

Religion and Discrimination in the United Kingdom

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Historical, Cultural and Social Background

Historically, the idea that religious discrimination was undesirable came relatively late to the various parts of the United Kingdom. Even today, the courts are struggling to define its scope, the recent legislation giving limited guidance.

In England and Ireland the removal of Papal jurisdiction led to discrimination against those who remained loyal to Rome and, to a much lesser extent, against Protestant dissenters from the Established Church. A series of Catholic Relief (or Catholic Emancipation) Acts was passed in the late 18th and early 19th century, an especially significant Act being that of 1829, removing most of the disabilities applying to Roman Catholics. A few remaining ones were removed by the Roman Catholic Relief Act 1926 and a special Act in 1974¹ allowed a Roman Catholic to be appointed to the office of Lord Chancellor. Roman Catholics are still prohibited from succeeding to the Throne or serving as Regent. Protestant dissenters were not targeted in the same way, but many public offices were at one stage reserved to members of the Church of England. It was only in 1866 that others were able to graduate in the University of Oxford.

In Scotland the reformation took a different form and for several centuries there was a struggle between those who favoured episcopal or presbyterian forms of government; for much of the 18th century what is now the Scottish Episcopal Church (an Anglican church) was discriminated against through the Penal Laws, repealed in 1792.

Northern Ireland, separated from the rest of Ireland in 1920 and remaining part of the United Kingdom, is a special case. Religious divisions between Catholics and Protestants (which in this context include the (Anglican) Church of Ireland) are reflected in political divisions between Nationalists or Republicans and Unionists and, as explained below, this has produced a different approach to anti-discrimination legislation.

Although the United Kingdom had become a party to the various United Nations instruments and was among the first to ratify the European Convention, they had for many years extraordinarily little impact on the law or legal debate in the United Kingdom. That is only partly explained by the fact that until the passage of the Human Rights Act 1998 the ECHR was not part of domestic law and proceedings under it had to be taken in Strasbourg.

One of the very few references to the international material is to be found in *Ahmad v Inner London Education Authority*² where the Court of Appeal held that the dismissal of the appellant school teacher for absenting himself from school to attend Friday prayers in the local mosque was justified³. Scarman LJ, dissenting, explained something of the reasons. He referred to the governing legislation enacted in 1944⁴. It had never previously been

¹ Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974.

² [1978] QB 36.

³ See also *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932 (same result where a Christian refused to work on Sundays).

⁴ Education Act 1944, s 30, which provided that 'no person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship, from being a

considered by the courts. This was for a number of reasons: one was that education authorities had sought to comply with the section by not asking questions, the theory being that, if you do not know a man's religion, you could not discriminate against him on that ground. Secondly, there were until recently no substantial religious groupings in England which fell outside the broad categories of Christian and Jew. So long as there was no discrimination between them, no problem was likely to arise. However, argued Scarman LJ, society had changed since 1944: religions, such as Islam and Buddhism, had substantial followings in England. The change in legal background was no less momentous. The United Kingdom had enacted a series of statutes after it had ratified the European Convention on Human Rights and in the light of its obligations under the Charter of the United Nations. It was necessary 'to construe and apply the legislation not against the background of the law and society of 1944 but in a multi-racial society which has accepted international obligations and enacted statutes designed to eliminate discrimination on grounds of race, religion, colour or sex'.

The development of anti-discrimination legislation in Great Britain in the late decades of the 20th century seems to have been prompted at least in its first phase more by national issues than by the UN and European developments. The development can be traced through such enactments as the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, and the Disability Rights Commission Act 1999. In implementation of the European Directive were several sets of Regulations⁵, but most of the earlier legislation has been replaced by two more recent Acts, the Equality Act 2006 and the Equality Act 2010.

Despite the close relationship in practice between race and religion, the enactment of the Race Relations Act 1976 was not accompanied by any proposal to deal with religious discrimination. Lord Templeman, in a case which reached the House of Lords⁶, made a cryptic comment:

'By section 3 of the [1976] Act the racial groups against which discrimination may not be practised are groups "defined by reference to colour, race, nationality or ethnic or national origins. ..." Presumably Parliament considered that the protection of these groups against discrimination was the most necessary. The Act does not outlaw discrimination against a group of persons defined by reference to religion. Presumably Parliament considered that the amount of discrimination on religious grounds does not constitute a severe burden on members of religious groups.'

The omission has now been made good.

teacher in a county school or in any voluntary school, or from being otherwise employed for the purposes of such a school'.

⁵ The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660); the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661; the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467; and the Employment Equality (Age) Regulations 2006, SI 2006/1031.

⁶ *Mandla (Sewa Singh) v Lee* [1983] 2 AC 548.

The duty not to discriminate

Institutional arrangements

The Equality Act 2006 established the Commission for Equality and Human Rights. This replaced three previous separate bodies (the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission) and gave it new responsibilities for promoting equality and combating unlawful discrimination in three new areas, namely sexual orientation, religion or belief, and age, and also more generally for promoting human rights⁷.

Under Schedule 1 to the 2006 Act⁸, the Commission consists of between 10 and 15 individuals appointed by the relevant Minister. At least one Commissioner must be, or have been, a disabled person; one, appointed in consultation with the Scottish Ministers, must be aware of conditions in Scotland; and one, appointed in consultation with the Welsh Ministers, must be aware of conditions in Wales. Commissioners hold office for a term of between two and five years and are eligible for re-appointment. One Commissioner is appointed as Chairman, and the Commission itself appoints a Chief Executive. The Commission may appoint one or more 'Investigating Commissioners' to carry out inquiries and investigations under the Act. The Commission may establish one or more advisory committees and must have a Disability Committee, a Scotland Committee and a Welsh Committee.

Discrimination on grounds of religion and belief

The Employment Equality (Religion or Belief) Regulations 2003 made unlawful discrimination on the grounds of sexual orientation and religion or belief in employment and vocational training. These Regulations implemented the UK's obligations under the Directive 2000/78/EC. It is important to note that in the United Kingdom, regulations to give effect to EU instruments do not require parliamentary approval but are made by ministerial order, subject to the possibility of a debate in either House of Parliament if, exceptionally, that is obtained.

More general provisions on this subject were first enacted in the Equality Act 2006 but they were repealed and replaced by the current provisions in the Equality Act 2010.

Meaning of 'religion or belief'

Religion or belief is declared to be a 'protected characteristic' by the Act⁹. 'Religion' is defined as 'any religion'¹⁰, not a major clarification; a reference to religion includes a reference to a lack of religion¹¹; and 'belief' is defined as 'any religious or philosophical

⁷ For the process leading up to the establishment of the CEHR see a Government consultation paper *Equality and Diversity: Making it Happen* published in October 2002 and a White Paper *Fairness for All: A New Commission for Equality and Human Rights* (Cm 6185), published in May 2004.

⁸ The Schedule has been amended on a number of occasions, but not so as to affect what is said in the text.

⁹ Equality Act 2010, s 4.

¹⁰ Equality Act 2010, s 10(1).

¹¹ *Ibid.*

belief' and a reference to belief includes a reference to a lack of belief¹². There was discussion in the House of Lords as to the significance of the word 'philosophical': a proposal to omit the word was resisted by a member of the British Humanist Association and also the Bishop of Chichester; the underlying issue was really about the 'Church of Scientology', and the Government indicated that there was no intention to include such a body¹³.

The matter was tested in the courts in *Grainger plc v Nicholson*¹⁴. The claimant, Mr Nicholson, was employed by a property company. The company dismissed him, saying that this was on the ground of redundancy. He argued that he was in fact dismissed because of his strong philosophical belief in man-made climate change. Quite how this affected his work is not clear from the report of the case which addressed the abstract question whether such a belief fell within the Employment Equality (Religion or Belief) Regulations 2003, the relevant language being the same as that in the 2010 Act.

The employer argued that the term 'philosophical belief' referred to a belief that was similar to a religious belief. It had to be a belief based on a philosophy of life, not a scientific or political belief or opinion, or a lifestyle choice. It had to be part of a system of beliefs. The Employment Appeal Tribunal found in favour of Mr Nicholson. The case law relating to the European Convention on Human Rights¹⁵ was directly material and accordingly, the following limitations to the term 'philosophical belief' apply: (i) the belief must be genuinely held; (ii) it must be a belief and not an opinion or viewpoint based on the present state of information available; (iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour; (iv) it must attain a certain level of cogency, seriousness, cohesion and importance; and (v) it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

It was necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief. However, even a religious belief was not required to be one shared by others. It was not therefore a bar to a philosophical belief being protected by the law that it was not shared by others; nor was it a bar that it was a 'one-off belief', namely a belief that did not govern the entirety of a person's life. Pacificism and vegetarianism could both be described as one-off beliefs in that sense, but both would be philosophical beliefs. The philosophical belief in question did not need to constitute or allude to a fully-fledged system of thought, provided that it otherwise satisfied the limitations set out in the paragraph above. A philosophical belief did not need to be an "-ism". Although the support of a political party might not meet the description of a philosophical belief, a belief in a political philosophy, such as socialism, Marxism, communism, or free-market capitalism, might qualify. If a person could establish that he holds a philosophical belief which is based on science, as opposed, for example, to religion, then that is no reason to disqualify it from protection. For example, Darwinism must be plainly capable of being such a philosophical

¹² Equality Act 2010, s 10(2).

¹³ *Parliamentary Debates (Lords)* 13 January 2010.

¹⁴ [2010] IRLR 4.

¹⁵ The tribunal cited *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 and the discussion in the English case of *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, HL.

belief, albeit that it may be based entirely on scientific conclusions (not all of which may be uncontroversial).

Remedies and scope

The Act creates some offences but in the main any remedy is civil in nature. Claims in relation to alleged contraventions may be made to a county court¹⁶ or in certain cases to a tribunal dealing with the specialist area.

The Act contains a limited provision¹⁷ allowing positive action in certain circumstances, for example to encourage more from an ethnic minority to take up certain opportunities.

The Act covers both direct and indirect discrimination¹⁸. It also deals with harassment¹⁹ and victimisation²⁰. The contexts in which the Act applies are the provision of services, premises, employment (including business partnerships), the holding of offices (of especial relevance as most clergy are office-holders rather than employees), pensions, schools, further and higher education (including universities), and associations. Related provisions deal with such matters as transport.

Case-law

There has been a large body of case-law and some of the decisions affecting Christians have attracted criticism not only from the Church press but also from the Equality and Human Rights Commission itself. A number of decisions may be mentioned, four of which are the subject of continuing proceedings in the European Court of Human rights²¹.

In *London Borough of Islington v Ladele*²², Ms Ladele worked as a registrar of marriages, which involved presiding at civil weddings. When same-sex 'civil partnerships' were introduced in England, the duties of a registrar were extended to include presiding at the registration of such partnerships. Ms Ladele refused to carry out that additional work, because to do so was inconsistent with her Christian religious beliefs. She was disciplined and alleged religious discrimination. It was held that there was no direct discrimination as Ms Ladele had not been discriminated against or subjected to harassment on the basis of her religious beliefs, but because she had failed to perform her duties. Any indirect discrimination was objectively justified as a proportionate measure designed to give effect to the principle of equality of treatment that public authorities were expected to respect.

In the Court of Appeal, Laws LJ offered an analysis much quoted in later cases:

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 art 9 of the [Convention] offer

¹⁶ In Scotland, a Sheriff's court.

¹⁷ Equality Act 2010, s 158.

¹⁸ Equality Act 2010, ss 13 (direct discrimination) and 19 (indirect discrimination).

¹⁹ Equality Act 2010, s 26.

²⁰ Equality Act 2010, s 27.

²¹ *Ladele v UK*; *McFarlane v UK* (App nos 51671/10 and 36516/10); *Eweida v UK*; *Chaplin v UK* (App nos 48420/10 and 59842/10).

²² [2009] EWCA Civ 1357.

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. ... The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers 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. ... The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. ... So it is that the law must firmly safeguard the right to hold and express religious beliefs. 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.'

This has been interpreted²³ as meaning that a distinction falls to be drawn between treatment on the grounds of a person's beliefs and on the grounds of the manifestation of those beliefs. That seems a very crude interpretation; the law is more subtle.

*McFarlane v Relate Avon Ltd*²⁴ concerned a counsellor working for relate, a marriage guidance body, who was dismissed when he refused on the grounds of his Christian beliefs to counsel same-sex couples. The Employment Appeal Tribunal reached the same conclusion, and on similar grounds, to that in *Ladele*.

In *Eweida v British Airways plc*²⁵ the claimant was employed by British Airways as a member of its check-in staff. The airline allowed Muslim headscarves and Sikh turbans, but a cross worn around the neck was forbidden unless it could be concealed from view. The courts dismissed her claims of direct and indirect discrimination. Ms Eweida's complaint was held to arise from a personal objection which did not result from any doctrine of faith. There had been no interference with her ability to practise her faith. Indirect discrimination required some element of group disadvantage which was found not to exist on the facts. *Chaplin v Royal Devon and Exeter NHS Foundation Trust* had essentially identical facts, the claimant being a nurse.

The Equality and Human Rights Commission has sought leave to intervene in the Strasbourg proceedings. It issued a statement in July 2011²⁶ saying:

Judges have interpreted the law too narrowly in religion or belief discrimination claims. If given leave to intervene, the Commission will argue that the way existing human

²³ *Power v Greater Manchester Police Authority* (EAT, October 2010).

²⁴ [2010] IRLR 196.

²⁵ [2010] EWCA Civ 80, followed in *Chatwal v Wandsworth Borough Council* (EAT, 6 July 2011) (Sikh employee refused to join fridge-cleaning rota as he objected to handling meat).

²⁶ EHRC Press Release, 11 July 2011.

rights and equality law has been interpreted by judges is insufficient to protect freedom of religion or belief. It will say that the courts have set the bar too high for someone to prove that they have been discriminated against because of their religion or belief; and that it is possible to accommodate expression of religion alongside the rights of people who are not religious and the needs of businesses.

The Commission is concerned that rulings already made by UK and European courts have created a body of confusing and contradictory case law. For example, some Christians wanting to display religious symbols in the workplace have lost their legal claim so are not allowed to wear a cross, while others have been allowed to after reaching a compromise with their employer. As a result, it is difficult for employers or service providers to know what they should be doing to protect people from religion or belief based discrimination. They may be being overly cautious in some cases and so are unnecessarily restricting people's rights. It is also difficult for employees who have no choice but to abide by their employers decision.

The Commission thinks there is a need for clearer legal principles to help the courts consider what is and what is not justifiable in religion or belief cases, which will help to resolve differences without resorting to legal action. The Commission will propose the idea of 'reasonable accommodations' that will help employers and others manage how they allow people to manifest their religion or belief.

Reference can finally be made to *R (on the application of Johns) v Derby City Council*²⁷. The applicants, who were Pentecostals, wished to be approved as foster parents, but the social workers indicated that the applicants' view that sexual acts were only proper within marriage made it unlikely that they would be approved²⁸. In a strongly-worded judgment, the Divisional Court followed *Ladele* and held that if the Council's treatment of their case was the result of the claimants' expressed antipathy, objection to, or disapproval of homosexuality and same-sex relationships it was clear that it would not be because of their religious belief.

Exceptions and exemptions

The seemingly comprehensive scheme of the Equality Act 2010 is subject to a very large number of exceptions and special provisions. So, inter alia:

- a) it is declared not to be a contravention of the Act for a charity to continue a practice it has followed since before 18 May 2005²⁹ of requiring members, or persons wishing to

²⁷ [2011] EWHC 375 (Admin).

²⁸ The court cited the National Minimum Standards for Fostering Services emphasised the need to value diversity, to promote equality and to value, encourage and support children in a non-judgmental way, regardless of their sexual orientation or preference. That duty did not apply only to the child and the individual placement, but to the wider context, including the main foster carer, a child's parents and the wider family, any of whom might be homosexual. In those circumstances it was quite impossible to maintain that a local authority was not entitled to consider a prospective foster carer's views on sexuality, least of all when, as in the instant case, it was apparent that the views held and expressed by the claimants might affect their behaviour as foster carers.

²⁹ The date is that of the introduction of the bill which became the Equality Act 2006.

become members, to make a statement which asserts or implies membership or acceptance of a religion or belief; or of restricting access by members to a benefit, facility or service to those who make such a statement³⁰;

- b) so far as the provision of services is concerned there is an exemption relating to religious or belief-related discrimination, in connection with the curriculum of a school; admission to a school which has a religious ethos; acts of worship or other religious observance organised by or on behalf of a school (whether or not forming part of the curriculum); the responsible body of a school which has a religious ethos; transport to or from a school; and the establishment, alteration or closure of school³¹;
- c) a general exemption for acts authorised under other statutes applies to the special rules in the Schools Standards and Framework Act 1998 as to the ability of schools to apply religious tests in appointing certain members of the teaching staff³²;
- d) in respect of religious or belief-related discrimination, there are exceptions applying in certain immigration contexts³³ and to existing insurance policies³⁴;
- e) it is not a contravention of the sex discrimination provisions for a minister of religion to provide a service³⁵ only to persons of one sex or separate services for persons of each sex, if the service is provided for the purposes of an organised religion, it is provided at a place which is (permanently or for the time being) occupied or used for those purposes, and the limited provision of the service is necessary in order to comply with the doctrines of the religion or is for the purpose of avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers³⁶;
- f) there are special provisions applying generally to 'organisations relating to religion or belief'³⁷, which require more extended treatment.

Religious organisations

Such an organisation is defined by reference to its purpose, which must be to practise the religion, to advance the religion, to teach the practice or principles of the religion, to enable persons of the religion to receive benefits, or to engage in activities, within the framework of that religion, or to foster or maintain good relations between persons of different religions, but an organisation does not qualify if its sole or main purpose is commercial. The Act provides that such an organisation (or a person or minister acting under its auspices) does not contravene Parts 3, 4 or 7 of the Act³⁸, in certain cases which would otherwise be discrimination on the ground of religion or belief or of sexual orientation. The actions which

³⁰ Equality Act 2010, s 193(5)(6).

³¹ Equality Act 2010, Sch 3, para 11. There are further exemptions in Sch 11, para 5.

³² Equality Act 2010, Sch 22.

³³ Equality Act 2010, Sch 3, para 18.

³⁴ Equality Act 2010, Sch 3, para 23.

³⁵ 'Service' is used here in the general sense and is not limited to services in the sense of religious rites or ceremonies.

³⁶ Equality Act 2010, Sch 3, para 29.

³⁷ Equality Act 2010, Sch 23.

³⁸ These Parts deal with services, premises and associations.

are allowed are restricting (a) membership of the organisation; (b) participation in activities undertaken by the organisation or on its behalf or under its auspices; (c) the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices; or (d) the use or disposal of premises owned or controlled by the organisation. There are further requirements, differently expressed in the two cases of religion or belief and of sexual orientation:

- A restriction relating to religion or belief may only be imposed (a) because of the purpose of the organisation, or (b) to *avoid causing offence, on grounds of the religion or belief to which the organisation relates, to persons of that religion or belief.*
- A restriction relating to sexual orientation may only be imposed (a) because it is necessary to comply with the doctrine of the organisation, or (b) *to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers*³⁹.

There is some quite complicated history behind this provision. When the Sex Discrimination Act 1975 was being drafted, it was obvious that some provision was needed to deal with the position of those churches which do not ordain women. Section 17 of that Act provided⁴⁰:

(1) Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to *comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.*

The italicised language is very vague and was much criticised. When the Employment Equality (Sexual Orientation) Regulations 2003⁴¹ were made in implementation of Council Directive 2000/78/EC, a group of trade unions challenged the validity of a number of provisions⁴², including regulation 7(3) which provided an exemption

'where –

- (a) the employment is for purposes of an organised religion;
- (b) the employer applies a requirement related to sexual orientation –
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to *avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; ...'*

It will be seen that the formula used now spoke of a 'conflict' and not merely 'offending'; and instead of 'religious susceptibilities' there is 'strongly held religious convictions'. The language is probably clearer, though how one determines whether a religious conviction is held 'strongly' is not at all clear.

Regulation 7(3) was not included in the draft regulations originally published for the purposes of consultation. It was added as a result of representations from the churches,

³⁹ Or in the case of a belief, the strongly held convictions relating to the belief of a significant number of the belief's followers.

⁴⁰ In the form in which it was enacted; a different formula was substituted by the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467, reg. 20(1).

⁴¹ SI 2003/1661.

⁴² *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin).

including in particular the Archbishops' Council of the Church of England. The trade unions argued that the regulation was not a proper transposition of article 4 of the Directive. Whether it was a correct transposition had been doubted by Parliamentary Joint Committee on Statutory Instruments⁴³, and a debate was secured in the House of Lords on the draft regulations by Lord Lester of Herne Hill QC⁴⁴. The Government minister, Lord Sainsbury of Turville, explained the Government's intentions:

Article 4(1) of the European directive is quite clear that religious considerations can be taken into account. What we are debating this evening is exactly where that line is drawn. We believe that Regulation 7(3) is lawful because it pursues a legitimate aim of preventing interference with a religion's doctrine and teaching and it does so proportionately because of its narrow application to a small number of jobs and the strict criteria which it lays down This is no 'blanket exception'. It is quite clear that Regulation 7(3) does not apply to all jobs in a particular type of organisation. On the contrary, employers must be prepared to justify any requirement relating to sexual orientation on a case by case basis. The rule only applies to employment which is for the purposes of 'organised religion', not religious organisations. There is a clear distinction in meaning between the two. A religious organisation could be any organisation with an ethos based on religion or belief. However, employment for the purposes of an organised religion clearly means a job, such as a minister of religion, involving work for a church, synagogue or mosque.

Counsel for the trade unions argued that the exemption would have a much wider scope. he gave examples:

'(a) a church is unwilling to engage a homosexual man as a cleaner in a building in which he is liable to handle religious artefacts, to avoid offending the strongly-held religious convictions of a significant number of adherents; (b) a school for girls managed by a Catholic Order dismisses a science teacher on learning that she has been in a lesbian relationship, reasoning that such a relationship is contrary to the doctrines of the Order; (c) a shop selling scriptural books and tracts on behalf of an organisation formed for the purpose of upholding and promoting a fundamentalist interpretation of the Bible is unwilling to employ a lesbian as a sales assistant since her sexual orientation conflicts with the strongly held religious convictions of a significant number of Christians and/or of that particular organisation; (d) an Islamic institute open to the general public but frequented in particular by Muslims is unwilling to employ as a librarian a man appearing to the employer to be homosexual, reasoning that his sexual orientation will conflict with the strongly held religious convictions of a significant number of Muslims.'

Without commenting directly on these examples, Richards J held that the regulation was valid. He noted that the earlier formulation in the Sex Discrimination Act 1975 had never been criticised as not a fair reflection of the European legislation.

Given that history, it is not surprising that very similar language is now to be found in the Equality Act 2010.

⁴³ Twenty-First Report (13 June 2003), paras 1.11-1.20.

⁴⁴ See *Parliamentary Debates (Lords)* 17 June 2003.

Northern Ireland

It is necessary to give a separate account of the position in Northern Ireland. Council Directive 2000/78/EC itself recognises the special circumstances in Northern Ireland, article 15 contains two special provisions:

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation⁴⁵.
2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

The European Directives have been implemented in Northern Ireland by a series of regulations which are closely based on those applying in Great Britain; they call for no further treatment. But there is one distinct piece of legislation in Northern Ireland which is important in the present context, the Fair Employment and Treatment (Northern Ireland) Order 1998⁴⁶. This is concerned with 'discrimination on the ground of religious belief or political opinion'⁴⁷ extended in 2003 to 'any religion or similar philosophical belief'⁴⁸. It is further provided that 'references to a person's religious belief or political opinion include references to (a) his supposed religious belief or political opinion; and (b) the absence or supposed absence of any, or any particular, religious belief or political opinion'⁴⁹ and there is an exclusion which speaks volumes about the situation in Northern Ireland:

- (4) In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear⁵⁰.

⁴⁵ The Police (Northern Ireland) Act 2000, s 46 provides that in making appointments on any occasion, the Chief Constable shall appoint from the pool of qualified applicants formed for that purpose an even number of persons of whom (a) one half shall be persons who are treated as Roman Catholic; and (b) one half shall be persons who are not so treated. It survived a challenge based on art 9 ECHR in *Re Parsons' Application for Judicial Review* (NI CA, June 2003).

⁴⁶ SI 1998/ 3162 (NI 21).

⁴⁷ Fair Employment and Treatment (Northern Ireland) Order 1998, art 3(1)(a). In *McKay v Northern Ireland Public Service Alliance* [1994] NI 103 (NI CA) it was said that 'the meaning of "political opinion" is obscure and incapable of precise definition'.

⁴⁸ Fair Employment and Treatment (Northern Ireland) Order 1998, art 2(2) as inserted by SR 2003/520.

⁴⁹ Fair Employment and Treatment (Northern Ireland) Order 1998, art 2(3).

⁵⁰ See *McConkey v The Simon Community* [2009] UKHL 24 (includes an opinion held in the past).

So entrenched are religious and political divisions in Northern Ireland that the case-law shows attempts to apply the concept of religious or political discrimination to matters as diverse as the flying of the Union flag, the grant of fishing licences, support for Gaelic football, the closure of a swimming pool on Sundays, and rules forbidding prisoners to use the Irish language in craft work.

Article 4 of the Order refers to 'affirmative action', defined as 'action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including (a) the adoption of practices encouraging such participation; and (b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation'.