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Religion and Sexual Orientation: The clash of equality rights

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England (and I mean England) is a paradoxical country when it comes to religion. We have an established church. This means that our head of state, the Queen, is also head of the Church of England and 26 of its bishops have seats in the upper House of Parliament. The Church of England also has special privileges and duties in relation to marriages and to burials. Until recently it also enjoyed the special protection of the law of blasphemy. But England is one of the least religious countries in Western Europe. According to the British Social Attitudes Survey (No 28, 2011), half the population do not belong to any religion and affiliation to the Church of England fell from 40% in 1983 to 20% in 2010. Politicians are not encouraged to wear their religion, if any, on their sleeves. Religious observance is much more common amongst minority communities than it is amongst the majority, who would once unhesitatingly have described themselves as "C of E" even if they never went to church. One reason for this loss of interest, of course, could be that the Church of England is a very undemanding church. It has no dietary laws, no dress codes for men or women, and very little that its members can say is actually required of them by way of observance.

Indeed, in *Mba v London Borough of Merton* [2013] EWCA Civ 1562, an employment tribunal held that even Sunday observance was not a "core component" of the Christian faith. This raises the fundamental question of how far courts can be expected to evaluate the importance of a belief which the believer holds or the extent to which it is in fact required by the religion to which she adheres. Generally speaking, as the Court of Appeal held in *Mba*, we have refused to do that. We

do not ask whether certain sects are correct to hold that the bible requires parents to beat their children (see *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246) or whether a particular interpretation of the Islamic instruction to dress modestly is in fact required (see *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100).

So given that we take as given beliefs that are genuinely held (at least if they reach a certain threshold of seriousness and coherence), what are we to make of a Christian who wants to wear a cross when her employers forbid her to do so? Or a Christian registrar of births, marriages and deaths, who refuses to conduct civil partnership ceremonies between same sex couples? Or a Christian relationship guidance counsellor who does not wish to offer couple counselling to same sex couples? These were all cases of Christian believers asserting their beliefs against their employers or the State. There is no competing equality right in play. But what too are we to make of Christian hotel keepers who are not prepared to offer a double-bedded room to a same sex couple? Here there are competing equality rights in play, because both religion and sexual orientation are characteristics protected by our equality laws.

In Europe, we have two different supranational sources of religious equality rights, quite apart from what our own national laws and constitutions may require. One is the European Convention on Human Rights, three articles of which are relevant. Article 9.1 protects freedom of thought, conscience and religion:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."

By article 9.2, freedom of thought is unqualified, but freedom to manifest one's beliefs can be subject only to such limitations as are "prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

Article 8.1 protects private life, including sexual orientation and activity:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

By article 8.2,

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Finally, article 14 requires that "the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Sexual orientation was recognised as another "status" many years ago. Article 1 of Protocol 12 applies the same principle to "the enjoyment of any right set forth by law" and also prohibits any discrimination by a public authority on such grounds, but this has not been ratified by the UK.

The other source is European Union law, which has inspired our anti-discrimination laws since before we joined the community in 1972, although we have often gone further than EU law required. Sex equality was one of its founding principles and inspired our Equal Pay Act 1970 as well as the Sex Discrimination Act 1975. We then applied equivalent rules to discrimination on grounds of race and ethnicity in the Race Relations Act 1976 and introduced protection for people with disabilities in the Disability Discrimination Act 1995. The EU has now developed a general principle of equal treatment, embodied in Council Directive 2000/78/EC, "establishing a general framework for equal treatment in employment and occupation". This requires member states to prohibit discrimination in those fields on a number of grounds, not only sex, but also race, disability, religion and belief, age and sexual orientation.

There are important differences between the ECHR and EU approaches to equality. The first difference is as to their sphere of operation. Article 14 of the ECHR covers only the enjoyment of the rights protected by the Convention. These are rights against the State, not against private persons, unless the State has a positive obligation to ensure that private persons also respect the Convention rights. EU law operates only in the fields of employment, occupation and training, for it is all part of establishing the common market in labour. But in those fields it covers both private and public sector employers and enterprises.

The second difference is as to the range of protected characteristics. Long though it has now become, the EU law list is much shorter than the ECHR list, and the ECHR list is open-ended. All sorts of things have been recognised under the "other status" rubric, including where you live or the character of your sentence of imprisonment. But religion and sexual orientation are on both lists.

The third difference lies in the approach to justification. EU law draws a sharp distinction between direct and indirect discrimination. This is not easy to define. Broadly speaking, it is direct discrimination when the prohibited characteristic constitutes the criterion for the decision in question; it is indirect discrimination when the prohibited characteristic is not the criterion, but there is an ostensibly neutral criterion (such as having a beard or being able to lift heavy weights) which fewer people with the protected characteristic can meet. To date, EU law has taken the view that direct discrimination (except on grounds of age) can only be justified on narrow grounds which must be spelled out in the implementing legislation, whereas an indirectly discriminatory criterion can be justified if it is a proportionate response to a legitimate aim. The ECHR, on the other hand, recognises both direct and indirect discrimination, but also recognises that either may be justified if it is a proportionate response to a legitimate aim. As in the USA, certain grounds of discrimination are particularly suspect, so that much stronger justification is required for discrimination on grounds of race, for example, than it is on grounds of place of residence. Sexual orientation falls into the category requiring "weighty reasons" to justify a difference in treatment.

I have been arguing for a long time now that the ECHR approach is preferable to the EU approach. The lack of a general defence of justification for direct discrimination is a problem. Courts and tribunals have a natural eye for what they see as the merits of the case. If they think that there is a good reason for a difference in treatment they will try and find a reason why it is not unlawful. They may, for example, hold that the difference in treatment is due to a material difference between the two cases other than the protected characteristic – for example that the woman denied promotion did not get on with her colleagues while the promoted men did. How much more satisfactory it would be, I have suggested, if there were to be a general defence of

justification in discrimination law, so that courts and tribunals could get down to addressing the real issues – legitimate aim, rational connection, proportionality – rather than looking for distinctions which mean that they hold that there was no discrimination at all. The problem has become more acute now that we have so many more protected characteristics which may well conflict with one another, in particular religious belief and sexual orientation.

Distinguishing between direct and indirect discrimination is not easy. In *James v Eastleigh Borough Council* [1990] 2 AC 751, a married couple went to their local swimming pool. The wife was allowed free entry because she was over 60, the state pension age for women. The husband was required to pay, because he had not yet reached 65, the state pension age for men. The factual criterion used to allow free entry to the swimming pool was not sex but pensionable age. There was, however, an exact coincidence between pensionable age and sex, so all women qualified at 60 and no man did. Although it was controversial at the time, I agree that this was direct discrimination on grounds of sex. But what about the situation where all women qualify but only some men can?

In *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783, claimants for certain welfare benefits had to satisfy a "right to reside" test, but all UK nationals could do this, whereas people from elsewhere in the EU had to show additional qualifications: was that direct or indirect discrimination on grounds of nationality? In *Bressol v Gouvernement de la Communauté Franĉaise* (Case C-73/08) [2010] 3 CMLR 559, Advocate General Sharpston said this: 'I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of person distinguished only by applying a prohibited classification' (para 56). So far so good. But she went on to characterise the "certain advantage" as automatically satisfying a

particular condition of entitlement and the correlative disadvantage as not automatically doing so (para AG 66). However, the Court of Justice did not apply the test in this way, and clearly considered the Belgian law under which all nationals qualified but only some non-nationals did so as indirect discrimination which was capable of justification.

The same sort of problem arises the other way round, where not all people with one characteristic can qualify but no people with the opposite characteristic can do so. This came up in *Rodriguez v Minister of Housing* [2009] UKPC 52, [2010] UKHRR 144, a Privy Council case from Gibraltar. A same sex couple complained of discrimination because eligibility for joint tenancies of public housing was limited to couples who were marred or had children together. So some opposite sex couples could qualify but no same sex couples could. We held that this was not a *James v Eastleigh* situation, because there was not an exact coincidence between the requirement and the prohibited ground (or protected characteristic as the Equality Act 2010 would now put it). Other unmarried couples might also be refused a joint tenancy. But as same sex couples could never marry, whereas most opposite sex couples could, it 'comes as close as it can to direct discrimination' (para 19).

The distinction between direct and indirect discrimination can obviously be crucial where there is a clash between two protected characteristics. One obvious example is the right of a woman not be discriminated against and the right of members of a religion to believe that woman are not qualified to hold certain positions or to do certain jobs. But the example which has come up most frequently so far is the right of people not to be discriminated against because of their sexual orientation and the right of Christians to manifest their belief that same-sex relationships are wrong. If we look at this solely through the prism of the ECHR, we may disagree about the answers but we have some comparatively straightforward tools of analysis. The Strasbourg

judgment in *Eweida and Others v United Kingdom*, App nos 48420/10, 59842/10, 51671/10, 36516/10, judgment of 15 January 2013, brought together four cases where Christians complained that their right to manifest their religion under article 9 of the Convention had been unjustifiably limited or that they had been discriminated against on the ground of their religion, contrary to article 14, or both.

Ms Eweida, who worked for British Airways, a private company, and Ms Chaplin, a nurse working in the National Health Service, for a public body, complained that their employers had not permitted them to wear a cross at work. Ms Ladele, a registrar of births, deaths and marriages employed by the London Borough of Islington, a public body, and Mr McFarlane, a relationship counsellor employed by Relate, a large national charity, complained that they had been dismissed because of their religious beliefs about same-sex relationships.

Ms Ladele had been appointed a registrar before the introduction of civil partnerships for same sex couples in 2005. Her local authority decided to designate all their registrars as civil partnership registrars, although they did not have to do this. They offered to accommodate her to the extent of requiring her to carry out signings of the civil partnership register and administrative tasks connected with civil partnerships but not to conduct ceremonies. She complained to the English courts of direct and indirect discrimination on grounds of her religion or belief and of harassment. The employment tribunal upheld her complaints, but both the EAT and the Court of Appeal held that it was only indirect discrimination and a proportionate means of achieving a legitimate aim.

She then complained to Strasbourg of a breach of Article 14 – discrimination in the enjoyment of her convention rights because of her religion. She complained of both direct and indirect discrimination: the local authority should have treated her differently from staff who did not have a conscientious objection to registering civil partnerships. They could reasonably have accommodated her beliefs and their refusal to depart from their hard line was disproportionate. She also contended that religious belief should be included in the list of "suspect categories" (such as sex, sexual orientation, ethnic origin and nationality) where "very weighty reasons" are required for discrimination to be justified. She accepted that the local authority's aim was legitimate, to provide non-discriminatory access to services and to communicate a clear commitment to non-discrimination. But she argued that the local authority did not adequately take account of its duty of neutrality: it had failed to strike a fair balance between delivering the service in a way which would not discriminate on grounds of sexual orientation, while avoiding discriminating against its own employees on grounds of religion.

Mr McFarlane worked for Relate, which used to be called the National Marriage Guidance Council but has long diversified into all forms of couple and relationship counselling. He had concerns about providing counselling services of any sort for same-sex couples but accepted that providing simple counselling did not involve endorsing their relationship. Then he undertook a further qualification in psycho-sexual therapy. He would find it difficult to reconcile working with couples on same-sex sexual practices with his duty to follow the teaching of the Bible. Eventually he was dismissed because Relate concluded that he had said that he would follow their equal opportunities polices and provide sexual counselling to same-sex couples without having any intention of doing so. The employment tribunals found that this was indirect discrimination because the charity's policy put people of his faith at a particular disadvantage. But the dismissal was a proportionate means of achieving a legitimate aim. He complained to

Strasbourg of a breach of article 9, either alone or in combination with article 14. Dismissal was one of the most severe sanctions which could be imposed upon any individual. Relate was a private organisation with no statutory duty to provide the service in question.

Strasbourg upheld Ms Eweida's complaint, but dismissed all the others. It found that what the complainants wished to do was a 'manifestation' of their religion. It did not have to be a mandatory requirement of the religion. What the employers had done was an interference with that right. Earlier case law which had held that there was no interference if the complainant could take steps – such as finding another job – to circumvent the limitation was disapproved. Given the importance of freedom of religion, the better approach was to weigh the possibility of changing jobs or otherwise avoiding the problem in the overall balance when considering whether or not the restriction was proportionate. Technically, there was a difference between Ms Eweida and Mr McFarlane, who were employed by private companies, and Ms Chaplin and Ms Ladele, who were employed by public authorities but the applicable principles were similar. "In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole" (para 84).

The court regarded the registrar, Ms Ladele's, case as indirect, rather than direct discrimination, because the requirement that all registrars be civil partnership registrars had a particularly detrimental impact upon her because of her religious beliefs. The local authority's policy had a legitimate aim – bearing in mind that differences in treatment based upon sexual orientation require particularly serious reasons by way of justification and that same-sex couples are in a relevantly similar situation to opposite sex couples as regards their need for legal recognition and protection of their relationship. As to whether it was proportionate, the consequences were serious and the requirement was introduced after she had taken the post. But the policy aimed to

secure the rights of others which were also protected under the Convention. "The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights" (para 106) and this had not been exceeded.

Mr McFarlane's case was probably easier for them. He had voluntarily enrolled on the psycho-sexual counselling course knowing of Relate's equal opportunities policy and that filtering clients would not be possible. But the most important factor was that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. Once again there was a wide margin of appreciation in balancing his right to manifest his religion and the employer's interest in securing the rights of others (para 109).

But there was a strongly worded dissent from two of the Strasbourg judges in *Ladele*. They argued that this was not so much a case of freedom of religious belief as one of freedom of conscience, protected under Article 9.1 and not mentioned in Article 9.2. "Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and avoid evil". As such it was different from and superior to religious doctrine: John Henry Newman had said that "conscience may come into collision with the word of a Pope and is to be followed in spite of that word". Once a genuine and serious case of conscientious objection was established, the State was obliged to respect it both positively and negatively. It was not a case of discriminating against the service users – none of them had complained. The local authority should have treated her differently from those who did not have such a conscientious objection and could have done so without prejudice to the service offered. Instead of practising the tolerance and "dignity for all" it preached, the local authority had "pursued the doctrinaire line, the road of obsessive political correctness". The dissenters had earlier said that it was "a combination of back-stabbing by her colleagues and the blinkered political correctness of

the Borough of Islington (which clearly favoured 'gay rights' over fundamental human rights)" which had eventually led to her dismissal.

Fair-minded people may therefore disagree about the application of these principles, but it is clear that we are in the territory of fair balance, between the interests of the individual and the community at large, and between the competing rights of individuals. The tools are comparatively clear: what is the importance of the right interfered with; what is the reason for the interference; is it legitimate; is the interference rationally connected to that aim; might a lesser degree of interference have been employed; and overall does the end justify the means?

All of these complainants had originally brought discrimination rather than Human Rights Act claims. Ms Eweida and Mr McFarlane could not have brought Human Rights Act claims against their employers, although they could argue that the tribunals and courts before which they came were not allowed to act incompatibly with their Convention rights. I wonder what would have happened if Ms Ladele had brought a Human Rights Act claim in England against the London Borough of Islington rather than or as well as a discrimination claim?

Instead, the cases were brought under the Employment Equality (Religion or Belief) Regulations 2003, which prohibited employers from discriminating either directly or indirectly on grounds of religion or belief. This was limited to discrimination in employment and vocational training, but the Equality Act 2006 extended the scope of this prohibition to the provision of goods, facilities and services. Then regulation 4 of the Equality Act (Sexual Orientation) Regulations 2007 prohibited direct and indirect discrimination on grounds of sexual orientation in the provision to the public or a section of the public of goods, facilities or services. This expressly applied to

"accommodation in a hotel, boarding house or similar establishment" (reg 4(2)(b)). (These regulations have since been replaced by the Equality Act 2010.) This created the potential for these rights to collide with one another and with the European Convention.

In *Preddy v Bull* [2013] UKSC 73, [2013] 1 WLR 3741, the defendants ran a private hotel. They believed that it was sinful for anyone, whether homosexual or heterosexual, to have sexual relations outside marriage. So their policy was only to let their double-bedded rooms to "hetero-sexual married couples only", although they would let single and twin bedded rooms to anyone. They made this policy plain on their website. The claimants, a same-sex couple in a civil partnership, booked a double room over the phone, not having seen the policy. When they arrived they were told about it, protested but left and were refunded their deposit. They brought a claim for discrimination on grounds of sexual orientation under the 2007 Regulations. The defendants denied direct discrimination and argued that a finding of direct discrimination would be incompatible with their rights under article 9 of the ECHR.

Both the judge and the Court of Appeal held that it was direct discrimination in the *Jones v Eastleigh* sense, in that the requirement that couples be married, although applied to everyone, was inextricably linked to hetero-sexual orientation, as same sex couples cannot marry one another. The Court of Appeal held that the 2007 regulations imposed a limitation upon their article 9 right to manifest their religious beliefs which was "necessary in a democratic society" to protect the rights of the claimants, including the right to respect for their private lives under article 8. Lady Justice Rafferty did say that a democratic society must ensure that the defendants could still espouse and express their beliefs.

> "It would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants' beliefs). . . . Any interference with religious rights . . . must satisfy the test of 'anxious scrutiny'. However, in a pluralist society it is inevitable that from time to time, as here, views, beliefs and rights of some are not compatible with those of others. . . . I do not consider that the defendants face any difficulty in manifesting their religious beliefs, they are merely prohibited from doing so in the commercial context they have chosen" (para 56).

The same issues arose in *Black and Morgan v Wilkinson* [2013] EWCA Civ 820. A same-sex couple were refused a room in a bed and breakfast establishment run by the defendant, who believed that homosexual relations and heterosexual sexual relations outside marriage were sinful. There were some differences from *Preddy v Bull*: the couple were not in a civil partnership and it was a bed and breakfast establishment where the guest rooms were in the same part of the house as the family's rooms and guests had their breakfast in the family's kitchen/dining room. The trial judge reached the same conclusions as in *Preddy v Bull*. Both the trial judge and Lord Dyson MR in the Court of Appeal found it difficult to reconcile *Preddy* with *Rodriguez* on the direct discrimination point. But had it not been direct discrimination it would undoubtedly have been indirect. The discrimination was not justified, for two reasons. First, Parliament had given careful consideration to whether there should be an express exemption (as there was for religious organisations under regulation 14) and decided against it. Secondly, *Eweida* holds that the fact that a person can avoid the problem by giving up her job, or in this case her business, does not prevent there being interference with her religious rights; but the seriousness of the impact upon the defendant is relevant to the balancing exercise. Mrs Wilkinson had not shown that the restriction on her right to manifest her religious beliefs would cause her serious economic harm.

Both cases were originally destined for the Supreme Court, but Mrs Wilkinson abandoned her appeal, so we only dealt with *Preddy*. We were unanimous in dismissing the appeal, but not in our reasons. Three of us held that this was direct discrimination, but only because the couple were in a civil partnership. Mr and Mrs Bull would refuse a double bed to any unmarried couple, whether of the same or opposite sexes. This is indirect discrimination against same sex couples who cannot (at present) marry. But they would also refuse a double bed to same sex couples in a civil partnership (or a same sex marriage when this becomes possible on 29 March this year) because they believed that marriage is reserved for opposite sex couples. That, thought three of us, was direct discrimination on the ground of sexual orientation. But two of the Justices thought that it was only indirect discrimination because the criterion was still a facially neutral one. All of us agreed that the discrimination could not be justified. Parliament had not enacted a specific defence for religious businesses. If you go into the market place you cannot pick and choose which laws you will obey and which you will not.

I suggested that this was not oppression of the Christian believers. Both homosexuals and Christians were subject to the same laws requiring them not to discriminate in the running of their businesses. So if homosexual hotel keepers had refused a room to an opposite sex or Christian couple, they too would have been acting unlawfully (para 54). The Attorney General of Northern Ireland has commented that this shows that I do not understand religious belief. The objection which believers have to same sex relationships is morally and biblically based, whereas any objection which homosexuals might have to religious believers would be pure prejudice. In similar vein was the intervention of the former Archbishop of Canterbury, Lord Carey of Clifton, in the *McFarlane* case in the Court of Appeal. He wished to "dispute that the manifestation of the Christian faith in relation to same sex unions is 'discriminatory'. . . Further, . . . that such religious views are equivalent to a person who is, genuinely, a homophobe and

disreputable". This, he said, "illuminates a lack of sensitivity to religious belief" and "is further evidence of a disparaging attitude to the Christian faith and its values".

Lord Justice Laws' response at [2010] EWCA Civ 880 cannot be bettered:

> "In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society. . . . The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur,* but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty. The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy . . . But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only

> in the heart of the believer who is alone bound by it; no one else is or can be so bound, unless by his own free choice he accepts its claims."

Lord Carey's argument is much the same as that which we faced at the Law Commission back in 1985 when considering the abolition of the common law offence of blasphemy. Everyone (including the Church of England) agreed that an offence which protected the established church against freedom of speech could not be justified. But there were some who wanted to replace it with a general offence of offending religious feelings, although without defining what constituted a religion for this purpose. In *R (Hodkin) v Registrar of Births, Deaths and Marriages* [2013] UKSC 77, in relation to scientology, Lord Toulson was careful to describe, rather than to define, what was meant by religion for the purpose of the Places of Worship Registration Act 1855:

> "I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with that belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science . . . Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science."

The underlying premise of the proposal to create an offence of injuring religious feelings, as of the arguments of Lord Carey and the Attorney General for Northern Ireland, is that religious

feelings are different from other kinds of feelings and deserve the special protection of the law. That view did not find favour either with the majority of the Law Commission or with Parliament and the offence of blasphemy was eventually abolished without replacement in 2008.

Nevertheless, it is not difficult to see why the Christians feel that their religious beliefs are not being sufficiently respected. Other religions with stricter dress codes or dietary laws are demanding concessions which Christians feel that it is harder to claim because they cannot point to equivalent religious requirements. *Eweida* is something of a breakthrough here. But instead of all the technicalities which EU law has produced, would it not be a great deal simpler if we required the providers of employment, goods and services to make reasonable accommodation for the religious beliefs of others? We can get this out of the ECHR approach but not out of our anti-discrimination law (although it is well established there in relation to disability).

In *Francesco Sessa v Italy*, App no 28790/08, judgment of 3 April 2012, a Jewish lawyer complained to the Strasbourg court that the refusal to adjourn his case to a date which did not coincide with the Jewish holidays of Yom Kippur and Sukkot was an interference with his right to manifest his religion. His complaint was dismissed by a majority of 4 to 3. A powerful minority pointed out that, for a measure to be proportionate, the authority must choose the means which is least restrictive of rights and freedoms. Thus, seeking a reasonable accommodation may, in some circumstances, constitute a less restrictive means of achieving the aim pursued. Mr Sessa had given the Italian court ample notice of the problem and reorganising the lists to accommodate him would cause minimal disruption to the administration of justice - "a small price to be paid in order to ensure respect for freedom of religion in a multi-cultural society" (para 13).

Then employers might have to make reasonable accommodation for the right of their employees to manifest their religious beliefs and suppliers of services might have to make reasonable accommodation for the right of their would-be customers to use them. In *Preddy v Bull* we were referred to two cases before the British Columbia Human Rights Tribunal which considered in great detail how it might reconcile the rights of Christian organisations and hoteliers with those of same sex couples who wanted to use their facilities.

In *Smith and Chymyshyn v Knights of Columbus and others* 2005 BCHRT 544, a lesbian couple had hired a hall owned by the Roman Catholic Church and let out on its behalf by the Knights in order to hold a reception after their marriage. The hall was available for public hire and they did not know of its connections with the Church. The letting was cancelled when the Knights learned of their purpose. The Tribunal accepted that the Knights could not be compelled to act in a manner contrary to their core belief that same sex marriages were wrong, but they had nevertheless failed in their duty of reasonable accommodation. They did not consider the effect their actions would have on the couple, did not think of meeting them to explain the situation and apologize, or offer to reimburse them for any expenses they had incurred or to help find another solution. In effect, they did not appreciate the affront to the couple's human dignity and do their best to soften the blow.

In *Eadie and Thomas v Riverbend Bed and Breakfast and others (No 2)* 2012 BCHRT 247, a gay couple had reserved a room in bed and breakfast accommodation offered by a Christian couple in their own home, but when the husband learned that the couple were gay, the booking was cancelled. Once again, the Tribunal held that there had been a failure in the duty of reasonable accommodation, in the offensive manner of the cancellation and the failure to explore alternatives. Interestingly, the Tribunal considered this a stronger case than *Knights*, because the

Knights were operating a church hall used for church purposes, whereas Riverbend had chosen to operate an ordinary commercial business, albeit from their own home.

This is not an approach which is permitted to us in the United Kingdom. Neither the Knights nor Riverbend would be allowed to refuse their accommodation to same sex couples. I wonder whether that is something of a relief or whether we would be better off with a more nuanced approach. I find it hard to believe that the hard line EU law approach to direct discrimination can be sustainable in the long run. But I am not sure how comfortable I would be with the sort of balancing exercise required by the Canadian approach. At all events, it is fascinating that a country with an established church can be less respectful of religious feelings than one without.