

[2018] PILARs CC

Lee v McArthur: Food for thought

Ilana Hirschberg¹

The Northern Irish case of *Lee v McArthur*² may have begun as a simple discrimination dispute between two parties, but it has developed into a multi-faceted debate involving several complex points of law. This case comment will analyse the points of law at issue in *Lee v Asher's Baking Company* (the *Lee* case) in the UK Supreme Court. Consideration will be given to the Court of Appeal (Northern Ireland) judgment, academic opinion, the submissions of the parties at the UKSC hearing and the comments from the bench during the UKSC hearing. An overall conclusion will then be given on the appropriate outcome and the possible judgment of the UKSC.

The facts of the case at first instance were relatively straightforward. The Complainant, Mr Lee, placed an order with one of the Defendants at Asher's Bakery, for a celebration cake with the following message printed on it; 'Support Gay Marriage'. Mr Lee subsequently received a call from the Defendants who cancelled the order, because, according to their Christian beliefs, same-sex marriage is against God's law and to support it is a sin. Mr Lee went to another bakery where the cake was provided without incident. Mr Lee did, however, bring a discrimination claim against the Defendants under Fair Employment and Treatment Northern Ireland Order 1998 (FETO) and Equality Act (Sexual Orientation) Regulations (NI) 2006 (SOR). His claim was upheld at first instance and by the Court of Appeal (NI). There was considerable academic criticism of the judgment at the Court of Appeal stage. The main thrust of the criticism was that the court had oversimplified certain issues and overcomplicated others.

On appeal to the UKSC, there were three questions before the court. Firstly, whether the Appellants discriminated against the Respondent on grounds of sexual orientation contrary to FETO and SOR. Moreover, whether the Court of Appeal was correct to find associative direct discrimination. Secondly, whether a finding of direct discrimination under SOR breached the Appellants' Article 9 and 10 European Convention on Human Rights (ECHR) rights and amounted to forced speech, in addition to contravening their rights of freedom of religion and political opinion under FETO. Thirdly and finally, whether SOR and FETO are in fact valid. Each question will now be assessed in turn.

The Court of Appeal failed to find direct discrimination under SOR, however, they did find associative direct discrimination. Associative discrimination refers to discrimination based on an individual's association with another person belonging to a relevant protected group. As evidenced by cases such as *Shamoon v Chief Constable*³ and *English v Thomas Sanderson Blinds Ltd*⁴, associative direct discrimination is an established principle of UK law and can be found on the application of the 'reason why' test established in *Shamoon*. This test requires the court to consider the reason for the allegedly discriminatory decision. The Court of Appeal in *Lee v McArthur* identified the reason why as being the word 'gay' in the requested message.

¹ Law student, The Open University

² [2016] NICA 39, [2016] H.R.L.R. 22

³ [2003] UKHL 11; [2003] 2 All E.R. 26

⁴ [2008] EWCA Civ 1421; [2009] 2 C.M.L.R. 18

However, as submitted by the Appellants at the UKSC hearing, this ‘reason why’ related to the cake itself, not the customer, and SOR clearly refers to discriminatory conduct against a person only⁵. Furthermore, FETO and *Shamoon* provide guidance on finding an appropriate comparator and both state, in summary, that the comparator should not be ‘materially different’.

On this point, the court approved the Respondent’s argument that there was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. The court stated that “This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community”. However, the legislation in question has never been held to apply to any person beyond a third party, and to stretch it to apply to an entire associated community appears dubious from a technical perspective. On a contextual basis however, as submitted by the Respondent at the UKSC, this extension is necessary to maintain the continuum of increasing LGBT rights in Northern Ireland. The UKSC judges intervened considerably more often to challenge the Respondent than they did the Appellants on this point, with the exception of Lady Hale, who intervened more frequently during the Appellants’ submissions on this issue. It would be surprising if Lady Hale did not favour the more technically correct outcome as that has been her preferred position in previous cases such as *Bull v Hall*⁶ and, in a different context, *R(Evans) v Attorney General*⁷. Lord Mance and Lady Black could feasibly favour either party, while Lord Kerr, considering his history as Lord Chief Justice of Northern Ireland from 2004 to 2009, and the content of his interventions during the hearing, appears likely to favour the Respondent on this point.

In addition to their argument for direct discrimination under SOR, the Respondent also maintains that Mr Lee was discriminated against under FETO on grounds of political belief. At the UKSC hearing, the Appellants’ counter argument was that the Court of Appeal erred in failing to consider FETO separately from SOR. It is unclear whether the Court of Appeal decision would have been materially different if they had done so, because many of the same issues with the reason why test and the comparators would still have arisen. At the UKSC, the Appellants listed several alternatives to the ‘reason why’ test in an attempt to demonstrate the infallibility of their argument regarding SOR. Interestingly, neither the Respondent nor the bench picked up on the Appellants’ avoidance of these alternative tests during their submissions on FETO. The first alternative test mentioned was the ‘different treatment’ test from *Ladele*⁸. The court stated in *Ladele* that direct discrimination could not be found if the alleged discriminator had treated everyone the same. On the application of this test, the Appellants’ clearly discriminated against Mr Lee, by treating him differently than they would have treated a customer who did not support gay marriage. The second alternative test cited was the well-established ‘but for’ test. But for Mr Lee’s political belief that gay marriage should be legal, would the Appellants’ have treated him differently? The answer is clearly no. Whether the UKSC will consider this angle is uncertain, but the Respondent could arguably win the debate on this issue.

⁵ Regulation 5

⁶ [2013] UKSC 73; [2014] H.R.L.R. 4

⁷ [2015] UKSC 21

⁸ *Eweida v The United Kingdom* (Nos. 48420/10, 59842/10, 51671/10 and 36516/10) 27 May 2013

The second question before the UKSC, was whether a finding of direct discrimination under FETO or SOR constituted a breach of the Appellants' Article 9 and 10 ECHR rights and amounted to forced speech, in addition to contravening their rights of freedom of religion and political opinion under FETO. The Court of Appeal held that there was arguably an interference with the Appellant's Article 9 rights, but that it had a legitimate aim i.e. the protection of the Respondents rights under domestic law. The court also found it to be proportionate to the aims pursued on the application of *Bull v Hall*. This was the submission of the Respondent before the UKSC, in addition to an in-depth public policy argument regarding the context of the case and the 'Getting Equal'⁹ paper which led to the domestic legislation in question. The Appellants' submissions on the Convention rights were twofold: firstly, they argued that the courts below had devalued the Bakers Article 9 rights by treating the case as purely one of manifestation of religion, rather than also a case of freedom of conscience; secondly, they stated that the interference with their Article 9 rights amounted to forced speech which breached their negative Article 10 right not to be compelled to speak. Accordingly, the Appellants invited the UKSC to either make a finding of incompatibility regarding SOR and FETO, or to read down SOR and FETO.

The Appellants' argument concerning Article 9 interference relied chiefly on *Eweida and others v The United Kingdom*¹⁰ and *Commodore of the Royal Bahamas Defence Force and others v Laramore*¹¹. The former case was applied to support the Appellants' submission that Article 9 rights needed to be brought properly into the commercial sphere, while *Laramore* was utilised as a reminder of each member state's obligation to uphold freedom of conscience. It is argued here that the right of conscientious objection available under the Convention should be extended to create a general rule of conscientious objection in all scenarios where it is motivated by a serious and insurmountable conflict between an obligation and a genuinely held belief¹². With regard to Article 10, the Appellants countered the Respondent's submission that the cake was simply a good and that baking it and icing the selected message was just a service, by arguing that the cake was in fact a product for the purpose of spreading a clear campaign statement. Therefore, the Appellants concluded that to take away the Baker's choice to decline the order amounted to forced speech, relying on *Buscarini and others v San Marino*¹³ as well as US case law. The Appellants' submissions on forced speech are intertwined with issues of conscientious objection and coercion under Articles 9 and 10 of the Convention. The coercion test to determine a breach of Article 9 is a well-established principle of ECtHR case law, and was utilised in *Buscarini* and in *Eweida*. It was however, passed over by the Court of Appeal, in a similar way to the issue of conscientious objection which was mentioned only briefly. In *Bayatyan* the ECtHR¹⁴ extended the meaning of Article 9 to include conscientious objection to military service and as argued above, a further extension could have a significant positive impact on the ongoing struggle between the LGBT and faith communities, especially in a religious state such as Northern Ireland.

⁹ (2006) The Office of the First Minister and Deputy First Minister

¹⁰ (Nos. 48420/10, 59842/10, 51671/10 and 36516/10) 27 May 2013

¹¹ [2017] UKPC 13, [2017] 1 W.L.R. 2752

¹² *Bayatyan against Armenia*, [(App No 23459/03) 7 July 2011]

¹³ (No. 24645/94) 18 February 1999

¹⁴ European Court of Human Rights

The Appellants went on to argue that even if the interference with the Bakers' Convention rights had a legitimate aim, the Court of Appeal's conclusions on proportionality were flawed as *Bull v Hall* should have been distinguished. Lady Hale did not react favourably to this submission. The Appellants argued that *Bull v Hall* could be distinguished on the following grounds: firstly, Article 10 was not involved in the *Bull* case; secondly, it was not a compelled speech case; and thirdly, the facts in *Lee v Asher's* were less connected to the dignity of the alleged discriminator. Commentators have also suggested that *Bull v Hall* should have been distinguished due to the difference between the status of religion in public life within England and Wales (the jurisdiction in which *Bull* arose) and Northern Ireland (the jurisdiction in which *Lee* arose), in addition to the legal status accorded same-sex relations in both countries¹⁵. It is argued here that *Bull v Hall* should indeed be distinguished. Furthermore, that it is questionable whether the interference with the Appellants' Convention rights had a legitimate aim due to the failure of the Court of Appeal to undertake sufficiently wide consideration on this point. An example of an established consideration which could have been taken into account during the assessment of the legitimacy of the aim, is whether any other options were available to Mr Lee which would not have caused him undue hardship¹⁶. Mr Lee was able to go to another bakery and obtain a cake with his requested message without undue hardship, and this should have been considered by the Court of Appeal.

In addition to the Appellants' arguments on Article 9 and 10, they also submitted that to find direct discrimination in this case would be to discriminate in turn against the Bakers themselves for their own religious beliefs under FETO. However, the Appellants' submissions on this point were cut short by a wave of disagreement from the bench, who contended that to extend FETO to apply to the discriminator themselves was to stretch the provisions of the legislation too far. It would also, arguably, constitute a misinterpretation of the intention behind the legislation. The Respondent did not make any submissions specifically on this point, but the opinion expressed by the judges and advocated here, is supported by the Respondent's public policy submissions and contextual arguments. The Respondent emphasised the long journey of LGBT marginalisation and activism which eventually led to the creation of SOR and FETO. It was also submitted that the LGBT community require more protection, not less, in a country such as Northern Ireland with a strong faith community, many of whom are opposed to the LGBT community and their developing rights. It is argued here that the Respondent is correct, but that any desire the UKSC may have to protect the LGBT community must not interfere with the correct application of the law.

The final question before the UKSC is whether SOR and FETO are in fact valid. Before the Court of Appeal hearing and further to the intervention of the Attorney General of NI, the Court issued the following: a Devolution Notice pursuant to Sch.10 para.5 of the Northern Ireland Act 1998 (NIA) and Order 120 of the Rules of the Court of Judicature (Northern Ireland) 1980; and a Notice of Incompatibility of Subordinate Legislation under Order 121 r.3A of the same Rules. The Devolution Notice stated the "devolution issue" to be:

¹⁵ Giles, J. *Lee v McArthur: a proportionate restriction on religious freedom rights?* [2016] PILARS CC 3

¹⁶ *Eweida and Others v The United Kingdom* (nos. 48420/10, 59842/10, 51671/10 and 36516/10) 27 May 2013

1. Whether, in light of the prohibition of discrimination on the grounds of political opinion or religious belief contained in s.24(1)(c) and (d) of the NIA1998, there was power to make, confirm or approve regulation 5 of SOR; and

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

These validity issues will now be analysed in the order set out above. At the Court of Appeal and at the UKSC, the Attorney General submitted that SOR was not valid because it was made by the Office of the First Minister and Deputy First Minister for Ireland and is therefore subject to section 24(1)(c) of the NIA 1998, which provides that a minister cannot make, approve or confirm legislation which discriminates on political or religious grounds. If wrongly made, approved or confirmed, such legislation is ultra vires and accordingly void. Section 98 defines discrimination for the purpose of the legislation as less favourable treatment. The Attorney General contended that compelling a person to pass on a message which goes against their beliefs amounts to less favourable treatment. In addition, the Attorney General submitted that the correct comparator should be with a service provider who does not have a difficulty with the message requested. The UKSC appeared to respond favourably to the Attorney General's submissions, until it was suggested that the court should apply the NI constitutional principle of horizontal severance used to invalidate the provisions of a piece of legislation which fall foul of constitutional provisions. The UKSC judges were critical, and Lady Hale pointed out that there was no sufficient UK authority to support their submission on this point. There was also contention as to whether the alleged discriminator's own views could count as a protected characteristic and therefore be taken into account. The Respondent argued that to do so would be to stretch the intention behind the legislation too far. Conversely, the Attorney General submitted that the intention behind the legislation should be given less weight as it was subject to a negative resolution. It is proposed here, that the rights of the alleged discriminator should be taken into account with regard to the validity of legislation, as failure to do so would set a dangerous precedent. However, it is also arguable that the intention of the legislator should not be disregarded. On balance, SOR is invalid on grounds of discrimination, but that the UKSC is likely to hold the opposite due to the importance of the legislation to the protection of the LGBT community in NI at this time, in addition to their awareness of the history of UK interference in NI affairs and resulting reluctance to interfere with the autonomy of the NI legal system.

With regard to the validity of FETO, the Attorney General submitted that, as an Order in Council, FETO was invalid on grounds of discrimination under section 17 of NICA 1973. Schedule 1 of the Northern Ireland Act 1974 allowed provisions to be made for NI through Orders in Council in the absence of an assembly, but also provided that any discriminatory Orders in Council would be void. Both pieces of legislation have been repealed, but the Attorney General contended that the current legislation, especially the NIA 1998 upheld the principles stated in the repealed statutes. It is advocated here that the Attorney General's argument with regard to the validity of FETO is considerably weaker than his argument concerning the validity of SOR. As stated above, it appears, on consideration of the legislation in question that SOR may in fact be invalid, whereas the wording of the legislation with regard to FETO seems to emphasise its validity. Furthermore, the Respondent's contextual submissions carry significantly more weight when argued alongside FETO, than alongside

SOR, due to the closer involvement of the LGBT community in the implementation of FETO and the emphasis of the legislation on LGBT rights. It appears likely that the UKSC will find FETO to be valid, even if they come to the contrary decision on SOR.

In summary, the weight of the arguments outlined above support the conclusion that the Appellants should but are unlikely to succeed on the issue of discrimination under SOR and FETO, on the question of validity under Articles 9 and 10 of the Convention, and on the validity of SOR. However, the Respondent should, and undoubtedly will succeed regarding the alleged breach of the Appellants' rights under FETO, and on the question of the validity of FETO. This case comment has also discussed the possibility of a general rule of conscientious objection, and it is concluded that such a development could ease the tension between the LGBT and faith communities, in addition to improving the balance of rights in cases such as *Lee v McArthur*, which arise in the commercial sphere.

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