

# Can the courts promote gay marriage and religious liberty?

Mark Hill QC discusses the public sector equality duty and reasonable accommodation of sexual and religious identity



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**R**ipples from the recent judgment on gay marriage handed down by the United States Supreme Court in *Obergefell v Hodges* will be keenly felt on this side of the Atlantic. While rainbow flags were waved at the outcome, the Christian right saw the decision as signalling the end of religious liberty.

With characteristic bombast, Justice Scalia considered the majority's decision a threat to democracy. Justice Alito's dissent suggested that the five judges in the majority had arrogated to themselves the right of the people to redefine the traditional understanding of marriage.

Chief Justice John Roberts, also in the minority, was more restrained. He said: 'Respect for sincere religious conviction has led voters and legislators in every

state that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations.'

Hereafter, he fears, there will be no room for the free exercise of religion to the extent that a genuinely held religious doctrine subscribes to the concept of marriage as the lifelong and exclusive union of one man and one woman. The concept of conscientious objector, developed and refined over successive generations, will be supplanted by the stigma of bigot.

## Religious conviction

In this country, the accommodation of religious conviction was written into the Marriage (Same Sex Couples) Act 2013 in terms of a 'quadruple lock', robustly constructed to safeguard churches from being compelled to act against their collective conscience.

But this high-minded concept of accommodation has failed to gain judicial traction in relation to the private sector concerning the provision of bed and breakfast services (*Bull v Hall* [2013] UKSC 73) or the baking of cakes (*Lee v Ashers Bakery* [2015] NICty 2), as well as the public sector for marriage registrars required to administer civil partnerships (*Ladele v Islington Borough Council* [2009] EWCA Civ 1357).

## Protected characteristics

The public sector equality duty under the Equality Act 2010 is more nuanced than an obligation to promote gay rights. Those subject to the duty must:

- Have due regard to the need to eliminate unlawful discrimination, harassment, and victimisation;
- Advance equality of opportunity between people who share a protected characteristic and those who do not; and
- Foster good relations between people who share a protected characteristic and those who do not.

'Sexual orientation' and 'religion or belief' are both protected characteristics, but it may be, in Orwellian terms, that some characteristics are more protected than others.

In his judgment in the Employment Appeal Tribunal in *Ladele*, Mr Justice Elias (as he then was) observed that '[f]undamental changes in social attitudes, particularly with regard to sexual orientation, are happening very fast and for some – and not only those with religious objections – they are genuinely perplexing. In that context, there seems... to be some virtue in taking a pragmatic line if it is lawful'.

But fundamental clashes of ideology, exacerbated in many cases by ill-informed and

inflammatory media coverage, leave room for pragmatism. Lady Hale, speaking to the Law Society of Northern Ireland last year, raised the question of how far the law should go in making special provisions or exceptions for particular beliefs. Perhaps anticipating developments in the US, as well as those closer at home, she observed that the story has just begun. The way forward, surely, must be to embrace the statutory 'carve outs', as discussed by Lady Hale, while at the same time endorsing the earthy pragmatism advocated by Elias J.

Practical solutions are negotiated in the workplace every day: creative rostering can properly accommodate employees who have different world views, have particular religious observances, or require specific sacred holidays. These matters are generally resolved swiftly, amicably, and locally.

In the public sector, where the statutory duty extends to advancing equality to individuals with protected characteristics, it will be interesting to see how central and local government seeks to promote and safeguard both sexual and religious identity. If the plea for pragmatism goes unheeded, the Administrative Court will be quite a lot busier in the years ahead. **SJ**