

Lady Hale gives the Alison Weatherfield Memorial Lecture at the Employment Lawyers Association

The Conflict of Equalities

10 July 2013

It is indeed an honour to be asked to deliver a lecture in memory of Alison Wetherfield. There can be few people to have inspired, not one, but two memorial lectures within a few weeks of one another. But this is testament to the vigour and variety of Alison Wetherfield's work. Philippe Sands has commemorated her work with Freedom from Torture and I am here to commemorate her work on gender and equality. The Times described her as 'a pathbreaking lawyer and versatile solver of problems, who combined a prodigious intellect and zest for life with a disarming squeeze of irreverence' (Obituary, 3 September 2012). She must also have had prodigious energy to cram all that she did into a life which was far too short. She is and will continue to be missed and mourned by her family and by a great many people who have good reason to be glad of and grateful for her life. We are honoured that her husband, Dan Schlesinger, and one their sons, Ben Wetherfield, are with us tonight.

When I last had the pleasure of addressing the Employment Lawyers' Association, in November 2008, my subject was 'discrimination in the House of Lords' – not, of course the discrimination practised by the House of Lords but its jurisprudence. My theme then was the difficulty arising from the lack of a general defence of justification to direct discrimination. Courts and tribunals have a natural eye for what they see as the merits of the case. If they think that there is a good reason for a difference in treatment they will try and find a reason why it is not unlawful. They

may, for example, hold that it is indirect rather than direct discrimination and so can be justified. Or they may hold that the difference in treatment is due to a material difference other than sex. How much more satisfactory it would be, I suggested, if there were to be a general defence of justification in discrimination law, so that courts and tribunals could get down to addressing the real issues – legitimate aim, rational connection, proportionality – rather than looking for technical distinctions which would mean that there was no discrimination at all. I went on to suggest that the approach to discrimination under article 14 of the European Convention on Human Rights was preferable to that under our EU mandated anti-discrimination laws because it allowed for competing rights to be balanced against one another. The problem was not going to go away, I concluded, especially now that we have so many more protected characteristics which may well conflict with one another. Well, my solution may not be the right one but I was certainly right about the problem.

It came before us in the Jewish Free School case – *R (E) v Governing Body of JFS School* [2009] UKSC 15, [2010] 2 AC 728 – the subject of the very last order made in the House of Lords and the very first order made in the Supreme Court. The case was brought on behalf of a boy who had been refused admission to the JFS school because he did not fall within the definition of a Jew in the school’s admission criteria. These depended upon whether the child was recognised as Jewish by the Office of the Chief Rabbi. He required that the child be an orthodox Jew either by conversion (which was virtually impossible at his age) or by descent from an orthodox Jewish mother, who might herself be orthodox either by descent from an orthodox Jewish mother or by conversion to Judaism in an orthodox ceremony. This child’s mother had converted from her original Roman Catholic faith but in a ceremony which the Chief Rabbi did

not recognise. The child was therefore denied admission to the school even though he was an observant Masorti Jew, much more observant than other children who would have been admitted. Unlike other faith schools, the JFS did not require religious observance, merely Jewishness according to the orthodox definition.

Faith schools are allowed to discriminate on religious grounds but they are not allowed to discriminate on grounds of race or ethnicity. No-one has ever doubted that the Jews are an ethnic group protected by the Race Relations Act. So what was this? There were three possibilities: direct discrimination on grounds of ethnic origin, which is absolutely prohibited; indirect discrimination on grounds of ethnic origin, which is prohibited unless objectively justified; or direct or indirect discrimination on religious grounds, which is permitted. Nine Justices heard the case, so the nightmare scenario was that there might be three Justices in favour of each possibility.

Fortunately for the child, the nightmare did not come. Five Justices held that it was direct discrimination on grounds of ethnic origin and thus not permitted; two held that it was indirect discrimination on grounds of ethnic origin and thus might have been justified but was not; and two held that it was not on grounds of ethnic origin at all but on religious grounds. I was one of the five. My main concern was to preserve the principle, established in the case of *Birmingham City Council v Equal Opportunities Commission* [1989] AC 1155 and maintained in the case of *James v Eastleigh Borough Council* [1990] 2 AC 751, that motivation or purpose was irrelevant: one can act in a discriminatory manner without meaning to do so or realising that one is. The question was simply (as Lord Phillips put it) ‘the factual criteria that determined the decision made by the discriminator’. It did not matter why he had chosen those

criteria if in fact they fell within the prohibited grounds. It was only necessary to look into the mind of the alleged discriminator if the factual criteria for his decision were not clear. Lord Phillips gave the example of a fat black man who goes into a shop to make a purchase and is told by the shopkeeper, ‘I do not serve people like you’: it would then be necessary to know which fact had led to the refusal – the fact that he was fat or the fact that he was black (or the fact that he was a man). But in the JFS case there was no doubt what the criteria were.

I appreciate that, although the principle is clear, the terminology is not. ‘The question why’ obviously does not help, as it could refer to either the motive or the cause. I myself think that the distinction between motivation and cause is perfectly plain. But we were not thinking about the problems this might cause for employment lawyers, who had been told by Lord Nicholls (in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] 1 WLR 1947, para 29) that ‘causation’ was not the right term for the factor which led the decision-maker to act as he did. So you had worked out a different terminology and then we threw you into disarray.

There was of course an issue over whether the criteria adopted by the school amounted to ethnic origins. The Jews as a whole fell within the definition of an ethnic group adopted by the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548, when considering the Sikhs, but did the orthodox do so? The majority gave a variety of reasons for holding that they did, but that need not concern us now. Lord Phillips, for example, quoted the example of Ruth the Moabite who converted: ‘Your people will be my people, and your God my God’. She was joining, not just a religious group but a people, an ethnic group.

But Lord Phillips did suggest that there might be a defect in our law of discrimination, because it provides no defence of justification to direct discrimination (para 9). He thought that it would not be easy to justify discriminating *against* a minority racial group, but he could envisage circumstances where giving preference to a minority group might be justified. He may well have had in mind the express permission given, for example in section 15(2) the Canadian Charter of Rights and Freedoms, for unequal treatment which has as its objective the amelioration of historic disadvantage. This is regarded by many as a legitimate aim (although not, it appears, by the Supreme Court of the United States when it comes to criteria for university admission: see *Fisher v University of Texas at Austin* 570 US ---- (2013), 24 June 2013. Promoting diversity in the student body is legitimate but redressing the historic educational disadvantage of blacks and Hispanics is not).

I too could see that there might be good reasons for allowing the JFS to continue its practice (para 69). Lord Hope (para 184) also complained that our prohibition of direct discrimination did not distinguish between ‘discrimination which is invidious and discrimination which is benign’. And Lord Walker remarked that the case illustrated ‘that the separateness and mutual exclusivity of direct and indirect discrimination . . . is sometimes elusive in practice. In consequence the sharp distinction between the impossibility of justifying direct discrimination in any circumstances, and the possibility of justifying indirect discrimination, sometimes seems a little arbitrary’ (para 237). So I have some powerful support for my proposition that the lack of a justification defence to direct discrimination can cause problems.

One of the problems is, of course, the difficulty of distinguishing between direct and indirect discrimination. In *James v Eastleigh Borough Council*, the factual criterion used to allow free entry to the swimming pool was not sex but pensionable age. There was, however, an exact coincidence between pensionable age and sex, so all women qualified at 60 and no man did. But what about the situation where all women qualify but only some men can?

This question came up in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783. That was a case about whether the qualifications for certain welfare benefits fell foul of the prohibition of discrimination on grounds of nationality in EU law. Claimants had to satisfy a ‘right to reside’ test, but all UK nationals could do this, whereas others had to show additional qualifications: was that direct or indirect discrimination on grounds of nationality? A similar question had come before the ECJ in *Bressol v Gouvernement de la Communauté Française* (Case C-73/08) [2010] 3 CMLR 559. Advocate General Sharpston quoted the definition of Advocate General Jacobs in *Schnorbus v Land Hessen* (Case C-79/99) [2001] 1 CMLR 40, para 33: ‘. . . where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex’. This would certainly fit *James v Eastleigh*. But AG Sharpston rephrased it thus: ‘I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of person distinguished only by applying a prohibited classification’ (para 56). So far so good. But she went on to characterise the ‘certain

advantage' as automatically satisfying a particular condition of entitlement and the correlative disadvantage as not automatically doing so (para AG 66). However, the ECJ itself did not apply the test in this way, and clearly considered the Belgian law under which all nationals qualified but only some nationals did so as indirect discrimination which was capable of justification.

In *Patmalniece*, Lord Walker commented that 'there is an obvious temptation for governments, in the face of understandable popular feeling (in this case, against "benefit tourism") to try to draft their way out of direct into indirect discrimination . . .' (para 72). Left to himself, I believe that Lord Walker would have applied AG Sharpston's test in the way that she had done, and found it direct discrimination, but the court had not done so and so neither did he. But he did say that the closer one got to direct discrimination the more searching the scrutiny of the alleged justification should be.

The same sort of problem came up the other way round in a Privy Council case from Gibraltar, *Rodriguez v Minister of Housing* [2009] UKPC 52, [2010] UKHRR 144. A same sex couple complained of discrimination because eligibility for joint tenancies of public housing was limited to married couples. So some opposite sex couples could qualify but no same sex couples could do so. We held that this was not a *James v Eastleigh* situation, because there was not an exact coincidence between the requirement and the prohibited ground (or protected characteristic as the Equality Act would put it). Other unmarried couples might also be refused a joint tenancy. But as same sex couples could never marry, whereas most opposite sex couples could, it 'comes as close as it can to direct discrimination' (para 19).

The distinction between direct and indirect discrimination can obviously be crucial where there is a clash between two protected characteristics. *JFS* was an example of a clash of equalities – the right of the child not to be discriminated against because he was not Jewish enough versus the right of the school and the Chief Rabbi to admit only those whom they believed that their faith compelled them to consider qualified. One could imagine more clear-cut examples – the right of a woman not to be discriminated against and the right of members of a religion to believe that women are not qualified to hold certain positions or to do certain jobs. But the example which has come up most frequently so far is the right of people not to be discriminated against because of their sexual orientation and the right of other people to practise their belief that same-sex relationships are wrong.

If we look at this solely through the prism of the European Convention on Human Rights, we may disagree about the answers but we have some comparatively straightforward tools of analysis. The judgment in *Eweida and Others v United Kingdom*, App nos 48420/10, 59842/10, 51671/10, 36516/10, judgment of 15 January 2013, brought together four cases where Christians complained that their right to manifest their religion had been interfered with, contrary to article 9 of the ECHR, or that they had been discriminated against on the ground of their religion, contrary to article 14, or both. Ms Eweida, who worked for British Airways, and Ms Chaplin, a nurse working in the NHS, complained that their employers had not permitted them to wear a cross at work. Ms Ladele and Mr McFarlane, complained that they had been dismissed because of their religious beliefs about same-sex relationships.

Ms Ladele was a registrar of births, deaths and marriages. She had been appointed before the introduction of civil partnerships in 2005. Her local authority decided to designate all their registrars as civil partnership registrars, although they did not have to do this. They offered to accommodate her to the extent of requiring her to carry out signings of the civil partnership register and administrative tasks connected with civil partnerships but not to conduct ceremonies. She complained of direct and indirect discrimination on grounds of her religion or belief and of harassment. The employment tribunal upheld her complaints, but both the EAT and the Court of Appeal held that it was only indirect discrimination and a proportionate means of achieving a legitimate aim.

She complained to Strasbourg of a breach of Article 14 – discrimination in the enjoyment of her convention rights because of her religion. She complained of both direct and indirect discrimination: the local authority should have treated her differently from staff who did not have a conscientious objection to registering civil partnerships. They could reasonably have accommodated her beliefs and their refusal to depart from their hard line was disproportionate. She also contended that religious belief should be included in the list of ‘suspect categories’ (such as sex, sexual orientation, ethnic origin and nationality) where ‘very weighty reasons’ are required for discrimination to be justified. She accepted that the local authority’s aims was legitimate, to provide non-discriminatory access to services and to communicate a clear commitment to non-discrimination. But she argued that the local authority did not adequately take account of its duty of neutrality: it had failed to strike a fair balance between delivering the service in a way which would not discriminate on

grounds of sexual orientation, while avoiding discriminating against its own employees on grounds of religion.

Mr McFarlane worked as a counsellor for Relate. He had concerns about providing counselling services of any sort for same-sex couples but accepted that providing simple counselling did not involve endorsing their relationship. But then he undertook a further qualification in psycho-sexual therapy. He would have some difficulty in reconciling working with couples on same-sex sexual practices with his duty to follow the teaching of the Bible. Eventually he was dismissed because Relate concluded that he had said that he would follow their equal opportunities policies and provide sexual counselling to same-sex couples without having any intention of doing so. The employment tribunal found that this was not direct discrimination: he had not been dismissed because of his faith but because of his non-compliance with their policy. But it was a policy which put people of his faith at a particular disadvantage, so it was indirect discrimination. But the dismissal had been a proportionate means of achieving a legitimate aim. The EAT agreed. He complained to Strasbourg of a breach of article 9, either alone or in combination with article 14. Dismissal was one of the most severe sanctions which could be imposed upon any individual. Relate was a private organisation with no statutory duty to provide the service in question.

Strasbourg upheld Ms Eweida's complaint, but dismissed all the others. It made several findings which were helpful to the complainants. What they wished to do was a 'manifestation' of their religion. It did not have to be a mandatory requirement of the religion. Also, what the employers had done was an interference with that right. The court disavowed earlier case law which had held that there was no interference if

the complainant could take steps – such as finding another job – to circumvent the limitation. Given the importance of freedom of religion, the better approach was to weigh the possibility of changing jobs or otherwise avoiding the problem in the overall balance when considering whether or not the restriction was proportionate. Technically, there was a difference between Ms Eweida and Mr McFarlane, who were employed by private companies, and Ms Chaplin and Ms Ladele, who were employed by public authorities but the applicable principles were similar. ‘In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole’ (para 84).

Ms Ladele had only complained of a breach of article 14, but the events in question fell within the ambit of article 9, so article 14 applied. The court regarded it as a case of indirect, rather than direct discrimination, because the requirement that all registrars be civil partnership registrars had a particularly detrimental impact upon her because of her religious beliefs. The local authority’s policy had a legitimate aim – bearing in mind that differences in treatment based upon sexual orientation require particularly serious reasons by way of justification and that same-sex couples are in a relevantly similar situation to different sex couples as regards their need for legal recognition and protection of their relationship. As to whether it was proportionate, the consequences were serious and the requirement was introduced after she had taken the post. But the policy aimed to secure the rights of others which were also protected under the Convention. ‘The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights’ (para 106, referring to *Evans v United Kingdom*) and this had not been exceeded.

Mr McFarlane's case was probably easier for them. He had voluntarily enrolled on the psycho-sexual counselling course knowing of their equal opportunities policy and that filtering clients would not be possible. But the most important factor was that 'the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. Once again there was a wide margin of appreciation in balancing his right to manifest his religion and the employer's interest in securing the rights of others (para 109).

But there was a strongly worded dissent from two judges in *Ladele*. They argued that this was not so much one of freedom of religious belief as one of freedom of conscience, protected under Article 9(1) and not mentioned in Article 9(2).

'Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and avoid evil'. As such it was different from and superior to religious doctrine: John Henry Newman had said that 'conscience may come into collision with the word of a Pope and is to be followed in spite of that word'. Once a genuine and serious case of conscientious objection was established, the State was obliged to respect it both positively and negatively. It was not a case of discriminating against the service users – none of them had complained. The local authority should have treated her differently from those who had not such conscientious objection and could have done so without prejudice to the service offered. Instead of practising the tolerance and 'dignity for all' it preached, the local authority had 'pursued the doctrinaire line, the road of obsessive political correctness'. (They had earlier said that it was 'a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which

clearly favoured “gay rights” over fundamental human rights)’ which had eventually led to her dismissal.)

Fair-minded people may therefore disagree about the application of these principles, but it is clear that we are in the territory of fair balance, between the interests of the individual and the community at large, and between the competing rights of individuals. The tools are comparatively clear: what is the importance of the right interfered with; what is the reason for the interference; is it legitimate; is the interference rationally connected to that aim; might a lesser degree of interference have been employed; and overall does the end justify the means? (See, for example, the summary of proportionality principles in the recent case of *Bank Mellat v HM Treasury* [2013] UKSC 39, paras 20 and 74.)

All of these complainants had originally brought discrimination rather than Human Rights Act claims. Ms Eweida and Mr McFarlane could not have brought Human Rights Act claims against their employers, although they could argue that the tribunals and courts before which they came were not allowed to act incompatibly with their Convention rights. I wonder what would have happened if Ms Ladele had brought a Human Rights Act claim against the London Borough of Islington rather than or as well as a discrimination claim?

Instead, the cases were brought under the Employment Equality (Religion or Belief) Regulations 2003, which prohibited employers from discriminating either directly or indirectly on grounds of religion or belief. These were the domestic implementation of the EU Framework Directive for Equal Treatment in Employment and Occupation

2007/78/EC. This was limited to discrimination in employment and vocational training. But the Equality Act 2006 extended the potential scope of this protection to the provision of goods, facilities and services. So regulation 4 of the Equality Act (Sexual Orientation) Regulations 2007 prohibited direct and indirect discrimination in the provision to the public or a section of the public of goods, facilities or services. This expressly applied to ‘accommodation in a hotel, boarding house or similar establishment’ (reg 4(2)(b)). (Now, of course, these regulations have been replaced by the Equality Act 2010.)

So we have a clear clash of non-discrimination rights. There is also a means of balancing them if the discrimination is classified as indirect rather than direct, although the precise phraseology of the justification defence has changed over time, but not generally if the discrimination is classified as direct. The Strasbourg cases were all cases where Christians complained that they had been discriminated against because of their religious beliefs, in two of them against same-sex relationships.

Coming our way soon is the reverse situation, where same-sex couples complain that they have been discriminated against by people who hold those same religious beliefs. I mention them, of course, not to express any views about the proper outcome but merely to discuss the problems of analysis which they pose.

In *Preddy v Bull* [2012] EWCA Civ 83, [2012] 1 WLR 2514, the defendants ran a private hotel. They believed that it was sinful for anyone, whether homosexual or heterosexual, to have sexual relations outside marriage. So their policy was only to let their double-bedded rooms to married couples, although they would let single and twin bedded rooms to anyone. They made this policy plain on their website. The

claimants, a same-sex couple in a civil partnership, booked a double room over the phone, not having seen the policy. When they arrived they were told about it, protested but left and were refunded their deposit. They brought a claim for direct or indirect discrimination on grounds of sexual orientation under the 2007 Regulations. The defendants denied direct discrimination and argued that a finding of direct discrimination would be incompatible with their rights under article 9 of the ECHR.

Both the judge and the Court of Appeal rejected an argument that this was discrimination on grounds of sexual practice rather than sexual orientation. They held that it was direct discrimination in the *Jones v Eastleigh* sense, in that the requirement that couples be married, although applied to everyone, was inextricably linked to hetero-sexual orientation, as homo-sexuals cannot marry one another. The judge had wrongly taken the view that if the regulations were incompatible with the defendants' convention rights there was nothing he could do about it, because only the High Court had power to strike down incompatible subordinate legislation. The Court of Appeal pointed out that he was wrong about that. But they went on to hold that the article 9 right to manifest their religious beliefs was a qualified right and the limitations imposed by the 2007 Regulations were 'necessary in a democratic society' to protect the rights of the claimants, including the right to respect for their private lives under article 8.

Lady Justice Rafferty did say that a democratic society must ensure that the defendants could still espouse and express their beliefs. 'It would be unfortunate to replace legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants' beliefs). . . Any interference

with religious rights . . . must satisfy the test of “anxious scrutiny”. However, in a pluralist society it is inevitable that from time to time, as here, views, beliefs and rights of some are not compatible with those of others. . . . I do not consider that the defendants face any difficulty in manifesting their religious beliefs, they are merely prohibited from doing so in the commercial context they have chosen’ (para 56).

The same issues arose in *Black and Morgan v Wilkinson* [2013] EWCA Civ 820. A same-sex couple were refused a room in a bed and breakfast establishment run by the defendant, who believed that homosexual relations and heterosexual sexual relations outside marriage were sinful. There were some differences from *Preddy v Bull*: the couple were not in a civil partnership and it was a bed and breakfast establishment where the guest rooms were in the same part of the house as the family’s rooms and guests had their breakfast in the family’s kitchen/dining room. Recorder Moulder reached the same conclusions as in *Preddy v Bull*: the Regulations applied; it was direct discrimination on the ground of their sexual orientation; and the regulations were not incompatible with Mrs Wilkinson’s rights, either under article 9 or under article 8. She clearly found it difficult to reconcile the Court of Appeal’s approach to the distinction between direct and indirect discrimination in *Preddy* with the Privy Council’s approach in *Rodriguez*. She gave permission to appeal to the Court of Appeal and the Court of Appeal has handed down judgment this very day.

The Master of the Rolls similarly found it difficult to reconcile *Preddy* with *Rodriguez* on the direct discrimination point. He would have wished not to follow *Preddy* but reluctantly concluded that it could not be distinguished. But had it not been direct discrimination it would undoubtedly have been indirect. He went on to

consider justification. He concluded that the discrimination was not justified, for two reasons. First, Parliament had given careful consideration to whether there should be an express exemption (as there was for religious organisations under regulation 14) and decided against it. This could not be conclusive in an indirect discrimination case, for otherwise there would be no balancing act to be done, but it had to be given considerable weight. Secondly, *Eweida* holds that the fact that a person can avoid the problem by giving up her job, or in this case her business, does not prevent their being interference with her religious rights; but the seriousness of the impact upon the defendant is relevant to the balancing exercise. Mrs Wilkinson had not shown that the restriction on her right to manifest her religious beliefs would cause her serious economic harm. Lady Justice Arden reached the same conclusions. She described the justification defence as ‘a safety valve . . . for situations for which Parliament has not provided an express exception’ (para 64). But given the Parliamentary history she clearly regarded the circumstances in which it would apply as exceptional. Lord Justice McCombe agreed with the Recorder that ‘the balance lies in allowing the defendant to hold her religious views and to manifest them, but requiring her, if she chooses to run a commercial venture to operate it in a manner which does not discriminate against homosexuals’ (para 76). But he did not think that the same respect should be shown to regulations as should be shown to primary legislation.

The Court of Appeal took the unusual step of granting permission to appeal to the Supreme Court so that both cases could be heard together. I have, of course, no views yet on the two main issues in these cases. My point is simply that the whole approach is dictated by the categorisation into direct and indirect discrimination. That, as the cases show, is by no means an easy question. It did not stop the Court of Appeal in

Preddy from asking itself whether the application of the regulations would constitute an unjustified interference with the defendants' right to manifest their religious beliefs. But should the fact that this would involve disapplying the regulations affect the court's approach to proportionality? These matters are now dealt with in primary legislation, so if the court considered that the interference was unjustified in the particular case it would have to make a declaration of incompatibility, which the county court hearing a discrimination claim cannot do. And whether we are considering incompatibility (in the context of direct discrimination) or justification (in the context of indirect) what weight should we give to the recently considered views of Parliament? Does it matter for this purpose whether it is in primary or secondary legislation?

As much of the non-discrimination legislation stems from EU law, is it worthwhile asking how the CJEU in Luxembourg has approached the clash of rights? The answer is that it has hardly started to do so.

In two 2007 cases, the court considered the clash between the employees' right to strike and the employers' free movement rights in EU law. In *Laval v Svenska Byggnadsarbetareförbundet* (C-341/05) [2007] ECR I-11767, a Latvian building firm won a government contract to renovate school premises in Sweden and posted some Latvian workers to work on the site. The Swedish trade union wanted to extend the local collective agreement to them and backed this up with a blockade which put a stop to all work on the sites, so that eventually the Latvian firm went bust. The firm complained of interference in their article 49 right to provide services anywhere in the EU. In *International Transport Workers' Federation v Viking Line ABP* (C-438/05)

[2007] ECR I-10779, a Finnish firm owned a ferry operating between Helsinki and Tallin which sailed under a Finnish flag. They wanted to re-register the ferry in Estonia. The Union has a long-standing campaign against the use of flags of convenience, so it threatened industrial action to prevent this. The shipping firm complained of interference with their article 43 right of establishment anywhere in the EU.

The good thing was that the ECJ recognised the right to strike as a fundamental right within EU law. But it also recognised that the rights under article 43 and 49 operated horizontally, so that the private employers could invoke them against the unions. The unions could then defend themselves on the basis that they were acting proportionately in the exercise of the fundamental right to strike. In *Laval*, the ECJ held that the action was disproportionate – the obligations in the collective agreement went further than the minimum necessary to protect the workers. In *Viking*, the ECJ left it to the national court to rule on whether the action was proportionate, but gave some guidance as to how to do this – including that national courts should use the ‘least restrictive alternative’ version of the proportionality test. Could the union have done something less restrictive of *Viking*’s freedom of establishment in order to bring about a successful conclusion to their negotiations?

I am not surprised that labour lawyers find this puzzling. The whole point of collective bargaining backed up by the threat of collective action is to interfere with the employers’ freedom of action. It cannot be easy to apply the least restrictive alternative analysis in that context. But, as Anne Davis has pointed out, the right to strike was here being used in a defensive context, to justify an interference with the

two fundamental community rights in question. She asks what would have happened had there been a clash between a free movement right and a fundamental right which is positively protected in EU law, such as equal pay for men and women? At least the free movement rights admit of some justification for interference, but this is not so of every right. How would the CJEU deal with that?

One thing that all these cases illustrate is the difference between offensive and defensive reliance on fundamental rights. Ms Eweida and Ms Chaplin were invoking their own right to manifest their religion. Other people were claiming their interference with that right to be justified. Ms Ladele and Mr McFarlane were claiming their right not to be discriminated against because of their religion. Other people were claiming their interference to be justified. Mr Preddy and his partner were claiming the right not to be discriminated against on the ground of their sexual orientation. Mr and Mrs Bull were claiming their religious rights as a defence against that. The same applies to the *Black v Wilkinson* case. Viking and Laval were claiming their freedom to provide services and to establish a business anywhere in the EU. The unions were claiming the workers' right to strike as a defence against that.

Is that enough to explain why some claims fail and others succeed? That we start with the right and ask whether the interference can be justified? So does it all depend upon who is suing whom for what? If Mrs Bull or Mrs Wilkinson were refused a room in a hotel because they were Christian or hetero-sexual, the refusers would have to justify what they had done and the answer might well be the same as it was the other way round. So does this suggest that it is not a true balancing of one right against the other? It all depends upon the right with which you begin. Or does it suggest that

there is a hierarchy of rights, where some are thought more important than others?

There are undoubtedly some critics who see these cases as an elevation of sexual orientation over religious belief. But I hope that is not the right way to look at things, because the whole idea of a hierarchy of equalities is a contradiction in terms.