Michaelmas Term
[2018] UKSC 49
On appeal from: [2016] NICA 39

JUDGMENT

Lee (Respondent) *v* Ashers Baking Company Ltd and others (Appellants) (Northern Ireland)
Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to paragraph 34 of Schedule 10 to the Northern Ireland Act 1998
Reference by the Attorney General for Northern Ireland of devolution issues to the Supreme Court pursuant to paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 (No 2)

before

Lady Hale, President
Lord Mance
Lord Kerr
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

10 October 2018

Heard on 1 and 2 May 2018

Attorney General for Northern Ireland
John F Larkin QC
Attorney General for Northern Ireland
(Instructed by Office of the Attorney
General for Northern Ireland)

Ashers Baking Company Ltd and others
David Scoffield QC
Sarah Crowther QC
Professor Christopher McCrudden
(Instructed by Hewitt & Gilpin)

Lee / Equality Commission for Northern Ireland
Robin Allen QC
Sinead Eastwood
(Instructed by The Equality Commission for
Northern Ireland Legal Division)

LADY HALE: (with whom Lord Mance, Lord Kerr, Lord Hodge and Lady Black agree)

1. The substantive question in this case is whether it is unlawful discrimination, either on grounds of sexual orientation, or on grounds of religious belief or political opinion, for a bakery to refuse to supply a cake iced with the message "support gay marriage" because of the sincere religious belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God. If the prima facie answer to either question is "yes", then questions arise as to the rights of the bakery and its owners to freedom of religion and freedom of expression, under articles 9 and 10 of the European Convention on Human Rights, and what difference, if any, those rights might make to that prima facie answer.

2. At first instance in the county court, the district judge held that there was direct discrimination, both on grounds of sexual orientation and on grounds of religious belief or political opinion, and that it was not necessary to read down the relevant legislation to make it compatible with the bakery owners' rights under articles 9 and 10 of the Convention. The bakery and its owners appealed by way of case stated, raising seven questions, to the Northern Ireland Court of Appeal. The Court of Appeal only found it necessary to answer two questions, holding that there was direct discrimination on grounds of sexual orientation and that it was not necessary to read down the legislation to take account of the bakery owners' beliefs. The bakery and its owners wish to appeal to this court.

3. The Attorney General for Northern Ireland intervened in the proceedings in the Court of Appeal in order to challenge the validity of the relevant legislation. In Northern Ireland, discrimination in the provision of goods, facilities or services on the ground of religious belief or political opinion is prohibited by the Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 21)) ("FETO"), made by Her Majesty in Council under the Northern Ireland Act 1974. Discrimination in the provision of goods, facilities or services on grounds of sexual orientation is prohibited by the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SI 2006/439) ("SOR"), made by the Office of the First Minister and deputy First Minister of Northern Ireland under the Equality Act 2006, an Act of the United Kingdom Parliament. The Attorney General for Northern Ireland questions the validity of both of those prohibitions, insofar as they impose civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.

4. However, this court can only answer the substantive questions if it has jurisdiction to entertain them, either by way of an appeal from the Northern Ireland Court of Appeal or by way of a reference made by the Attorney General for Northern Ireland. Issues arise in relation to both.

5. Appeals from the county court to the Court of Appeal are governed by the County Courts (Northern Ireland) Order 1980 (SI 1980/397 (NI 3)) and appeals from the Court of Appeal to this court in civil cases are governed by section 42 of the Judicature (Northern Ireland) Act 1978. Put shortly, article 61(7) of the Order provides that the decision of the Court of Appeal on an appeal by way of case stated shall be final and section 42(6) of the 1978 Act precludes an appeal to this court in such cases; but section 42(6) contains an exception for cases which involve any question as to the validity of a provision made by or under an Act of the Northern Ireland Parliament or Assembly. FETO is such a provision but the SORs, having been made under an Act of the United Kingdom Parliament, are not.

6. Under paragraph 33 of Schedule 10 to the Northern Ireland Act 1998, the Attorney General has power to require any court or tribunal to refer to this court any devolution issue which has arisen in proceedings before it to which he is a party. The Attorney General gave such a notice after judgment had been handed down by the Court of Appeal but before its order had been drawn up. The Court of Appeal declined to make the reference on the ground that the proceedings were at an end. Under paragraph 34 of Schedule 10, the Attorney General also has power to refer to this court any devolution issue which is not the subject of proceedings. Accordingly, by his first reference, he has referred to us the questions outlined in para 3 above. However, by his second reference, he has also referred to us the question whether the Court of Appeal should have made the reference under paragraph 33 when required by him to do so. No problem arises as to the validity of the references under paragraph 34, but the answers given by this court would have no effect upon the outcome of the proceedings in Northern Ireland. The matter may be different, however, if the Court of Appeal should have made the reference but failed to do so, because this raises questions as to validity of that court's decision in the case.

7. For the reasons given in a judgment prepared by Lord Mance we have concluded that this Court does have jurisdiction to determine an appeal brought by the bakery and its owners, as well as the Attorney General's two references. Accordingly we give them permission to appeal as the substantive questions raised are undoubtedly of general public importance, not only in Northern Ireland but also in the rest of the United Kingdom.

8. This judgment is arranged as follows. Part I gives an account of the facts and the outcome of the proceedings so far. Part II discusses the claim for discrimination on grounds of sexual orientation under the SORs. Part III discusses the claim for

discrimination on grounds of political opinion under FETO. Part IV discusses the impact of the Convention rights on such a claim.

I The facts

9. Mr and Mrs McArthur have run a bakery business since 1992. Their son Daniel is now the general manager. They have six shops, a staff of about 65 people, and they also offer their products on-line throughout the UK and the Republic of Ireland. Since 2004, the business has been run through Ashers Baking Company Ltd. The name was derived from Genesis 49:20: "Bread from Asher shall be rich and he shall yield royal dainties". The McArthurs are Christians, who hold the religious beliefs that:

> (a) the only form of full sexual expression which is consistent with Biblical teaching (and therefore acceptable to God) is that between a man and a woman within marriage; and
>
> (b) the only form of marriage consistent with Biblical teaching (and therefore acceptable to God) is that between a man and a woman.

They have sought to run Ashers in accordance with their beliefs, but this, and the biblical connection of the name, has not been advertised or otherwise made known to the public.

10. Mr Lee is a gay man who volunteers with QueerSpace, an organisation for the LGBT community in Belfast. QueerSpace is not a campaigning organisation, but it supports the campaign in Northern Ireland to enable same sex couples to get married. A motion supporting this was narrowly rejected by the Northern Ireland Assembly on 29 April 2014. Mr Lee was invited to attend a private event organised by QueerSpace at Bangor Castle on Friday 17 May 2014 to mark the end of Northern Ireland anti-homophobia week and the political momentum towards same-sex marriage. He decided to take a cake to the party.

11. He had previously bought cakes from Ashers shop in Royal Avenue, Belfast, but he was not personally known to the staff or to Mr and Mrs McArthur. He did not know anything about the McArthurs' beliefs about marriage and neither they nor their staff knew of his sexual orientation. Ashers offered a "Build-a-Cake" service to customers. Customers could request particular images or inscriptions to be iced onto a cake. There was a leaflet advertising this service, with various examples of what could be done, but no religious or political restrictions were mentioned.

12. On 8 or 9 May 2014, Mr Lee went into the shop and placed an order for a cake to be iced with his design, a coloured picture of cartoon-like characters "Bert and Ernie", the QueerSpace logo, and the headline "Support Gay Marriage". Mrs McArthur took the order but raised no objection at the time because she wished to consider how to explain her objection and to spare Mr Lee any embarrassment. Mr Lee paid for the cake. Over the following weekend, the McArthurs decided that they could not in conscience produce a cake with that slogan and so should not fulfil the order. On Monday 12 May 2014, Mrs McArthur telephoned Mr Lee and explained that his order could not be fulfilled because they were a Christian business and could not print the slogan requested. She apologised to Mr Lee and he was later given a full refund and the image was returned to him.

13. The district judge found that, when they refused to carry out the order, the defendants did perceive that Mr Lee was gay and/or associated with others who were gay; but one of the questions raised in the case stated was whether she was correct as a matter of law to make that finding. The Court of Appeal found it unnecessary to answer that question as the District Judge had made no finding that the order was cancelled because Mr Lee was perceived as being gay.

14. Mr Lee made arrangements with another cake provider for a similar cake which he was able to take with him to the party on 17 May. He complained to the Equality Commission for Northern Ireland ("the ECNI") about the cancellation of his order. The ECNI have supported him in bringing this claim for direct and indirect discrimination on grounds of sexual orientation, religious belief or political opinion. The Court of Appeal expressed some concern that the correspondence between the ECNI and the bakery may have created the impression that the ECNI was not interested in assisting members of the faith community when they found themselves in difficulties as a result of their deeply held religious beliefs (para 106). It is obviously necessary for a body such as the ECNI to offer its services to all people who may need them because of a protected characteristic and not to give the impression of favouring one such characteristic over others.

15. On 19 May 2015, the Presiding District Judge held that refusing to complete the order was direct discrimination on all three grounds. She also held that the legislation (both the SORs and FETO) was compatible with the Convention rights. She made a declaration to that effect and awarded Mr Lee damages in the agreed sum of £500: [2015] NICty 2.

16. The defendants appealed by way of case stated to the Court of Appeal. The Court of Appeal served a devolution notice and a notice of incompatibility upon the Attorney General, who then became a party to the proceedings. On 24 October 2016, the Court of Appeal handed down judgment dismissing the appeal: [2016] NICA 39. It held that this was a case of associative direct discrimination on grounds of sexual

orientation (paras 57 and 58) and that it was not necessary to read down the SORs to take account of the McArthurs' Convention rights (para 72). The court did not therefore decide, although it did discuss, the questions arising under political and religious discrimination (para 72).

17. On 28 October 2016, the Attorney General gave notice to the Court of Appeal requiring it to make a reference to this court. The Court of Appeal, in its separate judgment dealing with an appeal to this court, concluded that he had no power to do so because the proceedings had ended.

18. The principal judgment was sealed and filed on 31 October in the form of an order.

19. Hence there are before this court:

(i) an application by the defendants for permission to appeal against the order of the Court of Appeal dismissing their appeal from the county court;

(ii) a reference by the Attorney General raising the issues relating to the power to make the SORs and the validity of the FETO referred to in para 3 above; and

(iii) a further reference by the Attorney General raising the issue of whether he was entitled to require the Court of Appeal to make a reference to this court on 28 October 2016.

II The sexual orientation claim

20. The SORs were made by the Office of the First Minister and deputy First Minister under powers given to them by section 82(1), (3), (4) and (5) of the Equality Act 2006 (an Act of the UK Parliament). Regulation 3(1) defines direct discrimination thus: "a person (A) discriminates against another person (B) if (a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons; …". By regulation 2(2), "sexual orientation" means a sexual orientation towards "(a) persons of the same sex; (b) persons of the opposite sex; (c) persons of the same sex and of the opposite sex". By regulation 5(1), "It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services - (a) by refusing or deliberately omitting to provide him with any of them; …"

21. Regulation 3(1)(b) and (c) provide definitions of indirect discrimination against persons of a particular sexual orientation. The District Judge held that, if she had not reached a finding of direct discrimination, but found that there was indirect discrimination, she would have concluded that there was no justification for it (para 46). She did not however find that there was indirect discrimination, and it is not easy to see how she could have done so. It is now common ground that this is a case of direct discrimination or nothing.

22. The District Judge did *not* find that the bakery refused to fulfil the order because of Mr Lee's actual or perceived sexual orientation. She found that they "cancelled this order because they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs" (para 43). As the Court of Appeal pointed out, she did not take issue with the submission that the bakery would have supplied Mr Lee with a cake without the message "support gay marriage" and that they would also have refused to supply a cake with the message requested to a hetero-sexual customer (para 11). The objection was to the message, not the messenger.

23. Not surprisingly, therefore, Mr Scoffield QC, who appears for the appellants, argues that it was not open to the judge to find that there was direct discrimination on grounds of sexual orientation. The reason for treating Mr Lee less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way. In *Islington Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] 1 WLR 955, para 29, Lord Neuberger of Abbotsbury MR adopted the words of Elias J in the EAT: "It cannot constitute direct discrimination to treat all employees in precisely the same way". By definition, direct discrimination is treating people differently.

24. Mr Scoffield also criticises the comparator chosen by the District Judge. She compared the treatment of Mr Lee, not with a person of different sexual orientation who wanted the same cake, but with a person of different sexual orientation who wanted a different message: "support hetero-sexual marriage". This, he argues, is inconsistent with regulation 3(1)(a), which requires a comparison with the treatment of other "persons", not messages; and with regulation 3(2), which requires that the relevant circumstances in each case must be the same, or not materially different.

25. The District Judge also considered at length the question of whether the criterion used by the bakery was "indissociable" from the protected characteristic and held that support for same sex marriage was indissociable from sexual orientation (para 42). This is, however, to misunderstand the role that "indissociability" plays in direct discrimination. It comes into play when the express or overt criterion used as the reason for less favourable treatment is not the protected

characteristic itself but some proxy for it. Thus, in the classic case of *James v Eastleigh Borough Council* [1990] 2 AC 751, the criterion used for allowing free entry to the council's swimming pool was not sex but statutory retirement age. There was, however, an exact correspondence between the criterion of statutory retirement age and sex, because the retirement age for women was 60 and the retirement age for men was 65. Hence any woman aged 60 to 64 could enter free but no man aged 60 to 64 could do so. Again, in *Preddy v Bull* [2013] UKSC 73; [2013] 1 WLR 3741, letting double-bedded rooms to married couples but not to civil partners was directly discriminatory because marriage was (at that time) indissociable from hetero-sexual orientation. There is no need to consider that question in this case, as the criterion was quite clear. But even if there was, there is no such identity between the criterion and sexual orientation of the customer. People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation.

26. Against these powerful points, it is argued that this is a case of associative discrimination. In most direct discrimination cases, the argument is that a person has been less favourably treated because of *his own* protected characteristic. Indeed, the Explanatory Memorandum to the Northern Ireland SORs, at para 7.2, states that "The regulations will protect people from direct discrimination, ie where a person treats another person less favourably because of *his* sexual orientation".

27. However, regulation 3(1)(a) is not limited to less favourable treatment on the grounds of the sexual orientation of *that* person (see para 20 above). There is no "his or her" in the definition. This leaves open the possibility that a person may be less favourably treated because of *another person's* sexual orientation. The question is how far that possibility extends.

28. The Court of Appeal held that "this was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community" (para 58). This suggests that the reason for refusing to supply the cake was that Mr Lee was likely to associate with the gay community of which the McArthurs disapproved. But there was no evidence that the bakery had discriminated on that or any other prohibited ground in the past. The evidence was that they both employed and served gay people and treated them in a non-discriminatory way. Nor was there any finding that the reason for refusing to supply the cake was that Mr Lee was thought to associate with gay people. The reason was their religious objection to gay marriage.

29. The classic example of associative discrimination is the case of *Coleman v Attridge Law* (Case C-303/06) [2008] ICR 1128, in the European Court of Justice. The claimant had a disabled son and was treated less favourably than others because her son was disabled. In that case, there was a specific identified person whose

disability, the protected characteristic, was the reason for the less favourable treatment.

30. In *English v Thomas Sanderson Blinds Ltd* [2009] ICR 543, the applicant complained of harassment at work, because he was repeatedly taunted as if he were gay when in fact he was not. The Court of Appeal held, by a majority, that this was harassment "on grounds of" sexual orientation. The fact that he was not in fact gay made no difference. As Sedley LJ put it, at para 38:

> "If, as is common ground, tormenting a man who is believed to be gay but is not amounts to unlawful harassment, the distance from there to tormenting a man who is being treated as if he were gay when he is not is barely perceptible. In both cases the man's sexual orientation, in both cases imaginary, is the basis - that is to say, the ground - of the harassment."

31. There was, however, a powerful dissenting judgment from Laws LJ, who said this at para 21:

> "In my judgment, harassment is perpetrated on grounds of sexual orientation only where some person or person's actual, perceived, or assumed sexual orientation gives rise to it, that is, is a substantial cause of it. [Counsel's] case confuses the reason for the conduct complained of with the nature of that conduct. On the facts the reason for the harassment was nothing to do with anyone's actual, perceived, or assumed sexual orientation. It happened to take the form of 'homophobic banter' so called, which was thus the vehicle for teasing or tormenting the claimant."

32. It is of some interest, although not a guide to interpretation, that the Explanatory Notes to the Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263), which applied in Great Britain, go further than the Memorandum to the Northern Ireland SORs. Para 7.3 states that direct discrimination is "when a person treats another person less favourably on the grounds of his/her sexual orientation, or what is believed to be his/her sexual orientation, or the sexual orientation/perceived sexual orientation of another person with whom they associate".

33. That is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is "on grounds of" sexual orientation. There must, in my view,

be a closer connection than that. Nor would I agree with the Court of Appeal that "the benefit from the message or slogan on the cake could only accrue to gay or bisexual people" (para 58). It could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring.

34. This was a case of associative discrimination or it was nothing. It would be unwise in the context of this particular case to attempt to define the closeness of the association which justifies such a finding. Not only did the District Judge not make such a finding in this case, the association would not have been close enough for her to do so. In a nutshell, the objection was to the message and not to any particular person or persons.

35. In reaching the conclusion that there was no discrimination on grounds of sexual orientation in this case, I do not seek to minimise or disparage the very real problem of discrimination against gay people. Nor do I ignore the very full and careful consideration which was given to the development of the law in this area, to which Mr Allen QC drew our attention at considerable length. Everyone, as article 1 of the Universal Declaration of Human Rights put it 70 years ago is "born free and equal in dignity and rights". Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.

36. It follows that there is no need to consider whether it is necessary to read down the SORs to take account of the appellants' Convention rights or indeed to consider whether there was power to make them. The SORs do not, at least in the circumstances of this case, impose civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.

III The political beliefs claim

37. Protection against direct discrimination on grounds of religious belief or political opinion has constitutional status in Northern Ireland. The Government of Ireland Act 1920, which established the Parliaments of Northern and Southern Ireland, prohibited both Parliaments from making any law which prohibited the free

exercise of religion, gave preference, privilege or advantage, or imposed disability or disadvantage on account of religious belief and provided that any such law would be void (section 5). This was to protect the Protestant minority in the South and the Roman Catholic minority in the North. The Northern Ireland Constitution Act 1973 provided that certain types of legislation applicable in Northern Ireland should be void, to the extent that it discriminated against any person or class of persons on the ground of religious belief or political opinion (section 17(1)). This was principally designed for the legislation of the Northern Ireland Assembly, established under the Northern Ireland Assembly Act 1973, but also applied retrospectively to Acts of the Northern Ireland Parliament and prospectively to the power to legislate for Northern Ireland by Order in Council under the Northern Ireland Act 1974, while direct rule was in force (paragraph 1(1)(b) of Schedule 1 to the 1974 Act). This limitation is recognised and expressly preserved in the Northern Ireland Act 1998 (paragraph 21 of Schedule 14 to that Act). The 1998 Act also prohibits the Northern Ireland Assembly, established under that Act, and a Minister or Northern Ireland department, from making any legislation or doing any act which discriminates on the ground of religious belief or political opinion (sections 6(2)(e) and 24(1)(c)).

38. The discrimination thus prohibited is direct. The Northern Ireland Constitution Act 1973 provides that legislation "discriminates against any person or class of persons if it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland" (1973 Act, section 23(1)). The 1998 Act adopts the same definition of a discriminatory law (section 98(4)).

39. FETO was made by Her Majesty under powers conferred by paragraph 1 of Schedule 1 to the Northern Ireland Act 1974, having been approved in draft by both Houses of Parliament. Article 3(1), so far as relevant, defines direct discrimination: "(a) discrimination on the ground of religious belief or political opinion". By article 28(1), "It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services - (a) by refusing or deliberately omitting to provide him with any of them; …". Article 3(2) and 3(2A) (as inserted by regulation 4 of the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 (SR 2003/520) define indirect discrimination on the ground of religious belief or political opinion, but as with the sexual orientation claim, it is not now argued that this is a case of indirect discrimination.

40. Three questions therefore rise on this aspect of the claim:

(i) Did the bakery discriminate against Mr Lee on the grounds of his political opinions by refusing to supply him with a cake iced with this particular message?

(ii) If it did, is FETO invalid, or should it be read down under section 3(1) of the Human Rights Act 1998, as incompatible with the rights of freedom of religion and freedom of expression protected by articles 9 and 10 of the European Convention?

(iii) If the answer to (i) is "yes" and the answer to (ii) is "no", is FETO invalid under section 17(1) of the Northern Ireland Constitution Act 1974 to the extent that it imposes civil liability for refusing to express a political opinion contrary to the religious belief of the person refusing to express that view?

41. As already mentioned, the Court of Appeal did not find it necessary to answer these questions. The District Judge held that support for gay marriage was a political opinion for this purpose (para 54). There was a political debate going on in Northern Ireland at the time about whether same sex couples should be allowed to marry in Northern Ireland as they are in the rest of the United Kingdom. The Assembly had debated a motion calling for same sex marriage three times over a period of 18 months and had rejected it for a third time only the week before. Political opinion is not defined in the legislation, but in *McKay v Northern Ireland Public Service Alliance* [1994] NI 103, it was defined as "an opinion relating to the policy of government and matters touching the government of the state" (Kelly LJ at p 117) and in *Ryder v Northern Ireland Policing Board* [2007] NICA 43, it was said that "the type of political opinion must be one relating to the conduct of the government of the state or matters of public policy" (Kerr LCJ, at para 15). There is no need for an association with a particular political party or ideology, although no doubt that would also count. I see no reason to doubt that support for gay marriage is indeed a political opinion for this purpose.

42. However, it is not entirely clear on what basis the District Judge upheld this aspect of the claim. She clearly held, in two places, that the reason why the order had not been fulfilled was the McArthurs' religious belief (paras 43 and 57). Among the arguments presented to her on behalf of Mr Lee was that it was immaterial whether the bakery knew of Mr Lee's religious belief or political opinion, because "under the 1998 Order, discrimination can take place on the grounds of the discriminator's religious belief and political opinion" (para 47(7)).

43. Not surprisingly, Mr Scoffield, for the bakery, argues that this cannot be right. The purpose of discrimination law is to protect a person (or a person or persons

with whom he is associated) who has a protected characteristic from being treated less favourably because of that characteristic. The purpose is not to protect people without such a characteristic from being treated less favourably because of the protected characteristic of the alleged discriminator. This was reflected, for example, in section 45(1) of the Equality Act 2006 which made it clear that the discrimination has to be on the ground of the religion or belief of someone other than the alleged discriminator. It is also a well-established principle of equality law that the motive of the alleged discriminator is irrelevant: see, *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728, eg at paras 13-20, citing *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 and *James v Eastleigh Borough Council* [1990] 2 AC 751.

44. In *In re Northern Ireland Electricity Service's Application* [1987] NI 271, Nicholson J did observe *obiter* that the words of section 16(2) of the Fair Employment (Northern Ireland) Act 1976, which are essentially the same as those in article 3(2)(a) of FETO, were capable of being read widely enough to encompass acts done based on the religious belief or political opinion of the person doing the act. There are similar dicta in *In re O'Neill's Application* [1995] NI 274, at 279-280, and in *Ryder v Northern Ireland Policing Board* [2007] NICA 43, para 11. However, such a reading would be inconsistent with article 3(2)(a) which requires a comparison between the person receiving the less favourable treatment and "other persons": this would not be possible if the treatment were on the grounds of the discriminator's beliefs because everyone would be treated alike. It would also be inconsistent with the definition of indirect discrimination, which requires, in article 3(2)(b)(ii), that the discriminator cannot show that the requirement or condition with which the person to whom it is applied cannot comply is "justifiable irrespective of the religious belief or political opinion of the person to whom it is applied". Another pointer are the exemptions in article 31(3)(a) and (4)(a) for goods, facilities and services provided by a religious denomination or political party, the essential nature of which requires them to be provided only to persons holding or not holding a particular belief or opinion.

45. For all those reasons, of policy, principle and language, in my view the less favourable treatment prohibited by FETO must be on the grounds of religious belief or political opinion of someone other than the person meting out that treatment. To the extent that the District Judge held that the bakery had discriminated unlawfully because of its owners' religious beliefs she was wrong to do so.

46. However, that may not be an entirely fair reading of her judgment. She rejected the submission that the bakery had no reason to know about Mr Lee's political opinions (paras 59, 60). They clearly did know that he supported gay marriage, because of the message he wanted on the cake. "The [McArthurs] disagreed with the religious belief and political opinion held by [Mr Lee] with regard to a change in the law to permit gay marriage and, accordingly, by their refusal to

provide the services sought, treated [him] less favourably contrary to the law" (para 66). It was only if she had been persuaded by the submission that the defendants were not aware of Mr Lee's religious belief and/or political opinion or the religious belief and political opinions of those with whom he associated, that she would have found that there had been discrimination on the ground of the McArthurs' own beliefs (para 67). It is unfortunate that she referred to both religious beliefs and political opinions in making these findings, because there appears to have been no evidence of Mr Lee's religious beliefs. Once a claim based on the McArthurs' religious beliefs is dismissed, the claim must be made, if at all, on the basis of his political opinion. But those passages do suggest that the District Judge was holding that Mr Lee was treated less favourably because of his political opinion as well as because of the McArthurs' religious beliefs.

47. It may well be that the answer to this question is the same as the answer to the claim based on sexual orientation. There was no less favourable treatment on this ground because anyone else would have been treated in the same way. The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man. It was not as if he were being refused a job, or accommodation, or baked goods in general, because of his political opinion, as for example, was alleged to have happened in *Ryder v Northern Ireland Policing Board*. The evidence was that they were quite prepared to serve him in other ways. The situation is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.

48. However, there is here a much closer association between the political opinions of the man and the message that he wishes to promote, such that it could be argued that they are "indissociable" for the purpose of direct discrimination on the ground of political opinion. This would not always be the case, because the person ordering a particular message may in fact be indifferent to it. But in this case Mr Lee was perceived as holding the opinion in question. It becomes appropriate, therefore, to consider the impact of the McArthurs' Convention rights upon the meaning and effect of FETO.

IV The Convention Rights

49. The Convention rights to freedom of thought, conscience and religion and freedom of expression are clearly engaged by this case. Article 9(1) provides that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in

worship, teaching, practice and observance." Article 9(2) permits limitations on the freedom to manifest one's religion or beliefs but not on the freedom to hold them. In its first case dealing with article 9, *Kokkinakis v Greece* (1993) 17 EHRR 397, para 31, the European Court of Human Rights expressed the importance of the right in a passage which has been much-cited since:

> "As enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."

One is free both to believe and not to believe.

50. Furthermore, obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9(1) rights. In *Buscarini v San Marino* (1999) 30 EHRR 208, the Grand Chamber held that it was a violation of article 9 to oblige non-believers to swear a Christian oath as a condition of remaining members of Parliament. The court reiterated that freedom of thought, conscience and religion "entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion" (para 34).

51. The Judicial Committee of the Privy Council took the same view in *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] UKPC 13; [2017] 1 WLR 2752. The Board held that a Muslim petty officer had been hindered in the exercise of his constitutional right to freedom of conscience when he was obliged, on pain of disciplinary action, to remain present and doff his cap during Christian prayers at ceremonial parades and at morning and evening colours. This was a sufficiently active participation to hinder the claimant in the enjoyment of his conscientious beliefs. Nor had any justification been shown for it.

52. The freedom not to be obliged to hold or to manifest beliefs that one does not hold is also protected by article 10 of the Convention. Article 10(1) provides that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …". The right to freedom of expression does not in terms include the right *not* to express an opinion but it has long been held that it does. A recent example in this jurisdiction is *RT*

(Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38; [2013] 1 AC 152. The issue was whether asylum seekers should be sent back to Zimbabwe where they would face a real risk of persecution if they refused to demonstrate positive support for the then regime in that country. Citing, among other cases, both *Kokkinakis* and *Buscarini*, Lord Dyson held that the principle applied as much to political opinions as it did to religious belief: "Nobody should be forced to have or express a political opinion in which he does not believe" (para 42).

53. The respondent suggests that the jurisprudence in relation to "compelled speech" has been developed principally in the United States as a result of the First Amendment. There is indeed longstanding Supreme Court authority for the proposition that "the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all": see *Wooley v Maynard* 430 US 705, 714, per Burger CJ, citing *Board of Education v Barnette* (1943) 319 US 624, 633-634. But in the light of *Laramore* and *RT (Zimbabwe)*, and the Strasbourg case law on which they are based, it cannot seriously be suggested that the same principles do not apply in the context of articles 9 and 10 of the Convention.

54. The District Judge did not accept that the defendants were being required to promote and support a campaign for a change in the law to enable same sex marriage (paras 40 and 62). The Court of Appeal, while not deciding the point, appears to have agreed with this: "the fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either" (para 67). These are, in fact, two separate matters: being required to promote a campaign and being associated with it. As to the first, the bakery was required, on pain of liability in damages, to supply a product which actively promoted the cause, a cause in which many believe, but a cause in which the owners most definitely and sincerely did not. As to the second, there is no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message. Mrs McArthur may have been worried that others would see the Ashers logo on the cake box and think that they supported the campaign. But that is by the way: what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed.

55. Articles 9 and 10 are, of course, qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the

message conveyed by the icing on the cake - support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the FETO claim.

56. Under section 3(1) of the Human Rights Act 1998, all legislation is, so far as it is possible to do so, to be read and given effect in a way which is compatible with the Convention rights. I have already indicated my doubts about whether this was discrimination against Mr Lee on the grounds of his political opinions, but have acknowledged the possibility that it might be. But in my view, FETO should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.

57. As the courts below reached a different conclusion on this issue, they did not have to consider the position of the company separately from that of Mr and Mrs McArthur. It is the case that in *X v Switzerland* (Application No 7865/77), Decision of 27 February 1979, and in *Kustannus Oy Vapaa Ajattelija Ab v Finland* (Application No 20471/92), Decision of 15 April 1996, the European Commission of Human Rights held that limited companies could not rely upon article 9(1) to resist paying church taxes. In this case, however, to hold the company liable when the McArthurs are not would effectively negate their convention rights. In holding that the company is not liable, this court is not holding that the company has rights under article 9; rather, it is upholding the rights of the McArthurs under that article.

58. Had the conclusion been otherwise, it would of course have raised the constitutional question referred to us by the Attorney General. In the event, it is not necessary to address that question.

Postscript

59. After the hearing in this case, while this judgment was being prepared, the Supreme Court of the United States handed down judgment in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* (2018) 138 S Ct 1719. The facts are not the same. A Christian baker refused to create a wedding cake for a gay couple because of his opposition to same sex marriage. There is nothing in the reported facts to suggest that the couple wanted a particular message or decoration on their cake. The Colorado Civil Rights Commission, upheld by the Colorado courts, held that the baker had violated the Colorado law prohibiting businesses which offered sales or services to the public from discrimination based on sexual orientation. The baker complained that this violated his First Amendment rights to freedom of speech and the free exercise of his religion.

60. The majority (Justice Kennedy, with whom Chief Justice Roberts, and Justices Breyer, Alito, Kagan and Gorsuch joined) held that

> "the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the state itself would not be a factor in the balance the state sought to reach. … When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires." (p 1724)

The majority recognised that businesses could not generally refuse to supply products and services for gay weddings; but they acknowledged that the baker saw creating a wedding cake as an expressive statement involving his First Amendment rights; and contrasted the treatment that he had received, which they perceived as hostile, from the favourable treatment given to three bakers who had refused to produce cakes with messages demeaning gay persons and gay marriages.

61. Justices Ginsburg and Sotomayor, in dissent, drew a clear distinction between an objection to the message on the cake and an objection to the customer who wanted the cake. The other bakery cases had been clear examples of an objection to the message rather than an objection to the customer. In their view the objection in this case was to the customer and therefore a violation. Justices Kagan and Breyer, who voted with the majority on the lack of neutrality point, also accepted that the Commission could have based its reasoning on that distinction - the other bakers would have refused to make cakes with the demeaning messages for anyone, whereas this baker had refused to make this cake because it was a gay couple who wanted it. Justices Thomas (with whom Justice Gorsuch joined), on the other hand, considered that to make a cake for a gay wedding was expressive in itself and thus compelling it required strict scrutiny. Justice Gorsuch (with whom Justice Alito joined) would also not have distinguished between a cake with words and a cake without.

62. The important message from the *Masterpiece Bakery* case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics. One can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on grounds of sexual orientation. If and to the extent that there was discrimination on grounds of political opinion, no justification has been shown for the compelled

speech which would be entailed for imposing civil liability for refusing to fulfil the order.

LORD MANCE: (with whom Lady Hale, Lord Kerr, Lord Hodge and Lady Black agree)

63. On behalf of the respondent, Mr Lee, and the notice party, the Commission, Mr Allen submits that no appeal lies against the decision of the Northern Ireland Court of Appeal. The Court of Appeal decided the issues before it on a case stated by the District Judge pursuant to article 61(1) of the County Courts (Northern Ireland) Order 1980. Article 61(1) provides:

> "Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal on the point of law involved, and, subject to this article, it shall be the duty of the judge to state the case."

Article 61(7) of the Order goes on to impose a restriction on an appeal from such a decision. It provides:

> "Except as provided by section 41 of the Judicature (Northern Ireland) Act 1978, the decision of the Court of Appeal on any case stated under this article shall be final."

64. Although not referred to expressly in article 61(1), it is common ground that a further exception to finality exists under section 42(6) of the Judicature (Northern Ireland) Act 1978, which reads:

> "No appeal from an order or judgment of the Court of Appeal shall, unless it involves a decision of any question as to the validity of any provision made by or under an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly, lie under this section in a case where by any statutory provision, including a provision of this Act, it is expressly provided (whatever form of words is used) that that order or judgment is to be final."

65. It is also common ground that the Fair Employment and Treatment (Northern Ireland) Order 1998 ("FETO") falls to be considered as a "Measure of the Northern Ireland Assembly", but that the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ("SORs") do not. FETO was made as an Order in Council under powers conferred by section 1(3), read with Schedule 1 paragraph 1, of the Northern Ireland Act 1974. The Assembly, which it was intended would be set up in accordance with the Northern Ireland Assembly Act 1973, was at the time prorogued pending dissolution. Following the Belfast Agreement, the Northern Ireland Act 1998 completed that process of dissolution. By section 95(5), read with Schedule 12 paragraph 3(4), the 1998 Act provided for references to Orders in Council, such as FETO, made under its provisions to be considered as Measures of the Assembly which was then prorogued pending dissolution. SORs in contrast were made under powers in the Equality Act 2006, and there is no basis for regarding them as made "by or under an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly" within section 42(6).

66. In these circumstances, it is necessary to consider first whether the proposed appeal "involves a decision of any question as to the validity of any provision" of FETO. Mr Allen, on behalf of Mr Lee and the Commission, relies on FETO as valid. He points out, correctly, that the appellants' primary case is also that FETO is valid and that their conduct was not in breach of any of its provisions, properly understood. In this connection, the appellants contend that, pursuant to the interpretive obligation contained in section 83 of the Northern Ireland Act 1998 (the Northern Irish homologue of section 3 of the Human Rights Act 1998) FETO can and should, if necessary, be read compatibly with their rights under the European Convention on Human Rights.

67. However, all else failing, the appellants also contend that, if the effect of FETO is that their conduct in the present case was unlawful, then FETO is to that extent invalidated by section 24(1)(a) and/or (c) of the Northern Ireland Act 1998. Section 24 reads:

> "(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act -
>
> (a) is incompatible with any of the Convention rights;
>
> (b) …

> (c) discriminates against a person or class of person on the ground of religious belief or political opinion; …"

68. Mr Allen submits that this fall-back submission does not mean that the appeal "involves a decision of any question as to the validity of any provision" of FETO within section 42(6) of the Judicature (Northern Ireland) Act 1978. Further, the wording of that section must, he submits, be understood in context against the background of 1978; it cannot cover such invalidity as may arguably arise pro tanto to the extent of any incompatibility with provisions introduced in 1998.

69. I do not accept those submissions. Statutes are generally "always speaking" and there is no reason why section 42(6) of the 1978 Act should not embrace invalidity arising pro tanto under a subsequent provision such as section 24(1) of the 1998 Act. Further, I consider that, even if a question of invalidity only arises on the prospective appellants' case if all other aspects of their case fail, that must be sufficient to bring all issues within the scope of an appeal under section 42(6) of the 1978 Act. It is impossible to know whether the other aspects of the appellants' case fail, so that the question of validity directly arises, without hearing and determining an appeal on them. In response to Mr Allen's observation that section 42(6) is an exception and should therefore be understood narrowly, I observe that, while that is so, it is also the case that section 42(6) is an exception to an exception introduced by article 61(7) of the County Courts (Northern Ireland) Order 1980 to the general rule that an appeal lies from the Court of Appeal to the Supreme Court. I see no reason to give it other than its ordinary meaning.

70. I also note at this point a submission first raised before the Court of Appeal by the Attorney General as a notice party and intervener. By skeleton argument dated 11 April 2016, supported by the appellants in their skeleton in response dated 18 April 2016, the Attorney General submitted that, if article 28 of FETO has the effect for which Mr Allen submits, it is invalidated pro tanto by section 17 of the Northern Ireland Constitution Act 1973. That section reads:

> "(1) Any Measure, any Act of the Parliament of Northern Ireland and any relevant subordinate instrument shall, to the extent that it discriminates against any person or class of persons on the ground of religious belief or political opinion, be void."

The Court of Appeal, pursuant to Order 120 rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980, issued devolution notices which included this issue. Before the Supreme Court, the Attorney General has by his reference remained the primary protagonist of the same submission. But the appellants, by

their written case as interveners in the reference, have again endorsed the Attorney General's submission regarding section 17. There was therefore before the Court of Appeal and there is before the Supreme Court a question of invalidity, the answer to which could directly affect the appellants' case. Once again, even though invalidity could only arise upon all other submissions failing, that in my opinion is sufficient to enable an appeal in respect of FETO.

71. Having established a right of appeal in respect of FETO, the appellants submit that their proposed appeal in respect of SORs can also be maintained. The issue under FETO is discrimination on grounds of religious belief or political opinion, while the issue under SORs is one discrimination on grounds of sexual orientation. But there is, as the appellants point out, a considerable overlap in the circumstances relevant in this case to these different kinds of discrimination. The appellants therefore submit that, once an appeal is admissible in respect of one claim, then any other claim determined in the same proceedings may be appealed either generally or at least where there is an overlap of the relevant factual circumstances such as here exists. The Court of Appeal rejected this submission in its separate judgment dated 22 December 2016 on the appellants' application for permission to appeal to the Supreme Court [2016] NICA 55. In the further alternative, the appellants now invoke before the Supreme Court section 40(5) of the Constitutional Reform Act 2005, which provides that:

> "The [Supreme] Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

As will appear, it is unnecessary to consider the appellants' case on these points further, in the light of my conclusions with regard to the Attorney General's References, to which I next therefore turn.

72. The Attorney General has power to require or make a reference in circumstances defined by paragraphs 33 and 34 of Schedule 10 to the Northern Ireland Act 1998 (as amended by paragraph 2 of Schedule 7 to the Justice (Northern Ireland) Act 2002 and paragraph 118 of Schedule 9 to the Constitutional Reform Act 2005), as follows:

> "33. The Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland or the Advocate General for Scotland may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is or they are a party.

> 34. The Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland or the Advocate General for Scotland may refer to the Supreme Court any devolution issue which is not the subject of proceedings."

73. The Court of Appeal handed down its judgment on the substantive issues on 24 October 2016. Order 42 rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 (SR 1980/346) provides that:

> "(1) A judgment of the Court takes effect from the day of its date.
>
> (2) Such a judgment shall be dated as of the day on which it is given, unless the Court orders it to be dated as of some other earlier or later day …"

Rule 2 of the same Order provides that, unless the court otherwise orders and subject to certain other presently inapplicable exceptions, every judgment shall:

> "(a) … be drawn up and signed by an officer of the appropriate office; and
>
> (b) be sealed and filed by an officer of that office and such officer shall at the time of filing enter such judgment in the record kept for the purpose and the date of filing shall be deemed to be the date of such entry."

74. The Court of Appeal's substantive judgment was not drawn up or filed in the form of an order until 31 October 2016. Before this occurred, the Attorney General lodged on 28 October 2016 a notice dated 27 October 2016, purporting to require the Court of Appeal under paragraph 33 of Schedule 10 to the 1998 Act to refer to the Supreme Court issues as to whether, in the light of section 24(1)(a), (c) and (d) of the Northern Ireland Act 1998, there was power to make regulation 5 of SORs and whether, in the light of section 17 of the Northern Ireland Constitution Act 1973, article 28 of FETO was void. The Court of Appeal declined to make such a reference. Its reasons were given in a separate judgment, dated as delivered on 22 December 2016, by which the Court, firstly, refused the appellants permission to appeal in respect of the issues under FETO, held that there was no jurisdiction to permit any appeal in respect of the issues under SORs and, secondly, concluded that the Attorney General's request for a reference under paragraph 33 came too late,

because “the proceedings ended with the giving of judgment and have not been reopened” (para 10) and that, at the date at which he purported to require a reference, there were “no longer proceedings before it” (para 11).

75. The Attorney General’s response to the Court of Appeal’s rejection of his request under paragraph 33 has been to make two references, dated respectively 31 January 2017 and 27 March 2017 to the Supreme Court under paragraph 34. There are no jurisdictional objections to these references. The reference dated 31 January 2017 raises in abstract form three substantive issues all directly inspired by the main proceedings. The first such issue is whether there was, in the light of sections 24(1)(c), power to make regulation 5 of SORs, insofar as that regulation “imposes civil liability for the refusal to express a political opinion or to express a view on a matter of public policy contrary to the religious belief of the person refusing to express the view”. The second is whether, in the light of section 24(1)(a), there was power to make regulation 5 insofar as it “imposes civil liability for the refusal to express a particular political opinion that is inconsistent with the religious belief of the person refusing to express that opinion”. The third issue (touched on in para 70 above) is whether article 28 of FETO is void, in the light of section 17 of the Northern Ireland Constitution Act 1973, insofar as article 28 “imposes civil liability for the refusal to express a political opinion or to express a view on a matter of public policy contrary to the religious belief of the person refusing to express the view”. The second reference dated 27 March 2017 raises the procedural question whether, in effect, the Attorney General was, under paragraph 33, entitled to require the Court of Appeal to make a reference to the Supreme Court on 28 October 2016.

76. I start with the second reference. The Court of Appeal in its judgment dated 22 December 2016 noted correctly (para 9) that a court can always recall and vary an order before it is perfected (in this case by drawing up, sealing and filing). But the Court of Appeal found support in *Deighton v Cockle* [1912] 1 KB 206 for a conclusion that the proceedings were at an end as from 24 October 2016. The issue in that case was whether, having obtained leave on 28 May 1904 to sign summary judgment (under the old Order XIV), the plaintiff was by the actual signing of judgment, which it did not undertake until 3 July 1905, taking a “proceeding”, so as require a month’s notice to “proceed” to be given in advance. The Court of Appeal held that it was not. Vaughan Williams LJ concluded that the rule requiring a month’s notice to proceed “only applied to proceedings towards judgment” or “interlocutory proceedings”, and “did not apply to proceedings after judgment obtained” or “after an end of the litigation had been arrived at” (pp 209 and 211). Buckley LJ took a similar view, while Kennedy LJ considered that the rule referred to “some proceeding while the matter is still in controversy, or there is still some further step to be taken before judgment is obtained” (p 213).

77. The present context is different. Paragraph 33 confers a power to require a reference of “any devolution issue which has arisen in proceedings” which have not

yet been concluded, while paragraph 34 confers a power to refer "any devolution issue which is not the subject of proceedings". Appeals are in principle against orders, not judgments. Following the handing down of a judgment, there are frequently contentious issues about the form of order appropriate to give it effect and about other matters such as costs. It is natural to see the proceedings as being on foot, until such matters are resolved, and a final order is issued. The references to the existence or non-existence of relevant proceedings in paragraphs 33 and 34 are readily capable of being understood in a sense whereby such proceedings exist until their finalisation by an order which can be made the subject of an appeal.

78. There is no incongruity in a conclusion that a reference can be required in the light of a judgment handed down, but not yet conclusively formalised. Indeed, there are strong reasons why that should be possible. The need for a reference may only have become obvious as a result of the way in which the judgment handed down has been expressed. The reference will then still serve an important purpose in enabling the Court of Appeal to revise and, if necessary, alter its judgment before it is finally drawn up, sealed and filed. A reference of similar nature is not unfamiliar in the context of the procedure for references by national courts to the Court of Justice of the European Union. The alternative, that the Court of Appeal cannot refer but must formalise its judgment, leaves it open to the Attorney General thereafter to make a reference under paragraph 34, such as his first reference here - but to do so too late to affect the outcome of the proceedings to which the reference in substance relates.

79. It is true that the court has no discretion to refuse to make a reference under paragraph 33, if it applies in a situation such as the present. It could in some cases be regrettable and waste costs, if the Attorney General were to delay requesting a reference until after the hand-down of a judgment. But the legislation should not be construed on the basis that it will be abused or mishandled. The Attorney General can be relied upon to act sensibly, and, if necessary, the court also retains control over costs, which it can exercise whatever the outcome or success of the Attorney General's reference under paragraph 33.

80. I therefore conclude that the Attorney General's request to the Court of Appeal to make a reference fell within the terms of paragraph 33, and the Court of Appeal erred in refusing to give effect to it.

81. That means that the Court of Appeal and the parties to the main proceedings were deprived, by misconstruction of paragraph 33 and consequent procedural error, of the benefit of the answers on the substantive issues which the Supreme Court would have given and of the inevitably different judgment which would have followed. So far as concerns article 28 of FETO, the finding of violation in the courts below can, in the light of my conclusions above, be resolved by an appeal.

82. So far as concerns regulation 5 of SORs, the reference sought related to the power to make that regulation. However, as is confirmed by the form of the first reference actually made, the premise to the reference would have been that regulation 5 "imposes civil liability for the refusal to express" a political opinion or view contrary to or inconsistent with "the religious belief of the person refusing to express the view". The Supreme Court could not have answered the reference which the Attorney General was requiring under paragraph 33, without first considering this premise. In short, the Supreme Court would have had to consider and address the question whether and to what, if any extent, regulation 5 does impose civil liability for conduct such as the appellants' in refusing to bake the cake.

83. The Supreme Court would thus have arrived then at the conclusions which it has now reached, namely that (contrary to the District Judge's ruling) regulation 5 does not impose liability for such conduct. It would have been bound to express that conclusion, and, on that basis, to decline to go further into what would have been established to be the hypothetical constitutional issues otherwise raised by the reference. In that light it would also have been impossible for the Court of Appeal to maintain its judgment in the form initially handed down. The Court of Appeal would have been bound to reach the opposite conclusions on the issues of sexual discrimination under regulation 5 of SORs, as well as discrimination under FETO, to those which it did in fact reach.

84. That leads to the question what, if any, recourse is open to the appellants in circumstances where the Court of Appeal's error in refusing to give effect to the Attorney General's request under paragraph 33 can now be seen to have led the Court of Appeal to finalise a judgment and order reflecting a result which is the opposite of what should have followed. Does article 61(7) of the County Courts (Northern Ireland) Order 1980, providing that "the decision of the Court of Appeal on any case stated under this article shall be final", apply, in this context also, to preclude any appeal? The answer in my opinion is that it does not.

85. I start by noting that the present situation does not fall within the scope of the principle applied in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. In *Anisminic* the House was concerned with errors made by an inferior tribunal, the Foreign Compensation Commission. Anisminic Ltd was claiming compensation for property sequestered by the Egyptian authorities in 1956. The Commission had ruled against this claim on the ground that an Egyptian company, to which it had sold the sequestered property in 1957, was its "successor in title" for the purposes of a provision requiring any claimant and any successor in title of such claimant to be British. The Foreign Compensation Act 1950 provided that "The determination by the commission of any application made to them under this Act shall not be called in question in any court of law".

86. The House held that this provision did not preclude judicial review of a determination involving a misconstruction by the commission of the scope of its jurisdiction. Acting in bad faith, making a decision which a tribunal had no power to make, failing to give effect to the requirements of natural justice, taking into account something required to be left out of account and refusing to take into account something required to be taken into account were in this context all mentioned as matters outside the scope of such a finality provision: see p 171C-E per Lord Reid, pp 195B-C and 198F-G per Lord Pearce, p 210E-F per Lord Wilberforce and p 215A per Lord Pearson (agreeing with Lord Reid, Lord Pearce and Lord Wilberforce). In the later authority of *In re Racal Communications Ltd* [1981] AC 374, Lord Diplock said (p 383):

> "The break-through made by *Anisminic* … was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity."

87. There is however

> "no similar presumption that where a decision-making power is conferred by statute upon a court of law, Parliament did not intend to confer upon it power to decide questions of law as well as questions of fact. Whether it did or not and, in the case of inferior courts, what limits are imposed on the kinds of questions of law they are empowered to decide, depends upon the construction of the statute unencumbered by any such presumption. In the case of inferior courts where the decision of the court is made final and conclusive by the statute, this may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not that did so much to confuse English administrative law before *Anisminic* …; but upon any application for judicial review of a decision of an inferior court in a matter which involves, as so many do, interrelated questions of law, fact and degree the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question which it has to decide."

See *In re Racal Communications Ltd*, per Lord Diplock, at p 383.

88. The Northern Ireland Court of Appeal is a superior court, but the underlying question of construction remains, whether the legislature has by article 61(7) of the 1980 Order, set out in para 62 above, excluded any right of appeal in circumstances such as the present. Article 61(1) and (7), read together, provide for the decision of the Court of Appeal on a case stated relating to the correctness of "the decision of a county court judge upon any point of law" to be final. They contemplate the finality of the Court of Appeal's decision with regard to the correctness of the county court judge's decision on the point of law raised by the case stated. The finality provision in article 61(7) is therefore focused on the decision on the point of law, not on the regularity of the proceedings leading to it. It would require much clearer words - and they would, clearly, be unusual and surprising words - to conclude that a focused provision like article 61(7) was intended to exclude a challenge to the fairness or regularity of the process by which the Court of Appeal had reached its decision on the point of law. Suppose the Court of Appeal had refused to hear one side, or the situation was one where some apparent bias affected one of its members. This sort of situation cannot have been contemplated by or fall within article 61(7). Likewise, I consider that a failure to admit the Attorney General's request for a reference and to await its disposition, before ruling on a case stated, constitutes a procedural error, in respect of which an appeal must still be possible, if significant injustice would otherwise follow, notwithstanding the finality provision in article 61(7).

89. Does it matter that, in this case, the error identified consisted in failing to admit the Attorney General's reference and to await its determination, rather than in giving effect to any application made by the appellants? The appellants had no right to require, or to insist that the Attorney General require, a reference. It can be argued therefore that any error by the Court of Appeal, in failing to make a reference and to await its outcome, is collateral to the litigation between the appellants and Mr Lee and the Commission, and cannot afford the appellants any basis for complaint or appeal. In my view, that would be to take an overly technical view of the issues. The appellants had expressly adopted the Attorney General's case and submissions during the Court of Appeal proceedings. They and the Attorney General were ad idem in arguing that, by one route or another, the complaint made against the appellants was ill-founded. The appellants would have appeared and advanced their supportive position on the reference, had one been made under paragraph 33. They had, in relation to their appeal against the decision of the county court judge on the point of law stated, a direct interest in the content and outcome of the reference, and in its proper handling.

90. In summary, what occurred was an error in the proper conduct of the proceedings, which can now be seen to have precluded the Court of Appeal from deciding the case on a correct basis and from reaching the right outcome. Such an error takes the case outside any provision that "the decision of the Court of Appeal

on any case stated under this article shall be final". An appeal is therefore competent to the Supreme Court against all aspects of the Court of Appeal's judgment, including its decision in respect of sexual discrimination under SORs as well as its decision in respect of political opinion or religious belief under FETO. The appellants should be given permission to appeal accordingly in the light of the undoubted importance of the substantive issues; and, in the light of my conclusions on the substantive issues, the Supreme Court can and should allow the appeal in respect of both SORs and FETO.