



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Brandon Lewis MP
Secretary of State for Northern Ireland
Same-sex Religious Marriage Consultation
Northern Ireland Office
Stormont House
Stormont Estate
Belfast
BT4 3SH

samesexreligiousconsultation@nio.gov.uk

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Dear Brandon,

In September 2019, the Northern Ireland Human Rights Commission (the NIHRC) provided statutory advice to the Secretary of State pursuant to Northern Ireland Act 1998, section 69(3). In addition to that advice, the NIHRC welcomes the opportunity to respond to the NIO's public consultation on same-sex religious marriage. The NIHRC's response is in line with our function to review the adequacy and effectiveness of law and practice relating to the protection of human rights, pursuant to the Northern Ireland Act 1998, section 69(1). This letter focuses on the specific questions raised by the consultation.

The NIHRC welcomes that this consultation is seeking to ensure changes to the law regarding same sex marriage in Northern Ireland do not interfere with Article 9 of the European Convention on Human Rights (ECHR - right to freedom of thought, conscience and religion) and the autonomy of religious bodies in this regard.

Requirement of consent of religious bodies

Article 9 ECHR is clear that there is a collective aspect to the right, in that there is a freedom to “either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance”. Furthermore, in line with the applicability of this provision to religious bodies and the importance placed on the autonomy of those bodies, religious bodies are capable of establishing ‘victim status’ for the purposes of Article 34 ECHR, thereby satisfying the admissibility criteria to bring a case before the ECtHR collectively on behalf of its members.¹

As with individuals, the ECtHR recognises the belief that marriage is between a man and a woman as a manifestation of a religious body’s beliefs, by finding that “as regards Article 9 [ECHR], that the provisions do not purport to regulate marriage in any religious sense and that it depends on each particular religion the extent to which they permit same-sex unions”.²

Following on from this, the ECtHR noted the difference between the legal, State recognition of marriage, where Article 12 ECHR will apply and religious unions, where Article 12 ECHR will not.³

The NIHRIC advises that Article 9 ECHR requires that religious bodies, on behalf of their members and employees, have autonomy to define and solemnise marriage, as they understand it to be, free from disproportionate State interference. The ECtHR is clear that the State has a duty to remain neutral and impartial to preserve pluralism and democracy.⁴ As explained in *Leyla Sahin v Turkey* (2005):

pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote

¹ *Church of Scientology v Sweden* (1979) ECHR 9.

² *Parry v United Kingdom* (2006) ECHR 1157.

³ *Ibid.*

⁴ *Metropolitan Church of Bessarabia and Others v Moldova* (2001) ECHR 860, at paras 115-116.

the ideals and values of a democratic society. Where these 'rights and freedoms' are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society'.⁵

In answer to Question 1, the NIHRC advises that consent of the governing authority is not contrary to human rights requirements before officiants can be appointed to solemnise same sex religious marriage.

In answer to Questions 5 and 6, the NIHRC advises that the State cannot compel a religious body or persons acting on behalf or under the auspices of such bodies to undertake specified activities relating to same-sex marriage.

Definition of governing authority

The ECtHR is clear that:

the internal structure of a religious organisation and the regulations governing its membership must be seen as a means by which such organisations are able to express their beliefs and maintain their religious traditions. The Court points out that the right to freedom of religion excludes any discretion on the part of the State to determine whether the means used to express religious beliefs are legitimate.⁶

In answer to Questions 3 and 4, the NIHRC advises that a governing authority is defined in such a way that it respects the internal structure of a religious body. The proposed definition appears to accommodate this.

Freedom of officiants to choose whether to solemnise same-sex marriages

⁵ *Leyla Sahin v Turkey* (2005) ECHR 299, at para 108.

⁶ *Svyato-Mykhaylivska Parafiya v Ukraine* (2007) ECHR 478, at para 150.

Where there is a conflict between the individual manifestation of belief and the view of the religious body, it is the view of the body, which will prevail under Article 9 ECHR.⁷ In this context, the ECtHR has noted that the rights under Article 9 ECHR will apply to a religious body itself as it is “protected in its rights to manifest its religion, to organise and carry out worship, teaching, practice and observance, and it is free to act out and enforce uniformity in these matters”.⁸ However, a religious body can exercise discretion and enable an officiant the freedom to choose whether to solemnise same-sex marriages.

In the context of employment, the ECtHR acknowledged in *Fernández Martínez v Spain* (2014) that:

as a consequence of their autonomy religious communities can demand a certain degree of loyalty from those working for them or representing them. In this context, the [ECtHR] has already considered the nature of the post occupied by those persons is an important element to be taken into account when assessing the proportionality of a restrictive measure taken by the State or the religious organisation concerned. In particular, the specific mission assigned to the person concerned in a religious organisation is a relevant consideration in determining whether that person should be subject to a heightened duty of loyalty.⁹

However, the ECtHR found in *Schüth v Germany* (2010) that:

whilst it is true that, under the [ECHR], an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees, a decision to dismiss based on a breach of such duty cannot be subjected, on the basis of the employer’s right of autonomy, only to a limited judicial scrutiny exercised by the relevant domestic employment tribunal without having regard to the nature of the post in question and without properly balancing the interests involved in accordance with the principle of proportionality.¹⁰

In answer to Question 2, the NIHRC advises that it is within a religious body’s discretion to decide whether officiants are free to choose whether to solemnise same-sex marriages.

⁷ *X v United Kingdom* (1981) ECHR 9.

⁸ *Ibid*, at para 158.

⁹ *Fernández Martínez v Spain* (2014) ECHR 851, at para 131.

¹⁰ *Schüth v Germany*, Application No 1620/03, 23 September 2010, at para 69.

Equality protections

The ECtHR has considered whether a civil registrar with strong religious beliefs can be compelled to undertake activities that are contrary to those beliefs. In *Eweida and Others v United Kingdom* (2013), the ECtHR found that:

the Court of Appeal held in this case that the aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being “an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others”. The Court recalls that in its case-law under Article 14 it has held that differences in treatment based on sexual orientation require particularly serious reasons by way of justification. It has also held that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, although since practice in this regard is still evolving across Europe, the Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order.¹¹

The ECtHR further held that:

it remains to be determined whether the means used to pursue this aim were proportionate. The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority’s policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between

¹¹ *Eweida and Others v United Kingdom* (2013) ECHR 37, at para 105.

competing [ECHR] rights. In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.¹²

The NIHRC welcomes the clarity that the exception will not apply to other service providers, such as hotels, tourists, and wedding photographers. The ECtHR will be considering this issue further in the forthcoming application, *Lee v United Kingdom*.

In answer to questions 7 and 8, from a human rights perspective, the NIHRC advises that the UK Government and NI Executive have a wide margin of appreciation regarding protections provided to a religious body or person acting on behalf of a religious body in public and secular settings. However, such protections and resulting decisions should be guided by the principles of legitimate aim and proportionality.

In answer to question 8, the NIHRC advises that consideration will need to be given to the outcome of *Lee v United Kingdom*.

If the NIHRC can be of further assistance, please do not hesitate to get in touch.

Yours sincerely,



Les Allamby
Chief Commissioner

¹² Ibid, at para 106.