

## SEXUAL ORIENTATION DISCRIMINATION AND THE CHURCH: BALANCING COMPETING HUMAN RIGHTS

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The Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661 ('the Regulations'), came into force on 1 December 2003. They prohibit direct and indirect discrimination, harassment and victimisation on the grounds of sexual orientation in the fields of employment and vocational training. For Christian organisations (as well as those of other faiths) the ambit and effect of the Regulations have been a cause for uncertainty. Some guidance has now been given by Mr Justice Richards in the case of *R v Secretary of State for Trade and Industry; ex parte Amicus* [2004] EWCA 860.

It is self evident that the right not to suffer from discrimination is a fundamental human right of great importance. In *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113, HL, Lord Nicholls set out the rationale behind laws prohibiting discrimination (at para 9):

Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced.

Baroness Hale described the rationale as follows (at para 131):

Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being ... Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily ... Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority.

Sexual orientation is a most intimate aspect of private life and personal identity. The significance of the right not to be discriminated against on

the ground of sexual orientation has been fully recognised by European Community law. Article 8 of the European Convention on Human Rights sets out the qualified right of an individual to respect for his private and family life. Article 14 provides that the enjoyment of Convention rights shall be secured without discrimination. In *Ghadian* the House of Lords confirmed that sexual orientation is now clearly recognised as an impermissible ground of discrimination, on the same level as discrimination based on sex, race or religion. Baroness Hale (at para 142) was not prepared to accept any relevant distinction between homosexual and heterosexual couples:

Homosexual couples can have exactly the same sort of interdependent couple relationship as heterosexuals can. Sexual “orientation” defines the sort of person with whom one wishes to have sexual relations. It requires another person to express itself. Some people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation.

Few in society disagree in principle with the broad concept that discrimination on any ground is wrong. However, difficulties occur when this right comes into conflict with other, no less important, rights. Under Article 9 of the Convention it is provided that everyone has the right to freedom of thought, conscience and religion. A qualified right is also provided to manifest one’s religion or beliefs. Through the rights granted to its members under Article 9, a Church is protected in its right to manifest its religion, to organise and carry out worship, teaching, practice and observance, and is free to act out and enforce uniformity in these matters. In *Hasan v Bulgaria* (2002) 34 EHRR 55 the European Court of Human Rights stated (at p 1359, para 62):

Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer’s right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members.

Section 13 of the Human Rights Act 1998 provides that if a court's determination might affect the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

In *R v Secretary of State for Trade and Industry, ex parte Amicus*, Mr Justice Richards was asked to consider challenges (brought by seven public sector unions) by way of an application for judicial review in relation to several of the 2003 Regulations. The challenges were targeted against regulations that allowed exceptions to the general prohibition against discrimination on the grounds of sexual orientation where employment or vocational training is for the purposes of an organised religion.

As Mr Justice Richards recognised in the course of his judgment, what he was essentially being asked to rule on was the correct balance to be struck between these two competing rights: the right of non-discrimination on the grounds of sexual orientation and the right to manifest one's religion or beliefs.

At the core of the case were submissions put before the Court by CARE (Christian Action Research Education), the Evangelical Alliance and the Christian Schools Trust who were permitted to intervene in the litigation. They submitted that their ability to hold their religious beliefs and to carry on their teaching and practices would be undermined if forced to employ persons whose sexual practices and beliefs about those sexual practices were at odds with their own beliefs, teachings and practices. Mr Martyn Eden, Director of Strategic Development for the Evangelical Alliance told the court that:

Evangelicals, like all orthodox, mainstream Christians, hold to the biblical teaching that monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations between people. At the same time, we affirm God's love and concern for all humanity, including those with an orientation towards people of their own sex, but believe that homoerotic sexual practice to be incompatible with his will as revealed in scripture.

As a consequence, it was argued, employees working for Christian organisations were expected to behave in accordance with a Christian ethos and belief. Employing those who did not share this ethos would fatally undermine such an organisation's ability to achieve its objectives.

The challenge brought against the Regulations by the public service unions was essentially that the exclusions contained within the Regulations permitting religious organisations to discriminate against potential or existing employees or trainees on the grounds of sexual orientation were too wide and, therefore, were incompatible with the obligations imposed on the United Kingdom by Council Directive 2000/78/EC ('the Directive') and with Articles 8 and 14 of the European Convention on Human Rights.

In construing the Regulations against the background of the Directive, Mr Justice Richards held that he should interpret the Regulations purposively so as to conform so far as possible with the Directive. If, therefore, only a narrow construction of the Regulations would achieve conformity with the Directive, then he was at liberty to apply such a construction.

Dealing with the specific challenges, it was contended that regulation 7(2), which contains an exception in respect of discrimination where sexual orientation is a genuine and determining occupational requirement, was objectionable as it allows for discrimination on the basis of perceived as well as actual sexual orientation. It was said that such an exception would lead to employers acting on the basis of assumptions and social stereotyping (for example reliance on a man's 'camp' appearance as a reason for believing him to be homosexual).

Mr Justice Richards accepted the submissions made by the Secretary of State that this regulation had a sensible rationale. Plainly there were cases where being of a particular sexual orientation was a genuine and determining occupational requirement. As well as employment as the minister of a religious organisation, the example given was a requirement for a homosexual employee in certain gay or lesbian organisations. In such cases it was obviously permissible for the employer to ask the initial question of whether a prospective employee meets that requirement. However, the employer is not bound in all circumstances to accept at face value the answer given or precluded from forming his own assessment if no answer was given. In addition, the provision limits the risk of unduly intrusive inquiry. If an employer is not satisfied that the person meets the requirement, and it is reasonable in all the circumstances for him to do so, the employer can decline to employ the person without having to make the same degree of inquiry as might be necessary to establish sufficient proof of sexual orientation to meet a potential complaint of unlawful discrimination.

Regulation 7(3) was challenged on the basis that it granted to organised religions too wide an exemption, permitting discrimination on the grounds of sexual orientation where employment is for the purpose of such an organisation and the employer applies a requirement of sexual orientation 'so as to comply with the doctrines of the religion' or 'because the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'. It was argued that this regulation permitted discrimination in circumstances where the requirement does not pursue a legitimate objective or is not proportionate.

Mr Justice Richards held that the exception was intended to be a very narrow one and, on its proper construction, was very narrow, affording an exception only in very limited circumstances. He said that the tests set out were objective not subjective and were going to be far from easy to satisfy in practice. He held it unlikely that this exception would apply to

the various situations put forward on behalf of the applicant unions to illustrate their concerns:

- (1) a church unwilling to employ a homosexual man as a cleaner;
- (2) a Catholic school for girls dismissing a science teacher on learning that she had been in a lesbian relationship;
- (3) a shop selling scriptural books and tracts unwilling to employ a lesbian as a sales assistant;
- (4) an Islamic institute unwilling to employ as a librarian a man appearing to be homosexual.

Regulation 20(3) provides an exception to the prohibition of discrimination by institutions of further and higher education. The exception arises 'if the discrimination only concerns training which would help fit a person for employment which, by virtue of regulation 7..., the employer could lawfully refuse to offer the person in question'. This was challenged on the basis that the regulation does not require that the training concerned must be directly or necessarily related to any employment to which regulation 7 might apply, but requires merely that the training 'would help fit a person' for such employment. It was argued that a degree in theology might qualify a person to enter the clergy but would also constitute a qualifying degree for the purposes of entering a CPE course; and a higher education course in English might qualify a person to study for a theology degree but also for a law degree. Again, Mr Justice Richards held that the provision must be construed strictly. He held that the regulation does not cover training which has any purpose other than to fit a person for employment in relation to which sexual orientation is a genuine and determining occupational requirement. For example, therefore, it does not apply to a theology degree but does cover training at a theological seminary.

Regulation 25 was also challenged. This provides that the prohibition on discrimination shall not render unlawful 'anything which prevents or restricts access to a benefit by reference to marital status'. Its effect is that employment benefits defined by reference to marital status, such as a surviving spouse's pension, are not prohibited by the Regulations. It was submitted on behalf of the unions that this provision is in breach of Article 3(1) of the Directive which prohibits discrimination on grounds of sexual orientation in 'working conditions, including ... pay'. Benefits under occupational pension schemes have previously been held to be a form of pay. Under domestic law, of course, same sex partners are prohibited from marrying, although the Civil Partnerships Bill, when enacted, will permit registration of civil partnerships between same sex couples with various legal consequences. As same sex couples cannot under existing law marry, it was said that making employment benefits dependent upon marital status was discriminatory and not justified by the wording of the Directive.

In answer to this the Secretary of State submitted that the exclusion of benefits was justified on the following grounds:

- (1) The government's policy is to support marriage, a social institution the importance of which is recognised by Article 12 of the European Convention on Human Rights.
- (2) If benefits were payable to unmarried homosexual couples, it would be discriminatory to deny them to unmarried heterosexual couples.
- (3) The practical consequences of such an extension would be considerable. It would be necessary to set workable criteria to define the class of beneficiaries and to build in safeguards to prevent false claims.
- (4) Giving benefits to homosexual partners would lead to a very great increase in the costs of such schemes.
- (5) The impact, shortly, of the enactment of the Civil Partnerships Bill granting rights to same sex couples who undertake a registration ceremony.

Mr Justice Richards accepted the submissions made on behalf of the Secretary of State. He took the view that the above considerations were compelling and included aims of social policy in respect of which each European member state enjoys a wide margin of discretion.

Finally, Mr Justice Richards rejected challenges based upon incompatibility with Article 8 (the right to family life) and Article 14 (the prohibition against discrimination) of the European Convention on Human Rights. Article 8 rights are qualified in that any limitation on such rights must be 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 freedom of others. Mr Justice Richards held that in his view the Regulations as a whole do not interfere with rights under Article 8; instead they add to existing rights. In any event, he stated that the exceptions to the general prohibition on discrimination on the ground of sexual orientation meet a legitimate aim and are proportionate. As for Article 14, Mr Justice Richards again expressed the view that the Regulations were not discriminatory; they simply conferred rights not to be discriminated against. To the extent that comparisons were made between married couples and same sex couples, he held as before that they are not to be treated as in an analogous situation.

As can be seen from the above, the application for judicial review was rejected with Mr Justice Richards confirming that the Regulations are properly made and lawful. In addition, he applied a narrow interpretation of the Regulations stating, in particular, that regulation 7(3) will be strictly construed. By way of example, it is unlikely that Christian schools will be able to use the Regulations so as to justify failing to employ a homosexual teacher or that a Church will be able to avoid employing a lesbian cleaner. The clear intention is that circumstances where discrimination on the basis of sexual orientation will be permitted are likely to be few and far between.