Michaelmas Term
[2013] UKSC 73
On appeal from: [2012] EWCA Civ 83

JUDGMENT

Bull and another (Appellants) *v* Hall and another (Respondents)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

27 November 2013

Heard on 9 and 10 October 2013

Appellants
Aidan O'Neill QC
Sarah Crowther
Sarah Ramsey
(Instructed by Aughton Ainsworth)

Respondents
Robin Allen QC
Catherine Casserley

(Instructed by Equality & Human Rights Commission)

Intervener
Karon Monaghan QC
Henrietta Hill
(Instructed by Liberty)

LADY HALE

1. Is it lawful for a Christian hotel keeper, who sincerely believes that sexual relations outside marriage are sinful, to refuse a double-bedded room to a same sex couple? Does it make any difference that the couple have entered into a civil partnership? These are questions which would have been unthinkable less than two decades ago. That they can now be asked is a measure of how far we have come in the recognition of same sex relationships since the repeal of section 28 of the Local Government Act 1988, in Scotland in 2000 and in England and Wales in 2003.

2. The general rule is that suppliers of goods and services are allowed to pick and choose their customers. They were first prohibited from discriminating against a would-be customer on grounds of sex, race or disability, by the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995. Although to some extent inspired by the European Union's principle of equal treatment, some of this legislation went further than was then strictly required by EU law. Then came Council Directive 2000/78/EC of 27 November 2000, *establishing a general framework for equal treatment in employment and occupation*. Its purpose was to "lay down a general framework for combating discrimination on the further grounds of religion or belief, disability, age or sexual orientation, as regards employment and occupation" (article 1). The United Kingdom implemented that Directive by amendments to the Disability Discrimination Act and by Regulations dealing with discrimination on grounds of religion or belief, age and sexual orientation in those fields (see the Employment Equality (Religion of Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Age) Regulations 2006).

3. That was as far as EU law required, and still requires, it to go. But Parliament then passed the Equality Act 2006. This established the Equality and Human Rights Commission (EHRC) and extended the prohibition of discrimination on grounds of religion or belief into, among other things, the provision of goods, facilities and services. It also permitted the Secretary of State to make regulations similarly extending the scope of the prohibition of discrimination on grounds of sexual orientation. The Equality Act (Sexual Orientation) Regulations 2007, with which this case is concerned, were the result. All of this legislation has since been replaced (for a case such as this) by the Equality Act 2010, but the principles, concepts and provisions with which we are concerned have remained much the same.

4. Thus we have a dispute between two sets of individuals, Christian hotel keepers and same sex civil partners, all of whom have what is now called a "protected characteristic", that is a characteristic which protects them against discrimination in a wide variety of areas of activity. It is a curiosity of the case, of which Mr Aidan O'Neill QC complains on behalf of Mr and Mrs Bull, that the EHRC has prosecuted this case on behalf of parties with one protected characteristic against parties with another. It is understandable that his clients should feel this way and a more neutral stance of the Commission might have been to seek to intervene in, rather than to prosecute, these proceedings. But it misunderstands the nature of the case. If Mr Preddy and Mr Hall were hotel keepers who had refused a room to Mr and Mrs Bull, because they were Christians (or even because they were an opposite sex couple), no doubt the Commission would have been just as ready to support Mr and Mrs Bull in their claim. Each of these parties has the same right to be protected against discrimination by the other.

5. The issues in discrimination law are difficult enough, but there are also competing human rights in play: on the one hand, the right of Mr and Mrs Bull (under article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) to manifest their religion without unjustified limitation by the state; and on the other hand, the right (under article 14) of Mr Preddy and Mr Hall to enjoy their right (under article 8) to respect for their private lives without unjustified discrimination on grounds of their sexual orientation. But while both parties can assert their rights against the state, Mr Preddy and Mr Hall cannot assert their rights directly against Mr and Mrs Bull, who are private citizens.

The Regulations

6. Regulation 3 defines two types of discrimination, direct and indirect. It reads where relevant:

> "**3 Discrimination on grounds of sexual orientation**
>
> (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).
>
> …

> (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."

7. If there was discrimination in this case, it was prohibited by Regulation 4(1), which makes it 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 by . . . refusing to provide B with goods, facilities or services". By Regulation 4(2) this "applies, in particular, to . . . accommodation in a hotel, boarding house or similar establishment".

8. There are two exceptions in the Regulations which are relevant to the issues in this case, not because they do cover the situation here, but because they do not. Regulation 6(1) provides an exception from regulation 4 for people who take into their own home and treat as members of the family, children, elderly persons or persons requiring a special degree of care and attention. Regulation 14 makes a specific and carefully defined exception from this prohibition (and others) for religious *organisations*, as opposed to individuals such as Mr and Mrs Bull who hold particular religious beliefs.

The History

9. Mr Preddy and Mr Hall are civil partners who live in Bristol. They planned a short break in Cornwall. On 4 September 2008, Mr Preddy made a telephone booking at the Chymorvah Private Hotel in Marazion, of a double bedroom for the nights of 5 and 6 September. Mr and Mrs Bull own the Hotel, and run it together with their cousin, Mr Quinn. They are devout Christians who sincerely believe (as the judge put it) "that the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony". In 2008 their on-line booking form stated: "Here at Chymorvah we have few rules, but please note, that out of a deep regard for marriage we prefer to let double accommodation to heterosexual married couples only – thank you". Twin bedded and single rooms, on the other hand, would be let to any person regardless of marital status or sexual orientation.

10. Mr Preddy did not see this clause, because he booked by telephone, and Mrs Bull did not follow her usual practice of asking whether the reservation was for a man and his wife, because she was unwell when she got up to answer the telephone which had been ringing for some time. When Mr Preddy and Mr Hall arrived at the hotel on 5 September, they were met by Mr Quinn, who informed them that the double-bedded rooms were for married couples only. Mr Preddy said that they were in a civil partnership. Mr Quinn "explained that we were Christians and did not believe in civil partnerships and that marriage is between a man and a woman and therefore we could not honour their booking". It was accepted that this was not done in a demeaning manner, but there were other guests present. The refusal was "very hurtful" to the couple, who left the hotel and found alternative accommodation at another hotel. The deposit which they had paid was re-credited to their account.

11. These proceedings were launched, with the support of the EHRC, in March 2009 after a letter before action in February. In their response to that letter, Mr and Mrs Bull denied that they had unlawfully discriminated against the couple on the basis of their sexual orientation and claimed that the Regulations must be applied in a manner compatible with their Convention rights, in particular the right to manifest their religion. Without prejudice to that, they offered to reimburse the additional expense to which the couple had been put in having to find alternative accommodation, together with a modest sum for the inconvenience.

12. This offer having been rejected, the claim came before His Honour Judge Rutherford in the Bristol County Court. He held that the refusal to allow the couple to occupy the double room they had booked was due to their sexual orientation and was direct discrimination within the meaning of regulation 3(1). He held that the Regulations were a necessary and proportionate intervention by the state to protect

the rights of others and thus not incompatible with the Convention rights of Mr and Mrs Bull. Alternatively, if it was not direct discrimination, it was unjustified indirect discrimination within the meaning of regulation 3(3). He awarded each of the claimants £1,800 in damages for injury to feelings, to include the extra cost of their alternative accommodation.

13. The judge himself gave permission to appeal. The Court of Appeal unanimously dismissed the appeal: [2012] EWCA Civ 83; [2012] 1 WLR 2514. They held that this was direct discrimination on grounds of sexual orientation and thus not capable of justification. The hotel's policy was a manifestation of the owners' religious beliefs within the meaning of article 9. But the limitation imposed upon them by the Regulations was necessary in a democratic society for the protection of the rights of others.

14. A year later, the Court of Appeal decided the case of *Black v Wilkinson* [2013] EWCA Civ 820, [2013] 1 WLR 2490. The facts were very similar, save that this was a bed and breakfast establishment rather than a private hotel and the same sex couple were not in a civil partnership. Had the court not been bound by *Preddy v Bull* to hold that this was direct discrimination, they would have held the discrimination to be indirect, but not justified. The interference with the right to respect for the defendant's home and the right to manifest her religion was justified as a proportionate means of protecting homosexuals from discrimination on the ground of their sexual orientation. Permission was given to appeal to this court so that the two cases could be heard together, but Mrs Wilkinson decided not to pursue her appeal. This court is therefore solely concerned to decide the issues as they arise in relation to a same sex couple who are civil partners.

15. Those issues (in the order in which I propose to discuss them) are, firstly, whether this was direct or indirect discrimination on the ground of sexual orientation; secondly, if it was indirect discrimination, whether the policy was justified under regulation 3(3)(d); and thirdly, if it would otherwise be unlawful discrimination within the meaning of regulation 3(1) or 3(3), whether the Regulations fall to be "read and given effect" compatibly with the appellants' Convention rights under section 3 of the Human Rights Act 1998.

Direct or indirect discrimination?

16. The distinction between direct discrimination, as defined in regulation 3(1), and indirect discrimination, as defined in regulation 3(3), is crucial: not because direct discrimination can never be justified, as Mr Robin Allen QC reminds us, but because the justifications are expressed in the legislation. There is no general

defence of justification as there is in regulation 3(3)(d). Yet the distinction is by no means easy to draw, as this case illustrates all too clearly.

17. Put simply, Mr and Mrs Bull state that they did not discriminate against Mr Preddy and Mr Hall on the ground of their sexual orientation but on the ground that they were not married to one another. They have applied exactly the same policy to unmarried opposite sex couples. While discrimination against a person on the ground that she is married was outlawed in the sphere of work by the Sex Discrimination Act 1975, it has never been unlawful to discriminate against the unmarried in any of the other areas covered by the Sex Discrimination Act 1975 and now the Equality Act 2010. They accept that it was indirect discrimination, as opposite sex couples are able to marry while same sex couples currently cannot do so, and so the policy puts the latter at a particular disadvantage.

18. The Court of Appeal (in para 40 of the judgment of Rafferty LJ and para 61 of the judgment of Sir Andrew Morritt) based their finding of direct discrimination on the well-known, if controversial, case of *James v Eastleigh Borough Council* [1990] 2 AC 751. The Council allowed people who had reached state pension age free entry to its swimming pool. All women reached that age at 60 while all men reached it at 65. There was thus an exact correspondence between the criterion and the protected characteristic of sex. Hence their lordships decided, albeit by a majority of three to two, that this was direct discrimination on grounds of sex and could not be justified whatever the laudable motives of the Council in fixing on retirement age as the criterion for free entry.

19. Had it been available to them, their lordships might well have cited the words of Advocate General Sharpston twenty years later, in *Bressol v Gouvernement de la Commaunité Française* (Case C-73/08) [2010] 3 CMLR 559, para 56:

> "I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification."

In this she was building on the opinion of Advocate General Jacobs in *Schnorbus v Land Hessen* (Case C-79/99) [2000] ECR I-10997, para 33:

> "The discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or

> necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected."

20. Applying Advocate General Jacobs' test, it can be argued that a marriage criterion is "indissociable from sexual orientation", in that at present persons of hetero-sexual orientation can marry and persons of homosexual orientation cannot. I leave aside Mr O'Neill's argument that persons of homosexual orientation are free to marry persons of the opposite sex: examples abound in history of people who have done so (I would instance the long, happy and fruitful marriage of Victoria Sackville-West and Harold Nicholson). They are not free to marry a person who shares their own orientation.

21. But applying the test as stated by Advocate General Sharpston, there is not an exact correspondence between those suffering the disadvantage of being denied a double bed, and those enjoying the correlative advantage of being allowed one, with the protected characteristic. While all same sex couples were denied, so too were some opposite sex couples. Furthermore, I note that in *Schnorbus*, the criterion (of having served in the army) was one which men could meet but woman could not; and in *Bressol*, the criterion (of having the right to reside in Belgium) was one which all Belgian nationals could meet, but only some foreigner nationals; yet in both cases the Court of Justice held that the discrimination was indirect rather than direct.

22. We do not have to construe these Regulations in accordance with the jurisprudence of the Court of Justice, because they are not implementing a right which is (as yet) recognised in EU law. But as the same concepts and principles are applied in the Equality Act 2010 both to rights which are and rights which are not recognised in EU law, it is highly desirable that they should receive interpretations which are both internally consistent and consistent with EU law.

23. *Schnorbus* and *Bressol* (which were applied by this Court in *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783) demonstrate that this case is not on all fours with *James v Eastleigh Borough Council*. There is not an exact correspondence between the disadvantage and the protected characteristic. In *Black v Wilkinson* [2013] 1 WLR 2490, at para 21, Lord Dyson MR confessed to "some difficulty in agreeing with the view that the decision in *James's* case compels the conclusion that there was direct discrimination in *Preddy v Bull*." In his view, this 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.

24. Were this case solely about discrimination against the unmarried, I would agree with him. He found support in the decision of the Judicial Committee of the Privy Council in *Rodriguez v Minister of Housing of Government of Gibraltar* [2009] UKPC 52, [2010] UKHRR 144. This too was a complaint by a same sex couple against a criterion which restricted the right to succeed to a government tenancy to couples who were married or had children together. It was a human rights case under the Constitution of Gibraltar, where the distinction between direct and indirect discrimination is not as crucial as it is in our domestic anti-discrimination law. Nevertheless, in the opinion of the Board, this was not direct discrimination on grounds of sexual orientation, because other unmarried couples suffered the same disadvantage. But it was more severe than most cases of indirect discrimination, because the criterion was one which the couple would never be able to meet: "Thus it is a form of indirect discrimination which comes as close as it can to direct discrimination" (para 19).

25. Does it make a difference that this couple were in a civil partnership? In my view, it does. The concept of marriage being applied by Mr and Mrs Bull was the Christian concept of the union of one man and one woman. That is clear from the reference to "heterosexual married couples" in the statement of policy which was current at the time; it is even clearer from the amended policy, which read ". . . out of a deep regard for marriage (being the union of one man to one woman for life to the exclusion of all others) . . ."; and was made clear to the couple by what Mr Quinn said when Mr Preddy told him that they were civil partners.

26. Civil partnership is not called marriage but in almost every other respect it is indistinguishable from the status of marriage in United Kingdom law. It was introduced so that same sex couples could voluntarily assume towards one another the same legal responsibilities, and enjoy the same legal rights, as married couples assume and enjoy. It is more than a contract. Like marriage, it is a status, in which some of the terms are prescribed by law, and which has consequences for people other than the couple themselves and for the state. Its equivalence to marriage is emphasised by the provision in regulation 3(4) that being married and being a civil partner is not to be treated as a material difference for the purpose of a finding of either direct or indirect discrimination.

27. Regulation 3(4) is by no means easy to construe. It does not state in so many words that it is unlawful to discriminate between married couples and civil partners. It expressly applies equally to direct discrimination under regulation 3(1) and to indirect discrimination under regulation 3(3). For that reason, it is difficult to regard it as turning what would otherwise be indirect discrimination into direct. It is ostensibly about a different aspect of the discrimination inquiry, which is whether the circumstances of the people being compared are the same or not materially different from one another. In other words, it provides that people who

are married and people who are civil partners are to be regarded as similarly situated.

28. In *Maruko v Versorgungsanstalt der Deutschen Bühnen* (Case C-267/06) [2008] 2 CMLR 914, the Grand Chamber of the European Court of Justice held that it was for the national court to decide whether a surviving same sex "life partner" was in a comparable situation to a surviving spouse (para 73). That decision is made for us by regulation 3(4). But the Grand Chamber went on to hold that, if they were in a comparable situation, then to treat a surviving life partner less favourably than a surviving spouse, by denying him a survivor's pension, was direct discrimination within the meaning of the equal treatment directive, 2000/78 (para 72). Interestingly, they so held despite the fact that the survivor and the Commission had argued that this was indirect discrimination (see para 63).

29. As this case is not within the scope of EU law, we are not bound to follow *Maruko*, but for the sake of consistency and coherence it is highly desirable that we follow the same approach. With or without regulation 3(4), I have the greatest difficulty in seeing how discriminating between a married and a civilly partnered person can be anything other than direct discrimination on grounds of sexual orientation. At present marriage is only available between a man and a woman and civil partnership is only available between two people of the same sex. We can, I think, leave aside that some people of homosexual orientation can and do get married, while it may well be that some people of heterosexual orientation can and do enter civil partnerships. Sexual relations are not a pre-condition of the validity of either. The principal purpose of each institution is to provide a legal framework within which loving, stable and committed adult relationships can flourish. I would therefore regard the criterion of marriage or civil partnership as indissociable from the sexual orientation of those who qualify to enter it. More importantly, there is an exact correspondence between the advantage conferred and the disadvantage imposed in allowing a double bed to the one and denying it to the other.

30. With the greatest respect to Lord Neuberger, I cannot accept that this additional reason for the discrimination adds nothing. The important question, as Lord Phillips emphasised in *R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 AC 728, is what criterion was being employed by the service provider when granting a service to one and denying it to another. The reason for adopting that criterion is irrelevant. When it came to denying a double bed to Mr Preddy and Mr Hall, which they would have given to a heterosexual married couple, Mr and Mrs Bull were not only applying the criterion that they were unmarried. They were applying a criterion that their legal relationship was not that of one man and one woman, in other words a criterion indistinguishable from sexual orientation. They would undoubtedly (as their revised policy makes clear) have denied a double bed to a same sex couple who were married under some foreign law which allows it (and would do once same sex marriage becomes law in the United Kingdom).

31. The matter can be tested by imagining a different additional criterion. What if hoteliers limited their double-bedded rooms to married couples over the age of 30? They would not only be discriminating against all unmarried people, which is permitted unless it is indirectly discriminatory against a person with some protected characteristic. They would also be discriminating against a married person who is under the age of 30. That would in my view clearly be direct discrimination on grounds of age. There would be an exact correspondence between the protected characteristic of age and the criterion used for the difference in treatment.

32. Furthermore, although this is a small point, if this is not direct discrimination, it is much harder to bring it within the definition of indirect discrimination in the 2007 Regulations than is a marriage criterion alone. The criterion is not simply that "you are unmarried" but also "you are in a civil partnership". Most people would not regard that as a criterion which would be applied to people irrespective of their sexual orientation: it is specific to those of homosexual orientation.

Indirect discrimination

33. It is not disputed that, if this is not direct discrimination, it is indirect discrimination within the meaning of regulation 3(3). The policy of letting double-bedded rooms only to married couples, while applied to heterosexual and homosexual people alike, undoubtedly puts homosexual people as a group at a serious disadvantage when compared with heterosexuals, as they cannot enter into a status which Mr and Mrs Bull would regard as marriage. It undoubtedly put both Mr Preddy and Mr Hall at a disadvantage. The question, therefore, is whether it can reasonably be justified by reference to matters other than their sexual orientation.

34. Mr and Mrs Bull argue that they should not be compelled to run their business in a way which conflicts with their deeply held religious beliefs. They should not be obliged to facilitate what they regard as sin by allowing unmarried couples to share a bed. A fair balance should be struck between their right to manifest their faith and the right of Mr Preddy and Mr Bull to obtain goods, facilities and services without discrimination on grounds of their sexual orientation.

35. This question was not addressed in the Court of Appeal, as they had concluded that this was direct discrimination. It was addressed by the judge, who confessed that he did not find regulation 3(3)(d) easy to interpret. Worded as it is, I understand what he means. Mr and Mrs Bull seek to justify their policy by

reference to a deeply held belief that sexual intercourse outside marriage is sinful. Can that belief be a "matter other than [their] sexual orientation"? I am prepared to accept that it can, not least because it covers all kinds of unmarried couple. But it would be hard to find that a belief that sexual intercourse between civil partners was sinful was a "matter other than [their] sexual orientation", because by definition such sexual intercourse has to be between persons of the same sex.

36. Thus, even on the wording of the regulation itself, it is difficult to see how discriminating in this way against a same sex couple in a civil partnership could ever be justified. But it goes further than that. Parliament has created the institution of civil partnership in order that same sex partners can enjoy the same legal rights as partners of the opposite sex. They are also worthy of the same respect and esteem. The rights and obligations entailed in both marriage and civil partnership exist both to recognise and to encourage stable, committed, long-term relationships. It is very much in the public interest that intimate relationships be conducted in this way. Now that, at long last, same sex couples can enter into a mutual commitment which is the equivalent of marriage, the suppliers of goods, facilities and services should treat them in the same way.

37. Added to these considerations are those which weighed with the judge. To permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation. We do not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation (or indeed of heterosexual orientation) because of a belief, however sincerely held, and however based on the biblical text, would be to do just that.

38. Regard can also be had to the purpose of the Regulations, not as an aid to construction but in order to understand the problems they were meant to solve and how they proposed to solve them. The purpose was to secure that people of homosexual orientation were treated equally with people of heterosexual orientation by those in the business of supplying goods, facilities and services. Parliament was very well aware that there were deeply held religious objections to what was being proposed and careful consideration had been given to how best to accommodate these within the overall purpose. For the reasons explained in the Explanatory Memorandum to the Regulations, Parliament did not insert a conscientious objection clause for the protection of individuals who held such beliefs. Instead, it provided, in regulation 14, a carefully tailored exemption for religious organisations and ministers of religion from the prohibition of both direct and indirect discrimination on grounds of sexual orientation. This strongly suggests that the purpose of the Regulations was to go no further than this in catering for religious objections.

39. Mr and Mrs Bull are, of course, free to manifest their religion in many other ways. They do this by the symbolism of their stationery and various decorative items in the hotel, by the provision of bibles and gospel tracts, and by the use of their premises by local churches. They do not, of course, discriminate against non-believers or adherents of other faiths, for that would be just as unlawful under the Equality Act 2006 (and now the Equality Act 2010) as is discriminating against homosexuals under the 2007 Regulations. They are also free to continue to deny double-bedded rooms to same sex and unmarried couples, provided that they also deny them to married couples.

40. Before leaving this topic, it is worth noting that the Equality Act 2010 uses a different formulation. A provision, criterion or practice is indirectly discriminatory if the person who applies it "cannot show it to be a proportionate means of achieving a legitimate aim". This is now a much more familiar formulation and avoids the linguistic difficulty referred to in paragraph 35 above. But for the reasons given earlier, it is unlikely in this context to lead to a different result.

Does the Human Rights Act make a difference?

41. Under article 9 of the European Convention on Human Rights, Mr and Mrs Bull have the right, not only to hold the religious beliefs which they hold, but also to manifest them in "worship, teaching, practice and observance". The courts below held that their policy was a manifestation of their religious beliefs, and that has not been challenged in this appeal. The European Court of Human Rights has repeatedly stressed the importance of these rights in a democratic society. For example in *Bayatyan v Armenia* (2011) 54 EHRR 467, 494, the Grand Chamber said this:

> "The Court reiterates that, as enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion."

Under article 9(2), the freedom to manifest their religion can 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".

42. I have held above that to deny Mr Preddy and Mr Hall a double-bedded room constituted unlawful discrimination within the meaning of regulations 3(1) and 4 of the Regulations. But if such a finding were to be incompatible with the Convention rights of Mr and Mrs Bull, the court would be obliged by section 3(1) of the Human Rights Act 1998, so far as possible, to read and give effect to the Regulations in a way which is compatible with their rights. Mr O'Neill was agnostic as to the solution he preferred. It might be done, for example, by holding that what would otherwise be direct discrimination was indirect discrimination and justified. Or it might be done simply by ignoring the Regulation insofar as it produced an incompatible result (as the judge wrongly thought he was unable to do); but of course this solution would no longer be possible in respect of discrimination taking place after the Equality Act 2010 came into force, because the courts cannot ignore incompatible primary legislation.

43. However, we do not come to remedy until we have decided whether there is an incompatibility. Mr O'Neill understandably put the human rights dimension at the forefront of his submissions. He emphasised that it was the state which had placed limitations, in the shape of the Regulations, on the right of Mr and Mrs Bull to manifest their religion by conducting their business in accordance with their religious beliefs; whereas it was Mr and Mrs Bull, private citizens, who had arguably interfered with the right of Mr Preddy and Mr Hall to enjoy respect for their private lives without discrimination on the ground of their sexual orientation. The state had not interfered with that right. In order to engage the state's responsibility, it would be necessary to erect a positive obligation to protect them from interferences by private citizens.

44. One answer to that is that the state has already assumed such a responsibility, by enacting the Regulations. Another, and simpler, answer is that the "rights of others" for the purpose of article 9(2) (and indeed the other qualified rights in the Convention) are not limited to their Convention rights but include their rights under the ordinary law. The ordinary law gives Mr Preddy and Mr Bull the right not to be unlawfully discriminated against. It follows that, for the purpose of article 9(2), the limitation is "in accordance with the law" and pursues one of the legitimate aims there listed.

45. The question, therefore, is whether it is "necessary in a democratic society", in other words whether there is a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see, for example, *Francesco Sessa v Italy*, App No 28790/08, Judgment of 3 April 2012,

para 38). Mr O'Neill makes an eloquent plea for "reasonable accommodation" between the two competing interests. The mutual duty of reasonable accommodation unless this causes undue hardship originated in the United States and found its way into the Canadian Human Rights Act 1985. It can of course be found in our own disability discrimination law (see E Howard, "Reasonable Accommodation of Religion and Other Discrimination Grounds in EU Law" (2013) 38 EL Rev 360).

46. In *Francesco Sessa v Italy*, a Jewish lawyer complained that the refusal to adjourn his case to a date which did not coincide with the Jewish holidays of Yom Kippur and Sukkot was an interference with his right to manifest his religion. His complaint was dismissed by a majority of 4 to 3. A powerful minority pointed out that, for a measure to be proportionate, the authority must choose the means which is least restrictive of rights and freedoms. Thus, seeking a reasonable accommodation may, in some circumstances, constitute a less restrictive means of achieving the aim pursued. Mr Sessa had given the Italian court ample notice of the problem and reorganising the lists to accommodate him would cause minimal disruption to the administration of justice - "a small price to be paid in order to ensure respect for freedom of religion in a multi-cultural society" (para 13).

47. I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases. This is reinforced by the decision in *Eweida v United Kingdom* (2013) 57 EHRR 213, where the Strasbourg court abandoned its previous stance that there was no interference with an employee's right to manifest her religion if it could be avoided by changing jobs. Rather, that possibility was to be taken into account in the overall proportionality assessment, which must therefore consider the extent to which it is reasonable to expect the employer to accommodate the employee's right.

48. Our attention has been drawn to two examples of this concept in operation in the British Columbia Human Rights Tribunal. In *Smith and Chymyshyn v Knights of Columbus and others* 2005 BCHRT 544, a lesbian couple had hired a hall owned by the Roman Catholic Church and let out on its behalf by the Knights in order to hold a reception after their marriage. The hall was available for public hire and they did not know of its connections with the Church. The letting was cancelled when the Knights learned of their purpose. The Tribunal accepted that the Knights could not be compelled to act in a manner contrary to their core belief that same sex marriages were wrong, but they had nevertheless failed in their duty of reasonable accommodation. They did not consider the effect their actions would have on the couple, did not think of meeting them to explain the situation and apologize, or offer to reimburse them for any expenses they had incurred or to help find another solution. In effect, they did not appreciate the affront to the couple's human dignity and do their best to soften the blow.

49. In *Eadie and Thomas v Riverbend Bed and Breakfast and others (No 2)* 2012 BCHRT 247, a gay couple had reserved a room in bed and breakfast accommodation offered by a Christian couple in their own home, but when the husband learned that the couple were gay, the booking was cancelled. Once again, the Tribunal held that there had been a failure in the duty of reasonable accommodation, in the offensive manner of the cancellation and the failure to explore alternatives. Interestingly, the Tribunal considered this a stronger case than *Knights*, because the Knights were operating a church hall used for church purposes, whereas Riverbend had chosen to operate an ordinary commercial business, albeit from their own home.

50. We cannot place too much weight on these cases, decided upon under different legislation and in a different constitutional context. To the extent that they suggest that both the Knights and Riverbend were entitled to cancel the booking, provided that they did so in a way which respected the fundamental dignity rights of the couples concerned, they provide some comfort to Mr and Mrs Bull. Unlike Riverbend, Mr and Mrs Bull had made no secret of their policy, although Mr Preddy was not aware of it when making the booking. They would have been prepared to let Mr Preddy and Mr Hall have a twin bedded room, but there is no evidence that these alternatives were discussed at the time. The conversation with Mr Quinn was upsetting but not demeaning. The deposit was refunded almost immediately and a without prejudice offer to reimburse the additional expenditure was made later.

51. Nevertheless, Mr and Mrs Bull cannot get round the fact that United Kingdom law prohibits them from doing as they did. I have already held that, if justification is possible, the denial of a double bedded room cannot be justified under regulation 3(3)(d). My reasons for doing so are equally relevant to the Convention question of whether the limitation on the right of Mr and Mrs Bull to manifest their religion was a proportionate means of achieving a legitimate aim. The legitimate aim was the protection of the rights and freedoms of Mr Preddy and Mr Hall. Whether that could have been done at less cost to the religious rights of Mr and Mrs Bull by offering them a twin bedded room simply does not arise in this case. But I would find it very hard to accept that it could.

52. Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation. As Justice Sachs of the South African Constitutional Court movingly put it in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6, para 117:

> "While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an

> isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined."

53. Heterosexuals have known this about themselves and been able to fulfil themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised. Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires "very weighty reasons" to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.

54. There is no question of (as Rafferty LJ put it) replacing "legal oppression of one community (homosexual couples) with legal oppression of another (those sharing the defendants' beliefs)" (para 56). If Mr Preddy and Mr Hall ran a hotel which denied a double room to Mr and Mrs Bull, whether on the ground of their Christian beliefs or on the ground of their sexual orientation, they would find themselves in the same situation that Mr and Mrs Bull find themselves today.

55. For all those reasons, I would dismiss this appeal. I understand that this is the unanimous decision of the Court. However, three of us consider (albeit for rather different reasons) that it was direct discrimination, between persons who are married and persons who are in a civil partnership, and thus on grounds of sexual orientation, whereas two of us consider (again for rather different reasons) that it was indirect discrimination on grounds of sexual orientation. We all agree that, if it was indirect discrimination, it could not be justified.

LORD KERR

56. In my view, the material parts of regulation 3 are these:

> "(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)…
>
> …
>
> (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."

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

58. A married couple would have been permitted by Mr and Mrs Bull to occupy a double bedded room in their hotel. Mr Preddy and Mr Hall (who must for the purposes of regulation 3 be treated as if they were a married couple) were refused such a room. There can be no dispute that they were treated less favourably. Was this on the grounds of their sexual orientation? In my view, it was.

59. This is not a question of regulation 3(4) transforming what was indirect discrimination into direct discrimination. In concrete terms the effect of regulation 3(4) in the present case is that when Mr Preddy and Mr Hall arrived at Mr and Mrs Bull's hotel, their situation was the legal equivalent of that of a married couple. By virtue of that paragraph of the regulation, they could not be distinguished, as a matter of law, from a couple who were married. The fact that this applies both in the direct and indirect discrimination contexts does not derogate from the impact that the provision has on the operation of regulation 3(1). There is no material difference between Mr Preddy and Mr Hall and a married couple. The circumstance that they are not married in fact is to be ignored. It is of no relevance.

60. Mr and Mrs Bull may not, therefore, legally assert that they treated Mr Preddy and Mr Hall differently because they were not married for, in law, they are to be regarded as the same as a married couple. On that account the only remaining basis on which they were treated less favourably was their sexual orientation. As Lord Toulson has said, after regulation 3(4) is applied, the only differential between a married couple and Mr Preddy and Mr Hall is that the latter were of the

same gender. And, although no express finding to this effect was made by the trial judge, it seems inevitable that if Mr Preddy and Mr Hall hailed from a jurisdiction where same sex marriage was legally recognised and if they had been legally married, they would have met with the same resistance to their sharing a double bedded room. The refusal by the hotel to allow them to have this accommodation was rooted in religious conviction that marriage was only legitimate if contracted between a man and a woman. This was a state which Mr Preddy and Mr Hall, by reason of their sexual orientation, could not aspire to together.

61. Their sexual orientation may not have been the factor operating in the minds of Mr and Mrs Bull, or even that of Mr Quinn, but that is irrelevant. As Lord Phillips said in *R (E) v Governing Body of JFS* [2010] 2 AC 728 para 20, "whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied [in *James v Eastleigh Borough Council* [1990] 2 AC 751] as the basis for discrimination. The motive for discriminating according to that criterion is not relevant." Mr and Mrs Bull cannot avoid the charge of discrimination on the ground of sexual orientation by saying it was not their intention to treat Mr Preddy and Mr Hall less favourably because they were gay men. It is because they are gay men (and, moreover, gay men who must in law be treated as if they were married but who cannot together enter the married state which Mr and Mrs Bull consider is the only acceptable form of marriage) that they were *in fact* treated less favourably.

62. When one poses the question, what caused the unfavourable treatment of Mr Hall and Mr Preddy, against the backdrop that they are to be regarded as a married couple, the only answer is that they were discriminated against because they were homosexual. For that reason they were the victims of direct discrimination. Had it not been for regulation 3(4), the discrimination in this case would have been indirect. But for its impact on regulation 3(1) I would have agreed with Lord Neuberger and Lord Hughes that this was a case of indirect discrimination.

63. I agree with all that Lady Hale has had to say on the subject of indirect discrimination.

LORD TOULSON

64. The court is divided about whether this is a case of discrimination under regulation 3(1) of the Equality Act (Sexual Orientation) Regulations 2007 (direct discrimination). In my view it is.

65. Mr and Mrs Bull treated Mr Preddy and Mr Hall, who were civil partners, "less favourably than [they] would treat others", namely married heterosexuals. This is clear not only from their printed literature, which stated that their policy was to let double accommodation to "heterosexual married couples only", but from Mr Quinn's response when told by Mr Preddy that he and Mr Hall were civil partners. Lord Neuberger has said that the word "heterosexual" added nothing as a matter of logic, but it served to emphasise that Mr and Mrs Bull would not let a double room to a married couple if they were homosexual (as might be so in the case of foreign visitors). Same sex couples were therefore explicitly excluded from renting a double bedroom.

66. The disputed question is whether as a matter of causation Mr and Mrs Bull's less favourable treatment of Mr Preddy and Mr Hall was "on grounds of" their sexual orientation. Mr and Mrs Bull have at all times denied this. They say, firstly, that they did not refuse to let Mr Preddy and Mr Hall have a double room because of their sexual orientation but because they were not married (marriage being restricted to persons of opposite sex according to mainstream Christian teaching and according to English law, as it has been until now, although this is due to change as a result of section 1 of the Marriage (Same Sex Couples) Act 2013). They add, secondly, that they would equally have refused to let a double room to a heterosexual unmarried couple. This, they say, shows that the refusal of a double bedroom to Mr Preddy and Mr Hall had nothing to do with their sexual orientation.

67. The answer to the first point is given by Lady Hale at para 29. To treat civil partners differently from married persons on the ground that they are not married is to discriminate on grounds of their sexual orientation, no less than it would be to treat a same sex married couple differently from an opposite sex married couple, for sexual orientation is the differential factor – civil partnership is for homosexual couples what marriage is for heterosexual couples. One cannot separate the sexual orientation of Mr Preddy and Mr Hall from the resulting legal branding of their relationship, and to treat them differently from a married couple amounts to treating them differently because their relationship is homosexual and not heterosexual.

68. As to the second point, it is true that in the case of unmarried heterosexuals it is not their sexual orientation which causes Mr and Mrs Bull to treat them differently from married heterosexuals, but the fact that the couple have not chosen to marry. But it is a *non sequitur* to reason from this that the differential treatment of persons in a civil partnership from that of married heterosexuals (or, similarly, of same sex married couples from opposite sex married couples) is not due to their sexual orientation, when that is the very factor which separates them. Lord Neuberger considers that on proper analysis the fact that Mr Preddy and Mr Hall

were civil partners makes no difference; all that mattered was that they were not married. I am of the opposite opinion that it makes every difference.

69. At the risk of repetition, I go back to my starting point, from which everything else flows. Since Mr Preddy and Mr Hall are civil partners, it is fair and reasonable that they should identify married heterosexuals as the relevant "others" for the purposes of regulation 3(1). If I am right about that, the question is whether their sexual orientation was the decisive criterion which led to their different treatment. I have explained my reasons for concluding that it was.

70. The correctness of taking that starting point is reinforced by regulation 3(4). In considering whether there has been impermissible discrimination, either direct or indirect, the appropriate comparison is with others whose circumstances are not materially different. In saying this I am restating the point made by Lord Kerr in the second paragraph of his judgment.

71. The decision of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751, about gender equality, assists rather than hinders Mr Preddy and Mr Hall. Lord Bridge, with whom Lord Ackner and Lord Goff agreed, emphasised that under the relevant statutory provision the comparison which was required to be made was between persons whose relevant circumstances were the same. That is also a feature of the regulations with which we are concerned, by virtue of the words "in cases where there is no material difference in the relevant circumstances". There is no material difference in circumstance between civil partners and married couples because the regulation so provides. Mr and Mrs Bull therefore cannot be heard to assert that it was a material circumstance that Mr Preddy and Mr Hall were unmarried. Lord Bridge also held that the motive of the defendants was irrelevant. The question was objective: would the claimant in that case have received the same treatment as his wife but for his sex? Transposed to this case the question becomes: would the claimants have received the same treatment as married heterosexuals but for their sexual orientation?

72. On the questions about regulation 3(3) and article 9 there is no disagreement among the members of the court and I have nothing to add.

LORD NEUBERGER

73. I agree with Lady Hale that this appeal should be dismissed. However, I reach this conclusion on the ground that Mr and Mrs Bull were guilty of unjustified indirect discrimination contrary to regulation 3(3) of the 2007

Regulations, rather than (unjustifiable) direct discrimination contrary to regulation 3(1) of those Regulations.

74. For the reasons that Lady Hale gives in paras 17-24 above, if this case were "solely about discrimination against the unmarried", Mr and Mrs Bull would be guilty of indirect, rather than direct, discrimination. As she explains, this is because, in order for discrimination to be direct, there must be an exact correspondence between the criterion and the protected characteristic - see *James v Eastleigh Borough Council* [1990] 2 AC 751, which is consistent with the approach adopted by the CJEU, as well summarised in the passage quoted from the Advocate General's opinion in *Bressol v Gouvernement de la Commaunité Française* (Case C-73/08) [2010] 3 CMLR 559, para 56.

75. However, I am unable to join Lady Hale in accepting the respondents' argument that a different conclusion is warranted simply because Mr Preddy and Mr Hall had entered into a civil partnership.

76. I cannot see why the addition of the fact that there was a civil partnership relationship between the two men alters Lady Hale's conclusion in paras 23-24 above that, had Mr Preddy and Mr Hall not been in a civil partnership, the discrimination would have been indirect.

77. Lord Toulson says that to treat Mr Preddy and Mr Hall "differently from a married couple amounts to treating them differently because their relationship is homosexual and not heterosexual". That may be true as far as it goes, but (i) it is only a partial description of the discrimination being practised in this case and (ii) the existence of a civil partnership adds nothing. As to (i), one has to take the discrimination as it has been found to be: Mr and Mrs Bull would have treated an unmarried heterosexual couple in precisely the same way that they treated Mr Preddy and Mr Hall. As to (ii), I do not see why, on Lord Toulson's analysis, the fact that Mr Preddy and Mr Hall were in a civil partnership makes any difference. Thus, in my view, there is no getting away from the fact that, on the basis of the well-established rule identified by Lady Hale this is a case of indirect discrimination, unless there are any other good reasons to the contrary.

78. For the reasons Lady Hale gives in para 27 above, regulation 3(4) does not assist the respondents' argument. It is merely concerned to establish that, for the purpose of establishing whether there has been direct or indirect discrimination, it must be assumed that there is no "material difference" between a person in a civil partnership and a married person. Not only is that what regulation 3(4) says as a matter of ordinary language, but it is hard to think that it has the effect argued for by the respondents given that it is expressed to apply to both regulation 3(1) and

regulation 3(3) – ie to both direct and indirect discrimination. The suggestion that this interpretation of rule 3(4) is contrary to the purpose of the Regulations seems to me, with respect, to be circular or self-fulfilling: it assumes that the purpose of regulation 3 is to render discrimination in a case such as this direct, when that is the very question at issue. Having considered Lord Hughes's analysis of the effect of regulation 3(4), it is right to add that I agree with it.

79. Further, in so far as it is relied on to support the respondents' case, I do not see how Mr and Mrs Bull's express restriction to "*heterosexual* married couples" referred to in para 9 above helps (except as a possible basis for a cross-examination which sought to establish a different reason for the discrimination from that which they alleged). It was entirely consistent with the discrimination which Mr and Mrs Bull accepted that they practised, as explained to Mr Preddy and Mr Hall by Mr Quinn – see para 10 above. The word "heterosexual" added nothing as a matter of logic, and indeed could fairly be said to have been necessary, because there are a number of jurisdictions (which will shortly include the United Kingdom) where marriage is as open to homosexual couples as it is to heterosexual couples. The Bulls were, on the judge's finding, simply emphasising that they only permitted couples who were married in the traditional sense.

80. It is true, as Lady Hale says in para 26 above, that Parliament's purpose in introducing civil partnerships was to enable homosexual couples to enjoy the same rights as heterosexual couples. However, that is not, in my view, either as a matter of logic or as a matter of policy, a reason for holding that the discrimination in this case was direct, given that it would have been indirect if Mr Preddy and Mr Hall had not been in a civil partnership. So far as logic is concerned, the existence of a civil partnership does not undermine the points made in paras 17-24 above. As to policy, the laudable aim of treating couples in a civil partnership the same as married couples leaves unanswered the question which type of discrimination is being practised in the present case. If it had been Parliament's intention to change the normal and well-established distinction between direct and indirect discrimination where a civil partnership was involved, one would have expected to see the intention spelt out in the Civil Partnership Act.

81. While I see how the decision in *Maruko* (Case C-267/06) [2008] 2 CMLR 914, para 74, as discussed in paras 28-29 above, can be said to provide some assistance to the respondents' case, I do not find it very persuasive. It is true that the Grand Chamber found that there had been direct discrimination in that case, but it is, at best, of very limited assistance for a number of reasons: (i) the finding was an unreasoned assertion, (ii) the Grand Chamber seems simply to have contrasted the survivor of a homosexual partnership with his heterosexual equivalent, and, if that was the correct assessment of the discrimination, it would indeed have been direct, (iii) the Grand Chamber's conclusion was inconsistent with the case advanced by the successful claimant and the Commission, (iv) the

Advocate General, in a fully reasoned analysis, had held that the discrimination was indirect, (v) the decision of the Grand Chamber on this point is very hard to reconcile with the well established CJEU and domestic jurisprudence – see the cases cited in paras 18-24 above, and (vi) we are here concerned with domestic legislation, and not with legislation based on an EU directive or regulation.

82. It is perfectly true that there is "an exact correspondence between the advantage conferred and the disadvantage imposed in allowing a double bed to [a married couple] and denying it to [a couple in a civil partnership]", as Lady Hale says in para 29 above. However, that does not alter the fact that the well-established requirements of direct discrimination as explained in paras 17-24 above are not satisfied in this case.

83. I do not accept that, on the facts as found by the judge, it can be said that Mr and Mrs Bull operated a policy which was "specific to those of homosexual orientation". They said that their policy was that only traditionally married couples could share a bed, and that the exclusion of unmarried couples applied equally to homosexuals and heterosexuals. It would have been quite permissible for the judge to have concluded, on the basis of a cross-examination to that end, that their policy was, in truth, directly discriminatory against homosexual couples, because, for instance, they did not enforce their alleged rule against unmarried heterosexual couples, but no cross-examination or argument was raised to support such a contention.

84. Finally, I consider that it is important to keep the law in this area, as in almost any other area, clear and consistent. However much sympathy one may have with the notion that the discrimination practised by Mr and Mrs Bull "ought to be" or "feels like" direct discrimination, it is important for judges, perhaps particularly in this court, to bear in mind that potential and alleged discriminators and victims, as well as their advisers, know where they stand. Our domestic law is currently clear about the difference between direct and indirect discrimination, and it is well summarised by Lady Hale in paras 17-24 above. I believe that we should avoid reaching a decision which risks blurring that clarity.

85. While I differ from Lady Hale on the issue of direct discrimination, I nonetheless agree with her ultimate conclusion that this appeal should be dismissed. That is because, in my view, Mr and Mrs Bull fail in their attempt to justify the indirect discrimination or to rely on the Human Rights Act, for the reasons given by Lady Hale respectively in paras 33-39 and 41-53 above, to which I cannot usefully add anything.

LORD HUGHES

86. The regulation makes, as do other statutory provisions in the field of discrimination, a clear distinction between direct discrimination (regulation 3(1) and indirect discrimination (regulation 3(3)). Both are unlawful. Indirect discrimination may often be just as damaging as direct discrimination; indeed it sometimes has the added feature that it is insidious, although not in the present case.

87. Like Lord Neuberger, I entirely agree with Lady Hale's very clear judgment except that this was, as it seems to me, a case of indirect discrimination which cannot be justified, rather than of direct discrimination. I agree with Lord Neuberger's analysis and add only a few words of my own.

88. As I see it, the argument for saying that the present case is one of direct discrimination runs like this:

i) The defendants treated the claimants less favourably than they would have treated a married couple.

ii) There is no material difference between civil partners and married people: regulation 3(4).

iii) Therefore the only distinction between a married couple and civil partners is sexual orientation.

iv) Sexual orientation is therefore the ground for (reason for) the less favourable treatment.

v) Thus this is direct discrimination on grounds of sexual orientation.

89. As it seems to me, the flaw in this comes at step (iv). It concentrates on the characteristics of these claimants rather than on the defendants' reasons for treating them as they did.

90. The claimants, in a civil partnership, are a subset of the unmarried; let us say subset (a). So also would they have been if they had been members of two other subsets of the unmarried:

b) a same sex couple not in a civil partnership; or

c) a different sex unmarried couple.

91. The defendants were found to treat all three subsets the same. One cannot say that their less favourable treatment is on different grounds for each subset. It appears to be agreed that the less favourable treatment for subset (c) is on grounds of lack of marriage. So far as I can see, it is further agreed that the less favourable treatment for subset (b) is also on grounds of lack of marriage, and certainly that is how I see it. I am unable to see that one can legitimately say that when it comes to (a) it becomes less favourable treatment on grounds of sexual orientation. The reality is that it is on grounds of being unmarried for all of them.

92. I entirely agree that regulation 3(4) is part of a general legislative scheme to treat civil partnership as the equivalent of marriage for many purposes, and that the public has an interest in stable publicly-committed unions of both kinds. But that does not help in answering the question which form of discrimination is under consideration in the present case. It is still necessary to ask whether the claimants were treated less favourably than married people 'on grounds of' sexual orientation.

93. Because, however, being married is a condition which same sex couples cannot fulfil, the practice of the defendants amounted, in the case of both subsets (a) and (b), to indirect discrimination on grounds of sexual orientation within regulation 3(3)(b) and (c). For the reasons given by Lady Hale, it cannot be justified under regulation 3(3)(d). Nor, also for the reasons which she gives – and assuming that section 3 of the Human Rights Act 1998 requires us to read regulation 4(1) as subject to the qualification that its prohibition upon discrimination does not, on the facts of any particular case, occasion a disproportionate interference with the Convention rights of the defendants – can it be saved by reliance on article 9.