



10 October 2018

PRESS SUMMARY

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)
[2018] UKSC 49
On appeal from [2016] NICA 39

JUSTICES: Lady Hale (President), Lord Mance, Lord Kerr, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

Mr and Mrs McArthur are Christians who hold the religious belief that the only form of marriage consistent with Biblical teaching and acceptable to God is that between a man and a woman. They are the owners of a bakery business ('Ashers'). Ashers offered a 'Build-a-cake' service by which customers could request images or inscriptions to be iced onto a cake. In May 2014 Mr Lee, a gay man, wished to take a cake to an event organised by campaigners for same sex marriage in Northern Ireland. He placed an order with Ashers for a cake iced with a depiction of the cartoon characters 'Bert and Ernie' and the words 'Support Gay Marriage'. Mrs McArthur initially took the order but later advised Mr Lee that she could not in conscience produce such a cake and gave him a refund.

Mr Lee brought a claim against the McArthurs and Ashers ('the appellants') for direct and indirect discrimination on grounds of sexual orientation, contrary to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 ('the SORs') and/or on grounds of religious belief or political opinion, contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998 ('FETO'). His claim was supported by the Equality Commission for Northern Ireland. The district judge in the county court held that refusing to complete his order was direct discrimination on all three grounds.

The appellants appealed by way of case stated to the Court of Appeal, arguing that FETO and the SORs were incompatible with the McArthurs' rights under the European Convention on Human Rights (ECHR). The Court of Appeal served a devolution notice and notice of incompatibility on the Attorney General, who then became a party to the proceedings. On 24 October 2016 the Court of Appeal dismissed the appeal, holding that Mr Lee had suffered direct discrimination on grounds of sexual orientation and that it was not necessary to interpret the SORs to take account of the McArthurs' ECHR rights.

On 28 October 2016, before the order dismissing the appeal had been drawn up, the Attorney General gave notice to the Court of Appeal, requiring it to make a reference to the Supreme Court under paragraph 33 of Schedule 10 to the Northern Ireland Act 1998. The Court of Appeal concluded that he had no power to do so as the proceedings had ended. The Attorney General therefore made two references to the Supreme Court of devolution issues under paragraph 34, the first on the validity of FETO and the SORs and the second on whether the Court of Appeal should have made a reference. The appellants applied for permission to appeal against the order of the Court of Appeal, and this application was heard together with the Attorney General's references.

JUDGMENT

The Supreme Court unanimously holds that it has jurisdiction to hear an appeal against all aspects of the Court of Appeal's judgment, finding that the Court of Appeal erred in refusing to make a reference pursuant to the Attorney General's notice under paragraph 33.

It grants the appellants permission to appeal and allows their appeal. The Court concludes that neither the SORs nor FETO imposes civil liability on the appellants for the refusal to express a political opinion contrary to their religious beliefs.

Lady Hale gives the judgment on the discrimination issues, and Lord Mance that on the jurisdiction issues.

REASONS FOR THE JUDGMENT

The sexual orientation claim

The district judge found that the appellants did not refuse to fulfil Mr Lee's order because of his actual or perceived sexual orientation. The objection was to the message on the cake, not any personal characteristics of the messenger [22], or anyone with whom he was associated [33-34]. The message was not indissociable from the sexual orientation of the customer, as support for gay marriage was not a proxy for any particular sexual orientation [25]. The benefit of the message accrues not only to gay or bisexual people, but to their families and friends and to the wider community who recognise the social benefits which such commitment can bring [33]. Thus, there was no discrimination on grounds of sexual orientation in this case.

The political beliefs claim

Protection against direct discrimination on grounds of religious belief or political opinion has constitutional status in Northern Ireland [37]. The discrimination has to be on the ground of the religion or belief of someone other than the alleged discriminator [43-45]. As the appellants' objection was not to Mr Lee, but to being required to promote the message on the cake, the situation was not comparable with people being refused jobs or services simply because of their religious faith, but it was arguable that the message was indissociable from Mr Lee's political opinion. It was therefore necessary to consider the impact of the McArthurs' ECHR rights on the meaning and effect of FETO [48].

Impact of ECHR rights

The rights to freedom of thought, conscience and religion (article 9) and to freedom of expression (article 10) were clearly engaged by this case [49]. They include the right not to be obliged to manifest beliefs one does not hold [52]. The McArthurs could not refuse to provide their products to Mr Lee because he was a gay man or because he supported gay marriage, but that was different from obliging them to supply a cake iced with a message with which they profoundly disagreed [55]. FETO should not be read or given effect in such a way as to compel them to do so unless justification was shown, and it had not been in this case [56, 62].

Jurisdiction

The appellants were entitled to appeal to the Supreme Court in relation to FETO notwithstanding their election to appeal to the Court of Appeal by way of case stated. Although such appeals are usually final under article 61(6) of the County Courts (Northern Ireland) Order 1980 ('article 61(6)'), there is an exception in section 42(6) Judicature (Northern Ireland) Act 1978 in respect of decisions involving any question as to the validity of measures of the Northern Ireland Assembly. FETO was equivalent to such a measure and the appellants did challenge its validity if it failed to protect their rights. It was not necessary to decide whether this also permitted the SORs appeal, given the overlap in the circumstances, because of the Supreme Court's conclusions on the Attorney General's references [63-71].

The Court of Appeal had been wrong to reject the reference requested by the Attorney General under paragraph 33 on the ground the proceedings were concluded. In principle, appeals are against orders not judgments and, in this context, it is natural to regard the proceedings as live until a final order is issued. This error had deprived the appellants of the inevitably different judgment on the question of whether the SORs imposed civil liability on them for their refusal to express a political opinion contrary to their religious beliefs, which would have eventually followed. An appeal to the Supreme Court following such a procedural error was not precluded by article 61(6), which was focused on the point of law not on a challenge to the fairness or regularity of the Court of Appeal's process. Even though the error was collateral to the litigation between the appellants and Mr Lee, it would be overly technical to deny the appellants the benefit of the proper handling of the reference. An appeal therefore lay to the Supreme Court against all aspects of the Court of Appeal's judgment, including its decision in respect of the alleged discrimination under the SORs as well as under FETO [76-90].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>