

Case Summary

Bull and another v Hall and another **UK Supreme Court: [2013] UKSC 73**

1. Reference details

Date of Decision: 27 November 2013

Link to full court judgment:

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0065_Judgment.pdf

2. Facts of the Case

The Appellants in the case, Mr and Mrs Bull were Christians who owned and ran a hotel in Cornwall. Mr Hall and Mr Preddy were civil partners who, in 2008, booked a double room at the hotel by telephone. The Appellants are devout Christians who believe that sex other than between a man and woman who are married to each other is sinful. In their online booking form, the Appellants stipulated that "out of a deep regard for marriage" double rooms were to be let only to "heterosexual married couples". When the telephone booking was taken, Mrs Bull did not check whether the reservation was for a man and his wife. On arrival at the hotel, the rule was explained to the Respondents who were turned away.

The Respondents brought a discrimination claim before the court, with the support of the Equality and Human Rights Commission (EHRC) in March 2009. The Appellants denied that they had unlawfully discriminated against them and argued that the UK's discrimination law must be applied so as to be compatible with their right to manifest their religion under the European Convention on Human Rights and Fundamental Freedoms (ECHR).

The case was heard at Bristol County Court. The judge found that the Appellants had directly discriminated against the Respondents and that, even if that had not been the case, their policy would amount to indirect discrimination without justification. He awarded the Respondents £1,800 each for injury to feelings. The Court of Appeal agreed that this was direct discrimination and did not address indirect discrimination. It acknowledged that the hotel policy was a manifestation of Mr and Mrs Bulls' religious beliefs within the meaning of their right under the ECHR, but this right was justifiably limited by the laws relating to non-discrimination on grounds of sexual orientation, for the protection of the rights of homosexuals.

The Appellants appealed to the Supreme Court. The UK NGO Liberty was granted leave to intervene in the case.

3. Law

- Regulation 3, Equality Act (Sexual Orientation) Regulations 2007
- Section 3, Human Rights Act 1998
- Articles 8 (right to respect for private life), 9 (right to freedom of religion) and 14 (right to be free from discrimination), European Convention for the Protection of Human Rights and Fundamental Freedoms

4. Legal Arguments

The judgment does not detail the arguments of the parties, although it refers to some of the Appellants' claims in order to address them throughout.

Appellants' Arguments

The Appellants argued that the Court of Appeal had been wrong to find that this was a case of direct discrimination. They argued that they had discriminated against the Respondents not on grounds of their sexual orientation but on grounds of their not being married, which was not prohibited in English law.

The Appellants accepted that the policy in question indirectly discriminated against the Respondents on grounds of their sexual orientation as homosexual couples were not able to marry, but argued that this discrimination was justified. They argued that they should not be compelled to run their business in a way which conflicts with their deeply held religious beliefs. A fair balance should be struck between their right to manifest their religion and the right of the Respondents to obtain goods, facilities and services without discrimination on grounds of their sexual orientation.

5. Decision

The Supreme Court unanimously agreed that the Appellants had unlawfully discriminated against the Respondents and dismissed the appeal. By a 3-2 majority the court found that the treatment amounted to direct discrimination, albeit with differing reasoning. Lady Hale gave the leading judgment.

Direct Discrimination

Lady Hale stated that the distinction between direct and indirect discrimination under the Regulations is important not because direct discrimination can never be justified but because the justifications for indirect discrimination are expressed in the legislation.

The Court of Appeal's reasoning for its finding of direct discrimination was not accepted by Lady Hale. The case of *James v Eastleigh Borough Council* [1990] 2 AC 751, which the Court of Appeal had relied on in finding direct discrimination in the present case, was in fact distinguishable. In that case, which related to a Council swimming pool giving free swimming lessons to state pensioners at a time when women reached pensionable age at 60 and men at 65, there was an exact correspondence between the disadvantage suffered (having to wait until aged 65 for free lessons instead of 60) and the protected characteristic (sex). In the present case some heterosexual couples were also disadvantaged by the policy (i.e. those who were not married) so there was not an exact correspondence between the disadvantage and homosexual orientation.

However, the treatment suffered by the Respondents still amounted to direct discrimination. It is relevant that the Respondents were civil partners. The concept of marriage being applied by the Appellants was a Christian concept of the union of a man and a woman. But civil partnership, which was introduced so same-sex couples could enjoy the same legal rights as married couples, is almost indistinguishable from the status of marriage under UK law. Indeed, Regulation 3(4) of the Equality Act (Sexual Orientation) Regulations 2007 emphasises the civil partnership's equivalence to marriage by requiring that, in a direct or indirect discrimination inquiry under the Regulations, married people and people who are civil partners are to be regarded as similarly situated.

The precise impact of Regulation 3(4) was interpreted slightly differently by the justices. Lady Hale stated that Regulation 3(4) does not say "*in so many words*" that it is unlawful to

discriminate between married couples and civil partners. As it applies equally to Regulation 3(1) (direct discrimination) and Regulation 3(3) (indirect discrimination), “it is difficult to regard it as turning what would otherwise be indirect discrimination into direct discrimination.” Instead it relates to a different part of the discrimination inquiry, i.e. “whether the circumstances of the people being compared are the same or not materially different from one another”. Lady Hale also found that The European Court of Justice case of *Maruko v Versorgungsanstalt der Deutschen Bühnen* (Case C-267/06), which held that a surviving same sex “life partner” was in a comparable situation to a surviving spouse, was also instructive on this point, albeit not binding on the Supreme Court.

Lady Hale concluded that, with or without Regulation 3(4), discrimination between a married person and a civilly partnered person cannot be anything other than direct discrimination on grounds of sexual orientation. Marriage was currently only available to opposite sex couples and civil partnerships only available to same-sex couples. She stated:

The principal purpose of each institution is to provide a legal framework within which loving, stable and committed adult relationships can flourish. I would therefore regard the criterion of marriage or civil partnership as indissociable from the sexual orientation of those who qualify to enter it. More importantly, there is an exact correspondence between the advantage conferred and the disadvantage imposed in allowing a double bed to the one and denying it to the other.

The Appellants were not only applying a criterion that couples be married but also that the legal relationship be one between a man and a woman. They would have turned away not only civil partners but also same-sex married couples from jurisdictions in which it was lawful for same-sex couples to marry. Indeed a later amendment to their policy made that even clearer. The requirement that the married couple comprise a man and a woman was direct discrimination on grounds of sexual orientation as much as a requirement that married couples be over the age of 30 to hire a double room would be direct discrimination on grounds of age.

Lord Kerr and Lord Toulson also agreed that this was direct discrimination. Lord Kerr relied solely on the application of Regulations 3(1) and 3(4) in finding direct discrimination. He stated:

Applied to the circumstances of this case, the question posed by regulation 3(1) is did Mr and Mrs Bull treat Mr Preddy and Mr Hall less favourably, on grounds of their sexual orientation, than they would have treated others when there is no material difference in their respective positions. Mr Preddy and Mr Hall are civil partners. By virtue of regulation 3(4) they are to be treated as being not materially different from a married couple.

On that analysis the “only remaining basis” on which the Respondents were treated less favourably is their sexual orientation. The Appellants’ motivation for discriminating is irrelevant.

Lord Toulson agreeing that this was a case of direct discrimination, took a different approach from Lady Hale. In his view Regulation 3(4) made the current case analogous to that of *James v Eastleigh Borough Council*.

Lord Neuberger and Lord Hughes, who dissented on this point, did not consider that the fact that the Respondents were civil partners made a difference to the direct discrimination analysis.

Indirect Discrimination

Lady Hale reiterated that it was not disputed that the policy indirectly discriminates on grounds of sexual orientation, as it puts homosexual people at a serious disadvantage. The dispute was as to whether this is justified. The Court unanimously agreed that it was not.

Lady Hale held that it is difficult to *“find that a belief that sexual intercourse between civil partners was sinful was a ‘matter other than [their] sexual orientation’, because by definition such sexual intercourse has to be between persons of the same sex.”* So it is difficult to see how discriminating in this way could ever be justified.

Lady Hale listed a number of reasons which pointed to justification including:

- Civil partnership was created so same-sex couples can have the same legal rights as opposite sex couples and are worthy of equal *“respect and esteem”*;
- Both marriage and civil partnership rights exist to *“recognise and to encourage stable, committed, long-term relationships. It is very much in the public interest that intimate relationships be conducted in this way. Now that, at long last, same sex couples can enter into a mutual commitment which is the equivalent of marriage, the suppliers of goods, facilities and services should treat them in the same way”*;
- To permit a class of persons to discriminate on grounds of sexual orientation would be to create a class of people who are exempt from discrimination legislation;
- In passing the Regulations, Parliament was aware of deep religious objections. It permitted an exemption for *“religious organisations”*. Had it intended an exemption for private religious individuals it would have stated this.
- The Appellants were free to manifest their religion in many other ways. They could choose not to offer double bedrooms to any couples.

Lady Hale notes that, had the new formulation *“a proportionate means of achieving a legitimate aim”* as appears in the Equality Act 2010 (which has since replaced the Regulations) been applied, her decision would have likely been the same.

Human Rights Act 1998

The Court was unanimous in supporting the Human Rights Act (HRA) analysis given by Lady Hale. The Appellants have a right to manifest their religious belief under Article 9 ECHR, a right the importance of which the European Court on Human Rights has emphasised. Article 9(2) ECHR allows the right to manifest religious beliefs to be limited by *“such limitations as are prescribed by law and are necessary in a democratic society (...) for the protection of the rights and freedoms of others”*. If the Court’s finding as to the Regulations in this case were incompatible with Article 9 ECHR, it would be obliged by section 3 HRA to, so far as possible, read and give effect to the Regulations in a way compatible with the Convention rights. But there is no incompatibility here.

One interpretation is that the rights referred to in Article 9(2) include rights provided in national law (including the Respondents’ rights not to be discriminated against) as well as in the Convention. So the limitation here is prescribed by law for the protection of the rights of others.

As to whether it is *“necessary in a democratic society”*, this is a proportionality assessment between the aim and the means employed to achieve it. Lady Hale did not adopt the Appellants reasoning that a *“reasonable accommodation”* must be made between the competing rights of the Appellants and the Respondents but did accept that the possibility of some *“reasonable accommodation”* can be considered to be part of the proportionality assessment. Although two British Columbian cases adopt the reasonable accommodation analysis in similar cases to the present one, they are from a different jurisdiction and a different constitutional context and are

not of help to the Appellants, who cannot get round the fact in this case that UK law prohibits them from doing as they did. The reasons for finding a limitation justified under Regulation 3(3) (set out above) also applies to the question of whether the limitation on the Appellants' rights to manifest their religion was a proportionate means of achieving a legitimate aim. Lady Hale states:

The legitimate aim was the protection of the rights and freedoms of Mr Preddy and Mr Hall. Whether that could have been done at less cost to the religious rights of Mr and Mrs Bull by offering them a twin bedded room simply does not arise in this case. But I would find it very hard to accept that it could.

Sexual orientation is a core component of a person's identity. What's more, this was not a case of replacing legal oppression of one community with legal oppression of another:

If Mr Preddy and Mr Hall ran a hotel which denied a double room to Mr and Mrs Bull, whether on the ground of their Christian beliefs or on the ground of their sexual orientation, they would find themselves in the same situation that Mr and Mrs Bull find themselves today.

Appeal dismissed.