

# HUMAN RIGHTS

## Balancing diversity with freedom of speech and religion: finding the correct balance

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### Introduction:

The topic of free speech and diversity focuses on the opposition between the desire to promote diversity and equality on the one hand, and the need to ensure an individual's right to express themselves on the other. It incorporates issues of refusing to provide public services on religious grounds and the restriction of anti-diversity religious speech and actions, particularly in an employment setting.

This piece will examine the relevant legal framework, and analyse cases demonstrating the application of relevant law and the conflicting interests that are present. It will consider whether a correct balance exists between the need to protect freedom of speech and religion, and the popular desire to promote diversity, as well as suggesting that the current law is, at least in certain circumstances, overly restrictive. For example, in the case of *Randall v Trent College Ltd*,<sup>1</sup> a school chaplain was made redundant after telling students that they “did not have to accept the... ideologies of LGBT+ activists where they conflict with Christian values”.<sup>2</sup>

### The legal framework

Article 10 of the European Convention on Human Rights sets out an individual's “right to freedom of expression”, which includes “freedom to hold opinions and to... impart information”. Furthermore, Article 9 is particularly important in this context, as it sets out an individual's right to “freedom of thought, conscience and religion”, encompassing a right, “in public or private, to manifest [one's] religion or belief”. Articles 9 and 10, however, are conditional rights and states can interfere with them where it is deemed “necessary in a democratic society” for protecting the rights of others.<sup>3</sup> For example, if someone were to express homophobic speech, their article 9 and 10 rights could be lawfully restricted in an effort to protect another's article 8 “right to respect for... private and family life”. Furthermore, article 9 could be limited pursuant to a state's duty, under article 14, to ensure people are free from “discrimination on any ground”, in their “enjoyment of the [ECHR] rights”.

There are also relevant statutory provisions. For example, s.29(1) of the Equality Act 2010 states that “[a] person... concerned with the provision of a service to the public... must not discriminate against a person requiring the service by not providing the person with the service.” The Act also prevents direct discrimination “because of a protected characteristic”,<sup>4</sup> which includes “gender reassignment” and “sexual orientation.”<sup>5</sup> Furthermore, the criminal law can also be applicable, as the Public Order Act 1986 states that it is an offence to use “threatening words or behaviour,” with the intention “to stir up religious hatred... or hatred on the grounds of sexual orientation”.<sup>6</sup> Additionally, the Hate Crime and

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<sup>1</sup> [2023] 2 WLUK 493 (ET).

<sup>2</sup> DLA Piper, ‘Randall v Trent College (2020)’ (7 February 2024) <<https://blogs.dlapiper.com/beaware/randall-v-trent-college-2020/>> accessed 25 May 2024.

<sup>3</sup> Article 10(2), Article 9(2).

<sup>4</sup> Equality Act 2010, section 13(1).

<sup>5</sup> Ibid, s. 4.

<sup>6</sup> Public Order Act 1986, section 29B(1).

Public Order (Scotland) Act 2021, heavily criticised by JK Rowling,<sup>7</sup> affords “similar protections to people on grounds including... religion... and transgender identity.”<sup>8</sup>

### **Analysis of case law – how do the courts attempt to resolve conflicts?**

This section will examine cases relevant to diversity and freedom of religion in an effort to demonstrate some conflicts that exist. Briefly, these include the conflict between an employee’s belief and their employer’s diversity policy, and the duty to provide public services. It is important to establish what sort of beliefs are and are not subject to protection. The case of *Grainger Plc v Nicholson*<sup>9</sup> is helpful as it sets out the criteria for a “philosophical belief”. These criteria can also be used to determine whether a belief is subject to protection pursuant to article 9 ECHR and the Equality Act. They include a requirement that the belief is “genuinely held”, that the belief concerns “a weighty and substantial aspect of human life and behaviour”, that it does “not conflict with the fundamental rights of others”, and that it is “not incompatible with human dignity”.<sup>10</sup> Thus, for example, English nationalism was held not to be a philosophical belief,<sup>11</sup> because it was “not worthy of respect in a democratic society”.<sup>12</sup>

Regarding the conflict between freedom of religion and promoting diversity, many examples can be found within an employment setting. For example, in *Eweida and Others v United Kingdom*,<sup>13</sup> Ms Ladele, a Christian, saw marriage as “the union of one man and one woman”<sup>14</sup> and thus refused to be involved in creating same-sex civil partnerships, culminating in the loss of her job.<sup>15</sup> Similarly, Mr McFarlane, also a Christian, worked as a counsellor and expressed “difficulty in reconciling working with couples on same-sex sexual practices and his duty to follow the teaching of the Bible.”<sup>16</sup> He was later dismissed.<sup>17</sup> Concerning both Ladele and McFarlane, the European Court, attempting to balance the applicants’ rights with the employers’ equality policies,<sup>18</sup> held that both employers were acting to protect the rights of others, and that there was no violation of the applicants’ rights.<sup>19</sup> At first sight, therefore, the European Court considered that protecting the rights of others was more significant than securing rights pursuant to Article 9.

Domestic judges have also expressed this view. For example, in *Mackereth v DWP*,<sup>20</sup> a Christian doctor, relying on Genesis 1:27, was opposed to transgenderism and believed “that it would be irresponsible and dishonest” for him “to accommodate and/or encourage a patient’s “impersonation” of the opposite sex”.<sup>21</sup> He refused to call transgender clients by their preferred pronouns, and thus lost his job. The *Grainger* test was applied to his beliefs, and the tribunal rejected them, as “they were incompatible with human dignity and conflicted with the fundamental rights of others”.<sup>22</sup> Furthermore, the aims of the employer (for example, “to ensure transgender customers were treated with respect and in accordance with their rights under the 2010 Act”<sup>23</sup>) were held to be legitimate,<sup>24</sup> and their actions were judged as

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<sup>7</sup> The Standard, ‘Arrest JK Rowling? No, cheer her free speech fight over Scotland’s new hate crime law’ (2 April 2024) <<https://www.standard.co.uk/comment/jk-rowling-scotland-hate-crime-law-b1148931.html>> accessed 2 April.

<sup>8</sup> The Standard, ‘Why are Scotland’s new hate crime laws prompting concern?’ (2 April 2024)

<<https://www.standard.co.uk/news/politics/scotland-scottish-government-jk-rowling-scottish-parliament-snp-b1148757.html>> accessed 2 April 2024, see also Hate Crime and Public Order (Scotland) Act 2021, section 4(2)-4(3).

<sup>9</sup> [2010] ICR 360 (EAT).

<sup>10</sup> *ibid*, [24] (Burton J) See also *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 [23] (Lord Nicholls).

<sup>11</sup> *Cave v Open University* [2023] (ET) [47] (Employment Judge Manley).

<sup>12</sup> *ibid*, [44].

<sup>13</sup> (2013) 57 EHRR 8 (ECtHR).

<sup>14</sup> *ibid*, [23].

<sup>15</sup> *ibid*, [102].

<sup>16</sup> *ibid*, [34].

<sup>17</sup> *ibid*, [37].

<sup>18</sup> *ibid*, [24] and [32], respectively.

<sup>19</sup> *ibid*, [106] and [109]-[110], respectively.

<sup>20</sup> [2022] EAT 99, [2022] ICR 1609.

<sup>21</sup> *ibid*, [15].

<sup>22</sup> See note 30, [37].

<sup>23</sup> *ibid*, [51].

<sup>24</sup> *ibid*, [138].

“necessary and proportionate”.<sup>25</sup> The appeal was dismissed. In the employment context, therefore, apart from exceptions such as *Forstater v CGD*,<sup>26</sup> the law tends to favour diversity over ensuring the protection of Article 9.<sup>27</sup>

Outside of employment, however, the case of *Lee v Ashers Baking Co Ltd*<sup>28</sup> provides an example where religious opinions were upheld. In this case, Mr Lee (a gay man) asked Ashers Baking (run by the McArthurs, a Christian couple) to produce a cake with “Support Gay Marriage” iced on it. Mrs McArthur contacted Mr Lee to say that they could not proceed, as they were Christians. Mr Lee alleged unlawful discrimination, under article 3(1) of the Fair Employment and Treatment (NI) Order 1998/3162 (“the 1998 Order”), but the Supreme Court later rejected this, holding that the McArthurs’ refusal to complete the order was based on “their religious objection to gay marriage.”<sup>29</sup> It was not based solely on Mr Lee’s personal sexuality.<sup>30</sup> Moreover, the courts are under a duty to interpret legislation, where possible, “in a way which is compatible with the Convention rights”,<sup>31</sup> and it was held that articles 9 and 10 “included the right not to be forced to express an opinion with which one disagreed”.<sup>32</sup> Thus, Baroness Hale stated that “the 1998 Order should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree”.<sup>33</sup> This case was distinguished with *Bull v Hall*,<sup>34</sup> where Christian hoteliers refused to provide a gay couple with a double-bedded room.<sup>35</sup> That decision – that the hoteliers *intended* to discriminate against same sex partners on grounds of their sexual orientation,<sup>36</sup> was distinguished in *Lee*, where the shop owners were being forced to agree with the message.

### Can a correct balance be found?

This section aims to provide a critique of the law, and argues that the law, at least in certain circumstances, is overly restrictive and places too much weight on what are referred to as “legitimate” aims. It is easy for many in today’s culture to value diversity and inclusivity over religious beliefs. Foster states that “the state’s primary duty is to protect individuals and groups from anti-diversity speech and discrimination, rather than seek to equally balance the rights of free speech and conscience and religion with the right not to be subjected to such discrimination.”<sup>37</sup> Religious views could be seen as archaic and offensive, but this does not render them all unimportant.

In fact, “a person’s religion is often a core element of their identity.”<sup>38</sup> They should not be compelled to speak or act in a way which goes against their conscience and should have the right to manifest this key part of their identity without undue interference, even if that discriminates against others. Therefore, it is argued that the decision in *Eweida and Others*<sup>39</sup> was too harsh and inflexible. Had the court weighed the competing interests differently and decided in her favour, due to fact that she should not be compelled to speak or act in a way which goes against her beliefs, the judgment would likely have been fairer. It is difficult to see why the court did not take this approach, as they did in *Ashers*.<sup>40</sup>

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<sup>25</sup> *ibid.*

<sup>26</sup> [2022] ICR 1 (EAT).

<sup>27</sup> See *Page v NHS Trust* [2021] EWCA Civ 255, for another example.

<sup>28</sup> [2018] UKSC 49, [2020] AC 413.

<sup>29</sup> *ibid.*, [28].

<sup>30</sup> *ibid.*, [13].

<sup>31</sup> Human Rights Act 1998, section 3(1).

<sup>32</sup> See note 41, 415.

<sup>33</sup> *ibid.*, [56].

<sup>34</sup> [2013] UKSC 73.

<sup>35</sup> *ibid.*, [10] (Lady Hale).

<sup>36</sup> *ibid.*, [17].

<sup>37</sup> Steve Foster, ‘Free speech, equality and diversity: the legitimacy of controlling content-based expression under the ECHR and in domestic law’ (2023) 28(3) *Comms L* 102, 103.

<sup>38</sup> See note 41, 420.

<sup>39</sup> See note 23.

<sup>40</sup> See note 41.

However, it is possible that the decision relating to Mr McFarlane<sup>41</sup> and the decision in *Mackereith*<sup>42</sup> were both fair. Assuming that they lost their jobs because of their refusal to follow their employers' equality policy, it could be argued that this is acceptable (both morally and legally), if the employees were aware of and understood this policy, before accepting the position, which appears to be true of both cases.<sup>43</sup> These cases can be distinguished from Ms Ladele's case, where the requirement that she participated "in the creation of civil partnerships "was added during the course of her employment." This helps show how cases of this sort are highly dependent on specific facts.

Therefore, it is possible that there is no single approach that the courts should universally adopt, which would be suitable in all cases of this nature. That is not to say that a correct balance does not exist. It is argued that in each case relating to free religious speech and diversity, there is a correct approach to weighing the competing interests that is both legally and morally acceptable. Whether the courts can discern and apply this approach, however, is a separate matter.

## **Conclusion**

This piece has provided an overview of law concerned with the topic of free religious speech and diversity, and has critiqued relevant cases. To summarise, it is argued that in some cases the law is overly restrictive and gives too little weight to individuals' rights pursuant to articles 9 and 10. However, although the courts too often fail to reach a correct balance, it is argued that one always exists, which correctly weighs the competing interests. Looking forward, it is impossible to know how the law will develop, yet it is hoped that the courts will adopt a more sympathetic approach towards those rightfully using their freedoms under articles 9 and 10, and will weigh these rights against diversity considerations appropriately.

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<sup>41</sup> *ibid.*

<sup>42</sup> See note 30.

<sup>43</sup> See note 23, [17] and note 30, [109].