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How to cite:

Giles, Jessica (2014). The Exercise of Religious Freedom in a Commercial Context: *Preddy v Bull* and other cases. *Oxford Journal of Law and Religion*, 3(3) pp. 512–517.

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Version: Accepted Manuscript

Link(s) to article on publisher's website:
<http://dx.doi.org/doi:10.1093/ojlr/rwu041>

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Oxford Journal of Law and Religion/2014 - Volume 3/Issue 3, 1 October/Case Notes/The Exercise of Religious Freedom in a Commercial Context: *Preddy v Bull* and other cases - Ox. J Law Religion (2014) 3(3): 512-517

Oxford Journal of Law and Religion

Ox. J Law Religion (2014) 3(3): 512-517

1 October 2014

The Exercise of Religious Freedom in a Commercial Context: *Preddy v Bull* and other cases

Case Comment

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Law and Religion

This case comment considers the UK courts' approach to the protection of the freedom to manifest religion in a commercial context, focusing in particular on the freedom of business owners to direct the ethos and policy of the business in accordance with their religious beliefs. The analysis centers on *Preddy v Bull*¹ and therefore considers manifestation of religion when it comes into conflict with the right of same-sex couples not to be discriminated against. This piece does not discuss or take sides on the same-sex rights debate: it considers how the structural protection for those seeking to enjoy freedom of religion, in the form of Article 9 of the European Convention on Human Rights, and those seeking to enjoy same-sex relationships, in the form of antidiscrimination legislation, is being enforced by the courts. Its starting point and end point is that the dignity and identity of both same-sex couples and religious believers are important and worthy of protection in public as well as in private life and that mutual tolerance, that is living together without necessarily agreeing with each other, is a legitimate way forward.

In the *Preddy* case hoteliers refused a homosexual couple in a civil partnership a double bed in their hotel on the basis of their sincere religious belief that sexual intercourse outside traditional marriage was sinful. They did offer the couple a room with two single beds. The homosexual couple claimed damages pursuant to the Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263) on the grounds that they had been directly discriminated against by the hoteliers since a married couple in their situation would not have been refused a double bedded room. The hoteliers denied that their policy was direct discrimination on grounds of sexual orientation but conceded it was indirect discrimination. This was because the policy was directed not only at

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same-sex couples but at all unmarried couples, both heterosexual and same sex, as well as couples in civil partnerships.² The policy, they conceded, had a greater effect on same-sex couples since they could, at that time, never marry and so could never have the opportunity of enjoying a double bed in the hotel.

The Supreme Court accepted that the hoteliers were entitled to enjoy their Article 9 rights to freedom of thought conscience and religion pursuant to Part 1, Schedule 1 of the Human Rights Act 1998, in a commercial context, which meant that Article 9 was engaged on the part of the hoteliers. The majority refused, however, to recognize that the discrimination was indirect. They found rather that it was direct discrimination

within the meaning of the regulations because there was no essential difference between a married couple and a couple in a civil partnership. Consequently since the only ground for discrimination was based on the sexual orientation of the couple this therefore amounted to direct discrimination. Because it was direct discrimination there was no scope for justification.

The court further ruled that although this interpretation of the 2007 Regulations was an infringement of the hoteliers' right to manifest their religion pursuant to Article 9, it was justifiable and necessary in a democratic society as a proportionate means of achieving the legitimate aim of protecting the rights and freedoms of the same-sex couple.

By contrast, Lord Neuberger and Lord Hughes said that the fact that the couple were in a civil partnership did not add anything to the claim and that since the hoteliers treated same-sex couples, whether in a civil partnership or not, and unmarried heterosexual couples in the same manner there was no exact match between the criterion for refusing the double bed and the protected characteristic. The claim could not be one of direct discrimination but had to be indirect discrimination because same-sex couples could never marry and so could never enjoy a double bed in the hotel. The court was, however, unanimous in its ruling that if there had been indirect discrimination it could not have been justified by the hoteliers by reference to matters other than the couple's sexual orientation.

This ruling raises several questions in respect of the court's approach to clashes between same-sex rights and religious freedom rights.

First of all, the assumption by the majority that marriage and civil partnership are indistinguishable for all relevant purposes was contrary to the distinction between the two, in law, at the time of the case. Same-sex marriage was not at the time lawful.³ Whilst the debate might have been taking place in parliament concerning the availability of the status of marriage for same-sex couples, the hoteliers rightly argued that their policy was based on the Christian concept of marriage, which was also enshrined in law, that it was an institution between one woman and one man. By ruling that civil partnerships were equivalent to marriage the Supreme Court not only denied the hoteliers the right to hold to their Christian concept of marriage but they also appeared to undermine the reasons put forward for the same-sex community themselves

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for allowing same-sex marriage--namely that there was in fact a difference between civil partnership and marriage which necessitated the public expense of changing the law in this respect.

Furthermore there was at the time of the *Preddy* case, and still is, the potential for derogation within the religious sphere from the protection from discrimination that same-sex couples enjoy. Regulation 14 of the 2007 Regulations provides a religious organization exception.⁴ Furthermore it was possible to derogate from this right in the public sphere in respect of the role of civil registrars. Whilst in *Eweida et al v United Kingdom* [2013] 2 OJLR I-218 the European Court of Human Rights found that the London Borough of Islington were permitted to deny Ms Ladele's Article 9 right to manifest her religion by refusing to let her conscientiously object to carry out civil partnerships in order to pursue its 'Dignity for All' equality and diversity policy, the potential existed within the legislation for a county council to allow its civil registrars to do so. Many local authorities still do, and Islington had in fact initially allowed Mrs Ladele to refuse to carry out civil partnership ceremonies. Only later did its Dignity for All policy come to mean a recognition of the dignity of same-sex couples but a refusal to foster tolerance between the same-sex community and those holding a religious belief and a refusal to recognize the dignity of those holding religious beliefs.

The fact that it was and still is in certain circumstances possible to derogate from the prohibition of discrimination on grounds of sexual orientation begs the question as to why this is not possible in the commercial sphere. Clearly the Court could have created the space for religious exceptions by a finding of justified indirect discrimination or by ruling that the 2007 Regulations were an unjustifiable interference with the hoteliers Article 9 rights.

There is no doubt that in certain contexts within the commercial sphere a business is encouraged to take a conscientious stance based on moral choices on certain issues.⁵ This is, for the most part, undertaken on a voluntary basis and is governed by certain codes, for example the Global Compact which sets out 10 norms on human rights, labour conditions, environmental sustainability, and anti-corruption. These are derived inter

alia from the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles of Rights at Work.⁶

What then of the religious conscience of a business? Historically there have been plenty of examples of businesses motivated by what could be termed conscientious, ethical and/or religious beliefs⁷--for example, this has recently

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been undertaken by the Coca Cola Company with the placing of their Small World Machines in Pakistan and India to bridge the divide between two countries torn apart by religious division.⁸ Certain banks have adopted Islamic financial rules; shops are entitled to sell only halal meat or kosher food. In the USA pharmacies are entitled to refuse to sell contraception: *Stormans v Selecky* [2012] OJLR II-540. In the Hobby Lobby case the US Supreme Court recently ruled⁹ that (i) a business was capable of exercising religious freedom rights and (ii) that the regulations promulgated by the Department of Health and Human Services requiring employers to provide their female employees with no-cost access to certain types of contraceptive drugs to which the employers had a religious conscientious objection violated the Religious Freedom Restoration Act. Similarly the Italian Court of Cassation has recognized that juridical persons and collective juridical persons have fundamental rights.¹⁰ The German Constitutional Court has held that for-profit organizations can enjoy fundamental rights.¹¹ In *Cha'are Shalom Ve Tsedek v France* (Application No 27417/95) (ECtHR, Grand Chamber) (2000) the European Court of Human Rights found that an essentially commercial organization could bring an Article 9 claim.

The guidelines under the UN Global Compact do not exclude Article 9 from their remit, and the UK Supreme Court accepted in principle in *Preddy v Bull* that a business is capable of exercising religious freedom in the sense that business owners can decide business policy based on religious principles. Why not in practice? What is it about the nature of commercial activity that permits individuals through the corporate form or business entity to pursue moral or ethical objectives except when those objectives are religious ones *and* they come into conflict with same-sex rights?

A comparison with the abortion issue can be helpful here, particularly because one of the arguments highlighted in the *Preddy* case is that to be discriminated against in the enjoyment of services in the commercial sphere is an affront to the personal identity and dignity of same-sex couples.¹² As a comparator it must be equally an affront to a woman's sense of identity and dignity to be faced with a religious believer who believes that abortion involves the taking of human life and is therefore sinful.¹³ In law it is acceptable to hold the belief that abortion is sinful. Not only can a preacher stand in the pulpit and preach to her congregation that this is so, in the public service sphere as well a NHS trust can allow a doctor to opt out of the requirement to provide an abortion.¹⁴ It is also the case that a private clinic can refuse to supply

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abortion services.¹⁵ This creates a uniform approach to the manifestation of the religious belief that abortion is sinful. This view is tolerated as one that is held by a religious minority, and a doctor, for example, who holds this view and conscientiously objects is protected in law from discrimination. This is so even though the view of the minority is not accepted as valid by society as a whole. As indicated above, the *Preddy* case indicates that this approach and tolerance of what is now a minority view is not accepted in the case of same-sex relations in the commercial sphere.

The court's ruling in *Preddy* effectively imposes the moral position of the state upon citizens in the commercial sphere. This inhibits the freedom of the individual to seek moral guidance and make moral choices independently of the state, even where those choices are recognized as legitimate by a considerable body of opinion within various religious organizations and by those of various faiths. Many individuals without a religion already find it difficult to identify a moral compass beyond that which the state provides, and this decision reinforces this trend and encourages a positivist approach to law making such that the courts become unwilling to allow an alternative source of moral guidance beyond that which the state provides.

One must question whether in practice a watertight distinction can be maintained between commercial action and religious expression. This refusal to balance religious freedom rights and same-sex rights in the commercial sphere is problematic because it has singled out the commercial sphere as one in which it is unac-

ceptable to manifest the belief that same-sex relations are sinful. The consequence is that there is then some confusion as to whether or not it is acceptable not only to manifest this belief by action but also to hold and express this opinion at all. It becomes difficult for believers to anticipate when they might or might not express their religious beliefs in public let alone practise them. The religious believer then risks discrimination on account of the belief that same-sex relations are sinful. It might mean, for example, that an employee who expresses this belief outside of the context of her employment finds herself discriminated against on account of that belief within her employment, but may be unwilling or unable to pursue a claim since the sphere in which she is employed takes the view that that belief is unacceptable.

Whilst structural protection for religious freedom has not been enjoyed uniformly or absolutely in Europe over the past century, since the advent of the protection in international legal instruments of the right to freedom of religion or belief¹⁶ religious individuals and communities have enjoyed protection in law of the right to manifest their beliefs in public. This protection has involved the state, and in particular the courts in ensuring tolerance between those of various religions and between those of a religious persuasion and those of none. That tolerance has not required either absolute protection of one particular faith or the absolute acceptance by all others of any particular religious belief.

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The believer's identity and dignity has had to withstand the views of others in the public and commercial sphere that the core beliefs upon which that identity is based are wrong. Structural protection has now been extended in law to same-sex relationships, but the underlying political problem of how to reconcile competing religious and moral claims remains the same. It is not clear that the Supreme Court's decision in *Preddy* secures mutual toleration for these competing views.

¹ [2013] UKSC 73, [2014] 3 OJLR II-262.

² Civil Partnerships are only available in the UK to same-sex couples.

³ Same-sex marriage became lawful under the Marriage Act 2014.

⁴ The exemption in Regulation 14 applied to an organization the purpose of which is (i) to practise a religion or belief, (ii) to advance a religion or belief, (iii) to teach the practice or principles of a religion or belief, (iv) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief and in respect of certain activities carried out by those organizations: <<http://www.legislation.gov.uk/uksi/2007/1263/regulation/14/made>> accessed 6 August 2014. There are also public authority derogations built into the regulations. The 2007 Regulations are now incorporated into the Equality Act 2010.

⁵ For an explanation of the stages in Corporate Social Responsibility development see William C Frederick 'Corporate Social Responsibility. Deep Roots, Flourishing Growth, Promising Future' in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford 2008) 524-28.

⁶ <<http://www.unglobalcompact.org>> accessed 2 September 2014.

⁷ George Cadbury is an example of this. He ensured that his chocolate factory honoured biblical principles. He built houses for the people who worked for him with gardens and paid them good wages. He built them a swimming pool and cricket pitches and provided free dental and medical care.

⁸ For a case study on this project see Melissa E Grimm, 'Coke Serves up Love and Peace with Small World Machines': <<http://religiousfreedomandbusiness.org/2/post/2014/07/coke-serves-up-love-and-peace-with-small-world-machines.html>> accessed 6 August 2014.

⁹ *Burwell v Hobby Lobby Stores, Inc* together with *Conestoga Wood Specialties Corp v Burwell* 573 US ____ (2014) WL 2921709 30 June 2014

¹⁰ Private law section, decisions no 12929 (4 June 2007) (Ct of Cass. III) (Italy).

¹¹ BVerfGE 38, 281, 303 (1974); Michael Sachs (ed), *Grundgesetz Kommentar* (5th edn, CH Beck. Munich 2009) art 9, fn 7.

¹² As with the same-sex issue the author expresses no opinion concerning the belief that abortion is sinful.

¹³ Greenawalt argues that this is not necessarily the case: see Kent Greenawalt 'Religious Toleration and Claims of Conscience' (Winter 2013) XXVIII(2) *The Journal of Law and Politics* 91, 109.

¹⁴ S 4 of the Abortion Act 1967. See BMA views (2007), Ethics Department, 'The Law and Ethics of Abortion'.

¹⁵ For example where a private for-profit health clinic takes NHS contract work a doctor at a private clinic can conscientiously object to carrying out an abortion.

¹⁶ Article 9 ECHR and Article 18 International Covenant on Civil and Political Rights.