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Freedom of Religion and Discrimination- Two important UK cases

Shortly before Christmas two important decisions were handed down by UK courts dealing with the question of freedom of religion. One was right, though unfortunate; the other was wrong, and will hopefully be overturned on appeal. Both raise important issues about how a secular society accommodates freedom of religion while upholding policies against discrimination on various grounds.

Freedom of religion in education- JFS

The case that was rightly decided was *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2009] UKSC 15 (16 Dec 2009) (the *JFS case*). A decision of the new UK Supreme Court (which has now replaced the House of Lords as the final domestic appeal court in the UK), the importance of the decision can be judged by the fact a 9-member panel was convened (many appeals are determined by a 5-member panel; this is the first 9-member panel that has been convened in the new Court, and even when the members of the Court were sitting as the House of Lords, it has been some time since 9 Law Lords sat in a case.)

The case raised the difficult issue as to whether it amounted to racial discrimination for JFS (the acronym originally stood for the “Jew’s Free School” but seems to be the official title these days)¹ to adopt a policy where it would accept (when there were more applications than places available) only students who were Orthodox Jews according to the definition adopted by the Office of the Chief Rabbi. Judaism in the UK, as around the world, is splintered into different groups, and the definition adopted in what is called “Orthodox” Judaism is that someone is Jewish only if their mother, at the time of their birth, was themselves an Orthodox Jew (or if they themselves have converted in a way recognized by Orthodoxy). In this case the mother of M, who had applied for admission to the school, was Jewish by conversion at the time of his birth, but had converted into a group that was not recognized as Orthodox.

The school admission criteria allowed for the possibility that a prospective student may have been able to demonstrate his or her own Jewishness, but evidence showed that this was very rarely used as a criterion (students being admitted at a young age.) So effectively M was barred from admission on the basis of a fact about the circumstances of his birth. The question for the Supreme Court was whether the application of this criterion was an act of “racial discrimination” under the *Race Relations Act 1976* (UK).

In the end a 5-4 majority of the Supreme Court held that it was directly discriminatory to apply such a criterion for admission, and hence unlawful. The definition of “racial grounds” in s 3 of the Act refers to “colour, race, nationality or ethnic or national origins.” Lord Phillips, the President of the Court, and 4 other colleagues (Lords Mance, Kerr and Clarke and Lady Hale) all held that the test laid down by Orthodoxy, while clearly *motivated* by religious reasons, was a test of “ethnic... origin”- at [45] (that is, the test did not simply refer to “descent”

¹ See Lady Hale at [54]; though Lord Hope at [163] refers to it as the “Jewish Free School”.

from a type of ancestor, but the purpose of the test was to constitute a person a member of the Jewish “ethnic” group).

Lord Phillips indicated at [9] that the result of the case may point to a need for Parliament to re-think the legislation; but as it stands, once direct racial discrimination is established (that is, discrimination which uses racial origin as the direct criterion of the decision), then there is no defence available.

Four members of the Court, Lords Hope, Rodger, Walker and Brown, ruled that the criterion used was not “racial” but “religious”, and hence did not fall foul of the legislation governing direct discrimination.

Lord Rodger in particular felt that the decision of the majority must be wrong:

225. The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief. If the majority are right, expressions of sympathy for the governors of the School seem rather out of place since they are doing exactly what the Race Relations Act exists to forbid: they are refusing to admit children to their school on racial grounds. That is what the Court’s decision means. And, if that decision is correct, why should Parliament amend the Race Relations Act to allow them to do so? Instead, Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this secular court but it has no basis whatsoever in 3,500 years of Jewish law and teaching.

226. The majority’s decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can’t help feeling that something has gone wrong.

Lord Rodger’s comment points to a fascinating aspect of the litigation. The *Equality Act 2006* (UK) allows “faith-based” schools to apply selection criteria based on their religious beliefs.² But this case saw a direct conflict between that rule and the law on racial discrimination. For Lord Rodger, there should have been a way of avoiding the clash. For the majority, however, once the decision could be characterized as being on “racial grounds”, then there was nothing more that could be done.

There is another type of discrimination prohibited by the legislation (and all similar discrimination laws, including those in Australia.) This is called “indirect discrimination”, and it occurs where a criterion is applied to some decision which is not, on its face, one that relates to race; but where, when the *impact* of the criterion is examined, it is seen to have a more detrimental effect on people of one race than it does on people of another race.³ In the case of

² That is, to be precise, the prohibition under that Act in s 49, against an educational establishment discriminating against a pupil “in the terms on which it offers to admit him as a pupil”, is under s 50 said not to apply to a “foundation or voluntary school with religious character” and other religious schools. But, as this case illustrates, the fact that a school may be exempt from a breach of s 49 of the *Equality Act 2006*, does not immunize it from being in breach of other provisions of the law.

³ For example, a criterion for a job may be that applicants be of a certain height. But this may well be indirectly discriminatory against applicants from certain ethnic groups whose height tends to

indirect discrimination, as it is a more complex type of issue, the law usually allows some justification to be offered.

A claim of indirect discrimination had been made in the *JFS case*, in case the claim of direct discrimination failed. Two members of the Supreme Court, Lord Phillips and Baroness Hale, who found that there was direct discrimination, did not go on to rule on whether or not there was a case of indirect discrimination, presumably preferring to leave that issue to be determined in a case where it was necessary to do so. But the other members of the Court did go on to consider the issue. Perhaps oddly, there was a marked division within the 4 Law Lords who held that there had been no *direct* discrimination, on this issue of whether there was *indirect* discrimination.

Lord Hope held that there had been a case of indirect discrimination. Even assuming (as his Lordship had held) that the decision was not made directly on racial grounds, the effect of the criterion would be to impose a higher hurdle on those with no direct descent from Jewish mothers.⁴ On the issue of justification if a case of indirect discrimination were made out, his Lordship at [209] said the policy could in theory be justified: “a faith school is entitled to pursue a policy which promotes the religious principles that underpin its faith”. That is the reason why the *Equality Act 2006* (UK) allows faith-based schools to discriminate on religious grounds. But he found that insufficient evidence had been presented to show that the policy was “proportionate”- see [214].

He pointed out at [205] that if *prima facie* indirect discrimination is shown, the defence involved the question

whether JFS can show that the policy had a legitimate aim and whether the way it was applied was a proportionate way of achieving it. The burden is on JFS to prove that this was so: *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, per Mummery LJ at paras 131-132.

He held that the aim that JFS had was “legitimate”; but then went on to say that it was not “proportionate”. The School had not shown that it had gone through the process of considering “the impact that applying the policy would have on M and comparing it with the impact on the school” – [211]. In the end his Lordship’s view was that the issue had not been properly addressed in the evidence:

There may perhaps be reasons, as Lord Brown indicates (see para 258), why solutions of that kind might give rise to difficulty. But, as JFS have not addressed them, it is not entitled to a finding that the means that it adopted were proportionate (at [212]).

Lord Walker at [235] agreed with Lord Hope.

be less than that of others. And if the “height” criterion cannot otherwise be justified as “reasonable” and “proportionate” it may be illegal.

⁴ As his Lordship says at [205]: “M and all other children who are not of Jewish ethnic origin in the maternal line, together with those whose ethnic origin is entirely non-Jewish, were placed at a disadvantage by the oversubscriptions policy when compared with those who are of Jewish ethnic origin in the maternal line.”

By contrast, Lords Brown and Rodger argued strongly that this was a situation where it was reasonable for the school to wish to offer its services first of all to Orthodox Jews, and that any other scheme would have been impossible to administer.

I said at the outset that this decision was right. While I have the utmost sympathy for the arguments of the minority on the direct discrimination issue (and in that sense it is an unfortunate decision), it does seem to follow that if the community wishes to make discrimination on racial grounds unlawful, it must cover decisions like this one, that are based on descent, as to whether or not someone belongs to an ethnic group. There could well be a case for the Orthodox Jewish community to argue that an exception should be made, but while there is no such exception it seems that this is indeed a discriminatory decision.

For the Christian community the decision does not have direct impact. A key feature of the difference made by the Christian gospel, of course, is that Christianity is not now a religion where racial origin makes any difference. Paul can say in Galatians 3:28 that “There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus.” If the early Jerusalem church found it necessary to suggest rules that should have been observed by Gentile believers (Acts 15:20, 29), these were rules that were also binding on Jewish believers.

Perhaps the long-term impact of the decision may come in the way that the members of the court deal with the issue of indirect discrimination. Where a criterion is applied which has a “disparate impact” on people from a particular protected group, the approach which seems to be sanctioned by a majority of the members of the Supreme Court here is to consider whether or not it is related to a “legitimate” aim, and whether or not it is implemented in a “proportionate” way- that is, can the alleged discriminator demonstrate that the severity of the impact of the rule on the person discriminated against, is in proportion in some sense to the harm done to the discriminator? In my view this approach is sensible, and would have led to a different result if it had been properly applied in the other recently decided case, to which we now turn.

Freedom of religion in employment

The case is the decision of the Court of Appeal (led by the Master of the Rolls, Lord Neuberger, who has just recently “returned” from a stint on the House of Lords, as it then was, to the post) in *Ladele v London Borough of Islington* [2009] EWCA (Civ) 1357 (15 December 2009).

Ms Ladele was a long-serving marriage registrar, who was also a Christian. When UK law was changed to allow the registration of same-sex relationships under the *Civil Partnership Act* 2004, she refused to participate in registering such partnerships, her view being that the law was effectively designed to equate these relationships with marriage. As Lord Neuberger records at [7]:

Ms Ladele held “the orthodox Christian view that marriage is the union of one man and one woman for life”, and she “could not reconcile her faith with taking an active part in enabling same sex unions to be formed”, believing it to be “contrary to God’s instructions”.

Her employer, LBI, dismissed her for refusing to register the partnerships. Evidence showed that it was up to local councils to designate their registrars as those who would register civil partnerships, and that the Council could have chosen not to designate Ms Ladele to this office. But complaints against her refusal to register the partnerships had been made by two openly gay registrars, and the Council decided to order all registrars to be involved.

The initial Tribunal hearing found that the Council had discriminated against Ms Ladele on the ground of her religion, contrary to the *Employment and Equality (Religion or Belief) Regulations* 2003. But the Employment Appeals Tribunal (EAT) overturned this finding.⁵ Elias J gave a careful analysis. With respect, his Honour correctly concluded that there was no *direct* discrimination against Ms Ladele. LBI had not signalled her out for detriment because she was a Christian; all they had done was refuse to exempt her from a general requirement imposed on all the registrars. (See the discussion in the EAT judgment at [52].)

So the question came down to whether what LBI had done amounted to *indirect discrimination*, discussed above. Here the requirement that all registrars be involved in registering same-sex partnerships was “facially” neutral, but in fact had a detrimental impact on those registrars who, due to religiously-based beliefs, objected to doing so. Under reg 3(1)(b)(iii) of the relevant Regulations, the question was whether or not the requirement was “a proportionate means of achieving a legitimate aim”. Was the Council’s imposition of this requirement “proportionate” to what they said was the legitimate aim of not discriminating against members of the public?

It is hard to understand how the Council’s stance can be said to be “proportionate”. It was accepted that the unavailability of Ms Ladele to register the partnerships would not in any way have impeded the registrations- there were clearly a sufficient number of other registrars who were happy to do the work. Hence why is it “proportionate” to the provision of a “non-discriminatory” service for the Council to require Ms Ladele to either act against her conscience or resign her job?

Elias J accepted submissions by the Council (and “Liberty”, a gay rights group allowed to intervene) that “the aim of combating discrimination is necessarily undermined if acts of discrimination by staff are knowingly permitted” – [98]. But this seems to beg some important questions. The word “knowingly” is important- who would have known about Ms Ladele’s actions? Unless her actions were publicised by other staff, presumably members of the public at large would have no idea as to which registrars were allocated to which task. One cannot avoid the impression, reading the facts, that in fact one of the main interests being catered for by the Council lay in the fact that the two gay registrars felt “put down” by Ms Ladele’s objections, and perhaps had threatened to “go public” unless something were done. (See para [12]- the members of staff complained that some “were refusing to do civil partnerships... alleged that it was an act of homophobia and that they felt discriminated against.”)

⁵ *London Borough of Islington v Ladele* (UKEAT/0453/08/RN; Elias J presiding; 19 Dec 2008).

In addition, it seems hard to conceive how the decision in this case does not involve the “balancing” of the rights of one group with the rights of another. Yet there seems to have been a refusal by the Appeal Tribunal to acknowledge this- see the comments at [112]: “the issue is not... a matter of giving equal respect to the religious rights of the claimant and the rights of the gay community”. With respect, these are indeed fundamental issues that cannot be brushed aside. The Tribunal seems to argue in a circle when, at [111], in finding the Council justified in requiring all registrars to perform the duties, they comment-

They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform... where her personal stance involved discrimination on grounds of sexual orientation.

This statement ignores the fundamental question- is not Ms Ladele entitled to some consideration for her religious beliefs? The Appeal Tribunal makes it quite clear that it disapproves of Ms Ladele’s stand when it used the word “connive” in para [117]- Council “were not required to connive in what they perceived to be unacceptable discriminatory behaviour by relieving the claimant of these duties”. But it is quite unclear whether they properly weighed up the extent of the harm caused to Ms Ladele, in comparison with what harm would actually have been caused by simply allowing her not to participate – from her point of view, not obliging *her* to “connive” at the State supporting a relationship she perceived as contrary to the word of God.

How did the Court of Appeal deal with these issues? At [45] Lord Neuberger notes that “aim” of the Council was not simply to provide an efficient civil partnership registration service; its aim was a broader one of “being ‘an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others’”.

This of course puts the aim in a way that most favours the Council, but for the moment can be accepted. The difficulty again lies, to my mind, in the word “discriminate”. In what sense did Ms Ladele’s refusing to participate in same-sex partnership registrations “discriminate” against persons of homosexual orientation? The evidence showed that no one who wanted such a ceremony was denied it, as the Council had more than enough registrars to do the job. There seems to be no concrete harm that was done to any of the customers of the Council. In the end, as noted above, it was the two other gay registrars who complained. But even they did not complain, for example, that their workload had been increased by Ms Ladele’s decision. Their complaint was that they found her *attitude* “offensive” or “homophobic”.

But Lord Neuberger did not focus on these issues. Indeed, in what is a very disturbing passage, his Lordship said at [51]:

the aim of the Dignity for All policy was of general, indeed overarching, policy significance to Islington, and it also had fundamental human rights, equality and diversity implications, whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished.

That is an amazing trivialisation of the right to freedom of religion. For a start, it seems to reduce the right to mere “internal” beliefs and what happens on a Sunday! If freedom of religion, and freedom to manifest religion (explicitly protected under art 9 of the *European Convention on Human Rights*), is to mean anything, then it must cover actions that are in accordance with those beliefs in spheres other than the purely “religious” venue of church meetings. A more realistic statement of what was at stake here was, on the one hand, the right of some employees not to be “offended” by someone else’s opinions, which were not harming them or any members of the public, and on the other hand the right of Ms Ladele to earn a living at a profession to which she aspired.

The conclusion at para [52] demonstrates precisely why this decision is wrong:

Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele’s refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington’s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington’s employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele’s refusal was causing offence to at least two of her gay colleagues; Ms Ladele’s objection was based on her view of marriage, which was not a core part of her religion; and Islington’s requirement in no way prevented her from worshipping as she wished.

Taking these points *seriatim*:

- (1) “Ms Ladele was employed in a public job and was working for a public authority”- true, but nothing in the ECHR says that public authorities are free from the obligation to respect the freedom of religion of public servants;
- (2) “she was being required to perform a purely secular task, which was being treated as part of her job”- but if freedom of religion means anything, it applies across a range of activities, not just “religious” ones;
- (3) “Ms Ladele’s refusal to perform that task involved discriminating against gay people in the course of that job”- this is the key proposition which is disputed above; no gay person was actually worse off in any legally relevant sense because of her actions;
- (4) “she was being asked to perform the task because of Islington’s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington’s employees, and as between Islington (and its employees) and those in the community they served”- again, this point depends on the last- there was no actual discrimination;
- (5) “Ms Ladele’s refusal was causing offence to at least two of her gay colleagues”- no doubt many attitudes of others may cause “offence”; but unless the law proscribes such behaviour, it is not legally relevant;

- (6) “Ms Ladele’s objection was based on her view of marriage, which was not a core part of her religion”- this is a most disturbing comment, because it implies that the court must make a religious evaluation about what is, and is not, at the “core” of a religion- and in any event it would seem to be strongly arguable that the centuries-old orthodox view of marriage lies very near to the core of Christian ethical beliefs; and
- (7) “Islington’s requirement in no way prevented her from worshipping as she wished”- an incredibly patronising comment which sees “freedom of religion” watered down to “freedom to go to church”.

This view of Ms Ladele’s freedom of religion (protected, as Lord Neuberger is forced to acknowledge, by art 9 of the ECHR) as a minor right which can be cast aside when someone is simply “offended” by it, can be sharply contrasted with the way that rights based on “sexual orientation” are to be treated:

59. By contrast, decisions of the Strasbourg Court such as *Salguero da Silva Mouta v Portugal* (2001) 31 EHRR 47 and *EB v France* (2008) 47 EHRR 21 emphasise that, to quote from paragraph 90 in the latter case, “[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8”. It is not suggested that, by permitting Ms Ladele not to officiate at civil partnerships, Islington would have infringed anyone’s rights under the Convention, but observations such as these demonstrate the importance which the Convention should be treated as ascribing to equality of treatment irrespective of sexual orientation.

In other words, a clear Convention right protecting the right to manifest religious belief can be swept aside, but a right which is not even mentioned in the Convention requires “convincing and weighty reasons” if it is even to be lightly disturbed.

The Master of the Rolls then went on to consider another argument raised for the first time on appeal. This was that since the commencement of the *Equality Act (Sexual Orientation) Regulations* 2007, SI 2007/1263 (“the 2007 Regulations”), which make it unlawful to discriminate against persons on the grounds of their sexual orientation, LBI were actually obliged to dismiss Ms Ladele if she refused to perform civil partnership ceremonies.

The argument seems correct- once Ms Ladele had been appointed a civil partnership registrar, she would then not have been entitled to refuse to solemnise a partnership between persons of the same sex, especially since reg 3(4) of the 2007 Regulations makes it clear that civil partnership is not “materially different” from marriage for the purposes of the regulations. There may be a question as to whether the drafting of these regulations gives sufficient recognition of the strong freedom of religion right spelled out in art 9 of the ECHR. But it does seem true that the regulations as drafted would have this effect.

However, as Lord Neuberger also points out, it would not have been discriminatory for the Council to not *appoint* Ms Ladele as a civil partnership registrar in the first place, a step that she had requested. So in the end this

argument does not seem to make the Council's case any stronger- it simply pushes the point where Ms Ladele's freedom of religion was not recognised back to the decision to appoint her as a registrar.

It is as well to remember what the effect of this decision must be. Ms Ladele had a genuine objection to being involved in a newly expanded area of her responsibilities (it is not, for example, as if she approached for a job an organisation which already recognised same sex partnerships). Her objection could easily have been accommodated within the work practices of the Council, and indeed there is some evidence that other Councils had done so by not appointing registrars with a religiously-based objection to the position. By doing this, the Council would not have been making any particular public statement; no persons seeking a civil partnership registration would have been, or in fact were, inconvenienced in any way. The objection to this course of action came from two fellow staff members who "took offence" at Ms Ladele's actions. In the end the offended feelings of these staff members were given priority over Ms Ladele's ability to work at her chosen profession without violating her conscience.

With respect, this must be wrong. If there was ever a case where indirect discrimination on the basis of religious belief were to be found, it seems this should have been it. It is to be hoped that the more rigorous analysis of the "proportionality" between protected interests and the interests of the discriminating body, spelled out in the decision of the Supreme Court in *JFS*, will be applied when the *Ladele* case goes on appeal to that Court. In *JFS* a major reason for the majority of the members of the Court finding that there had been indirect discrimination, was a failure to examine the severity of the "disparate impact of the policy" on the various groups involved- see Lord Hope at [211]. Here it seems to be clear that there were a number of other policies that the Council could have adopted to further their legitimate aims of encouraging non-discrimination on the basis of sexual orientation, short of an ultimatum requiring Ms Ladele to choose between her job and her faith. The simplest of all was not putting her into the position where she would be required by law to conduct the registrations.

It may be that what lies beneath the Council's policy was a sense that "these sort of people", people who have views that are different to the prevailing orthodoxy of complete moral neutrality on questions of sexual conduct, should not be employed in public positions. This may be the trend of public law in the UK and Australia, and if so Christians will simply have to persevere with their commitment to their Lord and trust that he will provide what they need to do so. But until that point is reached, it seems that the law at the moment, particularly the law of the UK (where a right to freedom of religion, and the right to "manifest" religious beliefs "in public or private", in "practice and observance" as well as in worship, is enshrined in a binding Convention), should allow a Christian person's right to continue to work in circumstances such as those faced by Ms Ladele here.

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