

***Lee v Ashers Baking Company Ltd* [2018] UKSC 49**

Comment by Professor Kenneth McK. Norrie, Strathclyde Law School

Introduction

One of simple delights of modern life is *The Great British Bake Off*, a television programme. With its lesbian presenters and (certainly in the last few series) a minimum of one openly gay competitor, with its range of ethnicities and genders, and the space it makes for the disabled, the programme makes palpable the concept of pluralism, defined by the European Court of Human Rights as the “harmonious interaction of persons and groups with varied identities”, to be encouraged as the “hallmark of a democratic society” which is “essential for achieving social cohesion”.¹ The programme also suggests that bakers are, as a class, nice people.

Our laws and cosy television are admirable in their embracing of the LGBT community to an extent unthinkable twenty years ago. The reality for many individuals is far less comfortable. Gay and lesbian people still suffer discrimination, bullying, violence, even while the law prohibits all of that. Our culture has for centuries been ingrained with deep social prejudice against, and demonization of, gay and lesbian people and that will not disappear completely just because the law now requires it. LGBT individuals continue to choose to silence themselves, to seek privacy and invisibility, or otherwise to modify their behaviour, as a means of avoiding the hurt and humiliation caused by the prejudice, contempt and even hatred that some people still show against them. Concealment of sexuality is now recognised as having deleterious psychological and emotional effects, manifested in

¹ *Baczkovski v Poland* (2009) 48 EHRR 19 at paras. 62-63. In this case the Court found a breach of article 11 when the Mayor of Warsaw banned, for no good reason, a gay pride march. The same conclusion was reached more recently in *Alekseyev & Ors v Russia* 27th November 2018 (application No. 14988/09).

higher suicide and self-harming rates.² LGBT people continue to experience higher levels of homelessness amongst young adults,³ and much higher instances of bullying at school, in social media and in the workplace.⁴ Yet even in the light of all of this it remains an acceptable, even respectable, political position to hold that opposite-sex relationships are necessarily superior to same-sex relationships, in the way that it is no longer acceptable to profess that the white race is superior to all others, or that men are inherently superior to women. Said to be a political position, in fact it is one professed only by those whose political views are manifestations of their religious beliefs. Not all religious believers adopt negative views of gay people, but virtually no-one with such views traces them to any source other than religion.

Article 9 of the European Convention on Human Rights protects the right to freedom of religion or belief, though that protection has limits. In *R (Williamson) v Secretary of State for Education*⁵ Lord Nichols said that to engage article 9 the belief must be one that is “consistent with basic standards of human dignity and integrity”. The belief in white supremacy would not meet that test; the belief in the inferiority of homosexuality probably would. In *Re Christian Institute’s Application for Judicial Review*⁶ Weatherup J rejected the argument that a belief in the inherent wrongness of homosexual relations would necessarily fail Lord Nichols’ test. The recent decision of the Supreme Court in *Ashers Baking Company Ltd v Lee* is an example of how the law still grants legitimacy to religious beliefs in the sinfulness of LGBT people. Ashers Baking Company Ltd was funded throughout the litigation by the Christian Institute.

² K. Schreiber “Why Are Suicide Rates Higher Among LGBTQ Youth?” blog posted October 12, 2017, on the website of *Psychology Today UK*.

³ “Why Are So Many Young LGBT People in Britain Homeless?” *The Big Issue* July 26, 2017.

⁴ L. Hollins and S. McCalla “Bullied Back into the Closet: Displacement of LGBT Employees Facing Workplace Bullying” (2013) 4 *Journal of Psychological Issues in Organizational Culture* 6.

⁵ [2005] UKHL 15 at [23].

⁶ [2008] IRLR36 at [50].

The Facts, and the Lower Courts' Decisions

Mr Lee, a gay man living in Northern Ireland, wished to purchase a cake from a bakery in Belfast, and to have it decorated with the palpably political slogan “Support Gay Marriage”. The bakery, which was owned and operated by a company, Ashers Baking Company, Ltd (itself owned by Mr and Mrs McArthur) offered a cake decorating service to the public, and that decorating often included words piped into the icing (“Happy Birthday”, and the like). The McArthurs knew the mind of God and knew that for Him the only acceptable form of sexual expression was that between a man and a woman within marriage, and that for Him the only acceptable form of marriage was that between a man and a woman. This is, in fact, pretty orthodox religious belief. The McArthurs refused Mr Lee’s order. Mr Lee sued for discrimination, the applicable legislation rendering it unlawful to treat someone less well in the provision of goods and services because of either their sexual orientation or their religious belief or political opinion.

The Belfast County Court⁷ held that the McArthurs were guilty of direct discrimination on both these grounds, notwithstanding the finding in fact that the order would similarly have been refused had it been placed by a non-gay person, and notwithstanding that the bakery was willing to serve gay customers. The Northern Ireland Court of Appeal⁸ held that there had been direct discrimination on the ground of sexual orientation and so there was no need to address any other issue. The case was one, they held, of “associative direct discrimination”, that is to say Mr Lee had had his order refused because of his perceived or assumed or actual association with persons who have a protected characteristic under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.⁹ It was as much

⁷ [2015] NICty 2.

⁸ [2016] NICA 39.

⁹ SI 2006/439.

discrimination to treat Mr Lee less favourably because he associated with gay people as it was discrimination to treat Mr Lee less favourably because he was himself gay.

The matter then went to the United Kingdom Supreme Court, which addressed both the claim based on sexual orientation discrimination and that based on discrimination on the ground of religious or political belief. Lady Hale spoke for the Court on the substantive issue (while Lord Mance spoke for the Court on the issue of jurisdiction, which is not the subject of this note).

The Signature Challenge: the Sexual Orientation Claim

In relation to the sexual orientation claim (based on the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006), the Supreme Court found that the basis of the McArthurs' objection to Mr Lee's order was the message, and not the man: the man would have been served as any other customer had he not insisted on the message, and any other customer would have been refused had they ordered the message irrespective of their sexual orientation. From that finding it followed that there had been no direct discrimination on the ground of sexual orientation, with the result that "this was a case of associative discrimination or it was nothing" (per Lady Hale, at para. 34). But there would only be associative direct discrimination if refusing to give the message was so inherently associated with a protected characteristic of the man that it was in reality a proxy for that characteristic, or an excuse to discriminate against that man. Lady Hale gave as an example of this form of discrimination the case of *Preddy v Bull*¹⁰ where the Supreme Court had held that limiting double rooms in a hotel to married couples was indissociable from discrimination against gay people because at that time gay couples could not be married. But in the present case, as Lady Hale said (para. 25), "support for gay marriage is not a proxy for any particular sexual orientation" since many people of various orientations support that cause; indeed, she suggested, the whole of society

¹⁰ [2013] UKSC 73.

benefits from the message (para. 33). The complete absence of evidence to suggest that the refusal to supply the cake and message was because Mr Lee was thought to be or to associate with gay people meant that the case could not be seen as one of associative direct discrimination. This part of the claim failed.

While this reasoning is defensible, the limits of the decision need to be very clearly understood. There was no discrimination because there was no necessary association between the message on the cake and the man who ordered the cake. This does not give bakers *carte blanche* to refuse to supply cakes to the gay community, even when they “carry” a message. Often the cake and what it represents will indeed be indissociable from the person ordering it, or that person’s protected characteristic. In the US Supreme Court case of *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*¹¹ a baker had refused a gay man’s order for a wedding cake, one which carried no logo supporting any cause, but simply for the man’s own wedding – to another man. Two members of the Court (Justices Thomas and Gorsuch) accepted the baker’s argument that creating a wedding cake was an expressive statement that engaged his free speech rights protected by the First Amendment, though in the end it was the failure of the Colorado Civil Rights Commission to deal with the case with the required religious neutrality that led to the Supreme Court rejecting the discrimination claim. In *Lee v Ashers Baking Co Ltd* Lady Hale sought to distance herself from the potential implications of that decision (paras. 59-62), on the ground that what she had to decide was a different issue. Applying the reasoning she adopted, the question would become whether supplying a cake for a same-sex wedding was indissociable from the couple getting married, or their sexual orientation. The answer is surely yes, and the refusal unlawful, if the baker offered wedding cakes only to opposite-sex couples, for that decision is being made on the basis of the couple’s actual or perceived sexual orientation. It follows that bakers in this country cannot lawfully refuse to supply wedding cakes to gay couples if they are in the business of supplying wedding cakes at all.

¹¹ 4th June 2018, US Supreme Court.

The same applies to any person offering services associated with weddings – the venue and victuals supplier, the chauffeur, the caterer, the photographer, the baker, the honeymoon hotelier – who may well have a deep-seated religious belief in the inherent inferiority of same-sex relationships and in the illegitimacy of same-sex marriages, and a deep discomfort in being asked to “normalise” or “make socially respectable” that which they consider to be abnormal and socially unacceptable, or unacceptable to their god. But just as they could not refuse to provide their services to, say, a mixed race couple because of their discomfort with and disapproval of miscegenation, so they cannot refuse to provide their services to a same-sex couple – even if their contribution, with its message of social acceptability, adds to the legitimacy of what they believe to be illegitimate. The celebrant is in a rather different position, because he or she is involved not with the *wedding* but with the *marriage*. No registrar can refuse to solemnise a same-sex marriage or a civil partnership,¹² but ministers and priests are explicitly permitted to do so under the marriage legislation in both Scotland and England and Wales (the clerical question not arising, of course, in Northern Ireland where only civil civil (sic) partnership is available to same-sex couples).

The law does not force any person to offer goods and services to the public: it merely insists that they be offered without discrimination. Any supplier who cannot reconcile that with their own conscience is entirely free to leave the business of supplying goods and services. Most business people, of course, reconcile their beliefs with the needs of their businesses or are able, in the way the McArthurs were not, to separate out their business interests from their personal beliefs.

The Technical Challenge: the Political Opinion Claim

¹² *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *Eweida v United Kingdom* [2013] ECHR 37.

The message on the cake clearly amounted to the expression of a political opinion, held by Mr Lee, but it was the refusal by the McArthurs to print that message that was alleged to amount to their treating Mr Lee less favourably because of his political opinion, contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998.¹³ So this aspect of the case engaged and indeed turned on the McArthurs' freedom of thought, conscience and religion (as protected by article 9 of the ECHR) and, in particular, their freedom of expression (protected by article 10) rather than on Mr Lee's political belief in same-sex marriage (protected under the Fair Employment and Treatment Order).

It is well settled that both the right to freedom of thought, conscience and religion and the right to freedom of expression include not only the right to hold and express political views but also the right not to be forced to hold or express political views that one does not hold or wish to express. Lady Hale (at paras. 50-52) referred to a number of cases illustrating this point. In *Buscarini v San Marino*,¹⁴ the Grand Chamber of the European Court of Human Rights held that it was a violation of article 9 to oblige non-believers to swear a Christian oath as a condition of remaining members of Parliament. The court held 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".¹⁵ Likewise, in the Privy Council case of *Commodore of the Royal Bahamas Defence Force v Laramore*,¹⁶ the Board held, in Lady Hale's words, "that a Muslim petty officer had been hindered in the exercise of his constitutional right to freedom of conscience when he was obliged, on pain of disciplinary action, to remain present and doff his cap during Christian prayers at ceremonial parades and at morning and evening colours. This was a sufficiently active participation to hinder the claimant in the enjoyment of his conscientious

¹³ SI 1998/3162 (NI 21).

¹⁴ (1999) 30 EHRR 208.

¹⁵ (1999) 30 EHRR 208 at [34].

¹⁶ [2017] UKPC 13; [2017] 1 WLR 2752.

beliefs. Nor had any justification been shown for it.” These two cases involved religious beliefs but the same was held to apply to political views in *RT (Zimbabwe) v Secretary of State for the Home Department*,¹⁷ where Lord Dyson said: “Nobody should be forced to have or express a political opinion in which he does not believe.”

In the present case the Supreme Court held that if the law penalised the McArthurs for refusing to decorate the cake with words they disagreed with, that would amount to the law forcing them to express a political opinion that they do not hold, which would be an infringement of both articles 9 and 10 of the European Convention. They concluded that the law did not prevent the McArthurs from refusing to do so. How they came to that conclusion is far less persuasive than the conclusion the Court reached on the sexual orientation claim, for it suffers from at least three substantial weaknesses.

First, it was assumed throughout – not least by the McArthurs – that providing a cake with a message amounted to the suppliers endorsing the message, or at the very least expressing the view contained in the words “Support Gay Marriage”. This assumption is flawed. The Royal Mail is not endorsing or even expressing the views of political parties who use its services to distribute their propaganda: it is simply providing a medium. Broadcasters are not themselves expressing a view when they give airtime to those who offer opinions. No-one really believes that a shop selling cards, or cakes, with “Happy Birthday” on them is itself expressing birthday greetings to anyone. But this point was dismissed by Lady Hale (at para. 54): “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.” But it is, at the very least, not obvious that the shop owners were “expressing” any view at all by the act of selling a cake with words on it. Still less are

¹⁷ [2012] UKSC 38 at [42].

bakers expressing a view when they supply wedding cakes for same-sex weddings. Such a cake may well carry an important message – of social acceptability, of moral equivalence, of legitimate love, of the toleration of pluralism – but it is not the making or the selling of the cake that expresses that message but the use to which it is put. And that use is in the hands of the purchaser, not the seller.

The second weakness is that in the cases Lady Hale cites, the obligation to express a view was explicitly imposed by the state or its (armed) agents. In the present case, even if we concede for argument's sake that fulfilling Mr Lee's order amounted to the bakers' expression of an opinion, the obligation imposed by the state on the suppliers of goods and services was not a requirement to express a view, but to offer their services in a non-discriminatory fashion. Lady Hale nevertheless found (at para 62) a state-imposed obligation from the fact that if their refusal to "express" a view was unlawful then they would be exposed to civil liability for that discrimination: "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." In other words, the imposition of sanctions for not obeying the law is the state forcing people to do what they might not want to do. Yes indeed, but that takes us nowhere. In the decisions cited by Lady Hale there was no legitimate aim to the requirement to express a view. But a law prohibiting discrimination has an obviously legitimate aim, and a requirement to provide goods and services that are not in themselves unlawful has a clear rational connection to that aim. Though the state may have the onus of showing that the aim of a particular law is legitimate, it is not for the state to justify compelling someone to follow any law that has a legitimate aim: rather, it is for the person claiming an exemption from the general law to show why they should be free to do what the rest of the population are not. Such claims have frequently been held in the past not to be valid if based simply on the subjectivities of religious belief.¹⁸ The refusal of the late Ms Ladele (also funded by the Christian Institute) to moderate her views on

¹⁸ See *McLintock v Department of Constitutional Affairs* [2008] IRLR 29; *Ladele v London Borough Council of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate (Avon) Ltd* [2010] EWCA Civ 771 (esp at [24]); *Preddy v Bull* [2013] UKSC 73.

same-sex marriage and civil partnership in the performance of her employment duties led to her dismissal from her position as district registrar, and this was found lawful by both the Court of Appeal and the European Court of Human Rights because imposing that penalty pursued the legitimate aim of ensuring the registration service was provided in a non-discriminatory manner:¹⁹ so too a supplier of goods ~~and services~~ ought to be obliged to provide what they offer to the public without discrimination, even in circumstances when that provision is contrary to their personal belief that discrimination is justified.

It is common and acceptable for the law to prohibit some forms of speech if such a prohibition serves a legitimate state interest: prohibitions on hate speech, for example (including expressions of hatred on the ground of sexual orientation²⁰), or on defamation, or extreme pornography, are all permissible and exemptions cannot be claimed on the ground that staying silent is contrary to a person's profound beliefs. Less common, but equally legitimate, are requirements on individuals to speak even when they would rather not, so long as important public purposes are served thereby. Requiring district registrars to express the law's acceptance of civil partnership and same-sex marriage is not the only example of this. Witnesses in a court of law have similarly no right to refuse to answer questions asked of them. Likewise, various bodies are statutorily obliged to bring information they hold about children to the attention of the relevant authorities in cases of suspected child neglect.²¹ A bishop who takes a priest's confession of child sex abuse may well consider that to speak out would be contrary to his profound religious beliefs, but if the law insisted he speak out (as it does if he is cited as a witness in a court of law²²)

¹⁹ The French magazine *L'Obs* reported on 17th October 2018 that the European Court of Human Rights had on 4th October 2018 rejected as manifestly ill-founded a claim by various registrars in France that their article 9 rights were being infringed by the legal requirement that they conduct marriages for same-sex couples.

²⁰ Public Order Act 1986, s. 29AB, as inserted by the Criminal Justice and Immigration Act 2008.

²¹ See for example ss. 60 and 61 of the Children's Hearings (Scotland) Act 2011 which oblige local authorities and the police to pass information to the children's reporter.

²² *McLaughlin v Douglas and Kidston* (1863) 4 Irv. 273.

then his right of silence as part of the right of free speech is not being illegitimately interfered with. Nor would holding him civilly liable for the harm caused by his failure to speak out breach the ECHR. To require someone to obey a law that serves legitimate purposes is not an illegitimate breach of their rights either to speak or not to speak. To further equality, and a society in which minority groups feel as free to express themselves as majority groups, is a legitimate aim of anti-discrimination legislation, and an exemption therefrom must be based on more than a personal belief drawn from a source that deliberately eschews rationality.

A third weakness in Lady Hale's reasoning is her curt dismissal (at para 57) of the argument that Ashers Baking Corporation Ltd, which as an artificial entity clearly is incapable of itself holding political opinions or religious beliefs, could not rely on articles 9 and 10. It was the company with whom the contract for sale and for services was to be entered into; it was the company who had a direct financial interest. Lady Hale accepted that a limited company could not rely on articles 9 and 10 but she dismissed the point as irrelevant on the ground that to hold the company liable would be to negative the McArthurs' Convention rights – because the McArthurs owned the company. That rather rips open the corporate veil, and does so without any attempt at analysis of corporate law.

Conclusion: the Showstopper

There is an unfortunate undercurrent throughout the Supreme Court's decision in *Ashers Baking Company Ltd v Lee*: that all protected characteristics are of equal weight, at least, according to Lady Hale (at para. 14), to the extent that publicly funded bodies should treat them equally. But they are not all equally worthy of protection. Some characteristics are in need of more protection than others because of a long history of discrimination; some characteristics demand more protection because they are immutable (race, for example, and sexual orientation); others are chosen but not necessarily based on rational choice (political beliefs, religious beliefs). Opinions can change but skin colour cannot. (Your commentator does not subscribe to the view that religious believers have no choice but to follow the

precepts of the religious confession to which they belong, nor that religious doctrine is immutable).

While the sexual orientation claim was easily, and correctly, dismissed because the refusal to fulfil Mr Lee's order was based on the message and not who wanted it, the dismissal of the claim based on political opinion is, for the reasons given above, far less persuasive. It will give hope, and even encouragement, to those who would refuse, if the law allows it, services relating to gay marriages and to LGBT individuals generally. The courts will face further questions in the future as to where the line is to be drawn between explicit and implicit messages, between dissociable and indissociable connections: this very fact reminds us that members of the LGBT community even today face challenges in leading their lives as openly and as fully as non-LGBT people, notwithstanding the strengths of modern anti-discrimination legislation in this country. The law has its role to play not only in creating an equality framework but also in changing hearts and minds, in giving as clearly as it can the message of moral equivalence between different sexual orientations. So too does the highest court in the land. In that place Lady Hale has probably done more than any other judge to "normalise" same-sex relationships, and in the present case (at para. 35) she recognises the harm done to those peculiarly susceptible to discriminatory treatment in her comment that "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". Though she concluded that that is not what happened in this case, her acceptance that the McArthurs' negative opinions of gay relationships are as entitled to respect as positive opinions will be heard, and acted upon, by those who feel moral superiority over anyone who is different to themselves.

It is LGBT people who will continue bear the brunt of this all too familiar humiliation, this contempt and even hatred, and relief will only come when both society and the law equate homophobia with racism, antisemitism and other political views that are simply beyond the pale and worthy only of the law's contempt. Until then, we must find comfort in the safety of our own homes, and dream of the world as it ought to be, where no-one dislikes us, or thinks themselves superior to us, because of who we

are or how their god made us: the world, in other words, of mixing bowls and ovens, of pavlova, *petits fours* and *puits d'amour*, of good and tolerant and diverse people, the world of *The Great British Bake Off*.