RE: **THE GENERAL IMPLICATIONS FOR FREEDOM OF CONSCIENCE AND FREEDOM OF EXPRESSION ARISING FROM THE LITIGATION *GARETH LEE V. ASHERS BAKING COMPANY LIMITED*.**

ADVICE

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RE: THE GENERAL IMPLICATIONS FOR FREEDOM OF CONSCIENCE AND FREEDOM OF EXPRESSION ARISING FROM THE LITIGATION *GARETH LEE V. ASHERS BAKING COMPANY LIMITED*

ADVICE

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1. INTRODUCTION

1.1 I refer to the E-mail dated 2 March 2015 from my instructing solicitor, Sam Webster of The Christian Institute, and to the instructions contained therein. I am asked to advise The Christian Institute on the general implications for freedom of conscience and for the protection of freedom of expression arising from the litigation *Gareth Lee v. Ashers Baking Company Limited.*

1.2 This is a case which has been brought with the backing of the Equality Commission for Northern Ireland. It comes before Belfast County Court at the instance of Gareth Lee against a limited company, Ashers Baking Company Limited, which is convened as a defendant together with its directors Colin and Karen McArthur.

1.3 The plaintiff's case is that the defendants acted unlawfully in turning away his order, after full pre-payment for it had been made, to supply him with a cake bearing the slogan in icing: "*Support Gay Marriage – Queerspace born 1988*".

1.4 Although his money was refunded in full, the plaintiff seeks £500 damages for injury to feeling, loss and damage sustained by him as a result of this refusal (although it is to be noted that he did manage to find another bakery able and willing to provide him a cake on time and to his design). He also seeks a declaration that the treatment of the plaintiff by the defendants constituted unlawful discrimination by the defendants against the plaintiff contrary to:

- Regulations 5 [1] and 24 [2] of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ("SOR") and/or

- Articles 28 [3] and 35 [4] of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("FETO"). It may be noted that FETO gives no positive definition of

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[1] Regulation 5 SOR states:

"5.— Goods, facilities or services

(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services—

(a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person seeking belongs to a section of the public) to other members of that section.

(2) It is unlawful for any person concerned with the provision of goods, facilities or services as mentioned in paragraph (1), in relation to such provision, to subject to harassment—

(a) a person who seeks to obtain or use those goods, facilities or services; or

(b) a person to whom he provides those goods, facilities and services.

(3) The following are examples of the facilities and services mentioned in paragraph (1)—

(a) access to and use of any place which members of the public are permitted to enter;

(b) accommodation in a hotel, boarding house, or similar establishment;

(c) facilities by way of banking or insurance or for grants, loans, credit or finance;

(d) facilities for education;

(e) facilities for entertainment, recreation, or refreshment;

(f) facilities for transport or travel;

(g) the services of any profession or trader, or any local or other public authority.

(4) Nothing in these Regulations shall render unlawful any act done in affording persons of a particular sexual orientation access to goods, facilities or services to meet the specific and justified needs of persons of that group in regard to their education, welfare or any ancillary benefits."

[2]Regulation 24 SOR states:

"**24.— Aiding unlawful acts**

(1) A person who knowingly aids another person to do an act made unlawful by these Regulations shall be treated for the purposes of these Regulations as himself doing the same kind of unlawful act.

(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under regulation 23 (or would be so liable but for regulation 23(5)) shall be taken to have aided the employer or principal to do the act.

(3) For the purposes of this regulation, a person does not knowingly aid another to do an unlawful act if—

(a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of these Regulations, the act which he aids would not be unlawful; and

(b) it would be reasonable for him to rely on the statement.

(4) A person who knowingly or recklessly makes a statement such as is mentioned in paragraph (3)(a) which in a material respect is false or misleading shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

what might constitute religious beliefs or political opinions covered by its anti-discrimination provisions, providing only in Regulation 2(4) FETO that:

> "(4) In this Order any reference to a person's political opinion does *not* include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear."

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[3] Article 28 FETO provides:

"28.— Discrimination in provision of goods, facilities or services

(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services—

(a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section.

(2) The following are examples of the facilities and services mentioned in paragraph (1)—

(a) access to and use of any place which members of the public are permitted to enter;

(b) accommodation in a hotel, boarding house or other similar establishment;

(c) facilities by way of banking or insurance or for grants, loans, credit or finance;

(d) facilities for training;

(e) facilities for entertainment, recreation or refreshment;

(f) facilities for transport or travel;

(g) the services of any profession, trade or business, or any local or other public authority.

[4] Article 35 FETO provides **:**

"35.— Accessories and incitement

(1) Any person who—

(a) knowingly aids or incites; or

(b) directs, procures or induces,

another to do an act which is unlawful by virtue of any provision of Part III or IV or Article 34 shall be treated for the purposes of this Order as if he, as well as that other, had done that act.

(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under Article 36 (or would be so liable but for Article 36(4)) shall be taken to have aided the employer
or principal to do the act.

(3) A person does not under this Article knowingly aid another to do an unlawful act if—

(a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of this Order, the act which he aids would not be unlawful; and

(b) it is reasonable for him to rely on the statement.

(4) A person who knowingly or recklessly makes a statement such as is referred to in paragraph (3)(a) which in a material respect is false or misleading shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) An inducement consisting of an offer of benefit or a threat of detriment is not prevented from falling within paragraph (1) because the offer or threat was not made directly to the person in question."

1.5 The plaintiff's complaint is, in sum, that the defendants' refusal to produce his cake amounts to discrimination against him on grounds of sexual orientation and separately on grounds of his intent, in his design of the cake, to use it as a medium to express a political opinion in favour of same sex marriage.

1.6 The directors of Ashers Baking Company Limited, Colin and Karen McArthur, are committed Christians. They contend that it is unlawful for them or their business to be required to promote, support or be otherwise associated with, a particular moral or political cause, particularly one to which they have a fundamental objection. They argue that the legislation relied upon by the plaintiff does not, on its ordinary and natural application, require them to do so and that, in any event, this legislation has at all time to be construed and applied to them compatibly with their Convention rights protecting their freedom of thought, conscience and religion (Article 9 ECHR) as well as their freedom of expression (Article 10 ECHR). [5] As the Strasbourg Court has explained:

> "Bearing witness in words and deeds is bound up with the existence of religious convictions."[6]

1.7 In their letter before action dated 27 October 2014 to the defendants and their solicitors the Equality Commission for Northern Ireland make the following claims:

> "[I]t is of no consequence whether or not the directors thought that Mr. Lee (1) did or did not have the political opinion expressed in the design of the cake or (2) was or was not gay. *It is enough in a context such as this that it was the religious belief that they had and their objection to the political opinion that caused them to act in the way that they did on behalf of Ashers.*"
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> ….
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> We note that Hewitt & Gilpin seeks to raise defences to the claims of Mr. Lee in relation to SOR based on the religious beliefs of the directors. As to this, firstly it should be pointed out that no such provision is made in SOR, or for that matter FETO; secondly such a defence would be contrary to the law as explained by the Supreme Court in *Preddy v. Hall and Bull* [2013] UKSC 73 [2013] 1 WLR 3741.

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[5] Compare with *Ontario Human Rights Commission v Brockie* (2002) 22 DLR (4th) 174 in which a commercial printing company, Imaging Excellence Inc., was required by order of Ontario Superior Court of Justice to afford its general printing services in a non-discriminatory manner to a gay rights group (as regards the production of letterheads and business cards and the like), but was expressly not placed under any obligation to print leaflets which actively promoted "an homosexual lifestyle" and/or which was dismissive of the Christian beliefs of Mr Brockie, the president and directing mind of the company. The Ontario Superior Court of Justice held that, otherwise, there would be a disproportionate interference with Mr Brockie's freedom of religion in being forced to act in a manner contrary to his religious beliefs. This decision is considered by Weatherup J in *In re Christian Institute's Application for Judicial Review* [2007] NIQB 66 [2008] NI 86 at §§ 86-88 and by the Court of Appeal of England and Wales in *Preddy v Bull* [2012] EWCA Civ 83 [2012] 1 WLR 2514 *per* Rafferty LJ at §§ 26, 50.

[6] *Kokkinakis v Greece* (1993) 17 EHRR 397

Moreover a limited company cannot have a religious belief."

1.8 I am asked to consider the likely impact on the law of Northern Ireland of Mr Lee succeeding in his claim and for these propositions of the Equality Commission for Northern Ireland being accepted not just before the County Court but by higher courts on any appeal.

2. CONVENTION RIGHTS AND THE PROTECTION OF NEGATIVE FREEDOM OF EXPRESSION

2.1 There is no doubt that legal persons (companies etc.), just as much as natural persons, may pray in aid the protections of Article 10 ECHR. [7] This states, so far as relevant that

> "*Everyone* has a right to freedom of expression. This right shall include the freedom to *hold opinions* …."

2.2 In protecting the right to *hold* an opinion the ECHR also protects what might be termed "negative freedom of expression", [8] which is to say a right not to be compelled to express or commit oneself to a particular view point (or to be forced to assent in or appear to give support to another's views) but, instead, to keep one's own counsel on a matter. [9] This might also be termed the "freedom of non-expression".

2.3 The United Nations Human Rights Committee has observed as follows, under reference to Article 19 of the International Covenant on Civil and Political Rights (ICCPR):

> "9 … No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. <u>*All*</u> *forms of opinion are protected*, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with Article 19(1) ICCPR [which states that "everyone shall have the right to hold opinions without interference"] to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest detention, trial or

[7] See *Markt Intern* v *Germany* (1989) 12 EHRR 161. In an EU law context see *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH* [1997] ECR I-3689. See, too, Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025 and Case C-421/07 *Frede Damgaard* [2009] ECR I-2629.

[8] See *Gillberg v. Sweden* [2012] ECHR 41723/06 (Grand Chamber, 3 April 2012) at § 86

[9] See *Strohal v. Austria* [1994] ECommHR 20871/92 (Commission decision, 7 April 1994) at § 2:

> "[T]he Commission recalls that the right to freedom of expression by implication also guarantees a 'negative right' not to be compelled to express oneself, i.e. to remain silent (see *K. v. Austria* (16002/90, Commission Report of 13 October 1992, § 45.)"

imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.

10. *Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion*."[10]

2.4 This "negative right of expression" can be seen to parallel the "negative right of association" which the European Court of Human Rights has found to be contained in Article 11 ECHR which, in protecting everyone's "freedom of association with others, including the right to form and join trade unions for the protection of his interests", also protects the right of individuals *not* to be forced to join a trade union [11] or, indeed,

[10] UN Human Rights Committee *General comment No. 34 on Article 19: Freedoms of opinion and expression* (12 September 2011) at §§ 9-10

[11] See, for example, *Monica Lilja v. Sweden* [1989] ECommHR 12090/86 (4 July 1989):

"The applicant has been a member of the Swedish Municipal Workers Union (*Svenska Kommunalarbetareförbundet*) since March 1983. Through this membership the applicant falls under the umbrella of the Swedish Trade Union Confederation (*Landsorganisationen*). On 23 November 1984 the representative body of the applicant's local union branch No. 55 decided to terminate the arrangement under which members of the branch wishing to join the Social Democratic Party (SAP) should register themselves as members of the party, and to return to the old form of collective affiliation to the SAP. The decision by the representative body was followed up by an agreement on collective party membership between the branch No. 55 and the SAP. On 28 November 1984 the local trade union branch informed the applicant of the decision taken and that she would be considered as collectively admitted to the SAP as from 1 January 1985 onwards.

The applicant was informed however that if she did not want to be a party member she could exclude membership by notice in writing to the local trade union branch. Since the applicant was of the opinion that neither the trade union branch nor the SAP was in any respect legally qualified to act on her behalf on matters concerning membership of a political party, she did not submit any written reservation to the union. In consequence of this the applicant submits that she was treated as being a member of the SAP from 1 January 1985 and her trade union branch started paying an alleged party membership fee in her name and on her behalf. The SAP accepted the payment as a membership fee paid on the applicant's account and registered her as a party member.

The applicant who is voluntarily and according to her own option an active member of another political party found the situation created by her local trade union branch and the SAP embarrassing and a violation of her right to freedom of thought and conscience as well as a violation of her right to negative freedom of association.

….

The applicant has complained that the decision taken by her local trade union branch on collective affiliation of the branch's members to the SAP and the agreement between these two bodies concerning this matter constitute, separately as well as together, a violation of Articles 9 and 11 (Art. 9, 11) of the Convention, each Article in conjunction with Article 17 (Art. 9+17, 11+17) of the Convention. *Furthermore the applicant complains that the possibility offered by her trade union branch to exclude herself from membership of the SAP is unacceptable since this inevitably implies a political statement involving a violation of her right to negative freedom of expression as set out in Article 10 (Art. 10) of the Convention.*"

companies not being required to join an employer's organisation. [12] As the Strasbourg Court has repeatedly stated:

> "Article 11 of the Convention encompasses not only a positive right to form and join an association but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association, and that State responsibility may be engaged by a failure to secure the effective enjoyment of those rights." [13]

2.5 This freedom not to be forced or required to express support for a particular opinion or political position was, indeed, the very one which Sir Thomas More strove to uphold in declining to sign the Act of Supremacy declaring Henry VIII to be the Supreme Head of the Church of England.

2.6 The facts of the case brought out in this present litigation can properly be analysed as one in which the defendants are being required to endorse an opinion – support for same sex marriage – which they do not in fact hold. Their refusal to endorse this opinion – to protect their negative freedom of expression – has resulted in the State, in the form of the Equality Commission for Northern Ireland, funding court action against them which seeks to stigmatise as unlawful and render unactionable the defendants' religious beliefs and political opinions. The actions of the Equality Commission for Northern Ireland appear

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[12] See for example *Gustafsson v. Sweden* (1996) 22 EHRR 409

[13] *AB Kurt Kellerman v. Sweden* (2003) 37 EHRR CD 161. The case also contains the following passages:

> "[T]he union asserted that Art.11 of the Convention did not afford any protection to a limited liability company
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> …
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> The applicant company contends that Art.11 is applicable in the present case. It argues that the union threatened the applicant company with industrial action unless the applicant either joined an employers' association or signed the IG agreement. The applicant found that that collective agreement was poorly adapted to the special nature of the business conducted by the company, in contrast to the employment contracts already applied. Having in no way participated in the drafting of the terms and conditions of the agreement, the applicant was placed in a situation where its only possibility of—indirectly—influencing those terms and conditions was to join an employers' association. The applicant asserts that it was principally opposed to membership of such an association, as it did not wish to transfer the right of determination over central aspects of its business to an association whose aims did not correspond with those of the applicant and waive the right to negotiate itself with its employees regarding the terms and conditions governing their employment.
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> The Court considers that it is not decisive whether the applicant expressed a clear aversion to participate in the Swedish collective-bargaining system as such; it accepts that the applicant wished to retain the possibility of negotiating the terms of employment directly with its employees and that it, to this end, was opposed to joining an employers' association or signing the collective agreement proposed by the union. Facing industrial action, the applicant was placed under considerable pressure to meet the union's demand that it accept one of these alternatives. In these circumstances, the Court finds that, to a degree, the applicant's enjoyment of its freedom of association was affected and that, thus, Art.11 is applicable in the present case (see *Gustafsson v Sweden*, § 44)."

to echo Elizabeth Tudor's attributed remark to the effect that she had "no desire to make windows into men's souls", [14] a remark that was based not on any principled neutrality or commitment to pluralism, but on cynicism backed by power: "I cannot control how you think, but I can control what you do".

2.7 The Equality Commission for Northern Ireland appears however to have forgotten that the present case does not concern simply equality law, but with human rights law. It is to be noted in this regard that the European Court of Human Rights has repeatedly stated that claimants cannot rely upon the Convention to found a right to same sex marriage – this matter is one upon which there is no Europe-wide consensus and therefore falls within the margin of appreciation of individual Contracting States. [15] Furthermore, there is no absolute Convention right not to be offended [16] which a claimant might rely upon

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[14] See *R (on the application of Johns) v Derby City Council* [2011] EWHC 375 (Admin), [2011] HRLR per Munby LJ and Beatson J in which the Divisional Court stated at § 97:

> "It is quite impossible to maintain that a local authority is not entitled to consider a prospective foster carers views on sexuality, least of all when, as here, it is apparent that the views held, and expressed, by the claimants might well affect their behaviour as foster carers. *This is not a prying intervention into mere belief. Neither the local authority nor the court is seeking to open windows into people's souls*. The local authority is entitled to explore the extent to which prospective foster carers' beliefs may affect their *behaviour*, their *treatment* of a child being fostered by them. In our judgment the local authority was entitled to have regard to these matters."

[15] See *Hämäläinen v Finland* [2014] ECHR 37359/09 (Grand Chamber, 16 July 2014) at §§ 31, 71, 74, 96:

> "31. From the information available to the Court, it would appear that ten member States of the Council of Europe permit same-sex marriage (Belgium, Denmark, France, Iceland, Norway, Portugal, Spain, Sweden, the Netherlands and the United Kingdom (England and Wales only)).
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> …
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> 71. The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf v. Austria* (2011) 53 EHRR 20 § 101).
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> …
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> 74. …[I]t cannot be said that there exists any European consensus on allowing same-sex marriages.
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> …
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> 96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see *Rees v. United Kingdom* (1987) 9 EHRR 56 § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf v. Austria*, cited above, § 63)."

[16] *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 § 49

> 49. As the Court has consistently held, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population.

nor is it "possible to deduce from the Convention a right not to be exposed to convictions contrary to one's own". [17]

2.8 The focus in the present case has to be upon the *defendants'* Convention right to hold an opinion and their (negative) rights of free expression. [18] It is the Equality Commission for

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Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."

[17] *Appel-Irrgang v Germany* [2009] ECHR 45216/07 (8 October 2009 – non-admissibility decision). See to similar effect *Dojan v. Germany* (2011) 53 EHRR SE24 at §68:

"The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions"

[18] See *R. (Calver) v Adjudication Panel for Wales* [2012] EWHC1172 (Admin) [2013] PTSR 378 per Beatson J at §§20, 42, 47, 48, 55:

"20. .. Convention rights, including article 10, are given direct effect in domestic law by the Human Rights Act 1998. Section 6 of that Act provides that it is unlawful for a public authority to act in a way which is incompatible with, *inter alia*, article 10 (save in limited circumstances concerning primary legislation). Section 3 provides that legislation and subordinate legislation, so far as it is possible to do so, must be read and given effect in a way which is compatible with the Convention rights.

…

42. … [I]n *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 297 and *R v Shayler* [2003] 1 AC 247, § 21, Lord Steyn and Lord Bingham respectively described freedom of expression as having 'the status of a constitutional right with attendant high normative force', and 'a fundamental right' which 'has been recognised at common law for very many years'. One of the consequences of giving this constitutional status to freedom of expression is that clear words are required to restrict it, and thus in that sense there is a narrower approach to the interpretation of legislation and instruments made under legislation restricting it.

…

47. … Hoffmann LJ... recognised, in *R v Central Independent Television plc* [1994] Fam 192 at 203, that freedom of expression is subject 'to clearly defined exceptions laid down by common law or statute', but did not appear to favour a process of balancing. He stated that, outside those exceptions and any exception enacted in accordance with Parliament's obligations under the Convention, 'there is no question of balancing freedom of speech against other interests. It is a trump card which always wins': p 203.

….

48 More recently, in *R (Gaunt) v Office of Communications (Liberty intervening)* [2011] 1 WLR 2355, § 23 Lord Neuberger MR, considering restrictions on broadcasting 'offensive and harmful material' in the Broadcasting Code made pursuant to the Communications Act 2003, stated that 'like virtually all human rights, freedom of expression carries with it responsibilities which themselves reflect the power of words, whether spoken or written'. Although he also emphasised that 'any attempt to curtail freedom of expression must be approached with circumspection', his recognition of the responsibilities that are carried by freedom of expression reflects an element of balancing. There, of course, has to be balancing when the exercise of the right to free expression in article 10 right by one person will violate other Convention rights, notably the right to respect for private and family life protected by article 8.

…

55. .. [I]t is clear, as a general proposition, that freedom of expression includes the right to say things which 'right thinking people' consider dangerous or irresponsible or which shock or disturb: see *R v Central Independent Television plc* [1994] Fam 192, 203 (Hoffmann LJ); *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (Sedley LJ); *Jerusalem v Austria* 37 EHRR 567, § 32; *Kwiecien v Poland* (2007) 48 EHRR 150, § 43; *Filipovic v Serbia* (2007) 49 EHRR 1183, § 53. … The statements of Hoffmann LJ in the *Central Independent Television* case [1994] Fam 192, 203 that 'a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom' and that freedom of expression means 'the right to publish things which government and judges, however well motivated, think should not be published' and of Sedley LJ in *Redmond-Bate v*

Northern Ireland's duty to uphold and respect these fundamental (common law and Convention) rights in the exercise of its statutory functions and powers. [19] And if and insofar as subordinate legislation such as SOR or FETO cannot be interpreted – even to the extent of the court reading or implying provisions into their terms [20] - in a manner which is compatible with the defendants' Convention rights, then the offending provisions of this subordinate legislation fall to be disapplied as "not law". The Human Rights Act 1998 provides in this regard:

"**3:- Interpretation of legislation.**

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2) This section—
  (a) applies to primary legislation and subordinate legislation whenever enacted;
  (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
  (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility**….**

….

12:- Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
(2) …

Director of Public Prosecutions [2000] HRLR 249, § 20 that '[f]reedom only to speak inoffensively is not worth having', are clearly relevant and have been relied on by courts"

[19] See Section 6(1) of Human Rights Act 1998:
"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

[20] See *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [2004] 2 AC 557 per Lord Rodger of Earlsferry at 106:
"106. … Section 3 is carefully drafted in the passive voice to avoid specifying, and so limiting, the class of persons who are to read and give effect to the legislation in accordance with it. Parliament thereby indicates that the section is of general application. It applies, of course, to the courts, but it applies also to everyone else who may have to interpret and give effect to legislation. The most obvious examples are public authorities such as organs of central and local government, but the section is not confined to them. The broad sweep of section 3(1) is indeed crucial to the working of the 1998 Act. …. [S]ection 3(1) requires public authorities of all kinds to read their statutory powers and duties in the light of Convention rights and, so far as possible, to give effect to them in a way which is compatible with the Convention rights of the people concerned. … Once the 1998 Act came into force, whenever, by virtue of section 3(1), a provision could be read in a way which was compatible with Convention rights, that was the meaning which Parliament intended that it should bear. For all purposes, that meaning, and no other, is the 'true' meaning of the provision in our law.

107 … [S]ection 3(1) contains not one, but two, obligations: legislation is to be read in a way which is compatible with Convention rights, but it is also to be given effect in a way which is compatible with those rights. Although the obligations are complementary, they are distinct.
…
121. … [I]n terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights"

(3) …

(4) The court must have *particular regard* to the importance of the Convention right to freedom of expression ….”

2.9 The Equality Commission for Northern Ireland appear to place great weight on the decision of the UK Supreme Court in the English case of *Preddy v. Bull.* [21] It is equally clear that they have misunderstood this decision. In that case the owners of a bed and breakfast had refused to allow a same sex couple in a civil partnership to occupy a double room. The main issue for determination on appeal was whether the discrimination amounted to direct or indirect discrimination. This was decided specifically with reference to the fact that in that case the same sex couple had been civil partners. In essence the Supreme Court Decision was split 2:2:1. Lady Hale, followed by Lord Toulson, held that there had been direct discrimination on the grounds of sexual orientation because the owners of the bed and breakfast had failed to treat a couple in a civil partnership in the same way as they would treat a married couple. Their reason for concluding that there had been direct discrimination was that they considered it desirable to follow what they understood the approach of the ECJ to have been in *Maruko v Versorgungsanstaldt der Deutschen Buhnen*. [22] Lord Neuberger and Lord Hughes, however, held that there had been indirect discrimination. They did not consider the *Maruko* case to be persuasive and they considered it to be of very limited assistance for various reasons, including the fact that the relevant finding had been an unreasoned assertion, the fact that it was difficult to reconcile with well-established CJEU and domestic jurisprudence and the fact that the case in *Preddy v Bull* concerned domestic legislation rather than legislation based on an EU directive or regulation (paragraph 81). Lord Kerr held that there had been direct discrimination. His reason for doing so was based solely on the precise wording of regulation 3(4) of The Equality Act (Sexual Orientation) Regulations 2007 and its application to the specific circumstances of that case, namely the fact that the couple were in a civil partnership. Therefore, unlike Lady Hale and Lord Toulson, his finding of direct discrimination was not based on the reasoning in the *Maruko* case. Moreover, the Supreme Court decision was decided with reference to the particular circumstances of the *Preddy* case, and the fact that the couple were in a civil partnership was crucial to the finding that there had been direct

[21] *Preddy v. Bull* [2013] UKSC 73 [2013] 1 WLR 3741

[22] Case C-267/06 *Maruko v Versorgungsanstaldt der Deutschen Buhnen* [2008] ECR I-1757

discrimination. In this regard, although Lady Hale found that there had been direct discrimination, she nevertheless acknowledged, at paragraphs 23 to 25, that if the case had been solely about discrimination against the unmarried she would have agreed with Lord Dyson in *Black v Wilkinson*, [23] who had been of the view that this (i.e. *Preddy v Bull*) was not a case of direct discrimination against a homosexual couple on the ground of sexual orientation since there were other unmarried couples who would also be denied accommodation on the ground that they were unmarried. However, the fact that the couple in *Preddy v Bull* were in a civil partnership was relevant to Lady Hale and Lord Toulson's decisions, as well as to Lord Kerr's decision. Consequently, this means that the Court of Appeal in *Black v Wilkinson* was indeed wrong to find, in similar circumstances, that there had been direct discrimination on the grounds of sexual orientation against a same sex couple who were not in a civil partnership. Given the split in the Supreme Court decision and in the reasoning of the judges, the decision provides no clear line of reasoning and so the case does not bear the weight which the Equality Commission for Northern Ireland would place on it. In sum, *Preddy v. Hall* is certainly not authority for the claim made in the present case that there has been direct discrimination against the plaintiff on grounds of sexual orientation or it is "contrary to the law" to put forward a defence to the present action based on requirements for respect and protection of the defendants' Convention rights.

3. SCENARIOS PRESENTED TO ME

3.1 If the approach of the Equality Commission for Northern Ireland outlined above were correctly based in law (which I do not consider it to be) then on the basis that the law does not protect the fundamental right, within the commercial context of supplying services, to hold opinions nor guarantee any negative freedom of expression, there would be no defence to similar actions being taken against individuals or companies supplying services in any of the following scenarios which have been presented to me:

(1) A Muslim printer refusing a contract requiring the printing of cartoons of the Prophet Mohammed

(2) An atheist web designer refusing to design a website presenting as scientific fact the claim that God made the world in six days

[23] *Black v Wilkinson* [2013] EWC 820 [2013] 1 WLR 2490

(3) A Christian film company refusing to produce a "feminist/female-gaze" erotic film

(4) A Christian baker refusing to take an order to make a cake celebrating Satanism

(5) A T-shirt company owned by lesbians declining to print T-shirts with a message describing gay marriage as an "abomination"

(6) A printing company run by Roman Catholics declining an order to produce adverts calling for abortion on demand to be legalised

3.2 I trust that the foregoing is sufficient for my instructing solicitors. I have nothing more to add at this stage.

12 March 2015

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