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Accommodating Intolerant Speech: Religious Free Speech versus Equality and Diversity

Steve Foster [*]

Abstract

When one fundamental human right conflicts with another, the law has to maintain a balance between both rights, and ensure that on the facts the strongest claim succeeds. In most cases, no one right enjoys trump status over the other and proportionality decides whether the interference with one right is justified by the exercise of the other. That conflict is more complex when free speech or the manifestation of religious views conflict with the duty to promote equality and diversity. When that conflict occurs, the courts, both domestic and European, have tended to give preference to equality policies at the expense of individual speech and beliefs. However, the situation may be different when the person's views fall short of discriminating against another, and the speaker simply voices an opinion against the other right holder. This article examines UK and European Convention case law in this area; both in terms of accommodating religious free speech and beliefs in the enforcement of equality and diversity policies, and more specifically in regulating anti-gay speech. Specifically, it will ask whether the principle of tolerance inherent in free speech can be recognised when such speech conflicts with the tolerance and respect that should be shown to minority groups.

Introduction

When one fundamental human right clashes with another and two European Convention rights are in conflict with each other, the courts, both domestic and European, will have to maintain a balance between the enjoyment of both rights, and ensure that the strongest claim on the facts

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succeeds. For example, in cases where freedom of speech conflicts with individual privacy,[1] the domestic courts have stated that no one right enjoys 'trump' status over the other,[2] and the European Court's doctrine of proportionality is employed to decide whether the claimant's expectation of privacy will be overturned by any public interest in breaching that expectation.[3] The resolution of such conflict is more complex, however, when the exercise of one right not only conflicts with another right, but also involves the compromising of the state's duty to protect others from exceptional harm, discrimination, or more generally to promote equality and diversity. Here, because of the state's duty to uphold such interests, the court would be expected to side with that greater interest, even at the expense of compromising an individual's democratic rights.[4]

In the cases examined in this article - where individuals allege that their free speech and other religious rights are transgressed by policies of equality and diversity - domestic law needs to encourage tolerance, broadmindedness and pluralism via free speech.[5] However, at the same time it must not encourage intolerance towards others and their lifestyles by legitimising speech or actions (or inactions) that are founded on intolerance. This dilemma is most common when the individual exercising their rights is, directly or indirectly, involved in the state's duty to promote equality. For example, how does the law deal with the situation when an employee objects on religious or philosophical grounds to carrying out their contractual duties in line

[1] Involving a conflict between, respectively, arts. 8 and 10 of the European Convention on Human Rights (1950), guaranteeing, respectively, the right to respect for private and family life, and the right to freedom of expression.

[2] See *Re S (Publicity)* [2005] 1 AC 593, where the House of Lords held that the free speech defence to a confidentiality action should not be given trump status, or pre-eminence despite s.12 of the Human Rights Act 1998 requiring the courts to have special regard to freedom of expression.

[3] *Van Hannover v Germany* (2006) 43 EHRR 7. See, for example, the recent decision in *Richard v BBC* [2018] EWHC 1837 (Ch). See S Foster, 'Media Responsibility, public interest broadcasting and the judgment in *Richard v BBC*' [2018] 5 *European Human Rights Law Review* 490

[4] For example, in *R (Williamson) v Secretary of State for Education* [2005] AC 246, the House of Lords held that the rights of children not to be subjected to inhuman or degrading treatment, via corporal punishment, overrode the parents' right, allegedly supported by art. 8 and art. 2 of the First Protocol to the Convention, to insist that their children be subject to corporal punishment at schools,

[5] *Handyside v United Kingdom* (1976) 1 E.H.R.R. 737, considered later in the article.

with the employer's equality and diversity policy?[6] The dilemma deepens when Parliament has created statutory and other schemes to protect both free speech and religious freedom,[7] but at the same time has passed legislation to protect certain groups from discrimination that facilitates the right to equality.[8]

Despite evidence that the courts will balance employment policies with religious rights,[9] until recently, when that conflict has arisen, the courts, both domestic and European, have tended to side with the state, and employers, in giving preference to its equality and diversity policies at the expense of individual speech and beliefs.[10] This is understandable given that the cases are decided in the context of anti-discrimination laws, but a more recent case may have managed to accommodate the right to free religious speech, perhaps encouraging a more flexible and balanced approach to the conflict. In *R (Ngole) v University of Sheffield*,[11] the High Court decided that a university had acted lawfully in deciding to expel a devout Christian student from a post-graduate course after he posted comments on social media expressing his orthodox religious views about same-sex marriage and homosexuality. However, the Court of Appeal decided that the University's decision was both procedurally incorrect and disproportionate to the student's Convention rights of free speech and religion.[12] This decision has not overturned previous case law relating to employees' religious refusal to comply with equality laws. However, where the actor does not discriminate as such,[13] it has opened up the

[6] In August 2019, a bus driver was suspended from his employment when he refused to drive a bus that bore a rainbow-coloured number, in celebration of a local Gay Pride event, because it promoted homosexuality. See D Gayle, 'Bus driver suspended for refusing to drive bus with rainbow number' *The Guardian*, 14 August 2019.

[7] The UK Parliament has done this by enacting both ss.12 and 13 of the Human Rights Act 1998, which requires the courts to have 'special regard' to, respectively, arts. 10 and 9 of the European Convention.

[8] The Equality Act 2010.

[9] See *Eiweda v United Kingdom* (2013) 57 E.H.R.R. 8, where the European Court held that a policy where employees could not wear religious symbols for fear of offending the sensibilities of fellow employees or customers was disproportionate and in breach of her right under article 9 to manifest her religion.

[10] *McClintock v Department of Constitutional* Affairs [2008] I.R.L.R. 29; *London Borough of Ealing v Ladele* [2010] 1 WLR 995; and *McFarlane v Relate Avon Ltd* [2010] I.R.L.R 872. For the European Court's stance in this area, see the decision of the European Court of Human Rights in *McFarlane v United Kingdom* (2013) 57 E.H.R.R 8 and *Ladele v United Kingdom* (2013) 57 E.H.R.R. 8, considered later in the article.

[11] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin)

[12] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127

[13] The issue in *Ngole* was complicated by the fact that his views might have created the impression that he would discriminate against homosexuals in the future, when qualified as a social worker.

debate concerning the extent to which religious and personal views that do support equality and diversity, and which, specifically are anti-gay, can be voiced by employees, and others. Further, in *Lee v Ashers Baking Ltd.*,[14] the UK Supreme Court ruled that a bakery's refusal to bake a cake with the message 'Support Gay marriage' did not amount to discrimination based on the customer's sexual preference or association with the gay community, but rather reflected their objection to the political message that the words on the cake portrayed.[15] Accordingly, the supplier's Convention rights to freedom of expression were at issue,[16] meaning that the rights of both the customer and supplier had to be balanced. The decision in *Ashers Bakery* was not considered in *Ngole*, but this article will examine both decisions in considering whether they might inform a more flexible approach to the balancing of the right to religious views and the duty to promote equality and diversity generally.

The article will examine whether the approach adopted in *Ashers* to religious free speech and choice is appropriate in cases where the individual has a duty, either under their contract or by dent of their profession, to relegate their religious views to the greater aim of achieving equality. More generally, however, it will examine the extent to which anti-diversity speech can and should attract criminal liability, and how far the law should accommodate anti-diversity speech where such speech is claimed to promote pluralism, tolerance and broad-mindedness, but at the same time is intolerant of others' rights.

Anti-diversity views and the obstruction of equality and diversity policies

This section of the articles examines the legal position where an individual's religious views come into conflict with the duty to uphold equality or diversity. This will often be manifested by a refusal to carry out a contractual or public duty; the individual claiming that a compulsion to carry out this duty constitutes discrimination on the grounds of their religious or

[14] [2018] UKSC 49

[15] At the time of writing, the customer in that case, Mr Lee, has launched an application to the European Court of Human Rights, complaining that the judgment gives too little weight to his rights to private life and not to be discriminated against: H Macdonald, 'Gay marriage cake: customer takes case to the European Court' *The Guardian,* 14 August 2019.

[16] Specifically, whether the compulsion to ice the cake with that message constituted 'compelled' speech, from which the owners should be protected.

philosophical beliefs. Although specific protection against religious discrimination is available under domestic law,[17] not every refusal to accommodate requests to manifest one's religion will be unlawful and the enjoyment of religious rights can be circumvented by reasonable restrictions. For example, in *McClintock* v *Department of Constitutional Affairs*,[18] the Employment Appeal Tribunal held that a Christian magistrate had been fairly dismissed when he resigned in objection to having to carry out his duty to place children with same-sex couples. It was held that his objections had not been based on his philosophical views (because his main concern was to the lack of research as to the benefits of such placing), but that in any case the department was fully justified in insisting that all magistrates apply the law of the land without exception based on moral or principled objection.[19]

Further, in *London Borough of Ealing v Ladele*,[20] the Court of Appeal held that it was not a breach of the Employment Equality (Religion or Belief) Regulations 2003 to discipline a registrar, who had refused to participate in civil partnerships. The Court of Appeal held that the Equality Act (Sexual Orientation) Regulations 2007, which protected individuals from sexual orientation discrimination, took precedence over any right that a person would otherwise have by virtue of religious belief or faith to practice discrimination on the ground of sexual orientation. Even had the refusal been based on her religious views, the regulations offered no choice to both her and her employer to insist that such duties be carried out.[21] The above decisions were upheld by the Strasbourg Court,[22] and there appears to be little scope for accommodating individual religious beliefs to exempt individuals from their duty of enforcing equality and diversity policies.

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[17] See the Employment Equality (Religion or Belief) Regulations 2003, which made discrimination on the grounds of religion and belief unlawful in the employment field. In addition, s.10 of the Equality Act 2010 lists religion and belief as protected characteristics, thus protecting individuals from discrimination, harassment and victimization.

[18] [2008] IRLR 29.

[19] *McClintock* v *Department of Constitutional Affairs* [2008] I.R.L.R. 29, at [62]

[20] [2010] 1 WLR 995

[21] *London Borough of Ealing v Ladele* [2010] 1 WLR 995, at [73]. See also *McFarlane v Relate Avon Ltd* [2010] EWCA Civ. 660 and *Catholic Care v Charity Commission for England and Wales*, [2010] EWHC 520 (Ch); *The Times*, April 13 2010, where it was held that the Commission could reject Charity Care's request to amend its objectives so that it only provided an adoption service to heterosexuals. Such a change would have amounted to unlawful discrimination against persons on grounds of their sexual orientation.

[22] *Ladele v United Kingdom*, and *McFarlane v United Kingdom* and note 10, above

This approach has also been followed in cases outside the employment context, and in *Hall v Bull*,[23] the Supreme Court held that Christian hoteliers, whose policy was to only let double-bedded rooms to married couples, had directly discriminated against two homosexual men in a civil partnership on grounds of sexual orientation when refusing to let out a double-bedded room.[24] Thus, having accepted that the policy constituted indirect discrimination, the Court noted that it was hard to find that such a belief was a "matter other than their sexual orientation,[25] and that how discriminating in such a way against a same sex couple in a civil partnership could ever be justified.[26] Accordingly, the limitation on the appellant's art. 9 right to manifest their religion was a proportionate means of achieving a legitimate aim; that aim being the protection of the respondents' rights and freedoms.[27] In balancing the two competing claims, the Court was asked to consider the principle of a reasonable accommodation of the two competing claims in deciding whether the restriction on the hoteliers' rights was "necessary in a democratic society", and whether there was a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved." However, in the Supreme Court's view, the hoteliers could not escape the fact that United Kingdom law prohibited them from acting as they did. Having already held that, if justification is possible, the denial of a double-bedded room cannot be justified under the regulations, that finding was equally relevant to the Convention question of whether the limitation on their right to manifest their religion was a proportionate means of achieving a legitimate aim.[28]

However, although there is clearly no room for accommodating religious views in these cases, and statutory bodies, employers and the law itself are not required to make exceptions to accommodate such views,[29] as we shall see, this does not extend to compelling such individuals to share views that are contrary to their religious beliefs. Neither does the above stance inevitably prevent such individuals from expressing views that are contrary to the spirit of equality and diversity. Thus, we shall now examine the extent to which anti-diversity views are tolerated by the law; first by examining the recent decision of the Supreme Court on the

[23] [2013] UKSC 73

[24] Contrary to regulation 3(1) of the Equality Act (Sexual Orientation) Regulations 2007

[25] *Hall v Bull* [2013] UKSC 73, Lady Hale, at [51].

[26] *Hall v Bull* [2013] UKSC 73, at [53].

[27] *Hall v Bull* [2013] UKSC 73, at[55]

[28]*Hall v Bull* [2013] UKSC 73, Lady Hale, at [51].

[29] Such individuals are, of course, free to choose their employment, and are not compelled to join employment that require such services, or to set up business in providing services to the public.

difference between discrimination and compelled speech, and then by examining the law's general tolerance to anti-diversity speech.

The decision in Ashers Bakery: protecting against compelled speech and disassociation with others' views

In *Lee v Ashers Baking Ltd,*[30] the Supreme Court held that it was lawful for a shop to refuse to make a cake with a pro-gay message. It should be stressed that the case did not directly concern the acceptability of anti-diversity free speech under the general law; rather it was concerned with whether the shop had discriminated against the customer on prohibited grounds (of sexual orientation or political grounds). Nevertheless, parts of the judgment may be of relevance to the question whether, and to what extent, anti-diversity speech can be tolerated in other contexts; either within the general criminal law, or, more specifically, where the speaker has a public or professional duty to support diversity.

Mr and Mrs McArthur ran a bakery business through Ashers Baking Company Ltd., a name derived from Genesis 49:20 – Bread from Asher shall be rich and he shall yield royal dainties. Lee, a gay man, had ordered a cake decorated with the words "Support Gay Marriage" from one of the shops, which was then cancelled because of their religious beliefs, although Lee was provided with a full refund. Lee claimed damages for breach of statutory duty,[31] and in the district court, the judge - using as a comparator a heterosexual person ordering a cake supporting heterosexual marriage- found that the appellants had treated the respondent less favourably on grounds of sexual orientation and the respondent's political opinion (his support for same-sex marriage).[32]

In *Lee v McArthur*,[33] the Northern Ireland Court of Appeal held that the district judge had been right to find that a bakery had directly discriminated against a customer on the grounds

[30] [2018] UKSC 49. See S Foster, 'Let them eat cake; but don't expect me to make it; sexual orientation discrimination, religious objections and the Supreme Court' (2019) 24(1) *Coventry Law J*ournal 100, M Connolly. 'Lee v Ashers Baking and its ramifications for employment law' [2019] 48(2) *Industrial Law Journal* 240, and K Mc.K Norrie 'Lee v Ashers Baking Co Ltd (Case Comment) (2019) 1 *Juridicial Review* 88, at 95.

[31] That is discrimination on the grounds of sexual orientation contrary to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and religious and political belief contrary to the Fair Employment and Treatment (NI) Order 1998

[32] Lee was awarded a sum of £500 as compensation.

[33] [2016] NICA 39.

of sexual orientation and religious and political belief. Dismissing the appeal, the Court of Appeal found that the benefit of the message on the cake could only accrue to gay or bisexual people and that the use of the word "gay" was the reason why the appellants would not provide the cake. It was, therefore, a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of the community. The Court of Appeal also found that the limitation of the bakery's rights to its religious views under art. 9 was in accordance with the law, pursued a legitimate aim - being Mr Lee's right not to be discriminated against on grounds of sexual orientation - and was proportionate to that aim. In the Court's view, the structure of the Regulations, the need to protect against arbitrary discrimination, the ability to alter the services offered, and the lack of any association of the bakery with the message, all pointed to the conclusion that any interference with their art. 9 rights was necessary and proportionate.[34]

On appeal, the Supreme Court held that the bakery owners had not been guilty of associative direct discrimination on the ground of sexual orientation as their objection, because of their religious views concerning gay marriage, was to the message on the cake, and not to any particular person or persons. Lady Hale JSC found that although "indissociability" could be relevant when the reason for the less favourable treatment was not the protected characteristic itself, but some proxy for it,[35] support for same sex marriage was not in her view 'indissociable' from the sexual orientation of the customer. This was because people of all sexual orientations supported gay marriage, not just the gay community.[36] Thus, there was no finding that the reason for refusing to supply the cake was that the respondent was thought to associate with gay people.[37] The reason for the refusal to supply the cake was their religious objection to gay marriage, and the objection was to the message on the cake and not to any

[34] *Lee v McArthur* [2016] NICA 39, at [62] and [72]. The Court of Appeal held that in deciding whether the owners had been discriminated against on grounds of religious belief, the statutory comparison was with the treatment accorded by the legislation to other persons in the same circumstances. In other words, those who did not hold the religious belief that same sex relations were sinful and the political opinion that same sex marriage should not be introduced. The legislation would treat those other persons, if they were to refuse goods and services to those in support of same sex marriage, in the same manner as the appellants had been treated. Thus, neither the Order nor the Regulations treated the appellants less favourably: *Lee v McArthur* [2016] NICA 39, at [97-100].

[35] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at [25].

[36] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at [25].

[37] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at [28].

particular person or persons.[38] Thus, in distinguishing this case from those involving a refusal to carry out a statutory or contractual duty, it was noted the situation was not comparable to people being refused jobs, accommodation or business simply because of their religious faith, but more akin to a Christian printing business being required to print leaflets promoting an atheist message.[39]

Her Ladyship also found that that the district judge was wrong to find that the bakery had discriminated unlawfully because of its owners' religious beliefs. That claim could only be made based on the respondent's political opinion, as support for gay marriage was a political opinion, and there was close association between the respondent's political opinion and the message that he wished to promote, such that it could be argued that they were "indissociable."[40] As in this case Lee was perceived as holding the opinion in question, it was therefore necessary to consider the impact of the bakery's rights under the European Convention on the meaning and effect of the Order. In this respect, her Ladyship felt that obliging a person to manifest a belief that he did not hold was a limitation on his art. 9(1) rights to freedom of thought, conscience and religion.[41] The right to freedom of expression included the right not to express an opinion,[42] and although the bakery could not refuse to provide a cake to Lee because he was gay or because he supported gay marriage, that did not amount to a justification for obliging them to supply a cake iced with a message with which they profoundly disagreed.[43] Thus, the Order should not be read in such a way as to compel providers of goods,

[38] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at para 28. It has been argued that, comparing the case with *Hall v Bull*, above, it might be difficult to accept that the shop did not intend to discriminate against Lee as a homosexual and people in the gay community generally when it refused to provide the cake. This is despite the fact the shop was faced with a request to make a cake that had a particular message on it, and not simply a request to provide the cake to a person of a particular sexual orientation. In that context, the refusal was inevitably linked to the message that had been requested by the customer, but that may have simply hid the fact that the real reason for the refusal was that Lee was obviously gay. See S Foster 'Let them eat cake, but don't expect me to bake it' (2018) 23(2) *Coventry Law Journal* 109, 116.

[39] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at [47].

[40] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at [46], citing *R (on the application of E) v JFS Governing Body* [2009] UKSC 15.

[41] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at [50], citing *Buscarini v San Marino* (2000) 30 EHRR 208 and *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] UKPC 13.

[42] Citing *R (Zimbawe) v Secretary of State for the Home Department* [2013] UKSC 38

[43] Citing the case of *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* 44 BHRC

facilities and services to express a message with which they disagreed, unless justification was shown, and it had not been shown in the instant case.[44]

The Supreme Court's rejection of the claim that the bakery had discriminated against Lee on the grounds of his association with the gay community provided the Court with a (rejected) opportunity to consider the reasonableness of forcing a person to abide with ideas of equality and diversity, when to do so clashes with their religious beliefs.[45] As we have seen, this is not usually relevant, as both the domestic courts and the European Court of Human Rights have consistently held that the aims of anti-discrimination laws cannot be compromised by the religious or other beliefs of a person accused of discrimination.[46] As it was the message, and its association with the message, that they objected to, the shop owners' (religious) free speech rights were at issue and thus had to be balanced with the customer's political opinions. In that respect, to force such a person to support, or assist in the supporting, of that view, was a step too far in upholding equality on grounds of sexual orientation. Consequently, once it accepted that the bakers had discriminated against Lee on grounds of his *political* opinion, it was entitled to take into account the baker's religious and political beliefs and to balance them against those of Lee's.[47]

The decision was welcomed by certain writers for introducing a balancing exercise into the debate between religious freedom and the protection of sexual orientation. Thus, Butlin feels that the decision:

> '…constitutes a vital affirmation of the fundamental importance of freedom of conscience and of speech…the judgment represents an important waymark in the equality project, achieving a difficult balance between protecting minority groups from discrimination and ensuring religious freedom. This balance is essential if we are to live in a truly plural and diverse society.'[48]

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[44] *Lee v Ashers Baking Ltd.* [2018] UKSC 49, Lady Hale, at para 56.

[45] See M Connolly. 'Lee v Ashers Baking and its ramifications for employment law' 48(2) [2019] *Industrial Law Journal* 240

[46] See the cases referred to in note 10, above.

[47] It could be argued that it would have been more logical for the Supreme Court to have held that there had been sexual orientation discrimination in this case, and to accept that such discrimination might be justified if the person is being asked not simply to provide services to those protected groups, but to support their political or other messages.

[48] S Fraser Butlin, 'Cakes in the Supreme Court' (2019) 78(2) *Cambridge Law Journal* 280, 283. See also A Hamblin, 'Cake, compelled speech, and a modest step forward for religious liberty: the Supreme Court decision in Lee v Ashers' (2019) 181 *Law and Justice* 156.

Yet this does not address the issue of how the two opinions can be reconciled and balanced in practice, and what weight is to be placed on each view in conducting that balancing exercise. Thus, the Supreme Court in *Ashers* ignores the opportunity to set out the criteria for any balancing exercise in these cases, and instead assumes that there was no good reason for restricting the shop owners' religious views and free speech, other than that their views conflicted with another's political opinions. Thus, in the Court's view, it was simply a case of a clash of political or religious views, and that alone could not justify a restriction on the owners' right to refuse to disassociate it from the message on the cake. Further, that approach fails to take into account the relative strengths of each free speech claim. Consequently, it has been noted that the political opinions of the owners and the customer were not based on the same ideals, and that the opinion that everyone should be treated equally, and not discriminated against, should have been given greater weight than the political or religious view that same sex marriages are wrong:

> 'There is an unfortunate undercurrent throughout the Supreme Court's decision…: that all protected characteristics are of equal weight…But they are not all equally worthy of protection. Some characteristics are in need of more protection than others because of a long history of discrimination; some characteristics demand more protection because they are immutable (race, for example, and sexual orientation); others are chosen but not necessarily based on rational choice (political beliefs, religious beliefs). Opinions can change but skin colour cannot.'[49]

The decision in *Ashers* did little to provide guidance on how to balance those views in practice, or to suggest which anti-diversity views are acceptable, either under the criminal law or within the context of an individual's contractual, professional or public duties. Equally, a court would surely have to take into account that the owners' views were based not simply on their opinion, but their religious sensibilities, thus augmenting their free speech rights.[50] Unfortunately, in reaching its decision that there was no good reason for restricting their religious views, the Supreme Court failed to consider neither of these factors. Consequently, the context of equality,

[49] K Mc.K Norrie 'Lee v Ashers Baking Co Ltd (Case Comment) (2019) 1 *Juridicial Review* 88, 95.

[50] See *Redmond-Bate v DPP* [2000] HRLR 249, where greater strength was given to the protestors' rights because they engaged their art. 9 rights, and not simply their right to freedom of expression.

and the extent to which it can be balanced against religious free speech, does not disappear simply by calling the issue one of freedom of speech, or the right to be free from compelled speech. Those issues have to be addressed, and the next section of the article will examine the extent to which anti-diversity speech (including the freedom not to subscribe to such views) can be consistent with democratic free speech and where the balance may most suitably lie.

Anti-diversity views and free speech values

There are a number of legislative provisions that regulate, *inter alia*, offensive speech and which can be used to criminalise anti-diversity speech.[51] Thus, under s.4 of the Public Order Act 1986 it is an offence to use insulting, threatening or abusive words and behaviour where there is a fear of provocation of violence, and under s.5 to use threatening or abusive words or behaviour that are likely to cause a person harassment, alarm or distress.[52] Both sections contain a defence that the words or behaviour was reasonable in the circumstances.[53] In addition, s.137 of the Communications Act 2003 makes it an offence to send a grossly offensive message, and a person can be criminally and civilly liable for harassment under the Protection from Harassment Act 1997 for disseminating anti-gay views that harass another.[54] Specifically, under Part 3A of the Public Order Act 1996 it is now an offence an offence to use threatening words or behaviour, or to display, publish or distribute any threatening written material with the intent to stir up hatred on grounds of sexual orientation.

Such provisions need to be applied in line with relevant Convention rights; in our case, the right to free (religious) speech under arts. 9 and 10 of the European Convention on Human Rights. The views might also have to be judged in the context of a person's suitability to hold a certain post or duty, or to enter a particular profession; in other words whether such views are consistent with that duty to promote equality and diversity.[55] Yet, such views raise general

[51] For an excellent and thorough account of offensive speech in general, see P Wragg 'Offensive Speech' in H Fenwick, *Fenwick on Civil Liberties and Human Rights*, 5th edition Pearson 2017.

[52] Note, the word 'insulting' was removed from s.5 of the 1986 Act and the words or actions must message must now be threatening or abusive.

[53] Sections 4(5) and 5(5) 1986 Act.

[54] Sections 1-3 of the Protection from Harassment Act 1997.

[55] See the analysis of the Court of Appeal's decision in *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, below

issues about free speech, and the acceptance of anti-diversity (and other offensive) views as legitimate democratic speech. In other words, should such views, based on an intolerance towards others' life styles and equality and diversity generally, be protected as democratic speech, and is it legitimate to censor or penalise such speech; either within the general criminal or civil law, or, indirectly, by means of disciplinary measures?

Although free speech (including religious speech) will often have to bow to competing claims, liberal ideology begins with the assumption that free speech is a good in itself, and that it is incumbent upon those who wish to restrict it to justify any interference as both lawful and reasonable.[56] The spoken or written word must, therefore, be treated differently from other activities (such as acts of violence and discrimination), and should not attract liability unless there is a legitimate aim in restricting that expression. Further, if freedom of expression is to enjoy *true* protection, we must recognise that tolerance, pluralism and broadmindedness are pre requisites of a democratic society: if we start censoring or sanctioning free speech simply because we do not agree with the speaker's sentiments, or we find the views offensive, then we are left with speech not worth having.[57]

Anti-diversity speech and the European Court of Human Rights

UK domestic law on free speech is largely informed by art. 10 of the European Convention on Human Rights (the Convention) and the case law of the European Court of Human Rights.[58] Thus, whether any interference is legitimate and proportionate depends largely on the interpretation of art. 10 and the European Court's jurisprudence. Art. 10 applies, initially at least, to all forms of speech and expression that imparts information and ideas; excluding only activities that are aimed at the destruction of the rights of others under Article 17 of the Convention. Art. 17 has been identified as preventing individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the

[56] For an account of the values and benefits of free speech, see E Barendt, *Freedom of Speech*, 2nd edn. (OUP 2005), Chapter 1.

[57] See Sedley LJ in *DPP v Redmond-Bate* [2000] HRLR 249, at [20]

[58] Which UK domestic courts must, by virtue of s.2 of the Human Rights Act 1998, take into account when determining cases on free speech and other Convention rights?

Convention.[59] In this sense, it is unlikely that anti-diversity speech *in itself* would fall foul of art. 17 so as to exclude such speech from the protection of art. 10. Thus, in *Lehideux and Irsoni v France*,[60] it was held that the expression of ideas did not constitute an 'activity' within art. 17 so as to engage that article. Accordingly, the Court found that a pamphlet that defended war crimes and crimes of collaboration was not excluded from the protection of art. 10.[61] Further, in a concurring judgment, Judge Jumbrek stressed that in order for art. 17 to apply, the aim of the offending actions must specific. This would include spreading violence or hatred; resorting to illegal and undemocratic methods; encouraging the use of violence; undermining the nation's democratic and pluralist political system; or pursuing objectives that are racist or likely to destroy the rights of others.[62] Consequently, for the purposes of this article that aside from speech or activities that constitutes incitement to racial, religious or sexual orientation hatred, under Part 3 of the 1986 Act, it will not be argued that speech in breach of the above criminal law provisions is excluded from the protection afforded to free speech under art. 10 *per se*. This is despite the admissibility decision in *Norwood v United Kingdom*,[63] where it was held that the applicant's poster - declaring 'Islam out of Britain' - was not protected by art. 10. That was because the message constituted a vehement attack against a religious group being incompatible with values of tolerance, social peace and non-discrimination.

Therefore, subject to art. 17, although expression can be curtailed under art. 10 paragraph (2), freedom of speech is extended to all forms of speech, irrespective of content. The question now, therefore, is whether we can maintain a distinction between anti-diversity speech that is simply offensive, and such speech that is so offensive that it is legitimate to restrict it. In other words, the difference between penalising views that cause a real harm, and for which there is a legitimate aim for restriction, and penalising views that are contrary to the majority view; in our case that quality and diversity should be respected and promoted.

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[59] *Norwood v United Kingdom* (2005) 40 EHRR SE11

[60] (2000) 30 EHRR 665,

[61] Indeed the Court found that the penalty imposed on the applicant was disproportionate and thus in breach of art. 10.

[62] *Irsoni v France* (2000) 30 EHRR 665, concurring opinion, at [2]. For a discussion on hate speech and article 17, see A Nieuwenhuis, 'A positive obligation under the ECHR to ban hate speech?' (2019*) Public Law* 326; P Morree, 'Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights' (2017) 35(1) *Netherlands Human Right Quarterly* 72; and AR Greene and RM Simpson, 'Tolerating hate in the name of democracy' (2017) 80(4) *Modern Law Review* 746.

[63] (2005) 40 E.H.R.R. SE 11.

In *Handyside* v *United Kingdom*,[64] the European Court stated that freedom of expression constitutes one of the essential foundations of a democratic society and stressed that:

> '…the protection afforded by Article 10 is applicable *not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population.* Such, in the Court's view, are *the demands of pluralism, tolerance and broadmindedness without which there is no democratic society* (italics supplied).[65]

Art. 10 is, of course, a conditional right and in *Handyside* the Court noted that a person who exercises his freedom of expression undertakes 'duties and responsibilities' - the scope of which depends on his situation and the technical means he uses, provided the actual measures of 'interference' the state takes are relevant and sufficient under article 10(2).[66] However, as stressed by the European Court, because free speech upholds those values of tolerance and broadmindedness, every formality, condition, restriction or penalty imposed must be proportionate to the legitimate aim pursued. [67]

Despite its acceptance that speech can offend, shock and disturb, the European Court has also accepted that protection from some forms of offence, whether such offence attacks the religious or private rights of others, or, more generally public morals, is allowed under the Convention.[68] For example, in *Muller v Switzerland*,[69] it was held that domestic law could regulate offensive and indecent material provided it caused more than mere shock to the public. Thus, on the facts it was not unreasonable for the domestic courts to find that sacrilegious paintings were likely to 'grossly offend the sense of sexual propriety of persons of ordinary

[64] (1976) 1 E,H.R.R. 737

[65] *Ibid*, at [56].

[66] Of course, in cases such as *Ngole*, and *Ashers*, the speaker may indeed have an extra duty to respect the rights of others because of their contractual or other legal duties.

[67] *Sunday Times v United Kingdom* (1979) 1 E.H.R.R. 245.

[68] See, S Paramar, 'Freedom of expression narratives after the Charlie Hebdo attacks' (2018) 18(2) *Human Right Law Review* 267; E Howard, 'Gratuitously offensive speech and the political debate' (2016) 6 *European Human Right Law Review* 236; and A O'Reilly, 'In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights (2016) 19 *Trinity College Law Review* 248.

[69] (1988)13 E.H.R.R. 12.

sensibility.'[70] Further, in *Wingrove v United Kingdom*,[71] the European Court held that, under art. 10(2), the margin of appreciation is wider in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[72] This would suggest that it is acceptable for the domestic law, and the domestic courts, to provide limited tolerance to anti-diversity views.[73]

The dilemma, therefore, is that although to comply with principles of religious freedom and free speech domestic law and the courts must assess whether that speech causes an identifiable harm greater than mere offence, there is an argument that the harm in such a case is that such views are inconsistent with democratic and liberal ideas.[74]

Anti-diversity speech and domestic case law

Despite the clear theoretical difference between hate speech and unpopular views, in practice the courts appears to provide a low tolerance to anti-diversity views. The fear that the law might unreasonably outlaw or sanction anti-gay views was perhaps evident in the High Court decision in *Hammond v DPP*.[75] In that case Hammond was arrested for breach of the peace and subsequently charged and convicted under s.5 of the Public Order Act 1986 after he had displayed a sign in Bournemouth city centre which bore the words ''Stop Homosexuality'' and ''Stop Lesbianism'' on each side, and the words ''Jesus is Lord'' in each corner. On his arrest, a crowd of 40 people gathered around him and began arguing and shouting and at one point some people tried to pull the sign away from Mr Hammond and poured water over his head. When the police officers arrived, the crowd became outraged that Mr Hammond had not

[70] *Muller v Switzerland* (1988)13 E.H.R.R. 12, at [36].

[71] (1997) E.H.R.R. 1, at [58]

[72] *Wingrove v United Kingdom* (1997) E.H.R.R. 1, at [58].

[73] See the recent decision in *ES v Austria* (2019) 69 E.H.R.R. 4, where the European Court held that the applicant's prosecution for denigrating (Muslim) religious views was proportionate; reiterating that the right to freedom of expression carried with it a duty to protect the religious beliefs and peaceful enjoyment of rights guaranteed under art.9.

[74] See the European Court's decision in *Reefa Partisi Erbakan Kazan and Tekdal* v *Turkey* (2002) 35 E.H.R.R. 2, where the applicant's party political ideals were inconsistent with the fundamental ideal of the Convention and of equality. It is submitted that anti-gay views in themselves are not in this category.

[75] [2004] EWHC 69 (Admin)

been arrested, and eventually he was arrested. His conviction was appealed to the High Court, where May LJ began by stressing that the prosecution had to prove firstly that the sign was threatening, abusive or insulting,[76] and secondly that the defendant was aware that the sign might be so. His Lordship also stressed that the word insulting must be interpreted bearing in mind art. 10 of the European Convention and the case law of the European Convention.[77] This stresses that any restriction on freedom of expression must be established by compelling countervailing considerations, with the means employed being proportionate to any legitimate aim. In his Lordship's view, although freedom of expression included the right to shock and offend (and the defendant was preaching his sincerely and deeply held beliefs), it was open to the justices to find that the words on the sign were insulting and that the defendant's conduct was not reasonable.[78] The words on the sign linked homosexuality to immorality and directed specifically towards the homosexual and lesbian community. In those circumstances, his Lordship found that the justices had not erred in coming to their conclusions and dismissed the appeal.[79]

Further evidence that anti-diversity might be given limited weight is provided by the High Court ruling in *Core Issues Trust v Transport for London*,[80] a decision which may have blurred the distinction between speech which interferes with the rights of others and speech that is not regarded as 'acceptable' in modern society. In this case it was held that a decision to refuse to display the claimant's advertisement on its buses was justified and proportionate and thus in compliance with art. 10(2). The advert - placed in response to Stonewall's advert that stated 'Some people are gay. Get over it' - read 'Not gay, ex-gay, post-gay and proud. Get over it.' The advert provided a website address to the Trust, who believes that homosexuality was a curable sexual deviancy. The High Court held that although art. 10 was engaged, the advert was likely to cause widespread or serious offence on matters of public controversy or sensitivity.[81] In the court's view, adverts on buses were highly intrusive and the advert would

[76] *Hammond v DPP* [2004] EWHC 69 (Admin), at para. 10. Note, the word 'insulting' has now been removed from s.5 of the 1986 Act and the words or actions must message must now be threatening or abusive.

[77] *Hammond v DPP* [2004] EWHC 69 (Admin), at paras 12-15, citing *Sunday Times v United Kingdom (No 2)* (1992) 14 EHRR 123.

[78] *Hammond v DPP* [2004] EWHC 69 (Admin), at [31].

[79] *Hammond v DPP* [2004] EWHC 69 (Admin), at [34].

[80] [2013] EWHC 651 (Admin); upheld on appeal in *Core Issues Trust v Transport for London* [2014] EWCA Civ.34.

[81] *Core Issues Trust v Transport for London* [2013] EWHC 651 (Admin), at [128].

cause serious offence to a significant section of the large number of people who would read it.[82] Further, for those who were gay, it was liable to interfere with their art. 8 (private life) rights.[83] Defending the interference with freedom of expression, it was held that the advert was a confrontational assertion, not a reasoned, informed contribution to a debate. It was liable to encourage homophobic views and the defendants would have been acting in breach of their equality duty had it allowed the advertisement.[84]

The initial criticism of the judgment is that it appears to automatically discriminate against persons who view homosexuality as wrong or unacceptable, as opposed to those who view it as a natural and acceptable choice of private life. Thus, although the court was fearful that it might encourage homophobic views, the speakers in these cases might argue that views on homosexuality should not be censured simply because they are not pro-diversity. This criticism was met in some respects, as the court criticised the authority's decision to allow the pro-gay advertisement, suggesting that that advert also should have been banned.[85] However, the decision might encourage the view that anti-gay sentiments, however expressed, are not worthy of free speech protection (or at least can be more easily interfered with than other speech are politically incorrect) because they are politically incorrect. This approach might, in turn, create a state of attrition between the two views and obstruct any compromise in the enjoyment of both rights.

Cases such as *Hammond* and *Core Issues Trust* can be defended on the basis that the protestor's views are indeed intolerant of other's rights and their lifestyles and as such are destructive of the rights of others. However, even if this view is accepted, the law needs to distinguish between views that are inconsistent with others' views, and which are aired peaceably, and those manifested in a blatantly offensive way. The decisions, and the argument for censuring anti- gay views, is arguably based on the notion that it is unacceptable to air a view that homosexuality is fundamentally morally wrong and that those who practice it will face moral repercussions because that that would cause offence to gay people, and those who support gay rights. To sanction such views might strike a blow for equality and diversity, and

[82] *Core Issues Trust v Transport for London* [2013] EWHC 651 (Admin), at [130].
[83] *Core Issues Trust v Transport for London* [2013] EWHC 651 (Admin), at [138].
[84] *Core Issues Trust v Transport for London* [2013] EWHC 651 (Admin), at para 142. Note, that in this case the Court stressed the local authority's *duty* to promote diversity.

[85] *Core Issues Trust v Transport for London* [2013] EWHC 651 (Admin), at [135].

against religious intolerance, but at the same time might offend the principles of pluralism and tolerance inherent in free speech. [86]

These cases, including the recent Court of Appeal decision in *Ngole*, considered below, pose a variety of legal and moral issues for both the courts and free speech theorists. Whilst wishing to uphold the sanctity of free speech and tolerance in all cases save where there is a real likelihood of a social or individual harm,[87] the courts face the task of distinguishing between legally acceptable and unacceptable speech and actions. In doing so, they must have regard to the universal values of freedom of expression and the duty of every citizen to display tolerance towards another's views. It is one thing for Parliament to decide to favour freedom from discriminatory acts on grounds of sexual orientation over the religious rights of others,[88] but another to use the distinction between acceptable and unacceptable views when considering whether *speech is* reasonable. Criticism of these cases is, therefore, founded on the right to offensive speech, provided of course it does not cause more than mere offence and actually protects us against a real social harm. Yet, if we accept that anti-diversity speech is *in itself* harmful, beyond merely offending the rights of those who hold opposite views, then there may indeed be a basis for penalising or censuring it.[89]

[86] The fact that the views in Hammond were made in the context of a public order arrest should also be considered; it is unlikely that those views would have attracted criminal liability if posted on line. In the context of whether comments constitute malicious communications under the Communications Act 2002, former Director of Public Prosecutions, Keir Starmer, issued guidelines drawing a distinction between messages that *grossly offend* and those that merely *shock and are distasteful*. The question would then be whether the views expressed by the claimant, in the way they were expressed were in breach of the Act: 'DPP to issue guidelines on prosecution over face book and Twitter abuse' *The Guardian,* 19 December 2012.

[87] Of course, damage to diversity and equality policies caused by such views, might be regarded by many as an identifiable harm for the purposes of article 10(2).

[88] See the decision of the European Court of Human Rights in *McFarlane v United Kingdom* and *Ladele v United Kingdom,* cited in note 10 above

[89] See the European Court's decision in *Reefa Partisi Erbakan Kazan and Tekdal* v *Turkey* (2002) 35 E.H.R.R. 2, where the applicant's party political ideals were inconsistent with the fundamental ideal of the Convention and of equality. It is submitted that for the purposes of this article that anti-gay views, in themselves, are not in this category.

The decision in *Ngole*: exploring the right to make anti-gay comments

This section of the article examines recent litigation surrounding the expulsion of a social work student for airing his Christian views on homosexuality. The litigation raised the issue of whether such views can be consistent with the student's (future) professional role, but also, indirectly, examined the extent to which anti-diversity views can be tolerated more generally. The litigation is, therefore important in resolving the conflict between offensive and harmful speech. This is particularly the case after the decision in *Ashers* that religious speech and views should not be compromised by compelled speech, or, more significantly here, that speech which does not discriminate against others, but merely questions their views, should attract sufficient protection.

The claimant was a devout Christian and had orthodox religious views, including on the morality of homosexuality. He had enrolled as a mature student with the university on a post-graduate course in social work leading to registration and practice as a qualified social worker.[90] He was expelled by the university after he engaged in a lengthy debate on social media about a state official in the US who had refused to issue licences for same-sex marriages, stating that same-sex marriage was a 'sin and an abomination' and citing various Biblical passages in support of his views. The university initiated an investigation and found that there were areas of concern relating to his fitness to practice and referred the matter to a faculty 'fitness to practise' committee panel. The panel took issue with the posts, not on the grounds of his views, but because he had posted them publicly in a way which it believed would affect his ability to do the job of a social worker. It also expressed serious concerns about the level of insight the student had demonstrated in relation to the postings and concluded that there had been a serious breach of the requirement to keep high standards of personal conduct and to make sure that his behaviour did not damage public confidence in the profession. The panel noted that the claimant had given no evidence that he would refrain from presenting his views in the same way in future and concluded that the student should be excluded from further study

[90] The social work profession was regulated by the Health and Care Professions Council (HCPC), and that body was responsible for regulating the professional service provision in the health and social work sectors, and the university's postgraduate social work programme was the Council's approved course leading to a qualification approved for the purpose of professional registration.

on this specific programme. The university's appeal committee rejected his appeal and his complaint to the Independent Adjudicator for Higher Education was also rejected.

In his application for judicial review the student submitted that the decision was both irrational and in breach of his rights under arts. 9 and 10 of the Convention. He also claimed that the sanction of removal from the course was disproportionate. The university argued that the claimant had showed "no insight" with respect to the postings and that the decision to remove him from the course was fair and proportionate. Refusing the application, the High Court noted that at the centre of the case was the claimant's removal from his course on fitness to practise grounds and that this was not a simple student conduct disciplinary case. Thus, the university had defended its actions by reference to the regulatory framework of the Council and had an obligation not only to teach and examine the course, but also to act as a gatekeeper for the social work profession.[91] The substance of the university's decision to remove the student from the course was in terms that he was not fit to continue preparing for registration as a social worker.[92] The unanimous conclusion of those best placed to reach one was that the student could not be further educated to make a successful social worker, and that the benefit of the doubt could no longer be given to him in a way that would be consistent with professional standards. On this issue, the Court found that there was no good reason to disagree with that conclusion.[93]

Considering the claimant's Convention rights, the Court noted that freedom of expression was an important right, and that exercising that right to express the content of deeply held religious views deserved respect in a democratic and plural society; nowhere, in the Court's view, more so than in a university.[94] However, the university's issue was not the religious motivation or the religious content of the postings, but how they could be accessed and read by people, service users included, who would perceive them as judgmental, incompatible with service ethos, or suggestive of discriminatory intent.[95] In the Court's view, whatever the actual intention was, it was the perception of the postings that would cause damage, and it was reasonable for the university to be concerned about perception. The more the student insisted on the paramount importance of his faith and his freedoms, the more

[91] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at [17].

[92] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at [151].

[93] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at [162].

[94] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at [166].

[95] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at [169].

concerned the university became that he was simply unwilling or unable to see and deal with their concerns.[96] In this case, the balance between the public interest in the guaranteed professionalism of social workers and the free exercise of important convention rights by the student had been fairly and proportionately carried out, and any interference with the claimant's rights was justified.[97]

On appeal, the student argued firstly that the HCPC regulations and guidance were insufficiently clear or precise to be 'prescribed by law' in order to comply with the qualifying provisions of arts. 9 and 10. This argument was rejected, although the Court of accepted that a student professional had to be able to foresee to a reasonable degree the meaning of a rule and the consequences which might arise from default,[98] absolute certainty was not achievable, particularly where the regulations and attendant guidance addressed students training for a wide range of professions.[99] In the Court's view, it had to have been clear to the student that offensive language and the expression of discriminatory views would be unacceptable.[100] With respect to whether the regulations served a legitimate aim, the Court found that the maintenance of confidence in a profession fell within the legitimate aim of professional regulation. However, the Court stressed that the obligation to maintain confidence carried different requirements in different professions and could not extend to prohibiting any statement that was thought to be controversial or to have political or moral overtones.[101] Thus, in the Court's view, even a broad legitimate aim could not extend to preclude legitimate expression of views simply because many might disagree with those views.[102] Conversely, the legitimate aim of such regulation had to extend far enough to ensure that reasonable service users perceived they would be treated with dignity and without discrimination. Service users could not usually choose their social worker, and the use of aggressive or offensive language in condemnation of homosexuality would be capable of undermining confidence and bringing the social work profession into

[96] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at [170].

[97] *R (Ngole) v University of Sheffield* [2017] EWHC 2669 (Admin) at [181].

[98] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at para 120, relying on the decision of the European Court of Human Rights' decision in *Sunday Times v United Kingdom* (1979-80) 2 E.H.R.R. 245

[99] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [88 and 103].

[100] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [103].

[101] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [104] Thus, it noted that no social worker could be sanctioned for arguing in public that social work was under-funded, although the expression of such views in offensive language might damage confidence.

[102] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [105].

disrepute.[103] As the guidance made clear, the appellant had an obligation not to allow his views about a person's lifestyle to prejudice his interactions with service users by creating the impression that he would discriminate against them.[104]

On the issue of proportionality, the Court held that although interference with the appellant's art. 10 rights was rationally connected to a legitimate objective, the real questions concerned the degree of intrusion into those rights and whether a less intrusive alternative to expulsion and a bar from professional life would have sufficed.[105] Although the appellant's reaction when taxed about the postings, and his perceived lack of insight, had caused concern, the university had failed to appreciate that the appellant's apparent intransigence was an understandable reaction to being told that he could never publicly express his religious views on topics such as sexual morals, in other words that there was a blanket ban.[106] The Court also noted that the university had failed to appreciate that its stance did not accord with the HCPC guidance, or with common sense. The guidance did not prohibit the use of social media; it made clear that use of social media to share personal views and opinions was permitted, but also said that the university might have to take action if offensive comments were posted.[107] Crucially, at no stage did those in charge of the disciplinary process make it clear that it was the manner and language in which the appellant had expressed his views that was the problem. Neither did they offer him guidance as to how he might more appropriately and moderately express his views in a public forum and in a way in which it would be clear that he would never discriminate on such grounds or allow his views to interfere with his work as a professional social worker.[108]

Finally, the Court of Appeal considered the proportionality of the sanction, concluding that the university's approach was not proportionate. The Court noted that the views expressed were the appellant's religious and moral views, based on the Bible. Further, he had not been shown to have acted in a discriminatory fashion, and had stated that he would never do so; and that had been accepted by the university.[109] In the Court's view, there was no evidence that any service user had read the postings, or of any damage to the reputation of the profession. The

[103] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [106].

[104] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [106].

[105] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [107].

[106] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [109-110].

[107] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [111].

[108] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [113].

[109] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [135].

swift conclusion that the appellant needed to be removed from the course had not been demonstrated to be the least intrusive approach that could have been taken.[110] Allowing the appeal, the Court of Appeal remitted the case for a new hearing before a differently constituted fitness to practice committee.[111]

The decision in Ngole: is it possible to distinguish between acceptable and unacceptable speech?

Although the decision of the High Court in in *Ngole* protected the rights of others, and promoted general principles of equality and diversity - which have an added significance in the social work profession - it also gives rise to concerns regarding free speech and religious freedom. Firstly, the decision could lend support to the idea that certain speech, including the holding of religious views, should be prohibited however they are expressed; in other words, in a modern democratic society it is impermissible to hold and express anti-gay views. However, this case, as with others that involve the views of employees of public bodies and those who provide public services,[112] was decided in the context of the responsibilities owed by employees or representatives (or in this case potential employees of those bodies) towards upholding principles of equality and diversity. Such individuals - unlike purely private citizens who wish to express their views on matters such as homosexuality - are viewed differently by the courts as they have both a contractual and/or public duty to support the state and their employers in promoting equality and diversity. These cases undoubtedly impact on free speech and the right to hold and express religious and other views, but is there room for compromise in such cases, and can and should the law accommodate the (religious) human rights of the speaker?

Before addressing those questions, the limitations of this case, and of the Court of Appeal's decision in the context of the more general debate, need to be understood. First, the case is primarily concerned with the acceptability of views expressed by those in a particular profession (or in this case, those training for such a profession). Consequently, it is not direct

[110] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [137].

[111] *R (Ngole) v University of Sheffield* [219] EWCA Civ 1127, at [146].

[112] See the cases referred to in footnote 8, above, and the decision in *Hall v Bull* [2013] UKSC 73, where the religious objections of hoteliers to accommodating a homosexual couple were overridden by the statutory scheme of prohibiting discrimination on grounds of sexual orientation.

authority on the extent to which the law allows such views to be expressed. Nevertheless, some of the points made by the Court of Appeal on proportionality (of both the language used to express the view and the penalty imposed by the university) may have significance to a wider debate on free speech and will be discussed here.

Secondly, the decision does not disturb previous rulings that establish that religious views cannot be used to excuse discriminatory practices, or to justify the refusal to extend public or other services to individuals.[113] In *Ngole,* therefore, it was accepted that the student did not intend to discriminate against homosexuals when in practice; rather it was the perception that that might be the case, which was the reason for his expulsion, and courts' assessment of the legality of that perception in justifying his expulsion. The decision in *Ngole,* therefore, was about whether budding social workers can express anti-gay views, and if so how.

Finally, the decision of the Court of Appeal in *Ngole* was made, primarily, on procedural grounds: that the university was entrenched in its views, failed to provide the student with guidance as to what type of comment would be acceptable, and failed to consider an alternative action against the student. Thus, although the Court makes it clear that it is not permissible to penalise a person for *any* anti-gay comment, the Court does not give clear guidance on what would be an acceptable interference with free speech in such circumstances, and when it would be permissible to censure such speech. This is, of course, compounded by the fact that the decision has been referred to another committee in the university, rather than being quashed for its inconsistency with free speech values.

Returning to the decision in *Ngole,* the Court of Appeal has provided us with little guidance as to where that balance may lie in particular cases, other than insisting that bodies such as the university should not take a dogmatic approach. Consequently, that guidance may come from the clarification and revision of the authorities' regulations. Yet, we should be able to, albeit indirectly, discern some guiding principles from the tenor of the Court's ruling, which can be used in the future in balancing these two interests. First, despite the legitimacy in promoting equality and diversity policies, certain bodies, and the law generally, should not restrict (religious) free speech that questions those policies and related views beyond that which is necessary and proportionate. To prohibit *any* view that questions those policies and views is contrary to the principles of necessity and proportionality that temper unreasonable restrictions on free (religious) speech. Secondly, in deciding the proportionality of any interference with that speech, bodies and the law should pay due regard to the fact that the speech in question is

[113] Ibid.

based on the speaker's religious views. This should augment the free speech rights and should be considered in the balancing exercise.[114] However, as we have seen this does not provide an immunity where the speech in question otherwise transgresses the law; and the courts have shown a reluctance to accommodate religious free speech views in such cases.[115]

Thirdly, although the law should insist that there is a legitimate and proportionate aim in restricting (religious) free speech beyond censoring views that do not represent diversity, it should be permissible to consider a wider meaning of harm in deciding the existence of that aim, and the extent to which it is permissible to protect it. For example, in cases such as *Ngole*, it is surely permissible to consider the speaker's responsibilities (as a budding social worker) to embrace equality and diversity, and not to say anything which might suggest that he was not prepared to carry out those policies in the future. Although the Court of Appeal was not persuaded that the university had established that his views suggested a tendency to discriminate in the future, it is surely legitimate to restrict his speech if that intention were to be established; or, indeed, if his views gave such an *appearance* to the public or future clients. To make someone criminally or civilly liable for creating that appearance may well be unreasonable, but it should be relevant in judging a body's (or an employer's) reaction to such views or actions)

Fourthly, despite the more liberal approach taken by the Court of Appeal in *Ngole*, it is clear that the case law that favours equality and diversity policies over religious views has not been disturbed by the ruling in *Ngole* or *Ashers*. Whether the law should be adapted to accommodate religious and other exemptions to securing equality or diversity, the situation at present is clear: both national and European Convention law allows for the policies to be enforced without exemption based on religious views. The decision in *Ashers* may have caused some confusion in the field of discrimination law, but it is clear that the more liberal approach applied by that case, and in *Ngole*, only applies to speech and not to the right to discriminate or to refuse to treat individually equally. Consequently, if the university were able to prove that Ngole's views actually violated the principles of diversity expected of a social worker, or *suggested* that Ngole would breach them in practice, his views could, and should, be censored and penalised.

[114] *Redmond-Bate v DPP* [2000] HRLR 249.

[115] See for example, *Hammond v DPP*, note 78, and the decision in *Norwood v DPP* [2003] EWHC 1564 (Admin), concerning racist speech, and upheld in *Norwood v United Kingdom* (2005) 43 EHRR SE11.

As stated above, in *Ngole* the real issue was whether his views on homosexuality, and his failure to retract them, were consistent with his intended career as a social worker' despite his rights of free speech and religion. Whereas the High Court assumed such views and his stance to be inconsistent with his position, the Court of Appeal insisted on a further enquiry into those views, and of the necessity and proportionality of punishing them. Thus, the High Court's stance is based on the body of case law, examined above, which finds that religious objections to equality and diversity policies must bow to those policies, and that Convention rights cannot be used to obstruct the goals of those policies. Whereas the High Court in *Ngole* gave little weight to free (religious) speech, and the court refused to involve itself in a balancing exercise between that right and upholding equality and diversity, the Court of Appeal gave greater weight to the Convention rights of the speaker to express their religious views against homosexuality. This allowed the court to balance those views with the maintenance of equality and diversity in the social work profession and provided an opportunity to lay down guidelines on what constitutes acceptable and unacceptable free speech in the context of anti-gay messages. That opportunity was of course limited because of the nature of the Court of Appeal's review remit,[116] but the decision, alongside the Supreme Court decision in *Ashers*, provides some basis for adopting a more flexible approach when religious beliefs collide with anti-discrimination policies.

Prior to the decisions in *Ngole* and *Ashers*, the case law of both the domestic and European Courts firmly supported a no tolerance approach, excluding the possibility that exceptions to equality policies may have to be made for those who hold strong religious or philosophical beliefs. That stance is beneficial to the success of equality and diversity policies, but is inflexible in terms of accommodating liberal ideas of free speech and pluralism – particularly where, as in *Ngole*, the speaker's alleged intention is not to discriminate as such, but voice views that are inconsistent with accepted views of equality and diversity. Thus, those who feel that their right to religion is as strong as the right of certain groups to equality and will argue that the decision, along with previous case law, lacked balance.

[116] The Court of Appeal was considering the legality of the decision and having found it flawed referred the case back to the relevant university bodies.

Conclusions

The Court of Appeal's decision in Ngole eschews the High Court's simple approach: Ngole's views were not, *automatically*, inconsistent with his future role as a social worker, and the court had to ensure that his art. 10 rights were balanced with the university's aim to ensure respect, dignity and equality and diversity. Thus, no action was to be taken against him unless and until the university had carefully considered his right to freedom of expression and balanced it against the harm that speech may have caused to the university, his professional duties and the rights of individuals to receive social work facilities free from discrimination.

The previous approach removed from the courts the difficult and controversial task of balancing those rights in any given case. By restricting the application of anti-discrimination laws to exclude political opinions associated with such protected groups, the Supreme Court in *Ashers Bakery* introduced fresh difficulties in distinguishing particular cases and deciding what really motivated a person to act in a particular way or to refuse to perform a particular service. The Court of Appeal decision in *Ngole* adds impetus to that debate, and implores the court to distinguish between a clear act of discrimination (or expressing offensive views regarding equality and diversity) and expressing views that are not in line with ideas of equality and diversity, but which are nevertheless legitimate views to hold in a democratic, liberal society. This raises issues of freedom of choice, pluralism and tolerance, but the issue is to what extent can society tolerate views which themselves are intolerant of others' lifestyles? This dilemma is particularly complex when the speaker has a contractual or professional duty to uphold equality and diversity, as in *Ngole*, but raises more general issues of whether an opinion is acceptable or not, and the extent to which that view can be censored.

The decision in *Ngole*, and the Supreme Court's decision in *Ashers*, should not be understood as justifying what would otherwise be unlawful discrimination when a person has religious or other deeply held convictions that oppose equality and diversity in sexual orientation. However, the decisions in *Ngole* sand *Ashers*, based as they are on free speech and freedom from compelled speech (albeit in the context of applying anti-discrimination law), open up the debate as to the extent to which anti-gay and anti-diversity views can be consistent with democratic right of free speech, together with the state's duty to promote diversity. Specifically, it begs the question whether promoting diversity and equality is a good in itself, and a justifiable reason for taking a no or low-tolerance approach to anti-diversity speech; both in respect of a person's public or contractual duties, and with respect to liability under the general criminal law.