

IN THE EUROPEAN COURT OF HUMAN RIGHTS

F-67075 Strasbourg Cedex

France

Application No. 36516/10

Date of Introduction: 9th August 2007

Gary McFARLANE

-v-

UNITED KINGDOM

Full SUBMISSION

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Brief SUMMARY

Introduction:

1. This application is made on behalf of Mr. Gary McFarlane, of *Flat 5, Knightstone Court, Gordon Road, Whitehall, Bristol BS5 7EE*. Mr. McFarlane is represented by Paul Diamond, barrister.
2. Mr. McFarlane was an employee of Relate; he was employed from 2003 - 2008 as a Counsellor. Relate is well known in the United Kingdom and provides relationship counseling services for couples.
3. Mr. McFarlane is a practicing Christian. As a condition of his employment, he was required to 'state' that he would counsel same sex couples in directive sexual therapy, regardless of any violation of his religious conscience. Mr. McFarlane had never refused to counsel a same sex couple. In short, the employer required Mr. McFarlane to act contrary to his religious faith or be dismissed; he was singled out by reason of his religious faith.
4. Mr. McFarlane's own views on this issue were uncertain and he was unable to give an assurance to Relate as to how he would act if presented with a same sex couple who requested directive sexual therapy (when he himself did not know). On 18th March 2008, he was dismissed for gross misconduct.
5. Mr. McFarlane's claim before the Bristol Employment Tribunal was rejected on 5th January 2009; his appeal before the Employment Appeal Tribunal on 30th November 2009 was also rejected (Mr. Justice Underhill) and permission to appeal was refused on 29th April 2010 (Lord Justice Laws). These decisions are attached.
6. The Tribunals and Court of Appeal considered themselves bound by the decision in *Ladele v London Borough of Islington [2009]*.
7. This Application is brought under Article 6 because Mr. McFarlane was denied a fair trial because it has been held that the Christian manifestation on sexual ethics is, in effect, 'discriminatory' and therefore, there is no need for the Court to enquire into whether the religious practice can be accommodated.
8. The Claim is brought under Article 8 because the mere holding of beliefs and private opinions that had not been acted upon; or may not have been acted upon was considered unacceptable by a private employer. A condition of employment was that Mr. McFarlane had to state that he disagreed with his own religious conviction.
9. The Claim is brought under Article 9 because Mr. McFarlane was unable to manifest his religion or belief.

10. The Claim is brought under Article 14 because a neutral rule can discriminate against Article 9 Rights; and on grounds of discrimination.

Introduction:

Why this case is important:

11. This case raises controversial issues as it focuses on the clash of rights between religious freedom and the rights of homosexuals. The issue is whether the Contracting States of the *Council of Europe* can ‘*balance*’ and respect both rights.

12. In the United Kingdom, the anti-Christian animus is regularly reported in the media and the *balance* has gone too far in favour of the homosexual agenda, that there is little respect for religious manifestation, other than in the theoretical sense.

13. The Pope expressly condemned the aggressive secularist agenda in the United Kingdom during his visit in September 2010. A number of Bishops and a former Archbishop of Canterbury have spoken out that Christian adherents are persecuted¹ in the United Kingdom (and see attached witness statement prepared by former Archbishop of Canterbury for Court of Appeal hearing).

14. In effect, the Courts have categorized the Christian faith as ‘*discriminatory*’ as against persons of a homosexual orientation. ‘*Discrimination*’ is contrary to the *public policy* of the State, (as it should be), and so adherents of the Christian faith can be singled out for adverse treatment.

15. We have reached the stage of Orwellian ‘*double speak*’²; anti discrimination laws are used to discriminate against Christian persons.

16. The hostility to the Christian (and Jewish) faith was very prevalent in the *dark past* of Europe under Communist and National Socialist Governments. The use of the law to seek coercion of the individual to the State’s version of correct ideology has a dark history in Europe.

17. This case will determine whether the Contracting States of the Council of Europe are able to responsibly ‘*balance*’ human rights, or lose standing in international forums.

Background:

¹ *The Sunday Telegraph*; 27th March 2010.

² George Orwell 1984 (1948).

18. Mr. McFarlane is a Christian and the former elder of a large multicultural church in Bristol. He believes that it follows from Biblical teaching that same-sex sexual activity is sinful and that he should do nothing which endorses such activity in a direct manner.
19. Relate is a well-known national organisation which provides relationship counselling services.
20. Mr. McFarlane was employed by the Respondent from 25th May 2003 to 18th March 2008. He worked 5 hours a week on a Monday only; he was paid at the rate of 7.49 per hour. Mr. McFarlane successfully completed the *Certificate in Marital and Couple Counselling* in August 2005. Mr. McFarlane successfully completed the *Relate Postgraduate Diploma in Couple Therapy* in March 2008. Mr. McFarlane is a member of the *British Association of Counsellors and Psychotherapists*.
21. Mr. McFarlane is an 'excellent counsellor'. The evidence shows that he has always acted entirely professionally to all sections of the community, including members of the LGBT community, in his dealings with them.
22. He was required to, and did, sign up to Relate's *Equal Opportunities Policy*. Mr. McFarlane believes in the *Equal Opportunities Policy* in that no one should be discriminated against on prohibited grounds. He believes that such non discrimination policies are compatible with the Christian faith; and further the Christian faith should be treated equally with respect.

Mr. McFarlane and the counseling of same sex couples:

23. In December 2005 Mr. McFarlane was asked to assist a lesbian couple. He was concerned about this in relation to his Christian faith. He discussed his concerns in supervision with Ms Bloomfield, his counselling supervisor. As a result of the discussion, he accepted that counselling such a couple did not involve endorsement of any sexual relationship between them and he was prepared to proceed. He subsequently counselled parties to two other lesbian relationships without any difficulty.
24. Mr. McFarlane commenced the *Relate Postgraduate Diploma in Psychosexual Therapy (PST)* in September 2006, but due to the acts of Relate he is unlikely to complete this course, which was expected to be in September 2008. However this form of therapy was directive sexual therapy where the counsellor discusses sexual technique to improve the pleasure of sex.
25. After the commencement of this course, the Relate pro-actively sought an assurance that Mr McFarlane would counsel same sex couples in relation to psychosexual therapy. This was because Mr McFarlane had previously discussed private concerns with Ms. Bloomfield in relation to couple relationship counseling.
26. Mr. McFarlane was very distressed that private communications with his supervisor were made known to his employers. There were rumours that he was homophobic and exclusion by fellow counsellors.

27. He was unable to say what his position would be as he was unsure of his own position in relation to providing directive sexual therapy for same sex couples. When the issue previously had arisen in relation to Couple Counselling, he was able to resolve his position by discussion with his supervisor and he hoped a similar process would be followed in relation to psychosexual therapy.
28. However, the employer demanded that he declare that he would not follow his religious conscience and that he would comply with their interpretation of the *Equal Opportunities Policy*.
29. Mr. McFarlane believes this attitude by the employer illuminated animus to the Christian faith; the number of same sex couples was very small and there was no reason why same sex couples could not be directed to counsellors who were more sympathetic to the issue (this would be better for all the parties).
30. Furthermore, the employer refused to permit a return to Couple Counselling solely (which he has been practicing for 5 years to all individuals, including same sex couples). However, the employer held the Christian faith was discriminatory to homosexuals; and as Mr. McFarlane held private religious views that were deemed discriminatory, he was dismissed.

***Ladele v Islington London Borough Council*⁹:**

31. On 15th December 2009, in another case, in which a Marriage Registrar (who was a Christian) sought a concession from having to perform same sex civil partnerships, the Court of Appeal held:-
 - Paragraph 39. The Court of Appeal held that the correct comparator with Ms. Ladele is *'another registrar who refused to conduct civil partnership work because of an antipathy to the concept of same sex relationships, but which antipathy was not connected to or based upon his or her religious beliefs'*;
 - Paragraph 45. It was a *legitimate aim* for Islington to have a policy *'requiring all its employees to act in a way which does not discriminate against others'*;
 - Paragraph 49 *'permitting Ms Ladele to refuse to perform civil partnerships would necessarily undermine the Council's clear commitment to ... their non discriminatory objectives ...'*;

⁹ [2010] 1 WLR 955, CA.

- In paragraphs 69- 70 of *Ladele*, it was held/endorsed that the *Sexual Orientation Regulations 2007* ('the SORs') '*takes precedence over any right which a person would otherwise have by virtue of his or her religious believe or faith, to practice discrimination on grounds of sexual orientation*'.

32. The effect of the twin decisions of *McFarlane* and *Ladele* is that the manifestation of the Christian faith that does not endorse homosexual conduct is discriminatory; further the law overrides religious conscience on this issue.
33. Consequently, a Christian who has such views can be dismissed from employment, or refused to be employed. There is now a religious test to employment in the United Kingdom and the human rights situation is critical for religious adherents.
34. In both the cases of *McFarlane and Ladele* the employer could have accommodated the religious practice by filtering of clients, or by shift patterns, but as the religious view was contrary to State ideology, the individual could be dismissed and sustain severe hardship. Further there was a *chilling effect* on religious practice by Christians.

Breach of Article 6 of the Convention: (Fair Trial):

35. All major religions (Judaism, Christianity and Islam) have a code of sexual ethics that does not endorse homosexual sexual activity. The question for Europe is whether such views are '*worthy of respect*' in civil society: *Campbell and Cosans v United Kingdom* (1982) 4EHRR 293.
36. The Convention requires a *balancing of rights*: *Chassagnou v France* (1999) 29 EHRR 615; *Buscarini v San Marino* (1999) 30 EHRR 208. For the national Court to hold that the Christian faith is '*discriminatory*' in relation to sexual ethics and there is no balance for the Court to consider is a violation of rights. The Court did not consider Mr. McFarlane's Article 9 rights by virtue of the judgment in *Ladele*.
37. Article 6 requires a national court to balance the substance of the Convention Rights; a national law cannot vitiate a Convention Rights and Articles 9 (religious rights) and Article 8 (privacy rights) require a discreet balancing of interests.

Breach of Article 8 (and Article 9 First Sentence):

38. The dismissal of Mr. McFarlane was premised wholly on a theoretical basis that Mr. McFarlane refused to assure his employers that he would counsel same sex couples in directive sex therapy and thereby violate his religious conscience. No case or incident has arisen to question the professionalism of Mr. McFarlane.

39. From 2003 - 08, Mr. McFarlane had loyally worked for his employer and had worked with all couples who had come to him for counselling. He had some difficulties in relation to his Christian faith and some lesbian couples, but after talking with his supervisor, he resolved his conscience and assisted the same sex couple. He had never breached his contract of employment.
40. However, the employer viewed the Christian faith with adverse suspicion and as discriminatory to homosexual rights. The whole issue of homosexual diversity is becoming disproportionate. It is now Christians who are discriminated against.
41. Mr McFarlane was asked to assure the employer that he would treat all couples in directive sex therapy (psychosexual) no matter how remote such a scenario may be. He was informed that he must assure the employer there is no place for religious conscience in the workplace.
42. It is a violation of the most intimate field of human dignity to require an individual to 'renounce' their faith as a condition of employment. This is reminiscent of totalitarian societies in Central and Eastern Europe.
43. In *Smith & Grady v United Kingdom*⁴, the Armed Forces (the employer) had to accommodate the *personality privacy* needs of the homosexual servicemen. The servicemen sought to exercise a privacy right that the employer thought incompatible with the efficacy of his enterprise. In short, the *privacy* right would be vitiated if not accommodated to the employer's perceived detriment. *Mutandis Mutatis* to religious rights. It is core '*private life*' and religious thought to require a change of thought and belief: *Dugeon v United Kingdom (1981) mutandis mutatis to religious life. Goodwin v United Kingdom (2002) 35 EHRR 35* linked identity with private life.
44. A decision wholly based on the religious viewpoint of Mr. McFarlane breaches Articles 8 and 9; it is not related to the primary concern of the employer, namely the provision of services to his clientele. The private views and life of his employees is not his concern: *EB v France (Appl. No. 43546/02)*

Breach of Article 9:

45. The legal framework of Article 9 is straight forward and principled. Article 9 requires an analysis of the religious belief; and whether the belief should be accommodated or whether it can be restricted with the framework of Article 9(2).
46. In *Kokkinakis v Greece (1993) 17 EHRR 397* it was said (at paragraph 31) that:

⁴ (2000) 29 EHRR 493

Freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life ... the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions'.

47. To the religious adherent, faith is the route to salvation:-

- A religious message cannot demean or disparage a groups/ class/ sector by alerting them to a perceived fact concerning their '*eternal salvation*';
- To the adherent, sin will have eternal consequences, and for those who do not repent will mean hell;
- To the adherent, religious teaching on sexual ethics is to prevent a person's self destructive conduct;
- One cannot discriminate against the person you are seeking to love; it is not love to transmute a perceived false message or to encourage an erroneous belief;
- It contravenes religious conscience if an employer compels a person 'to sin'; a religious adherent cannot damn himself; he cannot be asked to facilitate that which he holds as intrinsically wrong.

48. Freedom of religion without the right to manifest in public is meaningless. The State must protect religious liberty; it must promote toleration and diversity; it cannot permit private actors to vitiate a fundamental right; the State must require a compelling interest to limit a fundamental right.

49. The loss of a religious right has a unique impact on the believer with spiritual sanctions and cannot be compared with other secular practices. A failure to eat *Hal'al* meat, or observe the Sabbath is irremediable; you have simply breached these obligations.

50. Accordingly, Article 9 requires respect for religious belief. This can be achieved by accommodation of the religious practice. Mr. McFarlane did not deny anyone a service and other counsellors were available for same sex couples. There is no reason to end a man's professional life for his valid religious views.

51. The Christian faith is a valid and lawful religion in the European area and weighty reasons will have to be given to justify conduct that interferes with religious rights. Where the religion is lawful (and the primary religion) the Convention requires that only the most pressing State interests can override religious rights: *Hoffmann v Austria* 17 EHRR 293, Commission Opinion paragraph 101.

52. There is a clash between religious and homosexual rights because both groups have differing concepts of morality. However, it is not right that a sea change in public morality should be implemented by threats to livelihood for individuals. Articles 9 and 8 must be balanced. The loss of employment by Mr. McFarlane is one of the most serious detriments for an individual to sustain and illuminates hostility to religious faith by the United Kingdom.

Breach of Article 14:

53. *Thlimmenos v Greece*⁵ addresses these issues [41] - [47]. In *Thlimmenos* the Court analysed a neutral and general rule that individuals with criminal convictions were unable to join a profession. The European Court held i) a uniform rule does undermine Article 9 Rights where the motivation for breaching the rule was religious; ii) a right exists to be treated differently and a *pure conduct approach* (without assessing motivation) was inadequate. The Court expressly held: -

‘The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when State without an objective reasonable justification fail to treat differently persons whose situations are significantly different’
(paragraph 44).

54. It was decided in *Thlimmenos* that the Greek court had undermined Mr Thlimmenos’ freedom of religion and impacted on his career.

Conclusion:

55. Religious freedom has been recognised in Western counties since the Treaty of Westphalia in 1648 and continuing; in the UN Declaration 1948, European Convention on Human Rights and Fundamental Freedoms 1950 (including other regional treaties), Covenant on Civil and Political Rights 1966 and the UN Declaration on the Elimination of all forms of Discrimination based on Religion 1981.

56. Article 9 rights are very important and must be balanced with Article 8 (sexual lifestyle rights). Religious activity is generally one of self denial and service, which the State should recognize area a public virtue and not in terms of discrimination.

57. Articles 8 and 10 deal with a specific aspect of the human existence; whilst Article 9 is comprehensive to a person’s life. Religious rights are clearly primary rights; religion directs every aspect of an individual's life. It is a comprehensive code of conduct of relationship between man and God. Spiritual sanction is more severe than secular sanction relating as it does to the after-life.

⁵ (2001) 31 EHRR 411.

Paul Diamond, barrister

Cambridge 29th October 2010.