

**Cakes in the Courts: measuring associative discrimination**  
**and weighing conflicting rights**

by Jane McNeill QC

**Introduction**

1. On 10 October 2018, Ashers Baking Company Ltd and its directors, Mr and Mrs McArthur, won their appeal to the United Kingdom Supreme Court against a finding of the Northern Ireland Court of Appeal (NICA).<sup>1</sup> NICA held that the bakers had discriminated against Mr Lee, a gay man, on grounds of sexual orientation when they refused to make a cake that he had ordered. The cake was to bear the slogan “Support Gay Marriage”. The refusal was motivated by Mr and Mrs McArthur’s opposition to same sex marriage, which was contrary to their Christian beliefs and which they regarded as sinful. Mr Lee was supported by the Equality Commission Northern Ireland (ECNI); and Ashers Bakery by The Christian Institute.
2. Under domestic law, a provider of goods and services (in a similar way to an employer) must not unlawfully discriminate. An individual who believes that he or she has been the victim of a discriminatory act may bring a claim in the civil courts (usually the County Court).
3. Shortly before the Supreme Court handed down its (unanimous) judgment in **Lee v Ashers Bakery**, on 4 June 2018 the Supreme Court of the United States handed down its (majority) judgment in **Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission**. The baker in that case refused to provide a wedding cake to a gay couple. The case concerned the provision of the cake and not a slogan. It was complicated by the fact that the Colorado Civil Rights Commission had, in the view of the majority of the Supreme Court, failed to consider the case with the neutrality that the constitution

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<sup>1</sup> **Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants)** [2018] UKSC 49

requires. As in **Lee v Ashers Bakery**, however, the refusal to make the cake was based on the bakers' religious beliefs.

4. In both cases, the claimants were complaining that the bakers discriminated against them because of their sexual orientation. Mr Lee also brought claims arising from discrimination on grounds of political opinion and religious belief. Both cases involved competing rights: the customer's right not to be subject to discrimination because of sexual orientation (or, in Mr Lee's case also political opinion) and the bakers' rights to freedom of speech or expression and their right to the free exercise of religion or the freedom to manifest their religion or belief.
5. The key difference between the two cases was that one concerned the refusal to bake the cake because the customer was gay: the other concerned the refusal to bake the cake because of the requested message supporting gay marriage. Was it enough for Mr Lee to win his case that the message had something to do with sexual orientation generally or that the message supported a political opinion in favour of gay marriage held by Mr Lee?
6. Ashers Bakery appealed against NICA's finding of direct discrimination. It also appealed against a finding that it was not necessary to read down the applicable legislation in relation to sexual orientation discrimination to take account of the bakery owners' religious beliefs.<sup>2</sup>

### **Direct discrimination**

7. Direct discrimination is a relatively simple and well-understood concept.<sup>3</sup> In domestic law, it is a statutory tort. It involves one person (A) treating another person (B) less favourably than A treats or would treat others because of a protected characteristic (not necessarily B's protected characteristic). Protected characteristics include sexual orientation and religion or belief. In Northern Ireland, but not in the rest of the UK, political opinion is also a protected characteristic.

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<sup>2</sup> There was also a constitutional issue which I do not address in this paper.

<sup>3</sup> Section 19 of Equality Act 2010

8. Direct discrimination involves a comparative process. In order for a direct discrimination claim to succeed, there must be no material difference between B and the comparator. Direct discrimination includes associative discrimination (or discrimination by association) or discrimination by perception. Associative direct discrimination is discrimination which arises because of someone else's protected characteristic.

### **Discrimination on grounds of sexual orientation**

9. The protection in Northern Ireland is the same as the protection under the legislation in the rest of the UK.<sup>4</sup> "Sexual orientation"<sup>5</sup> means a sexual orientation towards "(a) persons of the same sex; (b) persons of the opposite sex; and (c) persons of the same sex and the opposite sex". It protects individuals from discrimination because of homosexual, heterosexual or bisexual orientation.

### **Discrimination on grounds of political opinion**

10. The longstanding historical divisions and grievances in Northern Ireland set the background for the relevant regulations.<sup>6</sup> Discrimination on the grounds of political opinion often goes hand-in-hand with discrimination on grounds of religion in Northern Ireland. Political opinion, however, goes wider than being affiliated to a particular political party. NICA has ruled that 'political opinion' means "relating to the conduct of the government of the state or matters of public policy".<sup>7</sup>

### **Reading down**

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<sup>4</sup> Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SOR)

<sup>5</sup> Regulation 2(2) of SOR

<sup>6</sup> The Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) made under the Northern Ireland Act 1974

<sup>7</sup> **McKay v Northern Ireland Public Service Alliance** [1994] NI 103

11. 'Reading down' involves the interpretation of a statutory provision in a way that is compatible with Convention rights.

### **Mr Lee's case**

12. Why does a case about a cake, in which the amount of damages awarded was £500, go to our highest appellate Court and why is the case important?
13. The answer is because the case examines (and answers some) questions about (1) the scope of what constitutes unlawful direct discrimination, in particular discrimination by association; (2) the meaning of 'indissociability' in the context of discrimination law; and (3) how the Courts should approach cases where a right not to be discriminated against (in Mr Lee's case, what became material was the right not to be discriminated against on grounds of political opinion but similar issues would have been relevant if there had been a finding of discrimination on grounds of sexual orientation) competes with a conflicting right (here the rights to freedom of thought, conscience and religion and freedom of expression).

### **Facts**

14. Mr Lee is gay. He volunteered at an organisation known as QueerSpace. He was invited to attend a private party organised by QueerSpace to mark the end of anti-homophobia week at Bangor Castle and decided to take a cake.
15. He had previously bought cakes from the Ashers Bakery shop in Belfast. Mr and Mrs McArthur, who ran the bakery, had run a bakery business for more than 20 years. They offered a "Build-a-Cake" service to customers. Customers could ask for pictures or messages to be iced onto a cake.
16. Mr Lee went into the shop with his design. It included a coloured picture of Bert and Ernie, the QueerSpace logo and the headline "Support Gay

Marriage". The order was accepted by Mrs McArthur and Mr Lee paid for the cake.

17. What Mr Lee did not know was that Mr and Mrs McArthur were Christians who believed that (1) the only form of full sexual expression which was consistent with Biblical teaching (and therefore acceptable to God) was that between a man and a woman within marriage; and (2) the only form of marriage consistent with Biblical teaching (and therefore acceptable to God) was that between a man and a woman.
18. The name of the business, Ashers, in fact had a Biblical origin. Asher was a Biblical figure from Canaan, a virtuous progenitor of a tribe, who was blessed on his deathbed with the words (Genesis 49:20): "Bread from Asher shall be rich and he shall yield royal dainties". The McArthurs did not advertise that the name of their bakery had a biblical connection.
19. Having accepted Mr Lee's order, the McArthurs decided that they could not produce a cake with the slogan "Support Gay Marriage". Mrs McArthur phoned Mr Lee and explained that the order could not be fulfilled because Ashers Bakery was a Christian business. She apologised. Mr Lee was given a full refund and his design was returned to him.
20. Mr and Mrs MacArthur, when Mr Lee brought his case against them, relied on their Article 9 right to freedom of religion and their Article 10 right to freedom of expression.
21. The District Judge who heard Mr Lee's case at first instance in the County Court found as a fact that the McArthurs did **perceive** that Mr Lee was gay and/or associated with others who were gay. However and crucially, because causation is an essential element of direct discrimination, she made no factual finding that the order was cancelled because of that perception. She upheld Mr Lee's claim on the basis that he had been subjected to direct discrimination on grounds of sexual orientation, religious belief and political

opinion. She held that the Northern Ireland legislation was compatible with Convention rights.

22. NICA dismissed Ashers Bakery's appeal. It held that the case was one of associative discrimination on grounds of sexual orientation and that it was not necessary to read down the SORs to take account of the McArthurs' Convention rights. In making that finding, NICA did not consider it necessary to decide the issues of political and religious discrimination although those matters were discussed in the judgment.

### *Supreme Court Judgment*

#### **Discrimination on grounds of sexual orientation**

23. The claim for discrimination on grounds of sexual orientation was dismissed in the Supreme Court. The District Judge had made no finding that the order was cancelled because of Mr Lee's actual or perceived sexual orientation. The McArthurs would have made the cake for Mr Lee without the slogan. And they would have refused to bake a cake with a "Support Gay Marriage" slogan if that had been requested by a heterosexual customer. As was neatly stated: "the objection was to the message, not the messenger".
24. The District Judge had stated that support for same sex marriage was "indissociable" from sexual orientation. This was a misunderstanding of the role of "indissociability" in direct discrimination.
25. "Indissociability" arises when the reason for discriminating between two individuals is a proxy for a protected characteristic. For example, in **James v Eastleigh Borough Council** [1990] 2 AC 751, free entry to a swimming pool was available to those who had reached statutory retirement age. At that time, the statutory retirement age for women was 60 and for men was 65. There was an exact correspondence between statutory retirement age and the sex of the customer. Similarly, in **Preddy v Bull** [2013] UKSC 73 hotel owners would only let double-bedded rooms to married couples. At the relevant

time, same sex couples could not marry. Therefore by definition “marriage” was indissociable from heterosexual orientation.

26. Both of the above cases have been overtaken by the changing laws on retirement age, state pension age and same sex marriage but the essential principles remain good. Other hypothetical examples may be considered. What about the use of the word “loyal” in Northern Ireland? If an employer required an “employee” to be loyal, would that be a proxy for religion? A requirement that women working in public-facing role should not wear a headscarf (or hijab) would be indissociable from Muslim belief. It would be no defence to say that the requirement not to wear a headscarf was applied to all women, irrespective of their religion.
27. Returning to the cake, as Lady Hale stated: “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”. The “indissociability” argument was bound to fail.

### **Discrimination by association and by perception**

28. The non-discrimination legislation protects an individual from discrimination because of his, her or their protected characteristic. But it also protects individuals from discrimination because of the protected characteristic(s) of another person or persons. The definition of direct discrimination in section 13 of the Equality Act 2010 is broad: “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.
29. The Employment and Human Rights Commission (EHRC) Employment Code suggests that discrimination by association may occur where an individual has campaigned to help someone with a particular protected characteristic or where someone has refused to act in a way that would disadvantage a person or people who have (or whom the employer believes to have) a protected characteristic.

30. There is case law in which the Courts and Tribunals have considered whether the individual who alleges less favourable treatment must be the person who possesses the relevant protected characteristic. For many years, the answer to whether a claimant had to possess the relevant protected characteristic depended on which protected characteristic was relied on. As long ago as 1984, in **Showboat Entertainment Centre Ltd v Owens** [1984] ICR 65, the Employment Appeal Tribunal (EAT) upheld a decision of an Employment Tribunal (ET) that a white employee who refused to obey an instruction to exclude black customers from the entertainment centre where he worked was discriminated against “on racial grounds” under section 1(1)(a) of the Race Relations Act 1976. The words “on racial grounds” were key. The protection for a claimant was not only on grounds of his, her or their racial grounds but was a much broader protection. At that time, the similar protection in the Sex Discrimination Act 1975 defined the necessary causative test for making out sex discrimination as “on the ground of **her** sex”. Subject to European law arguments, the case in which a man was dismissed for refusing to obey an instruction not to serve female customers would have had a different outcome to Mr Owens’ case against Showboat.

31. Nearly twenty years later, in **Coleman v Attridge Law** [2008] ICR 1128, the European Court of Justice (ECJ) determined under the Framework Directive<sup>8</sup> that less favourable treatment because of another’s disability could constitute unlawful discrimination. The Disability Discrimination Act 1995 which was in force at that time outlawed certain types of a treatment of “a disabled person”. Mrs Coleman had a disabled child. She claimed that she was forced to resign from her employment after being harassed and being refused flexible working so that she could care for her child. She alleged that flexible working had been granted to other employees.

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<sup>8</sup> Directive 2000/78/EC which in Article 1 states that: “The purpose of this Directive is to lay down a general framework for combatting discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

32. The Advocate General in his opinion, in relation to all the protected characteristics under the Framework Directive stated that: “one way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but persons who are closely associated with them and do not themselves belong to the group”.
33. Following **Coleman v Attridge Law**, the EAT determined that the Disability Discrimination Act 1995 (DDA)<sup>9</sup> should be read so as to cover discrimination by association. The Framework Directive only covered certain protected characteristics<sup>10</sup> and not others. When the Equality Act was enacted, section 13 extended the definition of direct discrimination to cover associative discrimination in relation to almost all protected characteristics.<sup>11</sup>
34. Not long after the ECJ’s judgment in **Coleman v Attridge Law**, the Court of Appeal heard the appeal of Mr Stephen English against the decision of the EAT in **English v Thomas Sanderson Ltd**.<sup>12</sup> Mr English, a heterosexual, happily married man with three teenage children, complained that he was subjected to homophobic comments at work. He was called names, such as “faggot”, and lurid comments were made about him in writing. He brought a claim that his treatment amounted to harassment “on grounds of sexual orientation”<sup>13</sup> and drove him to leave his job. He accepted that his tormentors knew that he was not gay but nevertheless tormented him with homophobic abuse. The ET considered as a preliminary issue whether a person who was not gay or perceived to be gay and who accepted that his tormentors did not believe him to be gay could be harassed within the meaning of regulation 5 of the Regulations.

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<sup>9</sup> The DDA was the relevant domestic law statute protecting disabled people at the time.

<sup>10</sup> Religion or belief, age and sexual orientation.

<sup>11</sup> With the exception of marriage and civil partnerships

<sup>12</sup> [2008] EWCA Civ 1421

<sup>13</sup> Regulation 5(1) of the Employment Equality (Sexual Orientation) Regulations 2003

35. The ET rejected the claimant's claim and the EAT, on additional grounds, dismissed the appeal. The majority in the Court of Appeal<sup>14</sup> held that there was harassment on grounds of sexual orientation.
36. Sedley LJ noted that it was common ground that tormenting a man who was believed to be gay but was not would amount to unlawful harassment on grounds of sexual orientation. He considered the difference between that case and the case of treating someone as gay when he was not gay (and was not perceived to be gay) was barely perceptible. It was not necessary to examine motive but only to apply a 'but for' test: but for the sexual orientation which the tormentors chose to attribute to the claimant, they would not have harassed him.
37. Lawrence Collins LJ determined that there was harassment "on grounds of sexual orientation" by taking an objective approach to the characterisation of the conduct complained of. He focused on the words used rather than on the claimant: the repeated and offensive use of the word "faggot" was conduct "on grounds of sexual orientation". If conduct is "on grounds of sexual orientation", there is no need for a claimant to prove his sexual orientation any more than a claimant who had been subjected to racial abuse in a race discrimination claim would have to prove his protected characteristic.
38. Laws LJ, however, in what was described by Lady Hale as "a powerful dissenting judgment" in **Lee v Ashers Bakery**, said this:
- "In my judgment, harassment is perpetrated on grounds of sexual orientation only where some person or person's actual, perceived or assumed sexual orientation gives rise to it, that is, is a substantial cause of it. [Counsel]'s case confuses the reason for the conduct complained of with the nature of that conduct. On the facts the reason for the harassment was nothing to do with anyone's actual, perceived, or assumed sexual orientation. It happened to

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<sup>14</sup> Lord Justice Sedley and Lord Justice Lawrence Collins

take the form of ‘homophobic banter’ so called, which was thus the vehicle for teasing or tormenting the claimant.”

39. Before returning to how this analysis in the cases meshes with **Lee v Ashers Bakery**, I refer to one other case: **Redfearn v Serco Ltd.**<sup>15</sup> The claimant in **Redfearn v Serco** was a member of the British National Party. He was employed as a driver by a transport service. Most of his passengers and many of his colleagues were of Asian origin. He was summarily dismissed for his political opinions and brought a race discrimination claim. Although the EAT found in Mr Redfearn’s favour, the Court of Appeal allowed the employer’s appeal. Although racial considerations were relevant to the employer’s decision, that did not mean that his dismissal was “on racial grounds”. Any other result would be incompatible with the purpose of the (then) race discrimination legislation which was to promote equal treatment irrespective of race. Perhaps this is the most straightforward and plainly correct of the limits placed on associative discrimination.

40. Following **Lee v Ashers Bakery**, who now falls within the scope of direct discrimination by association? Lady Hale<sup>16</sup> states that “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”. Some no doubt argue that it was an affront to Mr Lee’s autonomy and dignity as a gay person supporting the cause of gay marriage that he should have been refused the cake-decorating service offered to all customers. Is his position truly analogous with the position of a straight person who asks for a cake bearing the slogan “Support Gay Marriage”? And would any reasonable person seeing a cake topper such as that proposed by Mr Lee really think that it represented the view of the bakers?

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<sup>15</sup> [2006] ICR 1367

<sup>16</sup> Para. 35

41. Lady Hale (para. 29) distinguishes **Coleman v Attridge Law** on the basis that there was a specific identified person whose protected characteristic (disability) was the reason for the less favourable treatment. In contrast, in **Lee v Ashers Bakery** there was no specific person identified who was associated with Mr Lee whose protected characteristic was the reason for his treatment. In relation to **English v Thomas Sanderson**, although the case is not expressly overruled, it appears that Lady Hale may prefer the analysis of Laws LJ to that of the majority. It is not enough, it seems, to look at the nature of the perpetrator's conduct: it is also necessary to look at the reason for that conduct. If the reason has nothing to do with the individual or a person or persons associated with that individual, the claim will fail.
42. The closeness of the association and how that closeness is measured is not addressed in any detail by the Supreme Court in **Lee v Ashers Bakery**. Lady Hale says that the message "Support Gay Marriage" is not a message whose only benefit would accrue to gay people. Benefit could also accrue to the benefit of the families and friends of gay people who wished to marry. Benefit could also accrue to the wider community which recognises social benefits that gay marriage may bring. It is not enough that the reason for the less favourable treatment has "something to do with the sexual orientation of some people" but Lady Hale states that it would be "unwise" to attempt to define the closeness of the association. She does, however, state that the District Judge in Mr Lee's case could not have found that there was a close enough association, on the facts, to make out associative discrimination.
43. Because there could be no finding of discrimination on grounds of sexual orientation, the Supreme Court did not go on to consider whether to "read down" the SORs to take account of Mr Lee's Convention Rights.

#### **Discrimination on grounds of political belief**

44. The further question arose in **Lee v Ashers Bakery**: if Mr Lee had not been subjected to discrimination on grounds of sexual orientation, had he been discriminated against on the ground of political opinion? In the context of an

ongoing political debate about whether same sex couples should be allowed to marry, the District Judge held that support for gay marriage was a political opinion. It was an opinion that related to “the policy of government and matters touching the government of the state”.<sup>17</sup> The Supreme Court did not doubt that support for gay marriage was a political opinion in this sense.

45. In a number of first instance and Court of Appeal cases in Northern Ireland, it had been suggested that prohibitions which were materially identical to those in FETO could be read as wide enough to provide protection against acts based on the political opinion (or religious belief) of the perpetrator of the act, in this case the Ashers: examples might include a Hindu waiter who refused to serve beef to a customer in a restaurant; or an environmental activist landlord of a flat who would only let their property on the basis of an undertaking from the tenant that the tenant would use no electrical equipment in the flat.

46. The Supreme Court firmly rejected an analysis based on the protected characteristic of the perpetrator. The less favourable treatment prohibited by FETO must be on the grounds of the religious belief or political opinion of someone other than the person meting out the treatment. The motivation of the perpetrator of an act of discrimination has long been held not to be a necessary ingredient of a direct discrimination claim: direct discrimination may be unconscious. In any event, it is essential to the analysis in any direct discrimination case that there should be a comparator (actual or hypothetical) who would have been treated more favourably by the perpetrator of the act. If the alleged discriminator’s belief were the basis for the claim, the Supreme Court held, everybody would be treated alike and the necessary comparison could not be made out. This analysis is likely to apply to all forms of direct discrimination.

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<sup>17</sup> In **Ryder v Northern Ireland Public Service Alliance** [1994] NI 103 it was said that the type of political opinion must be “one relating to the conduct of the government of the state or matters of public policy”.

47. The District Judge in Mr Lee's case held that Mr Lee was treated less favourably because of his political opinion. Mr Lee supported gay marriage and Mr and Mrs McArthur knew this, because of the message that he wanted to have written on the cake. Lady Hale considered whether it could be said that the less favourable treatment was afforded to the message and not to Mr Lee. The association between the message and Mr Lee's political opinion was, however, much closer than the association between the message and his sexual orientation. Mr Lee was perceived to hold the opinion that he wished to have iced on the cake.

48. This part of the judgment is less satisfactory and less clear than that in relation to sexual orientation. Did the Supreme Court accept that there was discrimination on grounds of political opinion? The association between the message and Mr Lee's political opinion could hardly have been closer. The message "Support Gay Marriage" was indissociable from his political opinion in support of gay marriage. Mr Lee was "perceived as holding the opinion in question": it could hardly have been clearer. And yet, at paragraph 56 of the judgment, Lady Hale says: "I have already indicated my doubts about whether this was discrimination against Mr Lee on the grounds of his political opinions, but have acknowledged the possibility that it might be".

49. Whatever the precise finding on direct discrimination on grounds of political opinion, the Supreme Court did go on to consider Mr and Mrs McArthur's Convention Rights, in particular their Article 9 right to freedom of thought, conscience and religion and their Article 10 right to freedom of expression. The Supreme Court held that Ashers Bakery was not obliged to supply a cake iced with a message with which they profoundly disagreed.

### **Weighing competing rights**

50. From time to time, the Courts have to weigh competing rights: for example, the competing rights not to be discriminated against because of religious belief and not to be discriminated against because of sexual orientation.

51. In **Islington London Borough Council v Ladele (Liberty intervening)**<sup>18</sup>, Ms Ladele complained that she was treated less favourably on the ground of her religion and belief. She was employed by Islington as a Registrar where she was required to undertake duties in relation to civil partnerships. Civil partnerships were contrary to Ms Ladele's Christian beliefs and she was not prepared to carry out such duties. She won her claim for direct and indirect discrimination before the ET but the ET's decision was overturned by the EAT and the Court of Appeal dismissed an appeal against the EAT's decision.

52. The Court of Appeal held that the Council did not treat Ms Ladele less favourably because of her religious beliefs. Its requirement for all registrars to perform civil partnership functions put person with her belief at a particular disadvantage but the Council had a legitimate aim, which was an overarching commitment to the promotion of equality and diversity. The claimant was not prevented from holding and exercising her religious beliefs; but she worked for a public authority which was required to perform purely secular tasks, including the performance of civil partnership functions, and her refusal to carry out civil partnerships involved discrimination against homosexuals in the course of her work. In relation to Article 9, the claimant's right to respect for her religious views on marriage should not be permitted to override the Council's concern to ensure that its Registrars accorded equal respect to the homosexual and heterosexual communities. The refusal to conduct a civil partnership by someone prepared to conduct marriages amounted to discrimination on grounds of sexual orientation which overrode the right to practise discrimination because of religious belief.

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<sup>18</sup> [2009] EWCA Civ 1357

53. Ms Ladele's case was subsequently considered in the ECJ,<sup>19</sup> where it was held that the decision of the Council and the domestic courts and tribunals did not exceed the broad margin of appreciation when it came to striking a balance between Convention Rights.
54. In Mr Lee's case, the Supreme Court considered Article 9 first and the jurisprudence from the European Court of Human Rights to the effect that freedom of thought conscience and religion "entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion".<sup>20</sup> Where a Muslim Petty Officer in the Royal Bahamas Defence Force was required to remain present and doff his cap during Christian prayers at ceremonial parades and at morning and evening colours, that hindered the claimant in the enjoyment of his beliefs.<sup>21</sup>
55. Similarly, the right to freedom of expression has long been held to include the right **not** to express opinion as well as the right to express opinion: "nobody should be forced to have or express a political opinion in which he does not believe".<sup>22</sup>
56. Lady Hale referred in **Lee v Ashers Bakery** to the jurisprudence in relation to "compelled speech" which has developed principally in the USA and observed that longstanding US Supreme Court authority for the proposition that "the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all" must apply equally to Articles 9 and 10 of the Convention.

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<sup>19</sup> [2013] IRLR 231

<sup>20</sup> **Buscarini v San Marino** [1999] 30 EHHR 208

<sup>21</sup> **Commodore of the Royal Bahamas Defence Force v Laramore** [2017] UKPC 13.

<sup>22</sup> Lord Dyson in **RT (Zimbabwe) v Secretary of State for the Home Department** [2013] 1 AC 152

57. Central to the decision of the Supreme Court in **Lee v Ashers Bakery** was that Mr and Mrs McArthur were being asked to provide a cake which expressed a message with which they deeply disagreed. Articles 9 and 10 are qualified rights which could be restricted only insofar as this was necessary in a democratic society in pursuit of a legitimate aim. The Supreme Court concluded that FETO should not be read or given effect in such a way that providers of goods, facilities and services are compelled to express a message with which they disagree, unless justification is shown for doing so.
58. Justification normally requires looking at the legitimate aim and considering whether the alleged discriminator's act or omission is a proportionate means of achieving that aim. No such analysis was carried out in **Lee v Ashers Bakery** and the case leaves open the extent to which an individual may refuse to publish a message. For example, could a Christian baker (or publisher of greetings card) agree to include the words 'Happy Christmas' in their products but not 'Happy Hanukkah' or 'Eid Mubarak'? That appears to fly in the face of the purpose of the equalities legislation with its emphasis on individual dignity and the avoidance of humiliation.

### **Masterpiece Cakeshop Ltd v Colorado**

59. Returning to the American cake the facts may have been more clear-cut but the arguments there too addressed the baker's First Amendment rights to freedom of speech and the free exercise of the baker's religion. The majority decision turned on the Colorado Civil Rights Commission's hostility to the baker's religious views in its decision. It therefore did not analyse or rule on the conflict between anti-discrimination laws and the freedom to exercise religion.
60. The majority of the Court did, however, recognise a distinction between refusing to provide a cake for a gay wedding and creating a cake with a message which conflicted with the baker's First Amendment rights. As Lady

Hale stated when commenting on this decision: “one can debate which side of the line particular factual scenarios fall”.

### **Conclusion**

61. The decision of the Supreme Court in **Lee v Ashers Bakery** may not have universal support. On the one hand, and under the banner of freedom of speech and freedom of religion, it enables persons lawfully to refuse to publish statements or messages with which they disagree (“Support Gay Marriage”, “Ban Gay Marriage” or perhaps any other message), whether in ordinary paper or other communications or on the top of cakes. On the other hand, if non-discrimination laws are there to protect the dignity and autonomy of individuals with protected characteristics, should the drawing of the boundaries for associative discrimination be so tight? Is it likely that Mr Lee’s dignity and autonomy as a gay man were not affected by the decision made by the McArthurs and is it irrelevant in asking that question that he was gay?
  
62. The balancing of different rights is a complex process in societies which seek to protect by law a range of important, but sometimes conflicting rights which are key to individuals’ freedoms and personal autonomy. Look out for further cases.

5 November 2018