



Neutral Citation Number: [2013] EWCA Civ 820

Case No: B2/2012/2896

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SLOUGH COUNTY COURT
RECORDER MOULDER
LOUD02282

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2013

Before:

THE MASTER OF THE ROLLS
LADY JUSTICE ARDEN
and
LORD JUSTICE McCOMBE

Between:

MICHAEL BLACK AND JOHN MORGAN
- and -
SUSANNE WILKINSON

Respondents

Appellant

Sarah Crowther (instructed by **Aughton Ainsworth**) for the **Appellant**
Henrietta Hill (instructed by **Liberty**) for the **Respondents**

Hearing date: 19 June 2013

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Master of the Rolls:

1. This is an appeal from the decision of Ms Recorder Moulder given on 18 October 2012 in the Slough County Court that the defendant unlawfully discriminated against the claimants in the provision of bed and breakfast facilities on the grounds of their sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263 (“the Regulations”). The claimants are homosexual partners who are not in a civil partnership. The defendant runs a bed and breakfast known as “The Swiss Bed and Breakfast” from her home in Cookham, Berkshire. The house has seven bedrooms of which one is occupied by the defendant and her husband, two are used for their children, a third room is kept for family and friends and the remaining three rooms are let out to guests.
2. The house has been the family home for about 15 years. The defendant has been running a bed and breakfast business there since 2007. The primary reason for doing so was financial. The bed and breakfast accommodation comprises two double rooms with en-suite facilities and one single room with its own bathroom facilities. The maximum number of guests at any one time is five. The defendant says that at the heart of the business is the very personal nature of the relationship between herself and her guests. It is this which distinguishes it from other types of business offering accommodation, such as hotels. Guests are invited into her home and treated as members of the family. As she explains at para 15 of her witness statement, she provides a special degree of care and attention to the guests. For some this means collection, free of charge, from the local railway station or driving them to a wedding or other engagement or local attraction. A few guests have been taken ill during their stay and she has nursed them back to health. Most guests take their breakfast in the family kitchen/dining room. She does her best to ensure that the guests are happy and feel at home.
3. At para 18 of her witness statement, she says:

“Because I am a Christian, I believe that monogamous heterosexual marriage is the form of partnership uniquely intended for sexual relations between persons and that homosexual sexual relations (as opposed to homosexual orientation) and heterosexual sexual relations outside marriage are wrong. Therefore since I started the business, I have sought to restrict the sharing of the double rooms to heterosexual, preferably married couples. I use the word “preferably” because it is impossible to know whether a heterosexual couple is married unlike with a homosexual couple and it would be offensive to pry into their personal lives whether when booking or on arrival. Many married couples do not share the same name. As a result, we have had some unmarried heterosexual couples who have stayed after finding out that they were unmarried. Having said this, I have turned away several unmarried heterosexual couples from the outset where it was obvious that they were unmarried from the fact that they only wanted to use the room during the day for sex. I have also made it very clear to members of our own family and friends that we

would not allow them to share a double room with their partner if they are not married.”

4. None of this was challenged by the claimants before the Recorder. In other words, the defendant’s policy is, so far as practicable, to restrict the use of her double rooms to married heterosexual couples. She never allows couples of the same sex to share a double room and never knowingly allows an unmarried heterosexual couple to do so either.
5. The defendant is a committed Christian. She believes that the Bible is the word of God and this belief informs everything that she does in her life both at home and at work. There are Bibles and tracts in every room and Bible verses on display. There are flyers on the notice board in the kitchen/dining room from missionaries. She says that she has tried to live her life and carry out her work in accordance with her deeply held Christian beliefs. The Recorder accepted the defendant’s unchallenged evidence as to these matters, but found at para 23(3) of her judgment that “it did not establish her business as an establishment that was overtly religious”.

The facts

6. On 11 March 2010, Mr Black contacted the defendant by email to enquire about booking a double room for 19 March. The defendant replied offering Mr Black the Zurich room which is a double room. Mr Black confirmed the booking and sent a cheque for the £30 deposit. The claimants arrived on the evening of 19 March. On seeing that they were both men, the defendant said that there was a problem as they had booked a double room. She made it clear that she would not accommodate them because she did not like the idea of two men sharing a bed. She refunded the deposit and they left. She would have been content to let the claimants take separate rooms and would have done so if such rooms had been available.

The Regulations

7. So far as material, the Regulations provide:
 - “3. –(1) For the purposes of these Regulations, a person (“A”) discriminates against another (“B”) if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).
 - (2) In paragraph (1) a reference to a person’s sexual orientation includes a reference to a sexual orientation which he is thought to have.
 - (3) For the purposes of these Regulations, a person (“A”) discriminates against another (“B”) if A applies to B a provision, criterion or practice-
 - (a) which he applies or would apply equally to persons not of B’s sexual orientation,

(b) which puts persons of B's sexual orientation at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),

(c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there is no material difference in the relevant circumstances), and

(d) which A cannot reasonably justify by reference to matters other than B's sexual orientation.

(4) For the purposes of paragraphs (1) and (3), the fact that one of the persons (whether or not B) is a civil partner while the other is married shall not be treated as a material difference in the relevant circumstances.

...

4.-(1) It is unlawful for a person ("A") concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person ("B") who seeks to obtain or to use those goods, facilities or services-

(a) by refusing to provide B with goods, facilities or services,

...

(2) Paragraph (1) applies, in particular, to-

.....

(b) accommodation in a hotel, boarding house or similar establishment,

...

6.-(1) Regulation 4 does not apply to anything done by a person as a participant in arrangements under which he (for reward or not) takes into his home, and treats as if they were members of his family, children, elderly persons, or persons requiring a special degree of care and attention.

...

14.-(1) Subject to paragraphs (2) and (8) this regulation applies to an organisation the purpose of which is-

(a) to practise a religion or belief,

(b) to advance a religion or belief,

(c) to teach the practice or principles of a religion or belief,

(d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief.

(2) This regulation does not apply –

(a) to an organisation whose sole or main purpose is commercial,

(b) in relation to regulation 7 (Educational establishments, local authorities, and education authorities).

(3) Nothing in these Regulations shall make it unlawful for an organisation to which this regulation applies, or for anyone acting on behalf of or under the auspices of an organisation to which this regulation applies –

(a) to restrict membership of the organisation,

(b) to restrict participation in activities undertaken by the organisation or on its behalf or under its auspices,

(c) to restrict the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices, or

(d) to restrict the use or disposal of premises owned or controlled by the organisation, in respect of a person on the ground of his sexual orientation.

(4) Nothing in these Regulations shall make it unlawful for a minister-

(a) to restrict participation in activities carried on in the performance of his functions in connection with or in respect of an organisation to which this regulation relates, or

(b) to restrict the provision of goods, facilities or services in the course of activities carried on in the performance of his functions in connection with or in respect of an organisation to which this regulation relates,

in respect of a person on the ground of his sexual orientation.

.....”

The issues

8. There are five issues: (i) Is the defendant's house a "boarding house or similar establishment" within the meaning of regulation 4(2)(b)? (ii) Is regulation 4 inapplicable on the grounds that the case falls within the exception provided by regulation 6(1)(a)? (iii) Is this a case of direct discrimination contrary to regulation 3(1)? (iv) If it is not a case of direct discrimination, does the defendant indirectly discriminate against persons on the grounds of sexual orientation by applying a criterion or practice which satisfies regulation 3(3)(a)(b) or (c)? (v) If the answer to (iv) is yes, can the defendant reasonably justify the criterion or practice within the meaning of regulation 3(3)(d) by reference to matters other than the claimants' sexual orientation?

Is the house a boarding house or similar establishment within the meaning of regulation 4(2)(b)?

9. It is the claimants' case that the defendant offers accommodation in a boarding house or establishment similar to a hotel or boarding house. The Recorder applied an Oxford dictionary definition of "boarding house" as being "a private house which people pay to stay in for a short time". She said that it seemed to her that a bed and breakfast establishment was "capable of falling within the meaning of the term 'boarding house' in the regulation" (para 66). She also held in the alternative that the defendant's bed and breakfast establishment was similar to the category of establishments to which hotels and boarding houses belong. She said that this conclusion was not undermined by the fact that the bed and breakfast establishment was small and that the defendant provided a personal service to her guests: hotels and boarding houses may be large or small and personal services may or may not be provided in them.
10. Ms Crowther challenges these conclusions. She cites various dictionary definitions in support of the submission that a boarding house is a private home that provides a room and meals to paying guests. She says that bed and breakfast accommodation is not a boarding house. A feature of a boarding house is the provision of more than one meal a day, and bed and breakfast accommodation contemplates only the provision of breakfast and no other meals. As for the Recorder's alternative conclusion, Ms Crowther submits that the overall character of the services provided by the defendant cannot properly be said to be of the nature of a "similar establishment".
11. I cannot accept these submissions. I see no reason to hold that "board" must include more than one meal per day. The normal meaning of the word is the provision of accommodation and some food which is prepared, served and cleared away by the provider. In *Otter v Norman* [1989] AC 129 (an authority to which Arden LJ drew our attention), the court had to decide whether a tenancy was protected under section 7(1) of the Rent Act 1977. That question turned on whether the dwelling-house had been let "at a rent which includes payments in respect of board, attendance..." It was held by the House of Lords that the provision of breakfast by itself, with the implicit inclusion of the ancillary services involved in preparing it and the provision of crockery and cutlery with which to eat it, amounted to "board" within the meaning of section 7(1). Their Lordships expressly rejected the submission that "board" requires at least the provision of one main meal in addition to breakfast. I accept that the word "board" is capable of different meanings and that the context in which it is used is important. But I can see no reason not to apply the same approach as that adopted in *Otter* in the present context.

12. Even if the defendant does not provide accommodation in a boarding-house, I would uphold the Recorder's alternative conclusion that the accommodation is in a "similar establishment" within the meaning of regulation 4(2)(b). A bed and breakfast establishment is similar to a hotel and boarding house in that in each of them (i) accommodation is provided for varying periods of time and (ii) the guests receive at least one meal per day (some hotels and boarding houses provide full or half board, but many only provide bed and breakfast).
13. I can think of no policy reason why Parliament would have intended to protect individuals from discrimination on grounds of sexual orientation in relation to the provision of half board (ie bed, breakfast and one other meal) but not in relation to the provision of bed and breakfast accommodation. Regulation 4(2)(b) is concerned with protecting the rights of guests staying in commercial accommodation, not just the rights of those who have breakfast plus one other meal. I would uphold the Recorder's decision on this issue.

Does regulation 6(1)(a) apply?

14. It is the defendant's case that regulation 4 does not apply to the provision of accommodation to her guests. It is submitted on her behalf that (i) the Recorder ought to have interpreted regulation 6(1) as applying to all cases where the defendant provides a special degree of care and attention to her guests and (ii) in the light of the Recorder's other findings, she ought to have found that the defendant treated her guests as if they were members of her own family to whom she provides a special degree of care and attention within the meaning of the regulation.
15. The Recorder found that the defendant provided "a personal and caring, and even loving, service"(para 53). But she rejected the defendant's interpretation of regulation 6(1) for reasons which in my view are plainly correct. On a natural reading of the regulation, the exception only applies to anything done by a person who takes into his home and treats as if they were members of his family "children, elderly persons or persons requiring a special degree of care and attention". The defendant's case has to be that the claimants were persons requiring a special degree of care and attention. But there is no finding that this is what they *required*. The fact that, if they were accommodated by the defendant, they *would* receive a special degree of care and attention is immaterial. The feature that is common to all three categories of persons stated in regulation 6(1) is that, broadly speaking, they do or may require special care and attention which other members of society do or may not require.

Direct discrimination

16. The case advanced on behalf of the defendant was that the reason why she refused to accommodate the claimants in a double room was that she objected to sexual relations outside marriage: see paras 3 and 4 above. At the heart of the defendant's case is the submission that sexual behaviour is not a protected characteristic and is different from sexual orientation. A similar argument was advanced and rejected by this court in *Preddy v Bull* [2012] EWCA Civ 83, [2012] 1 WLR 2514. The Recorder was unable to distinguish *Preddy* and for that reason held (para 41) that there was less favourable treatment of the claimants than heterosexual couples because they were refused a double bedroom. She rejected the submission that *Preddy* could be distinguished on the basis that the claimants in that case were in a civil partnership. On the authority of

Preddy, the reason for the less favourable treatment was sexual orientation and not sexual relations (para 43). She added (paras 44 and 45) that, if *Preddy* was distinguishable, then on the basis of para 18 of the defendant's witness statement, she treated the claimants less favourably than she treated unmarried heterosexual couples and did so on the grounds of their sexual orientation.

17. It is necessary to examine precisely what was decided in *Preddy*. The facts are in many ways similar to those in the present case. The defendants owned and ran a private hotel. They believed that it was sinful for persons, whether homosexual or heterosexual, to have sexual relations outside marriage. They operated a policy to restrict occupancy of the three double bedrooms to married couples. They refused to honour a booking for a double bedroom by the claimants, an homosexual couple in a civil partnership. The defendant denied direct discrimination on the ground that, since the restriction had been applied to couples of homosexual and heterosexual orientation alike if they were not married to each other, it was concerned not with sexual orientation, but with sexual practice.
18. The court held that there was direct discrimination on the ground of sexual orientation. The reasoning of Rafferty LJ is to be found at para 40:

“Though I agree with the claimants that *Ladele's* case [2010] 1 WLR 955 does not assist the defendants (and see below), for the reason the court there gave, in my view notwithstanding lengthy submissions on various topics, the answer to this appeal lies in a consideration of *James v Eastleigh Borough Council* [1990] 2 AC 751. It is fatal to the defendants' case. An homosexual couple cannot comply with the restriction because each party is of the same sex and therefore cannot marry. In *James's* case the male plaintiff, Mr James, could never have a pension aged 61. The restriction therefore discriminates against the claimants because of their sexual orientation, just as the criterion at the swimming baths discriminated against Mr James because of his sex. For this reason alone it is directly discriminatory. Put another way, the criterion at the heart of the restriction, that the couple should be married, is necessarily linked to the characteristic of an heterosexual orientation. There has in my view been direct discrimination by virtue of regulation 3(1)(3)(a) together with regulation 4—less favourable treatment on grounds of sexual orientation.”

19. Sir Andrew Morritt C expressed the point in similar terms at para 61:

“The judge concluded that the restriction constituted discrimination and was on the grounds of sexual orientation. Mr and Mrs Bull contend that this conclusion is wrong because they apply the restriction to persons of heterosexual and homosexual orientation alike if they are not married. But, in agreement with Rafferty LJ, that cannot, in my view, be a sufficient answer. The former may be married but the latter cannot be. It follows that the restriction is absolute in relation to homosexuals but not in relation to heterosexuals. In those

circumstances it must constitute discrimination on grounds of sexual orientation. Such discrimination is direct. As Rafferty LJ has pointed out there is a direct analogy with the decision of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751. This conclusion is not affected by the existence or terms of regulation 3(4). ”

20. Hooper LJ agreed with both judgments. In order to understand this reasoning, it is important to refer to the House of Lords decision in *James v Eastleigh Borough Council* [1990] 2 AC 751. The plaintiff and his wife were both 61 years of age. They went to the defendant’s leisure centre. The wife was admitted free of charge, but the plaintiff had to pay an admission fee, since the council only provided free admittance, inter alia, to people who had reached state pension age, which in the case of a man was 65 and in the case of a woman was 60. The plaintiff alleged unlawful sex discrimination. The House of Lords held that, since the pensionable age itself directly discriminated between men and women by treating women more favourably than men on the ground of their sex, any other treatment of men and women adopting the same criterion equally involved discrimination on the ground of sex: see per Lord Bridge at p 764A. The council would certainly have discriminated directly in favour of women and against men on the ground of their sex if they had *expressly* made the concession of free entry available to women aged 60 and to men aged 65. The expression “pensionable age” was no more than a convenient shorthand which referred to the age of 60 in a woman and the age of 65 in a man.
21. I confess that I have some difficulty in agreeing with the view that the decision in *James* compels the conclusion that there was direct discrimination in *Preddy*. The point in *James* was that the council’s policy discriminated against men on the ground of their sex because it *explicitly* provided that the concession was not available to any men until they reached the age of 65. The policy that was being considered in *Preddy* discriminated against all unmarried couples. This would include heterosexual as well as homosexual couples. In my view, it is not material that homosexual couples cannot marry. Nor is it material that the inability to marry is “absolute” in relation to homosexuals, but not in relation to heterosexuals (to use the language of the Chancellor). In relation to a policy which discriminates against unmarried couples, the only thing that is material is whether a couple is married or not. It seems to me that the reason why they are not married is not material. In my view, *Preddy* was not a case of *direct* discrimination against a homosexual couple on the ground of their sexual orientation, since there were other unmarried couples who would also be denied accommodation on the ground that they too were unmarried. It was, however, a case of *indirect* discrimination because the defendants’ policy in that case put homosexual couples at a disadvantage compared with heterosexual couples on the ground of their sexual orientation. The former could not marry, whereas the latter could (which was the very reason given by the court in *Preddy* for holding that there was direct discrimination in that case).
22. I find support for this approach in the Judicial Committee of the Privy Council decision in *Rodriguez v Minister of Housing and others* [2009] UKPC 52, [2010] UKHRR 144. The appellant was the tenant of a government flat in Gibraltar where she lived with her same sex partner. They were unable to marry or enter into a civil partnership. If they were married, the appellant’s partner would have a statutory right

to be granted a new tenancy of the flat when the appellant tenant died. The appellant applied to the statutory body responsible for the allocation of government housing for them to be granted a joint tenancy. The application was refused. The appellant applied unsuccessfully to the Supreme Court of Gibraltar inter alia for a declaration that the refusal was unlawful on the grounds of discrimination. Her appeal to the Privy Council was allowed. Lady Hale said:

“19. In this case we have a clear difference in treatment but not such an obvious difference between the appellant and others with whom she seeks to compare herself. The appellant and her partner have been denied a joint tenancy in circumstances where others would have been granted one. They are all family members living together who wish to preserve the security of their homes should one of them die. The difference in treatment is not directly on account of their sexual orientation, because there are other unmarried couples who would also be denied a joint tenancy. But even if, as Dudley J found, these are the proper comparator, the effect of the policy upon this couple is more severe than on them. It is also more severe than in most cases of indirect discrimination, where the criterion imposed has a disparate impact upon different groups. In this case, the criterion is one which this couple, unlike other unmarried couples, will never be able to meet. They will never be able to get married or to have children in common. And that is because of their sexual orientation. Thus it is a form of indirect discrimination which comes as close as it can to direct discrimination.”

23. It seems to me that *Rodriguez* was more in point than *James*. Accordingly, if I were free to do so, I would wish not to follow *Preddy*. Is there any basis for distinguishing *Preddy*? I do not consider that the fact that the claimants in that case were in a civil partnership, whereas the claimants in the present case are not, is a sound basis for distinction. In both *Preddy* and the present case, the policy under scrutiny was to exclude unmarried couples. The fact that the claimants in *Preddy* were in a civil partnership was not relevant to the decision. Indeed, the Chancellor expressly stated that regulation 3(4) was irrelevant to his decision. In my view, there is no difference between the essential facts in the two cases. I have reluctantly concluded that the Recorder was right to follow *Preddy* and hold that there was unlawful direct discrimination on the ground of sexual orientation in this case.

Indirect discrimination

24. Having decided that there had been unlawful direct discrimination in this case, it was not open to the Recorder to consider whether the same facts amounted to indirect discrimination. As Lady Hale said in *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728 at para 57, direct and indirect discrimination are mutually exclusive: you cannot have both at once. The main difference between them is that direct discrimination cannot be justified, whereas indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

25. Since, for the reasons that I have given, I feel constrained to agree with the Recorder's conclusion on direct discrimination, it is not strictly necessary to go on to deal with indirect discrimination. But since my conclusion on the direct discrimination issue may be wrong and the indirect discrimination issue was the subject of full argument before us, it is right that I should deal with it.

The disadvantage issue

26. The Recorder held that the provisions of regulation 3(3)(a), (b) and (c) were satisfied. The defendant's policy amounted to a provision, criterion or practice which she applied equally to persons not of the claimants' orientation, namely to unmarried heterosexual couples (regulation 3(3)(a)). The test in regulation 3(3)(b) was satisfied because, although not all unmarried heterosexual couples were allowed to stay in a double room, some at least were. The claimants were, therefore, at a disadvantage as compared with "some" unmarried heterosexual couples, namely those who arrived in the evening. As I have already said, in my view, this is a case of indirect discrimination. The defendant's policy of restricting her double rooms to married couples discriminates against homosexual couples indirectly, because it puts homosexual couples at a disadvantage on the ground of their sexual orientation when compared with heterosexual couples. For that reason, the policy unlawfully discriminates against homosexuals unless the defendant can reasonably justify it by reference to matters other than their sexual orientation. The defendant seeks to justify her treatment of homosexual couples by reference to her right to manifest her religion and her Christian beliefs and her rights to enjoyment of her home etc under article 8.

Justification

The Recorder's decision

27. It was submitted by the defendant in the court below that the exclusion of homosexual couples from the double room was justified as a proportionate means of fulfilling her legitimate aim of "holding a genuine and protected legitimate religious belief" (para 119). The issue of proportionality involved balancing her rights under articles 8 and 9 of the European Convention on Human Rights ("the Convention") against the claimants' rights under article 8 and 14 not to be discriminated against on the grounds of their sexual orientation. The Recorder considered this issue in some detail when addressing the different question raised by the defendant of whether regulation 3 was compatible with article 9 of the Convention.
28. Article 8 of the Convention provides, so far as material:
- “1. Everyone has the right to respect for his private and family life...
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society.....for the protection of the rights and freedoms of others.”
29. Article 9 of the Convention provides, so far as material:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedomto manifest his religion or belief, in worship, teaching and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society.....for the protection of the rights and freedoms of others.”

30. She decided (para 87) that the defendant’s refusal of double room accommodation to homosexual couples stemmed from her religious beliefs and accordingly “can be regarded as a manifestation of her religious beliefs within article 9(1)”. There is no appeal by the claimants from that finding. She then considered article 9(2) and, in particular, the question whether the restriction was “necessary in a democratic society...for the protection of the rights and freedoms of others” namely (in this case) homosexual individuals. She set out the submissions of the parties in some detail at paras 88 to 107.

31. At paras 101 to 104, the Recorder referred to the claimants’ submission that the proper balance between the defendant’s article 9(1) rights and the claimant’s article 8 and 14 right not to be discriminated on the grounds of their sexual orientation had been struck by the Secretary of State and the legislature in making the Regulations. The Recorder considered that she should “recognise the latitude to be accorded to the legislature and executive” (para 103). In doing so, she was applying what Rafferty LJ said in *Preddy* at para 51:

“I conclude that, to the extent to which under the 2007 Regulations the restriction imposed by the defendants upon the claimants constitutes direct discrimination, and to the extent to which the Regulations limit the manifestation of the defendants’ religious beliefs, the limitations are necessary in a democratic society for the protection of the rights and freedoms of others. The defendants simply seek a further exception from the requirements in the Regulations, which already provide exceptions, in the case, for example, of certain landlords and of those who permit others to share their homes. The Secretary of State has drawn what she considers the appropriate balance between the competing claims of hoteliers and (amongst others) homosexuals. Her decision has been approved by affirmative resolution. This court would be loath to interfere with her conclusions.”

32. The Recorder expressed her conclusion on the article 9(2) issue in these terms:

“108. In my view the application of the regulations to the Defendant’s bed-and-breakfast establishment does not prevent her from holding her religious beliefs but she has chosen to operate a commercial business indeed the primary reason for starting the business as stated in paragraph 8 of the witness statement was financial. The business is conducted from her home but it is still a business with a significant number of

guests albeit with a small number of rooms. I do not agree with the submission that if the restriction is unlawful, the Defendant would have to remove herself from public life. She may be content to let single and twin bedded rooms or she may have to withdraw from this business. It seems to me that the Defendant has a choice whether or not to operate this particular business; it is not a case where an employee has had new duties imposed on him by an employer and on this basis it is in line with the approach of the Strasbourg institutions in the cases referred to by Lord Bingham at paragraph 23 of his judgment in *Denbigh High School*.

109. For all these reasons therefore my conclusion is that the application of the regulations to the Defendant's bed-and-breakfast establishment and the finding that the refusal of the double room constituted direct discrimination are not in breach of her Article 9 rights in that they constitute a limitation which is prescribed by law and is necessary for the protection of the rights and freedoms of others and is proportionate in its means and effect."

33. The Recorder applied the same approach when she came to address the question whether the defendant could reasonably justify her disadvantageous treatment of the claimants pursuant to regulation 3(3)(d) by reference to matters other than the claimants' sexual orientation. The proportionality exercise which the Recorder conducted when considering this question raised the same considerations as she had taken into account when deciding whether the interference with the defendant's article 9 rights was justified. Thus it was that she said at para 119:

"The Defendant refers to the need to vindicate the Defendant's Article 8 and Article 9 rights. The Defendant submits that the restriction was a proportionate means of fulfilling the Defendant's legitimate aim of holding genuine and protected religious belief. This therefore raises the human rights issues considered above and for the reasons stated above in my view the balance lies in allowing the Defendant to hold her religious views but requiring her, if she chooses to run a commercial venture, namely a bed and breakfast business, to operate in a manner which does not discriminate against homosexuals. Accordingly in my view the Defendant cannot reasonably justify the policy by reference to matters other than the Claimants' sexual orientation. Therefore the restriction applied by the Defendant amounted to a breach of regulation 4(1) on the basis of indirect discrimination within the meaning of regulation 3(3)."

34. The defendant challenges this conclusion on this appeal. As I have said, it is accepted by the claimants that the defendant's decision to run a bed and breakfast is a manifestation of her article 9 rights. The issue is whether the interference with these rights is justified as a proportionate means of achieving the legitimate aim of protecting homosexuals from discrimination on the ground of sexual orientation.

Some basic principles

35. It is clearly established that, as a matter of general principle, (i) the right of a homosexual not to suffer discrimination on the grounds of sexual orientation is an important human right (article 8 and 14), and (ii) the freedom to manifest one's religion or belief under article 9(1) is also an important human right. The importance of the former has been stated many times. For example, in *EB v France* (2008) 47 EHRR 509, the ECtHR said at para 91: "where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8....". See also *Karner v Austria*, no 40016/98, (2003) 38 EHRR 528 at para 37 and *Eweida and others v United Kingdom* [2013] IRLR 231 at para 105. But the importance of the latter has also often been stated: see, for example, *Kokkinakis v Greece* (1993) 17 EHRR 397 at para 31 and *Eweida* at para 79 and 83 (last sentence). Neither is intrinsically more important than the other. Neither in principle trumps the other. But the weight to be accorded to each will depend on the particular circumstances of the case.
36. Nor is the nature of the proportionality exercise that has to be performed in dispute. In *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at para 19, the House of Lords endorsed (so far as it went) the formulation propounded by the Privy Council in *de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 which defined the questions generally to be asked in deciding whether a measure was proportionate as being:
- "whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".
37. But the House of Lords said that this formulation was deficient in omitting reference to the need to conduct a fair balancing of the interests of society with those of individuals and groups. This approach has since been confirmed by the Supreme Court in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 at paras 45-46. The overall balancing exercise will in many contexts (immigration is an obvious example) require the balancing of the interests of society as a whole with the interests of an individual or group of individuals. In other cases, the overall fair balancing that is required involves the competing rights and interests of groups of individuals.
38. Before I express my conclusion on the issue of justification, I should make two further introductory comments. First, there is case law which indicates that, if a person is able to take steps to circumvent a limitation placed on his freedom to manifest religion or belief, there is no interference with the right under article 9(1) and the limitation does not therefore require to be justified under article 9(2): see, for example, per Lord Bingham in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at para 23. This has been referred to as the "non-interference" rule. But the ECtHR decided in *Eweida* at para 83 that, rather than holding that the possibility of circumventing the limitation would negate any interference with the right, the better approach is to weigh that possibility in the overall balance when considering whether or not the restriction is proportionate.

39. Secondly, a question arises whether the Recorder was entitled to have regard to the fact that the proportionality issue had been considered by the Government and Parliament and to hold that the court should give considerable weight to the balance that was struck in the Regulations themselves. It is necessary to examine the relevant history.

40. On 13 March 2006, the Government published a consultation paper on its proposals for what became the Regulations. The consultation received 2,747 responses. The Secretary of State for Communities and Local Government explained to Parliament on 7 March 2007 that the reason why there had been such wide consultation on the proposals was that:

“While the case for this new legislation was widely accepted, opinion was divided on the issue of how the Regulations ought to balance the competing rights of individuals to hold and manifest a religious belief against the rights of lesbian, gay and bisexual people to live free from discrimination. It is exactly because of these complex issues about how to reconcile potentially competing rights and freedoms that the Government consulted so extensively on these measures.”

41. The Government published its response to the consultation on 7 March 2007 in a paper entitled “*Getting Equal: Proposals to outlaw sexual orientation discrimination in the provision of goods and services, Government Response to Consultation*”. It noted that in the consultation process the principle of legislating to prohibit unfair discrimination on grounds of sexual orientation had been supported by almost 97% of the responses. The proposed exemption for religious organisations was said to have generated “an exceptionally strong response”; and “there was a clear difference in opinion on the scope of the exemption needed to safeguard the right to freedom of conscience, religion or belief” (p 9). Religious organisations would be exempt from the Regulations, provided that they were not operating on a commercial basis (p 10). The Government explained that it intended to apply the Regulations to the selling or letting of premises, with an exemption for shared accommodation in small dwellings (p 13). The position of religion and bed and breakfast establishments was addressed specifically:

“The majority of responses from religious organisations proposed that the exemption be widened to allow either specifically Christian hostels or commercial bed and breakfast establishments with religious owners to turn away same sex couples. The Government contends that where businesses are open to the public on a commercial basis, they have to accept the public as it is constituted.”

42. At about the same time, the Government of Northern Ireland published a document entitled “*Analysis of Responses to the Consultation on Getting Equal: Proposals to outlaw discrimination on the ground of sexual orientation in the provision of Goods, Facilities and Services in Northern Ireland*”. Question 5 asked whether there should be an exemption for the selling and letting of private dwellings. The Paper contained a response to specific concerns that had been raised and included the following:

“In terms of the points brought forward in relation to bed and breakfast establishments, we have listened closely to the concerns raised but have concluded that where businesses are open to the public on a commercial basis, then they have to accept the public as it is constituted.

However, if a bed and breakfast had a policy of refusing to (sic) rooms to all unmarried heterosexual couples, these Regulations would not compel them to offer rooms to unmarried homosexual couples. The discrimination is in those circumstances not one of sexual orientation, but rather one of marital status.”

43. The draft Regulations were laid before the House of Commons on 8 March 2007 and the House of Lords on 20 March. They were reviewed by the Joint Committee on Statutory Instruments for technical concerns and relaid as a result. On 15 March, the House of Lords Statutory Instruments Committee drew the Regulations to the “special attention” of the House “on the grounds that they give rise to issues of public policy likely to be of interest to the House”. Baroness Andrews, the Parliamentary Under-Secretary of State, Department for Communities and Local Government, said:

“Perhaps I may suggest that few regulations have been subject to more intense or inclusive public scrutiny, while observing due parliamentary process....Throughout this process, the Government have fully recognised what a difficult and complex journey it is to steer a path between the demands of religious conscience and those of individual rights.”

44. Ms Crowther submits that the Recorder erred in giving any weight to the Regulations when considering the proportionality issue and deciding whether the defendant’s disadvantageous treatment of the claimants was reasonably justified. She says that it is not for the court to test the proportionality of the Regulations. Rather, it should test whether the application of the defendant’s legitimate aim of living in accordance with her religious belief that marriage is the only place for sex justified her conduct in refusing to offer accommodation in a double room to the claimants on the facts of this case.
45. I accept that the court is obliged to decide the issue of justification by making a careful assessment of the facts in each case. Thus it cannot simply say that the balance has been struck by Parliament against a person such as the defendant because she does not come within the exemption provided by regulation 14. If the balance was to be considered to have been conclusively struck by Parliament, regulation 3(3)(d) would be a dead letter. I accept the submission of Ms Crowther that the court is required to examine all relevant circumstances in every case where a person seeks to justify indirect discrimination on grounds of sexual orientation.
46. But in my view an important circumstance is the fact that the legislature has chosen to address the issue of religion and beliefs in the way that it has. That it has specifically addressed this issue is clear from the face of the Regulations themselves. The exemption in the case of discrimination for reasons of religious belief is tightly defined by regulation 14. The weight to be accorded to the balance struck by the

Regulations is all the greater because they were made after wide public consultation and careful consideration of how to strike the balance between the right of homosexuals to be protected from discrimination and right of individuals to manifest their religion and beliefs. Indeed, some of the consultation responses were directed to the specific question of whether there should be an exemption for bed and breakfast accommodation. It is for this reason that the decision of the legislature to limit the exemption on the grounds of religion and belief in the way that it did in regulation 14 is particularly telling.

47. The question of whether the court should give weight to the view of the legislature when Convention rights are in play has been the subject of consideration by the courts. The court in *Preddy* (para 41) concluded that the court should respect the recent and closely considered judgment of a democratic assembly. As support for this proposition, Rafferty LJ referred to *R (Countrywide Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719, where Lord Bingham said:

“45. But after intense debate a majority of the country's democratically-elected representatives decided otherwise. It is of course true that the existence of duly enacted legislation does not conclude the issue. In *Dudgeon v United Kingdom* (1981) 4 EHRR 149 and *Norris v Ireland* (1988) 13 EHRR 186 legislation criminalising homosexual relations between adult males was found to be an unjustifiable interference with the applicants' rights under article 8. But the legislation under attack had been enacted in each case in 1861 and 1885 and was not enforced in either Northern Ireland or Ireland. During the intervening century moral perceptions had changed. Here we are dealing with a law which is very recent and must (unless and until reversed) be taken to reflect the conscience of a majority of the nation. The degree of respect to be shown to the considered judgment of a democratic assembly will vary according to the subject matter and the circumstances. But the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament. ”

48. Lady Hale reached the same conclusion by a slightly different route. She said:

“126 But when we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states, it seems to me that this House should not attempt to second guess the conclusion which Parliament has reached. I do not think that this has to do with the subject matter of the issue, whether it be moral, social, economic or libertarian; it has to do with keeping pace with the Strasbourg jurisprudence as it develops over time, neither more nor less: see *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20.

127 In this case, I seriously doubt whether Strasbourg would regard the right to hunt wild animals with hounds as falling within either article 8 or article 11; but if it did, I believe that the ban would fall within the margin of appreciation it would allow to the United Kingdom on a matter such as this. Even if I were eventually to be proved wrong on both points, I would not think that the 1998 Act now required us to declare the Hunting Act 2004 incompatible.”

49. In my view, the Recorder was right to hold that, in deciding the proportionality issue that arises in this case, the court should give weight to the fact that, after wide consultation, the matter was carefully considered by the legislature, which produced a scheme which gives priority to religious belief, but only in certain narrowly circumscribed circumstances. The issue of how to strike the balance between the competing interests of homosexual couples and persons who, on religious grounds, believe that sexual relations should only be permitted between married heterosexual couples involves difficult and controversial questions of moral judgment. For that reason, this is a case which (to adopt the words of Lord Bingham) is pre-eminently one in which respect should be shown to what Parliament has decided. To adopt the approach of Lady Hale, in the light of what the ECtHR decided in *Eweida*, we can confidently predict that Strasbourg would regard the matter as within the margin of appreciation of the member states. For that reason too, the court should respect the decision of Parliament, always recognising that Parliament’s choice is not determinative.

My conclusion on justification

50. I can now express my conclusions on the issue of justification. I start by considering whether the particular facts of this case disclose any reasons for giving more weight to the claimants’ article 8 and 14 rights not to suffer discrimination on the grounds of their sexual orientation than to the defendant’s article 9 right to manifest her religious belief. I concentrate on article 9 because I do not think that article 8 adds materially to her case. Ms Hill submits that running a bed and breakfast business is a less fundamental manifestation of the defendant’s religious belief than, for example, her attendance at religious services would be. It is essentially a commercial rather than a religious enterprise, although she conducts it in a way which reflects her religious and moral values and beliefs.
51. It is clear that article 9(1) is engaged in situations far wider than religious activities alone, but the manifestation must reach a certain threshold. The point was put in *Eweida* as follows:

“82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a ‘manifestation’ of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of article 9(1)In article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion

which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.”

52. Thus on the facts in the case of Ms Eweida itself, the applicant was employed as a member of the check-in staff for British Airways and wore a cross on a chain around her neck as a sign of her commitment to the Christian faith. It was held by the court that this was a manifestation of her religious belief. Similarly, with regard to Ms Chaplin who was employed as a nurse and for religious reasons wore a cross and chain round her neck. The case of Ms Ladele was based on a complaint of breach of article 14 taken in conjunction with article 9. She refused on religious grounds to act as a registrar of civil partnerships. It was held that the case fell “within the ambit” of article 9. The case of Mr McFarlane involved a man who was employed to provide psycho-sexual counselling services, but refused to provide them to homosexual couples because he believed that the Bible stated that homosexual activity was sinful. The court accepted that his refusal to provide services to homosexual couples was a manifestation of his religion and belief. In each of the four cases, therefore, the court held that the applicant had article 9(1) rights and the question in each case was whether the interference with the rights was proportionate. It is noteworthy that in none of these cases did the court assess the intrinsic importance of the applicant’s article 9(1) right.
53. I consider that, if the act in question is sufficiently intimately linked to the applicant’s religion or belief to amount to a manifestation of it, then the court should be slow to make a judgment of the importance or significance of that manifestation. Quite apart from the insensitivity of making judgments of this kind, I do not consider that the court is equipped to make them. By what yardstick would the court make the assessment? For example, it is possible (to put it no higher) that for some Christians wearing a cross has more religious significance and is more intimately linked to their religion and beliefs than going to church. How people choose to manifest their religious beliefs is a matter for their consciences. I do not find it surprising that such judgments did not enter the discussion of the court in any of the four cases that it considered.
54. Nevertheless, in my view the Recorder was right to hold that the balance comes down in favour of the claimants in this case for two reasons. First, I agree with her that it is right to give considerable weight to the balance struck by the Regulations themselves. I have already dealt with this sufficiently at paras 46 to 49 above.
55. The second reason involves a consideration of the impact on the defendant of holding that her policy is contrary to the Regulations. As we have seen (para 38 above), although the non-interference principle is no longer a complete answer to the question whether indirect discrimination is reasonably justified, it is relevant to the balancing exercise that has to be performed. The *Eweida* cases demonstrate that the court is required to have regard to the effect on a person of an interference with his or her right to manifest religious belief. Thus the court took into account the fact that the

consequences for Ms Ladele were serious: given the strength of her religious convictions, she considered that she had no choice but to face disciplinary action and in the event she lost her job. The consequences for Mr McFarlane were equally grave. He too lost his job. The seriousness of the interference with the article 9 rights of both of these applicants had to be weighed in the balance by the court when considering whether it was proportionate.

56. The Recorder dealt with the impact on the defendant as follows:

“I have had no evidence before me as to whether or not a bed-and-breakfast business could survive if it only provided single or twin rooms. I imagine that some people would prefer a room with a double bed and therefore it could affect the business but I am prepared to accept that the business could survive on this basis.....I proceed on the basis that she may have to withdraw from the bed-and-breakfast business if she is not allowed to refuse a double or twin bedded room to a homosexual couple.”

57. If the defendant is prevented from denying homosexual couples the use of her double rooms, it is clear that she will not be able to offer her double rooms at all. There was some uncertainty in the evidence as to whether she would be willing to offer twin-bedded rooms to homosexual couples. Unsurprisingly, Ms Crowther told us on instructions (and we accept) that the defendant would not be willing to offer twin-bedded rooms either. There can be no doubt that such a restriction on her business would be commercially damaging to her. But no material was placed before the Recorder to enable her to measure the scale of its likely impact. There was no evidence about the profits earned by the defendant from her business and no assessment of the reduction in profits that would be likely to result if she was only able to offer single rooms. In these circumstances, the Recorder was justified in going no further than finding that it was *possible* that the defendant would have to withdraw from the bed and breakfast business. There was no evidence as to what the defendant could or would be likely to do in order to make up for the loss that she would suffer if she withdrew from the bed and breakfast business altogether or if she continued running the business on the basis of single-room occupancy and therefore at a lower level of profitability. In my view, the burden was on the defendant to justify her indirect discrimination of the claimants. If she wished to show that a restriction of her rights would cause her serious economic harm, then the burden was on her to do so. She failed to discharge it.

58. Taking into account these two reasons, I consider that the balance comes down in favour of the claimants. Ms Crowther submits that the defendant's policy is justified because (i) the defendant's policy does not prevent the claimants from continuing to live their lives together and (ii) she should be allowed, in her own home, to live her life manifesting her beliefs and providing a personal caring and loving service to everyone if they are in single beds, but only to married persons in double or twin-bedded rooms. In my view, this submission fails adequately to reflect (i) the importance attached by the Convention and Parliament to protecting persons against discrimination on the grounds of sexual orientation and (ii) the fact that the defendant has not shown that she will suffer serious damage if she is not permitted to refuse her double rooms to homosexual couples.

Overall conclusion

59. I would dismiss this appeal. The decision in *Preddy* compels the conclusion that, by her policy of only offering double rooms to married couples, the defendant directly discriminates against homosexual couples on the ground of their sexual orientation. For the reasons that I have summarised at paras 28 and 54 to 58 above, she indirectly discriminates against homosexual couples on the grounds of their sexual orientation by applying a policy which (a) puts them at a disadvantage as compared with heterosexual couples and (b) she cannot reasonably justify by reference to matters other than their sexual orientation.

Lady Justice Arden:

60. I agree with the judgment of the Master of the Rolls. We are bound to hold that this is a case of direct discrimination. I agree that, if this were a case of indirect discrimination, the defence of justification would fail.
61. However, I would add that where, as on this appeal, no issue arises as to compatibility with the European Convention on Human Rights (“the Convention”), the proportionality exercise inherent in the justification defence on its own is more limited than would be the case if compatibility were in issue. It can start from the point that the measure in question is Convention-compatible, that is, in the present case that the Equality (Sexual Orientation) Regulations 2007 (“the Regulations”) are compatible with the Convention rights of both parties.
62. The appellant does not invite us to hold that the Regulations are incompatible with the Convention. She recognises that we are bound by *Preddy v Hall* on that point. As has been explained, on justification, her legitimate aim is to live in accordance with her religious beliefs. Her religious beliefs include the belief that marriage is the only place for sex. Her case is that this belief justified her refusal of double-bed accommodation to the respondents.
63. If we proceed on the basis that the Regulations are Convention-compatible, the features of the scheme for the protection for religious beliefs in the Regulations provide the backdrop for the defence of justification. The features of the statutory scheme must thus be identified. There is no express exception in the Regulations for the refusal of shared accommodation to single sex couples for those offering bed and breakfast accommodation in their own homes. The only express exception for the manifestation of religious belief is Regulation 14, set out in paragraph 7 above, which the appellant does not satisfy.
64. However, Parliament has provided the defence of justification. The justification defence is therefore available where, on the facts of a particular case, the absence of an exception for bed and breakfast accommodation would violate the Convention rights of someone running such a business. It operates, as it were, as a safety valve in appropriate cases for situations for which Parliament has not provided an express exception.
65. Any finding of justification must be consistent with the statutory scheme, and thus with the way in which Parliament has utilised the implementation freedom given by the Convention.

66. The legislative history, which the Master of the Rolls has set out, serves the useful purpose of demonstrating that when making the Regulations Parliament sought to comply with rights guaranteed by the Convention.
67. The consequence of this analysis is that in my judgment that there must be something in the circumstances of the appellant's case which gives her an exception when there would normally be no such exception. Running bed and breakfast accommodation in the normal way will not do. There must be some specific facts which mean that in the appellant's case the Regulations do not strike a fair balance between her right to manifest her religious belief and the rights of the appellants under articles 8 and 14. Moreover, in the case of the latter rights, as the Master of the Rolls has said, convincing and weighty reasons are required to justify interference. This is consistent with the approach of Strasbourg jurisprudence to immutable characteristics such as race and sex. The requirement for convincing and weighty reasons affords added protection for a right.
68. As the Master of the Rolls points out, this court carries out its review on the basis of the evidence adduced. The appellate system is not an inquisitorial one and the court does not in general give directions of its own for evidence. It cannot build bricks without straw. The appellant must provide the straw.
69. In her written submissions, Miss Sarah Crowther submits that in this particular case a fair balance is not struck because the only realistic alternative open to the appellant is to withdraw from the bed and breakfast marketplace altogether. I particularly agree with what the Master of the Rolls has said about this submission (paragraph 57, above).
70. We have not been shown any regulatory impact assessment which may have been provided when the new Regulations were laid before Parliament prior to approval. We do not therefore know whether the financial impact on existing businesses was taken into account by the legislature. The process of approval was by affirmative resolution, and thus the scope for amendment was limited, if any. There is no transitional provision for any existing business. In those circumstances, I do not exclude the possibility that the financial impact on an existing business may be relevant to justification if appropriate evidence were available.
71. There may indeed be other strands of evidence relevant in other cases. An exceptional case might for instance arise where the accommodation in question is the only available accommodation on, say, an island run by a religious community, the policy is well advertised, the policy forms part of the manifestation of a religious belief and there is evidence that, if the policy were not adopted, no visitors at all could stay on the island. It may be that in those exceptional circumstances the court would hold that indirect discrimination was justified. But the defence would have to be considered in the light of all the circumstances in the case including the impact on single-sex couples.
72. Accordingly, even though the defence of justification has to be approached in the context of the Regulations, and on the basis that the regulations are Convention-compliant, it would be wrong to conclude that there are no circumstances where the defence of justification might not apply in the context of reliance on manifestation of religious beliefs.

73. I too would dismiss the appeal.
74. Since preparing this judgment, I have read the judgment of McCombe LJ. I agree with him that the weight to be attached to pre-legislative consultation will vary from case to case. It will depend on all the circumstances, including the breadth of the consultation and the consultation issues, the legislative process and the nature of the subject-matter.

Lord Justice McCombe:

75. I agree with the Master of the Rolls that this appeal should be dismissed, essentially for the reasons that he gives. I only wish to add a few words of my own on the question of the role of the consultation process and the making of the Regulations, as an aspect of the case on “justification”.
76. For my own part, I would find that the primary reason why the restriction operated by the defendant in the present case was not a proportionate means of fulfilling the legitimate aim of enabling the manifestation of her religious belief was that (as the Recorder said) 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. This is broadly in line with the Government’s conclusion on the competing public interests, quoted in paragraph 102 of the Recorder’s judgment, that “[where] businesses are open to the public on a commercial basis they have to accept the public as it is constituted...” In support of this view of the case, as the Master of the Rolls has mentioned, I would add that the evidence before the court below did not show that the defendant would suffer serious damage if she were not permitted to refuse her double rooms to homosexual couples.
77. In quoting part of the Government’s conclusions (based at least in part on the preceding public consultation) and in considering this aspect of the arguments on “justification”, I entirely agree that those conclusions are to be weighed appropriately in the justification process.
78. My concern, however, is that it should not be thought that the results of such processes will always be sufficient as a pointer to where the balance properly lies in any individual case before a court. This is not a case involving primary legislation, enacted after the Parliamentary processes attendant upon the passage of a Bill into an Act, which (under our constitutional arrangements) are the supreme expression of the democratic will. Public consultations and the enactment of secondary legislation are conducted with varying degrees of intensity and will call for more weight to be attached to them in this context in some cases than in others.
79. I would suggest that in few (if any) cases will the weight afforded to such arrangements be the same as would be afforded to primary legislation. In a recent decision of this court in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, Laws LJ was at pains to point out that the margin of discretion afforded to a decision maker is “at its broadest” where the decision made “applies general policy created by primary legislation”: see paragraph [47] of the judgments in that case, and (more fully) the passage beginning at paragraph [48],

headed “The Source of the Policy: Primary Legislation”. That is not, as I see it, the present case.

80. In my judgment, in summary, it should not come to be thought that the “public consultation + regulation” formula will always be regarded in this field as carrying similar weight as primary legislation, in balancing Convention rights and restrictions upon them.
81. That said, however, as already indicated, I agree with the Master of the Rolls that, on the facts and in regulatory context of this case, the appeal should be dismissed.