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DISCRIMINATION LAW IN 2018

SEXUAL ORIENTATION
AND
RELIGION OR BELIEF
DISCRIMINATION

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Introduction

1. I look forward to this annual conference when we review the developments of the last year and start a consideration of what the next may bring. In my chambers Cloisters we are constantly dealing with the most important issues in discrimination law. Please visit our website www.cloisters.com for the latest equality blogs, with contributions from our barristers who are routinely involved in the most complex and high-profile equality and discrimination cases. You can also follow us on Twitter @Cloisters or myself @RobinAllenQC for regular updates and news about discrimination law.

2. This year I am yet again asked to discuss Sexual Orientation discrimination and discrimination because of Religion or Belief. I shall start by considering the cases concerning Sexual Orientation and then go on to Religion or Belief. We shall also see that as always is the case there will be some overlap, and I shall also consider cases concerning Transgender rights where these seem to me to relate to the above issues, particularly in relation to marriage.

3. I shall not set out all the source law; this will be found in the Equality Act 2010 and Directive 2000/78,¹ and of course the Human Rights Act 1998 which imports Articles 8 (Right to respect for private and family life), 9 (Freedom of thought, conscience and religion), and 14 (Prohibition of discrimination) of European Convention on Human Rights (“the Convention”) into the consideration of the Equality Act 2010. Reference will also be made to the Charter of Fundamental Rights of the European Union (“the Charter”).

4. The painful process to Brexit is a reality at the moment. However, the UK remains a member of the European Union still, and will do so until the Brexit date of the 29th March 2019 or a different date if the 27 agree otherwise. So, the question is: What of European discrimination law will continue to be part of our domestic law after March next year and beyond? You will have to come next year to discover!

5. However we do now have a greater understanding of the landscape of discrimination law as it will appear after Brexit happens as a result of the continuing debates over EU Withdrawal Bill and I shall discuss this shortly as well.

Sexual Orientation

Establishing the protected characteristic of sexual orientation

6. It has, I think, long been recognised in the United Kingdom that it is not usually clever, in the course of litigation, to challenge a person’s self – identification with a particular protected characteristic.

7. You don’t ask in cross-examination: “Are you really the man you say you are?” or “Are you really a Sikh?” It does happen in disability cases where the test is more detailed and where there is stage when someone has lost full ability but may not yet be “disabled”. Advocates know that usually it is more likely to cause the judge or tribunal to query whether there is any substantive argument, in the case if you start there. Yet outside the Employment Tribunals, there is a developing trend of questioning the truth of an asserted sexual orientation.

8. Thus recent research has shown the increasing numbers of claims for asylum brought on the basis of sexuality. On the 1 December 2017 the Times reported that² –

One in five asylum applications from Pakistani citizens raised sexual orientation issues, according to official figures published for the first time yesterday. Pakistanis topped the list of nationalities for which lesbian, gay or bisexual issues formed part or all of the claim for asylum, followed by asylum seekers from Bangladesh and Nigeria. The Home Office statistics, which were described as experimental, show that sexual orientation was raised as part of the asylum claim in just over 3,500, or 6 per cent, of the 58,700 applications between July 2015 and the end of March. Sexual orientation was an issue in 1,000 asylum claims by Pakistanis, of which 440 applications resulted in the person being given asylum either at the first decision or on appeal. Of the 3,535 total claims involving sexual orientation only 814 were given asylum initially and a further 541 after an appeal.

9. The article concluded by noting that –

Paul Dillane, executive director of the Kaleidoscope Trust, which supports the human rights of LGBT people, said that the Home Office had published the figures after years of lobbying.

“This is a welcome step forward but they raise a series of concerns: the statistics do not provide any information as to why a person

² See https://www.thetimes.co.uk/article/sexuality-cited-in-3-500-asylum-claims-b2jgnq2fr
seeking asylum on account of their sexuality was refused, trans people are excluded entirely and we do not know how many people were detained upon seeking asylum,” he said.

“Asylum claims by LGBT people are often matters of life or death. We urge the Home Office to take proactive steps . . . to ensure LGBT people fleeing persecution are genuinely protected.”

10. Because this is a special area of law it may well have passed you by, but in my view it is probably important for us to be a little more aware of it. Determining the truth of an assertion about sexual orientation raises profound and important questions about the way in which law operates in examining such a personal issue about identity. It goes to the heart of Article 8.

11. The background to this trend lies in the Asylum Directive\(^3\) which requires sexual orientation to be taken into account in the processes of member states in considering asylum issues. This Directive’s requirements, in cases founded on sexual orientation, have been considered in *HJ (Iran) v Secretary of State for the Home Department*;\(^4\) there has also been considerable subsequent CJEU jurisprudence on the topic;\(^5\) and in early 2017, in *LC (Albania) v Secretary of State for the Home Department*,\(^6\) the Court of Appeal held that there was nothing wrong with the UK’s domestic guidance written post *Iran*.

12. These questions have now been re-raised in a recent reference to the CJEU in Case C-473/16, *F v. Bevándorlási és Állampolgársági Hivata*. In this case the Hungarian Administrative and Labour Court asked the CJEU, whether, when asylum application is based on persecution on grounds of sexual orientation the courts or administrative authorities can examine “by expert methods, the truthfulness of the applicant for asylum’s claims”?

13. The “expert methods” the Hungarian court had in mind concerned psychologist’s reports. Advocate General Wahl summarised the issues of the reference in this way in his Opinion\(^7\)-

How are the national authorities to verify the credibility of the statements made by an asylum seeker who invokes, as a ground for granting asylum,

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\(^3\) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12)


\(^6\) [2017] EWCA Civ 351; [2017] 1 W.L.R. 4173

\(^7\) ECLI:EU:C:2017:739
fear of being persecuted in his country of origin for reasons relating to his sexual orientation? In particular, does EU law preclude reliance by those authorities on psychologists’ expert opinions?

14. AG Wahl has said in this Opinion that –

[The Asylum Directive and Article 1 of the Charter of Fundamental Rights] do... not preclude the use by the authorities of a psychologist’s expert opinion, especially to evaluate the general credibility of an applicant for international protection, provided that: (i) the examination of the applicant takes place with the consent of the applicant and is carried out in a manner that respects the applicant’s dignity and private and family life; (ii) the opinion is based on methods, principles and notions that are sufficiently reliable and relevant in the circumstances of the case, and may produce sufficiently reliable results; and (iii) the expert’s findings are not binding for the national courts reviewing the decision on the application.

15. The Opinion provides a careful analysis of the extent to which psychologists really can help on such issues and also the critical importance of avoiding stereotypes and protecting personal dignity. We shall now have to wait to see how the CJEU develops these points in its judgment.

16. You should also know that this Opinion was not available to the Inner House of the Court of Session (Lord Drummond Young, Lady Clark of Calton, and Lord Malcolm) when it came to write its judgment in AR (Pakistan), a case concerned with the proper approach to an asylum case brought by a person fearing persecution on the basis of their sexual orientation. However here too the court wrote a sensitive and thoughtful judgment as to the proper judicial approach to a challenge to a person’s evidence about their sexuality, the need for anxious scrutiny, and the setting of a suitably low standard of proof.

17. It is to be hoped that the future CJEU judgment in the Hungarian case together with the CS judgment in AR (Pakistan) will halt what could become a new and frightening kind of state sexual orientation discrimination from developing.

The right of same sex couples to marry

18. Discrimination law is full of paradoxes. Northern Ireland was an early adopter of legislation to enable same – sex partners to enter into civil partnerships. The first set of civil partnership ceremonies for gay couples in the UK were held in

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8 [2017] CSIH 52; 2017 G.W.D. 25-419
Northern Ireland, and it is generally accepted⁹ that Shannon Sickles and Grainne Close, were truly pathfinders in the United Kingdom when they exchanged vows at Belfast City Hall on the 19th December 2005.

19. So it might have been hoped that Northern Ireland would have also been a pathfinder on the journey to secure a right for same-sex couples to marry. In fact as you will probably all know, not so. The Marriage (Same Sex Couples) Act 2013 made provision in England and Wales and the Marriage and Civil Partnership (Scotland) Act 2014 made like provision in Scotland.

20. The debate over whether like provision should be extended to Northern Ireland – as it is in the Republic of Ireland – has been the source of considerable frustration and litigation. Although the Assembly has debated the matter on several occasions and although a small majority in favour has been established the special constitutional situation in Northern Ireland has meant that no new laws bringing it into line have been passed. Is this failure lawful?

21. That issue was considered in litigation brought by among others the same two pathfinders I have mentioned above: Close & Ors, Re Judicial Review.¹⁰ O’Hara J. held in the summer of 2017 that the issue was one for political and not judicial resolution; however his judgment is still useful and relevant for the development of LGBTI rights.

22. The specific challenge in this case was to Article 6 of the Marriage (NI) Order 2003 (the 2003 Order) which prohibits marriage “if both parties are of the same sex”, on the basis that it was contrary to the Human Rights Act 1998, specifically Articles 8, 12 (the right to marry) and Article 14 of the Convention.

23. The court noted however that while the ECtHR required some legal recognition of same sex relationships it had not imposed on states an obligation to introduce same sex marriage under any provision of the Convention: Schalk and Kopf v. Austria,¹¹ Hämäläinen v. Finland,¹² and Oliari v Italy.¹³

24. The court did accept explicitly however the evidence as to the effects of this differential treatment and this is worth repeating here –

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⁹ In truth they were the second such couple: Matthew Roche, 46, who had lung cancer, and Christopher Cramp held their ceremony hours after the Civil Partnership Act became law on the 5th December 2005. The couple, from Brighton, were given special permission to go ahead before the normal 15-day waiting period. Matthew Roche sadly died the next day.


5...I must recognise the compelling evidence put before me about the effect on the gay and lesbian community of being treated less favourably than others so repeatedly and for so long. That evidence shows the psychiatric damage caused by isolation, insult and disapproval. It shows how lives are altered for the worse in the most damaging of ways. This evidence and the Westminster government’s case for same sex marriage which resulted in the Marriage (Same Sex Couples) Act 2013 make out a strong case for same sex marriage. Not only is it important for the gay and lesbian community; on the evidence it is also important to promote an open and tolerant society. That explains why this issue has attracted support far beyond the gay and lesbian community.

Campaigning for same – sex couples to be able to marry

25. I suspect you know that I am instructed in the case of Lee v. Ashers which concerns a conflict between the right to campaign for same – sex marriage and the refusal of a commercial bakery and its owners to bake a cake with a slogan to that effect on it. I have been reporting on this case for some years now.

26. It may be recalled that Mr Lee is a gay man involved with a volunteer organisation called QueerSpace, supporting LGBT rights in Northern Ireland. He has a genuine and deeply-held belief that gay people should be entitled to marry. Shortly after the last time that the Northern Ireland Assembly failed to agree to pass same – sex marriage laws he placed an order with Ashers bakery for a cake which was iced with a slogan “Support Gay Marriage” and the logo for QueerSpace. The order was originally accepted, but subsequently the bakery owners refused to fulfil the order and returned his money, stating that to make the cake would offend their deeply-held Christian beliefs.

27. The two share-owners in the bakery company describe themselves as Evangelical Christians and gave evidence that they held a sincere and deep belief that marriage is a union only for man and woman and that sexual relations outside of that bond of heterosexual marriage is contrary to the Bible.

28. In the proceedings, they argued that they had not refused the order because of Mr Lee’s own sexual orientation, but because of the slogan on the cake which supported a belief that was inconsistent with their religious beliefs. They testified that they would have refused to make the cake if a heterosexual customer had placed the same order and that they did not even know Mr Lee was gay. They also argued that it would breach their rights under article 9 ECHR (freedom to hold and manifest a religious belief) if the law required them to fulfil orders of this nature.
29. In 2015 Mr Lee’s claim that he had suffered both religion and belief and sexual orientation discrimination was successful at first instance. In the autumn of 2016 Northern Ireland Court of Appeal dismissed an appeal and refused permission to appeal to the Supreme Court.

30. As I predicted at this conference last year, an application for permission to appeal has been made by the bakery and the two owners of the bakery Mr and Mrs McArthur.

31. At this point this litigation has taken an unusual and interesting turn. This is because the Attorney – General for Northern Ireland John Larkin QC has taken the unique course of exercising his right to make a direct reference to the Supreme Court of an issue relating to the specific laws in Northern Ireland. It is little known how much opportunity there is for the chief law officers of the various parts of the United Kingdom to make such references. It is one of the few occasions on which the Supreme Court has an original jurisdiction.

32. By two references to the Supreme Court he has argued that the Equality Act (Sexual Orientation) Regulations (Northern Ireland) should be struck down as being contrary to the principle of non-discrimination set out in the Northern Ireland Act 1998 or the Human Rights Act 1998. He also argues that the Fair Employment and Treatment (Northern Ireland) Order 1998 (which prohibits discrimination on the grounds of religion and belief) is unlawful as being contrary to the Northern Ireland Constitution Act 1973.

33. These submissions raise specific constitutional questions about the protection from discrimination in Northern Ireland, but it should not be too readily assumed that this part of the case will not have significance for the rest of the United Kingdom.

34. While Northern Ireland does indeed have a unique set of constitutional provisions, Wales and Scotland have somewhat similar protections in relation to discrimination. The case may therefore be seen as appearing to open up a new front in the challenges by those opposed to effective protection against sexual orientation and religion and belief discrimination.

35. The two references by the AGNI (on which he does not need permission from the SC), together with the application for permission to appeal in the *Lee v. Ashers* litigation, are due to be heard on the 1st and 2nd of May 2018. Not only

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14 [2015] NICty 2, see [http://www.bailii.org/ew/cases/Misc/2015/NICty_2.html](http://www.bailii.org/ew/cases/Misc/2015/NICty_2.html)
16 This judgment on the appeal issues is not yet reported.
18 The references are made pursuant to paragraph 34 of schedule 10 to the Northern Ireland Act 1998.
will this important litigation start on May Day, it is believed that it will be the first time that the Supreme Court has sat in Belfast in Northern Ireland.

36. Lord Kerr (the former Lord Chief Justice of Northern Ireland) has recently indicated his real pleasure that as for Scotland the Supreme Court will show that it is not merely a London institution.\(^{19}\) It is nice to know that this case about equality rights will play its part in securing a more equal display of public justice across the UK.

An American case about the conflict between the protection from sexual orientation and the right to freedom of expression

37. One part of the argument for the bakery and its owners in the *Lee v. Ashers* litigation concerns a submission that the judgment against them amounts to “forced” or “compelled” speech. To date there are no UK or European cases that have adopted this kind of reasoning which is based on the First Amendment to the US Constitution.\(^{20}\)

38. So it is interesting that a case somewhat similar to *Lee v. Ashers* and raising this issue is currently before the US Supreme Court. This is *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*,\(^{21}\) which was argued on the 5\(^{th}\) December 2017.\(^{22}\) It seems likely to have considerable publicity when it is decided by the US Supreme Court not least because of the support given by the Trump administration in opposing the argument that there was sexual orientation discrimination.

39. The US Constitutional First Amendment right to free speech is somewhat different to the European right to freedom of expression and the right to be protected from discrimination in the US and its constituent States is not entirely analogous to the Equality Act 2010 or the cognate provisions in Northern Ireland. Yet I am sure that whether or not it is directly relevant to *Ashers v. Lee*, the US Supreme Court’s judgment will provoke yet more comment in the press here.

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\(^{20}\) This says “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

\(^{21}\) The judgment of the Colorado Supreme Court which is under appeal can be seen here [https://www.courts.state.co.us/Courts/Court_of_Appeals/Opinion/2015/14CA1351-PD.pdf](https://www.courts.state.co.us/Courts/Court_of_Appeals/Opinion/2015/14CA1351-PD.pdf)

The right of opposite sex couples not to marry but to enter into a civil partnership

40. If it can be said that the campaign by same-sex couples to have the right to marry is now a long way down the path to success (even in Australia\(^\text{23}\)) the campaign by straight couples to be able to enter into civil partnerships is really only just beginning. The challenge is to overturn the requirement in the Civil Partnership Act 2004 that the partners be of opposite sex. It has had some limited success to the extent of securing a minority opinion in its favour.

41. In *Steinfeld & Keidan v Secretary of State for Education*\(^\text{24}\) two opposite sex partners claimed that this limitation in the 2004 Act was discriminatory and therefore contrary to the Human Rights Act 1998.

42. The majority of the Court of Appeal held that the civil partnership regime in the Civil Partnership Act 2004 was within the ambit of Article 8 of the ECHR, and therefore that Article 14 (the non-discrimination provision) was relevant. It held that while such discrimination would be unsustainable in the long term, it remained justified at the current time. The secretary of state’s decision to "wait and see" how the Marriage (Same Sex Couples) Act 2013 impacted civil partnerships before making a decision whether to dispense with them or extend them to opposite-sex couples met a legitimate aim and was proportionate.

43. I know that my friend and colleague Karon Monaghan QC, who argued the case for the would be civil partners, is glad to have secured a minority judgment from Arden LJ to the effect that it was not justified to make such a distinction. The case is now under appeal to the Supreme Court and will I believe be heard later this year.

44. The campaign will be in the news again on the 2\(^{nd}\) February 2018 when it is expected that Tim Loughton M.P.’s Private Member’s Bill - The Civil Partnerships, Marriages and Deaths (Registration Etc) Bill - is expected to have its second reading. It is understood that there is some support for it among ministers.

45. His motive for this was explained to the Times\(^\text{25}\) thus –

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\(^{25}\) According to an article published in the Times on the 11\(^{th}\) December 2017 “Straight civil partnerships ‘backed by ministers’”; see [https://www.thetimes.co.uk/article/straight-civil-partnerships-have-backing-of-ministers-f5cnbn0kf](https://www.thetimes.co.uk/article/straight-civil-partnerships-have-backing-of-ministers-f5cnbn0kf)
greater stability to the 3.3 million couples, half of whom have children, who are unrecognised in law.

“What they want is to be able to commit to each other,” he said. “Officially in the eyes of the law they have no basis of doing that unless they want to go the full hog and get married, and for all sorts of reasons many of them don’t.

“So this is an opportunity for more people to commit in a formal relationship recognised by the state, and that has got to be good for family stability.”

Single person’s right to parental orders

46. Section 54 of the Human Fertilisation and Embryology Act 2008 currently only allows couples, but not single people, to obtain a parental order following a surrogacy arrangement. Parental orders transfer legal responsibility to the individual applying for the order and extinguish the rights of the birth mother.

47. This is not a mainline sexual orientation issue, but it is closely associated, and for this reason I thought it would be interesting to keep you informed of a change that is due to take place this year following the judgment of the High Court in Z(A Child) (1),26 following a concession by the Government, that section 54 was discriminatory against single parents and as a result incompatible with Articles 8 of the Convention by itself, and Article 8 taken with Article 14.

48. On 29th November 2017, the Government presented a “remedial order” to both Houses of Parliament. Remedial orders are “fast-track” legislation made under the Human Rights Act 1998 to remove an incompatibility with Convention rights in primary legislation identified by either domestic courts or the European Court of Human Rights. The matter has recently been considered by the Joint Committee on Human Rights and should proceed shortly to become law.

Pension equality for married gay partners

49. Pension equality for married gay partners was in issue in Walker v Innospec Ltd.27 This case was argued last year in the Supreme Court together with two cases in which I was instructed O’Brien v. Ministry of Justice and Miller v. Ministry of Justice. They all concerned equal treatment pension issues. Walker was

26 [2015] EWFC 73.
successful; O’Brien was referred to the Court of Justice of the European Union; and Miller was stayed pending the outcome of that reference.

50. In Walker, the SC held that, the statutory restriction on the payment of occupational pension benefits to same-sex partners and spouses, based on an employee’s period of service before the 5th December 2005 (being the date by which Directive 2000/78EC had to be transposed into domestic law) was incompatible with the prohibition against sexual orientation discrimination in that Directive.

51. In O’Brien, a very similar argument arose but in relation to the Part-time Workers Directive. In Miller, a different but connected issue arose as to the time – limit for making complaints about pension discrimination: do they run from the time when the work is done or from the time when the claim to a pension is properly made i.e. on or after retirement.

52. The SC has held in Walker –

| It was vital to keep distinct the concepts that there should be no retroactivity of legislation, and the Court of Justice of the European Union's power to limit the retrospective application of its own judgments. All the cases considered by the Court of Appeal in the instant case involved the limitation on the temporal application of judgments. None expressed a general rule that immediate application of EU legislation at the point of enactment should normally be avoided. On the contrary, the consistent theme of the CJEU jurisprudence was that rights established by legislation should be activated at the time that they were stated to exist (see paras 43-45 of judgment).

The point of unequal treatment occurred at the time that the pension fell to be paid. The financing of the employer’s pension scheme should have been planned taking into account a possible change to the appellant’s marital status. He could not have been denied entitlement to a spouse’s pension if he had married a woman after he retired. His marriage to his same-sex partner was just as legal as a heterosexual marriage would be, and his entitlement to a spouse’s pension was equally well-founded, Romer v Freie und Hansestadt Hamburg (C-147/08) EU:C:2011:286, [2013] 2 C.M.L.R. 11 and Maruko v Versorgungsanstalt der Deutschen Buhnen (C-267/06) EU:C:2008:179, [2008] E.C.R. I-1757 followed. The date when that pension would become due, provided that the appellant and his husband remained married and his husband did not predecease him, was the time at which denial of a pension was made.

| 30 See the Westlaw summary. |
would amount to discrimination on the grounds of sexual orientation (paras 56-58, 61).

The appellant could not have claimed entitlement to payment of the pension before the Directive had been transposed into UK law but, once that had happened, the rate of his pension was to be based on all the years of his service, even those that preceded the date of transposition, *Romer* followed (para.65).

In so far as it authorised a restriction on payment of benefits based on periods of service before 5 December 2005, Sch.9 para.18 was incompatible with the Directive and had to be disapplied (para.76).

**Pension equality for transgendered persons**

53. While not strictly a case about sexual orientation I would like to contrast Walker with another case about which some of you may be aware. Thus in 2016 the Supreme Court referred a question to the CJEU as to whether a male to female transgendered person was entitled to a state pension at 60: *MB v Secretary of State for Work and Pensions*.\(^1\)

54. The Appellant was a male-to-female transsexual.\(^2\) She had married while she was a man. She later underwent gender reassignment surgery. She and her wife continued to live together as a married couple. Under the Gender Recognition Act 2004 s.4, she could only obtain a full gender recognition certificate if she first applied to have her marriage annulled.

55. She and her wife did not wish their marriage to be annulled. When she reached the age of 60, she applied for a state pension on the ground that she had reached the pensionable age for a woman. Her application was refused on the basis that without the certificate she was legally still a man; she was therefore not entitled to a pension until the age of 65.

56. The law concerning marriage subsequently changed by virtue of the Marriage (Same Sex Couples) Act 2013, which allowed transsexuals to obtain a full gender recognition certificate without having to have their marriage annulled, but that did not have retrospective effect.

57. She submitted that the refusal to grant her a state pension at 60 was contrary to the principle of equal treatment in the field of social security under Directive 79/7.


\(^2\) These facts are taken from the Westlaw summary.
58. Advocate General Bobek’s Opinion has now been published, to the effect that the case is one of straightforward sex discrimination in failing to treat a transgendered person according to their new gender.33

59. Claire McCann of Cloisters has written a really good blog about this case,34 pointing out in particular AG Bobek’s five final points –

This case is not about the right to same-sex marriage. Member states remain free as to whether or not they wish to recognise same-sex marriages.

The judgment only affects benefits under Directive 79/7 and benefits unrelated to marital status.

This case concerns a unique situation and the difficulty in fitting gender reassignment discrimination into the traditionally binary divisions on which the prohibition of sex discrimination relies.

The technical arguments on comparability, relied on by the SSWP, might tend to obscure the profound impact that the requirement to annul one’s marriage in order to secure full gender recognition is likely to have on one’s privacy and personality.

The case only arose because of the derogation from the equal treatment principle within Directive 79/7, permitting direct discrimination based on sex in respect of pensions. However, in the UK, the retirement ages for men and women are gradually converging, thereby enabling the root of the problem in the case to disappear.

### Religion and belief

**Pension equality for unmarried straight partners**

60. I shall start with a case which neatly follows on from Walker and shows that issues concerning pension equality can arise in all sorts of situations. Although *Re Brewster’s application for judicial review*35 is not a case about sexual orientation, it contrasts nicely with the cases cited being, a case concerning a couple who had positively decided not to married but to cohabit. When the man died his cohabitee claimed entitlement to a survivor’s pension. However she could not meet the nomination requirement for unmarried couples in the Local Government Pension Scheme (Benefits, Membership and Contributions)

33 Case C-451/16 MB v Secretary of State for Work and Pensions ECLI:EU:C:2017:937.
Regulations (Northern Ireland) 2009. The death had been unexpected and no steps had been taken to fulfil this requirement and so make clear to the state that they were cohabitees.

61. In one sense this failure was a decision based on their personal beliefs not to get married, but the case was not in fact brought on the basis of religion and belief discrimination. It was put, more simply perhaps, on the basis of discrimination in the exercise of property rights contrary to Article 1 of Protocol 1 (the right to property) to, and Article 14 of the Convention on.

62. Westlaw’s summary of the Supreme Court’s conclusion shows how the different administrative and legislative consequences of decisions as to whether to get married or not will be closely scrutinised –

The [question] was whether there was objective justification for the interference, in the form of the nomination requirement, with the appellant’s right to property. The answer was no. The test for the proportionality of an interference with a Convention right or, as in this case, the claimed justification for a difference in treatment was now well settled. As Lord Reed had said in Bank Mellat v HM Treasury [2013] UKSC 39, [2014] A.C. 700, it was necessary to determine (1) whether the objective of the measure was sufficiently important to justify the limitation of a protected right, (2) whether the measure was rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applied against the importance of the objective, to the extent that the measure would contribute to its achievement, the former outweighed the latter. The objective of the particular provisions in the 2009 Regulations involved here must have been to remove the difference in treatment between a long-standing cohabitant and a married or civil partner of a scheme member. To suggest that, in furtherance of that objective, a requirement that the surviving cohabitant had to be nominated by the scheme member justified the limitation of the appellant’s art.14 right was, at least, highly questionable. The need for a formal affirmation was not explained. It had no inherent value. It did not, of and in itself, make the survivor any more deserving of the pension. The essence of entitlement, set out in the Regulations, was that the relevant

36 This says “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”
parties had lived together for a sufficiently long period and that one was financially dependent on the other or that they were financially interdependent. Being required to make a public declaration that those conditions obtained added nothing to the objective inquiry as to whether they in fact existed. Further, there was no rational connection between the objective and the imposition of the nomination requirement. Moreover, the third and fourth of Lord Reed’s questions were to be answered in the appellant’s favour, Bank Mellat applied. The respondents had argued that a broad margin of appreciation should be afforded to the decision to include the nomination procedure because it fell within the socio-economic sphere. However, socio-economic factors were not at the forefront of the decision-making process at the time the decision to include the nomination procedure was made; the reason for including the nomination requirement was to make the scheme congruent with the scheme then applicable in England and Wales. Moreover, the attempt to justify the retention of the nomination procedure on socio-economic grounds was characterised by general claims, unsupported by concrete evidence and disassociated from the particular circumstances of the appellant’s case (see paras 41, 47, 59, 63, 65-67 of judgment).

Equality of treatment for unmarried cohabitees following bereavement

63. You may also have seen the recent decision in Smith v (1) Lancashire Teaching Hospitals NHS Foundation Trust (2) Lancashire Care NHS Foundation Trust and (3) The Secretary of State for Justice,37 in which the Court of Appeal considered the rights of a cohabiting, but unmarried partner of a deceased person to a statutory bereavement award under the Fatal Accidents Act 1976 (“FAA 1976”). The CA allowed the appeal and made a declaration of incompatibility with Article 14 in conjunction with Article 8 of the Convention because section 1A of the FAA excluded those who have cohabited for more than two years from an entitlement.38

Genuine religious occupational qualifications

64. Back in the noughties, I was involved with the UK government and the European Commission in trying to work out what should be in the proposed Directive covering discrimination in work and occupation. This work contributed to the Directive 2000/78 which lies behind so much of the work that we do.

38 See the Linda Jacob’s blog at http://www.cloisters.comblogs/cohabitees-human-rights-breached-by-ineligibility-for-bereavement-award
65. One of the biggest problems was to work out how much freedom should be given to religious organisations that discriminated in their teaching and practice. The issue was very contentious across Europe and led to many different drafts of the proposed exceptions for these bodies.

66. The final agreed text of Article 4 of the Directive is complex and as follows –

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<th>Article 4 - Occupational requirements</th>
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<td>1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.</td>
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<td>2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.</td>
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Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

67. What does this last paragraph mean?

68. In his Opinion in Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* Advocate General Tanchev had to grapple with this issue

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39 ECLI:EU:C:2017:851
in an interesting case concerning the failure of Vera Egenberger to get a job with a Protestant development body.

69. The post advertised entailed preparing a report on Germany’s compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (‘the race discrimination report’). Vera Egenberger had many years of experience in this field and was the author of a range of relevant publications. She was not however a Protestant.

70. She claimed that she was not appointed to the post because of her lack of confessional faith, and that this was in breach of her right to belief as reflected in Article 10 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and that she has been discriminated against on the basis of this belief in breach of Article 21 of the Charter and Articles 1 and 2 of Council Directive 2000/78.

71. The charity however sought to rely on Article 4(2) of Directive 2000/78. The dispute was thus concerned with difference of treatment on the basis of belief with respect to ‘occupational activities within churches and other private or public organisations the ethos of which is based on religion or belief’ pursuant to that provision.

72. The case is important because it is the first occasion on which the Court has been called on to interpret Article 4(2) of Directive 2000/78, thereby raising complex questions on the interaction of this provision with various provisions of the Charter, including Article 22, which provides that the ‘Union shall respect cultural, religious and linguistic diversity’, along with Article 17 TFEU, which preserves the ‘status’ under Member State law of churches and religious associations or communities, and philosophical and non-confessional organisations.

73. It had particular resonance in Germany where church related institutions are reported to be the second largest employer in Germany, and as occupying a quasi-monopolistic position in some regions and fields of work.

74. Advocate General Tanchev said–

\[
\text{It would ... be difficult to overstate the delicacy of balancing preservation of the right of the EU’s religious organisations to autonomy and self-determination (this being the primary plank of the arguments of the defendant with respect to the unequal treatment in issue) against the need for effective application of the prohibition on discrimination with respect to religion and belief on the EU’s ethnically and religiously diverse labour market, when equal access to employment and professional development are of fundamental significance to everyone, not merely as a means of earning a}
\]
living and securing an autonomous life, but also for achieving self-fulfilment and realisation of personal potential.

75. For this reason alone, I am sure that it will be important to look out for the CJEU’s judgment on the case. It should also be noted that the CJEU has a reputation for granting Germany a wide measure of autonomy in dealing with long-standing institutional arrangements. However for his part, AG Tanchev has said:

(1) Article 4(2)... is to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may not itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church’s ethos.

…

(3) Pursuant to Article 4(2) of Directive 2000/78, in assessing genuine, legitimate and justified occupational requirements, having regard to the nature of the activities or of the context in which they are carried out, along with the organisation’s ethos, the national referring court is to take account of the following:

(i) the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law, as reflected in Articles 10 and 12 of the Charter. Article 4(2) of Directive 2000/78, and in particular its reference to the ‘ethos’ of religious organisations, is to be interpreted in conformity with this fundamental right;

(ii) Article 4(2) of Directive 2000/78 affords Member States a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amount to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out;

(iii) the reference to ‘Member States constitutional provisions and principles’, in the first paragraph of Article 4(2) of Directive 2000/78, when interpreted in the light of Article 17(1) TFEU, means that Directive 2000/78 is to be implemented in such a way that the model selected by individual

40 See his Opinion at [127].
Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced;

(iv) the word ‘justified’ in Article 4(2) of Directive 2000/78 requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the defendant to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(v) the words ‘genuine, legitimate’ require analysis of the proximity of the activities in question to the defendant’s proclamatory mission;

(vi) in conformity with the requirement in Article 4(2) of Directive 2000/78 for difference of treatment to be implemented in accordance with ‘general principles of law’, and the approach of the European Court of Human Rights to interpretation of Article 9(2) ECHR in determining whether the exercise of the right of a religious organisation to autonomy and self-determination produces effects disproportionate with respect to other rights protected by the ECHR, the impact, in terms of proportionality, on the legitimate aim of securing the effet utile of the prohibition on discrimination on the basis of religion or belief under Directive 2000/78, is to be weighed against the right of the defendant to its autonomy and self-determination, with due account taken of the fact that Article 3 of Directive 2000/78 makes no distinction between recruitment and dismissal.

Manifestation of religious belief through dress

76. You may recall that last year I spoke about the interesting contrast between the two Advocate General’s Opinions addressing essentially the same problem: How to analyse adverse treatment taken on grounds of Islamic dress?

77. Judgment has now been given in the two cases: Case C-188/15 Asma Bougnaoui Association de défense des droits de l’homme (ADDH) v Micropole SA and Case C-157/15 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV.

78. In essence (though the judgments are more nuanced than this) the CJEU has opted to analyse decisions about banning the Islamic head scarf as involving potentially justifiable indirect religion and belief discrimination. This should
ensure the court has the widest flexibility in determining whether there is a justification for any ban, but it does downgrade for some the religious significance of the head scarf.

79. The result supports AG Kokott’s approach and does not follow AG Sharpston’s approach which was based on the qualification provisions in Article 4 of Directive 2000/78.

80. You should also bear in mind that the facts in the two cases were a little different. In Achbita G4S operated a ban on religious symbols at work. It did not like Ms Achbita wearing a headscarf at work. In Bougnaoui the issue was different because her employer decided to take account of the wishes of a customer to the effect that it no longer wanted the employer’s services to be provided by a worker wearing an Islamic headscarf.

81. In Achbita the CJEU said the concept of religion had to be interpreted as covering both the fact of having religious belief and the freedom of persons to manifest that belief in public. The Court found that G4S’s internal rule referred to the wearing of visible signs of political, philosophical or religious beliefs and therefore covered any manifestation of such beliefs without distinction. The rule thus treated all employees in the same way, notably by requiring them, generally and without any differentiation, to dress neutrally.

82. Accordingly, such an internal rule did not introduce a difference of treatment that was directly based on religion or belief, for the purposes of the directive. However, the Court observed that it was not inconceivable that the national court might conclude that the internal rule introduced a difference of treatment that was indirectly based on religion or belief, should it be established that the apparently neutral obligation it encompassed resulted, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.

83. The CJEU then went on to consider justification. It said that it was for the Netherlands court to determine whether, and to what extent, the internal rule at issue met the core requirements of justification.

84. It noted that an employer’s desire to project an image of neutrality towards both its public and private sector customers was legitimate, in particular where the only workers involved were those who come into contact with customers. That desire related to the freedom to conduct a business, which was recognised in the Charter.

85. In addition, the ban on the visible wearing of signs of political, philosophical or religious beliefs was appropriate for the purpose of ensuring that a policy of
neutrality was properly applied, provided that that policy was genuinely pursued in a consistent and systematic manner.

86. In this instance, it was also necessary to ascertain whether the prohibition covers only G4S workers who interact with customers. If that was the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued. It should also be ascertained whether it would have been possible for G4S to offer Ms Achbita a post not involving any visual contact with those customers, instead of dismissing her.

87. A similar line was taken in Bougnaoui.

88. These judgments have been much discussed and you may find it interesting to consider Cloisters’ Schona Jolly QC’s blog on this under the title “A strange kind of equality”. 44

Religious beliefs no defence to gender discrimination

89. I was educated in institutions that took only boys; my children have been co-educated throughout. In their co-education, except for some sports, all children were treated the same. These were my wife and my, and my parents’ choices; they had nothing to do with religion. So what about schools, that are in some sense co-educational, having both boys and girls, that separate the boys from the girls throughout the curriculum, on religious grounds?

90. In Chief Inspector of Education, Children’s Services And Skills v The Interim Executive Board of Al-Hijrah School (Rev 2)45 (Al-Hijrah) the Court of Appeal framed the issue as follows –

The issue of principle on this appeal is whether it is direct discrimination, contrary to sections 13 and 85 of the Equality Act 2010 ("EA 2010"), for a mixed-sex school to have a complete segregation of male and female pupils over a certain age for all lessons, breaks, school clubs and trips.

91. I do not propose to analyse the judgment at length; it was in my view correctly decided as one of gender discrimination. The court concluded that the allegedly separate but equal treatment of the boys and girls was discriminatory because it was less favourable treatment to prevent a boy from mixing with a girl and vice versa.

44 http://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality

45 [2017] WLR(D) 664, [2017] EWCA Civ 1426
92. What I do want to note though is that the judgment rejected the schools’ religious defences, by reference to cases such as *R(E) v Governing Body of JFS*,\(^46\) and the Northern Ireland case *Smyth v Croft Inns Ltd.*\(^47\)

93. *Smyth* is less well known than *JFS*, but it deserves to be better known. In *Al-Hijrah*, the CA summarised the facts of *Smyth* as follows –

> …the Fair Employment Tribunal found that the applicant was unlawfully discriminated against by his employer on the ground of religious belief when he was constructively dismissed from his employment as a barman. The applicant was a Roman Catholic and was employed as a barman in a pub with Protestant customers in a “loyalist” area of Belfast. A message was delivered by a regular customer saying that the applicant should be advised not to be in the bar in the following week. The applicant having been told by the bar manager that he could stay or go, and the employers having done nothing else about the threat, the applicant resigned and successfully claimed constructive dismissal and discrimination on grounds of religious belief.

94. In *Al-Hijrah* the Court of Appeal cited a useful passage from the judgment of the then Lord Chief Justice of Northern Ireland, Sir Brian Hutton, in *Smyth* as follows:\(^48\) –

> If an employer owned a bar in a Protestant neighbourhood, patronised by Protestants, in which he employed a Roman Catholic barman, and a second bar in a Roman Catholic neighbourhood, patronised by Roman Catholics, in which he employed a Protestant barman, and the employer dismissed both barmen on the grounds that the customers in the respective bars did not like being served by a barman of a religious belief which differed from their own, then on the appellant’s argument the employer would not be guilty of religious discrimination because he did not treat either barman less favourably than the other. In my opinion the employer would be guilty of religious discrimination against both barmen. If the employer owned only one bar in a Protestant neighbourhood, patronised by Protestants, in which he employed two barmen, one a Roman Catholic and the other a Protestant, and he dismissed the Roman Catholic barman, telling him that his customers did not like being served by a Roman Catholic and that in future both his barmen would be Protestants, I consider it to be clear that the employer would be guilty of religious discrimination. His conduct cannot cease to be unlawful discrimination if, instead of owning only the one bar patronised by

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\(^{47}\)[1996] IRLR 84

\(^{48}\)See *Smyth* at [28].
Protestants, he also owns a second bar in a Roman Catholic neighbourhood, patronised by Roman Catholics, in which he dismisses a Protestant barman.

95. In her judgment in *Al-Hijrah*, Gloster LJ went further than her two male colleagues. While they accepted the conclusion of the trial judge that there was no practical detriment in the separate treatment, she did not agree at all, holding at [141] –

In my judgment, although the June 2016 Inspection Report does not expressly say so, an objective inference can be drawn from the entirety of the evidence found by the inspectors and their conclusions, that the risks identified by them had at least the potential adversely to affect girls more than boys. One does not need to be an educationalist, a sociologist or a psychiatrist to conclude that a mixed sex school:

i. which, whether intentionally or otherwise, tolerates an environment where extreme and intolerant contemporary views about the role and physical subservience of women, and the entitlement of men physically to dominate and chastise them, are on display, or available to read, in the school library;

ii. whose teachers approve the expression by the pupils of gender stereotyped views about the roles of women as homemakers and child minders and the role of men as the breadwinners;

iii. where girls are always required to wait for an hour during the school day so that the boys can take a break first; and

iv. where no, or no sufficient, consideration is given to promoting equal opportunity,

is a school where a strict sex segregation policy subjects girls to a greater risk of extreme and intolerant views and is likely to reinforce or create misogynist attitudes amongst the boy pupils towards them. Support for this view, if needed, is to be found in The Casey Review[14] to which I refer in greater detail below.

96. This is but a small part of a compelling judgment from one of the limited number of female judges of the Court of Appeal about the dangers to women from certain kinds of religious norms. It is very well worth a full read through in any case in which religious norms of any kind come into conflict with the right to be free from sex (or for that matter any) discrimination. The Race
Relations Acts expressly acknowledged that separate but equal was a recipe for discrimination, and in my view this is likely to be case whatever the protected characteristic, save in very limited contexts.

Transgender parent’s right not to be denied, because of conflicts the religious beliefs of a section of society

97. The acute sensitivity demanded of judges in dealing with discrimination issues arising in relation to decisions about the upbringing of children is well demonstrated by a judgment of the Court of Appeal given on the 20th December 2017 in Re M (Children).

98. The case brought into conflict the beliefs of the ultra-orthodox North Manchester Charedi Jewish community and a father of whose family life had been part of that community but who was rejected by it on his gender transition. The problem was that though it was agreed that the children should be brought up in the community the evidence was that they would be shunned if they had contact with their father. It appeared in particular that their school might shun them if they had such contact. As a result of a long consideration of the issues at first instance the court decided he should not have contact with his children.

99. On appeal that decision was set aside and the matter remitted for a fresh decision. The Court of Appeal said in terms that its decision had “profound significance for the law in general and family law in particular.” It added that the appeal –

.... raises the question of how, in evaluating a child’s welfare, the court is to respond to the impact on the child of behaviour, or the fear of behaviour, which is may be unlawfully discriminatory as involving breaches of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms or of the Equality Act 2010.

100. The court was clear that it would not be appropriate to deny the rights of the father on the grounds of the difficulties that might be caused by the religious beliefs of others at least to the extent that they were discriminatory.

101. The judgment is principally concerned with the importance of ensuring that the court acts in the best interests of the child. Its importance for this conference is that it recognises that families are not always nuclear but may be formed in many different quite acceptable ways; there is nothing inherently

49 See now section 13(5) of the Equality Act 2010.
50 [2017] EWCA Civ 2164
wrong with such different kinds of relationships. As the court put it again51 “religious conviction is no solvent” of legality.

102. The right to protection from discrimination on grounds of religion or belief, does not entail a right to impose your religious views on others to their detriment. Confusing that can lead to mistakes. This judgment makes it clear that, fortunately, when that happens, the appeal court will intervene.

Some very short conclusions

103. The length of this paper is testament to the radical social changes that are occurring as a result of the prohibition on both sexual orientation and religion or belief discrimination. The courts’ overall approach has mostly been to strip back old certainties that cause pain or discomfort or interfere with individual choice as to how different people should want to live their lives.

104. For that we should all be grateful, but we must also remember that this liberalism has to be defended against a reactionary populism. That is the challenge for all of us.

ROBIN ALLEN QC

2nd January 2018
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