Perspectives From Europe: Balancing Same-Sex and Religious Rights

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The Supreme Court's decision in *Burwell v. Hobby Lobby Stores*. 573 U.S. 22 (2014), and President Barack Obama's Executive Order 11246 amendment, adding sexual orientation and gender identity to the list of protected categories in the existing Executive Order covering federal contractors without including expanded religious exemptions, has brought questions of intersecting individual rights into the forefront of U.S. debate. In *Hobby Lobby*, the Supreme Court found that the "closely held" corporation could refuse to comply with the Affordable Care Act contraceptive coverage requirement because of the religious beliefs of its owners. Through Obama's Executive Order, an individual's right to be free of discrimination in employment based on his sexual orientation

and gender identity has been expanded to roughly 28 million workers, including those who work for religiously affiliated employers. In watching how these two decisions will play out in their implementation and likely further court challenges, it is informative to look to how other parts of the world are addressing similar questions.

One such example, comes from the European Court of Human Rights (ECHR) by way of the United Kingdom. In January 2013, the ECHR ruled in two UK-based cases addressing the question of whether individuals could claim religious discrimination after losing their jobs for refusing to perform duties for same-sex couples. In both *Ladele v. London Borough of Islington* and *McFarlane v. Related Avon,* the individuals lost.

Balancing Rights

By way of background, after the highest court in the UK makes a determination on a claim based on the Human Rights Act 1998, claimants (as plaintiffs are referred to in the English court system) can seek review by the ECHR. The ECHR operates in a manner similar to the U.S. Supreme Court in that it takes into account the evolving tides of decisions and law in the member countries, along with European-wide directives.

The claimants in these cases made arguments under the Human Rights Act 1998 and domestic discrimination law. The Human Rights Act (HRA) includes a provision for freedom of conscience (Article 9) and an anti-discrimination provision (Article 14), which includes religion explicitly and sexual orientation through "other status." Article 9 contains a second provision that the "freedom to manifest one's religion or belief is subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." s. 9(2). Interpretations of the HRA are more akin to constitutional questions and are often based on precedent rather than statutory text.

Additionally, under the Equality Act 2010, the UK's comprehensive anti-discrimination law,[1] discrimination, directly or indirectly, is prohibited based on, inter alia, sexual orientation (s.12) and religion and belief (s.10). Religion and belief discrimination includes not only the traditional

established religions, but philosophical beliefs, where the belief has a "sufficient cogency, seriousness, cohesion and importance and are worthy of respect in a democratic society."[2]

The Equality Act outlaws discrimination in, inter alia, employment (s.39-60), and the provision of public services (s.29). England also has a proactive duty placed on all public authorities to eliminate discrimination, advance equality of opportunity, and promote good relations amongst persons who share certain characteristics and those who do not.[3] Unlike in federal and New York State Human Rights Law, the Equality Act includes more specific language concerning how one proves direct and indirect discrimination; however, precedent also plays a role, particularly in areas of evolving status such as questions of balancing rights.

'Ladele': Civil Partnerships

Returning to the cases before the ECHR, in *Ladele v. London Borough of Islington*, shortly after civil registered partnerships (CRPs) became available for same-sex couples,[4] Islington designated that all registrars must perform civil partnerships. Lillian Ladele, a registrar, refused to carry out CRPs and switched shifts with other registrars. At about the same time, Islington implemented a "Dignity for All" policy stating that "there should be equality and freedom from discrimination and harassment (on the grounds, among others, of sexual orientation and religious belief) for all staff" and two gay registrars complained that they felt victimized by her refusal.

Ladele asserted that it was she who was not being treated with dignity. Islington offered accommodation to officiate at non-ceremonial CRPs, but she refused and brought a case before the Employment Tribunal (ET) alleging religious discrimination. In England and Wales, all employment cases are first heard by an ET made up of a legally qualified Employment Judge and, often, two "lay members," one from the trade union movement and one with employer-side experience.[5] Appeals are heard by the Employment Appeal Tribunal (EAT), the Court of Appeal and, if relevant, the Supreme Court.

In Ladele's case, the ET found that she had experienced direct discrimination, harassment, and indirect discrimination and the particular way Ladele had been treated was not a proportionate means of achieving the legitimate aim of "promotion of the LGBT community." The EAT reversed the

decision on all grounds.[6] The Court of Appeal agreed (particularly based on the fact that Islington had designated all registrars as CP registrars, unlike other jurisdictions).[7]

With regard to direct discrimination, the court found that Islington was not motivated in its actions by Ladele's religious beliefs but by refusal to perform an aspect of her job. With regard to indirect discrimination, the court found that Islington's aim was not only to provide the service of CRPs efficiently, but to perform its duties in compliance with its overarching Dignity policy. With regard to Article 9, the court again found that Ladele's religious views "should not be permitted to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community." Finally, the court explicitly agreed with the argument that the relevant equality legislation related to sexual orientation took precedence over any right that a person may have by virtue of her religious belief. The Supreme Court refused Ladele's leave to appeal.

'McFarlane': Counseling

In the second case, *McFarlane v. Related Avon*, Gary McFarlane was a counselor who sought exemption from working with same-sex couples because of his Christian beliefs, even though he signed an equal opportunities policy. His employer refused his request and he was dismissed. The ET found against him concerning discrimination on the ground of religion or belief, harassment, and unfair dismissal. The EAT dismissed both his direct and indirect discrimination claims, finding that compliance with the equality policy was a proportionate means of achieving the legitimate aim.[8]

Following *Ladele*, the Court of Appeal, after a hearing, refused McFarlane's application to appeal because the circumstances were so similar to *Ladele* that there was no way McFarlane's argument could succeed.[9] The judge provided a lengthy discussion concerning the different nature of religion as a protected characteristic, the personal nature of it, and the conflict between protecting one's ability to hold religious beliefs, while not protecting the actuality of that belief solely

because it is a religion.

Both claimants sought review by the ECHR in a consolidated motion in August 2010.[10] The applicants sought review based on Article 9 (freedom of conscience) alone or in conjunction with Article 14 (anti-discrimination provision). The ECHR heard argument on Sept. 4, 2012.

As a final note on the case histories, controversy arose when the Commission for Equality and Human Rights (CEHR), a non-departmental public body tasked with enforcing the Equality Act, sought to intervene in the cases. The CEHR suggested that the Court of Appeal was incorrect and that the claimants should have been offered a form of reasonable accommodation, similar to that used in the disability context. After objections from the community, the CEHR withdrew its intervention and sought a nation-wide consultation on the proposed position.

The consultation responses came from different organizations across the country. Religious stakeholders found the claimant's position to be more akin to medical staff exempted from certain duties. Business leaders were particularly concerned that pursuing this argument would actually lead to greater confusion and, thus, more litigation, and LGBT stakeholders were concerned that there was a growing campaign by Christians to seek to be able to discriminate against someone based on their sexual orientation and queried why the reasonable accommodation would be offered specifically with regard to views concerning sexual orientation, but not with respect to other issues. After the consultation concluded, the CEHR again moved to intervene, but this time supporting the courts' decisions.

Court Findings

On Jan. 15, 2013, the ECHR found for the United Kingdom in both cases.[11] In general, under Article 9, the court queried whether the ability to change employment should negate any interference in religious freedom. The court stated that "Given the importance in a democratic society of freedom of religion…rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."

Further, the court noted that it leaves member states—European countries that are parties to the European

Convention on Human Rights—a "wide margin of appreciation" in determining whether an "interference is necessary." Under ECHR jurisprudence, the margin of appreciation doctrine states that the court should consider the cultural, historical, and philosophical differences between how the ECHR and a member nation may interpret the law.

With regard to Article 14, the court stated that discrimination occurs if the action "does not pursue a legitimate aim or if there is a not a reasonable relationship of proportionality between the means employed and the aim sought to be realized." (p.31-33). Applying these principles, with regard to Ladele, the court found that case law under Article 14 supported that differences in treatment based on sexual-orientation "require particularly serious reasons by way of justification" and that Islington's aim was legitimate. In the end, the court held that the Court of Appeal decision had not exceeded the margin of appreciation in striking a balance between competing rights. McFarlane had brought his claim mostly under Article 9 focusing on a state's positive obligation to secure rights under Article 9.

The court again assessed whether "a fair balance was struck between competing interests" and found that the most important factor was whether the "employer's action was intended to secure the implementation of its policy of providing a service without discrimination." The court particularly noted in considering the balance of rights that McFarlane had voluntarily enrolled in the program knowing about the equal opportunities policy. Again the court held that the margin of appreciation had not been exceeded. (p. 37-39).[12]

A lesson to learn from across the pond here is that courts see the employment arena as one where an individual has required job duties that must be fulfilled regardless of individual beliefs. In the employment context, the court focused less on whether individual rights had been appropriately balanced. As the EAT stated in *Ladele*, the court focused on Ladele's refusal to perform her job duties and not her employer's motivations. Should one's job duties change and the employee object, they are free to seek alternative employment—although the ECHR considered this only one factor among many. Further, an employer who promotes an anti-discrimination policy has a wide margin of appreciation to take steps to fulfill that important policy.

Even in the UK, where greater worker protections exist, both the UK and European courts found that religious beliefs were not justification for other forms of discrimination when one's job specially requires a particular action. These cases do not address the situation where an employer seeks to make decisions based upon religious beliefs, such as Hobby Lobby Stores sought to do. However, they do stand for the principle that religious belief alone in the employment context does not allow one to ignore anti-discrimination law.

In recent months, the Conservative Party wing of the current UK coalition government has frequently discussed ways to limit the ECHR's power, which could potentially mean the UK could refuse to recognize rulings from the court. However, in the meantime it is likely that these issues will come before the ECHR again. The new law on same-sex marriages, while more inclusive, includes explicit language that shields religious institutions from discrimination claims should they not "opt in" to performing same-sex marriages, a provision that could end up before the ECHR.

For now, with regard to the balance of individual rights concerning sexual orientation and religion in the employment context in the United Kingdom, the highest court has spoken. In the United States, we watch as the courts and executive branch grapple with their own positions and power to influence, reflect, or ignore constantly evolving public opinion with regard to individual rights.

ENDNOTES:

1. The United Kingdom's devolved legal system means that certain laws apply only to England and Wales and not Scotland or Northern Ireland, whereas other laws that come from Parliament apply in all legal systems.

2. *Grainger v. Nicholson*, [2009], UKEAT/0219/09 (decision by the Employment Appeal Tribunal).

3. Equality Act 2010, s. 149.

4. Since December 2005 in England, same-sex couples have been able to form civil registered partnerships (CRP), but not marry. CRPs carry all of the same rights and responsibilities of marriage. In February 2013, the government put forth a bill to make same-sex marriage lawful in both civil and religious institutions, but allow religious institutions to "opt out" of performing same-sex marriages and disallow discrimination claims based on a religious institution's refusal to conduct a

same-sex marriage. The bill passed in July 2013, and England began performing same-sex marriages in March 2014, and Scotland will follow in the Fall of 2014.

5. The Employment Tribunals Act 1996—Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, s.8.

6. [2008] UKEAT 0453_08_1912.

7. [2009] EWCA Civ 1357.

8. [2009] UKEAT 0106_09_3011.

9. [2010] EWCA Civ 880.

10. *Ladele and McFarlane v. United Kingdom*, ECHR Application nos. 51671/10 and 36516/10.

11. *Case of Eweida and Others v. United Kingdom*, [2013] ECHR 37.

12. It should also be noted that these two cases were combined with two other Article 9 and 14 appeals, one of which was decided in the applicant's favor. See *Eweida v. British Airways*, [2010] EWCA Civ 80; [2013] ECHR 37 at p. 33-35 (found that British Airways' requirement that a check-in staff member remove her necklace with a Christian cross from view in enforcing its uniform code violated Article 9).

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