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

FOURTH SECTION

DECISION

Application no. 18860/19
Gareth LEE
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 9 November and 7 December 2021 as a Chamber composed of:

Yonko Grozev, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Pere Pastor Vilanova,
Jolien Schukking, *judges,*

and Andrea Tamietti, *Section Registrar,*

Having regard to the above application lodged on 3 April 2019,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by the third-party intervenors,

Having deliberated, decides as follows:

THE FACTS

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

2. The United Kingdom Government ("the Government") are represented by their Agent, Ms S. Macrory of the Foreign, Commonwealth and Development Office.

A. The circumstances of the case

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

1. The political background

4. 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.

5. During the course of 2014 legislation came into force in England and Wales and in Scotland which enabled same-sex couples in those jurisdictions to acquire married status in civil law on the same basis as heterosexual couples. This led to 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 between 2012 and 2015.

6. Same-sex marriage became legal in Northern Ireland on 13 January 2020.

2. The cake order

7. The applicant planned to attend a private event on 17 May 2014, shortly after the Northern Ireland Assembly had, by a narrow margin, rejected the third motion to introduce legislation enabling same-sex marriage in the jurisdiction. The event was to mark both the end of the Northern Ireland Anti-Homophobia and Transphobia Week and the gathering political momentum towards legislation for same-sex marriage.

8. 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 the client's own design. The promotional leaflet did not indicate that there was any limitation on the graphics which would be accepted. 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.

9. 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 subsequently to find another bakery to provide a cake with the required design.

10. 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") (see paragraphs 43-45 below). The domestic law provisions prohibit direct or indirect discrimination on grounds of sexual orientation, political opinion or religious belief.

3. The County Court proceedings

11. The question before the court was whether there had been any direct or indirect discrimination on grounds of sexual orientation, or on grounds of political opinion or religious belief. If this question was answered in the affirmative, the court would have to consider whether the relevant provisions of the 2006 Regulations or the 1998 Order should be read down so as to include, in addition to the exemption already contained in Regulation 16 (see paragraph 44 below), reasonable accommodation for the manifestation of the McArthurs' religious beliefs and freedom of non-expression under Article 10.

12. The applicant argued that the McArthurs took exception to his sexual orientation, which they considered sinful; and that, in placing the order, he had not asked them to support or promote his cause, but rather to bake a cake. The McArthurs, on the other hand, argued that the order was refused not because of the applicant's sexual orientation, of which they had no knowledge, but rather because they believed that providing the cake would have promoted and supported the political campaign for legalisation of same-sex marriage in Northern Ireland, which they regarded as sinful and against their Christian beliefs. They would have supplied the cake to the applicant, absent the slogan, and they would have refused to supply a cake to a heterosexual or bisexual customer requesting the same or similar slogan.

13. 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. As Ashers was not a religious organisation, but rather a commercial business run for profit, notwithstanding the McArthurs' genuine religious beliefs, there were no exceptions available under the 2006 Regulations which applied to this case. In this regard, the court noted that Christian-owned businesses had been excluded from the exception in Regulation 16 of the 2006 Regulations (see paragraph 44 below).

14. The court similarly found that the McArthurs must have known that the applicant supported same-sex marriage, and in the context of the ongoing debate in Northern Ireland this support constituted a political opinion. The court therefore concluded that they had directly discriminated against him on the ground of his religious belief or political opinion contrary to Article 3(2) of the 1998 Order (see paragraph 45 below) and as such the discrimination could not be justified.

15. 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 1998 (see paragraph 46 below) or, if that was not possible, to disapply the relevant provisions of the 2006 Regulations and the 1998 Order. In addressing this argument, the court observed that:

> "What we are faced with in this case are competing rights under the Convention. There is the Defendants right under Article (9) of the Convention to manifest their religion without unjustified limitation and the right under Article 14 of the Plaintiff to enjoy his right (under Article 8) to respect for his private life without unjustified discrimination on grounds of his sexual orientation. The Plaintiff also has additional rights under the 2006 Regulations."

16. The court considered that Article 9 of the Convention was engaged because the McArthurs had a Christian belief which was genuinely and sincerely held. However, whilst they had a right to hold religious views they were limited as to how they manifested them, provided those limitations were prescribed by law and were necessary for the protection of the rights and freedom of others (in this case the applicant's right as a gay man not to be discriminated against on the ground of his sexual orientation). In the court's view, to the extent to which the 2006 Regulations and/or the 1998 Order limited the manifestation of the McArthurs' religious beliefs, those limitations were both necessary in a democratic society and a proportionate means of achieving the legitimate aim of protecting the applicant's right not to be discriminated against on the ground of his sexual orientation. While the McArthurs were entitled to hold their genuine and deeply held religious beliefs and to manifest them, they could not do so in the commercial sphere if this would be contrary to the rights of others.

17. Insofar as the applicant's complaint was brought against Ashers, rather than its owners, the court found that as a limited company it could not itself invoke the protection afforded by Article 9 of the Convention.

18. 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 of the Convention.

19. The court made a declaration and awarded the applicant damages in the agreed sum of 500 British Pounds (GBP).

4. The Court of Appeal proceedings

20. The defendants appealed the decision by way of case stated before the Court of Appeal.

21. The Court of Appeal gave judgment on 24 October 2016. In providing context for the appeal, it stated:

> "[49] Northern Ireland has a large and strong faith community. The commitment to religion is fulfilled not just by regular worship but informs every aspect of the manner in which those of faith conduct their lives. Many of those are people who have played an active part in commerce and taken on leadership roles within the commercial world. It is plainly of importance to this jurisdiction that such people should continue to contribute to the well-being of the Northern Ireland economy and that there should be no chill factor to their participation.
>
> [50] The LGBT community has endured a history of considerable discrimination in this jurisdiction. Homosexual acts in private between consenting males were criminalised until 1985. The effect was to diminish the participation of gay people in many aspects of our community life. Those who were gay were reluctant to expose their sexuality and some were subjected to blackmail and other intimidation. The potential for conflict between the rights of the LGBT community and the religious community has unfortunately long been a feature of public debate in Northern Ireland and it is notable that in *Dudgeon v UK* (1981) 4 EHRR 149 the ECHR recorded that the strongest opposition to the decriminalisation of homosexual acts between consenting males came from the religious community. It is obviously of importance that the LGBT community should feel able to participate in the commercial life of this community freely and transparently. All of this sets the context for this appeal."

22. The court found that there had been associative direct discrimination against the applicant on the ground of sexual orientation (that is, direct discrimination by virtue of his association with the gay and bisexual community), and did not consider it necessary to read down or disapply the provisions of the 2006 Regulations. In reaching this conclusion, it took into account 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 of Appeal also agreed with the lower court that the defendants had not been required to promote or support gay marriage by providing the cake.

5. The Supreme Court proceedings

23. The Supreme Court granted the defendants permission to appeal. Lady Hale gave the leading judgment, with which Lord Kerr, Lord Hodge, Lady Black and Lord Mance agreed.

(a) The sexual orientation claim

24. The County Court had not found that Ashers cancelled the order because of the applicant's actual or perceived sexual orientation, but because they opposed same sex marriage. The Supreme Court observed 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."

25. In the Supreme Court's view, the Court of Appeal's finding that the applicant had been subjected to associative direct discrimination had

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. However, the Supreme Court found 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. It did not, therefore, accept that the reason for refusing to supply the cake was that the applicant was thought to associate with gay people: the reason was the McArthurs' religious objection to gay marriage.

26. The Supreme Court rejected the proposition that, because the reason for less favourable treatment "ha[d] something to do with the sexual orientation of some people", the less favourable treatment was "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.

27. The Supreme Court found that

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

28. In reaching this conclusion, Lady Hale, who delivered the leading judgment, made it clear that

> "...I do not seek to minimise or disparage the very real problem of discrimination against gay people. Nor do I ignore the very full and careful consideration which was given to the development of the law in this area, to which Mr Allen QC drew our attention at considerable length. Everyone, as article 1 of the Universal Declaration of Human Rights put it 70 years ago is 'born free and equal in dignity and rights'. Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. 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. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope."

29. Having found no discrimination on the ground of sexual orientation, it was not necessary to consider whether the 2006 Regulations should be read down to take account of the McArthurs' Convention rights.

(b) The political beliefs claim

30. The Supreme Court did not accept that Ashers had discriminated against the applicant because of the owners' religious beliefs since for reasons of policy, principle and language, the less favourable treatment prohibited by

the 1998 Order had to be on the grounds of religious belief or political opinion of someone other than the person meting out that treatment. Insofar as the County Court held that the applicant had been discriminated against because of his political opinion, the Supreme Court observed:

> "There was no less favourable treatment on this ground because anyone else would have been treated in the same way. The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man."

31. However, 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", such that it could be argued that they are "indissociable" for the purpose of direct discrimination on the ground of political opinion. The court therefore went on to consider the Convention rights of the McArthurs upon the effect of the 1998 Order.

(c) The defendants' Convention rights

32. The Supreme Court found that by being required to produce the cake, the defendants were required to express a message with which the McArthurs deeply disagreed. According to the court,

> "The District Judge did not accept that the defendants were being required to promote and support a campaign for a change in the law to enable same sex marriage. The Court of Appeal, while not deciding the point, appears to have agreed with this .... These are, in fact, two separate matters: being required to promote a campaign and being associated with it. As to the first, the bakery was required, on pain of liability in damages, to supply a product which actively promoted the cause, a cause in which many believe, but a cause in which the owners most definitely and sincerely did not. As to the second, 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."

33. 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 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."

34. 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."

35. 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 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."

36. In summarising the court's position, Lady Hale noted that the defendants 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.

37. 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.

(d) Postscript

38. In a postscript the Supreme Court noted that while the judgment was being prepared the Supreme Court of the United States had handed down judgment in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* (2018) 138 S Ct 1719. In that case a Christian baker had refused to create a wedding cake for a gay couple because of his opposition to same sex marriage. The Colorado Civil Rights Commission, and subsequently the Colorado courts, held that the baker had violated the Colorado law prohibiting businesses which offered sales or services to the public from discrimination based on sexual orientation. The baker complained that this violated his First Amendment rights to freedom of speech and the free exercise of his religion.

39. By a majority the Supreme Court set aside the order of the Colorado Civil Rights Commission, since it had not considered the case with the religious neutrality required by the Constitution. Statements had been made by Commissioners which cast doubt on their fairness and neutrality. There had also been a difference in treatment between the approach taken in this case and that taken in others where bakers had refused to make cakes on the basis of conscience: the Colorado Civil Rights Division had concluded on at least three occasions that a baker had acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages (see *Jack*

v. Gateaux, Ltd., Charge No. P20140071X (Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc*., Charge No. P20140070X (Mar. 24, 2015); *Jack v. Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015)).

40. The majority concluded:

> "The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

41. However, it noted that:

> "One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage – for instance, a cake showing words with religious meaning – that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference."

42. In a dissenting opinion, Justice Ginsberg, who was joined by Justice Sotomayor, distinguished the case at hand from those involving Mr Jack (see paragraph 39 above):

> "Phillips [the baker] declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal 'to design a special cake with words or images . . . might be different from a refusal to sell any cake at all.'"

B. Relevant domestic law and practice

1. Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006

43. Regulation 5 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ("the 2006 Regulations") made it unlawful for any person concerned with the provision of goods, facilities or services to the public to discriminate against someone on grounds of sexual orientation by refusing or deliberately omitting either to provide him with any of them, or to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as other members of the public.

44. Pursuant to Regulation 16, nothing in the 2006 Regulations made it unlawful for an organisation to restrict the provision of goods, facilities and services on the ground of a person's sexual orientation where the purpose of the organisation was to:

a) practice a religion or belief;
b) advance a religion or belief;
c) teach the practice or principles of a religion or belief; or
d) 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. Fair Employment and Treatment (Northern Ireland) Order 1998

45. Article 28 of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("the 1998 Order") made it unlawful for any person concerned with the provision of goods, facilities or services to the public to discriminate against someone on grounds of religious belief or political opinion (as defined in Article 3(2)) by refusing or deliberately omitting either to provide him with any of them, or to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as other members of the public.

3. Human Rights Act 1998

46. Section 3 of the Human Rights Act 1998 requires that, insofar 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.

47. Pursuant to section 6 of the Human Rights Act 1998 it is unlawful for a public authority to act in a way which is incompatible with a Convention right. In this section "public authority" includes "a court or tribunal". According to section 7, a person who claims that a public authority has acted incompatibly with a Convention right may bring proceedings against the authority under the Act or rely on the Convention right or rights concerned in any legal proceedings.

4. Bull and another v Hall and another [2013] UKSC 73

48. The appellants in this case were a Christian couple who owned a private hotel. They operated a policy that double bedrooms were only offered to "heterosexual married couples". The respondents were a gay couple in a civil partnership to whom the appellants had refused to provide a double room, and who subsequently brought proceedings against them under the Equality Act (Sexual Orientation) Regulations 2007 (the equivalent, in England and Wales, of the 2006 Regulations in Northern Ireland). Lady Hale gave the leading judgment, in which she held that the appellants' policy constituted direct discrimination. The minority considered that it had constituted indirect discrimination, which could not be justified.

49. While the Supreme Court considered that the application of the 2007 Regulations engaged the appellants' rights under Article 9 of the Convention, in its view the limitation of their rights was a proportionate means of achieving the legitimate aim of protecting the rights of others. In this regard, Lady Hale stated that:

> "Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires 'very weighty reasons' to justify discrimination on grounds of sexual orientation. It is for that reason that we should be

slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion."

COMPLAINTS

50. The applicant complains under Articles 8, 9 and 10, both alone and in conjunction with Article 14 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; and that the interference was not proportionate.

THE LAW

51. The applicant complains that the Supreme Court judgment of 10 October 2018 allowing the defendants' appeal and setting aside the declarations and order for damages made by the County Court violated his rights under Articles 8, 9, 10 and 14 of the Convention.

52. These provisions provide as follows:

Article 8

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

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 well-being 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."

Article 9

"1. 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.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are 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 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others,

for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground 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."

A. The parties' submissions

1. The Government

53. The Government argued that the applicant had not exhausted domestic remedies as he failed to raise his complaints under Articles 8, 9, 10 and 14 of the Convention in the domestic proceedings. Before the domestic courts the applicant's claim was that the defendants had discriminated against him, contrary to the 2006 Regulations and/or the 1998 Order (see paragraphs 43-45 above). Although the defendants invoked their rights under Articles 9 and 10 of the Convention, the applicant, who had access to extensive legal expertise throughout the proceedings, did not submit that his Convention rights should be balanced against theirs. It would have been open to him to argue that reading down or disapplying the domestic legislation would have breached his own Convention rights; instead, his core submission was that "the legislature and government had determined how the conflict of rights arising in this appeal should be resolved and formulated rules that worked in the commercial sphere". He could not point to one direct reference to his Convention rights in his submissions to the domestic courts.

54. The Government, relying on *Peacock v. the United Kingdom* ((dec.), no. 52335/12, 5 January 2016), argued that it was not sufficient for the applicant to have raised his Convention complaints "in substance"; his Convention rights had to be positively asserted before the domestic courts. The question was whether he requested the domestic courts to consider his Convention rights, not whether his submissions allowed them to do so. Moreover, it was clear from *Nak Naftogaz Ukrainy v. the United Kingdom* ((dec.), no. 62976/12, 23 May 2017) that he was required to raise those Convention rights pre-emptively; that is, to argue that if the courts allowed the defendants' appeal, his Convention rights would be breached. It was therefore no answer to the Government's objection to claim that the alleged breach only crystallised with the judgment of the Supreme Court (see paragraph 57 below).

55. Finally, the Government argued that even if the applicant thought he could win his claim without reference to his Convention rights, that was beside the point. His failure to make that reference deprived the national courts of the opportunity to consider and rule on those rights.

2. The applicant

56. The applicant argued that it had been correct and proper for him to have formulated his initial claim by reference to the 2006 Regulations and the 1998 Order (see paragraphs 43-45 above), the relevant provisions of which were enacted to protect his rights under Articles 8, 9, 10 and 14 of the Convention. He therefore relied on his Convention rights in substance and making further, explicit, reference to them would have added nothing to his case. The fact that they were pleaded in substance was fully recognised by the domestic courts; the County Court, in particular, had stated expressly that it was faced with competing rights under the Convention (see paragraph 15 above).

57. Moreover, it was the applicant's case that the violations now complained of only crystallised with the handing down of the judgment of the Supreme Court, at which point there were no further remedies available for him to exhaust.

3. The third-party intervenors

(a) Mr and Mrs McArthur and Ashers Baking Company Limited

58. The McArthurs stated that, as Christians, they believe that the only form of full sexual expression consistent with Biblical teaching and therefore acceptable to God is that between a man and a woman within marriage; and that the only form of marriage consistent with Biblical teaching and therefore acceptable to God was that between a man and a woman. For Ashers to have been required to produce the cake would have been to require the McArthurs to betray their faith and act contrary to their consciences.

(b) The Government of the Republic of Poland

59. The Polish Government submitted that where there existed two or more competing rights and freedoms arising under the Convention the national authorities should be afforded a wide margin of appreciation in balancing those rights. Furthermore, according to the Court's case-law, obliging a person to express a belief he or she does not hold amounts to a restriction of rights under Article 9 of the Convention (they referred, for example, to *Buscarini and Others v. San Marino* [GC], no. 24645/94, ECHR 1999-I).

(c) Alliance Defending Freedom ("ADF") International

60. ADF International submitted that the Convention rights of religious persons engaging in commercial activity should not be nullified. In this regard, Articles 9 and 10 had a negative aspect, namely the right not to express an opinion or to act contrary to one's religious beliefs. In dealing with clashing rights, it was incumbent on the State, insofar as reasonably possible,

to ensure that both sets of rights were equally protected. Where the national authorities, including the courts, have done so, the Court should not substitute its view for theirs.

(d) The Christian Institute

61. Having regard to the Convention case-law, the Christian Institute argued that there were significant limits to the horizontal application of positive obligations (they referred, for example, to *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI, and *Remuszko v. Poland*, no. 1562/10, 16 July 2013). They further submitted that Article 9 clearly had a negative aspect, namely the right not to voice opinions or beliefs (see, for example, *Sinan Işık v. Turkey*, no. 21924/05, ECHR 2010).

(e) Mr Jonathan Cooper OBE and Professor Paul Johnson

62. Mr Jonathan Cooper OBE and Professor Paul Johnson argued that in introducing the 2006 Regulations (see paragraph 43-44 above) the United Kingdom Parliament had given careful and extensive consideration to how best to deal with the clash of rights at the heart of the present case. The balance was achieved by creating an exception in law for organisations whose purpose was, *inter alia*, to advance, practice or teach the practice or principles of a religion or belief. It did not extend this exception to an organisation whose sole or main purpose was commercial.

(f) European Centre for Law & Justice (ECLJ)

63. The ECLJ was granted permission to intervene but did not submit a third-party intervention.

(g) Observatory on Intolerance and Discrimination Against Christians in Europe ("the OIDAC")

64. The OIDAC submitted that the deepening and widening of equality legislation in Europe has failed to safeguard the freedoms of people of faith and has thus negatively interfered with the human rights of Christians in their private, public and professional lives. However, for Christians, and indeed members of all faiths, religion and belief is not a lifestyle or hobby but rather a primary identity marker which overrides any other individual and social identities and ultimately guides the behaviour of the individual.

(h) Ordo Iuris

65. Ordo Juris was granted permission to intervene but did not submit a third-party intervention.

(i) Professor Robert Wintemute on behalf of six NGOs

66. Professor Robert Wintermute submitted his written comments on behalf of Fédération Internationale pour les Droits Humains, the Committee on the Administration of Justice, the AIRE Centre, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, the Network of European LGBTIQ Families Association, and the European Commission on Sexual Orientation Law.

67. They argued that Article 14 imposed a positive obligation on the legislature or judiciary to provide legal protection against discrimination in access to goods or services on the basis of sexual orientation, in both the public and private sector, and the Convention did not require an exemption where discrimination by a private sector business was motivated by religious belief. In this regard, there was a clear European consensus that national law must prohibit discrimination based on sexual orientation in access to goods or services.

B. The Court's assessment

68. The general principles of the Court's case-law are set out in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). In particular, the Court has held that the specific Convention complaint presented before it must have been aired, either explicitly or in substance, before the national courts. It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument (see also *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III, and *Peacock*, cited above, § 33).

69. The applicant in the present case did not invoke his Convention rights expressly at any point in the domestic proceedings. Instead, he formulated his claim by reference to the 2006 Regulations and the 1998 Order (see paragraphs 43-45 above). He now contends that (a) he raised his Convention arguments in substance, as the domestic law provisions relied on were enacted to protect his rights under Articles 8, 9, 10 and 14 of the Convention; and (b) that in any event the violations now complained of only crystallised with the handing down of the judgment of the Supreme Court (see paragraphs 56 and 57 above). For the reasons set out below, the Court is not persuaded by either submission.

70. Even if the applicant is correct in saying that the relevant provisions of the 2006 Regulations and the 1998 Order (see paragraphs 43-45 above) were enacted to protect the Convention rights of consumers, those provisions protect consumers only in a very limited way; that is, against discrimination

in access to goods and services. They cannot, therefore, be said to protect consumers' substantive rights under Articles 8, 9 or 10 of the Convention.

71. Insofar as the applicant complains under those Articles read in conjunction with Article 14 of the Convention, the Court acknowledges that his submissions before the domestic courts were to the effect that in accessing goods and services he had been discriminated against on the grounds of his sexual orientation and/or political opinion. The domestic courts were therefore required to consider whether the applicant was treated differently from other consumers on the basis of his sexual orientation and/or political opinion; and, if they answered this question in the affirmative, to consider whether the difference in treatment was objectively justified, having regard to the McArthurs' rights under Articles 9 and 10 of the Convention.

72. The test under Article 14 of the Convention is similar insofar as it requires an assessment of whether an applicant has been treated differently – on the basis of an identifiable characteristic or status – from persons in analogous or relevantly similar situations (see, for example, *Biao v. Denmark* [GC], no. 38590/10, §§ 89-90 24 May 2016). However, while the protection against discrimination in the 2006 Regulations and the 1998 Order is free-standing, Article 14 is ancillary in nature: there can be no room for its application unless the facts at issue fall within the ambit of one or more substantive Convention rights (see, for example, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 124, ECHR 2012 (extracts)); in other words, if "the subject matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed ...", or if the contested measures are "linked to the exercise of a right guaranteed ..." (see, for example, *Konstantin Markin,* cited above,§ 129).

73. For the Court, it is not self-evident that the facts of the present case – in which the applicant complains only about the judgment of the Supreme Court – fall within the ambit of Article 8, 9 or 10 of the Convention. In particular, it is not immediately apparent how the findings of the Supreme Court and the consequences of those findings for the applicant either constitute one of the modalities of or are linked to the exercise of a right guaranteed by any of those Articles. The Supreme Court found on the facts of the case that the applicant was not treated differently on account of his real or perceived sexual orientation, but rather that the refusal to supply the cake was because of the defendants' religious objection to gay marriage (see paragraph 25 above). What was principally at issue, therefore, was not the effect on the applicant's private life or his freedom to hold or express his opinions or beliefs, but rather whether Ashers' bakery was required to produce a cake expressing the applicant's political support for gay marriage.

74. That is not to say that the facts of the case could not fall within the ambit of Articles 8, 9 and 10 of the Convention. However, the preliminary question of whether Article 14 of the Convention is applicable to the facts of the present case is a fundamental one. It is highly fact-sensitive and to date

no similar issue has been addressed by the Court. By relying solely on domestic law, the applicant deprived the domestic courts of the opportunity to address this important issue themselves before he lodged his application with the Court.

75. Consequently, the domestic courts were tasked only with balancing the applicant's very specific rights under the 2006 Regulations and the 1998 Order (see paragraphs 43-45 above) against the McArthurs' rights under Articles 9 and 10 of the Convention. At no point were they tasked with balancing his Convention rights against those of the McArthurs. It is clear from the impassioned third-party interventions in this case (see paragraphs 58-67 above) that this balancing exercise is a matter of great import and sensitivity to both LGBTIQ communities and to faith communities. As the Supreme Court of the United States pointed out in Masterpiece Cakeshop Ltd, these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market (see paragraph 40 above). This is particularly so in Northern Ireland, where there is a large and strong faith community, where the LGBTIQ community has endured a history of considerable discrimination and intimidation, and where conflict between the rights of these two communities has long been a feature of public debate (see paragraph 21 above).

76. Given the heightened sensitivity of the balancing exercise in the particular national context, the domestic courts were better placed than this Court to strike the balance between the competing Convention rights of the applicant, on the one hand, and the McArthurs, on the other (see, among many examples, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24).

77. In view of the fact that the Human Rights Act 1998 gives litigants the right to invoke their Convention rights directly before the domestic courts, and obliges those courts, so far as it is possible to do so, to read and interpret both primary and subordinate legislation in a way which is compatible with those rights (see paragraphs 46 and 47 above), the Court does not consider that the applicant has provided a satisfactory explanation for not advancing his Convention rights (see, *mutatis mutandis*, *Peacock,* cited above, § 38). In a case such as the present, where the applicant is complaining that the domestic courts failed properly to balance his Convention rights against those of another private individual, who had expressly advanced his or her Convention rights throughout the domestic proceedings, it is axiomatic that the applicant's Convention rights should also have been invoked expressly before the domestic courts, even if the alleged breach was contingent on the outcome of their assessment. Throughout the domestic proceedings the McArthurs' position was that the courts should read down the provisions of the 2006 Regulations and the 1998 Order in a manner which was compatible with their Convention rights or, if that was not possible, to disapply the

relevant provisions of the 2006 Regulations and the 1998 Order (see paragraph 15 above). It would have been open to the applicant – and in the Court's view, it was incumbent on him – to contend that "reading down" or "disapplying" the relevant provisions of the 2006 Regulations and the 1998 Order would violate his own rights under Articles 8, 9, 10 or 14 of the Convention. In choosing not to rely on his Convention rights, the applicant deprived the domestic courts of the opportunity to consider both the applicability of Article 14 to his case and the substantive merits of the Convention complaints on which he now relies. Instead, he now invites the Court to usurp the role of the domestic courts by addressing these issues itself.

78. As such an approach is contrary to the subsidiary character of the Convention machinery (see *Azinas*, cited above, § 38 and *Peacock*, cited above, § 33), the Court considers that the applicant has failed to exhaust domestic remedies in respect of his complaints under Articles 8, 9 and 10 of the Convention, read alone and together with Article 14. Accordingly, these complaints must be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 6 January 2022.

Andrea Tamietti
Registrar

Yonko Grozev
President