



What level of respect does opposition to same-sex marriage deserve in a democratic society?

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ABSTRACT

The opening of marriage to same-sex couples shifted the legal debate from whether that should be done to the extent to which individuals and organisations can lawfully refuse to engage with same-sex marriage or can continue to argue against such marriages. This raises the question of the level of respect that needs to be shown to anti-LGBT (lesbian, gay, bisexual, transgender) views in a democratic society, a question that ought to have been, but was not, the central issue in *Lee v Ashers Baking Company Ltd*. By focusing on the right not to express a view that the defendants in that case did not hold, the United Kingdom(UK) Supreme Court avoided examining the views that they did, in fact, hold. The defendants' belief that LGBT people are sinful, manifested in their opposition to same-sex marriage, is in essence a belief in heterosexual superiority, which is a form of homophobia and therefore inconsistent with the values underlying the European Convention on Human Rights (ECHR), especially that of dignity. This article explores the level of respect such beliefs and their expression can expect to receive in the UK. It concludes that it should be no higher than 'toleration'. It will identify as the central flaw in the Supreme Court's approach that it afforded a higher level of respect than toleration, that it allowed the belief in heterosexual superiority to exempt the defendants from a legal obligation that would have to be met by those whose views on homosexuality were more in line with the values of the ECHR.

Keywords: LGBT rights; freedom of belief; freedom of expression; discrimination; dignity; homophobia; proportionality; same-sex marriage.

INTRODUCTION

The opening of marriage to same-sex couples throughout the United Kingdom (UK)¹ resolved the headline question, but it did not end the debate, which has shifted to the extent to which opponents can

1 Marriage (Same Sex Couples) Act 2013 (for England & Wales); Marriage and Civil Partnership (Scotland) Act 2014 (for Scotland); Marriage (Same-Sex Couples) and Civil Partnership (Opposite-Sex Couples) (Northern Ireland) Regulations 2019 (SI 2019/1514) and the Marriage and Civil Partnership (Northern Ireland) Regulations 2020 (SI 2020/742).

either refuse to engage with any involvement in such marriages or can legitimately continue to speak out against such marriages. A recent manifestation of this continuing debate is found in *303 Creative LLC et al v Elenis*,² where in June 2023 the United States (US) Supreme Court decided that a web-designer for wedding planners would be entitled to limit the services she offered to those planning opposite-sex weddings only, for otherwise she would be forced to express a belief of the state (that marriage could legitimately be entered into by a same-sex couple) rather than one she possessed herself (that such a marriage was contrary to her god's will). At the oral hearing in December 2022, Justice Alito (who subsequently joined the majority opinion, penned by Justice Gorsuch) had sought to distinguish between 'decent and respectable' opposition to same-sex marriage and (presumably unacceptable) opposition to interracial marriage.³ Also in December 2022 President Biden signed into law legislation to ensure that same-sex marriages continue to be recognised throughout the US, but which contains a provision allowing faith groups to refuse goods, services and accommodations in connection with same-sex marriages.⁴

It is timely, therefore, to revisit the implications for this ongoing debate of the UK Supreme Court's decision in *Lee v Ashers Baking Company Ltd*.⁵ This was the case in which Mr Gareth Lee had claimed discrimination when a Belfast retail baking company refused to supply him with a cake bearing the words 'Support Gay Marriage' in its icing. The claim based on sexual orientation discrimination need not detain us here: it was dismissed because, in the words of Lady Hale, the baking company's objection 'was to the message and not to any particular person or persons'.⁶ It is the claim for discrimination on the ground of political opinion, also dismissed by the Supreme Court, that is the focus of this article.

The message on the cake was clearly the manifestation of a political view, which the customer sought to express at a time when the debate on opening marriage to same-sex couples was very much

2 *303 Creative LLC v Elenis* 600 US 570 (2023).

3 See <https://www.oyez.org/cases/2022/21-476> (last accessed 19 November 2023).

4 Respect for Marriage Act 2022, Public Law 117-228, s 6. See also, to similar but more limited effect, s 16 of the Marriage and Civil Partnership (Scotland) Act 2014.

5 [2018] UKSC 49.

6 *Ibid* [34].

live, and contentious, in Northern Ireland.⁷ Mr Lee argued that the refusal to accept his order amounted to discriminatory treatment on the basis of his political opinion, contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998.⁸ However, instead of exploring the level of protection that Mr Lee's political opinion was entitled to, the Supreme Court turned the spotlight away from the customer and onto the baking company's (and its owners') beliefs. It then resolved the case on the basis of the baking company's right not to be forced to express views that it did not hold, a sleight of hand that relieved the Supreme Court of the task of scrutinising the level of protection to be afforded to the actual beliefs held by the baking company and its owners. In January 2022 the Fourth Section of the European Court of Human Rights rejected as manifestly unfounded an application by Mr Lee claiming that his rights under articles 8, 9 10 and 14 of the European Convention on Human Rights (ECHR) had been infringed, because he had not exhausted his domestic remedies in respect of his own Convention rights. The fact that Convention rights had been fully explored by the Supreme Court was dismissed as irrelevant because the domestic courts had been asked to balance Mr Lee's rights under domestic law with the defendants' Convention rights, and he could not now ask the European Court to balance his own Convention rights with those of the defendants.⁹ This allowed the European Court to avoid, like the UK Supreme Court, scrutinising the baking company's actual beliefs the manifestation of which Mr Lee was complaining about.

It is that scrutiny that I seek to undertake here. Both the Supreme Court and the European Court assumed that the baking company's belief – that same-sex marriage should not be supported because it was wrong and sinful – was entitled to respect and protection under articles 9 and 10 of the ECHR. As we will see below, the Convention permits substantial limitations on manifestations of racist (or anti-Semitic or Islamophobic) beliefs and the belief, for example, that mixed-race marriages should not be permitted would be afforded little if any respect in a decent and democratic society. The purpose of this article is to interrogate whether opposition to same-sex

7 The Northern Ireland regulations cited in n 1 above were made a year after the case, following the UK Parliament's imposition of a requirement that the Secretary of State for Northern Ireland (a UK Government minister) do so: Northern Ireland (Executive Formation etc) Act 2019, s 8.

8 SI 1998/3162 (NI 21).

9 *Lee v United Kingdom* Appl 18860/19, 6 January 2022, [75].

marriage, when a manifestation of homophobia,¹⁰ falls into the same category as racism and the extent to which the assertion that marriage should be limited to opposite-sex couples remains within the realms of acceptable – or respect-worthy – political debate entitled to protection under the ECHR.

THE IMPORTANCE OF DIGNITY AND TOLERANCE

The level of respect that is to be afforded to any manifestation of belief, or freedom of expression, is determined not only by the words of the substantive provisions of the ECHR but also by its spirit and underlying values. Beliefs ‘deserve little, if any, protection if their content is at odds with the democratic values of the Convention system’.¹¹ These democratic values include ‘pluralism’, that is to say the ‘harmonious interaction of persons and groups with varied identities’,¹² ‘tolerance, social peace and non-discrimination’¹³ and, perhaps most significant for the buttressing of lesbian, gay, bisexual and transgender (LGBT) rights, dignity,¹⁴ which is increasingly recognised as inherent in many of the substantive articles of the ECHR.¹⁵ In *Bouyid v Belgium*, the European Court pointed out that, although the ECHR itself does not mention the concept of dignity,¹⁶ ‘the Court has emphasised that respect for human dignity forms part of the very essence of the Convention,

10 It is important to acknowledge that not all opposition to same-sex marriage is necessarily homophobic: see, for example, Kenneth Norrie, ‘Marriage is for heterosexuals: may the rest of us be saved from it’ (2000) 12 *Child and Family Law Quarterly* 363, who argues that some essential differences between same-sex and opposite-sex couples are ignored by applying one institution (marriage) to both; and Nancy Polikoff, ‘We will get what we ask for: why legalizing gay and lesbian marriage will not dismantle the legal structure of gender in every marriage’ (1993) 79 *Virginia Law Review* 1535 and *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press 2008), who argues in the former piece that marriage is irredeemably gendered and in the latter piece suggests that the focus on marriage is not the best means to ensure genuine and universal LGBT equality throughout society and particularly in family law. Neither author (a gay man and a lesbian) is arguing for LGBT people to be treated less well by the law than non-LGBT people.

11 *Pastörs v Germany* Appl 55225/14, 3 October 2019, [47].

12 *Baczkowski v Poland* (2009) 48 EHRR 19, [62], [63].

13 *Norwood v United Kingdom* (2005) 40 EHRR SE11.

14 See Peter Laverack, ‘The indignity of exclusion: LGBT rights, human dignity and the living tree of human rights’ [2019] EHRLR 172.

15 See Sebastian Heselerhaus and Ralph Hemsley, ‘Human dignity and the European Convention on Human Rights’ in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) 969–992.

16 Though it does appear in the preamble to optional Protocol 13.

alongside human freedom’; it follows that ‘any interference with human dignity strikes at the very essence of the Convention’.¹⁷

Tolerance of others, their actions, opinions and beliefs – and especially of their immutable characteristics such as race and sexual orientation – is the ultimate guarantor of respect for the dignity of others and thereby the guarantor of true equality. This means that philosophies and beliefs (irrespective of their source) that encourage intolerance of others, that denigrate different identities by denying or diminishing the dignity of others, that seek conflict and division, are contrary to the values underlying the ECHR and are worthy of little or no respect in a democratic society. But it does not mean that they are entitled to none.

DIFFERING LEVELS OF RESPECT

It is settled law that, while the right guaranteed by article 9 of the ECHR to freedom of thought, conscience and religion is unqualified, the right to manifest thought, conscience or religion and the right of expression, including the right guaranteed by article 10 to receive and impart information and ideas without interference, may be subject to limitations. Indeed, article 17 of the Convention itself provides that certain extreme views may be deprived completely of any protection, because they are not worthy, in a democratic society, of any respect whatsoever.¹⁸

Article 17 has a radical effect, and for that reason its application requires a high threshold: it removes entirely the protections offered by the ECHR and so may be invoked only when there is an attempt to use Convention rights to challenge the very notion of democracy the protection of which is the Convention’s overarching purpose.¹⁹ In the context of freedom of speech, article 17 is normally used to prevent those seeking to propagate the worst forms of hate speech, or the transmission of ideas that encourage violence, hatred or social unrest, from claiming that article 10 gives them the right to do so.²⁰ The

17 (2016) 62 EHRR 32 [89], [101].

18 Art 17: ‘Nothing in this Convention may be interpreted as implying, for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

19 *Vajnai v Hungary* (2010) 50 EHRR 44, [21]–[26]; *Ibragimov v Russia* Appl 1413/08, 28 August 2018, [62].

20 In *Reference by Attorney General of Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [54], the UK Supreme Court pointed out that conduct will fall outwith the protection of the Convention by operation of art 17 if it ‘involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society’.

typical example is Holocaust denial, or support for Nazi ideology.²¹ In *Norwood v United Kingdom*²² a member of the British National Party, a far-right group with strongly racist beliefs, had been convicted of an offence under section 5 of the Public Order Act 1986 having displayed in his window a poster showing a photograph of the New York Twin Towers aflame on 9/11, and the words 'Islam out of Britain'. When he complained to the European Court that his conviction was an infringement of his article 10 right to freedom of expression the Court dismissed the application as manifestly unfounded, concluding that his actions were 'incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination'.²³

However, the Convention as a whole does not operate as a binary, with expressions of views either respected fully by articles 9 and 10 or rejected entirely by article 17. The respect that requires to be shown to views is, rather, determined by a sliding scale with differing levels of respect being required in different contexts. States are allowed to impose limitations on the expression of views that would not engage article 17, and the validity of these limitations is determined by the familiar proportionality analysis. Individuals may be entitled to hold homophobic views, but the respect that states must show to these views will differ, depending upon a variety of factors.

In, for example, *Lilliendahl v Iceland*²⁴ a man had been convicted of hate speech against LGBT people, and though the threshold for article 17 was held not to have been reached his comments were found to 'promote intolerance and detestation of homosexual persons' and so legitimately subject to restrictions. His complaint under article 10 was rejected as manifestly ill-founded, not because of article 17 but because article 10 itself contains another, and more easily satisfied, source of the requirement that the right to freedom of expression must be exercised consistently with the underlying values of the European Convention. Article 10(2) provides: 'the exercise of the freedom of expression carries

21 The first unequivocal recognition that Holocaust denial would be excluded completely from ECHR protection by art 17 is in *Lehideux v France* (2000) 30 EHRR 665, [47] (though in that case itself the contentious attempts to rehabilitate the reputation of the leader of Vichy France, Pétain, were held not to amount to Holocaust denial). See generally Paolo Lobba, 'Holocaust denial before the European Court of Human Rights: evolution of an exceptional regime' (2015) 26 *European Journal of International Law* 237.

22 See *Norwood* (n 13 above).

23 See also *Glimmerveen v Netherlands* (1982) 4 EHRR 260, [16] for a further description of the scope of art 17. That case involved the banning of a political party that sought to remove all non-white persons from the Netherlands.

24 Appl 29297/18, 12 May 2020.

with its duties and responsibilities',²⁵ and the applicant in *Lilliendahl* was held to have abused his responsibilities by speaking in the manner he did. Uniquely within the European Convention, article 10(2) explicitly imposes responsibilities on individuals (as well as the more familiar positive obligations on states that are implicit in many of the substantive articles of the Convention). In *Vejdeland v Sweden*²⁶ various individuals entered a secondary school and distributed leaflets describing homosexuality as a 'deviant sexual proclivity' and alleged that LGBT rights groups 'played down paedophilia'. Rejecting their complaint that their conviction for agitation against a national or ethnic group was a breach of their article 10 rights, the European Court emphasised the obligations on the applicants that arise alongside the rights in article 10, 'one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights'.²⁷ Though the concept of responsibility remains vague in the European Court's jurisprudence, it would seem that the obligation on speakers is to be aware of the context in which they speak, and to moderate that speech when necessary to avoid compromising the underlying values of the Convention.²⁸ Speakers need, in other words, to be aware of the potential for their words to lead to unwarranted hurt in others, as well as to violence or social unrest: 'even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them'.²⁹

While the right to hold a belief is absolute under article 9, that does not mean that the state, when adjudicating on its manifestation, or the expression of the belief under article 10, is prohibited from evaluating how close the belief itself is to the democratic values underpinning the Convention. The further the belief is from the core values of the

25 See Claire Moran, 'Responsibility and freedom of speech under article 10' [2020] European Human Rights Law Review 67, who warns against an over-reliance on art 17 and would prefer the focus to be on the limitations in art 10.

26 *Vejdeland v Sweden* (2014) 58 EHRR 15. See also *Hammond v DPP* [2004] EWHC 69 (Admin) where an evangelical Christian preacher, while preaching in a public street, displayed a sign 'Stop Homosexuality. Stop Lesbianism'. His conviction under s 5 of the Public Order Act 1986 was upheld and his defence based on arts 9 and 10 rejected as his actions were not a reasonable exercise of the freedoms protected by these articles.

27 *Vejdeland v Sweden* (n 26 above) [57].

28 A clear example of this context-dependency is the responsibility of members of the judiciary to show 'maximum discretion' in expressing views in public due to the 'special role in society of the judiciary, which, as a guarantor of justice, a fundamental value in a law-governed society, must enjoy public confidence if it is to be successful in carrying out its duties': *Baka v Hungary* (2017) 64 EHRR 6, [164].

29 *Forstater v CGD Europe* [2019] 12 WLUK 516, [87] (Employment Tribunal).

Convention, the easier it will be for the state to establish a justification for any restriction on its manifestation or expression. In *Pastörs v Germany*³⁰ a German *Land* MP complained of having been convicted of Holocaust denial³¹ as a result of various statements he had made in the *Land* Parliament. The European Court of Human Rights, while acknowledging that the existence of that offence in German criminal law amounted to a restriction on the right to freedom of expression, said this:

The applicant sought to use his right to freedom of expression [article 10] with the aim of promoting ideas contrary to the text and spirit of the Convention. This weighs heavily in the assessment of the necessity of the interference ... While interferences with the right to freedom of expression call for the closest scrutiny when they concern statements made by elected representatives in Parliament, utterances in such scenarios deserve little, if any, protection if their content is at odds with the democratic values of the Convention system.³²

Likewise, the strength of the language used to express the view, the context in which it is expressed and its capacity to cause offence and social unrest will be central to the proportionality analysis. Actions or statements that are likely to offend significant numbers of people are manifestations of belief whose prohibition may well be proportionate to the legitimate aim of avoiding social conflict, as with the street preacher sermonising about the sinfulness of homosexuality in *Hammond v DPP*.³³ But since a tolerant society tolerates the offensive (and indeed the intolerant),³⁴ to lose ECHR protection the belief or expression thereof must do more than simply offend: it must have the potential to cause *harm*, such as ‘expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance’.³⁵ Though offensiveness alone is not sufficient to deny a belief or its expression of the protections in articles 9 and 10, the Convention is designed to do far more than discourage social unrest, for the parameters of ‘harm’ here are wider than violence or civil disturbance. It will normally be enough to justify restrictions if the rights, broadly conceived, of other individuals would be detrimentally affected without the prohibition. In *Vejdeland v Sweden*,³⁶ mentioned above, the European Court found

30 Appl 55225/14, 3 October 2019.

31 A crime in most countries in Europe (though not, specifically, in the UK) and in Israel.

32 Appl 55225/14, 3 October 2019, [46]–[47]. See also [37] for the relevance of the concepts in art 17 in the proportionality analysis.

33 [2004] EWHC 69 (Admin).

34 As Lord Walker put it (quoting counsel) in *R (Williamson) v Secretary of State for Education* [2005] UKHL 15, [60]: ‘In matters of human rights the court should not show liberal tolerance only to tolerant liberals.’

35 *ES v Austria* (2019) 69 EHRR 4, [43].

36 *Vejdeland* (n 26 above).

that, while the anti-LGBT leaflets the applicants had distributed in a high school did not directly recommend individuals to commit hateful acts, they did make serious and prejudicial allegations, and therefore the conviction of the applicants was a proportionate interference with article 10:

The Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner.³⁷

Inherent in the Convention is the understanding that there is no inconsistency between sincerely holding to one belief while respecting the right of others to hold a contrary belief: indeed showing respect to the beliefs of others is the only way of ensuring the inherent dignity of every human person. It follows that the more intolerant of other views a belief is, the easier the court will find it to hold the belief inconsistent with the Convention aim of fostering tolerance and pluralism, and the more readily the limitations on its manifestation can be found justified.

That messages of tolerance will find it far easier to be considered consistent with the Convention and entitled to a higher degree of respect than messages of intolerance, and that restrictions on the latter are therefore more likely to be found to be proportionate than restrictions on the former, is well illustrated in *R (Core Issues Trust) v Transport for London*.³⁸ Transport for London (TfL) had displayed adverts on the sides of London buses, placed by Stonewall UK (an LGBT rights organisation) with the words ‘Some People are Gay. Get Over it’. Shortly thereafter, TfL refused to display adverts on its buses placed by Core Issues Trust, an organisation that claims the mission to support gay people seeking to become non-gay people (by a process the organisation calls ‘sexual re-orientation’ and which is normally referred to as ‘gay conversion therapy’).³⁹ The organisation challenged, by way of judicial review, TfL’s refusal of their advert arguing (*inter alia*) that the refusal interfered with their article 10 right to freedom of expression. The challenge was rejected by the Court of Appeal which saw a crucial difference between the two adverts. Lord Dyson MR explained that

37 Ibid [55].

38 *R (Core Issues Trust)* [2014] EWCA Civ 34.

39 The UK Government published plans to ban ‘these coercive and abhorrent practices’ in England and Wales: *Banning Conversion Therapy Consultation* 21 October 2021. Likewise, ‘The Scottish Government has committed to introducing legislation by the end of 2023 which will end conversion practices as comprehensively as possible within devolved powers’: ‘Ending conversion practices’ (*Gov.scot* 18 November 2021).

Stonewall's advert had been designed to discourage discrimination, while the Trust's advert would *encourage* discrimination:

The restrictions are justified in view of the prominence of the advertisements and the fact that they would be seen by, and cause offence to, large numbers of the public in central London. Moreover, for those who are gay, the advertisements would be liable to interfere with the right to respect for their private life under article 8(1).

... I agree with the judge that the advertisement is liable to encourage homophobic views *and homophobia places gays at risk ...*

I consider that the Stonewall advertisement was intended to promote tolerance of homosexuals and discourage homophobic bullying ... The Trust's advertisement was a riposte to the 'gay acceptance' message promoted by Stonewall and would have been seen (and was seen) as countering that message and encouraging 'gay rejection' by implying offensively and controversially that homosexuality can be cured.⁴⁰

The importance of this judgment for our purposes is not only that it recognises that encouraging homophobic views is dangerous for LGBT people but also that, for that reason, limitations on free speech designed to prevent homophobia are likely to be proportionate to their protective aims – and are likely thereby to be consistent with the ECHR.

HOMOPHOBIA: AN ASSUMPTION OF SUPERIORITY

'Homophobia places gays at risk.' This is reason enough to show that its manifestation, whether by direct expression or by implication from acts or omissions, will be inimical to the values that underpin the ECHR. But it is wrong to restrict our understanding of homophobia only to speech or behaviour that indicates mindless hatred of, extreme prejudice against, or the encouraging of violence towards LGBT people. LGBT people are exposed to risk in many more insidious ways than by attacks on our physical safety. Public attitudes and cultural mind-sets can (and for many long centuries did) create a social atmosphere that is toxic for LGBT people, one with a substantial ability to impact destructively on our emotional and mental wellbeing,⁴¹ our sense of self and our place in society. The word 'homophobic' is today widely understood to encompass beliefs and expressions that are less obviously destructive, and it is commonly used to describe even moderately expressed

40 *R (Core Issues Trust)* (n 38 above) [84]–[85], [88] (emphasis added).

41 See, for example, K Schreiber and H Hausenblas, 'Why are suicide rates higher among LGBTQ youth?' (*Psychology Today UK* 12 October 2017). The Mental Health Foundation refers to a survey by Stonewall that half of all LGBTIQ+ have experienced depression, that one in eight have attempted suicide and almost half of all trans people have considered suicide: 'LGBTIQ+ people: statistics'.

anti-LGBT viewpoints – anything indeed that suggests that gay and lesbian people are of less worth, due to their sexual orientation, than heterosexual people.⁴² Homophobia, in essence, is the assumption of heterosexual superiority – the spoken or unspoken belief that the holder of the belief, because heterosexual, is morally better and socially more valuable than those who are not, irrespective of any intent to discriminate against or otherwise harm any individual or group. Lady Hale, in *Lee v Ashers Baking Company Ltd*, spoke to the lived experience of millions when she said that ‘it is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person’s race, gender, disability, sexual orientation or any of the other protected personal characteristics’.⁴³ The affront to dignity lies in the necessary implication that a person – or a whole community – is worth less than others, merely on account of their race, gender, disability or sexual orientation. Homophobia in this broader sense, because it denies the dignity of those it assumes to be inferior, offends ‘the very essence of the Convention’⁴⁴ just as much as violent or extreme homophobia does, if in a different (but more insidious) way: it causes real and enduring harm to every LGBT person. So even if the owners of the Ashers Baking Company Ltd act respectfully to LGBT individuals that they come across in their professional and personal lives, and even when it would not cross their minds (as good Northern Ireland Christians) to encourage violence or hatred against anyone, their belief in their own heterosexual superiority may justly be described as homophobic, and as harmful to those who do not share their sexuality. *Lee v Ashers Baking Company Ltd* may not have been about an act of discrimination against someone because of their sexual orientation, but it was fundamentally about the extent to which homophobic belief was worthy of respect in a democratic society. Though obscured by the Supreme Court’s focus on the defendants’ right not to express a belief that they did not actually hold, the defendants were in essence asserting their right to deny the equal worth of homosexuality and heterosexuality as aspects of the human condition.

This is no different from the claim to racial superiority that lies at the heart of racism, and courts often point to homophobia and racism

42 In *Campbell v Dugdale* [2020] CSIH 27 the Court of Session accepted as fair comment a description of a tweeter as ‘homophobic’ when he had made a clumsy joke in poor taste at the expense of a gay MP.

43 *Lee v Ashers* (n 5 above) [35].

44 *Pretty v United Kingdom* (2002) 35 EHRR 1, [65].

being regarded in the same light, and as equally unworthy of respect.⁴⁵ But *Lee v Ashers Baking Company Ltd* reveals that the analogy is not (yet) accepted as exact. While racism that falls short of violent hatred has long been regarded as incompatible with Convention values, the Supreme Court's approach creates doubt as to whether homophobia falling short of violent hatred is equally incompatible. Few would deny the racism in a remark like: 'I wish black people well, and no harm, but I would not want to associate with them myself because they are racially inferior to me', because that is a claim to superiority based on no factor remotely relevant to worth and is indifferent to the very real harm that such assertion of superiority does to the dignity of all black people. Replacing 'black' with 'LGBT', and 'racially' with 'sexually', should not make the remark any more acceptable in a democratic society, nor entitled to any greater respect or protection. But the Supreme Court has – unintentionally I accept – cast doubt on that proposition.

Imagine the following two scenarios:

Scenario one

Ms Aristel Basquet goes to a bakery and asks for a cake to be decorated with the words 'Black Lives Matter', which she intends to share at a rally supporting that movement. The baker, very politely, declines on the ground that it is contrary to her own philosophical belief that, in fact, white lives matter more than black lives and that it is white people, more than black people, who today suffer true discrimination. Ms Basquet complains of discrimination in the provision of goods and services and in defence the baker pleads article 10 of the ECHR, asserting that it would breach her right of free speech to be forced to give expression to a belief that she does not, in fact, hold.

Scenario two

Mr Pierre Makarel goes to a bakery and asks for a cake to be decorated with the words 'Islam Out of UK', which he intends to share at a rally of neo-Nazis. The baker, not very politely, declines on the ground that it is contrary to his own philosophical belief that racial and religious hatred should always be resisted. Mr Makarel complains of discrimination and in defence the baker

45 In *Grainger plc v Nicholson* [2010] 2 All ER 253, [28], Burton J offered as examples of beliefs that would not be worthy of respect in a democratic society, would not be compatible with human dignity and would conflict with the fundamental rights of others 'a racist or homophobic political philosophy'. The European Court in *Vejdeland v Sweden* (n 26 above) [55], a case about homophobic belief, gave 'racist speech' as an example of speech that would be an irresponsible exercise of freedom of expression.

pleads article 10 of the ECHR, asserting that it would breach his right of free speech to be forced to give expression to a belief that he does not, in fact, hold.

Are the beliefs held by these bakers each entitled to the same level of respect under articles 9 and 10? A proportionality analysis would readily allow the courts to give different answers in these two scenarios. In the first, the belief held by the baker (white superiority), being inconsistent with the values of tolerance and pluralism that underpins the Convention, should not receive a level of respect that would allow it to be used as a defence to a claim for discrimination. In the second, the baker's belief (in the importance of resisting racial and religious hatred) is entirely consistent with both the text and the spirit of the Convention and for that reason is entitled to a higher degree of respect in a democratic society than the belief in the first scenario, *including its manifestation by use as a defence to a claim for discrimination*. If so, then the baker in the first scenario should be unable to rely on article 10 and so would be obliged to fulfil the order (or leave the business of offering goods and services to the public), while the baker in the second scenario would be able to use article 10 to protect himself from being forced to express a view with which he profoundly disagrees.⁴⁶

Now, in *Lee* the Supreme Court failed to subject the actual belief of the owners of the Ashers Baking Company Ltd, or how they manifested their belief, to any assessment of its consistency with ECHR values, because it diverted its attention to the belief that the owners did *not* hold, and which they claimed they were being forced to express. Had the focus been on the actual belief of the owners, the Supreme Court might well have realised that their belief was analogous to the belief of the baker in the first scenario – analogous to racism, in other words, since both beliefs are founded on an (unmerited) assumption of superiority, notwithstanding that their refusal to supply the cake was not in itself an expression of hatred nor, directly, the promotion of violence or prejudice. Instead, the owners' belief (in their own heterosexual superiority) was treated, by default, as analogous to the

46 This assumes, for the sake of present argument, that the Supreme Court were right in their assumption that a supplier of goods decorated with words is expressing the content of the words. I previously challenged that assumption in 'Case and comment: *Lee v Ashers Baking Company Ltd*' (2019) *Juridical Review* 88, 92: 'The Royal Mail is not endorsing or even expressing the views of political parties who use its services to distribute their propaganda: it is simply providing a medium. Broadcasters are not themselves expressing a view when they give airtime to those who offer opinions. No-one really believes that a shop selling cards, or cakes, with "Happy Birthday" on them is itself expressing birthday greetings to anyone.'

baker's belief in the second scenario – it was a belief entitled to a level of respect that allowed the owners to use it to claim an exemption from the general law prohibiting discrimination. By doing so, the Supreme Court afforded homophobic belief that was not directly violent more respect than it would likely afford racism that is not directly violent, an approach inconsistent with the position of the European Court that discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'.⁴⁷

THE LEVEL OF PROTECTION PROPERLY AFFORDED TO OPPOSITION TO SAME-SEX MARRIAGE

It is likely that few people who oppose same-sex marriage self-identify as 'homophobic'. But just as opposition to mixed-race marriage is unquestionably racist, as a proxy for the belief in racial supremacy, so too opposing same-sex marriage, when founded on the belief in heterosexual superiority,⁴⁸ is necessarily homophobic. Both oppositions are therefore deeply suspect as being inconsistent with the underlying values of the European Convention, in particular that of dignity. But that does not mean that expressing opposition to same-sex marriage is entitled to no protection at all under the Convention. I am far from arguing that opposing the opening of the institution of marriage to same-sex couples is as destructive of Convention values as Holocaust denial or support for neo-Nazism: it does not, in itself, activate article 17,⁴⁹ nor fail to satisfy the fifth *Grainger*

47 *Smith and Grady v United Kingdom* [2000] 29 EHRR 493, [97]. See also *Karner v Austria* (2004) 38 EHRR 24, [37]: 'Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.' In *Ratzenböck and Seydl v Austria* Appl 28475/12, 26 October 2017 [32], the court reiterated that 'differences based solely on sexual orientation are unacceptable under the Convention'. In *Campbell v Dugdale* 2019 SLT (Sh Ct) 141, [86], Sheriff Ross described, in the context of an action for defamation, an allegation of homophobia as 'toxic' and bearing comparison with 'racist' or 'holocaust denier'.

48 See n 10 above.

49 See *Lilliendahl v Iceland* Appl No 29297/18, 12 May 2020 where art 17 was held not to be activated by comments designed to promote detestation of homosexuals. This was a hate crime far more explicitly homophobic than opposition to same-sex marriage, and the European Court of Human Rights has, in fact, never used art 17 to deprive homophobic speech of any ECHR protection.

criterion.⁵⁰ Nor am I arguing that opposing same-sex marriage should be criminalised as a hate crime. Free debate is so deeply rooted in the needs of democracy that the courts are, rightly, very reluctant to condemn contributions to political debate as unworthy of any respect at all in a democratic society. In the well-known words of Sedley LJ in *Redmond-Bate v DPP*:⁵¹ ‘Free speech includes not only the inoffensive but also the irritating, the contentious, the eccentric, the heretical, the unwelcome and provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.’ The right to offend is itself an essential element of democracy,⁵² and that means that even homophobic beliefs and their expression must be entitled to some level of ECHR respect and protection. The question is, what level?

There are a number of cases which show that, as a minimum, speech involving claims of heterosexual superiority has to be tolerated, in the sense of being permitted to be expressed. In *Re Christian Institute’s Application for Judicial Review*⁵³ the applicants (a group of Christian churches and organisations) sought the nullification of a Northern Irish statutory instrument⁵⁴ prohibiting discrimination and harassment on the ground of sexual orientation: they argued that granting this protection to the LGBT community would interfere with the applicants’ conception of Christian beliefs (by requiring them and their fellow adherents to treat gay people with the same level of respect that they would show to non-gay people). The application was granted in part, and, though that was mainly due to flaws in the consultation process, Weatherup J took pains to point out:

50 In *Grainger plc v Nicholson* [2010] 2 All ER 253 Burton J set out the criteria that needed to be satisfied before an opinion qualified as a philosophical belief worthy of protection. The fifth criterion was that it be not incompatible with human dignity and not conflict with the fundamental rights of others. It is worth noting that Burton J, though he did not have opposition to same-sex marriage in mind explicitly suggested at [28] that ‘a homophobic political philosophy’ would indeed fail his fifth criterion. In *Forstater v CGD Europe* [2021] 6 WLUK 104 the Employment Appeal Tribunal said at [66]: ‘even comments which are “serious, severely hurtful and prejudicial”, or which promote intolerance and detestation of homosexuals would not fall outside the scope of art 10 altogether. However, that does not mean that the individual making such comments has free rein to make them in any circumstance at all. The individual’s freedom to express their views is limited to the extent provided for by art 10(2) and it will then be for the Court to assess whether any limitation imposed by the State is justified.’

51 [2000] HRLR 249 [20].

52 *Handyside v United Kingdom* (1979–80) 1 EHRR 737, [56]; *Sunday Times v United Kingdom (No 2)* (1992) 14 EHRR 123, [50].

53 *Re Christian Institute* [2007] NIQB 66.

54 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SI 2006/439).

The belief in question is the orthodox Christian belief that the practice of homosexuality is sinful. The manifestation in question is by teaching, practice and observance to maintain the choice not to accept, endorse or encourage homosexuality. Whether the belief is to be accepted or rejected is not the issue. The belief is a long established part of the belief system of the world's major religions. *This is not a belief that is unworthy of recognition.* I am satisfied that Article 9 is engaged in the present case. The extent to which the manifestation of the belief may be limited is a different issue.⁵⁵

More recently, in *Omooba v Michael Garret Associates*,⁵⁶ an actress had her offer of a role in a play where the character would show lesbianism in a sympathetic light withdrawn when her own negative views on homosexuality came to light. The Employment Tribunal dismissed her claim on finding that the offer was withdrawn not because of her views as such but because, when these views became known and she refused to (sufficiently) retract them publicly, she would not be credible in the role and the production itself was threatened. Nevertheless the Employment Tribunal, if with noticeable hesitancy, affirmed that a belief that no one is born gay (that God makes everyone non-gay and LGBT people choose their sexuality, contrary to God's word, and are sinful) was entitled to respect and protection under article 9:

While wholly understanding why the statement of the claimant's beliefs was deeply offensive to people of same sex orientation, as well as to those of other orientations and none, we could not go so far as to say that merely stating the belief was not worthy of respect in a democratic society. It does not advocate harassment, although the belief may from time to time be expressed in ways that do amount to intimidation, nor that gays should not be employed, run businesses, be punished or shunned. She did not suggest conversion therapy, though that is underpinned by the belief that you are not born gay. A pluralist society must respect belief, however unacceptable to many people. There may be limits, for example to incitement to violent action, or setting restrictions on other people leading their lives, but as expressed by the claimant, she was not advocating any more than that other Christians must express their beliefs ...

After anxious and careful consideration we concluded that the Claimant's beliefs as manifested in the Facebook post, did scrape over the threshold for protection [under article 9], having regard to section 9(2).⁵⁷

One of the clearest judicial affirmations of the right to hold and to express the view that marriage should not be extended to same-sex

55 *Re Christian Institute* (n 53 above) [50] (italics added).

56 *Omooba v Michael Garret Associates*, Employment Tribunal Case Number 2202946/19, 2602362/19, 17 February 2021.

57 *Ibid* [93]–[94] (the reference to 'section' 9(2) is a slip of the keyboard: throughout, the Tribunal were discussing art 9 of the ECHR).

couples is to be found in *Foster v Jessen*,⁵⁸ an action for defamation raised by Arlene Foster, previously First Minister of Northern Ireland, against a defendant who had accused her of being (*inter alia*) homophobic due to her opposition to same-sex marriage. McAlinden J said that Foster's 'traditional religious views which ... are an important part of who she is, are views which she is entitled to hold and entitled to express ... As Northern Ireland becomes a more secular society, there must be room or accommodation for an individual to hold such traditional religious views without being automatically classed as homophobic.'⁵⁹

Now, the test for the legitimacy of limitations on opposition to same-sex marriage is not found in the parameters of the contested word 'homophobic' (which is not a legal term of art) but in a proportionality analysis that will assess the acceptability of any limitations to the rights in articles 9 and 10 in the light of the aims sought by these limitations. The European Court has more than once acknowledged that:

the notion of 'respect' ... is not clear cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in Contracting states, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention.⁶⁰

The appropriate level of respect to be shown, for reasons of democracy, to unpopular views may be gleaned from the way Lady Hale expressed herself in *R (Williamson) v Secretary of State for Education*. She said that 'a free and plural society must expect to tolerate all sorts of views which many, even most, find completely unacceptable'.⁶¹ The language of toleration was again used by the Employment Appeal Tribunal in *Forstater v CGD Europe* when it said:

the legal recognition of Civil Partnerships does not negate the right of a person to believe that marriage should only apply to heterosexual couples ... [Such] beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society.⁶²

58 [2021] NIQB 56 [36].

59 This reflects the words of the US Supreme Court in *Obergefell v Hodges* 135 SCt 2584 (2015), 2602, [12]: 'Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.'

60 *Goodwin v United Kingdom* (2002) 35 EHRR 18, [72]; *Hämäläinen v Finland* Appl 37359/09, 16 July 2014; *Fedotova v Russia* Appl No 40792/10, 13 July 2021, [45].

61 *Williamson* (n 34 above) [77].

62 *Forstater v CGD Europe* (n 50 above) [116].

To ‘tolerate’ unpalatable views means no more than that the law must permit them to be expressed without legal punishment and to require states to restrict their expression only in a manner that is proportionate to the aim of protecting the rights of others.⁶³

BEYOND TOLERANCE?

So, democracy tolerates intolerance by allowing it to be manifested in words and deeds, but it does not encourage it, and the ECHR does not require states to offer intolerance any higher level of respect and protection than toleration. To put it another way, while states must allow the expression of controversial, upsetting and offensive views (within limits discussed above), there is no positive obligation on them to encourage or facilitate such expression, nor to confer some positive legal advantage from holding such views, nor to protect the believer from the social consequences of expressing their beliefs. This may be illustrated in the following cases.

In *Ladele v Islington Borough Council*,⁶⁴ a local authority marriage registrar considered same-sex relationships to be sinful in the eyes of her god: she held absolutely and irrevocably to the belief in heterosexual superiority. Her right to hold that view is absolute under article 9. Her right to express that view is protected by article 10, though that right may be restricted if the mode of expression incites violence or unrest or amounts to a hate crime. But Ms Ladele wanted more than simply the right to express her view peacefully: she wanted an employment benefit, in the form of being relieved from the obligation of registering civil partnerships for same-sex couples that would otherwise be part of her job. She was attempting to use her belief in the sinfulness of homosexuality (the superiority of heterosexuality) to give her an exemption from her employer’s policy of providing the registration service they offered to the public in a non-discriminatory fashion. Both the English Court of Appeal and the European Court of Human Rights had little difficulty in rejecting her claim.⁶⁵ They would not allow her to use her article 9 right of freedom of thought, conscience and religion to gain the legal advantage of an exemption not open to those of her colleagues who did not share her belief in

63 The refusal to prosecute a homophobic joke made against a gay television personality was found by the European Court of Human Rights not to constitute a violation of either art 8 or art 14 because the balance between these articles and art 10 had been properly struck: *Sousa Goucha v Portugal* Appl 70434/12, 22 March 2016. But the refusal to prosecute calls for a gay couple to be killed did violate arts 8 and 14 in *Beizaras and Levickas v Lithuania* (2020) 71 EHRR 28.

64 [2009] EWCA Civ 1357.

65 *Ibid*; *Eweida v United Kingdom* (2013) 57 EHRR 8.

heterosexual superiority. The protection given to her by the ECHR was no more than the right to express her views: they were respected (protected) to that extent only.

In *R (Cornerstone (North East) Adoption and Fostering Services) v OFSTED*,⁶⁶ a Christian charity that offered adoption services failed in their challenge to a requirement by the regulatory body that they remove a condition that their prospective adopters ‘refrain from homosexual behaviour’.⁶⁷ They were held entitled to hold, and indeed to expound, the view that children should always be brought up by opposite-sex couples, but they could not use that belief to give them an exemption from the non-discrimination provisions in the Equality Act 2010 beyond the religious exemptions that the Act explicitly contains.

A similar case is that of *R (Johns) v Derby City Council*⁶⁸ where a couple with strongly anti-LGBT (religiously inspired) views had their approval as short-term foster carers denied. The court held that the attitudes of potential foster carers to sexuality was a relevant consideration in the approval process. The couple, by seeking approval, were submitting themselves to the National Minimum Standards for Foster Carers, and they could not require the approving council to exempt them from the standard that required non-discrimination on the ground of sexual orientation just because of their beliefs.

And, in *Page v Lord Chancellor and Lord Chief Justice*,⁶⁹ a magistrate who had refused to sign adoption papers for a same-sex couple seeking (unopposed) to adopt a child, and confirmed to the press that his views remained unchanged, was held not to have been unlawfully victimised when he was dismissed from his positions. His right to express his understanding of Christian belief, that children should be brought up by a man and a woman, was protected by article 10; but he wanted more. He wanted to apply that belief to the legal questions that his position as a magistrate required him to answer. He was effectively asking for the right to operate the adoption process in a manner consistent with his own beliefs rather than consistent with the law of the land. No judge can be granted that request in a society founded on the rule of law.

These cases suggest that only a very modest level of respect needs to be shown to homophobic beliefs, but the respect inherent in tolerance

66 [2021] EWCA Civ 1390.

67 OFSTED’s requirement that the agency remove the ban on LGBT people was accepted to be an infringement under art 9(1), but its aim of ensuring a diverse and inclusive body of prospective adopters was a legitimate aim and the requirement was a proportionate means of achieving that aim, which in any case reflected Parliament’s ‘specifically expressed will’ in the Equality Act 2010.

68 [2011] EWHC 375 (Admin).

69 [2021] EWCA Civ 254; and related case *Page v NHS Trust Development Authority* [2021] EWCA Civ 255.

is not without value to those who hold and express these beliefs. In *R (Ngole) v University of Sheffield*⁷⁰ a student on a social work degree programme had posted on social media his belief in the sinfulness of homosexuality, as a consequence of which the university withdrew him from the programme. His application for judicial review of that decision was successful because the university had misapplied its own disciplinary proceedings by assuming that the student would act upon his beliefs and discriminate against LGBT clients. The student won his case because he was claiming no more than the right to speak, and the toleration to be shown to his speaking was the limit of the respect to be accorded to that right. The Court of Appeal made clear that had there been evidence that the student would manifest his beliefs through his social work practice the university would indeed have been entitled to withdraw him from the course. In other words, he would not be allowed to use his own religious beliefs to carve out an exemption from the general law requiring him not to discriminate in his provision of social work services.⁷¹ The applicants in *Re Christian Institute's Application for Judicial Review*,⁷² already discussed, were likewise successful because they too were not claiming any exemption from existing legal rules: they were simply exercising their right to argue that such exemptions should be written into the legal rules. Ms Ladele, Cornerstone (North East) Adoption and Fostering Services, Mr and Mrs Johns, and your man Page on the other hand, lost their claims because they were seeking exemptions from legal rules presently in force and applicable to everyone who did not subscribe to their belief in heterosexual superiority.⁷³

70 [2019] EWCA Civ 1127. For comment and comparison with *Lee v Ashers Baking Company Ltd* see Steve Foster, 'Accommodating intolerant speech: religious free speech versus equality and diversity' (2019) *European Human Rights Law Review* 609. See also Foster, 'Accommodating intolerant speech: the decision in *Ngole v University of Sheffield*' (2020) 25 *Coventry Law Journal* 108.

71 A similar issue arose in Dundee Sheriff Court in *Keogh v University Court of Abertay University* 2023 GWD 2-20, 12 December 2022, where the university instituted a complaints procedure against a student who (other students felt) was expressing transphobic views in class, but dismissed the complaint. The student sued the university for subjecting her to the complaints procedure (which she accepted had been conducted properly) but failed on the ground that she had not been discriminated against: the complaints process had not been instituted because she had expressed views, but because other students complained about her doing so.

72 *Re Christian Institute* (n 53 above).

73 See also Stijn Smet who explains the decision in *Ladele* as the English court's resistance to allowing toleration to accommodate the 'expressive harm' that Ms Ladele's refusal to register civil partnerships necessarily caused, contrary to the 'expressive function' of the non-discrimination policy at issue: 'Conscientious objection to same-sex marriage: beyond the limits of toleration' (2016) 11 *Religion and Human Rights* 115.

Omooba v Michael Garret Associates,⁷⁴ the case of the actress whose offer of a role as a gay-friendly character in a play was withdrawn, illustrates the same point in a different way. Ms Omooba was not seeking an exemption from any rule of law or employment obligation, as Ms Ladele was, but she was asking the law to protect her from the economic consequences of expressing unpopular views, including from the unwillingness of others to maintain contractual arrangements with her. Her views were entitled to respect, to the minimal extent that the law had to tolerate her expressing them, but it was her own responsibility to balance her decision to express these views with the effect doing so would have on her future employment prospects. Effectively, she was asking for a higher level of protection: the right to express views and at the same time to have these views disregarded by others when they proved inconvenient to her. The Employment Tribunal held that she had only the right to express her views: it was up to her to take responsibility for the social and economic consequences of doing so.

GIVING ASHERS MORE

Applying these principles to the owners of the Ashers Baking Company Ltd, the law clearly and properly recognises that they have an absolute right to hold their belief in heterosexual superiority, and that they have a strongly protected right to manifest that belief by expressing opposition, in political debate, to any advancement of the legal rights of those they consider inferior to themselves, including marital rights for same-sex couples. But, like Ms Ladele and Mr Page, and unlike Mr Ngole, they demanded something more positive from the law than the right to believe themselves superior and indeed to say so. They demanded that the state give them benefit from that feeling of superiority in the form of an exemption from the non-discrimination rules contained in the Fair Employment and Treatment (Northern Ireland) Order 1998, which required everyone to provide the goods and services they offered to the public without discrimination on the ground of political belief. Like Ms Omooba they sought to be protected from the economic consequences of manifesting their beliefs – in her case losing a role in a play irrespective of her perceived suitability, in their case the obligation to pay damages for discrimination. The UK Supreme Court ought to have rejected their demand, just as the European Court rejected Ms Ladele's demand and Employment Tribunals rejected the demands of Ms Omooba and Mr Page. Its refusal to do so therefore offers higher protection than mere toleration of the defendants' belief in heterosexual superiority, a belief inconsistent with the values underpinning the ECHR. By allowing positive legal benefit

74 See *Omooba* (n 56 above).

to be gained from the defendants' belief in heterosexual superiority the Supreme Court gives it a legitimacy, an acceptability, a respectability, that runs perilously close to endorsing the belief itself.

CONCLUSION

There are two central flaws at the heart of the Supreme Court's decision in *Lee v Ashers Baking Company Ltd*. The first is that it affords the same level of respect to opposition to the opening of marriage to same-sex couples as it does to support for same-sex marriage, notwithstanding that opposition is inconsistent with, while support reflects, the values that underlie the ECHR. That led to the Supreme Court giving the belief in heterosexual superiority a level of protection greater than is justified by existing jurisprudence. The second central flaw is that this new level of respect is greater, almost certainly, than that which would be afforded to a belief in racial superiority, and the decision thereby creates a retrograde hierarchy of legitimacy where homophobia is less unacceptable (more acceptable) to the law than racism. This too is inconsistent with Strasbourg jurisprudence. While opposition to same-sex marriage is in itself neither a statement of hatred nor a call to violence, its common underpinning belief that heterosexuals are superior to homosexuals will, in Lord Dyson's words, 'encourage homophobic views'.⁷⁵ When the UK Supreme Court goes beyond toleration of such views, and affords them benefit, succour is given to those who do hate and who do wish to see that hatred manifested in violence and the violation of the rights of others. Until opposition to substantive LGBT equality is seen as exactly equivalent to opposition to racial equality, then the belief in heterosexual superiority will continue to be offered a greater level of respect and protection by the law than is consistent with the personal safety and emotional wellbeing of LGBT people. The decision serves to counter the message of moral equivalence between sexualities that hate crime prohibitions against homophobic speech and the legislation opening marriage to same-sex couples give⁷⁶ (and were designed to give) loud and clear. The losers, very directly, are LGBT people. Lord Dyson again: 'Homophobia places gays at risk.'⁷⁷

75 *R (Core Issues Trust)* (n 38 above) [85].

76 See Kenneth Norrie, 'Now the dust has settled: the Marriage and Civil Partnership (Scotland) Act 2014' (2014) *Juridical Review* 135, 142–144.

77 *R (Core Issues Trust)* (n 38 above).