent different treatment of a particular religious belief *Queckett's The Constitution of Northern Ireland Part 1* at page 30 interpreted the provision as prohibiting Parliament "... from making laws so as to interfere with religious equality; as, for instance, establishing or prohibiting the exercise of any particular form of religion, or making a discrimination as respects State aid between schools of different religious denominations." The marginal note to section 5 referred to the "prohibition of laws interfering with religious equality", which was relied on by Andrews LJ in O'Neill v NIRTB [1938] NI 104 as being section 5's "main purport".

Discrimination under the 1973 Act

[79] The Parliament of Northern Ireland established by the Government of Ireland Act 1920 was abolished by the Northern Ireland Constitution Act 1973 and a Northern Ireland Assembly was established. The 1973 provides -

"17(1) Any Measure, any Act of the Parliament of Northern Ireland and any relevant subordinate instrument shall, to the extent that it discriminates against any person or class of persons on the grounds of religious belief or political opinion, be void..."

23(1) For the purposes of this Part of this Act a Measure, an Act of the Parliament of Northern Ireland or any other instrument discriminates against any person or class of persons if it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland."

[80] The Northern Ireland Assembly established in 1973 was short lived. The Northern Ireland Act 1974 provided for the dissolution of the Assembly and made temporary provision for the government of Northern Ireland by direct rule. Schedule 1 paragraph 1 provided that during the 'interim period' Her Majesty may by Order in Council make laws for Northern Ireland. The Fair Employment and Treatment (NI) Order 1998 was made by Order in Council under Schedule 1 paragraph 1 of the Northern Ireland Act 1974.

[81] The anti-discrimination measures in sections 17(1) and 23(1) of the 1973 Act continued to apply to Orders in Council made under the Northern Ireland Act 1974. This legislative structure remained in place until replaced by the Northern Ireland

Act 1998. By that replacement there was a saving in Schedule 14 paragraph 21 of the 1998 Act for the operation of section 17 of the 1973 Act (read with section 23 of that Act) for extant Northern Ireland legislation, including Orders in Council under Schedule 1 of the 1974 Act. Hence the 1998 Order remains subject to the anti-discrimination provisions of the 1973 Act.

Discrimination under the 1998 Act

[82] The Northern Ireland Act 1998 established the modern constitutional arrangements for Northern Ireland and a new Northern Ireland Assembly. The 1998 Act provides:

“6(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly; and..

(2) A provision is outside that competence if any of the following paragraphs apply:

(c) *it is incompatible with any of the [ECHR] Convention rights*

(e) *it discriminates against any person or class of persons on the grounds of religious belief of political opinion.*

24(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act

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(a) *is incompatible with any of the [ECHR] Convention rights*

(b) *discriminates against a person or class of persons on the ground of religious belief or political opinion*

(c) *in the case of an act, aids or incites another person to discriminate against a person or class of person on that ground*

98(4) For the purposes of this Act, a provision of an Act of the Assembly or of subordinate legislation discriminates against any person or class of persons if it *treats that person or that class less favourably in any circumstances than other persons are treated in those*

circumstances by the law for the time being in force in Northern Ireland.

(5) For those purposes a person discriminates against another person or a class of persons if he *treats that other person or that class less favourably in any circumstances than he treats or would treat other persons in those circumstances.*"

[83] Difficulties emerged in the new political settlement and the Northern Ireland Act 2000 made provision for the suspension of devolved government in Northern Ireland. By the Schedule to the Act the legislative powers of the Assembly under the 1998 Act were exercisable by Her Majesty by Order in Council.

[84] The Equality Act (Sexual Orientation) Regulations (NI) 2006 were made under section 82 of the Equality Act 2006 during the suspension of the Northern Ireland Assembly and subject to negative resolution under paragraph 7(3) of the Schedule to the Northern Ireland Act 2000. As the Regulations were subject to negative resolution and did not amend primary legislation no Statement was required for the purposes of compliance with the European Convention on Human Rights. Hence the 2006 Regulations remain subject to the anti-discrimination provisions of the 1998 Act.

Interpretative provisions.

[85] The result is that the 1998 Order and the 2006 Regulations are subject to the discrimination provisions on the grounds of religious belief or political opinion. There is a 'reading down' provision in section 83 (1) of the Northern Ireland Act 1998 which provides -

“(1) This section applies where:

(a) any provision of an Act of the Assembly, or of a Bill for such an Act, could be read either –

(i) in such a way as to be within the legislative competence of the Assembly; or

(ii) in such a way as to be outside that competence; or

(b) any provision of subordinate legislation made, confirmed or approved, or purporting to be made,

confirmed or approved, by a Northern Ireland authority could be read either –

(i) in such a way as not to be invalid by reason of section 24 or

(ii) in such a way as to be invalid by reason of that section.

(2) The provision shall be read in the way which makes it within that competence or, as the case may be, does not make it invalid by reason of that section, and shall have effect accordingly.”

[86] Similarly, section 3 of the Human Rights Act 1998 also provides for the interpretation of legislation -

“(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

Section 21 provides that ‘subordinate legislation’ includes an Order in Council, with some exceptions that are not relevant for present purposes.

Religious belief or political opinion

[87] In McKay v Northern Ireland Public Service Alliance [1994] NI 103 Kelly J stated that political opinion means in broad terms an opinion relating to the policy of government and matters touching the government of the state.

[88] The witness statement of the second appellant sets out her religious belief as follows:

“As part of my Christian faith I believe that the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony. In other words, God’s word is that full sexual relations between persons should only take place within a monogamous heterosexual marriage. Marriage is also to be between a man and a woman. No other form of marriage is permissible according to God’s law. This is my and my husband’s and children’s understanding of what the bible teaches about marriage.

Therefore, as part of my faith I believe it would be sinful for me to say or do anything which has the intention or effect of promoting homosexual sexual relations or same sex marriage.”

[89] As we have noted, unlike Great Britain there is no provision for same sex marriage in Northern Ireland. The Northern Ireland Assembly has on several occasions rejected provisions for same sex marriage. At the time the respondent visited the third appellant’s premises there was and continues to be a political debate about the introduction of same sex marriage with the respondent holding a political opinion in support of the introduction of same sex marriage and the first and second appellants holding a political opinion in opposition to the introduction of same sex marriage.

[90] The Attorney General contends that by virtue of section 23(1) of the 1973 Act a provision of the 1998 Order discriminates against any person or class of persons if it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland. Adopting the observation of the County Court Judge at paragraph 66 of her judgment that the first and second appellants disagreed with the religious belief and political opinion held by the respondent with regard to a change in the law to permit gay marriage and accordingly, by their refusal to provide the services sought, treated the respondent less favourably according to the law, has the effect that Article 28 clearly treats the political and religious opinions and beliefs of the appellants less favourably than those of the respondent.

[91] Similarly, the Attorney General contends that if any provision of the 2006 Regulations were to discriminate in a manner described by section 98 of the 1998 Act against a person or class of persons on the grounds of religious belief or political opinion, such a provision would be ultra vires by virtue of section 24(1)(c) of the 1998 Act. The Attorney General refers to the finding of the County Court Judge at paragraph 43 of her judgment that the appellants cancelled this order as they opposed same sex marriage for the reason that they regard it as sinful and contrary to genuinely held religious beliefs; the appellants are not a religious organisation; they are conducting a business for profit and, notwithstanding their genuine religious beliefs, there are no exceptions available under the 2006 Regulations which apply to this case. Accordingly, the Attorney General contends that the appellants were required, on pain of civil liability, to produce a political message with theological content to both of which they objected on the grounds of their own religious belief and political opinion and further that this requirement constituted less favourable treatment of them in comparison with the persons sharing the

political and religious views expressed in the message. Accordingly, the Attorney General says that those holding such religious or political views as the appellants are at a disadvantage as compared to those holding contrary religious or political beliefs and so section 24(1)(viii) of the 1998 operates to render the provision which has this effect ultra vires.

[92] The Attorney General states two propositions at the heart of his submissions. The first is that a requirement, underpinned by civil liability, to publish or enunciate a theologically loaded political statement constitutes less favourable treatment of those persons whose religious beliefs or political opinions are opposed to that statement in comparison with those persons who share, or are indifferent to, the religious and political ideas contained in the statement. Secondly, insofar as the 2006 Regulations and the 1998 Order are properly interpreted as requiring, on pain of incurring civil liability, a person to enunciate or produce a theologically loaded political statement to which he objects, the 2006 Regulations and 1998 Order are invalid to the extent that they so require by virtue of (as respects the 2006 Regulations) section 24 of the Northern Ireland Act 1998 and (as respects the 1998 Order) by section 17 of the Northern Ireland Constitution Act 1973.

Direct discrimination

[93] The anti-discrimination provisions in the 1973 Act and the 1998 Act are concerned with what has been described as direct rather than indirect discrimination. It is common case that direct discrimination is not limited to provisions which are ex facie discriminatory. To return to Advocate General Jacobs in Schnorbus v Land Hessen [2000] ECR I-10997 at paragraph 33 -

“The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected.”

[94] The legislative provisions provide that there is such discrimination if, on the stated grounds, the legislation or the act of any person treats a person or class of persons less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland or as the case may be by that person. The preferable approach to an examination of the issue is to ask a single question: did the claimant, on the prescribed ground, receive less favourable treatment than others? The alternative has been to consider first whether

the claimant received less favourable treatment than the appropriate comparator and secondly whether that was on the relevant prescribed ground.

[95] The Education Reform (NI) Order 1989 was also made by Order in Council under Schedule 1 paragraph 1 of the Northern Ireland Act 1974. In Bishop Daly's Application (Unreported 5 October 1990) a challenge was made to the provisions of the 1989 Order designed to encourage and facilitate integrated education. It was contended that the provisions offended section 17 of the Northern Ireland Constitution Act 1973 by discriminating against a class of persons on the grounds of religious belief or political opinion. The applicant referred to the affected class as being those persons whose religious beliefs required them to strive to educate children in schools which reflected the ethos of their religion. MacDermott LJ stated that any less favourable treatment was not by reason of political opinion as the class could embrace every possible shade of political opinion but rather the application concerned alleged religious discrimination. James v Eastleigh [1990] 3 WLR 55 had just been decided and reference was made to Lord Griffiths to the effect that whether a person treats another less favourably on the grounds of sex did not permit of much refinement and meant, 'did they do what they did because she was a woman (or a man)', being a question of fact answered by applying common sense to the facts.

[96] MacDermott LJ found the affected class to be wider than that identified by the applicant and that it extended to all non-integrated schools, including those not concerned with any religious ethos. Further, he found that any damage said to be caused by the 1989 Order affected all non-integrated schools and that those affected who were outside the applicant's class could not claim discrimination on grounds of religious belief as they would suffer the same damage as others. Such damage was not caused or contributed to by their religious belief but by the school not being integrated.

[97] In the present case it is alleged that the legislation discriminates against the appellants and against that class of persons who subscribe to their religious belief concerning the sinful nature of homosexual activity and their political opinion that opposes same sex marriage. The statutory comparison is with the treatment accorded by the legislation to other persons in the same circumstances. The other persons are those who do not hold the religious belief that same sex relations are sinful and the political opinion that same sex marriage should not be introduced.

[98] The appellants' approach is that their religious belief and political opinion concerning same sex relations and same sex marriage are being penalized because those with a contrary religious belief that same sex relations are not sinful and the

contrary political opinion that supports same sex marriage are not being penalized and accordingly the appellants receive less favourable treatment.

[99] How does the legislation treat a person who holds the contrary religious belief and political opinion to that of the appellants in the same circumstances? Those who refuse goods and services to those who accept same sex relations and support same sex marriage are treated *by the legislation* in the same manner as the appellants have been treated. They may not be treated the same by those holding opposing religious beliefs or political opinions but *the legislation* treats them all the same.

[100] Neither the 1998 Order nor the 2006 Regulations treat the appellants less favourably. The legislation prohibits the provision of discriminatory services on the ground of sexual orientation. The appellants are caught by the legislation because they are providing such discriminatory services. Anyone who applies a religious aspect or a political aspect to the provision of services may be caught by equality legislation, not because the legislation treats their religious belief or political opinion less favourably but because that person seeks to distinguish, on a basis that is prohibited, between those who will receive their service and those who will not. The answer is not to have the legislation changed and thereby remove the equality protection concerned. The answer is for the supplier of services to cease distinguishing, on prohibited grounds, between those who may or may not receive the service. Thus the supplier may provide the particular service to all or to none but not to a selection of customers based on prohibited grounds. In the present case the appellants might elect not to provide a service that involves any religious or political message. What they may not do is provide a service that only reflects their own political or religious belief in relation to sexual orientation.

[101] It would be ironic if the constitutional protections against legislative or executive discrimination based on religious belief or political opinion, as introduced by the Northern Ireland Constitution Act 1973 and the Northern Ireland act 1998, were to become the instruments for the support of differential treatment of fellow citizens based on religious belief and political opinion.

[102] The additional aspect of the Attorney General's challenge concerns provisions that are outside the legislative or executive competence of the Assembly as being incompatible with Convention rights (sections 6(2)(c) and 24(1)(a) of the 1998 Act¹). The relevant Convention rights are Article 9 (freedom of thought, conscience and religion) Article 10 (freedom of expression) and Article 14 (freedom from discrimination on the grounds of religion, political or other opinion). The issue for the defendants is one of compelled speech in being forced to supply the message on

the case contrary to freedom of thought, conscience, religion and expression and the related claim of discrimination on the grounds of religious belief and political opinion. We reject these contentions for the reasons discussed earlier in relation to the submissions of the respondent and the appellants.

[103] In response to the devolution issues the Court finds that the prohibition on discrimination in section 24 (1) of the Northern Ireland Act 1998 did not affect the power to make, confirm and approve Regulation 5 of the 2006 Regulations and the prohibition on discrimination in section 17 of the Northern Ireland Constitution Act 1973 does not affect the legality of Article 28 of the 1998 Order.

[104] In response to the Notice of Incompatibility of Subordinate legislation the Court finds that the provisions of the 2006 Regulations and the 1998 Order are not incompatible with Articles 9, 10 or 14 of the European Convention on Human Rights.

Conclusion

[105] For the reasons given we consider that it is only necessary to answer the following questions:

- (a) Yes
- (d) It was not necessary to read down or disapply the provisions of the 2006 Regulations.

[106] In the course of the hearing concern was expressed about the role of the Equality Commission in the pursuit of this case. Mr Allen made it clear to us that the Commission recognised its role in ensuring that all elements of Northern Ireland society participate in the commercial space. To that end we have been assured that the Commission is available to give advice and assistance to those such as the appellants who may find themselves in difficulties as a result of their deeply held religious beliefs. The only correspondence to the appellants that we have seen, however, did not include any offer of such assistance and may have created the impression that the Commission was not interested in assisting the faith community where an issue of this sort arose. It should not have been beyond the capacity of the Commission to provide or arrange for the provision of advice to the appellants at an earlier stage and we would hope that such a course would be followed if a situation such as this were to arise in future.