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## [2016] PILARS CC 3

# ***Lee v McArthur*: a proportionate restriction on religious freedom rights?**

Jessica Giles \*

In *Lee v McArthur* [2016] NICA 39, (2017) OJLR 6(1)<sup>1</sup>, the Court of Appeal in Northern Ireland ruled that it was directly discriminatory for a Christian bakery to refuse to ice a cake with the slogan 'Support Gay Marriage'. In reaching that decision the Court considered, *inter alia*, *Preddy v Bull* [2013] UKSC 73, (2014) OJLR 3(2) 362-363<sup>2</sup>. This case comment argues that while the two cases have similarities, the distinguishing features in *Lee* could have led the Court of Appeal to accord more weight to the defendant bakers' article 9 and 10 rights in assessing whether interference with those rights was proportionate.<sup>3</sup> It then considers the case through a theological lens and suggests a way forward for Northern Ireland along the American model of exempting those seeking to exercise a religious conscience in the commercial context in certain limited circumstances.

Gareth Lee, the plaintiff, a homosexual and member of the LGBT organization QueerSpace ordered a cake from Asher's Bakery Co Ltd, the first defendant. The defendant bakery was a for-profit bakery company. The plaintiff asked that the cake should be iced with the slogan 'Support Gay Marriage'. The McArthurs, the second and third defendant directors of the first defendant company, through an employee, initially accepted but subsequently refused to fulfill the order on the basis that they were a bakery run on Christian principles that was opposed to same-sex marriage. The plaintiff claimed direct discrimination on grounds of sexual orientation pursuant to the Equality Act (Sexual Orientation) Regulations (NI) 2006 and discrimination on grounds of political belief contrary to the Fair Employment and Treatment (NI) Order 1998. The Attorney

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My thanks go to my OU colleague Dr Neil Graffin for his comments on an earlier draft of this manuscript, to those presenting papers and commenting on this issue at the Restoring Religious Freedom Conference at the Centre for Law and Religion, Emory University, Atlanta, USA. November 6-7 2016.

<http://cslr.law.emory.edu/news/releases/2016/10/laycock-speaks-at-religious-freedom-conference.html#.WGHqRhSE6uc>

The opinions expressed in this comment remain my own

<sup>1</sup> Publication pending at the time of publication of this comment

<sup>2</sup> The Attorney General for Northern Ireland has subsequently referred this case to the Supreme Court of the United Kingdom on a devolution issue.

<sup>3</sup> This case comment does not express any personal view of the author on the issue of same-sex marriage or same-sex relations, it looks rather at how the balance may be struck fairly between competing interests within society, in particular in the light of the specific constitutional settlement between a state and its citizens vis-à-vis religion.

General for Northern Ireland issued a devolution notice stating the devolution issue to be whether there was power to make, confirm, or approve the subordinate legislation. He also issued a Notice of Incompatibility of Subordinate Legislation with the defendants' freedom of expression and freedom of religion pursuant to articles 8 and 9 of the European Convention on Human Rights, incorporated in the Human Rights Act 1998.

At first instance the District Judge ruled that in light of the ongoing debate as to whether the Northern Ireland Assembly should legislate on same-sex marriage, the plaintiff's support for same-sex marriage was political opinion. She concluded that the defendants had directly discriminated against the plaintiff on grounds of sexual orientation and on grounds of political belief. On an appeal by way of case stated the Court of Appeal in Northern Ireland affirmed the District Judge's ruling that the refusal to supply the iced cake amounted to direct discrimination on grounds of sexual orientation<sup>4</sup>. It ruled that it was not necessary to deal separately with the issue of whether there had been discrimination on grounds of political opinion since the same issues arose in respect of both<sup>5</sup>.

The Court of Appeal dismissed the defendant's appeal pursuant to article 10, whereby the defendants, relying on *Gillberg v Sweden* (2012) 34 BHRC 247, had argued that the ruling that their refusal to ice the cake was discriminatory would mean that they were compelled to provide a message with which they disagreed contrary to their freedom of expression pursuant to article 10. The Court ruled that nothing arose under article 10 that did not already arise pursuant to article 9<sup>6</sup>. It further ruled that the Northern Ireland secondary legislation should not be read down to take account of the defendant directors' rights to manifest their religious belief and that the subordinate legislation was valid.<sup>7</sup>

In reaching this decision the Court of Appeal of Northern Ireland ruled that direct discrimination pursuant to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 could be established by association: see *English v Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421<sup>8</sup>. This meant that the discriminatory treatment did not necessarily have to be related to a protected characteristic itself, in this case the client's sexual orientation as a homosexual, but could relate to difference in treatment arising because of a protected characteristic. This was provided that the benefit of the provision of the service or goods could only accrue to someone with the protected characteristic. The benefit of the message or slogan 'Support Gay Marriage' could only accrue to someone with a protected characteristic, in this case someone who was gay or bisexual. It was the use of the word 'gay' in the statement that prevented the order being fulfilled. The Court reasoned that the defendants would not have objected to a slogan 'Support Heterosexual Marriage' or 'Support Marriage'. There was consequently an association with the gay and bisexual community, and the protected personal characteristic was the

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<sup>4</sup> Lee paras 58 and 72

<sup>5</sup> Lee para 72

<sup>6</sup> Lee para 71.

<sup>7</sup> Lee para 105

<sup>8</sup> Lee para 58

sexual orientation of that community. Accordingly, they concluded that this was a case of direct discrimination.<sup>9</sup>

In so far as whether this decision infringed the defendants' right to freedom of religion pursuant to article 9 of the European Convention on Human Rights the Court ruled that the protection afforded by article 9 was not limited to private acts of religious worship or collective acts by religious organizations. It included the commercial sphere. It emphasized that article 9 was one of the foundations of a democratic society and as 'one of the most vital elements that go to make up the identity of the believers and their conception of life' it was 'also a precious asset for atheists, agnostics, sceptics and the unconcerned': *Bayatyan v Armenia* (2012) OJLR 1(1) 292-293.<sup>10</sup>

The Court of Appeal ruled that the interference with the defendant's article 9 rights arising as a result of the finding of direct discrimination was in accordance with the law and pursued the legitimate aim of protecting the rights of the LGBT community pursuant to the 2006 Regulations. The issue was whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>11</sup>

It explained that on the one hand the faith community within Northern Ireland was both a large and a strong one and religion informed every aspect of the manner in which those of faith conducted their lives. Many of those from this community were actively engaged in commerce and leadership roles within the commercial world. Consequently, it was important within the jurisdiction to ensure that this community could continue to contribute to the well-being of the Northern Ireland economy and that there should be no chill factor in their participation<sup>12</sup>. On the other hand, it considered that the LGBT community had suffered a history of discrimination in Northern Ireland. Homosexual acts in private between consenting males were criminalized until 1985 and the participation of gay people in public life had for many years been diminished. It was consequently important that those from the LGBT community felt able to freely participate in commercial life.<sup>13</sup>

The Court then set out the factors relevant in the assessment of proportionality in the light of *Preddy v Bull* (2014) OJLR 3(2): 362-363 in which the Supreme Court of the United Kingdom had ruled that direct discrimination occurred when a hotelier refused a double bed to a homosexual couple in a civil partnership. These factors were first, that there was no legal provision for same-sex marriage within the jurisdiction of Northern Ireland; consequently, what was at stake was the ability within the commercial sphere to obtain a service that the customer could use to express support for a change in the law. Second, if businesses were free to choose what services to provide the gay community on the basis of religious belief the potential for arbitrary abuse would be substantial. Third, the 2006 Regulations made specific and limited exceptions catering for those with

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<sup>9</sup> *Lee* paras 20 and 105

<sup>10</sup> Cited in *Lee* para 61

<sup>11</sup> *Lee* para 62

<sup>12</sup> *Lee* para 49

<sup>13</sup> *Lee* para 50

religious objections and the defendants were not covered by these exceptions. Fourth, it was open to the defendants to amend their offers to customers so as to ensure they provided the type of cakes, such as birthday cakes, that did not give rise to potential conflicts provided there was no consequent indirect discrimination. Fifth, the fact that a baker provides a cake portraying a particular message did not indicate any support for that message or that the baker was associated with that message. There was nothing in the message that would have ridiculed the defendants' deeply held religious beliefs; the issue of forced speech only potentially arose because the defendants chose to provide a wide offer. Accordingly this was not a case of compelled speech in violation of article 10 and there were no issues arising under article 10 which did not already arise under article 9.

The Court concluded that based on the above factors the proportionality assessment pointed firmly to the conclusion that the 2006 Regulations should be interpreted in accordance with their natural meaning. This was so, given, in particular, the structure of the Regulations, the need to protect against arbitrary discrimination, the ability of the defendants to alter the offer, and the lack of any association of the defendants with the message. The same principles applied in relation to the issues under the claim for political and religious discrimination by the defendants against the plaintiff, and it was not appropriate to deal separately with this ground of appeal. Accordingly, the District Judge had been correct to rule that there had been direct discrimination contrary to the 2006 Regulations.

On the constitutional issue of whether the subordinate legislation was valid in the light of the prohibition against discrimination on grounds of religious belief and political opinion pursuant to section 24 of the Northern Ireland Act 1998 and section 17 of the Northern Ireland Act 1973 the Court ruled that the discrimination alleged by the defendant was that occurring against the class of person who subscribed to their religious belief as to the sinful nature of homosexual activity and their political opinion that opposed same-sex marriage. The statutory comparison was with the treatment accorded by the legislation to other persons in the same circumstances. The Court identified the comparator as those who did not hold the religious belief that same-sex relations were sinful and the political opinion that same-sex marriage should not be introduced. They found that this comparator group were treated in the same manner by the legislation as the defendants, even though they may not have been treated the same by those holding opposing religious beliefs or political opinions. Consequently neither the 1998 Order nor the 2006 Regulations treated the defendants less favourably. The Court pointed out that anyone who applied a religious aspect or a political aspect to the provision of services might be caught by equality legislation, because they sought to distinguish on a basis that was prohibited between those who would receive their services and those who would not. They concluded that the answer was not to change the subordinate legislation and remove the equality protection but for the supplier to provide the service either to all or to none. The defendants could, for example, choose not to provide a service that involved any religious or political message. They could not refuse to provide a service unless it reflected their own political or religious belief in relation to sexual orientation.

## Analysis

The additional factors which the Court of Appeal might have used in *Lee* to distinguish the *Preddy* case and which could have affected the weighing up of factors in the assessment of whether the restriction on the bakers freedom to manifest their religious belief was proportionate include: the difference between the status of religion in public life within England and Wales (the jurisdiction in which *Preddy* arose) and Northern Ireland (the jurisdiction in which *Lee* arose); the legal status accorded same-sex relations in both countries; the type of service being provided in each case and the proximity to or association of the service provider with the 'wrongful act' to which they were objecting.

In Northern Ireland at the time of the *Lee* case the issue of same-sex marriage was still a hotly contested and party political issue<sup>14</sup>. By contrast in England and Wales legislation legalizing same-sex marriage had been passed at the time of the Supreme Court's decision in *Preddy* and was due to come into force four months after the judgment was given<sup>15</sup>. In order to establish direct discrimination the majority of the Court in *Preddy* equated civil partnership and marriage ruling that those in civil partnerships were directly discriminated against because they were in the same position as married couples, but they could not obtain a double bed in the hotel and were therefore discriminated against because the ground for the refusal was the sexual orientation of the customers<sup>16</sup>. While this begs the question as to why, if civil partnership and marriage are equivalent, the LGBT community had fought so long and hard for marriage, at least the Supreme Court decision was made in the light of the impending change in the legislation and thus acknowledged an acceptance by a democratically elected parliament that attitudes to same-sex relations and the fundamental rights attaching thereto had changed.

The situation in Northern Ireland was different. Due to the influence of the Democratic Unionist Party (DUP) law formation in Northern Ireland is based more closely on a Christian ethic thus linking politics and religion in the public sphere<sup>17</sup>. The Northern Ireland Assembly had rejected the proposals to grant the status of marriage to same-sex couples four times since 2011<sup>18</sup>. There are recent indications that a majority of citizens might support such a change in the law and a fifth attempt won assembly approval but

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<sup>14</sup> <https://www.theguardian.com/uk-news/2015/nov/02/northern-ireland-assembly-votes-to-legalise-same-sex-marriage>

<sup>15</sup> Legislation to allow same-sex marriage was passed by parliament in July 2013 and came into force on 13 March 2014. The first same-sex marriages took place on 29 March 2014. Judgment in *Preddy* was given on the 27 November 2013. The legislation had therefore been passed but had not yet come into force at the date of judgment.

<sup>16</sup> Jessica Giles 'The Exercise of Religious Freedom in a Commercial Context: *Preddy v Bull* and other cases'. OJLR (2014) 3(3) 512-517

<sup>17</sup> <https://www.theguardian.com/uk-news/2015/nov/02/northern-ireland-assembly-votes-to-legalise-same-sex-marriage>

<sup>18</sup> <http://www.newsletter.co.uk/news/stormont-to-debate-gay-marriage-for-a-fifth-time-in-five-years-1-7016219>

was subsequently blocked by the DUP <sup>19</sup>.

This denial by a nation state of the status of marriage (although not civil partnership) to same-sex couples was and still is seen by the European Court of Human rights as within the margin of appreciation of a member state. Most recently in *Oliari v Italy* OJLR (2016) 5(1) 176-177. The ECtHR has distinguished between the European consensus which requires states to have in place some form of legal protection for civil partnerships, but in the absence of consensus it does not require states to provide the status of marriage to same-sex couples. The Court in *Lee* recognized that same-sex marriage was not lawful in Northern Ireland but did not build into the factors relevant to the proportionality test the fact that Northern Ireland had held a firmer line on this issue than England and Wales and that within the European Convention framework this was an acceptable stance to take.

The Court of Appeal in *Lee* recognized the importance of religious belief to the people of Northern Ireland and recognized the link between the political and the religious views of the parties, yet its ruling in that case caused a situation where a baker was either required to refuse to ice any political slogans on cakes at all or would be forced to ice a cake with a slogan which supported a position which parliament itself and many in Northern Ireland did not at the time support. The Court of Appeal regarded this as unproblematic because it ruled that a baker icing a cake did not thereby associate themselves with that message. This ruling is problematic, particularly in a context where the baker finds themselves required to ice a cake with a slogan which has strong links to the position of one particular party or another and feelings run deep within their local community on that particular issue. One does not have to look too far into Northern Irish history to discover types of political slogans or signs linked to religious issues that would have been imputed to the bakers and could have led to risk of violence – the request to ice a particular colored flag onto a cake for example.

If the baker decided to ice political slogans on cakes at what point would it become possible for the baker to refuse a given slogan? If a customer were to ask a baker from the Shankill (a loyalist working class area) to write 'Tíocfaidh ár la' (our day will come, referring to a potential future united Ireland. A phrase used by Irish Republican's) on 15 cakes for a meeting of a political party, the baker would no doubt want to refuse. Suppose the baker in the Shankill had employed a young EU worker newly arrived in Northern Ireland, who had no knowledge of the troubles. The new employee might accept the request and the customer may pay for the cakes in advance. A contract would be formed. The managers of the bakery would subsequently refuse to complete the order. The customer could sue for breach of contract and on the back of this private law claim by virtue of section 6 of the Human Rights Act 1998 the court would be required to consider the fundamental rights claims of the parties to freedom of expression and freedom of religion. The Court of Appeal's reasoning in *Lee* that the baker is not associated with the slogan would not be an accurate analysis of the

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<sup>19</sup> <http://www.belfasttelegraph.co.uk/news/northern-ireland/northern-ireland-says-yes-to-samesex-marriage-latest-polling-finds-35281876.html>

situation and would involve a miscalculation in the application of the proportionality test.

There are other instances where it is arguable that a baker would be associated with a slogan or image iced on a cake. In certain circumstances a baker could be caught by legislation prohibiting hate speech, pursuant to the Racial and Religious Hatred Act 2006<sup>20</sup>, or for encouraging or assisting an offence pursuant to the Serious Crime Act 2007<sup>21</sup>. If a slogan involved some form of religious hate speech or encouraged the legalizing of cannabis in this instance the actions of the baker in icing the cake might be imputed to it. The point here is not whose rights should prevail, the baker or the customer, but that the icing of the cake could result in the baker being involved in some way in the unlawful act.

If a link can exist in certain circumstances explained above and the association between the baker and the requested slogan can occur, then it is necessary to consider why a baker who ices a cake with a slogan concerning gay marriage is not in that instance associated with that particular political point of view. It is correct that not all slogans that a baker chooses to ice on a cake create an association but the political situation or known religious views of that baker may well create such an association – to deny the baker the potential to respond to that situation is to limit their fundamental rights in a disproportionate manner, in particular where the customer can obtain the service elsewhere. The cake itself cannot contain a disclaimer that the baker does not ascribe to the views expressed on it and while some may view the icing of a cake as dissociated from the political views of the baker, others may not. When this is placed in the context of a society with strong religious views and the political subject matter is hotly contested there is potentially a greater reason for allowing the baker discretion as to whether they fulfill an order or not. Denying the baker the ability to fulfill any such orders where the baker may in fact only want to refuse a small number may well be a disproportionate reaction.

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<sup>20</sup> For crimes of racial or religious hatred it is necessary to prove that the person either intended to stir up racial hatred or made it likely to be stirred up. According to the CPS web site it is not necessarily enough to show that racial or religious tensions within a community have been stirred up. It is enough to prove that, in all the circumstances, racial hatred was likely to be stirred up. "Likely" means more than merely possible and it is necessary to consider the full context of the alleged behaviour, including the likely audience.

[https://www.cps.gov.uk/publications/prosecution/cases\\_of\\_inciting\\_racial\\_and\\_religious\\_hatred\\_and\\_hatred\\_based\\_upon\\_sexual\\_orientation.html](https://www.cps.gov.uk/publications/prosecution/cases_of_inciting_racial_and_religious_hatred_and_hatred_based_upon_sexual_orientation.html)

<sup>21</sup> For example by section 45 of that Act:

**45 Encouraging or assisting an offence believing it will be committed**

A person commits an offence if—

(a) he does an act capable of encouraging or assisting the commission of an offence; and (b) he believes— (i) that the offence will be committed; and (ii) that his act will encourage or assist its commission.



## The status of religion and section 13 of the Human Rights Act 1998

This case comment has already referred to the religious nature of public life in Northern Ireland. This comment will argue that there is potential within the Human Rights Act 1998 to build the nature of public life in to the assessment of proportionality by using section 13 of that Act. This permits the court to give particular regard to the fundamental right to freedom of religion in specific instances.

The Court in *Lee* noted at paragraph 49 that:

‘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’.

Professor Simon Lee<sup>22</sup> has argued<sup>23</sup> that judges have not taken section 13 of the Human Rights Act 1998 to heart and that there could be a broadening out of religious freedom under this section<sup>24</sup>. Section 13 states that:

**‘Freedom of thought, conscience and religion.**

(1) If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.’

Section 13 applies to ‘religious organizations (itself or its members collectively)’. Commercial enterprises do not on the face of it come within the definition of ‘religious organizations’ so that this would not assist in the assessment of proportionality in so far as it could not act as a trump card for the bakers in that test. However, in a country such as Northern Ireland where Christian values undergird much of public life it may be arguable that in a decision such as that in *Lee* the Courts should have ‘particular’ regard to the exercise by members of the churches of their convention right to freedom of thought, conscience and religion as members of the church acting collectively. In this

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<sup>22</sup> Not to be confused with the Plaintiff Gareth Lee. Professor Lee is a law professor at the Open University and director of the Citizenship and Governance Strategic Research Area and Chair of the Project on Interdisciplinary Law and Religion Studies.

<sup>23</sup> Simon Lee ‘The cardinal rule of religion and the rule of law’, in Robin Griffith-Jones and Mark Hill QC eds (2015) *Magna Carta, Religion and the Rule of Law*, Cambridge University Press Cambridge, 314-333.

<sup>24</sup> Lee (2015), 315. Judges in the UK common law adversarial trial system are dependent on the arguments presented to them by the barristers appearing before them. It would therefore be incumbent on the barristers to make greater use of section 13 in order to provide scope for the judiciary to protect religious freedom more broadly under this section.

instance given the extent of the Christian business community they could be perceived as members of the church acting 'collectively'. The impact of denying these church members the ability to exercise their religious conscience could be said to impact on the mission and ministry of the Church itself. The requirement to have particular regard to the religious freedom of members of religious organizations could consequently be taken into account in the assessment of proportionality by the court.

Alternatively in order to accord particular regard to the religious freedom of the members of a particular religious organization it would be possible to look towards the USA model of exemption by building exemption for conscientious objection into the equality legislation. Professor Fretwell Wilson explains that: 'notwithstanding dramatically shifting views about the underlying civil right – propped up by a balancing of competing interests and concerns over take-backs' exemption means that 'Interest groups also protect settled gains'<sup>25</sup>. Although building exemptions into the statutory provisions would provide an element of certainty for business owners it might take away some of the potential flexibility if section 13 were used to protect commercial interests in this way.

The recent case of *R (Hamat) v Secretary of State for the Home Department* [2016] UKUT 286 (IAC) OJLR (2017) 6(1)<sup>26</sup> on article 13 indicates that its scope may well be limited. However the *Hamat* case was decided in the context of England and Wales and concerned whether or not an Islamic community was adversely affected in the event that an individual from the Muslim community was deported. Given the different national and subject matter contexts the ruling in *Hamat* would not necessarily preclude such an argument in *Lee*.

## Viewing the cases through a theological lens

There is an alternative method by which distinguishing features in *Lee* and *Preddy* can be identified. Since the enjoyment of fundamental rights by the commercial enterprises in both cases were based on Christian theological precepts, viewing these matters through a theological lens can perhaps shed some light onto them and set both the cases and the law in context<sup>27</sup>.

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<sup>25</sup> Professor Robin Fretwell Wilson 'Bargaining for Civil Rights: Lessons from Mrs Murphy for same-sex marriage and LGBT rights' 95 BUL Rev (2015) 951, 954. The USA is currently in a state of flux over religious freedom exemptions after the Supreme Court ruling legalizing same-sex marriage: <http://www.christianitytoday.com/ct/2016/december-web-only/fairness-for-all-evangelicals-explore-truce-lgbt-cccu-nae.html> ; for example <http://religionclause.blogspot.co.uk/2016/12/wedding-videographers-sue-to-refuse.html> ; [http://www.christiantoday.com/article/christian\\_artists\\_threatened\\_with\\_fines\\_and\\_jail\\_time\\_for\\_refusing\\_to\\_make\\_gay\\_wedding\\_invitations/102708.htm](http://www.christiantoday.com/article/christian_artists_threatened_with_fines_and_jail_time_for_refusing_to_make_gay_wedding_invitations/102708.htm)

<sup>26</sup> Publication pending

<sup>27</sup> Christian theological views on the issue of same-sex relations are not uniform. For example see: Catherine Sider Hamilton ed (2003) *The Homosexuality Debate. Faith Seeking Understanding*. ABC Publishing, Anglican Book Centre, Toronto, Ontario, Canada. This lack of

The Equality legislation in both England and Wales and Northern Ireland provides for specific exemptions for religious organizations so that they can in certain limited circumstances discriminate without infringing the law. One way to understand the granting of exemptions to religious organizations but not to individuals is to consider that a religious organization will be run on a spectrum of coherent religious principles whereas a commercial enterprise may choose to exercise single-issue religious principles. A commercial enterprise or an individual will want to exercise their conscience in respect of one particular issue. In this sense the religious enterprise would appear to be exercising a religious conscience rather than operating a religious ethos. The single-issue taken up by the hoteliers in *Preddy* was that of sexual sin. Their stated policy was that they would not tolerate what, based on their biblical understanding, amounted to sexual sin in the rooms of their hotel. In *Preddy* the hoteliers consciences were troubled not just by same-sex relations but by any sexual relations which took place outside marriage. Their policy was to deny double beds to all those who were not married whatever their sexual orientation.

The first question that arises is why pick on this single type of sexual sin? Within the Christian tradition there are other types of sexual sin which they could have chosen based on biblical principles<sup>28</sup>. Why was the conscience of the business owners particularly troubled by sexual sin outside marriage and why should the law protect them in this particular manifestation of their religious belief? Further in the case of *Preddy* the hoteliers were making a statement that sexual relations outside marriage were more sinful than those between remarried adulterous couples. Married couples, regardless of their previous marital history, were allowed double beds. Yet arguably from a theological perspective there is no difference in terms of sinfulness at least between heterosexual sexual relations outside marriage and within a second adulterous marriage – yet the question was not asked when couples checked in whether they were in a second marriage and whether that marriage had arisen as a result of adultery on the part of one or the other parties.

The second question is why pick on sexual sin alone? If the hoteliers were running their business as a Christian business why not choose to exclude those who were greedy? Indeed scripture lists sexual sin along side greed:

‘... adultery, greed, malice, deceit, lewdness, envy, slander, arrogance and folly. All these evils come from inside and defile a person’ Mark 7:22-23<sup>29</sup>

Traditionally the Christian message and that of religious organizations, in particular

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uniformity is not taken in this case comment to undermine the potential for exemption in limited circumstances for those within the Christian tradition who might seek it.

<sup>28</sup> ‘Or do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral, nor idolaters nor adulterers nor men who have sex with men’ 1 Cor 6:9 NIV.

<sup>29</sup> Further references include 1 Cor 6:9-11; Eph 5:3; Gal 5:19; Hebrews 13:4; Col 3:5 NIV.

Numerous references to the sin of greed in biblical texts can be found:

<https://www.openbible.info/topics/greed>

Christian churches, is to welcome all sinners. The message is not 'go away you are too sinful' but 'come unto me, all ye who are weary and burdened, and I will give you rest'.<sup>30</sup> Indeed Jesus was challenged on the attention he gave to tax collectors and sinners. While He Himself remained free from sin, he spent time with sinners in order to explain his message to them<sup>31</sup>. A Christian community might exclude a member if they persistently break the precepts upon which that community is based and as a matter of discipline, but it is likely to have spent time with an individual who comes to it first. On one view it is difficult to see why hoteliers offering a public service would choose to exclude complete strangers who may not be Christians, in respect of their sexual behaviour, when they have no prior connection with them. The Christian business thus involves the identification of certain Christian precepts to the exclusion of others. If businesses choose to object to same-sex sexual relations this would accordingly need to be within the context of a single-issue exemption and the basis for that exemption would need to be carefully thought through on biblical as well as legal principles. It would be possible to create an exception similar to the abortion exception in the Abortion Act 1967<sup>32</sup>. In order to obtain such an exemption it would be necessary to demonstrate why this issue, above other issues, is one for which a business should gain an exemption and where to draw the line in terms of which acts would be exempted.

The problem with legislation incorporating single-issue conscientious objection to same-sex sexual relations or to same-sex marriage is that this would be challenging, although not impossible, to legislate. This is because it would have to account for the issue identified in *Doogan v Greater Glasgow and Clyde Health Board* [2014] UKSC 68; [2015] AC 640, namely, at what point is an individual too far removed from the commission of an act to be considered involved with it to the extent that it justifies an exemption from undertaking it. In the *Preddy* case the hoteliers were not being asked to

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<sup>30</sup> Matthew 11:28-30 NIV

<sup>31</sup> Matthew 9:11 NIV.

<sup>32</sup> Abortion is legal in England, Wales and Scotland but is illegal in Ireland, although in November 2015 the High Court of Justice in Northern Ireland ruled that 'although the law criminalizing the termination of pregnancy in Northern Ireland in cases of serious malformation of the foetus (SMF), including a fatal foetal abnormality (FFA), or as a result of rape and incest (sexual crime) did not subject the mother to inhuman or degrading treatment within the meaning of Article 3 of the European Convention. [And] It considered that the stress of having to travel to England for an abortion, which was lawful, did not meet the threshold of severity of suffering as required by that Article. The court reiterated that while the foetus did not have a right to life pursuant to ECHR Article 2 it was accorded protection under certain statutes on the basis of its status as pre-natal life.' It went on to rule that: 'Article 8 was breached only in the absence of exceptions to the general prohibition on abortions, in cases of FFA, and pregnancies which were a consequence of sexual crime, up to the date when the foetus became capable of existing independently of the mother. This was because the right to private life pursuant to Article 8(1) encompassed the personal autonomy of pregnant women with a diagnosis of SMF or FFA, or who had been impregnated as a result of sexual crime, to decide whether or not to continue with a pregnancy': *The Northern Ireland Human Rights Commission's Application: In the Matter of an Application for Judicial Review by the Northern Ireland Human Rights Commission In the Matter of the Law on the Termination of Pregnancy in Northern Ireland* [2015] NIQB 96; OJLR (2016) 5(1) 168-182

engage in what according to their biblical understanding were sinful sexual relations themselves, they were being asked to provide a room for a same-sex couple where they assumed such relations would take place. The issue therefore was how far the provision of a room could be said to involve them in what they perceived to be sexual sin.

In the case of conscientious objection to abortion doctors and nurses can refuse to engage in the actual act of carrying out the abortion. They cannot refuse to take part in any of the services ancillary to or too far removed from the act itself: see the *Doogan* case. The service provider is asking to be exempted because their biblical understanding is that carrying out an abortion involves them in the taking of human life. In *Preddy* the service provider is asking to be exempted from allowing what their understanding of wrong doing to occur in their premises. This is on the basis that they would thereby be implicated or on the basis that they and their guests do not want to associate with those who are practising what they regard as unbiblical sexual relations. The involvement with the 'wrongful' act in the *Preddy* case is not as close as that which occurs in the case of conscientious objection to abortion.

Arguably if Christian enterprises are going to make claims for exemptions on single-issues perhaps framing them as claims of conscience and examining how and why that claim arises and the proximity of the service provider to or strength of association with the perceived wrong doing will enable them to discern how that claim might fit within the legal framework.

In the *Lee* case the business owners were being asked to engage more directly with what they regarded as wrong doing. This does not mean that they were being asked to engage in same-sex marriage, but that they were being asked to write something on a cake which supported a position which was currently unlawful and which parliament and potentially the community around them found to be so. The arguments for the potential association of a baker with a slogan iced on a cake were rehearsed above and apply equally here. Since a baker could in law be associated with a statement iced on a cake it must also be the case that they could in conscience be associated with a statement on a cake and that that association could carry consequences for them such that they would want to avoid. In the case of the baker there is an act that involves the baker in taking part in creating the end product which carries the message – rather like a publisher who might carry responsibility for the publication of hate crime. It is this closer connection to the act to which the service provider objects in *Lee* that distinguishes it from *Preddy* and should have been taken into account in the Courts weighing up of the factors relevant to the proportionality exercise.

A pragmatic way forward to enable those who wish to campaign for same-sex marriage to do so, and those who wish to run their businesses on Christian principles to do so, could be to accommodate those who wish to conscientiously object provided this can be undertaken in a way that does not offend same-sex couples and provided same-sex couples are able to obtain the service they required. Professor Fretwell Wilson writes:

‘Bargaining *today* delivers the benefits of marriage *today* to real families clamouring to marry. And bargaining *today* offers important, if imperfect, protections for religious objectors.’<sup>33</sup>

A baker, for example, could refer business that it was unable to undertake itself by suggesting a number of other bakers to customers desiring a service that in all conscience they could not perform, alternatively if the order was a large one they could seek to contract out the work. A system for referral is in place in 49 US states for those pharmacists who conscientiously object to supplying abortifacients<sup>34</sup>. The pharmacist is required to refer a customer to a nearby pharmacist willing to supply the drug. A referral system would at least provide specific exemptions for single-issue conscientious objection within a commercial context and could pave the way for a bargain which would see those who want to campaign for legalization of same-sex marriage in Northern Ireland accommodated while still providing sufficiently broad religious exemption protections not only for religious organizations but for those within the commercial sector.

## Conclusion

This case comment has highlighted some distinguishing factors between the *Preddy* and *Lee* cases which could have affected the court’s assessment of whether the interference with the bakers article 9 and 10 rights were proportionate. These factors include the Northern Ireland context whereby religion and politics are closely intertwined meaning that the Christian ethic through the influence of the DUP plays a prominent role in law formation in particular with regard to same-sex relations. This, when linked to the nature of the service in *Lee* and its potentially close association with the service provider, could have led the court to give more weight to the bakers article 9 and 10 rights. In addition the potential impact of decisions of the courts on members of the commercial community who were also members of religious organizations was considered in the light of the application of section 13 of the Human Rights Act 1998. All these factors could have influenced the extent to which the interference with the defendant’s rights were considered proportionate. In addition this case comment considered the case through a theological lens in order to assess whether a way forward might be found to accommodate both sides of the political and theological divide and reference was made to the US approach permitting religious conscience claims in circumstances which still ensure that same-sex couples could obtain the service they required. It then looked at the *Lee* case through a theological lens and considered whether exemptions for those exercising a conscience in a commercial context was a feasible option.

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<sup>33</sup> Fretwell Wilson (2015) 952

<sup>34</sup> Although Washington state denies pharmacists this possibility.

<http://www.adfmedia.org/news/prdetail/4118>

