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Lee v United Kingdom: Rejected on procedural grounds

Dr Caroline K Roberts¹

In April 2019, six months after the Supreme Court's judgment in *Lee v Ashers Baking Company Ltd and Others*,² Mr Lee lodged an application before the European Court of Human Rights (ECtHR) against the UK, challenging the Supreme Court's decision. The ECtHR communicated the case to the UK Government for its response on 6 March 2020,³ and exactly ten months later, on 6 January 2022 the ECtHR published its decision in *Lee v United Kingdom*.⁴

Whilst the Supreme Court's judgment has received extensive comment, the proceedings before the ECtHR have received relatively little attention. The communicated case of *Lee v United Kingdom* and the ECtHR's decision in *Lee v United Kingdom* are the focus for this comment.

1. The background: Discrimination complaint

In order to fully understand Mr Lee's complaint before the ECtHR it is useful to recap the background. This case began in 2014, when Mr Lee, a gay man associated with QueerSpace, placed an order for a cake with Ashers Baking Company Ltd. He requested that the cake be iced with a picture of the characters Bert and Ernie from Sesame Street, the QueerSpace logo and the message 'Support Gay Marriage'. The bakery owners, Mr and Mrs McArthur refused to fulfil the order on the grounds that they believe gay marriage is incompatible with Biblical teaching. In response to this refusal, Mr Lee brought an action for breach of statutory duty. Specifically, he complained that he had suffered discrimination contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (the '2006 Regulations') and/or The Fair Employment and Treatment (Northern Ireland) Order 1998 (the '1998 Order') which prohibit direct or indirect discrimination on grounds of sexual orientation, political opinion or religious belief.

The case progressed through the domestic courts, beginning with the Belfast County Court, then the Northern Ireland Court of Appeal, and finally reaching the Supreme Court. Mr Lee was initially successful at the Belfast County Court, at which the District Judge held that the McArthur's refusal to fulfil the order constituted direct discrimination on grounds of sexual orientation and on grounds of religion belief or political opinion. He was also successful when the bakery and the McArthurs appealed the decision to the Northern Ireland Court of Appeal as the court held that he had suffered associative direct discrimination on grounds of sexual orientation. However, when the bakery and the McArthurs appealed to the Supreme Court, the Supreme Court (after granting permission to appeal) reversed the decisions of the lower courts, unanimously holding that there had been no discrimination on grounds of sexual orientation nor on grounds of religious belief or political opinion.⁵

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² *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49.

³ *Lee v The United Kingdom* (communicated case) App no 18860/19 (ECtHR, 6 March 2020).

⁴ *Lee v The United Kingdom* App. no 18860/19 (ECtHR 7 January 2022).

⁵ Lady Hale gave the leading judgment. Lord Kerr, Lord Hodge, Lady Black and Lord Mance agreed.

In addressing the complaint of sexual discrimination, the Supreme Court drew a distinction between the message ('Support Gay Marriage') and the man, holding there had been no sexual discrimination because the objection was to the message on the cake and not to Mr Lee or anyone with whom he associated. The Supreme Court explained that '[p]eople of all sexual orientations, gay, straight or bisexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation'.⁶

In addressing the complaint about discrimination on grounds of political opinion, the court again made a similar distinction, holding that the objection was to being required to promote the message on the cake, and not to 'Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage'.⁷ However, the Supreme Court did recognise that there was a closer association between the message on the cake and Mr Lee's political opinions than there was between the message and his sexual orientation,⁸ so it accepted that the argument could be made that they were 'indissociable' for the purpose of direct discrimination on grounds of political opinion.⁹

As a result, the ECtHR deemed it appropriate to consider the impact of the McArthurs' rights under the European Convention on Human Rights (ECHR) on the meaning and effect of the 1988 Order relating to fair employment and treatment. For the Supreme Court, the nub of the issue was that the McArthurs had been asked to ice a cake with a message with which they profoundly disagreed. Drawing on the ECtHR jurisprudence, the Supreme Court observed that ECHR Articles 9 and 10 offer protection to individuals from being obliged to hold or manifest a religion or belief that they do not hold. Recalling *Buscarini v San Marino*, the Supreme Court explained that freedom of thought, conscience and religion 'entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion'.¹⁰

The Supreme Court also referred to domestic jurisprudence, citing the decision of the Judicial Committee of the Privy Council in *Commodore of the Royal Bahamas Defence Force v Laramore* in which the Board held that Mr Lamore, a Muslim Petty Officer, was hindered in the enjoyment of his freedom of conscience when he was obliged, on pain of disciplinary action, to remain on parade and to take off his cap when Christian prayers were said during regular colours parades.¹¹ No justification was found for the obligation to actively participate in the religious ceremony in that case. Further, the Supreme Court recalled its earlier judgment in *RT (Zimbabwe) v Secretary of State for the Home Department*, in which Lord Dyson held that '[n]obody should be forced to have or express a political opinion in which he does not believe'.¹²

Recognising that Articles 9 and 10 are qualified rights, the Supreme Court found that the bakery could not refuse to provide goods to Mr Lee because he was gay or because he supported gay marriage, however, it did not consider that this amounted to a justification for 'something completely different',

⁶ *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49, para. 25.

⁷ *Ibid.*, para. 47.

⁸ This is because Mr Lee was perceived to hold the opinion in question.

⁹ *Ibid.*, para. 48.

¹⁰ *Ibid.*, para 50. See *Buscarini v San Marino*, ECHR 1999-I 605, para. 34.

¹¹ See *Commodore of the Royal Bahamas Defence Force and others (Appellants) v Laramore (Respondent) (Bahamas)* [2017] UKPC 13, paras. 26, 28, 30

¹² See *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38, para. 42.

namely, the obligation to supply a cake bearing a message with which they profoundly disagreed.¹³ In light of this, the Supreme Court decided that the 1988 Order ‘should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree unless justification is shown for doing so’.¹⁴ In this case, the Supreme Court found that no justification for compelled speech had been demonstrated. With respect to the bakery (a limited company), the Supreme Court concluded that holding the bakery liable for discrimination when the McArthurs were not liable would, in effect, negate the McArthurs’ ECHR rights. The Supreme Court, therefore, allowed the appeal and set aside the declarations and award of damages to Mr Lee made by the County Court.¹⁵

2. Complaint before the ECtHR

Before the ECtHR, Mr Lee complained that the decision by a public authority (namely, the Supreme Court) to dismiss his claim for breach of statutory duty due to discrimination contrary to the provisions of the 2006 Regulations and the 1998 Order, interfered with his rights under Articles 8, 9 10 and Article 14 taken in conjunction with those Articles, and that the interference was not proportionate.

After asking whether the applicant had exhausted domestic remedies in respect of his ECHR complaints, the ECtHR asked whether there had been an interference with the Articles listed above, and if so, whether the interference was legitimate. Additionally, referring to *Pla and Puncernau v Andorra*,¹⁶ the ECtHR asked about the appropriate test to be applied in a case ‘concerning a dispute of a “purely private nature”’.¹⁷

3. ECtHR Decision

On the question of exhaustion of domestic remedies, the government argued that the applicant had failed to raise his complaints under the ECHR Articles listed above in the domestic proceedings, and as such, he had not given the national courts the opportunity to examine them. In its assessment the ECtHR explained that ECHR complaints before it ‘must have been aired, either explicitly or in substance’ before the national courts’.¹⁸ It observed that in the domestic proceedings, the focus of Mr Lee’s claim had been the 2006 Regulations and the 1998 Order; he had not invoked his ECHR rights expressly at any point, and his claim that he raised his ECHR arguments in ‘substance’ (because, he contended, the domestic provisions he relied on were enacted to protect the ECHR rights he relied on) was not persuasive.¹⁹

¹³ *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49, para. 55.

¹⁴ *Ibid.*, 56.

¹⁵ The District Judge in the County Court had held that the refusal to fulfil Mr Lee’s order was direct discrimination on grounds of sexual orientation, religious belief, and political opinion, and made a declaration to the effect that the 1998 Order and the 2006 Regulations were compatible with the Convention Rights. Mr Lee was awarded damages of £500, see *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49, para. 15.

¹⁶ In *Pla and Puncernau v Andorra*, the ECtHR noted that it is not ‘in theory required to settle disputes of a purely private nature’ but conceded that in exercising its European supervision, it ‘cannot remain passive where a national court’s interpretation of a legal act...appears unreasonable, arbitrary, or...blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention’, see *Pla and Puncernau v Andorra* App. no 69498/01 Reports of Judgements and Decisions 2004-VIII, 215, para. 59.

¹⁷ *Lee v The United Kingdom* (communicated case) App no 18860/19 (ECtHR, 6 March 2020).

¹⁸ *Lee v The United Kingdom* App. no 18860/19 (ECtHR 7 January 2022), para. 68.

¹⁹ *Ibid.*, paras. 69 -70.

The ECtHR observed that before the domestic courts, Mr Lee had argued that in accessing goods and services he had been discriminated against on grounds of sexual orientation and/or political opinion and, as such, the task of the domestic courts was to determine whether there was difference of treatment on those grounds. If the domestic courts found difference of treatment, then it was to consider whether this was justified, with regard to the McArthurs' rights under ECHR Articles 9 and 10.²⁰ The domestic courts were not tasked with balancing Mr Lee's ECHR rights with the ECHR rights of the McArthurs.

The ECtHR did not consider that Mr Lee's complaint—which focused on the Supreme Court's judgment—obviously fell within the scope of Articles 8, 9 or 10. And, as no substantive right was engaged, Article 14 (an ancillary right) did not apply either. Whilst the ECtHR noted that this was 'not to say that the facts of the case could not fall within the ambit' of these Articles, by relying on domestic law, the applicant did not provide the domestic courts with the opportunity of exploring the preliminary question whether Article 14 was applicable to the facts before he applied to the ECtHR.²¹

The ECtHR was emphatic that where an applicant complains that the domestic courts did not adequately balance his ECHR rights with those of another individual, who had expressly invoked their ECHR rights throughout the proceedings, 'it is axiomatic that the applicant's Convention rights should also have been invoked expressly before the domestic courts'.²² By choosing not to do so, Mr Lee had invited the ECtHR to 'usurp the role of the domestic courts by addressing these issues itself'.²³ The ECtHR, therefore, declared the application inadmissible on the grounds that the applicant had failed to exhaust domestic remedies.

4. Comment

ECHR Article 35(1) provides that the ECtHR may only deal with a matter after all domestic remedies have been exhausted. The ECtHR has developed extensive jurisprudence in relation to this principle. Given the facts of the case in *Lee v United Kingdom*, the ECtHR's decision to declare the complaint inadmissible on this procedural ground was unsurprising.

The rationale for the rule that domestic remedies must be exhausted is that the national courts should have the opportunity to deal with questions regarding the compatibility of domestic law with the ECHR, and to prevent or rectify alleged ECHR violations before an application is made to the ECtHR.²⁴ This principle demonstrates the application of the doctrine of subsidiarity under the ECHR, and was indeed emphasised in *Lee v United Kingdom*; the ECtHR explained that given the 'heightened sensitivity of the balancing exercise in the particular national context' the domestic courts were better placed than the ECtHR to carry out a balancing exercise between the competing ECHR rights of Mr Lee and the McArthurs.²⁵ Additionally, the ECtHR noted that the Human Rights Act 1998 permits individuals to invoke their ECHR rights directly before the UK courts and, in so far as possible, the courts are obliged to read the legislation in a way which is compatible with ECHR rights.²⁶

²⁰ This was clearly set out by Lady Hale, see *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)* [2018] UKSC 49, para. 1.

²¹ *Lee v The United Kingdom* App. no 18860/19 (ECtHR 7 January 2022), para. 74.

²² *Ibid.*, para. 77.

²³ *Ibid.*

²⁴ See *Selmouni v France* Reports of Judgments and Decisions 1999-V 149, para. 74. For further information on the rule, see Council of Europe, 'Practical Guide on Admissibility Criteria' (30 April 2022), available at: https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.

²⁵ *Lee v The United Kingdom* App. no 18860/19 (ECtHR 7 January 2022), para. 76.

²⁶ *Ibid.* para. 77.

In terms of the requirement that ECHR complaints must be raised explicitly or at least in substance during domestic proceedings, Mr Lee’s complaint appears to have encountered a number of obstacles. Firstly, the claim that the 2006 Regulations and the 1998 Order were enacted to protect his rights under Articles 8, 9, 10 and 14 of the ECHR appears to lack force. As the ECtHR observed, even if he were correct in making such a claim, the 2006 Regulations and the 1998 Order which focus on access to goods and services, do not protect substantive rights under the ECHR Articles mentioned; the domestic legislation only protects against *discrimination* in access to goods and services.

Secondly, whilst the protection against discrimination in the 2006 Regulations and the 1998 Order is free-standing, ECHR Article 14 has no independent existence. Whilst it is not necessary to show a violation of a substantive provision to fall within the scope of Article 14, the facts must fall within the ambit of one or more substantive ECHR rights.²⁷ However, there was no obvious engagement of the right to privacy, or to the freedom to hold or express opinions or beliefs in this case; the focus was whether the bakery was required to produce a cake bearing the message ‘Support Gay Marriage’ as Mr Lee requested.

This is not the first case concerning Article 9 in which the ECtHR has found that complaints have not been raised expressly or in substance before the ECtHR. In *Association Les Témoins De Jéhovah v France*, for instance, the ECtHR found that the complaints concerning Article 9 combined with Article 14 were not raised, even implicitly, at the highest domestic court.²⁸ The decision in *Lee v United Kingdom*, therefore, draws attention, once again, to the importance of ensuring that ECHR rights are raised expressly, or at least in substance, during domestic proceedings before an application is made to the ECtHR.

28 July 2022



²⁷ See *Carson and Others v The United Kingdom* ECHR 2010-II 407, para. 63.

²⁸ *Association Les Témoins De Jéhovah v France* App. no 8916/05 (ECtHR, 21 September 2010) [French]. For an example of a case against the UK in which the ECtHR found that the complaint had not been raised expressly or in substance, see *Nicklinson and Lamb v The United Kingdom* App. no 2478/15 1787/15 (ECtHR, 23 June 2015), paras. 87-95.