

15 September 2011

LADELE AND MCFARLANE

v.

UNITED KINGDOM

APPLICATION NOS. 51671/10 AND 36516/10

**WRITTEN SUBMISSION ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS,
PROFESSOR ROBERT WINTEMUTE, FIDH, AND ILGA-EUROPE**

1. These written comments are submitted on behalf of the International Commission of Jurists (ICJ), Professor Robert Wintemute, FIDH, and ILGA-Europe pursuant to leave granted by the Court in accordance with Rule 44 § 2 of the Rules of Court. For their interest and expertise see "Application for leave to submit written comments" (5 July 2011), granted 5 August 2011.

INTRODUCTION

2. These cases present the issue of whether there is a state duty to protect the right to manifest one's religion by creating an exception or exemption from compliance with generally applicable equality laws. The applicants complain that their rights under Articles 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms have been violated by the refusal of their employers to accommodate their religious beliefs. The first case involves a town registrar who refused to perform civil partnership ceremonies for same-sex couples. The second case involves a counsellor working for a national therapeutic organisation who expressed concerns about providing psycho-sexual therapy for same-sex couples. Thus in both cases the issue is the denial of services to members of the public because of their sexual orientation by a religiously-motivated individual. This is an issue that has arisen in a number of states within and outside the Council of Europe.
3. This Submission is limited to a review of comparative law on the granting of religious exemptions to individuals in the provision of non-religious goods and services to gays and lesbians. The scope here is narrow. This Submission is not directly concerned with the formal recognition of same-sex couples by religious organizations or entities. Nor does this Submission deal with the interaction of Articles 9 and 14. Rather it seeks to present a summary of laws and litigation concerning the provision of non-religious goods and services to members of the public.
4. The Interveners submit that individuals providing goods and services or offering facilities to members of the public are not entitled to accommodation for their religious beliefs where those religious beliefs require that they exclude segments of society on the basis of personal identity characteristics such as sexual orientation. The Interveners further submit that any distinction between same-sex sexual orientation and same-sex sexual conduct is artificial, such that granting individual exemptions for religious views about the morality of same-sex relationships is equivalent to granting exemptions for religious views about gay and lesbian people generally. In these circumstances, protecting the right of others to be free from

discrimination is sufficient to overcome the right to manifest one's religion in the public sphere.

5. The freedom to manifest one's religion or belief may be subject to limitations that are prescribed by law and necessary in a democratic society for the protection of the rights of others, including the right to be free from discrimination under Article 14. The Interveners submit that denying religious employees exemptions or accommodations concerning the performance of work-related duties in order to ensure that public goods and services are available to everyone regardless of sexual orientation, to the extent that it constitutes an interference with their Article 9 rights, is a legitimate limitation on religious freedom. The interference is necessary in a democratic society because the elimination of sexual orientation discrimination corresponds to a pressing social need and is moreover proportionate to that aim. The interference is relatively minor because it concerns the offering of non-religious goods and services to members of the public for a secular state or private employer.
6. This analysis is borne out by national law and practice which commonly deny such exemptions, in order to ensure the equal provision of goods and services to people regardless of sexual orientation. Around the world, domestic laws and judicial decisions demonstrate that religious exemptions are limited to religious organizations, most typically performing religious activities. Individual employees engaged in commercial or public activities are not engaged in religious functions. Their right to manifest their religious beliefs may thus be limited by laws that further the goal of equality for all members of society.

RELIGIOUS EXEMPTIONS IN DOMESTIC LAWS

7. The question whether there should be statutory exemptions on religious grounds has arisen in two contexts: laws recognising same-sex marriage or partnerships and laws prohibiting discrimination on the basis of sexual orientation. Many but far from all States and individual jurisdictions with laws that provide for same-sex marriage include exemptions for religious organisations.¹ Such exemptions provide that clergy members or other religious officials are not required to officiate any marriage that would be contrary to their religious doctrine. In some cases, religious institutions and organizations are also exempted from providing goods and services related to the celebration or solemnisation of a marriage if doing so would violate the religious principles of the organization.² Outside the marriage context, religious exemptions

¹ States providing for religious exemptions in marriage equality laws: South Africa (Civil Union Act 2006, section 6); Norway (The Marriage Act, Part I. Chapter I. Section 1 Section 13); individual states within the USA: New York (New York Marriage Equality Act 2011, section 3 and 5, amending section 10-b and 11 of the domestic relations law), New Hampshire (HB 437, Chapter 457-A on Civil Unions: 457-A:5), Vermont (H.275, § 5144), Connecticut (Substitute Senate Bill 899 para 2, Sec. 7), District of Columbia (Religious Freedom And Civil Marriage Equality Amendment Act 2009, (b) Section 1288), Rhode Island (H6103, January 2011, amending Title 15 (Domestic Relations) of the General Laws). Other States have marriage equality laws with no religious exemptions: Belgium (Article 143 of the Belgian Civil Code (amended by L 2003-02-13/36, art. 3)); Netherlands (Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage); Spain (Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, amending Article 44 of the Spanish Civil Code).

² Connecticut: An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 17.

are less common. Some States and some jurisdictions within the United States include exemptions for religious organizations and institutions in their general laws prohibiting discrimination but most do not.³

8. Within the European Union, Council Directive 2000/78/EC of 27 November 2000, which prohibits discrimination on the grounds of sexual orientation in the field of employment and occupation, includes a provision permitting the continuation of national legislation exempting compliance by churches and organizations “the ethos of which is based on religion or belief.”⁴ Article 4(2) permits such organisations to impose requirements relating to their employees’ religious beliefs if such beliefs are a genuine occupational requirement. In implementing the Employment Equality Directive, France, Portugal, Romania and Sweden, however, did not adopt any exception clause for employers with an ethos based on religion or belief.⁵ In the Netherlands, churches and other religious organisations may apply differences in treatment provided that distinctions are not based exclusively on political opinion, race, gender, nationality, sexual orientation, or civil status.⁶ The EU proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation contains no exemption clauses.⁷
9. Where they are granted, statutory exemptions are for religious institutions and organizations. This stems from the belief that religious communities should not be obliged by the State to celebrate marriages that do not conform to their tenets.⁸ Exemptions for religious individuals, however, are extremely rare. For example, within the United States no individual jurisdiction has granted public officials or commercial providers of goods and services exemptions from state non-discrimination laws that protect sexual orientation.⁹ The only law the Interveners

³ Examples of states whose anti-discrimination laws contain religious exemptions: Indiana (Ind. Code Ann. § 22-9-1-3(q)(3) (1998)); New Mexico, (N.M. Stat. § 28-1-9(B) (2006), City of Louisville Code of Ordinances, § 92.07 (“The provisions of § 92.07 in regard to sexual orientation or gender identity shall not apply to a religious institution, or to an organization operated for charitable or educational purposes, which is operated, supervised, or controlled by a religious corporation, association or society.”); Australia (Equal Opportunity Act 2010, No 16 of 2010, section 84). Most anti-discrimination legislation however, does not contain any religious exemption: France (articles 225-1 and 225-2 of the French Penal Code); Canada (Saskatchewan Human Rights Code (Chapter S-24.1 of the Statutes of Saskatchewan, 1979), Part II); Finland (Non-Discrimination Act (21/2004), section 6), and the majority of US states (Delaware (DEL. CODE ANN. tit. 6, § 4502 (1999)), District of Columbia (D.C. CODE § 2-1402.31 (Supp. 2006)), Florida (FLA. STAT. § 760.07 (2006)), Hawaii (HAW. REV. STAT. § 489-2 (1993)), Illinois (775 ILL. COMP. STAT. 5/5-103 (2004)).

⁴ Article 4(2), Council Directive 2000/78/EC.

⁵ “Developing Anti-Discrimination Law in Europe”, a report prepared by Isabelle Chopin and Thien Uyen Do for the European Network of Legal Experts in the non-discrimination field, November 2010, accessible at <http://www.non-discrimination.net/content/media/Comparative%20EN%2017052011.pdf>

⁶ Article 5(2)(a) GETA, Netherlands Country Report 2009 on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, drafted for the European Network of Legal Experts in the Non-discrimination Field, p. 83 (reports are available at <http://www.non-discrimination.net/en/law/NationalLegislation/country-reportsEN.jsp>)

⁷ COM(2008) 426 final, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

⁸ See, e.g., *Minister of Home Affairs and Another v. Fourie and Another*, Constitutional Court of South Africa, 1 December 2009 at para. 97.

⁹ Ira C. Lupu & Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom, 5 *Northwestern Journal of Law & Social Policy* 274 (November 2010); see also Law Professor Letter to State of New York dated 17 May 2011 (arguing for creation of an individual exemption), available at

have discovered that grants an individual religious exemption is the Equal Opportunity Act 2010 of the State of Victoria in Australia.¹⁰ However, the exception is apparently unique in Australian human rights law and has been soundly criticized.¹¹ In a recent case, a Victorian court found it inapplicable where an employee of a Christian organization refused to accept a reservation by a gay and lesbian youth group for a forum at the resort owned and operated by the organization.¹²

ACCOMMODATION FOR RELIGIOUS BELIEFS IN JURISPRUDENCE

10. National courts within Council of Europe member states have heard cases concerning religious objections to compliance with equality and non-discrimination laws, as well as requests for religious accommodation more generally. For example, in the Netherlands a building contractor refused to provide construction services for a client whom he thought was living with another man. He cited his personal religious beliefs about homosexuality as the reason for his refusal. The Cantonal Court fined him under a criminal law provision prohibiting discrimination in the course of one's professional activities. The Court reasoned that freedom of religion was restricted by the right not to be discriminated against on the basis of sexual orientation.¹³ In France in a case involving a butcher who objected for religious reasons to handling pork meat, the Court of Cassation reasoned that the employer was not required to accommodate an employee's religious beliefs where there had not been an express provision in the work contract.¹⁴ The Court of Cassation also held that pharmacists who refuse to provide contraceptives on religious grounds commit an offence under French consumer law. The French court ruled that there is no religious exemption under French law to the prohibition on refusal to sell.¹⁵
11. The issue of religious exemptions for "conscientious objectors" to same-sex marriage laws has been litigated in the Netherlands and in Spain. In 2008 the Dutch Equal Treatment Commission ruled in favour of a municipality that had rejected an applicant for the position of registrar because he refused to marry same-sex couples on the grounds of his religious belief. The Commission found that the interference with religion was justified because the aim pursued, protecting the rights of others and

<http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>.

¹⁰ Section 84 provides: "Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion."

¹¹ Human Rights Law Centre, Briefing paper on removal of the religious exemptions from the Equal Opportunity Act (Vic) (July 2009) available at <http://www.hrlrc.org.au/content/topics/equality/equality-briefing-paper-on-religious-exemptions-under-the-equal-opportunity-act-1995-vic-july-2009/>

¹² *Cobaw Community Health Services Ltd. V. Christian Youth Camps and Mark Rowe*, [2010] VCAT 1613, Victorian Civil and Administrative Tribunal, Australia – Victoria, 8th October, 2010.

¹³ LJN BN8113, Rechtbank Arnhem, 05/720597-10, September 2010.

¹⁴ Cour de Cassation, Ch. soc., 24 mars 1998, n°95-44.738, Bull 98 V N° 171 p.125.

¹⁵ Cour de Cassation, chambre criminelle, 21 oct 1998. JCP 1998.I.10163, note F. Freund ; Bull. Ord. pharm. 1999, n°363, p.299. The European Court of Human Rights held that the pharmacists' application was inadmissible based on its merits (manifestly ill-founded) *Pichon and Sajous v. France*, App. No. 49853/99, Decision of 2 October 2001.

