



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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FIRST SECTION

Application no. 18860/19
Gareth LEE
against the United Kingdom
lodged on 3 April 2019

STATEMENT OF FACTS

The applicant, Mr Gareth Lee, is a British national, who was born in 1969 and lives in Belfast, the United Kingdom. He is represented before the Court by Mr Ciaran Moynagh of Phoenix Law, a firm of solicitors based in Belfast.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant, a gay man, is associated with an organisation called 'QueerSpace' which is a volunteer-led organisation for the lesbian, gay, bisexual and transgender community in Northern Ireland. Legislation came into force in England and Wales and in Scotland during the course of 2014 which enables same-sex couples in those jurisdictions to acquire married status in civil law on the same basis as heterosexual couples. There has been political debate in Northern Ireland as to whether similar legislation should be introduced in that jurisdiction, and the Northern Ireland Assembly voted on the matter five times in total between 2012 and 2015.

The Northern Ireland Assembly voted for the third time on the issue on 29 April 2014 and rejected the motion calling for the introduction of

same-sex marriage in Northern Ireland by a narrow margin. The applicant planned to attend a private event on 17 May 2014 to mark the end of the Northern Ireland Anti-Homophobia and Transphobia Week and to mark the political momentum towards legislation for same-sex marriage.

The Court notes in this context that domestic legislation requiring the Government to introduce regulations to provide for the legalisation of same-sex marriage in Northern Ireland by 13 January 2020 was passed in July 2019, and became effective on 21 October 2019 in the absence of the operation of the Northern Ireland Assembly.

1. The cake order

The applicant decided to purchase a cake to bring to the private event. He had previously purchased items at an establishment called ‘Ashers Baking Co. Limited’ (hereafter referred to as ‘Ashers’) and was aware from a promotional leaflet they had published that they offered a service whereby a cake could be iced with a graphic of his own design. No limitation concerning the graphics which would be accepted was indicated in the promotional leaflet. The applicant placed an order for a cake on 8 or 9 May 2014. He provided an A4 sheet with a picture of ‘Bert and Ernie’ (popular characters from a children’s television show), the logo of QueerSpace and the headline caption, “Support Gay Marriage”. His order was received without comment, and he paid for and received a receipt for his purchase.

On 12 May 2014 the applicant received a telephone call from Ashers indicating that the order could not be fulfilled. The reason given was that they were a Christian business and, in hindsight, should not have taken the order. An apology and a refund were offered to the applicant. He was able to find another bakery to provide a cake with the required design.

The applicant sought legal advice and made a complaint to the Equality Commission for Northern Ireland. With their support, he brought an action for breach of statutory duty in and about the provision of goods, facilities and services against Ashers as a limited company and its owners, Mr and Mrs McArthur (the “McArthurs”), collectively referred to as “the Defendants”, in the County Court. He claimed that he had been discriminated against 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”). The domestic law provisions prohibit direct or indirect discrimination on grounds of sexual orientation, political opinion or religious belief.

2. County Court proceedings

The court recalled the evidence given by the McArthurs that they oppose the introduction of same-sex marriage in Northern Ireland. They believed

that providing the cake would have promoted and supported the political campaign for legalisation of same-sex marriage, which they regard as sinful and against their Christian beliefs. The McArthurs gave evidence that the decision to cancel the order was “in no way” related to the applicant’s sexual orientation, political opinion or religious beliefs.

On 19 May 2015 the County Court found that the Defendants had directly discriminated against the applicant on the ground of his sexual orientation contrary to the 2006 Regulations, for which there could be no justification. The court similarly found that the Defendants must have known that the applicant supported same-sex marriage, and that this support constituted a political opinion. It concluded that the Defendants had directly discriminated against the applicant on the ground of his religious belief or political opinion contrary to the 1998 Order and as such could not be justified.

The Defendants invited the court to read down the provisions of the 2006 Regulations and the 1998 Order in a manner which was compatible with their Convention rights, under section 3 of the Human Rights Act or, if that was not possible, to disapply the relevant provisions of the 2006 Regulations and the 1998 Order.

The court considered that Article 9 of the Convention was engaged because the McArthurs held a Christian belief which was genuinely and sincerely held. However, the manifestation of that belief was circumscribed by Article 9 § 2 of the Convention. Those limitations were prescribed by law in the present case in the form of the 2006 Regulations and 1998 Order.

The court found that there was no incompatibility between the Article 9 rights of the McArthurs and the rights of the applicant under the domestic legislation (while recalling that a limited company cannot itself invoke Article 9 rights). Regarding Article 10 of the Convention, the court made a finding of fact that the Defendants had not been required to support, promote or endorse the applicant’s view. It found that Article 10 was not engaged, but that even if it were, the anti-discrimination provisions in the relevant legislation were a proportionate interference permitted under Article 10(2).

The court made a declaration and awarded the applicant damages in the agreed sum of £500.

3. Court of Appeal proceedings

The Defendants appealed the decision by way of case stated before the Court of Appeal. On 24 October 2016 the court found that there had been associative direct discrimination against the applicant on the ground of his sexual orientation.

The court considered the proportionality of the limitation of the Defendants’ Article 9 rights. It noted the possibility for arbitrary abuse if businesses were free to choose what services to provide to the gay

community on the basis of religious belief. The court also recalled that the 2006 Regulations themselves describe how conflicts arising are to be resolved, and their form strongly suggested that the specific provisions in Regulation 16 catering for religious objections should not be surpassed.

The court upheld the finding of the lower court that the Defendants had not been required to promote or support gay marriage by providing the cake. The Court of Appeal concluded that nothing arose in the case under Article 10 of the Convention which did not already arise under Article 9.

Regarding proportionality, the court concluded that the 2006 Regulations should be interpreted in accordance with their natural meaning. The court pointed in particular to the structure of the 2006 Regulations, the need to protect against arbitrary discrimination, the ability for Ashers to alter the services it offered to the public and the lack of any association with the message on the cake. The Court of Appeal set out that the same principles applied in relation to the issues under discrimination in respect of religious belief and political opinion, and did not consider it necessary to examine that aspect of the case any further. The court held that it was not necessary to read down the 2006 Regulations or 1998 Order to take account of the Convention rights of the McArthurs.

4. Supreme Court proceedings

The Supreme Court granted permission to appeal to the Defendants upon their renewed application.

(a) The sexual orientation claim

The court recalled that the County Court had not found that Ashers cancelled the order because of the applicant's actual or perceived sexual orientation, but for the reason that they opposed same sex marriage. Noting that the County Court had held that support for same sex marriage was "indissociable" from sexual orientation, the court concluded that to consider the case in this way was a misunderstanding of the role of indissociability in direct discrimination. In any event, the court acknowledged at paragraph 25 that

"... 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."

With regard to the Court of Appeal's finding that the applicant had been subjected to associative direct discrimination, the court noted that the finding suggested that the reason for cancelling the cake order was that the applicant was likely to associate with the gay community, of which the McArthurs disapproved. The Supreme Court found however at paragraph 28 that

“... there was no evidence that the bakery had discriminated on that or any other prohibited ground in the past. The evidence was that they had 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.”

The Supreme Court rejected the proposition that, because the reason for less favourable treatment “has something to do with the sexual orientation of some people”, the less favourable treatment is “on grounds of” sexual orientation. The court further noted that the benefit from the message on the cake of support for gay marriage could accrue not only to gay people but also to the children, parents, families and friends of gay people who wished to marry. It concluded therefore that there was a lack of sufficiently close “association” in the circumstances for a finding of associative direct discrimination to be upheld. Accordingly, there had been no discrimination against the applicant on grounds of sexual orientation. The Supreme Court found at paragraph 34 that

“... In a nutshell, the objection was to the message and not to any particular person or persons.”

On the basis of the Supreme Court’s finding, it was not necessary to consider the 2006 Regulations should be read down to take account of the Defendants’ Convention rights.

(b) The political beliefs claim

The Supreme Court recalled that the County Court had found that support for gay marriage was a political opinion for the purpose of the domestic legislation, while the Court of Appeal had not found it necessary to answer the questions posed on appeal relating to this aspect of the case. The court found that, to the extent that the County Court had held that Ashers had discriminated against the applicant because of the owners’ religious beliefs, it was wrong to do so.

However, insofar as the County Court held that the applicant had been discriminated against because of his political opinion, the court accepted that there is a “much closer association between the political opinions of the man and the message that he wishes to promote” for the purpose of direct discrimination in these circumstances. The court went on therefore to consider the Convention rights of the McArthurs upon the effect of the 1998 Order.

The Supreme Court found that Ashers was, by being required to produce the cake, also required to express a message with which they deeply disagreed. The court recalled that Article 9 and 10 of the Convention are qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. It found at paragraph 55 that

“... 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 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...”

Having indicated its doubts about whether the applicant had been discriminated against on grounds of his political opinion but acknowledging the possibility that this was indeed the case, the court found that the 1998 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.”

Concerning the particular situation of Ashers as a limited company, the court found that to hold the company liable for discrimination when the McArthurs were not would effectively negate the McArthurs’ Convention rights. The Supreme Court concluded at paragraph 57 that

“... In holding that the company is not liable, this court is not holding that the company has rights under article 9; rather, it is upholding the rights of the McArthurs under that article.”

In summarising the court’s position, Lady Hale noted that Ashers would have refused to supply this particular cake to anyone, whatever their personal characteristics. As such, there had been no discrimination on grounds of sexual orientation. If and to the extent that there had been discrimination on grounds of political opinion, no justification had been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order.

The Supreme Court allowed the Defendants’ appeal on 10 October 2018 and set aside the declarations and order for damages made by the County Court against the Defendants.

B. Relevant domestic law

The relevant provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (the “2006 Regulations”) read as follows:

“Discrimination and harassment on grounds of sexual orientation

3.—(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if —

(a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons; or...

(2) A comparison of B’s case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

...

Goods, facilities or services

5.—(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.

...

Organisations relating to religion or belief

16.—(1) Subject to paragraphs (2) and (8) this regulation applies to an organisation the purpose of which is —

(a) to practice a religion or belief;

(b) to advance a religion or belief;

(c) to teach the practice or principles of a religion or belief;

(d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief.

(2) This regulation does not apply —

(a) to an organisation whose sole or main purpose is commercial; or

...”

The relevant provisions of The Fair Employment and Treatment (Northern Ireland) Order 1998 (the “1998 Order”) read as follows:

““Discrimination” and “unlawful discrimination”

3.—(1) In this Order “discrimination” means—

(a) discrimination on the ground of religious belief or political opinion; or

(b) discrimination by way of victimisation;

and “discriminate” shall be construed accordingly.

(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order if—

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or

...

Discrimination in provision of goods, facilities or services

28.—(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.

...”

Section 3 of the Human Rights Act 1998 reads as follows:

“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.”

COMPLAINTS

The applicant complains under Articles 8, 9, 10, and under Article 14 in conjunction with those Articles of the Convention, that his rights were interfered with by a public authority (namely, the Supreme Court) by its decision to dismiss his claim for breach of statutory duty due to discrimination contrary to the provisions of the 2006 Regulations and the 1998 Order.

The applicant argues that the interference was not proportionate and that the Supreme Court disregarded the democratically chosen resolution to the conflict of rights between religious organisations and persons of same sex orientation, and those supporting the aspirations of such persons.

QUESTIONS TO THE PARTIES

1. Has the applicant exhausted domestic remedies in respect of his complaints under Articles 8, 9, 10 and 14 of the Convention by presenting his complaints in so far as they are different to his complaints under domestic legislation, either explicitly or in substance, in a manner to allow his allegations of violations of Convention rights to be addressed and, where appropriate, to afford redress before those allegation were submitted to the Court (see *Peacock v. the United Kingdom* (dec.), no. 52335/12, § 33, 5 January 2016 and *Nak Naftogaz Ukrainy v. the United Kingdom* (dec.) no. 62976/12, § 50, 23 May 2017)?

2. If so, has there been an interference with the applicant’s rights under Articles 8, 9 and 10 of the Convention, both alone and in conjunction with Article 14 of the Convention? Was that interference in accordance with the law and necessary in a democratic society?

3. In this context, what is the appropriate test to be applied by the Court in a case concerning a dispute of a “purely private nature” (see *mutatis mutandis Pla and Puncernau v. Andorra*, no. 69498/01, § 59, ECHR 2004 VIII, i.e.)?