

Had the Ashers 'gay cake' ruling gone the other way it would have seriously undermined equality law

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Despite the outcry following this week's Ashers 'gay cake' ruling, Northern Ireland's Court of Appeal delivered a clear and logical judgment.

There was an outcry this week when the Christian bakers found to have discriminated against a gay man by refusing to make a cake bearing a pro-gay marriage slogan lost their appeal against the ruling.

A number of commentators, some of whom normally take the same position on such matters as us, expressed concerns about its implications on freedom of expression and conscience.

The National Secular Society takes freedom of conscience and expression issues very seriously and so reserved judgment on [the ruling](#) until we'd had chance to consider it carefully. On reflection we fully endorse the decision and hope that this piece gives some of its detractors pause for thought.

We very much concur with the respected former BBC legal correspondent, Joshua Rozenburg, who described the judgment as "[surprisingly straightforward](#)". As he paraphrased the ruling, "the correct comparison was not with a straight man who wanted a 'gay' cake, which Ashers would have refused. It was with a gay or straight person who ordered a cake celebrating traditional marriage -- which the company would have supplied."

Ashers are perfectly at liberty to refuse to fulfil an order for the cake with the pro-same sex marriage message provided it would also refuse one with a pro opposite sex marriage too. They are now, understandably, going to limit themselves in future to birthday cakes, avoiding religious and political messages; arguably the cake message in question was both. This way, Ashers' proprietors can lawfully avoid having to produce any cake with a message which their proprietors' oppose, just refusing just pro-gay cake messages –is offensive and discriminatory.

The proprietors remain entirely able to express whatever lawful opinions, however harsh, about homosexuality and same sex marriage in their personal lives.

And as the court noted "It was not suggested that there was any approbation of the message on the face of the cake and the trial judge concluded that what the respondent wanted did not require them to promote or support gay marriage. ... The fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either."

Those critical of this ruling have argued that, following it, a Muslim baker refusing to bake a cake with an image of Prophet Mohammed, could be breaching equality law.

A careful reading of the ruling reveals that this simply isn't the case.

In our opinion therefore, the freedom of conscience and freedom of expression arguments are

beyond baseless, they are wrong and mask something deeply unpleasant. The logical – but carefully unspoken result of allowing them, as they would have been had the decision gone the other way, was that Ashers could have put up a sign reading "no pro-gay messages on our cakes". And in the Court's words "If businesses were free to choose what services to provide to the gay community on the basis of religious belief the potential for arbitrary abuse would be substantial."

And this needs to be put in the particular political and religious context of Northern Ireland, the most religious part of the UK, where gay people have been victimised and denied the rights enjoyed by others by both the majority population and the province's institutions. The cake slogan was the most benign reference to the ugly reality; the province is the only part of the UK where same-sex marriage remains unavailable, despite a religiously-motivated veto of a majority decision in the NI Assembly to introduce it. And religious forces in Northern Ireland have consistently opposed civil rights for gay people that were enjoyed elsewhere in the UK. Forty years ago it took a brave man [applying to the European Court of Human Rights](#) to secure the decriminalisation of homosexual acts.

The message of the court, echoing *Hall v. Bull*, the Cornish private hotel same sex couple and double room case, was that businesses cannot discriminate on protected grounds whatever the proprietors' personal views. And as the Supreme Court noted, had it been the same sex couple who ran the hotel, they would have been in breach of equality law were they to have refused beds to the Bulls because they were religious.

For the same reasons as shown above, we do not think this judgment violates freedom of expression, and we take freedom of expression very seriously. It is beyond irony that the NSS and the Christian Institute, who are supporting the Ashers' legal case, have collaborated with much success in defending freedom of expression for many years and we hope will continue to do so.

We therefore urge those who have rushed to judgment on a freedom of expression and conscience bandwagon to consider the implications of a reversal of this decision which they would appear to be welcoming.

As NSS Council member Dorothy Smith [wrote in the Guardian](#) echoing the Court's warning above, that a reversal "would put us back to a time when landlords had signs in their windows saying 'no blacks, no Irish, no dogs'".

And there is an even more insidious element that troubles us, as the Court put it that Ashers was a "business for profit and was not a religious organisation". We will set aside that it was also a limited company, a separate legal persona from the proprietors. Were the decision to be reversed it would, as its detractors well know and the Court strongly implies above, open the door for non-religious organisations to discriminate based on the (usually religious) consciences of their proprietors.

This has [already happened in the United States](#) where a court case (involving a commercial organisation called Hobby Lobby owned by religious conservatives) "permitted religious objectors to refuse to comply with a rule requiring employers to include birth control in their employer-provided health plans. The dissenting justice explained that the decision effectively overruled longstanding doctrines establishing that "accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties." Under Hobby Lobby a religious objector may now wield their faith to diminish the rights of others.

And we have got uncomfortably close to that situation in Scotland in 2014. St Margaret's Children and Family Care Society appealed against a ruling by the Office of the Scottish Charity Regulator

that it should not unlawfully discriminate against adoptive parents on grounds of religion or belief and sexual orientation, and won. Albeit the Society had Catholic connections and wording in its objects, it was not a religious organisation in the legal sense, which would have allowed it to benefit from religious exemptions. It did have some Catholic funding, but was largely funded from the public purse. As a result of a plethora of legal cases, scores of other British Catholic adoption societies have been forced to close down or abandon discriminatory policies, something St Margaret's has it appears not been forced to abandon. The decision was made by a non-judicial appeals panel, so fortunately no legal precedent was set.

Key to the decision was that the panel accepted the argument of counsel for St Margaret's that it "is capable of possessing and exercising its Article 9 rights on its own behalf". This seems uncomfortably close to the Hobby Lobby situation which we think could lead to the situation the Court rightly guarded against "If businesses were free to choose what services to provide ... on the basis of religious belief the potential for arbitrary abuse would be substantial".

Curiously, lead counsel for St Margaret's was Aidan O'Neill QC, who is also advising the Christian Institute and Ashers. He was also counsel for the hotel proprietors in *Hall v. Bull* (the Cornish private hotel proprietors who lost their case).

Four years ago the NSS intervened, largely successfully, at the ECtHR over several cases of evangelical Christians challenging equality laws because we thought adverse decision would undermine the equality law edifice. We think a reversal of Ashers decision would, for all the reasons given above, be similarly dire.

We remind those contemplating an appeal to the Supreme Court, including the NI Attorney General who supported Ashers, that the NI decision was unanimous and closely followed *Hall v. Bull*, which the Supreme Court unanimously – albeit for [different reasons](#) – found against the hotel proprietors.

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