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Following on from my recent presentation on "Legal Pressure Points",[1] today brings an interesting decision from the UK that raises some related issues.

In *R (On the Application Of Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 (27 January 2014)[2] the England and Wales Court of Appeal handed down a decision relating to a controversy over signs displayed on London buses.

The history is slightly complex, and some of the issues concerned go back to the fairly famous attempt by some of the "New Atheists" to spread their message on London buses by signs saying "There is Probably No God." A lobby group supporting the gay and lesbian movement, Stonewall, subsequently ran a bus campaign with signs that read: "SOME PEOPLE ARE GAY. GET OVER IT!"

In response, two Christian groups sponsored and proposed to run signs saying: "NOT GAY! EX-GAY, POST-GAY AND PROUD, GET OVER IT- *www.anglican-mainstream.net* *www.core-issues.org*". Having been made aware of these proposed signs, the bus company, Transport for London (TfL) cancelled them at the last minute. Part of the debate in the proceedings is the process by which this cancellation took place. The Core Issues Trust, one of the Christian groups, contended that they had been pulled on direct orders of Boris Johnson, the controversial Mayor of London, who was about to stand for re-election, and in particular was due to attend a rally in favour of his campaign organised by the Stonewall group (the sponsors of the original "Get over it!" advertisement) on the next day.

Core Issues Trust complained about the cancellation of its advertisement, both on the grounds that the Mayor had behaved illegally and exceeded his authority in giving a direct order to TfL on political grounds; and also on the grounds that their freedom of speech and freedom of religion rights were being breached.

In earlier proceedings[3] the trial judge had found that there was insufficient evidence to conclude that the Mayor had been directly involved. She did, however, comment adversely on the way that TfL were relying on a policy they had adopted that "advertisements will not be approved for the London public transport network which in TfL's reasonable opinion "are likely to cause widespread or serious offence" or "which relate to matters of public controversy or sensitivity"." She commented that if TfL were truly being consistent with their policy they should have rejected both the earlier atheism advertisements and also the original Stonewall advertisement. But in the end she concluded that the fact that TfL had behaved wrongly in the past, did not mean that their decision now not to run the Core Issues ad was wrong.

In these proceedings on appeal, the Court of Appeal (Lord Dyson, Master of the Rolls; Briggs and Christopher Clarke LJJ) reversed the trial judge's decision on the improper behaviour of Boris Johnson. They did this because after the trial, and by the time the matter had come to the appeal, the classic "smoking gun" had

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[1] See Neil J. Foster. "Legal Pressure Points for Christians In 21st Century Australia" Australia Day Convention VII- St Andrew's Cathedral- *Australia's Future: Christ, the Nation, the State*; Sydney, NSW, Jan. 2014, at: http://works.bepress.com/neil_foster/73 .

[2] See *http://www.bailii.org/ew/cases/EWCA/Civ/2014/34.html* for the full report.

[3] *Core Issues Trust v Transport for London* [2013] EWHC 651 (Admin).

been located: an email sent from the Mayor's office saying: "Boris has just instructed tfl to pull the adverts"! (See para [28] of the CA decision.) This issue then had to be sent back to the judge, who it was strongly suggested should reinstate the Mayor as a defendant and require him to testify on the point.

However, the Court generally agreed with the trial judge's position on the other issues. Article 10 of the *European Convention on Human Rights* gives a right to freedom of speech, which of course has to be balanced against other interests. A breach of art 10 has to be justified by being shown to be "(i) prescribed by law; (ii) in pursuance of a legitimate aim; and (iii) "necessary in a democratic society"." (at [51])

Here the Court accepted that TfL's "no serious offence" policy was one that was legally made under the relevant Act and Regulations, and was in pursuance of a legitimate aim. The Master of the Rolls said at [58]:

> I accept the submission of Mr Pleming that the standards of "offensiveness" and "public controversy" are sufficiently precise to meet the requirement of legal certainty. Both "offence" and "controversy" are uncomplicated ordinary English words. They are both concepts that are frequently used to set regulatory standards of decency.

This can be interestingly contrasted with the recent decisions of the High Court of Australia and the Supreme Court of Canada noted in my earlier paper, all of which expressed concern about a law that restricted free speech merely on the grounds of "offence".[4]

On the question of the legitimacy of the aim, Lord Dyson said that protection of the rights of same-sex oriented persons was an important aim. Interestingly his Lordship at [61] quoted the organisation's duty under s 149 of the *Equality Act* 2010 (UK), which was to have

> due regard to the need to (a) eliminate discrimination, harassment and victimisation against persons with same-sex sexual orientation; and (b) foster good relations between those who have same-sex sexual orientation and those who do not and in particular to tackle prejudice and promote understanding.

One would perhaps have thought that accepting an aggressively rude advertisement from Stonewall, but rejecting a similar advertisement from the Core Issues Trust on the same point, was unlikely to "foster good relations" between those different parties!

Finally, on the proportionality point, Lord Dyson accepted the trial judge's findings that TfL had behaved wrongly by allowing the earlier Stonewall advertisement to run.[5] But he concluded that TfL's decision was still arguably correct. The core reasons are expressed as follows:

> [84]…. The restrictions are justified in view of the prominence of the advertisements and the fact that they would be **seen by, and cause offence to**, large numbers of the public in central London. Moreover, for those who are gay, the advertisements would be liable

[4] See *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (27 Feb 2013); *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 and *Monis v The Queen* [2013] HCA 4 (27 February 2013).

[5] Interestingly, his Lordship noted that separate proceedings are currently under way for a specific ruling on the illegality of the earlier decision, thought those proceedings had been "stayed" pending the outcome of this case- see paras [78]-[79].

> to **interfere with the right to respect for their private** life under article 8(1).
> [85] Secondly, I agree with the judge that the advertisement is liable to **encourage homophobic views and homophobia places gays at risk**. Closely linked to this is TfL's duty under section 149(1) of the EA which points strongly against allowing the advertisement to appear on its buses, since it would **encourage discrimination**. (emphasis added)

With respect, it is not immediately apparent that all these reasons are valid. Yes, the advertisements might offend. If a broad view of art 8 of the ECHR were taken, this would be some "interference" with "respect" for private life. But would the advertisement really encourage "homophobia"? Surely the only way it could do that would be if *any* suggestion doubting the genetic basis of homosexuality were to suddenly lead to an outbreak of hatred for homosexual persons. But why should this be the case?

And notice the subtle connections here. No one would dispute in a general sense the contention that "homophobia places gays at risk"- we would all want to condemn gay-bashing and "homophobically"-motivated violence. But to slide from "encourage homophobic views" to the dark overtone of "risk" is a very big move! Again, why does expressing a view that not all those who are gay, will always be so, "encourage discrimination"? We are not told.[6] But we are told at [88], with no real reasons being offered, that the Core Issues advertisement was wrong:

> by implying offensively and controversially that homosexuality can be cured.

Is it so "offensive" and "controversial" to make this claim? That seems to be a conclusion that Lord Dyson starts with, not one that he provides any reasons for offering.

Perhaps it is not surprising, then, though it is sad, that the Article 9 freedom of religion claims are met with very short treatment. Lord Dyson refers at [91] to the reasons offered by the trial judge for refusing to apply art 9: first, that rights to freedom of religion are not enjoyed by "corporate entities" other than "religious communities or churches"; second, that in any case freedom of religion does not apply to "moral" issues which are merely "motivated", as opposed to being "required", by belief.

Thankfully the Master of the Rolls does not endorse these propositions, which both seem to be wrong. If "religious communities" are to be allowed rights of freedom of religion, why not an explicitly religious organisation like Core Issues? And the second proposition is simply incoherent as well as being clearly wrong in light of the decision of the European Court of Human Rights in *Eweida and ors v United Kingdom* [2013] ECHR 37 (15 January 2013), noted in my earlier paper. There it was specifically ruled that the fact, for example, that moral objections to same sex marriage were not "required" of Christians, did not prevent such an objection being a free exercise of religion.

So why does Lord Dyson say that art 9 is not engaged? It is slightly hard to determine, but he simply says that since the test in art 9 (legality, lawful purpose,

[6] See also para [88], where Lord Dyson defends the earlier Stonewall ad as encouraging "gay acceptance", and then shifts to conclude that the Core Issues ad, as a response to it, must be guilty of encouraging "gay rejection"!

proportional) is the same as that in art 10, then for the same reasons an art 9 claim would fail.[7]

There was, however, an interesting point made about whether it could be argued that TfL were discriminating against "ex-gays". In other words, does a right not to be discriminated against on the ground of sexual orientation include a right not to be discriminated against because one has *changed* sexual orientation?

Lord Dyson accepted that an argument of this sort might be made out:

> [98] Discrimination against a person because of his or her past actual or perceived sexual orientation, or because his or her sexual orientation has changed, is discrimination "because of…..sexual orientation". There is no requirement in the EA that discrimination must relate to a person's current sexual orientation. All that is required is that the discrimination is "because of sexual orientation".

However, his Lordship seems to have accepted that, as the trial judge had found, the Core Issues group *qua* group did not have a "sexual orientation", and that any claim of this sort would have to be brought by an individual.

The other members of the Court agreed with the Master of the Rolls. But it was encouraging to read the comments of Lord Justice Briggs:

> [104] … There are many people, of many different faiths and none, who have been brought up and taught to believe that all homosexual conduct is wrong. Many have, after long and careful thought, arrived at a different view. Some have been encouraged along the way by bold expressions of the type found in the Stonewall advertisement. But many others continue sincerely to hold that belief, and some regard a departure from it as inconsistent with the maintenance of their faith. Some would rather give up their jobs, or discontinue their businesses, than act in a way which they believe condones such conduct, whether by conducting civil partnership or gay marriage ceremonies, by admitting gay couples to bed and breakfast accommodation, or by providing adoption training to gay couples. Sincere differences of view about this issue are tearing apart some religious communities, both here and abroad.
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> [105] Like my Lord, I consider that the Stonewall advertisement was probably intended to promote tolerance of gay people and to discourage homophobic bullying, and that this is plainly a lawful aim. But the advice to 'get over it' is a confrontational message which is likely to come across to many of those to whom I have just referred as at least disrespectful of their sincerely held beliefs, and to some as suggesting that there is no place for the toleration of their beliefs in modern society. Displayed on the side of London buses it is therefore likely to cause widespread offence to many, even if it may have promoted tolerance and understanding in others.

This at least seems to introduce some balance into the discussion.

In the end the decision means that the question of whether the Mayor arranged for the removal of the advertisements improperly, for political purposes, will need to be re-examined. The related proceedings challenging the original Stonewall advertisements will, it seems to me, find that they were unlawful as contrary to TfL's policy. But that policy has also led to the banning of the Core Issues advertisements. It seems obvious that each of the ads was as

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[7] His Lordship in paras [93]-[94] also virtually ignored an argument based on s 13 of the *Human Rights Act* 1998, which requires special importance to be given to the free exercise of religion by a "religious organization". The provision is indeed hard to interpret, but one would like to at least have seen some attempt!

"offensive" as the other (ie mildly)- but for reasons noted in my previous paper, in my view each should have been allowed to run and the issues debated openly, rather than being "covered up" and removed from the public square.

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