The age of Trump and "Brexit": is the balance between gay rights and religious freedom changing?

How far should the right to freedom of religion and belief be protected when it conflicts with the rights of other protected groups? This is a fundamental question which has been the subject of polarised debates in the UK and the USA. Last month, the Northern Ireland Court of Appeal revisited the issue in the context of sexual orientation and Christian belief in *Lee v Ashers Bakery Ltd* [2016] NICA 39, finding in favour of the rights of Mr Lee, the gay claimant. However, might the UK's withdrawal from the EU and the election of President Trump herald a rebalancing of discrimination laws as social conservatism strengthens and protections of minority groups become weaker? We believe that the balance of rights may be changing.

Mr Lee is a gay man who believes in the right to same-sex marriage. He placed an order with Ashers Bakery for a cake decorated with the slogan "Support Gay Marriage". Ashers rejected the order 48 hours after it had been made because it offended the owners' Christian beliefs. Mr Lee successfully brought claims for direct and indirect discrimination on the grounds of sexual orientation and political belief in the County Court. The Court of Appeal, dismissing the Bakery's appeal, found that Mr Lee's treatment constituted unlawful *associative* direct discrimination on the ground of sexual orientation:

> There was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community. Accordingly this was direct discrimination. (see paragraph 58)

The Court of Appeal's decision is, of course, the latest in a line of significant court decisions which have tended to protect religious freedom only to the extent that it does not impinge on the basic rights of others:

- In 2013, the UK Supreme Court found in favour of a gay couple who had been refused a double room at a Bed & Breakfast run by Christians (see *Bull and another v Hall and another* [2013] UKSC 73).

- In *Ladele v UK* [2013] IRLR 231, which concerned the refusal of a marriage counselor to deal with gay couples, the ECHR found that although Article 9 ECHR included freedom to manifest one's religious belief in the workplace, it was lawful to make necessary restrictions on that right where an individual's religious observance impinged on the rights of others.

- In 2016, the Advocate General's opinion in the *Achbita v G4S Secure Solutions NV* (C-157/15) was that companies do not commit direct discrimination by banning employees from wearing an Islamic headscarf at work, providing the ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive. (Please note that the judgment from the CJEU is still awaited and there is a conflicting opinion from the Advocate General in *Asma Bougnaoui v Micropole SA (*C-188/15) which focuses more heavily on the value of pluralism).

These cases make a crucial distinction between the right to *hold* a belief, which is absolute, and the freedom to *manifest* a belief, which is qualified. It is perhaps unsurprising that the development of the law in this important matter of balance has, in many cases, taken place through the prism of LGBT rights. Legal protection of equal rights of same sex couples has tended to lag behind those of others: only 35 years ago, homosexuality was a crime in Northern Ireland. Today, civil marriage for same sex couples remains unlawful in Northern Ireland.

What is striking about the *Ashers* decision is that it has upheld a finding of direct discrimination, not because the claimant was subjected to a detriment because he himself was gay, but because he *associated* with gay people.

Associative discrimination first reached prominence in the disability discrimination case of *Coleman v Attridge Law* [2008] IRLR 722. In that case, the ECJ (now the CJEU) decided that an employee, who was not herself disabled but who was the carer for her disabled child, could bring a claim for direct discrimination or for harassment if the reason for the discriminatory treatment or harassment was the disability of the child. It was subsequently brought into UK legislation in the Equality Act. This has been developed more recently by the CJEU in the case of *Chez* (C-83/14) where it was held that the protections against direct and indirect discrimination under the EU Race Equality Directive (No.2000/43) extend to persons who, although not themselves a member of a specific race or ethnic group, nevertheless suffer less favourable treatment or a particular disadvantage on the ground of that race or ethnic origin.

While criticism of the *Ashers* judgment has focused on arguments that religious people may now be forced to do things that they vehemently disagree with, from a legal point of view, the greater challenge may be identifying how wide the ambit of associative discrimination should now be drawn.

In *Ashers* and in *Coleman* the claimants had direct connections with individuals holding characteristics on the grounds of which the discrimination occurred. But what about those who have a looser connection or who merely support the equality principles: will they find protection in the law? There is some suggestion in the Advocate General's opinion in *Chez* that this type of looser relationship may also attract protection.

The answers to these questions are likely to be significantly affected by recent political upheavals. Britain's exit from the European Union is likely to be a huge threat to the continued progress of this protection from discrimination.

Associative discrimination is made unlawful under the Equality Act 2010. But the principle of associative discrimination has been wholly developed in case law by the CJEU, in cases including *Coleman* and *Chez.*

It is a principle of EU law that where a court in a UK jurisdiction hears a case, it must interpret UK legislation, as far as possible, in a manner which ensures compliance with EU directives. This principle has allowed associative discrimination to be brought into UK law.

Theresa May suggested in her speech to this year's Conservative Party conference that a Great Repeal Bill will be introduced which will save "the body of EU law" as it stands. It is unclear whether this means that judgments of the CJEU will be saved by domestic legislation.

There may be great opposition to keeping CJEU case law. A key complaint of UKIP et al. prior to the referendum was that British judges are required to follow the decisions of EU judges. If the interpretive duty of UK courts disappears with the loss of CJEU case law, it will be very easy for the executive to repeal the principles of associative discrimination and other wide ranging discrimination protections which are currently incorporated in the Equality Act.

Meanwhile, in the USA, the new President may permit the overturning of the legal recognition of gay marriage and the introduction of a new Defence of Marriage Act.

Equality lawyers in the UK and USA will now sit up and take notice of the potential ramifications on the balance between religious and other rights from Brexit and the forthcoming Trump Presidency. It may be that the law is about to change in a way which allows a much broader expression of religious belief than to date, at the expense of the rights of others.

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