

Lee v Ashers Baking Company Ltd and others [2018] UKSC 49

EXTRACTS FROM THE JUDGMENT OF THE SUPREME COURT GIVEN ON 10 OCTOBER 2018

SEXUAL ORIENTATION LAW

“People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation.” [Para. 15]

“The Court of Appeal held 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”... This suggests that the reason for refusing to supply the cake was that Mr Lee was likely to associate with the gay community of which the McArthurs disapproved. But there was no evidence that the bakery had discriminated on that or any other prohibited ground in the past. The evidence was that they both employed and served gay people and treated them in a non-discriminatory way. Nor was there any finding that the reason for refusing to supply the cake was that Mr Lee was thought to associate with gay people. **The reason was their religious objection to gay marriage.**” [Para. 28]

“That is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is “on grounds of” sexual orientation. There must, in my view, be a closer connection than that. **Nor would I agree with the Court of Appeal that “the benefit from the message or slogan on the cake could only accrue to gay or bisexual people”**... It could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring.” [Para. 33]

“This was a case of associative discrimination or it was nothing. It would be unwise in the context of this particular case to attempt to define the closeness of the association which justifies such a finding. Not only did the District Judge not make such a finding in this case, the association would not have been close enough for her to do so. **In a nutshell, the objection was to the message and not to any particular person or persons.**” [Para. 34]

“...It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person’s race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.” [Para. 35]

“...The SORs [Sexual Orientation Regulations] do not, at least in the circumstances of this case, impose civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.” [Para. 36]

RELIGIOUS AND POLITICAL BELIEFS LAW

“...the less favourable treatment prohibited by FETO [NI’s Fair Employment and Treatment Order] must be on the grounds of religious belief or political opinion of someone other than the person meting out that treatment. **To the extent that the District Judge held that the bakery had discriminated unlawfully because of its owners’ religious beliefs she was wrong to do so.**” [Para 45]

“The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. **The less favourable treatment was afforded to the message not to the man.** ...The evidence was that they were quite prepared to serve him in other ways. The situation is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.” [Para. 47]

“...obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9(1) rights.” [Para. 50]

“**The freedom not to be obliged to hold or to manifest beliefs that one does not hold is also protected by article 10 of the Convention**... The right to freedom of expression does not in terms include the right not to express an opinion but it has long been held that it does. ...Citing, among other cases, both *Kokkinakis* and *Buscarini*, Lord Dyson held that the principle applied as much to political opinions as it did to religious belief: **‘Nobody should be forced to have or express a political opinion in which he does not believe’**” [Para. 52]

“The District Judge did not accept that the defendants were being required to promote and support a campaign for a change in the law to enable same sex marriage... The Court of Appeal, while not deciding the point, appears to have agreed with this: “the fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either”... These are, in fact, two separate matters: being required to promote a campaign

and being associated with it. As to the first, the bakery was required, on pain of liability in damages, to supply a product which actively promoted the cause, a cause in which many believe, but a cause in which the owners most definitely and sincerely did not. As to the second, there is no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message. Mrs McArthur may have been worried that others would see the Ashers logo on the cake box and think that they supported the campaign. But that is by the way: **what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed.**" [Para. 54]

"...The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. **In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake** - support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the FETO claim." [Para. 55]

"...FETO 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." [Para. 56]

"The important message from the Masterpiece Bakery case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics. One can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. **The bakery would have refused to supply this particular cake to anyone, whatever their**

personal characteristics. So there was no discrimination on grounds of sexual orientation. If and to the extent that there was discrimination on grounds of political opinion, no justification has been shown for the **compelled speech** which would be entailed for imposing civil liability for refusing to fulfil the order." [Para. 62]

FACTUAL BACKGROUND

"On 8 or 9 May 2014, Mr Lee went into the shop and placed an order for a cake to be iced with his design, a coloured picture of cartoon-like characters "Bert and Ernie", the QueerSpace logo, and the headline "Support Gay Marriage". Mrs McArthur took the order but raised no objection at the time because she wished to consider how to explain her objection and to spare Mr Lee any embarrassment. Mr Lee paid for the cake. Over the following weekend, the McArthurs decided that they could not in conscience produce a cake with that slogan and so should not fulfil the order. On Monday 12 May 2014, Mrs McArthur telephoned Mr Lee and explained that his order could not be fulfilled because they were a Christian business and could not print the slogan requested. She apologised to Mr Lee and he was later given a full refund and the image was returned to him." [Para. 12]

THE EQUALITY COMMISSION FOR NORTHERN IRELAND [ECNI]

"The Court of Appeal expressed some concern that the correspondence between the ECNI and the bakery may have created the impression that the ECNI was not interested in assisting members of the faith community when they found themselves in difficulties as a result of their deeply held religious beliefs (para 106). It is obviously necessary for a body such as the ECNI to offer its services to all people who may need them because of a protected characteristic and not to give the impression of favouring one such characteristic over others." [Para. 14]