

DECISION IN ASHERS BAKING COMPANY LTD APPEAL

Summary of Judgment

(Oct 2016)

The Court of Appeal today found that Ashers Baking Company had directly discriminated against Gareth Lee on grounds of sexual orientation by refusing to make a cake supporting same sex marriage. It further found that the relevant legislation is not incompatible with Articles 9, 10 or 14 of the European Convention on Human Rights.

The following is a summary of the Court of Appeal judgment:

This is an appeal by way of case stated from a decision of District Judge Brownlie whereby she found that Colin McArthur (“the first appellant”), Karen McArthur (“the second appellant”) and Ashers Baking Company Limited (“the third appellant”) directly discriminated against Gareth Lee (“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”). 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. Ashers Bakery is a limited company. The first and second appellants are directors of the company who are Christians who oppose the introduction of same-sex marriage as they believe that it is contrary to God’s law.

At the beginning of week commencing 4 May 2014 the respondent made a general enquiry at the premises of the third appellant shop about ordering a cake. He said he was from a small voluntary group and wanted a cake with a logo on it. He was told by the second appellant 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 his group. The respondent wanted the cake for a private event on 17 May 2014 to mark the end of “Northern Ireland Anti-homophobic Week” to mark the political momentum towards same-sex marriage legislation.

On 8 or 9 May 2014, the respondent placed an order with the second appellant for a customized cake and gave her an A4 sheet with a colour picture of “Bert and

Ernie” (the logo for QueerSpace) with the headline caption, “Support Gay Marriage”. On 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 respondent issued a Civil Bill on 6 November 2014 claiming damages for breach of statutory duty in and about the provision of goods, facilities and services. When the matter came on for hearing, District Judge Brownlie accepted that the first and second appellants had a Christian belief which was genuinely and sincerely held but that the third appellant conducted a business for profit and was not a religious organization. She held that it could not therefore avail of the specific exemption for such organisations in Regulation 16 of the 2006 Regulations.

The judge reached the following conclusions:

1. The appellants had the knowledge or perception that the respondent was gay and/or associated with others who were gay;
2. 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;
3. The appellants cancelled the order as they opposed same sex marriage which is inextricably linked to sexual relations between same sex couples which is a union of persons having a particular sexual orientation; and
4. The respondent did not share the particular religious and political opinion which confined marriage to heterosexual orientation.

District Judge Brownlie concluded that the appellants’ actions amounted to direct discrimination contrary to Regulation 5(1) of the 2006 Regulations.

In relation to the claim for discrimination on the ground of political opinion, District Judge Brownlie noted the 1998 Order did not provide a definition of political opinion and adopted the analysis contained in the authorities 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, she found that the respondent’s support for same-sex marriage was a political opinion. The judge concluded that the 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. The judge said that even if she had been persuaded that the appellants had not been aware of the respondent's religious belief and/or political opinion, she would have found that the appellants discriminated against him by treating him less favourably on the grounds of their own religious beliefs and political opinion.

District Judge Brownlie then considered the application of the Human Rights Act 1998. She considered that she was required to read down the 2006 Regulations and the 1998 Order so as to include reasonable accommodation for the manifestation of the appellants' beliefs. The judge 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 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. Finally, 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) of the ECHR.

The Questions

The questions included in the case stated are set out in the full judgment. We indicated that we do not intend to answer two of the questions:

- The first was whether the judge was correct as a matter of law to hold that, had she not considered the case to give rise to direct discrimination alternatively she would have held that the same amounted to indirect discrimination which was not justified by the appellants? It is common case that there was no material which could have enabled the judge to come to a conclusion on indirect discrimination. This was always presented as a direct discrimination case.
- The second was whether the judge was correct as a matter of law in finding that the appellants "did have the knowledge or perception that the respondent was gay and/or associated with others who are gay" in light of the reasoning contained in her judgment? 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. She found that the appellants cancelled the order as they opposed same sex marriage. If she had come to the view that the order was cancelled because the respondent was perceived as being gay, this would have been the most straightforward case of direct discrimination and would undoubtedly have been plainly expressed by her. We conclude therefore that the finding was not material to her determination.

Consideration

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 appellants. 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.

Northern Ireland has a large and strong faith community many of whom 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.

The LGBT community has endured a history of considerable discrimination in this jurisdiction. Homosexual acts in private between consenting males were criminalised until 1985. 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 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.

Normalisation

The appellants 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 was not a refusal to provide goods or services in the same manner as was normal for other members of the public, the point being that the request in this case was so unusual that it did not fall within the services advertised by the appellant company. This submission depended on the interpretation of the offer made by the appellant company and while there were limitations within the terms and conditions they were not such as to exclude a cake of this type.

Further, 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.

Direct Discrimination on the Grounds of Sexual Orientation

The relevant legislation essentially contains a single question: Did the claimant, on the prescribed ground, receive less favourable treatment than others.

The case of 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 declined to honour the booking as they only provided double bedrooms to heterosexual married couples. 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, a criterion indistinguishable from sexual orientation. The discrimination was therefore direct in that the difference in treatment was based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex.

Counsel for the appellants in this case 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.

We do not accept this. 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. 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

The 2006 Regulations 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. Regulation 16 makes specific provision for organisations relating to religion or belief so as to ensure that such organisations should not find that certain specified activities were rendered unlawful. 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.

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 service and the protection of religion, belief and conscience was considered in Bull v Hall. As in that case 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. The Supreme Court agreed on four matters:

- Firstly, the less favourable treatment was between those who had entered into a civil partnership and those who had married. The appellants in this case 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.
- Secondly, 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 agreed 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.

- Thirdly, the 2006 Regulations describe how the conflicts arising in cases of religious objection 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.

- Fourthly, 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 Supreme Court found that they were free to continue to deny double bedrooms to same-sex and unmarried couples provided they also denied them to married couples. In the same way it was open to the appellants in this case 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.

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.

We conclude that there is nothing in this case arising under Article 10 ECHR 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 appellant disagreed because of their deeply held religious beliefs. In the commercial sphere that is what the absence of direct discrimination can require, depending on the offer.

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 focussed 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

In light of our conclusion it is necessary to address the constitutional point raised by the Attorney General for Northern Ireland.

Further to the intervention of the Attorney General, the Court issued a Devolution Notice and a Notice of Incompatibility of Subordinate Legislation. The Devolution Notice stated the “devolution issue” to be:

- 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 a power to make, confirm or approve Regulation 5 of the 2006 Regulations; and
- 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 1998 Order is void.

The Notice of Incompatibility of Subordinate Legislation noted the contention that the respondent’s claim violated the first and second appellants’ rights under Articles 9, 10 and/or 14 ECHR as being contrary to their religious beliefs and/or political opinions. The Court was invited to read down the provisions of the 2006 Regulations and the 1998 Order in a manner which was compatible with those Convention rights or, if that was not possible, to disapply the relevant provisions of the 2006 Regulations and the 1998 Order.

Discrimination under the 1973 Act

The 1973 Act established the Northern Ireland Assembly. Section 17(1) provides that any measure, Act and relevant subordinate instrument of the Parliament of Northern Ireland 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. Section 23(1)

provides that legislation discriminates against any person or class of persons if it treats that 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.

The Northern Ireland Assembly established by the 1973 Act was dissolved and the Northern Ireland Act 1974 made temporary provision for the government of Northern Ireland by direct rule. The 1998 Order was made by Order in Council under Schedule 1 of the 1974 Act. 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 1974 Act. This legislative structure remained in place until replaced by the Northern Ireland Act 1998 however there was a saving provision for the operation of the anti-discrimination measures in the 1973 Act for extant Northern Ireland legislation. Hence the 1998 Order remains subject to the anti-discrimination provisions of the 1973 Act.

Discrimination under the 1998 Act

The Northern Ireland Act 1998 established a new Northern Ireland Assembly. It states that a provision is outside the legislative competence of the Assembly if it is incompatible with any of the ECHR rights and discriminates against any person or class of persons on the grounds of religious belief or political opinion. Section 24(1) states that 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 act is incompatible with any of the ECHR rights, discriminates against a person or class of person on the grounds of religious belief or political opinion, and in the case of an act, aids or incites another person to discriminate against a person or class of person on that ground. Section 98(4) provides that legislation will discriminate 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. For those purposes a person discriminates against another if he treats that person or that class less favourably in any circumstances than he treats or would treat other persons in those circumstances.

Difficulties emerged in the new political settlement and once again direct rule provided for the legislative powers of the Assembly to be exercisable by Order in Council. The 2006 Regulations were made during the suspension of the Northern Ireland Assembly and remain subject to the anti-discrimination provisions of the 1998 Act.

Religious Belief or Political Opinion

The witness statement of the second appellant sets out her religious beliefs as being that full sexual relations between persons should only take place within a monogamous heterosexual marriage and that marriage should only be between a man and a woman. As part of her faith she believes it would be sinful for her to say or do anything which has the intention or effect of promoting homosexual sexual relations or same sex marriage.

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 this debate was ongoing and he held a political opinion in support of the introduction of same sex marriage which was in opposition to the political opinion held by the first and second appellants.

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 the 1998 Order are invalid to the extent that they so require by virtue of section 24 of the 1998 Act (as respects the 2006 Regulations) and section 17 of the 1973 Act (as respects the 1998 Order).

Direct Discrimination

The preferable approach to an examination of the issue is to ask the 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.

In the present case it is alleged that the legislation discriminates against the appellants and against that class of person 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, namely 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. The appellants consider that their religious belief and political opinion concerning same sex relations and same sex marriage are being penalised because those with a contrary religious belief and contrary political opinion are not being penalized. Accordingly the appellants contend that they are receiving less favourable treatment.

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.

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 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 message in relation to sexual orientation. It would be ironic if the constitutional protections against legislative or executive discrimination based on religious belief or political opinion, as introduced by the 1973 or 1998 Acts, were to become the instruments for

the support of differential treatment of fellow citizens based on religious belief and political opinion.

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. The issue for the appellants is one of compelled speech in being forced to supply the message on the cake 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.

In response to the devolution issues the Court finds that the prohibition on discrimination in section 24(1) of the 1998 Act 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 1973 Act does not affect the legality of Article 28 of the 1998 Order. 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 ECHR.

Conclusion

For the reasons given we consider that it is only necessary to answer the following questions in the case stated:

- Was I correct as a matter of law to hold that the appellants had discriminated against the respondent directly on grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations 2006 - Yes;**
- Was I correct as a matter of law to hold that it was not necessary to read down or display 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? - It is not necessary to read down or display the provisions of the 2006 Regulations.**

In the course of the hearing concern was expressed about the role of the Equality Commission in the pursuit of this case. It was made 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 issues 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.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).
2. This summary was copied from [The Law Society for Northern Ireland's website](#)