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Conscience clauses and equality law

Brice Dickson, Professor of International and Comparative Law, Queen's University Belfast, examines interesting recent developments in both the Supreme Court (SC) and at the Northern Ireland Assembly concerning the compatibility of conscience clauses with equality laws. The extent to which equality obligations should make allowance for deeply held personal convictions is a concern for some religious believers and presents a challenge to UK anti-discrimination practitioners. Professor Dickson argues that the allowance made should be negligible, not because some convictions are not worth accommodating but because they can be accommodated in other ways which do not impinge upon other people’s rights to be treated as equals.

The abortion case

In Greater Glasgow Health Board v Dougan [2014] UKSC 68, [2015] 2 WLR 126 the SC rejected claims by two Catholic coordinators in the labour ward at the Southern General Hospital in Glasgow that under the Abortion Act 1967 (the 1967 Act) they were entitled to refuse to engage in activities such as booking in patients to have an abortion, allocating staff to care for those patients, or supervising and supporting midwives who are assisting in the abortion. As is well known, the 1967 Act recognised a right of conscientious objection to taking part in an abortion, but the question for the SC was how far that right extends.

Everything turned on the interpretation of s4(1), which reads:

No person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection.

The key words are ‘participate’ and ‘treatment’. The 5-judge SC, led on this occasion by Lady Hale Deputy President of the SC, unanimously held that, while ‘treatment’ should be interpreted broadly, ‘participate’ should be interpreted narrowly. This meant that the two coordinators could not be said to be ‘participating’ in treatment if they were merely engaged in various ancillary, administrative or managerial tasks associated with the treatment. In this context, said Lady Hale, ‘participate’ means taking part in a ‘hands-on’ capacity, that is, actually performing the tasks involved in the course of treatment (para 38). She also thought that this construction of s4(1) was more likely to be in line with parliament’s intention when passing the 1967 Act.

The SC was nevertheless at pains to point out that its decision on the interpretation of the conscience clause in the 1967 Act did not mean that the two women claimants could not claim that their employer should have made more reasonable adjustments to the requirements of their job in order to make allowances for their religious beliefs. That issue, said the SC, was best resolved by an employment tribunal (para 24).

Services v employment

The distinction between the provision of services and the provision of employment is an important one. People who access services – such as those provided by a

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hospital or by a hotel – expect to be treated as equals because in the vast majority of situations there are no objectively justifiable grounds for denying them access to those services on the same basis as everyone else. But people who are employees – even when they are engaged in the business of providing services to others – may more frequently be able to claim on objectively justifiable grounds that they should not be required to do certain things which their employer wishes them to do. Service provision is an impersonal relationship whereas employment is a personal one. An employee therefore has a better case for requiring an employer to make allowances in his or her favour on account of his or her personal circumstances.

In her Oxfordshire High Sheriff’s Lecture delivered on October 14, 2014, entitled ‘Are we a Christian country? Religious freedom and the law’, Lady Hale stressed the importance of the distinction just made:

*It is one thing to expect employers (and others) to make reasonable adjustments to cater for their employees’ religious beliefs. It is another thing to expect the law to make exceptions to generally applicable rules in order to cater for particular religious beliefs. Believers who want it to do this must surely show that it will not cause harm to others, whether members of the religion or outsiders.*

S4(1) of the 1967 Act is a good example of the law making an exception to a generally applicable rule in order to cater for particular beliefs, but we should remember that under s4(2) the exception does not apply if participating in the abortion treatment is ‘necessary to save the life or prevent grave permanent injury to the physical or mental health of a pregnant woman’. In such scenarios the harm that would be caused by allowing the exception would outweigh the benefits to be obtained from granting it. The test referred to in the second sentence of the quote from Lady Hale would not then be satisfied.

**Northern Ireland**

This point is worth remembering in Northern Ireland, where the 1967 Act does not apply at all. At present, the only situations in which an abortion is legal in Northern Ireland are ones in which, because of s4(2), no right of conscientious objection currently exists even in England, Scotland or Wales.

The law relating to abortion is a devolved matter in Northern Ireland (unlike in Scotland or Wales), but there is minimal prospect of the Northern Ireland Assembly legislating to extend the 1967 Act to Northern Ireland because the vast majority of both unionist and nationalist Members of the Legislative Assembly (MLAs) are opposed to the so-called ‘right to choose’. Most unionists, by the way, are also opposed to homosexuality, which means that gay marriage is not yet allowed in Northern Ireland, nor can gay men ever donate blood.

Controversy over the extent to which people of religious faith should be allowed to deny services to gay people in Northern Ireland has recently arisen as a result of a move by the Equality Commission for Northern Ireland (ECNI) to take a bakery to court for refusing to decorate a cake it was baking with the words ‘Support gay marriage’. The facts may be trivial, but the case raises important questions
concerning the extent to which people of religious faith should be allowed to treat people unequally.

Although the bakery case will not be heard in the county court for a month or two, regardless of its outcome a Democratic Unionist Party politician, Paul Givan MLA, is planning to table a Private Members’ Bill at the Northern Ireland Assembly which would have the effect of extending to a person running a commercial business the right to restrict the provision of goods, facilities and services, or the use or disposal of premises, ‘so as to avoid endorsing, promoting or facilitating behaviour or beliefs which conflict with the strongly held religious convictions of that person’.

The Private Members’ Bill

The Bill is a thinly veiled attempt to allow people of religious faith to discriminate in the way they provide services to gay people. Most readers will remember the case of Bull v Hall [2013] UKSC 73, [2013] 1 WLR 3741 [see Briefing 697], where the SC held (again led by Lady Hale) that the owners of a private hotel had discriminated against a gay couple because they only allowed couples who were married to book a double room in the hotel. All five Justices agreed that the hotel owners’ right to manifest their religious belief was justifiably limited within the terms of article 9(2) of the European Convention on Human Rights (ECHR). Mr Givan’s ‘Northern Ireland Freedom of Conscience Amendment Bill’ would reverse that decision as far as hotels and other service providers in Northern Ireland are concerned. Judging by his comments on a BBC programme broadcast on February 5, 2015, Mr Givan also thinks his Bill would allow hotels to refuse double rooms to unmarried heterosexual couples.

There are at least four serious objections to what his Bill proposes. First and foremost, it would alter the existing delicate balance which has been carefully constructed within UK discrimination law. The Equality Act (Sexual Orientation) Regulations (NI) 2006 are almost identical to the equivalent 2007 Regulations applying in England, Scotland and Wales. Regulation 7 (reg 6 in the 2007 Regs) creates exceptions for things done within a private home or when leased premises are being disposed of, and regulation 16 (reg 14 in the 2007 Regs) creates a further exception for organisations the sole or main purpose of which is to practise, advance or teach a religion or belief and which want to restrict the provision of goods, facilities or services in the course of their activities or to restrict the use or disposal of premises they own or control.

The exception for religious or belief organisations is limited to situations where the provider of the service is itself a religious or belief organisation. Indeed the regulation explicitly states that the exception does not apply to organisations of which the sole or main purpose is commercial (reg 16(2)(a)). Mr Givan’s Bill would extend the existing exception to all commercial organisations. That is a radical departure from the 2006 settlement and swings the pendulum hugely in favour of individuals, as opposed to organisations, who wish to have their religious beliefs trump the rights of people not to be discriminated against.

Other objections
Secondly, the Bill, as currently worded, would protect convictions based on religious grounds only. This privileges religious beliefs over other beliefs, again contrary to the 2006 and 2007 Regulations. An individual who wishes to restrict access to goods, facilities and services to gay people purely on grounds of conscience, not based on religion, would not be able to claim the ‘protection’ provided by the Bill. This is doubtless because it would open the door to the application of all kinds of prejudice supposedly based on moral grounds. But why should faith-based prejudice be any more acceptable than prejudice based on other grounds? Is the former any more objectively justifiable than the latter, or is it just more traditional?

Thirdly, the Bill would allow people with strongly held religious convictions to refuse to provide goods, facilities, services or premises if this would avoid them ‘endorsing, promoting or facilitating’ behaviour or beliefs which conflict with their convictions. The phrase ‘endorsing, promoting or facilitating’ is nowhere defined or illustrated. It might, for example, mean that a person working in a bank or building society could refuse to arrange a mortgage for a gay couple. Likewise, a person working in an estate agency or a travel agency could refuse to assist a gay person who wants to buy a house, rent a flat or book a holiday. To permit such ‘exceptions’ would be to allow private prejudice and disapproval to manifest themselves in public ways, thereby intruding into the personal lives of individuals who are otherwise causing no harm to others in society. The logic of the approach is that providers of services could discriminate against people who, for example, drink or smoke, eat too much, gamble or have had an abortion.

Fourthly, the alleged reform is internally contradictory. It purports to protect people’s strongly held religious convictions but refuses to protect other people’s strongly held non-religious convictions. In an increasingly secularised society it seeks to prioritise one group of beliefs over another. If this prioritisation was based on the harm which contrary non-religious behaviours and beliefs were likely to bring about (such as the practice of female genital mutilation or the cruel treatment of animals) there might be a justification for it. But neither Mr Givan nor others who support the Bill have yet explained what harm is caused (except to their own beliefs) by allowing gay people to get on with their private lives in ways which do not impact in the slightest on the rest of society.

The role of conscience clauses

Mr Givan prefaces the consultation paper accompanying his Private Members’ Bill by referring to laws which, throughout the UK, allow Sikhs not to wear crash helmets when driving motorbikes or safety helmets when working on construction sites. These are indeed interesting exceptions to health and safety laws, but they are based on the principle that while, as a general rule, people need to be protected against their own folly in certain situations, they should be permitted to risk their own lives if their religious conviction requires this. A further example would be the unwillingness of Jehovah’s Witnesses to accept a blood transfusion. Such individuals are endangering or disrespecting no-one but themselves by adopting such a stance.

There is also a noble legal tradition whereby people who conscientiously object to serving in military forces should be allowed to do so. Even at a time when serving
soldiers who deserted during World War I were being executed for failing in their promise to serve, the Military Service Act 1916 allowed individuals not to serve in the first place if they could satisfy a Military Service Tribunal that they had a conscientious objection to doing so. In many instances, however, they were required to undertake some form of alternative service. A similar scheme was created under the National Service (Armed Forces) Act 1939, where many were exempted from service in the armed forces if they could demonstrate that they were opposed to using warfare as a means of settling international disputes. The right to conscientious objection is based not so much on religious belief as on a moral abhorrence at the use of potentially lethal force, even in the defence of one’s country.

The view of the European Court of Human Rights

The first sentence of article 9(1) of the ECHR states that ‘everyone has the right to freedom of thought, conscience and religion’ and it continues by saying that this right includes the freedom ‘to manifest one’s religion or belief, in worship, teaching, practice and observance’. Article 9(2) allows this latter freedom to be limited if the limitations ‘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’.

No case has ever been successfully brought against the UK for failing to protect a person’s belief that homosexuality was in some way wrong. In Eweida v UK (2013) [see Briefing 663] one of the four applicants (Ms Ladele) was a registrar of marriages in Islington who refused to register civil partnerships and was disciplined for adopting that stance. When she complained that she was being discriminated against on the basis of her Christian beliefs she succeeded at the ET but her employers won at both the EAT and the CA. Ms Ladele was refused leave to appeal to the SC but she lodged an application with the European Court of Human Rights (ECtHR). She was joined in Strasbourg by Mr McFarlane, a counsellor for Relate who had been dismissed for refusing to give sex-counselling to gay couples and who had lost his claim for discrimination and unfair dismissal at both domestic tribunal levels.

The ECtHR found against both of these applicants. In the case of Ms Ladele it held that the UK’s law was within the wide margin of appreciation allowed to national authorities when it comes to striking a balance between competing ECHR rights (the right on one side to manifest a religious belief and the right on the other side not to be discriminated against because of one’s sexuality): Islington Borough Council was entitled to require its registrars to register civil partnerships and to cease to employ someone who refused to do so. Likewise, in the case of Mr McFarlane the ECtHR held that UK law did not violate article 9(1) by allowing Relate, a private company, to dismiss an employee who would not implement its policy of providing a service without discrimination. It is clear, therefore, that the ECtHR gives greater priority to the right not to be discriminated against than it does to the right to manifest religious belief.

As regards the right of conscientious objection to military service, the Grand Chamber of the ECtHR has required states to recognise such a right (Bayatyan v
Armenia, 2011). In coming to that conclusion the Court turned away from the position previously adopted by the European Commission of Human Rights (last set out in 1995) and held that imposing a criminal sanction on a conscientious objector was a violation of article 9(1). It cited findings reached by the UN’s Human Rights Committee in 2006 in two complaints made against South Korea (Yeo-Bum Yoon v Korea and Myung-Jin Choi v Korea) and also article 10 of the EU Charter on Fundamental Rights, in force for all EU countries since 2009, which explicitly recognises the right to conscientious objection albeit ‘in accordance with the national laws governing exercise of this right’. The ECtHR considered that:

Opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.

It is safe to assume that if the Private Members’ Bill coming before the Northern Ireland Assembly were to be considered by the ECtHR it would not be deemed acceptable. The Court would be likely to conclude either that the proposed law falls outside the state’s margin of appreciation or that the conviction or belief in question (that the behaviour or beliefs of homosexuals should not be endorsed, promoted or facilitated) does not have the requisite cogency, seriousness, cohesion and importance to attract the protection of article 9.

Freedom of expression

There is, however, another relevant principle which may at times come to the aid of those whose conscience does not allow them to endorse, promote or facilitate homosexuality. It is the principle that no-one should be required to manifest his or her religious beliefs by declaring what they are. Thus, in Alexandridis v Greece (2008) the ECtHR found a violation of article 9(1) when the applicant, in order to begin practising as a lawyer in Greece, was required to reveal that he was not an Orthodox Christian.

To return to the case coming before the Northern Ireland county court concerning the words to be iced on a cake, it would surely be common ground between all parties that on occasions a supplier of a cake should be entitled to refuse to write words on a cake which might give the impression that the supplier of the cake shares the views expressed on the cake. It would obviously be unlawful, for example, for anyone to write words on a cake which are threatening or abusive and likely to stir up racial hatred – so much is clear from s18 of the Public Order Act 1986 and from the wider provision in article 9 of the Public Order (NI) Order 1987 (which is not limited to racial hatred and extends to arousing fear as well).

But there may also be situations where the supplier of a cake should be able to refuse to write words on a cake which, while not illegal, are, objectively speaking, very distasteful. ‘The IRA were right’, ‘Hands off paedophiles’ and ‘Hitler had the answer’ are all messages which no-one should be required to write on pain of any sanction whatsoever. Admittedly people eating a cake will not necessarily assume
that the suppliers of the cake agreed with the sentiments expressed on it, but they would surely have assumed that any supplier at least had a choice under the law not to express the sentiments without suffering any loss other than the withdrawal of the custom of the particular person requesting the cake.

The bakery in the Northern Ireland case might therefore make the argument that it should not be required to express words, even if they are just icing on a cake, in a way which contravenes its right to freedom of expression under article 10 of the ECHR. Whether ‘Support gay marriage’ is a statement which the supplier of a cake has the right not to have to make will depend on whether, in and of itself, the item supplied would give the impression that the bakery actually shares the view expressed and also on whether the view expressed is so outrageous that no service provider should be required even to give an impression that it endorsed the view. I do not myself think that those two tests are met in this case and so the ECNI should still be successful in its complaint that the bakery has discriminated against a customer on grounds of sexual orientation regardless of the article 10 implications.

Discrimination on grounds of political opinion

An additional argument raised by the ECNI is that the bakery discriminated against its customer on grounds of political opinion, the assumption being that ‘Support gay marriage’ is a statement of political opinion, which, given the recent controversies throughout the UK on the subject of legalising same-sex marriage, it probably is. In England, Scotland and Wales the law protects people against discrimination on the basis of religion or belief, with belief being defined as ‘any religious or philosophical belief’ (Equality Act 2010, s10(2)). But in Northern Ireland the law also extends protection to persons on the basis of political opinion (Fair Employment and Treatment (NI) Order 1998, art 3). The term ‘political opinion’ is not defined, except to the extent that it excludes an opinion which ‘consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland’ (art 2(4)).

In the context of political opinion it does not seem plausible to allow the right of conscientious objection to be raised as a defence to a claim based on discrimination. No-one, surely, has the right to conscientiously object to someone else’s political opinion? The only argument the bakery might perhaps raise in this context is a corollary to the one based on the right to freedom of expression, namely that the bakery should not be forced to express a political opinion if it can be reasonably assumed that the bakery is thereby endorsing that opinion. For the reasons given above in relation to freedom of expression, I do not think that any objective observer would deduce from the words iced on a cake that the bakery which produced the icing was endorsing the opinion expressed in those words or that it was being forced to suppress its own political opinion. The observer would deduce that the bakery was a commercial concern that was merely satisfying its customer’s wishes.

Conclusion

Reconciling ‘conscience’ with the right to equality is difficult because, in the context of the commercial activities in particular, it is rather challenging to conceptualise
equality in a way which allows for someone to ‘conscientiously’ object to the concept. Equality is itself a matter of conscience and to imagine that it could be a matter of conscience to believe that some people should be treated differently merely on the basis of what they do when they are in bed with another person seems as irrational as to imagine that the state should deny those people the right to privacy, to liberty, or to a fair trial. Where does conscience stop? I would argue that it stops at the door marked ‘unlawful discrimination against other people’.