Case No: B2/2011/0313 AND B2/2011/0314

Neutral Citation Number: [2012] EWCA Civ 83

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Bristol Civil Justice Centre
His Honour Judge Rutherford DL
9BS02095 and 9BS02096

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2012

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HOOPER
and
LADY JUSTICE RAFFERTY DBE

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Between :

BULL & BULL	**Appellants**
- and -	
HALL	**Respondent**
&	
PREDDY	**Respondent**

- -
- -

James Dingemans QC and Ms Sarah Crowther (instructed by **Aughton Ainsworth**) for the **Appellants**
Robin Allen QC and Ms Catherine Casserley (instructed by **Equality and Human Rights Commission**) for the **Respondents**

Hearing dates: 8th and 9th November 2011

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Judgment

Lady Justice Rafferty

1. The Appellants seek to set aside the 18 January 2011 declaration of HHJ Rutherford that contrary to regulation 4(1) of the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, (`the Regulations'), they discriminated against the Respondents when on the 5th September 2008 they refused to honour the latter's 4th September 2008 booking of a double-bedded room at the Chymorvah Private Hotel ("the hotel"). The Judge found that the Respondents had suffered direct discrimination, and were he wrong as to that would have found that they had suffered indirect discrimination. Damages for injury to feelings were set at £1,800 for each Respondent.

2. The Appellants deny discrimination direct or indirect. They have over the many years of their tenure operated a policy of restricting to married couples the provision of double beds ("the restriction") a policy which, before the 2008 arrival of the Respondents, had apparently affected only unmarried heterosexual couples. The Appellants submit that since their policy is directed not towards sexual orientation but towards sexual practice there is no direct discrimination. As to indirect discrimination they accept that their policy constitutes a provision, criterion or practice which, were they to avoid a finding against them of direct discrimination, required justification pursuant to regulation 3(3)(d). At the outset of this case Mr James Dingemans QC for the Appellants candidly accepted that were the court against him on direct discrimination it would be unlikely his arguments on indirect discrimination would prevail, since the issue of justification is inevitably comprehended within his submissions as to direct discrimination.

3. The Appellants contend that they have been attempting to live and act in accordance with their religious beliefs, including the relevant religious belief that monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations and that both homosexual sexual relations and heterosexual sexual relations outside marriage are sinful. They argue that were they obliged to offer double beds to other than married couples they could no longer run their business and the inevitability of such closure founds their argument that the Judge failed to balance their rights with those of the Respondents. They contend that their religious beliefs engage both heterosexual and homosexual sexual practices. Whether those beliefs be considered outdated, uneconomic for those operating a hotel, or both, nevertheless they submit that in the particular circumstances of this case they must be entitled to manifest them.

4. Mr Robin Allen QC, for the Respondents, supported by the Equality and Human Rights Commission, submits that the restriction necessarily excludes all homosexual couples in a civil partnership, is a plain case of direct discrimination and that the Appellants are not exempt from liability by reason of their religious beliefs. If the court were against the Respondents on direct discrimination they contend that this is indirect discrimination, the Appellants having failed to justify their treatment of the Respondents.

5. The principal issues before us were distilled as: whether there were direct discrimination on an `ordinary' reading of regulations 3(1) and 3(4); if there were, whether that reading is compatible with the European Convention on Human

Rights ("ECHR") and absent direct discrimination, whether there were indirect discrimination.

6. The facts were not in issue. The Appellants let single-bedded and twin-bedded rooms to anyone, regardless of marital status or sexual orientation, but let double-bedded rooms only for occupation by a married couple, and made this plain on the hotel website. They believe that permitting unmarried individuals, heterosexual or homosexual, to share a double bed in a double room involves on their, the Appellants', part the promotion of sin. They were willing to permit homosexual and unmarried heterosexual couples to stay in the hotel in double but single bedded rooms. The Appellants were not young and were nearing retirement and for many years, both before and after the Regulations came into effect, ran the hotel with this consistently applied policy. Print media as long ago as September 1996 had publicized their stance, at least one article headed 'YOU COULDN'T MAKE IT UP' noting that the Appellants warned guests "no sex if you are single". In the Appellants' view their policy had affected many more unmarried heterosexual than it had homosexual couples. Other hotels in the vicinity were willing to provide to the Respondents a double bed. When on 4th September 2008 over the telephone the Respondent Mr Preddy booked a double room he had not seen the booking conditions. Only when the Respondents arrived on 5th September 2008 were they told of it by Mr Quinn on behalf of the Appellants. The Respondents protested, left, found alternative accommodation and were reimbursed their £30 deposit. There was no suggestion that the restriction was explained in a demeaning fashion.

The statutory framework

7. The Regulations are made pursuant to section 81 of the Equality Act 2006 and, subject to affirmative resolution, make provision about discrimination or harassment on grounds of sexual orientation. They recognise that some religious beliefs consider homosexual relationships to be wrong and as a consequence make certain exceptions for religious organisations and in relation to the occupation of property.

8. Regulation 3 – defining discrimination in the context of the Regulations – reads where relevant:

> **"3 Discrimination on grounds of sexual orientation**
>
> (1) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).
>
> (3) For the purposes of these Regulations, a person ("A") discriminates against another ("B") if A applies to B a provision, criterion or practice—

(a) which he applies or would apply equally to persons not of B’s sexual orientation,

(b) which puts persons of B’s sexual orientation at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),

(c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there is no material difference in the relevant circumstances), and

(d) which A cannot reasonably justify by reference to matters other than B's sexual orientation.

(4) For the purposes of paragraphs (1) and (3), the fact that one of the persons (whether or not B) is a civil partner while the other is married shall not be treated as a material difference in the relevant circumstances.”

The effect of Regulation 3(4) is to make it clear in Regulation 3(1) that the fact that A or B is a civil partner and that the other is married is not a material difference for the purposes of Regulation 3(1).

9. Regulation–4 - what is unlawful in relation to the provision of goods facilities and services – reads where relevant -

“4. Goods, facilities and services

(1) It is unlawful for a person (“A”) concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person (“B”) who seeks to obtain or to use those goods, facilities or services—

(a) by refusing to provide B with goods, facilities or services,

(2) Paragraph (1) applies, in particular, to—…………

(b) accommodation in a hotel, boarding house or similar establishment….…”

Regulation–6 - exceptions to Regulation–4 - reads where relevant:

“6 Exceptions to regulation[s] 4 …

(1) Regulation 4 does not apply to anything done by a person as a participant in arrangements under which he (for reward or not) takes into his home, and treats as if they

were members of his family, children, elderly persons, or persons requiring a special degree of care and attention."

Regulation –4 - an exemption for religious organizations - reads where relevant:

"14 Organisations relating to religion or belief.

(1) Subject to paragraphs (2) and (8) this regulation applies to an organisation the purpose of which is—

(a) to practise a religion or belief,

(b) to advance a religion or belief,

(c) to teach the practice or principles of a religion or belief,

(d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief…."

The Regulations and the Human Rights Act 1998

10. The Appellants argue that the Regulations must be construed consistently with Articles 8, 9,14 and 17 ECHR which read as follows:-

"Article 8 Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 Freedom of thought, conscience and religion

1 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.

2 Freedom to manifest one's religion or beliefs shall be 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.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 17 Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

11. The Appellants also rely on Section 13 Human Rights Act 1998, a provision inserted into the legislation following representations from certain religious organisations. It reads as follows:

"Section 13 Freedom of thought, conscience and religion.

(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right."

The developed arguments of the Appellants

12. The Appellants accept that, for the purposes of Regulation 3(1), Regulation 3(4) equates marriage with civil partnership, but only where the discrimination was on the basis of sexual orientation. They argue that the Judge was wrong to hold (paragraph 37) that there was direct discrimination contrary to regulation 4(1), contending that their religious objection to a particular sexual conduct, that is, sexual relations outside marriage, was the basis for the restriction. That there was no direct discrimination was, they argue, underlined by many unmarried heterosexual couples being affected by the restriction.

13. The Judge said:-

"35. It seems to me that a correct analysis of the position of the defendants is that they discriminate on the basis of marital status…….If that is ... correct…then Regulation 3(4) comes into play. There is no material difference (for the purpose of this regulation) between marriage and a civil

> partnership. If that is right then upon what basis do the defendants draw a distinction if it is not on sexual orientation?
>
> 36. It is important to note that Regulation 3(4) only deals with civil partnerships. I say nothing about what would have been the position if the claimants had not entered into such a legal relationship or indeed if they were a heterosexual unmarried couple.
>
> 37. I have reached the clear conclusion that on a proper analysis of the defendants' position on the facts of this particular case the only conclusion which can be drawn is that the refusal to allow them to occupy the double room which they had booked was because of their sexual orientation and that prima facie the treatment falls within the provision of Regulation 3(1) and that this is direct discrimination."

14. The Judge plainly read regulation 3(4) as compelling him to find that discrimination was on the grounds of sexual orientation. The Appellants contend that in so doing he fell into error since it should not have been read so as to avoid asking `why' the discrimination had occurred, the very question whose answer would have identified the reason behind any difference in treatment: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337:

> "Para 7. ……. When the claim is based on direct discrimination… the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
>
> Para 11. …employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case."

15. The Appellants argue that since the restriction engages sexual practice not sexual orientation, as applied it affects those of any sexual orientation and practice who are not married. Applying a restriction equally to all is not direct discrimination; **Ladele v London Borough of Islington and another** [2010] 1 WLR 955 at para 29 ("**Ladele**"). I shall return to **Ladele** in more detail. The submission continues that were the discrimination on the basis of marital status or sexual conduct, then Regulation 3(4) could not convert it into direct discrimination on the basis of sexual orientation. Such a difference the Appellants argue has been recognised in cases dealing with other Regulations: **R (Amicus) v Secretary of State for Industry** [2004] IRLR 430 ("**Amicus**"). This case concerned claims by various trade unions with a very significant number of gay, lesbian or bisexual members

potentially affected by provisions of the Employment Equality (Sexual Orientation) Regulations (SI 2003/1661) made for the purposes of implementing Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation so far as it related to discrimination on grounds of sexual orientation, which contained a derogation in article 4 for the purposes of occupational requirement. The effect of Regulation 25 was to preserve "anything which prevents or restricts access to a benefit by reference to marital status." Richards J, as he then was, held that the Regulation was within the scope of the Directive. In an obiter dictum he went on to deal with an alternative submission that the Regulation was "compatible with the Directive since it is not discriminatory". It was submitted on behalf of the Secretary of State that there was no direct discrimination since the ground of the difference in treatment was marriage, not sexual orientation and the difference in treatment between married and unmarried couples did not amount to indirect discrimination since married and unmarried couples are not in a materially similar situation.

16. Richards J said:

> "164. I am inclined to agree with the submissions for the Secretary of State both as to the absence of direct discrimination and as to the absence of indirect discrimination. The consistent approach [of the ECJ], … has been to hold that married partners are not in a comparable position to same-sex partners. It is true that until [the Directive] came into force there was no prohibition of discrimination on grounds of sexual orientation in Community law. There is also some force in [the] submission that the application of a condition with which same-sex partners are unable to comply because they are precluded from marrying is discriminatory. I am not persuaded, however, that those considerations ……..justify the conclusion that [the] previous statements [of the ECJ] as to the lack of comparability between marriage and other relationships no longer hold good."

17. The Appellants submit that the words of Richards J answer the Judge's findings on direct discrimination. I am not persuaded that they do. As Mr Allen points out, the Secretary of State's submissions in the **Amicus** case could not be made in this case because Regulation 3(4) provides that married and unmarried couples are not in a materially different situation. Furthermore the **Amicus** case concerned the law of the European Community and Richards J was bound to follow the decisions of the ECJ on discrimination to the effect that married partners are not in a comparable position to same-sex partners.

18. The Appellants next argue that were the Judge correct to interpret Regulation 3(1) in such a way that the application of the restriction to the Respondents constituted direct discrimination, then he should have read down the Regulations so as to give effect to the provisions of the ECHR. The Appellants rely on **An Application for Judicial Review by the Christian Institute and others**, [2007] NIQB 66 ("**Christian Institute**"). In that case the Claimants opposed regulations prohibiting discrimination or harassment on grounds of sexual orientation on the

grounds inter alia that they offended orthodox Christian beliefs and violated rights under the ECHR.

19. The court found that the outlawing of harassment in the case of sexual orientation might involve interference with the freedom to manifest a religious belief. That right, on the facts before the court the teaching or maintaining that homosexuality was sinful, was engaged and overlapped with the right to free expression under art.10. An assessment of the balance of interests required close consideration of issues such as the actions of the parties, the measures in question, the value of the policy promoted and the right diminished. The conclusion of the court was that individual issues when raised should be decided by the County Court on a case-by-case basis. Having reviewed the authorities Weatherup J said at paragraph 52:

> "…In general the applicants contend that the Regulations have the effect that the protection afforded to sexual orientation in accordance with the right to respect for private life under Article 8 and Article 14 of the Convention outweighs the protection afforded to the manifestation of religious belief under Article 9 and 14 of the European Convention so that there is a lack of fair balance between the respective rights.
>
> 53. On the other hand the respondent contends that this Court should not undertake an examination of the Regulations in the abstract as civil liability…will be fact specific and should be determined on a case by case basis…in the County Court."

20. Weatherup J concluded that interference with the Applicants' rights and justification for it and the balance of interests in play required the close multi-factorial consideration for which the Respondent argued. He went on to say (para 66) that not every impact on the manifestation of religious belief constituted Article 9 interference: **R (Williamson) v Secretary of State for Education and Employment** [2005] 2 AC 246 ("**Williamson**.")

21. The Appellants contend that HHJ Rutherford should have recognised that the Regulations, interpreted in such a way that the application of the restriction to the Respondents constituted direct discrimination, are incompatible with the ECHR.

22. HHJ Rutherford said (para 38):

> "Are Regulations 3(1) and (4) incompatible with the European Convention?
>
> 38. I think that the answer to this question must be "no". The Regulations recognise the article 8 right of the claimants to respect for their private and family life. The defendant's right to have their private and family life and their home respected is inevitably circumscribed by their decision to use their home in part as an hotel. The regulations do not require them to take into their home (that

> is the private part of the hotel which they occupy) persons such as the claimants and arguably therefore do not affect the article 8 rights of the defendants. If I am wrong about that then the regulations are necessary to protect the convention rights of the claimants and are a proportionate response to achieve that end.
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> 39. The regulations do affect the right of the defendants to manifest their religion which is a right protected under article 9.2. This right however is not absolute and can be limited to protect the rights and freedoms of the claimants. It seems to me that in so far as the regulations do affect this right they are, as I have said above, a necessary and proportionate intervention by the state to protect the rights of others.
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> 40. The regulations give effect to Article 14, namely the prohibition of discrimination."

23. The Respondents of course accept that the Appellants' rights include a right to manifest their religious beliefs, in public or private, pursuant to article 9(1) of the ECHR, and their private rights pursuant to article 8(1) of the ECHR. That freedom of religion is one foundation of a democratic society within the meaning of the Convention, one of the most vital elements which make up the identity of believers and that it implies freedom to manifest one's religion by bearing witness in words and deeds is also not in issue; **Kokkinakis v Greece** 17 EHRR 397.

24. Neither is it in issue that the Appellants' freedom to manifest their beliefs and their private rights were subject to `such limitations as are prescribed by law for the protection of the rights and freedoms of others'. In issue however is whether Regulation 3(4) were "necessary in a democratic society ... for the protection of the rights and freedom of others". The Appellants argue that in the circumstances of this case it was not. Their relevant religious belief that sexual relations outside marriage were sinful and should be reserved exclusively for married couples is they contend an orthodox religious belief worthy of recognition in a modern democratic society: **Christian Institute** Para 50.

25. The Appellants were nearing retirement and consistently over many years had operated the challenged policy both before and after the Regulations came into effect. Consequently, so the submission goes, their freedom to live and act in accordance with their religious beliefs had been compromised by subordinate legislation introduced long after their then permissible policy was introduced, a factor which they suggest the Judge did not consider when to do so would have led him to see it as a "very particular characteristic of this case".

26. The Appellants argue that, consistent with the legislative intention of s13 Human Rights Act 1998, a reasonable balance is struck by not requiring them to promote what they believe to be a sin, namely sexual relations between unmarried persons: **Ontario Human Rights Commission v Brockie** [2002] 22 DLR (4th) 174 ("**Brockie**"), considered by Weatherup J. in **The Christian Institute** at paragraphs 86-88. In **Brockie** the court held that it was not an answer to say that

those who hold the relevant religious belief should not be free to offer services to sections of the public unless prepared to act inconsistently with the belief. Such an approach would lead to withdrawal from society of those holding it, which should be neither the aim nor function of human rights jurisprudence. It would risk the replacement of one set of predominant orthodox views with another. A careful balancing exercise is required.

27. The Appellants argue that HHJ Rutherford fell into error when holding that if he were wrong about the Regulations interfering with the Appellants' protected rights, the Regulations could not be interpreted compatibly with those rights. He said (para 41):

> "**Can the Regulations be read in a way compatible with the Convention?**
>
> 41. I can deal with this very shortly. It only arises if I am wrong in my view that the regulations are not incompatible. If I am wrong then it seems to me that there is no way of construing the regulations in a way which would make them compatible and I, as a judge in the County Court, have no alternative but to apply them.
>
> 42. It therefore follows that I find that the defendants have breached Regulation 4(1) and therefore acted unlawfully. Indeed it was accepted that if I found discrimination under Regulation 3 (whether direct or indirect) then this would be inevitable and there was no argument addressed to me in respect of Regulation 4 during the trial."

28. I can deal briefly with HHJ Rutherford's conclusion as to the powers of a judge sitting in the County Court. He was wrong to say in paragraph 41 that he had no alternative but to apply the Regulations even if they were incompatible with the ECHR. Unless the primary legislation dictates the contents of the Regulations (and section 81 of the Equality Act 2006 does not), any judge can strike down subordinate legislation (see section 4(3) of the HRA).

29. The Appellants argue that a proper interpretation would have given force to S13 of the Human Rights Act 1998, which required the Court to have particular regard to the importance of the right to freedom of thought, conscience and religion.

30. They further submit that an alternative route is open to them in reliance upon EU law. The argument (not advanced below) is that under the provisions of the EU Charter their religious beliefs are protected by articles 10 (freedom of thought, conscience and religion) and 15 (freedom to choose an occupation) of the Charter. The Lisbon Treaty whose provisions are part of European law, which itself forms part of the laws of England and Wales, gives effect to the Charter. Consequently, the submission is that regulation 3(4) should be interpreted so as to give effect to EU law. It is accepted that the Respondents' rights pursuant to article 7 (respect for private and family life) are also engaged. Article 52 permits some limitations on rights where they are provided by law, respect the essence of the rights and are

proportionate to meet a necessary objective recognised by the Union or for the protection of the rights of others.

The developed submissions of the Respondents on direct discrimination

31. The Respondents begin by submitting that the Appellants' reliance upon **Ladele** (that in applying the restriction equally to all they do not directly discriminate on grounds of sexual orientation) is to miss the point. Ms Ladele, a registrar employed by Islington Borough Council, wished, as contrary to her religious beliefs, to be relieved of the duty required of one in her position to officiate at civil partnerships. The Court of Appeal held that her refusal to perform them would amount to discrimination "as it cannot be said in the light of Regulation 3(4) that marriage and civil partnerships are materially different".

32. Under the Regulations motive for direct discrimination is irrelevant: **R (E) v Governing Body of JFS** [2010] 2 AC 728. ("JFS") E was Jewish by descent, his wife a convert through a non-orthodox synagogue. The Jewish Free School's admissions policy gave preference to children whose status was recognised by the Office of the Chief Rabbi (OCR), which required that the mother be Jewish by matrilineal descent or by conversion under orthodox auspices, or that the child had converted. No condition was met and the child was refused admission. The school argued that the discrimination was religious, not racial. A majority of the HL found the motive of the discriminator irrelevant. Lady Hale said:

> "This was…direct discrimination…It follows that, however justifiable….however benign the motives ..., the law admits of no defence."

33. Second, the Respondents submit that the restriction is directly discriminatory as excluding all homosexuals but not all heterosexuals since it confers a benefit only on married persons and on none other.

34. The Respondents rely heavily upon **James v Eastleigh Borough Council** [1990] 2 AC 751 ("**James**"). The plaintiff, who had retired, and his wife, both 61, used swimming baths run by the defendant council ("EBC"). Mrs James was admitted free of charge, the plaintiff had to pay as the council only provided free admittance to those of state pension age, for a man 65 for a woman 60. The plaintiff alleged discrimination. EBC argued that its criterion excluded both genders and consequently could not be discriminatory.

35. The majority in the HL found inter alia that the Social Security Act 1975 directly discriminated between men and women by treating women more favourably on the ground of their sex; the test to be applied was objective, and if, applying it, the answer would have been that the plaintiff would have received the same treatment but for his sex there was direct discrimination. A benign motive was irrelevant.

36. Although at first it might have appeared that the criterion for free admission was pensionable age, and thus not related to sex, in my view once one looked behind the pension, so as to speak, it was clear that by virtue of a statutory age threshold the criterion divided potential beneficiaries into two groups, men and women. The

question then became: "Would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex?" There was only one answer, that he would.

37. As to direct discrimination, the Respondents' third submission is that the Appellants have no option but to argue that where marriage and civil partnership are in issue the Regulations compel an impermissible approach to comparisons. Regulation 3(4) addresses who, when dealing with a civil partnership, is the comparator: "….that one of the persons (whether or not B) is a civil partner while the other is married shall not be treated as a material difference in the relevant circumstances." The Regulations prohibit treatment of those in a civil partnership in a way which differs from, and is less favourable than, treatment of those married.

38. The Respondents took us to the Explanatory Note attached to the Regulations which reads:

> "7.14 The Regulations will make clear that married persons and civil partners are in materially the same position for the purposes of the regulations. This would remove a possible obstacle to civil partners bringing a discrimination claim on grounds of sexual orientation against a provider of goods and services who denied them access to a benefit or service that was being offered to a married person in a similar situation."

39. Thus the Respondents submit that their treatment must be compared with that of others in the same material circumstances and, in light of Regulation 3(4), such others are those who are married. The Respondents were treated differently from (in the language of the Regulations, "less favourably than") a married couple who would have been afforded a double-bedded room. The only difference between their situation and that of a married couple is the Respondents' sexual orientation.

Conclusion on the issue of direct discrimination under the Regulations

40. Though I agree with the Respondents that **Ladele** does not assist the Appellants (and see below), for the reason the Court there gave, in my view notwithstanding lengthy submissions on various topics, the answer to this appeal lies in a consideration of **James**. It is fatal to the Appellants' case. An homosexual couple cannot comply with the restriction because each party is of the same sex and therefore cannot marry. In **James** the male plaintiff could never have a pension aged 61. The restriction therefore discriminates against the Respondents because of their sexual orientation just as the criterion at the swimming baths discriminated against Mr James because of his sex. For this reason alone it is directly discriminatory. Put another way, the criterion at the heart of the restriction, that the couple should be married, is necessarily linked to the characteristic of an heterosexual orientation. There has in my view been direct discrimination by virtue of Regulation 3(1) and (3)(a) together with Regulation 4 – less favourable treatment on grounds of sexual orientation.

41. As I have rehearsed, Mr Dingemans QC for the Appellants conceded that were his submissions on direct discrimination to fail, his arguments on indirect

discrimination could not succeed. That realism of that approach is evident from a consideration of the legislative framework taken together with the approach of the courts. In my view Regulation 14 reflects a clear decision by the legislator, the Secretary of State, with the approval of Parliament, as to the point of demarcation. Those who choose to offer services, especially (since there is specific reference to them) hoteliers, may not discriminate on grounds of sexual orientation. The Appellants are in effect asking this court to rewrite Regulations 3 and 14 by amending the dividing line and re-ordering the demarcation agreed by the legislator. This court would be loath to interfere with that decision. Respect is owed by the judiciary to the recent and closely considered judgment of a democratic assembly: **R. (on the application of Countryside Alliance) v Attorney General** [2008] H.R.L.R. 10 per Lord Bingham at paragraph 47, Lord Hope at paragraph 89, and Baroness Hale at paragraph 127. In **James v UK** (1986) 8 E.H.R.R. 123 the court stated that the margin of appreciation extended to the legislature in implementing social and economic policies should be wide.

42. It follows that I agree with the Respondents that it is not necessary to reach a conclusion on the issue of indirect discrimination.

43. I turn to the issue whether, insofar as Regulation 3 has the consequence that the restriction imposed by the Appellants upon the Respondents constitutes direct discrimination, it is compatible with the ECHR.

Article 8

44. To the extent to which under the Regulations the restriction imposed by the Appellants upon the Respondents constitutes direct discrimination, does it constitute a breach of the Article 8 rights of the Appellants? I can take this shortly. It does not. In my view, to find permissible a refusal to allow homosexual couples to share double-bedded accommodation offered to the public would to be breach that couple's rights under Article 8 read in conjunction with Article 14. As will be seen from my analysis of the proper approach to Article 9 (infra), the Regulations address equality in a commercial setting, regardless of sexual orientation.

Article 9

45. To fall within Article 9 a belief must be consistent with basic standards of human dignity or integrity, possess an adequate degree of seriousness and importance and be intelligible and capable of being understood, a threshold set out in **Williamson** – a case relating to teachers and parents in independent private schools who supported corporal punishment. Lord Nicholls said that it is not for the Court to judge a belief's "validity" by some objective standard, since freedom of religion protects a subjective belief. The Respondents suggested that, notwithstanding those words, in the present case the Judge found that the Appellants' belief in the sanctity of marriage fell within Article 9. There was some bridling on the part of the Appellants at this perceived slight upon them. They can be reassured. The Respondents were at pains throughout to acknowledge that the Appellants' principled stand was intended to bear witness to their interpretation of Christianity. Arguments on both sides recognized that co-existence in society

requires mutual acceptance of differing views and standards and each side readily bowed to the strongly held views of the other.

46. More important is that HHJ Rutherford found in their favour that the Appellants' running of an hotel along Christian principles was a manifestation of their religion. The Respondents argue that his approach to the ultimate question, whether interference with than manifestation could be justified as a legitimate aim, and whether the means of achieving it were appropriate and necessary, was unimpugnable. The legal framework for the interference, the Regulations, aims to ensure in a commercial context equality for all regardless of sexual orientation, and that civil partnerships are treated as is marriage for the purposes of the provision of goods, facilities and services, an aim recognized not only by the ECHR but also in domestic authority: **Ghaidan v Godin-Mendoza** [2004] 2 A.C. 557.

47. It is convenient at this stage to consider **Ladele** in the greater detail I indicated. Turning to Article 9 the court said:

> "**The Strasbourg jurisprudence on Article 9 of the Convention**
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> 54…Article 9(1) provides that everyone has 'the right to freedom of thought, conscience and religion' and to manifest that religion, but Article 9(2) states that the right to manifest religion or beliefs 'shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society' for, inter alia, 'the protection of the rights and freedoms of others'. It is clear that the rights protected by the article are qualified, and that it is only beliefs which are 'worthy of respect in a democratic society and are not incompatible with human dignity' which are protected – *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, paragraph 36. As Lord Hoffmann put it in *R (SB) v Governors of Denbigh High School* [2007]1AC 100, paragraph 50, 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing'.
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> 55 This appears to me to support the view that Ms Ladele's proper and genuine desire to have her religious views relating to marriage respected 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. This assessment of the assistance to be obtained from Article 9 in the present case is reinforced if one looks a little more closely at decisions of the Strasbourg Court.
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> 56 In *Pichon and Sajous v France* Application 49853/99 (2 October 2001), the Strasbourg Court pointed out that 'the main sphere protected by Article 9 is that of personal

convictions and religious beliefs' although it 'also protects acts that are closely linked to those matters such as acts of worship or devotion forming part of the practice of a religion or a belief'. Accordingly, the article did not protect pharmacists who claimed that their 'religious beliefs justified their refusal to sell contraceptives' as 'the sale of contraceptives is legal and occurs nowhere other than in a pharmacy', and the pharmacists could 'manifest [their] beliefs in many ways outside the professional sphere.'

57.[In[*C v United Kingdom* App. No.10358/83, (1983) 37 DR 142, the Commission …said at 147, that the article 'primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the forum internum.' Accordingly, as it went on to explain, Article 9 'does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief'.

58 Accordingly, in *Sahin v Turkey* (2007) 44 EHRR 5, the Grand Chamber … said that the need 'to maintain and promote the ideals and values of a democratic society', … can properly lead to 'restrict[ing] other rights and freedoms ... set forth in the Convention' …[and] that 'Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account'.

59 By contrast, decisions of the Strasbourg Court such as *Salguerio da Silva Mouta v Portug*al (2001) 31 EHRR 47 and *EB v France* (2008) 47 EHRR 509 emphasise that, ….'[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8'. … observations such as these demonstrate the importance which the Convention should be treated as ascribing to equality of treatment irrespective of sexual orientation.

60 Casting one's eyes beyond Europe, it is worth quoting what Sachs J, … said in Christian Education South Africa v Minister of Education (2000) 9 BHRC 53, paragraph 35:

'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere

only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.'

61 The conclusion reached by the South African Supreme Court in that case was that a ban on corporal punishment had to be complied with by Christians whose religious beliefs extended to believing in the right, indeed, in certain circumstances, the obligation of a teacher to chastise a child physically. This conclusion was, of course, consistent with the subsequent decision to much the same effect of the House of Lords in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246."

48. The arguments there set out are to my mind compelling. Their application to these facts is even clearer if, in paragraph 56, for "pharmacists" one substituted reference to the Appellants, when it might have read:

"Accordingly, the article did not protect hoteliers who claimed that their 'religious beliefs justified their refusal to provide double beds to homosexual couples' as 'the provision of hotel rooms is legal and occurs nowhere other than in an hotel', and the hoteliers could 'manifest [their] beliefs in many ways outside the commercial sphere."

49. I am fortified in my conclusion by a study of the judgment in **McFarlane v Relate Avon Ltd** [2010] IRLR 872. Laws LJ considered both jurisprudence and founding philosophy when he said:

"22. In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.

23 The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious imprimatur, but on the footing that

> in reason its merits commend themselves. So it is with core provisions of the criminal law: the prohibition of violence and dishonesty. The Judaeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy. And the liturgy and practice of the established Church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be true; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claims.
>
> 25 So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime."

50. The Appellants rely on **Brockie**. In that case a Christian printer was required to offer services to an homosexual group, but not required to print leaflets which actively promoted an homosexual lifestyle and which was dismissive of Christian beliefs. However, though in that case the printer was required positively to do something, here the Appellants were not. They were not put in a position which would have asked them so to behave as to suggest, wrongly, to an interested public that the views which apparently lay in their mouth were those they genuinely held. Far from it. All that happened here was the desire of the Respondents to rent a double-bedded room in a public hotel. I have no difficulty concluding that the discrimination here differs little from that in **Ladele**. The Appellants are able, as I have transposed the comments in **Pichon**, 'to manifest [their] beliefs in many ways outside the professional [commercial] sphere'.

51. I conclude that, to the extent to which under the Regulations the restriction imposed by the Appellants upon the Respondents constitutes direct discrimination, and to the extent to which the Regulations limit the manifestation of the Appellants' religious beliefs, the limitations are necessary in a democratic society for the protection of the rights and freedoms of others. The Appellants simply seek a further exception from the requirements in the Regulations, which already provide exceptions, in the case, for example, of certain landlords and of those who

permit others to share their homes. The Secretary of State has drawn what she considers the appropriate balance between the competing claims of hoteliers and (amongst others) homosexuals. Her decision has been approved by affirmative resolution. This court would be loath to interfere with her conclusions.

52. I should deal with one further submission, albeit advanced with a lighter touch, that the Appellants are old and nearing retirement. This comes nowhere near rendering Regulation 3(4) disproportionate. This Court should be slow to require the Secretary of State to make special provision for hoteliers in a similar position to the Appellants.

Section 13 Human Rights Act

53. I can deal shortly with the Appellants' argument as to S13 HRA. Its provisions require a court determining a question which might affect the exercise by a religious organization of the Convention right of freedom of thought, conscience, and religion to have "particular regard to the importance of that right". However it does not in my view on the facts of this case add to the requirements already set out in the Convention and, in any event, the present case is related not to a religious organization.

The EU Charter

54. Not raised at the trial but advanced here, against opposition from the Respondents to its late and impermissible surfacing and on the merits, were submissions in reliance on the EU Charter that there is no direct discrimination upon an interpretation of the Regulations consistently with the HRA and with the Charter. The latter was created as "necessary to strengthen the protection of fundamental rights in the light of changes in society, societal progress and scientific and technological developments by making those rights more visible in a Charter; reaffirmed with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms …". There was disagreement between the parties as to whether European Union law applies to purely domestic supply of services. The Appellants contend that where issues of fundamental rights and freedoms are engaged, it does., in reliance upon **R (S) v Secretary of State for the Home Department** [2010] EWHC 705 (Admin) ("**R(S)**"). Cranston J at paragraph 56, albeit in the context of asylum said "the level of protection afforded by the Charter may never be lower than that guaranteed by the Convention but it can be more extensive". The Respondent submits that the Charter does not apply to purely domestic supply of services and that **R(S)** does not advance the case.

55. I can take this shortly. Whether or not the Charter applied, it could afford to the Appellants no greater rights than those to be found within the ECHR Articles 14 and 9.

General comments in conclusion

56. Whilst the Appellants' beliefs about sexual practice may not find the acceptance that once they did, nevertheless a democratic society must ensure that their espousal and expression remain open to those who hold them. It would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the Appellants' beliefs); rather there should be achieved respect for the broad protection granted to religious freedom as underlined in **Kokkinakis**. Any interference with religious rights, specifically identified in article 9 and listed in article 14 of the ECHR, must satisfy the test of `anxious scrutiny'. However, in a pluralist society it is inevitable that from time to time, as here, views, beliefs and rights of some are not compatible with those of others. As I have made plain, I do not consider that the Appellants face any difficulty in manifesting their religious beliefs, they are merely prohibited from so doing in the commercial context they have chosen.

57. For the reason set out I conclude that the Respondents endured direct discrimination and I would dismiss this appeal.

Lord Justice Hooper

58. I agree with both judgments subject only to one caveat. In the last sentence of paragraph 66 of the Chancellor's judgment he includes the words "in a civil partnership". In my view it matters not in law whether the homosexual couple are in a civil partnership or not.

The Chancellor

59. I am grateful to Rafferty LJ for setting out the facts, arguments and relevant authorities so fully. I agree with her conclusions but add a few words of my own in recognition of the importance of the case to the parties and generally. I remind myself at the outset of certain key findings of HH Judge Rutherford. First, the hotel owned and run by Mr and Mrs Bull has seven guest rooms, three with double beds, a family room, two with twin beds and one single room. Second, the relevant belief of Mr and Mrs Bull, which the judge concluded was genuine, was and is that:

> "monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations between persons and that homosexual sexual relations (as opposed to homosexual orientation), and heterosexual sexual relations outside marriage, are sinful"

Mr Preddy and Mr Hall do not suggest that such belief was not genuinely held nor do they suggest that Mr and Mrs Bull do not enjoy the right to hold it under Article 9 ECHR. Third, in the management of their hotel Mr and Mrs Bull manifested their belief in their refusal to let any of the three double bedded rooms to any unmarried couple – a restriction which was not applied to any of the other four rooms in the hotel.

60. It is that restriction which Mr Preddy and Mr Hall contend constitutes unlawful discrimination against them under Regulation 3 of the Equality Act (Sexual Orientation) Regulations 2007 either directly under sub-paragraph (1) or indirectly under subparagraph (3). In the light of my conclusion it is only necessary to consider the former. That sub-paragraph provides:

> "For the purposes of these Regulations, a person ("A") discriminates against another ("B") if, on the grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances)."

Sub-paragraph (4) provides, so far as relevant:

> "For the purposes of paragraphs (1) ... the fact that one of the persons (whether or not B) is a civil partner while the other is married shall not be treated as a material difference in the relevant circumstances."

61. The judge concluded that the restriction constituted discrimination and was on the grounds of sexual orientation. Mr and Mrs Bull contend that this conclusion is wrong because they apply the restriction to persons of heterosexual and homosexual orientation alike if they are not married. But, in agreement with Rafferty LJ, that cannot, in my view, be a sufficient answer. The former may be married but the latter cannot be. It follows that the restriction is absolute in relation to homosexuals but not in relation to heterosexuals. In those circumstances it must constitute discrimination on grounds of sexual orientation. Such discrimination is direct. As Rafferty LJ has pointed out there is a direct analogy with the decision of the House of Lords in **James v Eastleigh BC** [1990] 2 AC 751. This conclusion is not affected by the existence or terms of Regulation 3(4).

62. Mr and Mrs Bull then submit that such a conclusion is incompatible with Article 9 ECHR as it would involve an infringement of their rights under that article. Article 9 provides:

> **"Freedom of thought, conscience and religion**
>
> 1. 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.

> 2. Freedom to manifest one's religion or beliefs shall be 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."

The restriction on the letting of the hotel's double bedded rooms applied by Mr and Mrs Bull in the management of their hotel is a manifestation of their religious belief within Article 9(2).

63. It is clear from the terms of Article 9(2) that the right to manifest one's belief, as opposed to the right to hold it, is qualified by such "limitations as are prescribed by law and are necessary in a democratic society… for the protection of the rights and freedoms of others." Such rights include the rights of Mr Preddy and Mr Bull under the Equality Act (Sexual Orientation) Regulations 2007. If, as I conclude, Mr and Mrs Bull directly discriminated against Mr Preddy and Mr Hall then the fact that they did so by way of manifestation of their religious belief does not give rise to any incompatibility between the rights of Mr and Mrs Bull under Article 9 and the rights of Mr Preddy and Mr Hall under the Equality Act (Sexual Orientation) Regulations.

64. Similar points may be made in relation to the rights of Mr Preddy and Mr Hall under Articles 8 and 14. Article 8 provides:

> **"Right to respect for private and family life**
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin,

> association with a national minority, property, birth or other status."

If any of those rights is engaged then the manifestation of their religious beliefs by Mr and Mrs Bull cannot excuse their direct discrimination of Mr Preddy and Mr Hall.

65. The effect of such limitations of the right to manifest a religious belief is exemplified by the decision of the Court of Appeal in **Ladele v London Borough of Islington** [2010] 1 WLR 955. As counsel for Mr Preddy and Mr Hall put it, no individual is entitled to manifest his religious belief when and where he chooses so as to obtain exemption in all circumstances from some legislative provisions of general application. The judge concluded:

> "39...It seems to me that in so far as the regulations do affect this right they are, as I have said above, a necessary and proportionate intervention by the state to protect the rights of others.
>
> 40. The regulations give effect to Article 14, namely the prohibition of discrimination."

66. I agree. Although described as private, the hotel owned and run by Mr and Mrs Bull is available to all. Moreover the rooms available to the guests are not in the part of the building Mr and Mrs Bull occupy as their home. The religious beliefs of Mr and Mrs Bull do not exempt them from observing the regulations in their ownership and management of the Hotel. In short, they are not obliged to provide double bedded rooms at all, but if they do, then they must be prepared to let them to homosexual couples, at least if they are in a civil partnership, as well as to heterosexual married couples.

67. I agree with Rafferty LJ that the judge was right to conclude that Mr and Mrs Bull had directly discriminated against Mr Preddy and Mr Hall in refusing to let to them the double bedded room they had booked. There is, therefore, no need to consider the alternative case of indirect discrimination under regulation 3(3), nor the further points under s.13 HRA. I too would dismiss this appeal.