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Moral victory of the 'Gay Cake Case'; the decision in *Gareth Lee v UK*, ECtHR Application no. 18860/19

In January 2022 the European Court of Human Rights (ECtHR) declared that Gareth Lee's complaint of breaches of the European Convention on Human Rights (ECHR) in relation to the treatment of his complaints of discrimination by Ashers Bakery Ltd and its owners, the MacArthurs, was inadmissible. This brings his case to an end. Robin Allen QC, Cloisters Chambers, who represented the plaintiff throughout his litigation journey to Strasbourg, shares his reflections on a case which has made history – not just in making new discrimination law and highlighting potential conflicts of rights, but in influencing social and political change in Ireland, north and south. He asks what can be learnt from the ECtHR's decision, and more generally, from this litigation about events that took place over a weekend, nearly eight years ago in 2014?

Litigation background

Those events which gave rise to the litigation could hardly have been more mundane. They concerned a request in early May 2014 from Mr Lee to Mrs MacArthur, that the Belfast based business Ashers Bakery Ltd she owned with her husband, should bake a cake for him icing it to his design; her acceptance of the request was followed by her subsequent refusal to honour the commission. The sticking point for her and her husband was that Mr Lee's design contained the words '*Support Gay Marriage'*, hence the case has been called the '*Gay Cake Case'*. Though the facts are mundane, the case was controversial from the outset. It has made new discrimination law, and its final conclusion raises really significant issues for all discrimination lawyers who are concerned with conflicts of rights.

Despite or because of, the mundane nature of the desired transaction, the refusal and subsequent litigation have achieved so much public attention that it has been deemed worthy of its own page in Wikipedia; so by now most readers of *Briefings* will already have heard about the case. They will know that Mr Lee was successful twice in proceedings in Northern Ireland (NI) – first in 2015[1] in the Northern Ireland County Court, then in 2016[2] in the Northern Ireland Court of Appeal – in establishing that Mrs MacArthur's actions were unlawful direct discrimination in respect of sexual orientation, religion and political opinion. They will also know that Mr Lee lost when the case eventually came before the SC in 2018; the court held that he had not suffered sexual orientation discrimination and to the extent that it was potentially religion and political opinion discrimination, the MacArthurs' rights under the Article 9 - freedom of thought conscience and religion and Article 10 - freedom of expression of the ECHR protected them from liability.

In 2019 he complained to the ECtHR about the law of the United Kingdom as explained in that SC judgment alleging that it amounted to a breach of his human rights under Article 8 - right to respect of private and family life, as well as Articles 9 and 10, both alone and in conjunction with Article 14 - prohibition of discrimination ECHR. It might be thought that there was something in this complaint which was worthy of consideration by the ECtHR because it took it nearly three years to consider the case. It was only by a majority that the court determined on the January 6, 2022 that it would not give a substantive judgment in this complaint: *Lee v The United Kingdom*.[3]

A political dimension?

The timing of this decision may explain in part why the majority of the ECtHR reached this view. There is no doubt that if it was accepted as admissible the ECtHR would have been required to decide whether the UK's SC had got it wrong in 2018. Given how controversial the case had been when it was being heard in the UK's courts, that must have looked potentially very dangerous in 'political' terms because for some time the UK's current government has been complaining about the allegedly adverse effects of the rulings and jurisprudence of the ECtHR on the UK and threatening to take action.

While the ECtHR has been willing in the past to criticise judgments in UK courts, the debate about

1 *Lee v Ashers Baking Co Ltd* [2015] NICty 2 (May 19, 2015); Briefing 757, July 2015

2 *Lee v McArthur & Ors* [2016] NICA 39 (October 24, 2016); Briefing 819, March 2017; and see the judgment on the application for permission to appeal: *Lee v McArthur & Ors* [2016] NICA 39 (December 16, 2016).

3 [2021] ECHR 1129

cutting the UK loose from the ECHR has been growing and growing. So, it has to be wondered how this potentially dangerous undermining of the ECHR looked to the judges of the ECtHR in Strasbourg when confronted with Mr Lee's application. It seems certain that from a 'political' point of view a degree of caution before accepting his complaint for substantive treatment could have seemed very sensible.[4]

Thus, less than a month before the ECtHR's ruling, on December 14, 2021, the UK government published 'Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998'; this was not the first time that it had expressed its intentions to substantially loosen the power of the ECtHR in the UK. This report made it clear yet again that the government intended to cut the ties which bind the SC and other courts to give effect to the judgments of the ECtHR.

Whether this was the turning point in the ECtHR's thinking or whether the earlier statements by the government were more significant is not something which can be known. It is though obvious that a judgment in Mr Lee's case disagreeing with or contradicting the judgment of the SC would have provided further ammunition to those wishing to undermine the ECtHR's role and jurisprudence.

In other times and circumstances, I would hesitate to reach a conclusion that there was such a political dimension to a ruling by the ECtHR, but in this case my suspicion that this was a factor is strengthened by my analysis of the reasoning in the admissibility decision and its very odd consequences.

ECtHR's majority decision

The essence of the reasoning of the majority of the ECtHR is at [69] where it is said that Mr Lee '*did not invoke his Convention rights expressly at any point in the domestic proceedings. Instead, he formulated his claim by reference to…*' the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SOR) and the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO).[5]

In my view this is neither true, fair, nor relevant.

First in order to make a claim in the county court in Northern Ireland Mr Lee had to establish a cause of action. That is why he had to rely on the provisions of SOR and FETO since these were the two provisions which gave the court jurisdiction to hear his complaint. There was no possibility of an original complaint that the MacArthurs or Ashers had breached his human rights since the Human Rights Act 1998 (HRA) does not give such a direct cause of action. The HRA's enforcement of ECHR rights is possible against the government because the government has the obligation to protect those rights. In litigation between non- government parties the HRA gives protection through the interpretative obligation in s3 and the obligation in s6 on the courts as public authorities to respect those rights.

Secondly, when the MacArthurs complained that pursuant to s6 of the HRA the court had to respect their rights under Articles 9 and 10, it was argued for Mr Lee that they were in conflict with his rights under the ECHR. I know this because I was there and did the arguing. I have added above that it was not fair of the ECtHR to suggest otherwise, because it had itself noted in a prior paragraph as much. It said at [15] -

> *[The MacArthurs] invited the court to read down the provisions of the 2006 Regulations and the 1998 Order in a manner which was compatible with their Convention rights, under section 3 of the Human Rights Act 1998 (see paragraph 46 below) or, if that was not possible, to disapply the relevant provisions of the 2006 Regulations and the 1998 Order. In addressing this argument, the [County Court] observed that:*
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> > *"What we are faced with in this case are competing rights under the Convention. There is the Defendants right under Article (9) of the Convention to manifest their religion without unjustified limitation and the right under Article 14 of the Plaintiff to enjoy his right (under Article 8) to respect for his private life without unjustified discrimination on grounds of his sexual orientation. The Plaintiff also has additional rights under the 2006 Regulations."*

But not only was this said, it is also a fact that I explained to every court how SOR and FETO had been made, and that these were intended by the UK's different legislatures to be legal provisions which provided protection of the relevant rights mentioned above. In fact, I went further and said that they were intended to resolve the conflict which it was foreseen would arise between those with differing religious or political views about sexual orientation in a human rights' compliant way. I cited the background to FETO in the workings of human rights bodies in NI and the Belfast Agreement, and the approval of the SOR by the Parliamentary Joint Committee on Human Rights. I am completely clear that both the county court judge and the judges of the NI Court of Appeal took this all on board. It was

4 Moreover, by now it would have realised that across the UK there was no longer a need to campaign for 'Support [for] Gay Marriage' as it was now possible in each of the four UK jurisdictions.

5 These are similar to provisions in the Equality Act 2010, which does not extend to Northern Ireland. There are few differences: FETO protects against discrimination based on religion or political opinion whereas the Equality Act 2010 speaks of religion and belief.

spelt out at length in written submissions and moreover the ECtHR were made aware of this. Regrettably the SC ignored this factual background, whether this was because it was concerned that it had gone too far in *Bull and Bull v Hall and Preddy*,[6] an earlier decision in which a conflict between sexual orientation and religious opinion had been before it, I do not know.[7]

The decision of the ECtHR poses a really difficult problem for all discrimination lawyers. If there is a possibility of a conflict of rights argument in the course of a case between private (i.e. non-governmental parties) how should a lawyer protect the right to take a complaint in due course to the ECtHR? It seems it is not enough to invoke the provisions of the ECHR in argument, and it is not enough to get the trial court to say that this has happened. The ECtHR seems to expect a pleaded case that there has been a breach of the ECHR. This is no easy thing to do given the way in which the SOR and FETO or, for that matter, the Equality Act 2010 are written. However, the learning point seems to be to put any possible ECHR right that might be invoked in some way into the pleadings. It won't be pretty and it will run the risk of annoying the tribunal or court if it considers it has no direct jurisdiction to protect those rights beyond ss3 and 6, but it will be necessary to protect this ultimate review by the ECtHR.

Impact of the litigation

So has the litigation been a waste of time? I do not believe so; indeed, I consider Mr Lee to be one of many heroes in the cause of gay rights. His '*Support [for] Gay Marriage*' became well known as a result of his determination not to accept the refusal of Mrs MacArthur to honour the contract she had entered into. That was at a time when some countries, including Great Britain, were moving to enact the necessary legislation but others were facing huge push-back, none more so than in Ireland, where the Catholic Church and the Free Presbyterian theology was in full agreement in condemning consistently the idea of same-sex marriage.[8]

Of course, there was an important campaign in the Republic of Ireland for constitutional change to provide for civil marriage rights for same-sex couples. I am sure that the judgment of the Belfast County Court in Mr Lee's favour, which was given just one week before the day of the referendum (May 22, 2015) on altering the constitution must have had some effect there. I like to think that the publicity around this result may have given the campaign some encouragement.

Mr Lee's case had also highlighted the fact that it was not likely in the foreseeable future that the NI Assembly would ever muster a sufficient majority to pass the necessary legislation to make such a change. Indeed, the reason he had wished to commission this cake in the first place was for a small gathering of campaigners after the latest failure to secure the necessary votes in the Assembly.

Those campaigners continued to argue for change and while Mr Lee's litigation was still on foot, on January 13, 2020, following regulations made under s8 of the Northern Ireland (Executive Formation etc) Act 2019, same-sex marriages were permitted to be celebrated in NI. This was only possible because the Assembly was suspended at the time of this 2019 Act thus requiring the UK parliament to become its legislature again and enabling it to impose the necessary change to bring it into line not only with Great Britain but also the Republic of Ireland.

Mr Lee's case is important for yet another reason. In NI, as in Great Britain, litigation about discrimination in consumer cases where a provider of goods and services is challenged in court is very rare. There are many times fewer such cases than those brought in the employment tribunal. In large part this may be because the county court is a venue in which costs may be payable by the losing party and where the damages are often very small making the risk-reward ratio unattractive. This is important because it does mean that those providing goods and services can be less concerned to comply with equality law. Mr Lee's case shows that this is not always so.

There will be future conflicts of this kind and the judgments in Mr Lee's cases will be cited in these and other contexts. The law will roll on but I hope that it will not be necessary again to argue '*Support Gay Marriage'* in any part of the UK. Mr Lee's cases have contributed to the right to same-sex marriage being embedded in our constitutional rights. I am proud to have represented him in those cases.

6 [2013] 1 WLR 3741, [2013] WLR(D) 454, [2014] HRLR 4, [2013] UKSC 73, [2014] 1 All ER 919, [2014] Eq LR 76, [2013] WLR 3741, 36 BHRC 190, Briefing 697, March 2014

7 Certainly, Lady Hale has already expressed some concern about the resolution of such conflicts in public lectures after the judgment in *Bull and Bull v Hall and Preddy*.

8 Thus the official website of the Free Presbyterian Church of Ulster states 'Marriage is a holy institution given by God for the monogamous, lifelong, marital union of men and women' and the Irish Catholic Church has taken the same position as can be seen in this posting in 2015 on the Irish Catholic Bishop's Conference website.