HUMAN RIGHTS

The 'gay cake' case before the European Court Human Rights; more than a little misunderstanding

Lee v United Kingdom, application No. 188060/19, decision of the European Court (admissibility) 6 January 2022.

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Introduction and background

The European Court has recently ruled inadmissible an application brought by Mr. Lee, the unsuccessful claimant in the 'Gay Cake' case - *Lee v Ashers Baking Co. Ltd*. [1]

In that case, the Supreme Court ruled that the claimant had not been discriminated against on grounds of his sexual orientation when a bakery refused to sell him a cake with a pro-gay message on it. In the domestic proceedings, the applicant brought an action for breach of statutory duty against the bakery in and about the provision of goods, facilities and services, claiming he had been discriminated against contrary to the provisions of The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and/or The Fair Employment and Treatment (Northern Ireland) Order 1998. After several judgments and appeals, the Supreme Court ruled that any discrimination had not been based on the customer's sexual preference or association with the gay community, but on their objection to the political message that the words on the cake portrayed. In addition, as the difference in treatment was due to the political opinion of the customer, the *supplier's* Convention rights to freedom of expression were at issue and justified their refusal.[2]

The claimant subsequently brought an application under the European Convention, claiming that his rights under Article 8 (respect to private life) and 14 (enjoyment of Convention rights without discrimination) had been violated by the ruling, asking the European Court to rule that the law and the Supreme Court had given insufficient protection to his Convention rights. However, as we shall see, the European Court has now declared that application inadmissible, stating that the applicant had failed to exhaust all domestic remedies because he had used domestic law (the Equality Act 2010 and the regulations) rather than Convention rights to argue his rights.

This short piece will analyse that decision and consider its effect on both the adjudication of human rights in domestic law and the relationship between domestic law and the machinery under the European Convention on Human Rights.

The decision of the European Court of Human Rights

The Court first set out the general principles with respect to the requirement to exhaust all domestic remedies, as set out in *Vučković and Others v. Serbia;*[3] that the specific Convention complaint presented before it must have been aired, either explicitly or in substance, before the national courts. Thus, in the Court's view, it would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the

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[1] [2018] UKSC 49.
[2] For an account of the case, see Steve Foster, 'Let them eat cake but don't expect me to make it; sexual orientation discrimination, religious objections and the Supreme' (2018) 23(2) Cov. Law J. *
[3] Preliminary objection, Grand Chamber, Application nos. 17153.

national authorities for challenging an impugned measure, but then lodge an application before the Court based on the Convention argument.[4]

The Court then noted that the applicant in this case did not invoke his Convention rights expressly at any point in the domestic proceedings, but rather he formulated his claim by reference to the 2006 Regulations and the 1998 Order. Further, he now contends that he raised his Convention arguments in substance, as the domestic law provisions relied on were enacted to protect his rights under Articles 8, 9, 10 and 14 of the Convention, and that, in any event, the violations now complained of only crystallised with the handing down of the Supreme Court's judgment.[5]

The Court rejected those arguments for the following reasons. First, even if the relevant provisions of the 2006 Regulations and the 1998 Order were enacted to protect the Convention rights of consumers, those provisions protect consumers only in a very limited way; that is, against discrimination in access to goods and services. They cannot, in the Court's view, be said to protect consumers' substantive rights under Articles 8, 9 or 10 of the Convention.[6]

Secondly, insofar as the applicant complained under those Articles read in conjunction with Article 14 of the Convention, the Court acknowledged that the domestic court was required to consider whether the applicant was treated differently from other consumers because of his sexual orientation and/or political opinion. So too the courts had to decide whether the difference in treatment was objectively justified, having regard to the defendant's rights under Articles 9 and 10 of the Convention. However, although the Court noted that the test under Article 14 is similar, insofar as it requires an assessment of whether an applicant has been treated differently based on an identifiable characteristic or status, there was a difference. Thus, while the protection against discrimination in the 2006 Regulations and the 1998 Order is free-standing, Article 14 is ancillary in nature: there can be no room for its application unless the facts at issue fall within the ambit of one or more substantive Convention rights.[7]

Thus, in the Court's view, it was not self-evident that the facts of the present case – in which the applicant complains only about the judgment of the Supreme Court – fall within the ambit of Article 8, 9 or 10. In particular, it was not immediately apparent how the findings of the Supreme Court and the consequences of those findings for the applicant either constitute one of the modalities of or are linked to the exercise of a right guaranteed by any of those Articles. The Supreme Court found on the facts of the case that the applicant was not treated differently because of his real or perceived sexual orientation. Thus, what was principally at issue was not the effect on the applicant's private life or his freedom to hold or express his opinions or beliefs, but rather whether the bakery was required to produce a cake expressing the applicant's political support for gay marriage.[8] That was not to say that the facts of the case could not fall within the ambit of Articles 8, 9 and 10. However, the preliminary question of whether Article 14 of the Convention is applicable to the facts of the present case is a fundamental one, being highly fact-sensitive and to date no similar issue has been addressed by the Court. However, by relying solely on domestic law, the applicant deprived the domestic courts of the opportunity to address this important issue themselves before he lodged his application with the Court.[9] In the Court's view, the domestic courts were tasked only with balancing the applicant's very specific rights under the 2006 Regulations and the 1998 Order against the defendant's rights under Articles 9 and 10. At no point were they tasked with balancing his Convention rights against those of the defendants.[10]

At this point however, the Court conceded that the applicant's arguments before the Court did raise important issues respecting Convention rights. Thus, the Court conceded that the above balancing

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[4] *Lee v United Kingdom*, application No. 188060/19, para 68.
[5] *Lee v United Kingdom*, application No. 188060/19, para 69.
[6] *Lee v United Kingdom*, application No. 188060/19, para 70.
[7] *Lee v United Kingdom*, application No. 188060/19, paras 71-72, citing *Konstantin Markin v Russia*, Grand Chamber Application No. 30078/06.
[8] *Lee v United Kingdom*, application No. 188060/19, para 73.
[9] *Lee v United Kingdom*, application No. 188060/19, para 74.
[10] *Lee v United Kingdom*, application No. 188060/19, para 75.

exercise is a matter of great import and sensitivity to both LGBTIQ communities and to faith communities. Further, as the Supreme Court of the United States pointed out in *Masterpiece Cakeshop Ltd*,[11] these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market. This was particularly so in Northern Ireland, where there is a large and strong faith community, where the LGBTIQ community has endured a history of considerable discrimination and intimidation, and where conflict between the rights of these two communities has long been a feature of public debate.[12]

Then, in a statement that more reflected the Court's jurisdiction, it held that given the heightened sensitivity of the balancing exercise in the particular national context, the domestic courts were better placed than this Court to strike the balance between the competing Convention rights of the applicant, on the one hand, and the defendants, on the other.[13] This indeed was the expected result of the application, had the Court accepted jurisdiction to hear the case on its merits. In other words, it was within the Court's right to accept that the balancing of these conflicting interests (which had in fact taken place in the Supreme Court), was best resolved by the Supreme Court when interpreting and applying domestic law, rather than by the European Court. That indeed would reflect the principle of subsidiarity that the Court refers to in its judgment in this case, rather than denying itself jurisdiction at all.

Yet the Court continued to rule the case inadmissible. It stated that as the Human Rights Act 1998 gave litigants the right to invoke their Convention rights directly before the domestic courts, and obliges those courts, so far as it is possible to do so, to read and interpret both primary and subordinate legislation in a way which is compatible with those rights, it did not consider that the applicant has provided a satisfactory explanation for not advancing his Convention rights in the domestic proceedings. In its view, where the applicant is complaining that the domestic courts failed properly to balance his Convention rights against those of another private individual, who had expressly advanced his or her Convention rights throughout the domestic proceedings, it was axiomatic that the applicant's Convention rights should also have been invoked expressly before the domestic courts. That was the case even if the alleged breach was contingent on the outcome of their assessment. In choosing not to rely on his Convention rights, the applicant deprived the domestic courts of the opportunity to consider both the applicability of Article 14 to his case and the substantive merits of the Convention complaints on which he now relies. Instead, he now invites the Court to usurp the role of the domestic courts by addressing these issues itself, but such an approach is contrary to the subsidiary character of the Convention machinery and the Court considered that the applicant has failed to exhaust domestic remedies.[14]

Commentary

The lawyers for Lee are now considering a further appeal to the domestic courts, presumably using ECHR rights as the direct claim; although they (quite rightly) maintain that they have already pleaded Convention rights in the original claim. However, should they launch this appeal, and is indeed the European Court's admissibility decision correct?

Under the Convention (Article 35), all applicants must exhaust all domestic remedies before applying to the Court; that is clear and acts as an effective filter, and opportunity for the domestic law to provide a remedy. The question in this case, however, is whether a domestic claimant has to, specifically, raise

[11] reference
[12] *Lee v United Kingdom*, application No. 188060/19, para 76.
[13] *Lee v United Kingdom*, application No. 188060/19, para 76, citing *Handyside v United Kingdom*, 7 December 1976, § 48, Series A no. 24.
[14] *Lee v United Kingdom*, application No. 188060/19, para 77.

ECHR rights in the claim. According to the Court in this case, the answer is yes, but surely, that is not within the spirit or sense of the Convention and its machinery.

First, in order to comply with the Convention, member states must provide an effective remedy for breach of Convention rights (Art. 13) and secure the rights in their own jurisdiction. However, that does not require them to incorporate the ECHR or name such rights as ECHR rights, provided those rights are in reality protected. The fact that the Equality Act protects Arts 8 and 14 in practice, and allows arguments based on those articles, should thus suffice. Secondly, Lee's Art 8 and 14 rights *were* raised in the domestic proceedings, as were the bakery's Article 9 (religion) and 10 (free speech) rights. The case was brought under the appropriate domestic proceedings and law (which are imbued with Convention rights by virtue of the Human Rights Act 1998), and the domestic courts undoubtedly considered those rights when applying the relevant domestic law. Had the Supreme Court found that there had been discrimination on the facts, then it would have balanced Lee's rights (under statute and under the Convention), with the defendant's right to religion and free speech. As with other cases of this type, it would have had to decide where the balance lay, and whether the need to protect people from discrimination could be outweighed by religious rights. That decision would then surely be reviewable by the European Court.[15] Although the Supreme Court may have had the right to decide against Lee under domestic law, that should not stop the European Court from claiming jurisdiction in that case and asking whether the Supreme Court had given insufficient weight to Lee's claims.

The European Court's decision also ignores the basic fact that domestic human rights claims are fought not solely by human rights claims, but within the relevant domestic rules and cases. For example, a person sued for breach of privacy (under the tort of misuse of private information) makes use of the defence of public interest, which is shaped by Article 10 ECHR, as is the claimant's private law action (which uses Article 8 in support). The action, and defence, are informed by Convention rights, but are not the basis of the action. So too, in our case, the action has to be brought under the domestic legislation, but at the heart of the claim is the argument that the law breaches Convention rights. True, the defendant's in the domestic proceedings expressly relied on their Convention rights in defending the domestic claim, and the applicant merely relied on the statutory framework. However, that framework was set up to provide a remedy to those who felt that they had been the subject of unjustified discrimination, on grounds of sexual orientation. Such remedies had been introduced to protect basic human rights, or, at the very least, to bolster legal claims that raised such basic rights. Given that opportunity, a claimant is naturally going to use those statutory rights, and the defendant, naturally on the back foot, will claim that the law should be read and applied in such a way as to accommodate their Convention rights.

Conclusion

What the Court should have done was to accept the case, and then decide whether the law, and the Supreme Court, had adequately recognised and protected Lee's Convention rights. At that point, using the established doctrine of the margin of appreciation, the Court may well have decided that the law achieved the correct balance, but to accept the Court's ruling as it stands risks great confusion (more so than the Supreme Court's original ruling) and a reduction in the Court's power to resolve human rights disputes.

Moreover, of course, despite the above points, the reality is that we are no further forward in knowing whether the existing law is compatible with specific Convention rights, or how the domestic courts should balance those conflicting Convention claims in cases of this type. This may be discovered if Lee now brings a claim based specifically on his Convention rights, as the European Court suggested that he did in the first place, although one would expect the Court's decision to reflect its jurisprudence on subsidiarity and the margin of appreciation. Whoever is to blame for this misunderstanding,

[15] See for example, the Supreme Court's decision in *Hall v Bull* [2013] UKSC 73, where the Supreme Court held that the hotelier's religious objections did not provide a defence to an otherwise discriminatory act (of refusing accommodation to a homosexual couple).

opportunities have been missed to add clarity to this area of law and to cases where two Convention rights collide.