Application No. 18860/19, *Lee* v. *United Kingdom*
European Court of Human Rights, First Section

WRITTEN COMMENTS OF FIDH, CAJ, AIRE CENTRE, ILGA-EUROPE, NELFA, AND ECSOL, submitted on 26 October 2020

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale pour les Droits Humains*); CAJ (Committee on the Administration of Justice); AIRE Centre (Advice on Individual Rights in Europe); ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association); NELFA (Network of European LGBTIQ* Families Associations); and ECSOL (European Commission on Sexual Orientation Law). Their interest and expertise are set out in their "Application for leave" of 28 May 2020, granted on 25 September 2020, under Rule 44(3) of the Rules of Court.

I. Article 14 (combined with Article 8, respect for private life, or Article 10) is applicable to cases of discrimination based on sexual orientation in access to goods and services (including the services of message-printing businesses).

2. There are two reasons why Article 14 is applicable, combined with Article 8. The first is that sexual orientation itself falls "within the ambit" of "private life" in Article 14. As the Court observed in *Laskey, Jaggard & Brown* v. *United Kingdom* (19 February 1997): "36. … There can be no doubt that sexual orientation and activity concern an intimate aspect of private life …" If a lesbian, gay, or bisexual (LGB) individual refers to a sexual orientation in the course of applying for a service, and then is denied the service because of the reference, the link between the difference in treatment and a negative effect on the individual's private life is clear, just as the link with Article 9 would be clear if the individual had referred to a religion. The Court's reasoning in *Thlimmenos* v. *Greece* (6 April 2000) applies by analogy:[1] "41. … The Court considers that such difference of treatment [not being appointed a chartered accountant] does not generally come within the scope of Article 14 in so far as it relates to access to a particular profession, the right to freedom of profession not being guaranteed by the Convention. 42. However, … the 'set of facts' complained of by the applicant – his being treated as a person convicted of a serious crime … despite the fact that the offence … was prompted by his religious beliefs – 'falls within the ambit of a Convention provision', namely Article 9."

3. The second reason is that, since 2013, the Court has been more generous in finding that the facts of cases of discrimination in access to, or dismissal from, employment (or a profession), fall "within the ambit" of another Convention right. In *I.B.* v. *Greece* (3 October 2013), which concerned the dismissal of an HIV-positive employee by a private jewellery manufacturing company (because his co-workers were afraid to work with him), the Court declared: "70. It is therefore now established that … employment matters … fall within the scope of private life. … 72. It is clear that the applicant's dismissal resulted in the stigmatisation of a person ... That measure was bound to have serious repercussions for his personality rights, the respect owed to him and, ultimately, his private life. …" Similarly, in *Emel Boyraz* v.

[1] Robert Wintemute, "'Within the Ambit': How Big Is the 'Gap' in Article 14 European Convention on Human Rights?", [2004] *European Human Rights Law Review* 366, 371-378.

Turkey (2 December 2014), which concerned the dismissal of a female employee by the state-run electricity company (because she was not a man who had done military service), the Court held: "44. … the concept of 'private life' extends to aspects relating to personal identity and a person's sex is an inherent part of his or her identity. Thus, a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life. … [T]he applicant's dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life (see, mutatis mutandis, *Smith & Grady* v. *United Kingdom* …)." The same reasoning applies to a refusal of a service because of the customer's sexual orientation, or a sexual orientation mentioned in the customer's message.

4. In the alternative, Article 14 is applicable combined with Article 10, when the goods or services refused fall "within the ambit" of freedom of expression.

II. Article 14 clearly imposes a negative obligation on public authorities not to discriminate in access to goods and services on the basis of sexual orientation.

5. It has been clear since *Smith & Grady* v. *United Kingdom* (27 September 1999) that Article 14 (combined with Article 8) imposes a negative obligation on public authorities not to discriminate in access to, or dismissal from, employment on the basis of sexual orientation. Although the Court found a violation of Article 8 in *Smith & Grady*, probably because of the armed forces' intrusive questioning about the applicants' sexual lives (and the absence of any prior case law on Article 14 in relation to sexual orientation), the Court could easily have found a violation of Article 14 (combined with Article 8). There was clearly direct discrimination based on sexual orientation, because heterosexual individuals were allowed to serve in the armed forces, while lesbian, gay, and bisexual individuals were dismissed.

6. Indeed, in *Emel Boyraz* (above), which involved direct sex discrimination in employment, the Court cited *Smith & Grady*, a case of direct sexual orientation discrimination in employment, in support of its conclusion that Article 14 was applicable (combined with Article 8). Similarly, if *Thlimmenos* (above), had involved direct discrimination based on religion in employment ("a Jehovah's Witness may not be appointed a chartered accountant"), there would obviously have been a violation of Article 14 (combined with Article 9), without extending Article 14 to persons in different situations. And if, hypothetically, a Council of Europe member state excluded from the civil service persons of Jewish or African racial or ethnic origin, there would be a serious violation of Article 14 (combined with Article 8).

7. There is no reason not to apply the Court's case law on access to employment or a profession to access to goods and services.

III. Article 14 also imposes a positive obligation on the legislature or judiciary to provide legal protection against discrimination in access to goods and services on the basis of sexual orientation, both in the private sector and in the public sector.

8. The novel question presented by this application is whether or not Article 14 imposes a positive obligation on the legislature or judiciary to provide legal protection against discrimination in access to goods and services on the basis of sexual orientation, both in the private sector and in the public sector. To date, the Court has no case law on this question, because this is the first application to reach the Court involving discrimination based on sexual orientation in access to private-sector

goods and services. However, the 4 November 2000 Explanatory Report to Protocol No. 12 provides guidance as to how Article 14 should be interpreted (emphasis added): "26. … [I]t cannot be totally excluded that the duty to 'secure' under the first paragraph of Article 1 [of Protocol No. 12; for Article 14, 'shall secure' appears in Article 1 of the Convention] might entail positive obligations. … [T]his question could arise if there is a clear lacuna in domestic law protection from discrimination. … [A] failure to provide protection from discrimination in … relations [between private persons] might be so clear-cut and grave that it might engage clearly the responsibility of the State … 28. … [A]ny positive obligation in the area of relations between private persons would concern, … relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, … access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc) …"

9. There is no reason not to interpret Article 14 with regard to positive obligations in the same way as Protocol No. 12, just as the Court has interpreted the term "discrimination" in Protocol No. 12 in the same way as the term "discrimination" in Article 14: *Sejdić & Finci* v. *Bosnia and Herzegovina* (22 December 2009), para. 55. Such an interpretation would be entirely consistent with the Court's case law regarding dismissal from, or other discrimination in, private-sector employment under Articles 9, 11, and 14 (combined with Article 8 or 11).

10. In *Danilenkov* v. *Russia* (30 July 2009), the applicants suffered various kinds of discrimination in their employment by a seaport company (it was not necessary to decide whether or not their employer was state-controlled), including being made redundant and dismissed, because of their membership of a particular trade union. The Court ruled: "123 … Article 11 … obviously includes a right not to be discriminated against for choosing to avail oneself of the right to be protected by a trade union ... Thus, the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership which … constitutes one of the most serious violations of freedom of association, capable of jeopardising the very existence of a trade union … 124. … States are required under Articles 11 and 14 … to set up a judicial system that ensures … effective protection against anti-union discrimination." Applying this principle to the facts, the Court concluded: "136. … [T]he State failed to fulfil its positive obligations to adopt effective and clear judicial protection against discrimination on the ground of trade union membership. … [T]here has been a violation of Article 14 … taken together with Article 11."

11. The Court applied its reasoning in *Danilenkov* (without citing *Danilenkov*) in *Redfearn* v. *United Kingdom* (6 November 2012), in which the applicant had been dismissed by his private-sector employer (even though there had been no complaints about his conduct at work), after he was elected to Bradford City Council as a representative of the racist British National Party. Because he had been employed for less than one year, UK legislation did not permit him to claim unfair dismissal. The Court found that the UK had breached its positive obligation under Article 11 (and that it was not necessary to examine Article 14): "43. … [T]here is … a positive obligation on the authorities to provide protection against dismissal by private employers where the dismissal is motivated solely by the fact that an employee belongs to a particular political party … 57. … [I]t was incumbent on the [UK] to … protect employees … from dismissal on grounds of political opinion or affiliation ..."

12. *Eweida* v. *United Kingdom* (15 January 2013) was not analysed as a case of discrimination, but could have been, because the first applicant's private-sector

employer had discriminately directly on the basis of religion: employees were permitted to wear or display Jewish, Muslim, or Sikh clothing or symbols, but not a Christian symbol (a small cross).[2] The Court held that: "91. … the refusal by British Airways … to allow the [first] applicant to remain in her post while visibly wearing a cross amounted to an interference with her right to manifest her religion. Since the interference was not directly attributable to the State, the Court must examine whether in all the circumstances the State authorities complied with their positive obligation under Article 9; … whether Ms Eweida's right freely to manifest her religion was sufficiently secured within the domestic legal order … 94. … There was no evidence that the wearing of other … items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. … 95. … [T]he domestic authorities failed sufficiently to protect the first applicant's right to manifest her religion, in breach of the positive obligation under Article 9. ..."

13. Finally, in *I.B.* v. *Greece*, the Court found: "91. … that the applicant was discriminated against on the basis of his health, in breach of Article 14 … taken in … with Article 8." This conclusion implies breach of a negative obligation not to discriminate, whereas it would have been consistent with *Danilenkov*, *Redfearn*, and *Eweida* to find a breach of a positive obligation (on the Greek legislature or judiciary) to provide legal protection against discrimination to HIV-positive persons.

14. From *Danilenkov*, *Redfearn*, *Eweida*, and *I.B.*, it is clear that the Court has imposed positive obligations on Council of Europe member states (through their legislatures or courts) to protect private-sector employees against discrimination because of their membership of a trade union or a political party, or a manifestation of their religion, or their being HIV-positive (their health or disability). What varies in these four judgments is whether the positive obligation was imposed under a single Convention Article (9 or 11), as in *Eweida* and *Redfearn*, or under a combination of Article 14 and another Convention Article (8 or 11), as in *I.B.* and *Danilenkov*. There is no reason not to apply the reasoning in these four judgments to access to goods and services made available to the public by private-sector businesses.

IV. Discrimination in access to goods or services offered by a private profit-making business to the public is not a "dispute[] of a purely private nature".

15. In *Pla & Puncernau* v. *Andorra* (13 July 2004), the Court observed: "59. Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears …, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 …"

16. Similarly, the Court cannot "remain passive" where national legislatures or courts breach their positive obligations under Article 14 by failing to provide protection against discrimination based on sex, race, religion, disability, sexual orientation, etc, in access to employment or to goods and services made available to the public. The Court did not "remain passive" in the disputes between private parties in *Danilenkov*, *Redfearn*, *Eweida*, and *I.B.* (III. above), which were all decided after *Pla*. Nor did it do so in the dispute between a private landlord and a private tenant in

[2] Robert Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others", (2014) 77 *Modern Law Review* 223, 231-233.

Kurshid Mustafa v. *Sweden* (16 December 2008; court-authorised eviction of a family from their rented home for refusing to remove their satellite dish violated Article 10). The Court should not "remain passive" in this case (or *Oleynik* v. *Russia*, 4086/18).

V. There is a clear European consensus that national law must prohibit discrimination based on sexual orientation in access to goods and services, both in the private sector and in the public sector.

17. In Recommendation 924 (1981) on "Discrimination against homosexuals" (1 October 1981), the Parliamentary Assembly of the Council of Europe (PACE) "7. Recommend[ed] that the Committee of Ministers: … 7.3. call on the governments of the member states: … b. to assure equality of treatment … for homosexuals with regard to employment …" In Recommendation 1474 (2000) on the "Situation of lesbians and gays in Council of Europe member states" (26 September 2000), PACE recommended "that the Committee of Ministers: … 11.3. call upon member states: a. to include sexual orientation among the prohibited grounds for discrimination in their national legislation [which often extends beyond employment]; …"

18. The Appendix to "Recommendation CM/Rec(2010)5 of the Committee of Ministers to [Council of Europe] member states on measures to combat discrimination on grounds of sexual orientation or gender identity (31 March 2010)" calls for measures extending well beyond employment (emphasis added): "29. Member states should ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation … in employment and occupation in the public as well as in the private sector. … 31. … [M]ember states should take appropriate legislative and other measures … to ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation … 33. Member states should take appropriate legislative and other measures to ensure that the highest attainable standard of health can be effectively enjoyed without discrimination on grounds of sexual orientation … 37. Measures should be taken to ensure that access to adequate housing can be effectively and equally enjoyed by all persons, without discrimination on grounds of sexual orientation … 40. Sport activities and facilities should be open to all without discrimination on grounds of sexual orientation …"

19. 29 of 47 (61.7%) of Council of Europe member states have adopted national legislation that expressly prohibits discrimination based on sexual orientation in access to goods and services, private-sector and public-sector. See Appendix (30 if North Macedonia's law is restored; there are regional laws in Austria and Spain).[3]

20. This level of European consensus can be compared with that noted by the Court in *I.B.* v. *Greece* (emphasis added): "82. … [A] comparative study of the legislation of thirty member States of the Council of Europe on the protection from discrimination in the employment context afforded to HIV-infected persons showed that seven States had enacted specific legislation to that end. However, in the twenty-three other States, … HIV-positive persons … could rely on the general anti-discrimination provisions of domestic law. … 83. … [E]ven if not all the member States … have enacted specific legislation in favour of persons living with HIV, there

[3] See also Article 3 ("access to and supply of goods and services which are available to the public") of the European Commission's "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation", COM/2008/0426 final (2 July 2008). The Proposal has yet to be adopted, even though 18 of 27 EU member states already prohibit sexual orientation discrimination in access to goods and services.

is a clear general tendency towards protecting such persons from any discrimination in the workplace by means of more general statutory provisions [grounds such as health or disability] … in both the public and private sectors …"

VI. Legislation and case law of other democratic societies support a positive obligation to prohibit discrimination based on sexual orientation in access to private-sector and public-sector goods and services.

21. In other democratic societies, sexual orientation (or a similar ground) appears in the anti-discrimination legislation (applying to the private and public sectors) of, for example, all 8 states and territories and the federal level in Australia, all 13 states and territories and the federal level in Canada, New Zealand, and South Africa. These laws generally cover access to goods and services.

22. When sexual orientation was added to the Canadian Human Rights Act (the federal anti-discrimination law) in 1996, 5 of 13 provinces or territories had yet to do the same: Alberta, Newfoundland and Labrador, the Northwest Territories, Nunavut (created from the N.W.T. in 1999), and Prince Edward Island. The omission of sexual orientation from Alberta's anti-discrimination legislation was considered by the Supreme Court of Canada in *Vriend* v. *Alberta* (2 April 1998), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1607/index.do, in which gay chemistry teacher Delwin Vriend was unable to challenge his dismissal by a private religious college. Did Section 15(1) of the Canadian Charter of Rights and Freedoms (part of the federal Constitution) oblige all Canadian legislatures to include sexual orientation in their anti-discrimination legislation? All eight judges ruled that Alberta's omission (failure to provide legal protection against private-sector and public-sector sexual orientation discrimination) violated section 15(1), and seven judges agreed that sexual orientation should be "read in" to Alberta's legislation.[4]

23. Justices Cory and Iacobucci held that the Alberta legislation drew a distinction "between homosexuals and heterosexuals" in that "the exclusion of the ground of sexual orientation ... clearly has a disproportionate impact on [gays and lesbians] as opposed to heterosexuals" (para. 82; there was indirect discrimination). This distinction was based on the analogous ground of sexual orientation and, whether it had a discriminatory intent or not, its effects were discriminatory. The exclusion "sends a strong and sinister message," suggesting that "discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination," which may be "tantamount to condoning or even encouraging discrimination against lesbians and gay men" (para. 100).

24. Under Section 1 of the Charter ("objective and reasonable justification" under Article 14), Justices Cory and Iacobucci rejected all of the Alberta government's justifications for the discriminatory distinction, including the argument that the Court should defer to the Alberta legislature in making a social policy decision that required it to mediate between competing interests: religious freedom and homosexuality. They held that any conflicts with religious freedom can be dealt with on a case-by-case basis under the exceptions (paras. 123-125). "Reading in" was the appropriate remedy, rather than "striking down" (para. 161). "Reading in" operated until the Human Rights, Citizenship and Multiculturalism Amendment Act, 2009, https://www.canlii.org/en/ab/laws/astat/sa-2009-c-26/147814/sa-2009-c-

[4] For a longer discussion, see R. Wintemute, "Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits", (2004) 49 *McGill Law Journal* 1143, 1151-1153.

26.html, added sexual orientation to the Alberta Human Rights Act. Section 4 of the Act now reads: "No person shall (a) deny to any person … any goods, services, … that are customarily available to the public, or (b) discriminate against any person … with respect to any goods, services, … that are customarily available to the public, because of the … sexual orientation of that person …"

VII. The Convention does not require an exemption from legislation for discrimination by private-sector businesses that is motivated by religious beliefs.

25. In *Eweida & Others* v. *United Kingdom* (15 January 2013), the third applicant, Ms. Ladele, was an employee of a public authority that registered marriages and civil partnerships, while the fourth applicant, Mr. McFarlane, was an employee of a private organisation providing counselling services. The Court held that in neither case was the public-sector or private-sector employer required by Article 9 (taken alone or in conjunction with Article 14) to accommodate the refusal of the employee to serve same-sex couples because of the employee's religious beliefs. In both cases: "109. … the employer's action was intended to secure the implementation of its policy of providing a service without discrimination ..."

26. In 2014, Prof. Wintemute analysed the Court's rejection of a religious exemption: "The … 'slippery slope' view of *Ladele* and *McFarlane* reflects the concern that women, and members of minorities defined by race, religion, disability, age or sexual orientation, have struggled for many years to achieve legal protection against discrimination by public authorities and private, non-religious companies or organisations. If an ECHR-based conscience exemption for employees of these bodies were recognised, it could create a very large hole in … anti-discrimination legislation. Members of previously protected groups would constantly have to fear that a religious individual, at any level of any public or private organisation, might refuse to serve them or work with them. Compliance with anti-discrimination law could become voluntary and random, subject only to a subjective assertion that the refusal to comply was a manifestation of religious beliefs. … It is extremely unlikely that the ECtHR would require such a broad religious exemption from a prohibition of sex or race discrimination. … [T]he ECtHR declared inadmissible the application in *Staatkundig Gereformeerde Partij* v *Netherlands*, where a Protestant Christian political party claimed an Article 9 right to refuse to select women as candidates … [T]he ECtHR concluded that, under Article 14 combined with Protocol No 1, Article 3, the party's position 'is unacceptable regardless of the deeply-held religious conviction on which it is based'. … The ECtHR would almost certainly take the same view of a religious man who refused to serve or work with a woman (in a non-religious context where no question of physical decency or intimacy arose), or vice versa. And given its strong case law on racial discrimination, it is hard to imagine that the ECtHR would grant a religious exemption to a civil servant or other employee who refused to serve an individual or couple because of their racial or ethnic origins."[5]

27. In *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission* (U.S. Supreme Court, 4 June 2018), before considering defects in the procedure before a lower tribunal, Justice Kennedy stated the general principle for conflicts between the race, religion, or sexual orientation of a customer and the religious beliefs of a business owner: "it is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny

[5] See Wintemute, footnote 3, p. 245, https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.12064.

protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968)" (federal legislation prohibited refusals to serve black customers at drive-in restaurants in South Carolina, despite the business-owner's claim that this interfered with his religious beliefs). Justice Kennedy added: "It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."

28. Similarly, in *Bull* v. *Hall*, [2013] UKSC 73 (27 November 2013), the United Kingdom Supreme Court (UKSC) rejected a religious exemption from a Christian-owned hotel's obligation, under anti-discrimination legislation applying to "goods … or services", [6] to provide a room with a double bed to a same-sex couple. Baroness Hale observed: "37. … 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 … because of a belief, however sincerely held, … would be to do just that." The exception for religious organisations did not apply to "an organisation whose sole or main purpose is commercial",[7] and the Convention did not require a broader exception.

VIII. The UKSC has set a dangerous precedent, by creating a "disguised religious exemption", when the discrimination can be characterised as aimed at the customer's message rather than at the customer.

29. In the United Kingdom, the legislature and the executive have discharged the positive obligation to prohibit sexual orientation discrimination in access to goods and services in the public and private sectors, through the Equality Act 2010 (sections 4, 12, 13(1), 29(1), 31(2)) for Great Britain, and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (regulations 2(2), 3(1)(a), 5(1)). The exception for religious organisations does not apply to "an organisation whose sole or main purpose is commercial" (paragraph 2(2) of Schedule 23 to the Act in Great Britain; regulation 16(2)(a) in Northern Ireland).

30. However, in *Lee* v. *Ashers Baking Company Ltd.*, [2018] UKSC 49, the UKSC failed to interpret the 2006 Northern Ireland Regulations in a way that discharged the positive obligation to provide protection against sexual orientation discrimination in the provision of goods and services. The UKSC did so (despite the exclusion of commercial organisations like a bakery business from the legislative exception for religious organisations, and despite its prior conclusion in *Bull* v. *Hall* that the Convention does not require a broader exception) by refusing to find less favourable treatment (a difference in treatment) "on grounds of sexual orientation", contrary to regulation 3(1)(a). The UKSC accepted the appellants' argument (emphasis added): "22. … [The bakery business] would also have refused to supply a cake with <u>the message</u> requested to a hetero-sexual customer … The objection was to <u>the message</u>, not the messenger. 23. … The reason for treating Mr Lee less favourably … was not his sexual orientation [gay] but <u>the message</u> [with the word 'gay'] he wanted to be iced on the cake. Anyone who wanted <u>that message</u> would have been treated in the same way … 34. … [T]he objection was to <u>the message</u> and

[6] Equality Act (Sexual Orientation) Regulations 2007, Regulations 3 and 4.
[7] Regulation 14(2)(a).

not to any particular person … 35. … [T]here was no discrimination on grounds of sexual orientation …"

31. Whether or not the UKSC intended to do so, the effect of its refusal to apply *Bull* v. *Hall* was to grant a Christian-owned bakery business a "disguised religious exemption" for goods or services that can be characterised as involving a "message". The bakery business could legally refuse to put "Support Gay Marriage" on a cake, even though they would have been willing to put "Support Heterosexual Marriage".[8] The UKSC's narrow reasoning, which failed to consider the possibility of sexual orientation discrimination against the content of the customer's message, will be cited across Europe. Religious and non-religious owners of businesses providing goods or services (commercial organisations) will frequently argue that they become a party to a "message" when they serve an LGB individual, a same-sex couple, or an LGB organisation (or an individual, group, or organisation defined by another ground of discrimination). Their defence will be: "We do not object to your sexual orientation (or your sex/race/religion/disability). We object to the sexual orientation (sex/race/religion/disability) mentioned in your message."

32. The UKSC's narrow reasoning would allow a bakery business to refuse to put the message "Black Lives Matter" on a cake, even though it would be willing to put the message "White Lives Matter". "Congratulations on your baby girl!" could be refused, even though "Congratulations on your baby boy!" would be accepted. "Happy Diwali/Eid/Hanukkah!" could be refused, even though "Happy Easter!" would be accepted. "Good luck at the Paralympics!" could be refused, even though "Good luck at the Olympics!" would be accepted. Similarly, a restaurant could refuse to serve a customer wearing a "Black Lives Matter" T-shirt, even though a customer wearing a "White Lives Matter" T-shirt would be seated.

33. Individuals and organisations exercising their Convention rights to defend the human rights of LGB persons (*Alekseyev* v. *Russia*, 2010; *Bayev & Others* v. *Russia*, 2017; *Zhdanov & Others* v. *Russia*, 2019) are particularly vulnerable. The effective exercise of their Article 10 and 11 rights will often require access to goods and services provided by private businesses: printing posters, leaflets, and other materials; setting up websites; or booking hotel or meeting rooms for conferences and other indoor assemblies. In each case, the provider of goods or services could rely on the UKSC's narrow reasoning and claim that they are not discriminating on grounds of sexual orientation: "It's not you. It's your message." In Poland, "a printer from Łódź refused to make posters for an LGBT foundation because of his religious beliefs".[9] In Georgia, a company refused to print materials for the organisers of Tbilisi Pride: "the company does not support the rights of LGBTQ+ people and does not want to provide professional services to such an organization".[10]

34. A broader view of discrimination that includes potential discrimination against the content of a customer's message is supported by *Weathersfield* v. *Sargent*, [1998] EWCA Civ 1938 (discrimination based on the race of potential customers of the employer rather than the race of the dismissed employee), *Coleman* v. *Attridge Law*, Case C-303/06 (Court of Justice of the European Union, 17 July 2008) (discrimination based on the disability of the employee's child rather than the employee's own disability), and *CHEZ Razpredelenie Bulgaria AD*, Case C-83/14

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[8] See the judgment of the Northern Ireland County Court, [2015] NICty 2, paras. 64, 66.

[9] See "Constitutional Court rules in favour of printer who refused to print LGBT posters", https://tvn24.pl/tvn24-news-in-english/polish-court-rules-in-favour-of-man-who-refused-print-lgbt-posters-ra947916-2290300; https://ipo.trybunal.gov.pl (Wyrok 26 czerwca 2019 r. sygn. akt K 16/17).

[10] See https://tbilisipride.ge/en-US/News/Details/45.

(CJEU, 16 July 2015) (discrimination based on the racial composition of an urban district rather than the race of a particular individual): "91. … a measure such as the practice at issue constitutes direct discrimination [based on racial or ethnic origin] if that measure proves to have been introduced … for reasons relating to the ethnic origin [Roma] common to most of the inhabitants of the district concerned".

35. This broader view is supported by the text of prohibitions of discrimination, which do not generally require that the difference in treatment be based on a characteristic of the customer (vs. a third party, a district, or the content of a message): Convention Article 14 ("on any grounds such as"), Directive 2000/43/EC ("on grounds of racial or ethnic origin"), Directive 2004/113/EC ("on grounds of sex"), Equality Act 2010 (s. 13, "because of a protected characteristic"), 2006 Northern Ireland Regulations (reg. 3(1)(a), "on grounds of sexual orientation").

36. Ashers Baking chose to offer a message-printing service, as the UKSC explained: "11. … Ashers offered a 'Build-a-Cake' service to customers. Customers could request particular … inscriptions to be iced onto a cake. There was a leaflet advertising this service, … but no religious or political restrictions were mentioned."

37. A message-printing business, required by law not to discriminate with regard to the content of the messages it prints, is not "compelled" to express a message with which it disagrees, because the message is clearly the message of the customer, not the message of the business: "… [I]n the case of a … message-printing business, which prints content chosen by its customers (on T-shirts, leaflets or cakes, in electronic form, or in paper form …), a reasonable observer would see the message as that of the customer, not of … the message-printing business. In such cases, the … message-printing business cannot claim that they are being compelled to express an opinion they do not share, because the opinion is clearly not theirs. They must comply with anti-discrimination legislation, but may protect themselves through non-discriminatory rules regarding the content they accept ... A director of the bakery expressed her concern that 'the cake would have been identified as an Asher's cake as there is a logo on the box'. This concern could have been addressed by a disclaimer on the box [or in the bakery's website]: 'Any slogan on this cake represents the views of the purchaser of the cake and not of Ashers Baking Co Ltd.'"[11]

38. FIDH, CAJ, the AIRE Centre, ILGA-Europe, NELFA, and ECSOL respectfully submit that the analysis of the Northern Ireland Court of Appeal, [2016] NICA 39, is correct: "58. … The appellants would not have objected to a cake carrying the message 'Support Heterosexual Marriage' … We accept that it was the use of the word 'Gay' in the context of the message which prevented the order from being fulfilled. The reason that the order was cancelled was that the appellants would not provide a cake with a message supporting a right to marry for those of a particular sexual orientation. 67. … [T]he appellants contended that … this was a case of forced speech and engaged [their] rights under Article 10 ECHR. … [T]he trial judge concluded that what the [customer] wanted did not require [the bakery] to promote or support gay marriage. … [W]e consider that the conclusion was undoubtedly correct. The fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either. … 100. … [T]he appellants might elect not to provide a service that involves any religious or political message. What they may not do is provide a service that only reflects their own political or religious message in relation to sexual orientation."

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[11] R. Wintemute, "Message-Printing Businesses, Non-Discrimination …", (2015) 26 *King's Law Journal* 348, 352-54, https://www.tandfonline.com/doi/abs/10.1080/09615768.2015.1114715.

IX. Conclusion

39. The Court's judgments in *Smith & Grady*, *Danilenkov*, *Redfearn*, *Eweida*, and *I.B.*, the clear European consensus (evidenced by recommendations of the PACE and the Committee of Ministers, as well as national legislation), and legislation and case law in other democratic societies all support the conclusion that Article 14 (combined with Article 8, Article 10, or another Convention right) imposes a positive obligation on the legislature or judiciary in all Council of Europe member states to provide legal protection against discrimination on the basis of sexual orientation in access to goods and services, both in the private sector and in the public sector.

APPENDIX:
COUNCIL OF EUROPE:
LEGISLATION PROHIBITING
DISCRIMINATION BASED ON SEXUAL ORIENTATION
IN ACCESS TO GOODS AND SERVICES
(IN THE PRIVATE AND PUBLIC SECTORS)

1. **Albania** - Law No. 10 221 (4 February 2010) on protection from discrimination, (Official Journal of the Republic of Albania, No. 15/2010, 25 February 2010), https://kmd.al/wp-content/uploads/2019/06/law-brochure-english.pdf, Articles 1, 20

2. **Andorra** - *Llei 13/2019, del 15 de febrer, per a la igualtat de tracte i la no-discriminació*, Articles 3(l), 4(2), http://www.consellgeneral.ad/fitxers/documents/lleis-2019/llei-13-2019-per-a-la-igualtat-de-tracte-i-la-no-discriminacio/view

3. **Belgium** - *Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination, Wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie, Moniteur belge* (30 May 2007), p. 29.016: http://www.ejustice.just.fgov.be/mopdf/2007/05/30_2.pdf#Page6, Articles 4, 5

4. **Bosnia and Herzegovina** - Law on Prohibition of Discrimination, BiH Official Gazette No. 59/09, published on 28 July 2009, https://arsbih.gov.ba/wp-content/uploads/2014/02/002-Anti-Discrimination-Law-.pdf, Articles 2(1), 6(1)(j)

5. **Bulgaria** - Protection Against Discrimination Act (Закон за защита от дискриминация), Article 4, 6(1), 37 (adopted in 2003, in force in 2004)

6. **Croatia** - Anti-Discrimination Act, Official Gazette 85/08, 112/12, Articles 1(1), 8

7. **Czech Republic** - Anti-Discrimination Act, No. 198/2009, Articles 1(1)(j), 2(4)

8. **Denmark** - *Lov nr 289 af 9. juni 1971 om forbud mod forskelsbehandling på grund af race m.v.*, as amended by *Lov nr. 357 af 3. juni 1987*, https://www.retsinformation.dk/eli/lta/1987/626, article 1

9. **Finland** - Non-Discrimination Act (*Yhdenvertaisuuslaki*) 1325/2014 (30 December 2014), http://www.finlex.fi/fi/laki/ajantasa/2014/20141325 (Finnish), https://www.finlex.fi/fi/laki/kaannokset/2014/en20141325.pdf (English, unofficial), Sections 2 and 8

10. **France** – *Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000018877783/2020-10-20/, articles 1, 2(3)

11. **Georgia** – Law on the Elimination of All Forms of Discrimination (7 May 2014), https://matsne.gov.ge/en/document/view/2339687?publication=0 , Articles 1, 3

12. **Germany** - General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz AGG*) of 14 August 2006 (BGBl. I, 1897), https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile&v=2, Articles 1, 2(1)(8)

13. **Greece** - Law 4443/2016 (9 December 2016), Article 11(1)

14. **Hungary** - Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV, https://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex3.pdf, Articles 5(b), 8(m)

15. **Iceland** – General Penal Code, Article 180, https://www.government.is/lisalib/getfile.aspx?itemid=dd8240cc-c8d5-11e9-9449-005056bc530c

16. **Ireland** - Equal Status Act 2000, http://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html, ss. 3(2)(d), 5.

17. **Liechtenstein** – Criminal Code, https://www.regierung.li/media/medienarchiv/311_0_11_07_2017_en.pdf, para. 283(1)(6)

18. **Lithuania** - Law on Equal Treatment, No. IX-182, adopted on 18 November 2003, Article 8

19. **Luxembourg** – *Code pénal*, articles 454, 455

20. **Montenegro** - Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), Official Gazette of Montenegro, nos. 46/2010, 18/2014 and 42/2017, https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/Montenegro_the-Law-on-Prohibition-of-Discrimination.pdf, Articles 2, 11, 19, 34

21. **Netherlands** - *Algemene wet gelijke behandeling* (General Equal Treatment Act) of 2 March 1994 (Staatsblad 1994, nr. 230), https://wetten.overheid.nl/BWBR0006502/2020-01-01, https://mensenrechten.nl/sites/default/files/2013-05-08.Legislation%20Equal%20Treatment.pdf, Articles 1 to 3, and especially 7

22. **Norway** - Act relating to equality and a prohibition against discrimination (Equality and Anti-Discrimination Act), https://lovdata.no/dokument/NLE/lov/2017-06-16-51, sections 2, 6

23. **Romania** - Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 31 August 2000, http://legislatie.just.ro/Public/DetaliiDocument/24129, Article 10

24. **Serbia** - Law on the Prohibition of Discrimination (*Zakon o zabrani diskriminacije*), Official Gazette of the Republic of Serbia, No. 22/2009, 26 March 2009, http://ravnopravnost.gov.rs/en/legislation/republic-of-serbia-legislation, Articles 2(1), 17, 2

25. **Slovakia** - Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-Discrimination Act) (*zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)*), https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/365/20160102, Articles 2(1), 5(1)

26. **Slovenia** - Protection against Discrimination Act, Official Gazette of the Republic of Slovenia, No. 33/16 in 21/18, 21 April 2016 (*Zakon o varstvu pred diskriminacijo*), http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7273, http://www.zagovornik.si/wp-content/uploads/2019/02/PADA-ZVarD_EN.pdf, Articles 1(1), 2(1)

27. **Sweden** - *Diskrimineringslag* (2008:567) (Discrimination Prohibition Act), Chapter 2, Section 12

28. **Switzerland** – Criminal Code (RS 311), https://www.admin.ch/opc/en/classified-compilation/19370083/index.html#a261bis, Article 261bis

29. **United Kingdom** – Equality Act 2010 (Great Britain), https://www.legislation.gov.uk/ukpga/2010/15/contents, sections 4, 12, 13(1), 29(1), 31(2); Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, https://www.legislation.gov.uk/nisr/2003/497/contents/made, regulations 2(2), 3(1)(a), 5(1)

Law annulled because of procedural defect:

30. **North Macedonia** - Law on Prevention of and Protection against Discrimination, 17 May 2019, http://www.mtsp.gov.mk/content/pdf/zakoni/ZRO%20Precisten%2074-15.pdf (annulled by the Constitutional Court on 14 May 2020, https://www.ilga-europe.org/resources/news/latest-news/decision-constitutional-court-north-macedonia-lppd)

Austria (legislation in all nine *Länder* but no federal law, so some situations not covered: https://www.klagsverband.at/gesetze/laender):

Burgenland - *Gesetz vom 8. Juli 2005 über das Verbot der Diskriminierung auf Grund der … sexuellen Orientierung (Burgenländisches Antidiskriminierungsgesetz - Bgld. ADG)*

Kärnten - *Gesetz über das Verbot der Diskriminierung auf Grund der … sexuellen Orientierung und des Geschlechtes (Kärntner Antidiskriminierungsgesetz - K-ADG)*

Niederösterreich - *Antidiskriminierungsgesetz 2017*

Oberösterreich - *Landesgesetz über das Verbot der Diskriminierung auf Grund der … sexuellen Orientierung (Oö. Antidiskriminierungsgesetz - Oö. ADG)*

Salzburg - *Gesetz vom 1. Februar 2006 über die Gleichbehandlung im Bereich des Landes … (Salzburger Gleichbehandlungsgesetz - S.GBG)*

Steiermark - *Gesetz vom 6. Juli 2004, mit dem ein Gesetz über die Gleichbehandlung im Bereich des Landes … (Landes-Gleichbehandlungsgesetz L-GBG) erlassen wird*

Tirol - *Gesetz vom 1. Februar 2005 über das Verbot von Diskriminierungen (Tiroler Antidiskriminierungsgesetz 2005 – TADG 2005)*

Vorarlberg - *Gesetz über das Verbot der Diskriminierung (Antidiskriminierungsgesetz - ADG)*

Wien - *Gesetz zur Bekämpfung von Diskriminierung (Wiener Antidiskriminierungsgesetz)*

Spain (legislation in 9 of 17 *comunidades autónomas*, but no law at the level of the Spanish State):

Andalucía - *Ley 8/2017, de 28 de diciembre, para garantizar los derechos, la igualdad de trato y no discriminación de las personas LGTBI y sus familiares en Andalucía*, https://www.boe.es/buscar/pdf/2018/BOE-A-2018-1549-consolidado.pdf, art. 49

Aragón - *Ley 18/2018, de 20 de diciembre, de igualdad y protección integral contra la discriminación por razón de orientación sexual, expresión e identidad de género en la Comunidad Autónoma de Aragón*, http://www.boa.aragon.es/cgi-bin/EBOA/BRSCGI?CMD=VEROBJ&MLKOB=1055478702424, art. 43

Catalunya - *Llei 11/2014, del 10 d'octubre, per a garantir els drets de lesbianes, gais, bisexuals, transgèneres i intersexuals i per a eradicar l'homofòbia, la bifòbia i la transfòbia*, https://portaljuridic.gencat.cat/eli/es-ct/l/2014/10/10/11, art. 26

Extremadura - *Ley 12/2015, de 8 de abril, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de Extremadura*, https://www.boe.es/buscar/pdf/2015/BOE-A-2015-5015-consolidado.pdf, art. 40

Islas Baleares - *Ley 8/2016, de 30 de mayo, para garantizar los derechos de lesbianas, gays, trans, bisexuales e intersexuales y para erradicar la LGTBI fobia*, https://www.boe.es/buscar/pdf/2016/BOE-A-2016-6310-consolidado.pdf, art. 26

Madrid - *Ley 3/2016, de 22 de julio, de Protección Integral contra LGTBIfobia y la Discriminación por Razón de Orientación e Identidad Sexual en la Comunidad de Madrid,* https://www.boe.es/buscar/pdf/2016/BOE-A-2016-11096-consolidado.pdf, art. 52

Murcia - *Ley 8/2016, de 27 de mayo, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales, y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de la Región de Murcia*, https://www.boe.es/boe/dias/2016/06/25/pdfs/BOE-A-2016-6170.pdf, art. 44

Navarra - *Ley Foral 8/2017, de 19 de junio, para la igualdad social de las personas LGTBI+*, https://www.boe.es/buscar/pdf/2017/BOE-A-2017-8527-consolidado.pdf, art. 49

Valencia - *Ley 23/2018, de 29 de noviembre, de igualdad de las personas LGTBI*, https://www.boe.es/buscar/pdf/2019/BOE-A-2019-281-consolidado.pdf, art. 56