JUDICIARY OF ENGLAND AND WALES

IN THE SLOUGH COUNTY COURT **CLAIM NO 0UD02282**
FOR TRIAL AT THE READING COUNTY COURT
BEFORE RECORDER MOULDER

BETWEEN:

MICHAEL BLACK
JOHN MORGAN

Claimants

- and -

SUSANNE WILKINSON **Defendant**

APPROVED JUDGMENT

HEARING DATE 17 SEPTEMBER 2012

JUDGMENT HANDED DOWN 18 OCTOBER 2012

1. This is a claim in tort for breach of statutory duty under regulation 20 of the Equality Act (Sexual Orientation) Regulations 2007 in which the Claimants allege that contrary to Regulation 4 of the said regulations the Defendant discriminated against them by refusing to provide them with a double room at the Swiss bed-and-breakfast on 19 March 2010.

Background

2. The material facts in this case are as follows. The Claimants are a homosexual couple but are not in a civil partnership. The Defendant runs a bed-and-breakfast business in Cookham in Berkshire. The house has seven bedrooms of which one is occupied by the Defendant and her husband, two are used for her children, a further room is kept for family and friends and three rooms are let out to guests.
3. Michael Black, the First Claimant, contacted the Defendant by e-mail on 11th March 2010 to book a double room for 19 March 2010. By e-mail in response the Defendant offered Mr Black the Zürich room, a double room. Mr Black confirmed the reservation and sent the Defendant a cheque for the £30 deposit.
4. On the evening of 19 March 2010 the Claimants arrived at the bed-and-breakfast and were met by the Defendant in the driveway. The Defendant invited them into the house and explained there was a problem as they had booked into the Zürich room which had a double bed. The Defendant said that she did not like the idea of two men sharing a bed. The Defendant said she had personal convictions against this and ,according to the Defendant, that as she was fully booked she could not offer them 2 rooms for single occupancy. The Second Claimant said that in that case they would go somewhere else. The First Claimant asked for the deposit back and the deposit was returned by the Defendant.
5. After attending the engagement for which they travelled to Cookham, the Claimants drove home to Huntingdon that evening rather than seek alternative accommodation for the night.

Summary of the legal issues

6. The Claimants' case is that by virtue of regulation 4 (1) of the Equality Act (Sexual Orientation) Regulations 2007 (revoked with effect from 1 October 2010 by the Equality Act 2010 but not in relation to acts occurring before that date) it was at the material time unlawful for a person concerned with the provision of services to the public to discriminate against a person who seeks to obtain those services on the grounds of that person's sexual orientation by refusing to provide that person with those services (or services of the same or similar quality, in the same or similar manner, or on the same or similar terms in each case which he would provide to the public generally).

7. By virtue of regulation 4(2) (b) regulation 4 (1) applies to accommodation in a hotel, boarding house or similar establishment.
8. The Claimants' case is that by refusing to provide them with accommodation (and/or accommodation of the same quality, in the same or similar manner and/or on the same or similar terms in each case that she would provide accommodation to the public generally) the Defendant unlawfully discriminated against them on the grounds of their sexual orientation in breach of the regulation.
9. The Claimants' primary case is one of direct discrimination contrary to regulation 3 (1) in that, on the grounds of their sexual orientation, the Defendant treated them less favourably than she treats or would treat others by refusing them access to a double room.
10. The Claimants' alternative case is that the Defendant subjected them to indirect discrimination contrary to regulation 3 (3) in that the Defendant's policy of restricting access to the double rooms to those who are "heterosexual and preferably married" amounted to a provision, criterion or practice which she applied equally to persons not of the Claimants' orientation, this puts homosexual people at a disadvantage (as they could never be heterosexual or married), this puts the Claimants at a disadvantage and this could not be justified.
11. In her Defence the Defendant states that she had been attempting to act in accordance with her religious beliefs and in particular the belief that "monogamous heterosexual marriage is the form of partnership uniquely intended for full sexual relations between persons" and that homosexual sexual relations (as opposed to **homosexual orientation**) and heterosexual sexual relations outside marriage are sinful.
12. The Defendant denies that regulation 4 applies. She relies on regulation 6 (1). She states that the double bedroom is in the heart of the Defendant's home and the Defendant treats guests as if they are members of the family. She provides a special degree of care and attention to the guests staying in her home. Further or alternatively the refusal related to bedrooms in premises which were occupied by the Defendant's own family and therefore it was not "a hotel, boarding house or similar establishment" within the meaning of regulation 4 (2) (b).
13. The Defendant denies that there was any direct discrimination and denies that any discrimination occurred on the basis of the sexual orientation of the Claimants. The Defendant did not permit homosexual sexual behaviour in her home which is why any difference in treatment occurred. Sexual behaviour is not a protected characteristic and is different from sexual orientation.
14. The Defendant denies any indirect discrimination. The defence case is that because of her religious belief she has "sought to restrict the sharing of the double rooms to heterosexual preferably married couples" and the Defendant has turned away several unmarried heterosexual couples from the outset where it was obvious that they were unmarried from the fact that they only wanted use of the room during the day for sex. The practice of restricting the sharing of the double rooms to heterosexual, preferably married couples did not put homosexual people at a disadvantage because unmarried heterosexual persons were unable to share a double room and therefore would be at a similar disadvantage.
15. Further or alternatively the matters could be reasonably justified by reference to matters other than the Claimants' sexual orientation namely by reference to the Defendant's religious belief and the need to vindicate her own Article 8 and Article 9 rights protected by the European Convention on Human Rights incorporated into domestic law by the Human Rights Act 1998.

16. In particular the defence is that the Defendant holds the religious belief stated and not permitting Claimants to share a double room in her home was a manifestation of her religious belief. This is because the supply of a double bedroom to the Claimants would involve the Defendant in the promotion of what she believed to be a sin. The Defendant was ready and willing to supply a single room to the Claimants.
17. The holding and manifestation of religious beliefs are protected pursuant to the provisions of Article 9 of the European Convention of Human Rights scheduled to the Human Rights Act 1998. The Defendant let rooms in her home which remained her home and her Article 8 rights were engaged.
18. The Claimants' rights are not compatible with the Defendant's rights but the Defendant submits a reasonable balance is struck by not requiring the Defendant to promote the sharing of a double room which she believes to be a sin.
19. Accordingly the Defendant submits that, in accordance with the Human Rights Act 1998, the regulations should be interpreted so that the regulations are compatible with the Defendant's rights under Articles 8 and 9 of the European Convention of Human Rights and so that there is no finding of direct discrimination and any indirect discrimination is held to be justified.
20. In summary the five issues before the court are as follows
    1. The direct discrimination issue-regulation 3 (1)
    2. the "special care and attention" issue – regulation 6 (1)
    3. the "not a hotel" issue-regulation 4 (2) (b)
    4. the human rights issue-Articles 8 and 9 of the European Convention of Human Rights
    5. the indirect discrimination issue-regulation 3 (3)

The evidence

21. I have had witness statements and heard oral evidence from the Claimants, Michael Black and John Morgan and from the Defendant Suzanne Wilkinson.
22. On the basis of the evidence put before the court, I am invited by Counsel for the Claimants to make the following findings of fact
    1. "The Claimants are homosexual partners".
       This is stated in paragraph 1 of the amended Particulars of Claim and admitted at paragraph 5 of the amended Defence.
    2. "They have not entered into a civil partnership"
       This was confirmed in the oral evidence of Mr Black and not challenged by the Defendant in cross-examination. It is also accepted at paragraph 3 of the Defendant's witness statement.
    3. "The Defendant is the owner and manager of the Swiss bed-and-breakfast"
       This is stated in the Defendant's witness statement at paragraph 1
    4. "The Defendant conducts business letting rooms in her house and providing breakfast to members of the public in return for payment"
       This is evident from the Defendant's witness statement in particular paragraphs 10, 11 and 14.
    5. "She advertises her business to the public at large through her own and other tourist websites."
       This is clear from paragraph 12 of the Defendant's witness statement.

Accordingly the facts stated at paragraphs 1-5 are established on the evidence.

6. "On 11 March 2010 the First Claimant contacted the Defendant by e-mail to enquire about booking a double room for the night of 19 March 2010. She replied by e-mail and offered the First Claimant the Zürich room, a double room. The First Claimant confirmed the reservation and subsequently posted the Defendant a cheque for the £30 deposit she requested."
   This version of events appears to be admitted in paragraph 7 of the amended Defence and is accordingly established. The only issue between the parties appears to be whether the Claimants were told that the Zürich room was not only a double room but also had a double bed. However I do not believe that anything turns on this. The amended Defence refers to the fact that the First Claimant made no mention of his homosexual partner at the time of booking. This does not appear to be disputed by the Claimants but again I do not believe anything turns on this.
7. "On the evening of 19 March 2010 the Claimants arrived at the Swiss bed-and-breakfast and were met by the Defendant. The Defendant made clear to the Claimants that she was not prepared to allow them access to the room they had booked. She stated that she would not accommodate them as it was against her convictions for two men to share a bed. The Claimants informed the Defendant that they believed that she might be acting unlawfully if she did not permit them access to the room. The Defendant refunded the deposit of £30 and the Claimants left. "
   At paragraph 8 of the Amended Defence it states "*the Defendant said that she did not like the idea of two men sharing a bed..... The Second Claimant asked if it was legal and said that it wasn't in hotels. The Defendant explained that it was not a hotel but that it was her own private family home. The Defendant said she had personal convictions against this and that as she was fully booked she unfortunately could not offer them two rooms for single occupancy."*

This version of events is therefore established on the evidence. It was confirmed by both Claimants in their oral evidence that the Defendant did say that she would have been prepared to offer them single rooms but she was full.

23. Counsel for the Defendant invites the Court to make the following findings of fact

1. "The Defendant has a sincere religious belief and does attempt to provide "a personal and loving service"".
   The Defendant's religious belief is evident from paragraph 5 of her witness statement in which the Defendant stated
   "*I am a committed Christian..... I attend a local evangelical church..... I take an active part in the church..... We believe that the Bible is the word of God and this belief informs everything we do in our home life and work life."*
   This was not challenged by the Claimants.
   As regards the service provided by the Defendant to her guests she refers at paragraph 15 of her witness statement to
   "*the very personal nature of the relationship between myself, as host, and the guests which distinguish it from other types of business offering accommodation, such as hotels. Guests are invited into our home and for the length of their stay are treated as members of the family. I provide a special degree of care and attention to the guests staying in my home. For some this means collection, free of charge, from the local railway station or driving to a wedding or*

another engagement or local attraction. A few guests have taken ill during their stay and I have nursed them back to health."

There was produced in evidence extracts from the Defendant's guestbook. These included statements such as "I have been as comfortable as I would be staying with family. Could not have been better cared for." (At 83); "your beautiful home and warm hospitality have made this one of the nicest places we have ever stayed" (89); "I have very much enjoyed our chats and I appreciate your warmth and understanding" (111) "much better than staying in those faceless business hotels" (115).

These extracts were not challenged by the Claimants and do establish a personal and caring, and what could be described as a loving, service.

2. "The layout of her home is such that the bedrooms for guests are on the same floor as her bedroom and not separate".

   This was confirmed in the Defendant's oral evidence.

3. "Her business is run by a Christian along biblical principles."

   I have already accepted above that the Defendant had a sincere religious belief and was running a business. At paragraph 28 of her witness statement the Defendant states

   "*as a Christian I have tried to live my life and carry out my work in accordance with my deeply held Christian beliefs; and to permit same sex couples to share a double room in my home would be to act against my core religious beliefs and conscience..."*

   This belief was not challenged by the Claimants. However whilst these principles undoubtedly governed the Defendant's behaviour and to that extent the business could be said to be run along biblical principles, in my view the evidence did not establish the Defendant's business as an establishment which was overtly religious.

   At paragraph 17 of her witness statement the Defendant states

   "*there are Bibles and tracts in every room and Bible verses on display. There are flyers on the noticeboard in the kitchen/dining room from missionaries we support. The conversation with guests invariably comes around to my husband's employment as a church leader and this presents me with the opportunity to share my Christian faith."*

   However I agree with the submission for the Claimants that the presence of a Gideon Bible in the bedside table drawer is a common feature in hotels, that the picture in the hallway shown to the court was not overtly religious and that the notices on the fridge and on the table outside the bedrooms did not amount to a religious establishment. I note further that there is no mention of the Defendant's religion or her beliefs on her website for the business. Accordingly I agree with the description of Counsel for the Claimants that this was a bed-and-breakfast business which had evidence of the faith of those who lived there.

24. In addition to these findings I also note the Defendant's account at paragraph 20 of her witness statement that she "politely explained" to the Claimants that there was a problem and at paragraph 8 of the amended Defence that "the Defendant handled the meeting in a private and respectful manner." This was confirmed in cross examination of Mr Morgan when he said that the Defendant was "polite, courteous and firm that we were not staying".

The developed submissions

1 <u>The direct discrimination issue</u>

The Claimants' submissions

25. The Claimants accept that the motive for direct discrimination is irrelevant and relies on the statement of Lady Hale at paragraph 71 of the judgement in *R (E) v Governing Body of JFS* [2010] 2 AC 728 where she said
"*this was in my view a clear case of direct discrimination... It follows that however justifiable it might have been, however benign the motives of people involved, the law admits of no defence.*"
26. Accordingly in order to make out their claim of direct discrimination the Claimants do not need to satisfy the court of any malign motive by the Defendant. Rather they would have to prove that the Defendant breached regulation 3 (1) and regulation 4 (and defeat the Defendant's arguments on the construction of the regulations which are addressed in issues 2-4 below).

Regulation 3 (1)

27. Regulation 3 (1) provides as follows

"*For the purposes of these regulations, a person ("A") discriminates against another ("B") if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).*

Subsection 3 (4) provides

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

28. Accordingly direct discrimination comprises two elements:

1 less favourable treatment and

2 the reason for that treatment [on the grounds of sexual orientation]

In this case the Claimants contended that the Defendant did directly discriminate against them because

1 she treated them less favourably than she treats or would treat others: she denied them access to a double room in her accommodation when she does or would have permitted others such access and

2 the reason why she treated the Claimants less favourably was their homosexual sexual orientation: she stated as much in refusing them the room and has since made clear that she will not permit any homosexual couples access to the double room.

29. The Claimants rely on the findings on this issue made by the Court of Appeal in *Bull and Bull v Hall and Preddy* [2012] EWCA Civ 83. In *Bull*, the Defendants argued that the reason why the homosexual couple was denied access to a double room was not their sexual orientation as such, but their sexual behaviour, namely sexual relations outside marriage. This is the point advanced by the Defendant at paragraph 12 of her amended Defence (19 J).
30. In *Bull* the Court of Appeal relied on the case of *James v Eastleigh Borough Council* [1990] 2 AC 751. In that case the plaintiff complained that he had been discriminated against on grounds of

his gender because when he attended the local swimming baths with his wife, she did not have to pay but he did. The basis for that was that the local council provided free swimming to those of pensionable age, which was 60 for a woman but 65 for a man. The council argued that its criterion for free admission was pensionable age and excluded both genders so could not be discriminatory. The majority in the House of Lords rejected this approach and held that the concept of state pension age was inextricably linked with discrimination on grounds of sex.

31. At paragraph 40 of Rafferty LJ's judgement in *Bull* she said

"*a homosexual couple cannot comply with the restriction because each party is of the same sex and therefore cannot marry. In James the male plaintiff could never have a pension aged 61. The restriction therefore discriminates against the respondents because of their sexual orientation just as the criterion at the swimming baths discriminated against Mr James because of his sex..... Put another way the criterion at the heart of the restriction that the couple should be married, is* ***necessarily linked*** *to the characteristic of heterosexual orientation."*

And at 61 of the judgement the Chancellor said

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

32. The Claimants submit that this court is required to follow the approach taken by the Court of Appeal in *Bull* to this issue.

On that basis this court should also conclude that the reason why the Claimants were less favourably treated by the Defendant was their sexual orientation. The Claimants submit that the facts are even more stark in this case because the sexual behaviour that was objectionable to the Defendant was "homosexual sexual behaviour" and referred to paragraph 12 of the amended Defence (19 J). On that basis the Claimants contend that the reason why the Claimants in this case were less favourably treated was even more necessarily linked with their sexual orientation than the reason in *Bull*.

Defendant's submissions

33. The Defendant submits that the decisive facts in *Bull* were that the Claimants were in a civil partnership and that the regulations equate marriage and civil partnership.

The Defendant submits that even if regulation 4 applies, there was no direct discrimination and any discrimination did not occur on the basis of the sexual orientation of the Claimants. Counsel argues that this is a restriction which engages sexual practice and not sexual orientation. Secondly the Defendant applied the restriction and the restriction affects people of all sexual orientation and practices who are not married (where the Defendant is aware of the relevant facts). Applying a restriction equally to all persons is not direct discrimination and he relies on

Ladele v London Borough of Islington [2010] IRLR 211 at paragraph 29 "*it cannot constitute direct discrimination to treat all employees in precisely the same way*".

The Defendant would have been perfectly content to let the Claimants separate single rooms (and would have done so if such rooms were available). However the Defendant did not permit homosexual sexual behaviour in her home which is why any difference in treatment occurred. Sexual behaviour is not a protected characteristic and is different from sexual orientation. The European Commission, when proposing legislation in this area, stated "a clear dividing line should be drawn between sexual orientation which is covered by this proposal and sexual behaviour which is not".

34. The Defendant submits that the answer to the question why the difference in treatment occurred and the identification of the factual criteria applied by the Defendant leads to the clear conclusion that there was no direct discrimination. This was because the restriction applied by the Defendant was that there should be no "sexual relations outside marriage" in their double bedrooms. The evidence establishes that the Defendant would have been perfectly content to let single rooms "if they had been available" to the Claimants which shows that the reason for difference in treatment was not "sexual orientation" but sexual behaviour.

    The factual criteria applied by the Defendant affected many persons in a situation different from the Claimants (namely unmarried heterosexual couples). It would be a very unusual form of direct discrimination which affected so many persons in a different position from the Claimants.

35. Counsel for the Defendant relies on the Privy Council decision in *Rodriguez v Minister of Housing* [2009] UKPC 52. In that case a same-sex couple shared a government flat in Gibraltar. The appellant's partner had no statutory right to be granted a new tenancy because the appellant and her partner were not married and could not marry. The appellant asked that her partner be granted a joint tenancy but the application was refused. The appellant applied for a declaration that the refusal to grant a joint tenancy was unlawful because of, among other grounds, discrimination. Baroness Hale at paragraph 19 stated

    "*the difference in treatment is not directly on account of their sexual orientation because there are other unmarried couples who would also be denied a joint tenancy".*

    It was noted that the effect of the policy was more severe on the appellant and her partner because the criterion was one which the appellant and her partner could never satisfy. It was concluded that *"it is a form of indirect discrimination"* albeit one which Baroness Hale noted *"comes as close as it can to direct discrimination*."

36. Counsel for the Defendant submits that the cases which cross the line from indirect to direct discrimination are when the application of any restriction will lead without any other possibility to discrimination on the grounds of the protected characteristic. This was the situation in James where the selection of the pension age meant that men and only men would be disadvantaged by the policy. The regulations had the effect of equating marriage and civil partnership so that James applied. In this case there is no civil partnership between the Claimants.

    Conclusion on direct discrimination

1 was there less favourable treatment?

2 what was the reason for that treatment?

37. In this case it seems to me to be difficult to disentangle the issue of "less favourable treatment" from the "reason why" issue. This is because the test is whether the Defendant treated the Claimants less favourably than she would treat others in cases where there is no material difference in the relevant circumstances.

    Under regulation 3 (4) the fact that one of the persons is a civil partner or the other is married shall not be treated as a material difference.

    Accordingly this seems to equate married heterosexuals and homosexuals in a civil partnership. In this case the Claimants are not in a civil partnership so 3 (4) does not apply and by implication the appropriate comparator would be unmarried heterosexuals.

38. Did the Defendant treat the Claimants less favourably than she would treat others? The Defendant's contention is that she would treat unmarried heterosexual couples in the same manner. In other words the Defendant would have refused an unmarried heterosexual couple the double room (assuming that the Defendant was aware that they were unmarried). The Defendant submits that *Bull* should be distinguished because the respondents in that case were in a civil partnership.

    However as has been pointed out by Counsel for the Claimants, Rafferty LJ at paragraph 40 of the judgement in *Bull* said:

    "*the answer to this appeal lies in a consideration of James. It is fatal to the appellant's case. A homosexual couple cannot comply with the restriction because each party is of the same sex and therefore cannot marry. The restriction therefore discriminates against the respondents because of their sexual orientation just as the criterion of swimming baths discriminated against Mr James because of his sex. For this reason alone it is directly discriminatory. Put another way, the criterion at the heart of the restriction, that the couple should be married, is necessarily linked to the characteristic of an heterosexual orientation. There has in my view been direct discrimination by virtue of regulation 3 (1) and (3)(a) together with regulation 4 – less favourable treatment on grounds of sexual orientation.*"

39. It is clear to me from this passage that the decision of Rafferty LJ in the Court of Appeal in *Bull* rested on the basis that a homosexual couple cannot marry and therefore the restriction discriminates against the respondent because of their sexual orientation. The reasoning and her conclusion as set out at paragraph 40 did not depend on the fact of whether the respondents were in a civil partnership. Accordingly therefore whilst I accept that the facts of this case are different in that the Claimants are not in a civil partnership, in my view this is not a determinative factor in the reasoning of Rafferty LJ in reaching her conclusion on the issue of direct discrimination in *Bull*.
40. As far as the judgement of the Chancellor is concerned he referred to subparagraph (4) of the regulations and the argument that Mr and Mrs Bull applied the restriction to persons of heterosexual and homosexual orientation alike if they are not married. The Chancellor concluded at paragraph 61

"*but in agreement with Rafferty LJ that cannot in my view be a sufficient answer. The former may be married but the latter cannot be. It follows that the restriction is absolute in relation to homosexuals but not in relation to heterosexuals. In those circumstances it must constitute discrimination on grounds of sexual orientation. Such discrimination is direct. As Rafferty LJ has pointed out there is a direct analogy with the decision of the House of Lords in James v Eastleigh Borough Council. This conclusion is not affected by the existence or terms of regulation 3 (4).*"

Hooper LJ agreed with the judgements of Rafferty LJ and the Chancellor.

41. In my view the issue of civil partnership was not a determinative factor in the reasoning of the Court of Appeal in *Bull* and I am therefore bound in relation to this issue by the reasoning set out above as forming the basis for the decision of the Court of Appeal in that case on direct discrimination.

    Accordingly applying that reasoning I find that there was less favourable treatment of the Claimants than heterosexual couples because they were refused a double bedroom.

42. What was the reason for this less favourable treatment?

    At paragraph 15 of Rafferty LJ's judgement she said:

    "*the appellants argued that since the restriction engages sexual practice not sexual orientation, as applied it affects those of any sexual orientation and practice who are not married. Applying a restriction equally to all is not direct discrimination; Ladele v London Borough of Islington.... The submission continues that were the discrimination on the basis of marital status or sexual conduct, then regulation 3 (4) could not convert it into direct discrimination on the basis of sexual orientation.*"

    Rafferty considered the case of James

    "*although at first it might have appeared that the criterion for free admission was pensionable age, and thus not related to sex, in my view once one looked behind the pension, so as to speak, it was clear that by virtue of the statutory age threshold criterion divided potential beneficiaries into two groups, men and women*."

43. The Claimants could not be married and could never therefore satisfy the criterion applied by the Defendant. In my view there was less favourable treatment because the Defendant would never allow the Claimants to stay in a double room and it is no answer to say that the Defendant would have allowed the Claimants to stay in single rooms. The offer of a single room does not place the Claimants in the same position as married heterosexual couples. On this basis there was a division between heterosexual and homosexual couples in the same way as there was a division between men and women in the case of James. Further on the authority of *Bull* the reason for the less favourable treatment was sexual orientation not sexual relations.
44. I am aware that the Court of Appeal decision in *Bull* is the subject of an appeal to the Supreme Court but this court is bound by the law as it stands. If I am wrong and the decision in *Bull* should have been distinguished on the basis that the Claimants in this case are not in a civil partnership, then I should add the following. On the facts of this case, if the comparison is between the treatment of homosexual couples who are not in a civil partnership and heterosexual couples

who are unmarried then on the evidence before the court I find that the Defendant treated the Claimants less favourably than she would treat unmarried heterosexual couples. Although the Defendant gave the example of her niece who she would not allow to share a room with her boyfriend, her evidence (paragraph 18 of her witness statement) is also to the effect that the Defendant does allow some unmarried couples to stay in the double rooms because as she indicated:

" it is impossible to know whether a heterosexual couple is married unlike with a homosexual couple and it would be offensive to pry into their personal lives either when booking or on arrival. Many married couples do not share the same name. As a result, we have had some unmarried heterosexual couples who have stayed after finding out that they were unmarried."

45. Accordingly even though I accept the evidence that she has turned away several unmarried heterosexual couples from the outset where it was obvious that they were unmarried from the fact that they only wanted to use the room during the day, it is the case that the Defendant treated the Claimants less favourably than she would treat unmarried couples who booked and arrived as the Claimants had done. Accordingly if the issue of civil partnership is key, in my view the Claimants would succeed on the alternative comparison of the Claimants and unmarried heterosexual couples. As to the "reason why" the Claimants were treated less favourably, I adopt the reasoning of the Court of Appeal in relation to which the arguments before this court were identical.

2 <u>The “special care and attention” issue-regulation 6 (1)</u>

46. The Defendant argues that even if any direct discrimination is made out in principle, the same was not unlawful because regulation 4 does not apply to her actions by virtue of the operation of regulation 6 (1) which exempt from the scope of regulation 4
"*anything done by a person as a participant in arrangements under which he (for reward or not) takes into his home, and treats as if they were members of his family, children, elderly persons or persons requiring a degree of special care and attention*".
47. The Claimants averred that regulation 6 (1) was not intended to apply to the provision of bed-and-breakfast accommodation and that it does not apply on the facts of this case in any event.
48. Regulation 4 sets out one of the "spheres" in which direct discrimination is rendered unlawful by the regulations, namely the provision of "goods, facilities and services" and is the sphere in which the Claimants put their case.
Regulation 4 states *"it is unlawful for a person ("A") concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person ("B") which seeks to obtain or to use those goods, facilities or services –*
(a) by refusing to provide B with goods, facilities or services,
(b) by refusing to provide B with goods, facilities or services of a quality which is the same as or similar to the quality of goods, facilities or services that A normally provides to (i) the public, or (ii) a section of the public to which B belongs,
(c) by refusing to provide B with goods, facilities or services in a manner which is the same as or similar to that in which A normally provides goods, facilities or services to (i) the public, or (ii) a section of the public to which B belongs,

(d) by refusing to provide B with goods, facilities or services on terms which are the same as or similar to the terms on which A normally provides goods, facilities or services to (i) the public, or (ii) a section of the public to which B belongs,

49. The Claimants submit that the Defendant carried out an act in breach of regulation 4 (1) in that she

    1 refused to provide the Claimants with the facility or service of the double room contrary to regulation 4 (1) (a) and/or

    2 refused to provide them with facilities or services which were the same as or similar to the quality of facilities or services that she normally provides to the public and/or section of the public to which the Claimants belong (namely paying guests at her bed-and-breakfast accommodation), contrary to regulation 4 (1) (b)

    3 refused to provide them with facilities or services in a manner which was the same as or similar to that which she normally provides to the public and/or the section of the public to which the Claimants belong contrary to regulation 4 (1) (c)

    4 refused to provide them with facilities or services on terms which were the same as or similar to those which she normally provides to the public and/or the section of the public to which the Claimants belong, contrary to regulation 4 (1) (d)

50. The Claimants note that the Defendant does not appear to deny the approach set out above and this aspect of the applicability of regulation 4 (1) did not appear to have been in issue in *Bull*: Rafferty LJ simply concluded at paragraph 40 of the judgement that regulation 4 had been breached.

51. Given my conclusion above in relation to direct discrimination, in my opinion there is on the facts before me a breach of regulation 4 (1) (a) in that the Defendant was concerned with the provision to the public of facilities and services namely bed and breakfast accommodation and she refused to provide the Claimants with the double room. If I am wrong on this then in my view there was a breach of paragraph (d) on the basis that, since she was only prepared to offer them a single room, she refused to provide the Claimants with the services on terms which are the same or similar to the terms on which she normally provided facilities to guests. In my view offering them the alternative of staying in separate single rooms is not providing the services on terms which are the same or similar to the terms on which the Defendant normally provides the facilities or services to the public or alternatively, the section of the public to which the Claimants belong (namely unmarried couples) since in my view the Defendant would not in these circumstances have withdrawn the offer of the double room from an unmarried heterosexual couple and insisted that the only alternative was a single room. Therefore the terms on which the services or facilities were provided were in my view not the same or similar. It does not go to whether a single room should be compared with a double room but the basis on which the room was made available.

52. However the Defendant relies on the exception in regulation 6 (1) which provides that "*regulation 4 does not apply to anything done by a person as a participant in arrangements under which he (for reward or not) takes into his home, and treats as if they were members of his family, children, elderly persons, or persons requiring a special degree of care and attention*." The Defendant submits that this means regulation 4 does not apply to anything done by a person in arrangements under which she takes them into her home and treats them as if they were members of the family or persons requiring a special degree of care and attention. The Defendant submits that the double bedroom in question is in the heart of the Defendant's

home, where the Defendant and members of the family continued to live. The Defendant treats guests as if they are members of the family. She provides a special degree of care and attention to the guests staying in her home, and relies on the evidence of the comments in the Defendant's guestbook.

Conclusion on regulation 6(1)

53. I accept that, unlike *Bull* where the accommodation for guests appears to have been in a separate part of the house (paragraph 22 of Rafferty LJ judgement referring to the first instance decision), in this case the double bedroom is in the heart of the Defendant's home. It is not in a separate part of the house. I accept the evidence of the Defendant (paragraph 15 of the witness statement) that in this case most guests had their breakfast in the Defendant's own kitchen/dining room. I also accept the evidence that she was on occasions helpful in that she collected guests from the station free of charge or attended to them when they were ill. The degree of care and attention that she provided is evidenced from the comments in the Defendant's guestbook. I have found that a matter of fact that she provided a personal and caring, and even loving, service.
54. However in my view the Defendant's interpretation strains the syntax of regulation 6(1) by trying to interpret the phrase so as to make the object of the sentence "members of the family, children, elderly persons and persons requiring a special degree of care and attention." I do not agree with this. In my view the correct interpretation is that "how" a person treats the relevant categories is "as if they were members of the family" and "who" is so treated are children, elderly persons and persons requiring a special degree of care and attention. Accordingly it seems to me on a straight reading of the regulation 6 (1) that this exception applies only to "children, elderly persons or persons requiring a special degree of care and attention". The test is whether these classes of individuals are a) taken into the Defendant's home and b) treated as if they were members of the family. Therefore the first question is whether the guests fell within any of the three specified categories. The first two categories, children and elderly persons, do not apply. In relation to the third, I am inclined to the view of Counsel for the Claimants that the service was no more than one would hope for in a good bed and breakfast establishment. In any event it has not been established that the guests "required" as opposed to "received" a special degree of care and attention.
55. In my view the language of 6.1 giving the words their normal meaning, is clear and unambiguous. Accordingly even if the guests received a special degree of care and attention, this does not fall within the scope of the exception and the exception in paragraph 6 (1) does not apply in this case.
56. I have at this point to consider the Parliamentary materials that the Claimants sought to rely upon in support of their case. The Claimants' primary position is that the language in issue is clear and unambiguous and the court should rely on the general principle of statutory interpretation set out by Lord Nicholls in *R (Spath Holme) v Secretary of State for Environment* [2001] 2 AC 349 that "language is to be taken to bear its ordinary meaning in the general context of a statute". However the Claimants submit that the court can if it so wishes consider the Parliamentary material for confirmation of its view.
    Alternatively if I am wrong in finding that the words are unambiguous, then the Claimants seek to rely on the Parliamentary material on the basis that the conditions set out in *Pepper v Hart* [1993] AC 593 are met.

57. In reliance on these Parliamentary materials the Claimants submit that it was clearly Parliament's intention that the provision of bed and breakfast accommodation would be caught by the regulations.

Lord Nicholls of Birkenhead in *Spath Holme* said

"*statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to an intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the Minister or other persons who promoted the legislation. Nor is it the subjective intention of the draughtsman, or of individual members or even the majority of individual members of either house..... As Lord Reid said in Black-Clawson Ltd ... "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament use.*"

Lord Nicholls referred to the words of Lord Diplock in *Fothergill v Monarch Airlines*

"*the source to which Parliament must have intended the citizen to refer is the language of the act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon the meaning but was required to search through all that happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted communicated to those affected by the legislation*."

Lord Nicholls then continues "*this constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation enacted. This is a matter of everyday occurrence.*

That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable."

58. It is clear from Lord Nicholls that in order for Parliamentary statements to be relied upon as an external aid, they must be clear and unequivocal. He said
"if, however, the statements are clear and were made by a minister or other promoter of the bill, they qualify as an external aid. In such a case the statements are a factor the court will take into account in construing legislation which is ambiguous or obscure or productive of absurdity. They are then as much part of the background to the legislation as, say, government White papers. .... As with other extraneous material, it is for the court, when determining what was the intention

of Parliament in using the words in question, to decide how much importance, or weight, if any, should be attached to a government statement."

59. In support of the Claimants' submission that the court can if it wishes consider the Parliamentary material for "confirmation" of its view the Claimants also cited the House of Lords decision in *Chief Adjudication Officer v Foster* and the statement of Lord Bridge that
"the Parliamentary material endorses the conclusion I had reached as a matter of construction independently of that material".
However in that particular paragraph from which that extract is taken it is clear that the section in question was held to be ambiguous and therefore was a situation where the rule in *Pepper v Hart* applied. In addition in that particular case the material that was considered was an account of the circumstances in which the specific sections came to be enacted and the statements by the government spokesman moving the relevant amendment in both Houses.
60. The Claimants also rely on the conditions in *Pepper v Hart* being satisfied. The conditions in Pepper v Hart are summarised by Lord Bingham in *Spath Holme* at 391D namely that reference to statements made in Parliament for the purpose of construing a statutory provision was permissible only where
    (a) legislation was ambiguous or obscure, or led to an absurdity
    (b) the material relied on consisted of one or more statements by a Minister or other promoter of the bill together, if necessary with such other Parliamentary material as might be necessary to understand such statements and their effect
    (c) the effect of such statements was clear
61. It is therefore necessary to consider the nature of the material produced to the court by the Claimants.
    1 <u>A paper dated March 2007 setting out the Government response to consultation prior to enactment of the regulations.</u>
    It seems to me that the submissions for the Defendant are correct that this is not a statement by the Minister in Parliament as to what the regulations achieve but rather a statement of the Government's position in response to the replies received in the consultation process. Although the Government's intentions in relation to "commercial bed-and-breakfast establishments with religious owners" are clearly stated at page 13, it was not demonstrated to the court that the Government's intentions as set out in these regulations were implemented. Accordingly in my view although it may be the case that the regulations did implement the Government position as stated in the consultation paper, there was no evidence before the court which would entitle it to draw that conclusion.
    2 <u>Statements during the Parliamentary debates on the regulations of Lord Anderson and Lord Smith.</u>
    The extracts from Hansard for 21 March 2007 appear to be the debate in the House of Lords on the regulations where the only option available to the House was to accept or reject the regulations. Lord Smith speaks in favour of the regulations and in doing so states that the regulations seek to tackle discrimination and detriment to lesbian and gay people and gives as an example, gay partners turned away from bed-and-breakfast accommodation. The statement of Lord Anderson was a statement explaining why he did not support the regulations. He states that the government has given greater weight to the demands of gay rights than to the concerns of mainstream religious bodies and gives as an example a Muslim couple who decide to operate

bed-and-breakfast accommodation and refuse a homosexual couple who will be subject to civil liabilities.

The Defendant submitted that this material did not cross the threshold to be admitted. He relied on the authority of *Spath Holme* where Lord Bingham dealt with the scope of a power conferred by the relevant section. Lord Bingham having set out the conditions in *Pepper v Hart* stated at 391G

"*it is one thing to rely on a statement by a responsible minister or promoter as to the meaning or effect of a provision in a bill thereafter accepted without amendment. It is quite another to rely on a statement made by anyone else, or even by a minister or promoter in the course of what may be lengthy and contentious Parliamentary exchanges, particularly if the measure undergoes substantial amendment in the course of its passage through Parliament*."

At 392C he said "*here the issue turns not on the meaning of the statutory expression but on the scope of the statutory power. In this context a minister might describe the circumstances in which the government contemplated use of a power, and might be pressed about exercise of the power in other situations which might arise. No doubt the Minister would seek to give helpful answers. But it is most unlikely that he would seek to define the legal effect of the draughtsman's language or to predict all the circumstances in which the power might be used, or to bind any successor administration."*

In this case the court is not concerned with the scope of a power but with the meaning of a statutory expression. Although the debate from which the extracts are taken appears to be a debate in which the only option was to approve or reject the regulations and therefore it is not a situation where the measure might have been amended in the course of its passage through the House, nevertheless in my view the views expressed by the peers were not statements by a Government minister and cannot be taken to define the legal effect of the draughtsman's language. Accordingly I do not think that these statements satisfy the conditions laid down in *Pepper v Hart*.

3 Guidance

The Claimants also relied on guidance published by the Department for Communities and Local Government in September 2007 on the regulations. However in my view the submission for the Defendant that guidance cannot be a substitute for a proper interpretation of the legislation must be correct. For the same reason I do not think any weight can be attached to the guidance provided by the Equality and Human Rights Commission as an aid to interpretation of the statutory provision.

4 Hansard written answers from the Secretary of State for the Home Department in relation to the Equality Bill.

The Claimants accept that this statement by the Minister relates to the Equality Act 2010 rather than the regulations in issue before this court. In my view on its face it does not provide a statement as to the position under the regulations and accordingly it cannot be said to provide a statement as to the meaning or effect of the 2007 regulations as distinct from the subsequent Equality Act.

62. The Claimants submit that even if the material does not satisfy the conditions in *Pepper v Hart* the court has a broad inherent jurisdiction to admit material. The Claimants rely on a statement in Halsbury's laws at 1124 and in particular the cases of *Foster* and *Johnson*. In *Foster* Lord Bridge considered the circumstances in which the relevant sections came to be enacted and the statements made by the government spokesmen moving the relevant amendment in both

houses. In *Johnson* Lord Roskill considered a proposed amendment and the response of the relevant Minister. It is not clear to me that these cases go beyond the principle laid down in *Pepper v Hart* that the material relied upon should consist of one or more statements by a Minister or other promoter of the bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect.

63. Although I accept that the material submitted by the Claimants indicates that the issue of whether bed-and-breakfast establishments should be caught by the regulations had been considered prior to the regulations becoming law and from the Government response to the consultation paper, it was the intention of the Government at that stage to include such establishments, in my view the Claimants did not produce material from which the court could be clear that this intention was carried through. From the debates in Parliament it would again appear that bed-and-breakfast establishments were to be caught but again in my view it was not demonstrated that the views expressed by the peers did relate to the regulations as enacted nor, as they were not speaking for the Government, whether their views were correct. Whilst therefore the Parliamentary material did support the Claimants' case, in my view none of the items relied upon by the Claimants either individually or taken together, were sufficient either to meet the threshold test in *Pepper v Hart* or to justify the exercise of any broader discretion, if in fact such discretion exists, such that they qualify as an external aid to be taken into account in construing the legislation if, contrary to my finding, the legislation were held to be ambiguous or obscure or productive of absurdity.

3 The "not a hotel" issue-regulation 4 (2) (b)

64. Regulation 4 (2) (b) provides

"paragraph 1 applies in particular to

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

It has not been suggested that the Defendant falls within regulation 4(2) as providing accommodation in a hotel. However the Claimants submit that the business does fall within the meaning of the terms a "boarding house" or a "similar establishment" to a hotel or boarding house.

The Defendant argues that her business does not fall within the scope of regulation 4 because the room in question related to premises which were also occupied by her own family.

Counsel for the Defendant submitted that a boarding house was unlikely to be a house where people live.

65. The Claimants provided the Oxford dictionary definition of "a boarding house" as being "*a private house which people pay to stay in for a short time*". The Claimants also submit that the inclusion of a boarding house within the regulation routinely involves paying guests sharing accommodation with a service provider's family. Accordingly the Claimants submit that the fact that the Defendant's family shared the accommodation with her paying guests cannot mean that it is not covered by regulation 4.
66. The meaning of boarding house was not explored beyond the dictionary definition and the submissions of counsel. But the reference to "private house" does suggest to me that it does involve guests staying in the house with the service provider and to that extent "sharing

accommodation" whether or not it is in fact separated into separate areas of the house. I am inclined to agree with the submission for the Claimants that boarding house seems a dated expression. However I have not had any evidence in support of the submission that a distinction should be drawn between a boarding house and a bed-and-breakfast establishment. Accordingly applying the dictionary definition of "*a private house which people pay to stay in for a short time*" it seems to me that a bed-and-breakfast establishment is capable of falling within the meaning of the term "boarding house" in the regulation.

67. However in the absence of any evidence other than the dictionary definition in relation to the meaning of "boarding house" in this context, I should consider the alternative submission namely that it is a "similar establishment" to a hotel or boarding house.
In her witness statement at paragraph 15 the Defendant states
"*at the very heart of the business is the very personal nature of the relationship between myself, as host and the guests which distinguishes it from other types of business offering accommodation, such as hotels. Guests are invited into our home and for the length of their stay are treated as members of the family."*

68. Counsel for the Defendant also submitted that applying the principle of "*eiusdem generis*", a "small bed-and-breakfast" could not be within the scope of 4 (2)(b). The Defendant refers to the judgement of Rafferty LJ at 51 where she referred to the appropriate balance between competing rights of hoteliers and (among others) homosexuals.

69. I do not accept that the service provided by the Defendant in her bed-and-breakfast business would preclude it from being a "similar establishment" to a hotel or boarding house. Hotels obviously may be large and may be impersonal but equally they may be small as was the case in *Bull* with only seven guest rooms and in a small hotel there may well be a personal service. A hotel provides short-term accommodation to members of the public on a commercial basis and a bed-and-breakfast establishment in my view provides a similar service. I accept that in a hotel guests are not taken into the owner's home in the same way as a bed-and-breakfast. However I do not go so far as to say that guests in the Defendant's bed-and-breakfast establishment are treated as members of the family. In relation to the type of facilities provided, the Defendant provides ensuite rooms and even access to a swimming pool. The Defendant does not deny that she is running a business providing accommodation and breakfast to a wide variety of guests. At paragraph 13 and 14 of her witness statement the Defendant states that
"*the average number of bed nights was 60 per month in the year ended 31st March 2011. The average number of guests for the same period was 31 per month ...."*
"*During the week guests are typically business people..... At weekends and during holiday periods guests are more likely to be visiting family or friends or attending weddings or other functions. A few guests have used my bed-and-breakfast as a holiday destination.... I regularly have international guests and so far I have received visitors from some 25 countries....."*
It is clearly a commercial venture in the same way as a hotel is a commercial venture. At paragraph 8 of her witness statement the Defendant states that the primary reason she started the bed-and-breakfast business from the property was financial in order to supplement the earnings of her husband since he entered full-time church leadership.

70. The test in the regulations is whether the establishment is "similar" and not whether it is the same or identical to a hotel or boarding house. For the reasons stated above I do not think the number of rooms, the facilities or the nature of service provided by the proprietor/manager can have been intended to be the determinative factors. Furthermore if a bed-and-breakfast

establishment is not the same as a "boarding house" in the context of these regulations as discussed above, it must applying the dictionary definition of boarding house referred to above, in my view be "similar". If I am wrong therefore and a bed-and-breakfast establishment is not within the meaning of a "boarding house" in the regulations, then in my view the Defendant's bed-and-breakfast establishment is a "similar establishment" to the category of establishments to which hotels and boarding houses belong and therefore within the scope of the regulation. In my view if the principle of *eiusdem generis* is applied the Defendant's bed-and-breakfast is of the same kind.

71. The Defendant submits that if the regulations had been intended to apply to bed-and-breakfast services that could have been made clear in the regulations. Further the Defendant submits that the interpretation that regulation 4 does <u>not</u> apply is consistent with the exception set out in regulation 6 (2) which provides that regulation 5 does not apply to anything done in relation to the management of a part of any premises if the landlord resides in another part of the premises. Whilst I accept that Lord Nicholls in *Spath Holme* referred to internal aids to construction and said "*Other provisions in the same statute may shed light on the meaning of the words under consideration*", I do not think that regulation 6 (2) can shed light on the meaning of the words given the express reference in 4 (2) (b) to a boarding house which applying the dictionary definition is defined as a "private house" and accordingly in my view is an establishment where the landlord would reside in the premises.
72. In my view the reference in Rafferty LJ's judgement to hoteliers is of no assistance in the interpretation of the application of 4(2) (b) in this case, since in *Bull* the establishment called itself a "Private hotel" and the interpretation of the words "similar establishment" did not fall to be considered.
73. For completeness I do not think that Defendant's establishment would fall within 4(2)(a) "a place which the public are permitted to enter" since giving the words their normal meaning, in my view the public is not permitted to enter as of right. Only that section of the public, namely guests are permitted to enter. I think it would strain the normal meaning to find that it fell within paragraph (d) "facilities for entertainment, recreation or refreshment" or (e) "facilities for transport or travel".
74. Given my conclusion I do not need to have regard to what I will call the "Parliamentary material" put forward by the Claimants. In any event for the reasons set out above in my view the material submitted by the Claimants does not in my view pass the threshold test to be considered as an external aid to construction.

4 <u>The human rights issue</u>

75. The Defendant relies on section 3 of the Human Rights Act which provides that "(1) *So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*"

The Defendant's overarching submission is that the regulations have to be read so as to give effect to the rights of the Defendant protected by the Human Rights Act. The Human Rights Act is primary legislation and therefore if the effect of the regulations would amount to a breach of the Defendant's rights under the Human Rights Act, the court can read the regulations down either on the basis of ordinary construction of the regulations or on the basis of justification. Counsel submits that under Article 17 one right does not trump another.

76. Article 8 of the Convention provides
    1. "*Everyone has the right to respect for his private and family life, his home and his correspondence."*
    2. *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, but the protection of health or morals, of the protection of the rights and freedoms of others*".

    Article 9 provides

    1. "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
    2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."*

Article 8 (1) rights are not absolute but qualified in the sense that certain interferences with them are justified in a democratic society under Article 8 (2). Similarly while the freedom to hold or change your religious belief under Article 9(1) is absolute, limitations on the freedom to manifest one's religion or belief can be justified provided they meet the criteria of Article 9 (2).

The European Convention prohibits discrimination under Article 14

> "*The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with the National minority, property, birth or other status*".

"Other status" has been interpreted to include sexual orientation.

Article 9 claim

77. The Claimants accept that the Defendant holds the belief that she describes and do not seek to impugn her right to do so. The Claimants also accept that the Defendant's beliefs fall within the Article 9(1) concepts of "thought conscience and religion". However the Claimants submit that the natural interpretation of the regulations which would find her to have acted unlawfully by refusing her services to a gay couple does not lead to any incompatibility with her Article 9(1) rights.
78. The issues which the court therefore has to decide on this point are
    (i) are the Defendant's rights to hold religious beliefs affected
    (ii) do her actions amount to a manifestation of her religious beliefs?
    (iii) if the answer to the question (ii) is "yes", is any interference with these rights justified in accordance with Article 9(2)?

79. The Claimants submit that the Defendant's decision to run a bed and breakfast business does not affect her right to hold religious beliefs under Article 9 (1) nor is it a manifestation of her religious beliefs under Article 9 (2).
In *C v United Kingdom* (1983) 37 DR 142 the Commission held that Article 9
"*does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief*"
The Claimants cite Lord Hoffmann in *R(SB) v Governors of Denbigh High School* [2007] 1 AC 100 where he said at paragraph 50
"*Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing*".
In *C*, the Commission said that Article 9 primarily protects the sphere of personal beliefs and religious creeds and in *Pichon and Sajous v France* Application 49853/99 the Strasbourg court said it "*also protects acts that are closely linked to those matters such as acts of worship or devotion forming part of the practice of any religion or a belief*".
Further the Claimants submit that the manifestation of religious belief must be compatible with the rights and freedoms of others.
80. In C the Commission declared inadmissible a claim by a Quaker that he should not be required to pay tax insofar as it was used to finance weapons research, on the grounds that it would infringe his Article 9 rights and in Pichon the court held that Article 9 did not protect pharmacists who claimed that their religious beliefs justified their refusal to sell contraceptives as the sale of contraceptives was legal and occurred nowhere other than in a pharmacy and the pharmacists could "*manifest their beliefs in many ways outside the professional sphere".*
The Claimants submits that in this case the Defendant has chosen to operate in the public sphere. She does not run a religious establishment but a bed-and-breakfast business open to members of the public. This is not a manifestation of her religious rights.
81. The Claimants relied on the acceptance by the Court of Appeal of this argument in *Bull*. In particular at paragraph 47 of her judgement Rafferty LJ quoted a summary of the case law on the manifestation issue that had been given in *Ladele* citing the relevant principles from the *SB Pichon* and *C* cases and concluded at 48
"*The arguments there set out are to my mind compelling. Their application to these facts is even clearer if, in paragraph 56 for "pharmacists" one substituted reference to the appellants, when it might have read:*
"Accordingly, the article did not protect hoteliers who claimed that "their religious beliefs justify their refusal to provide double beds to homosexual couples" as "the provision of hotel rooms is legal and occurs nowhere other than in a hotel" and the hoteliers could "manifest [their] beliefs in many ways outside the commercial sphere".
On that basis the Claimants submit that in *Bull* the appellants' decision to run a hotel business was not deemed to be a manifestation of their Article 9 rights. The Claimants submit that this court is bound to adopt the reasoning of the Court of Appeal on this issue and should similarly conclude that the Defendant's running of her bed-and-breakfast business did not amount to a manifestation of her Article 9 rights.
82. In my view the question is not correctly phrased by the Claimants. The question is not whether the decision to run a bed-and-breakfast business affects her right to hold religious beliefs or is a manifestation of her religious beliefs. The question is whether running a bed-and-breakfast business along Christian principles is a manifestation of her religious beliefs and whether a

restriction on her business preventing her from operating in accordance with her Christian principles affects her right to hold religious beliefs.

83. As to the latter point I think this is dealt with by the dicta cited above from the cases of *C* and *Denbigh High School* and accordingly I do not think that the interpretation of the regulations to include bed-and-breakfast establishments would affect her right to hold religious beliefs.
84. In relation to the question as to whether running a bed-and-breakfast business along Christian principles is a manifestation of her religious beliefs, the Claimants submit that it does not and that this court is bound by the reasoning of the Court of Appeal in *Bull* on this issue. However in my view the Claimants' submission as to the findings of the Court of Appeal on this issue is not supported by close examination of the judgements.
    At paragraph 46 of Rafferty LJ's judgement she noted that the first instance Judge found that the appellants running of a hotel along Christian principles was a manifestation of their religion. In her conclusion at paragraph 51 she concludes
    "*to the extent to which the regulations limit the manifestation of the appellant's religious beliefs, the limitations are necessary in a democratic society to the protection of the rights and freedoms of others".[emphasis added*]
    It seems to me therefore that Rafferty LJ was assuming that the finding of the judge at first instance was correct but did not specifically address the point.
    However the Chancellor stated at paragraph 62 of his judgement that
    "*the restriction on the letting of the hotel's double bedded rooms applied by Mr and Mrs Bull in the management of their hotel is a manifestation of their religious belief within Article 9 (2)."*
    Hooper LJ stated that he agreed with both judgements.
85. On the second question therefore of whether the restriction applied by the Defendant in this case is a manifestation of her religious belief, I am inclined to agree with the views of the first instance Judge and the Chancellor but I reject the submission that this court is bound by the Court of Appeal decision in *Bull* on this question.
    In relation to the particular facts of this case, the Claimants took the court through various photos of items on display in the Defendant's house and questioned the extent to which the Defendant makes it obvious that she runs her business along the lines of a religious establishment. The Claimants pointed out that there was no mention of religion on the Defendant's website. Having referred to the nature of the material displayed the Claimants submitted that it was not run as a religious organisation but rather as a bed-and-breakfast business which evidences the faith of those who live there.
    In my view the Defendant did not disagree with this analysis. At paragraph 17 of the witness statement the Defendant describes it as a "*business.. run by a Christian along biblical principles*". She continues
    "*there are Bibles and tracts in every room and Bible verses on display. There are flyers on the noticeboard in the kitchen/dining room from missionaries we support. The conversation with invariably comes around to my husband's employment as a church leader and this presents me with the opportunity to share my Christian faith*."
    At paragraph 18
    "*because I am a Christian, I believe that monogamous heterosexual marriage is the form of partnership uniquely intended for sexual relations between persons and that homosexual sexual relations (as opposed to homosexual orientation) and heterosexual sexual relations outside*

marriage, are wrong. Therefore since I started the business, I have sought to restrict the sharing of the double rooms, to heterosexual, preferably married couples."

86. In my view the pictures and notices around the house are a manifestation of the Defendant's religious belief but it is not the display of these materials which is the issue before the court. I accept, and I do not think the Defendant sought to establish the contrary, that this is not a religious establishment.
87. However, in my view the refusal of access to the double room and the restriction imposed in this case by the Defendant in relation to the double rooms clearly stemmed from the Defendant's religious beliefs and accordingly can be regarded as a manifestation of her religious beliefs within Article 9 (2).
88. On this basis I therefore have to turn to question (iii) namely is the limitation which would be imposed on the Defendant's right to manifest her religion if the regulations are interpreted to prevent her applying the restriction, justified under Article 9 (2)?

The Claimants submit that the elements of Article 9(2) are satisfied in that

(i) the limitation is "prescribed by law" in the form of the regulations and
(ii) the limitation is "necessary in a democratic society .....for the protection of the rights and freedoms of others" namely homosexual people and/or "the protection of morals" namely a respect for human dignity and difference.

In support of their argument on justification the Claimants rely on the following:

(i) running a bed-and-breakfast business is a less fundamental manifestation of the Defendant's religious rights than for example her attendance at religious services. On that analysis a relatively low level of justification is needed.
(ii) domestic law recognises the principle that it is not acceptable to discriminate against individuals because of their sexual orientation.
(iii) the principle that it is wrong to discriminate on grounds of sexual orientation has become established as an important human rights standard particularly under the European Convention of Human Rights.
(iv) recognition by the European Court of Human Rights that different treatment on grounds of sexual orientation is not only covered by Article 14 but requires particularly cogent reasons in order to be justified, has also been given effect under the Human Rights Act by the House of Lords in *Ghaidan v Godin-Mendoza [2004] UKHL 30.*
(v) the proper balance to be struck between religious beliefs and freedom from discrimination on grounds of sexual orientation was considered at some length by the Parliamentary Joint Committee on Human Rights prior to the introduction of the regulations.
(vi) The Government conducted an extensive consultation process prior to the introduction of regulations which again specifically considered the issue and which concluded that the appropriate balance was struck
(vii) recent cases which have considered the balance to be struck between religious beliefs and freedom from discrimination on grounds of sexual orientation in fields other than the provision of bed-and-breakfast accommodation namely *Ladele* in relation to the requirements registrar to carry out civil partnership ceremonies, *McFarlane v Relate Avon* [2010] ICR 107 which concerned a relationship counsellor providing counselling to

same-sex couples, *R (on the application of Johns) v Derby City Council* [2011] EWHC 375 as to whether a council should consider adverse views of homosexuality in relation to potential foster carers

(viii) the decision in *Bull* and in particular the conclusion of Rafferty LJ at paragraph 51 "*I conclude that, to the extent to which under the regulations the restriction imposed by the appellants upon the respondents constitutes direct discrimination, and to the extent to which the regulations limit the manifestation of the appellant's religious beliefs, the limitations are necessary in a democratic society for the protection of the rights and freedoms of others. The appellants simply seek a further exception from the requirements in the regulations, which already provides exceptions, in the case, for example, certain landlords and of those who permit others to share their homes. The Secretary of State has drawn what she considers the appropriate balance between the competing claims of hoteliers and (amongst others) homosexuals. Her decision has been approved by affirmative resolution. This court would be loath to interfere with her conclusions*."

89. I shall deal first with the submission that this issue was resolved in the Claimants' favour in *Bull* and that these findings bind this court. In relation to the decision in *Bull* I note the conclusion of Rafferty LJ set out above and the following conclusions of the Chancellor in that case:
At paragraph 63 of his judgement he said
"*it is clear from the terms of Article 9 (2) that the right to manifest one's beliefs, as opposed to the right to hold it, is qualified by such "limitations as are prescribed by law and are necessary in a democratic society.... for the protection of the rights and freedoms of others". Such rights include the rights of Mr Preddy and Mr Hall under the 2007 regulations. If, as I conclude, Mr and Mrs Bull directly discriminated against Mr Preddy and Mr Hall then the fact that they did so by way of manifestation of their religious belief does not give rise to any incompatibility between the rights of Mr and Mrs Bull under Article 9 and the rights of Mr Preddy and Mr Hall under the 2007 regulations."*
At paragraph 65 and 66 the Chancellor continued:
"*The effect of such limitations of the right to manifest a religious belief is exemplified by the decision of the Court of Appeal in [Ladele]. As counsel for Mr Preddy and Mr Hall put it, no individual is entitled to manifest his religious belief when and where he chooses so as to obtain exemption in all circumstances from some legislative provisions of general application. The judge concluded:.... In so far as the regulations do affect this right they are.... a necessary and proportionate intervention by the state to protect the rights of others... The regulations give effect to Article 14, namely the prohibition of discrimination."*
"I agree. Although described as private, the hotel owned and run by Mr and Mrs Bull is available to all. Moreover the rooms available to the guests are not in the part of the building Mr and Mrs Bull occupy as their home. The religious beliefs of Mr and Mrs Bull do not exempt them from observing the regulations in their ownership and management of the hotel. In short they are not obliged to provide double bedded rooms at all, but if they do then they must be prepared to let them to homosexual couples, at least if they are in a civil partnership, as well as to heterosexual married couples."

90. The obvious distinction to be drawn in this case from the conclusions of the Chancellor in *Bull*, is that the Defendant's establishment is a bed-and-breakfast establishment and not called a hotel, the rooms which are let by the Defendant are on the same floor as the Defendant's own

bedroom and that the Claimants are not in a civil partnership. Further taking the reasoning of Rafferty LJ referring to *Pichon* it could be said that the provision of bed-and-breakfast accommodation could occur elsewhere namely in an establishment such as a hotel.

91. However although there are these differences noted in the paragraph above, the question is whether these differences formed part of the reasoning for the decision in the Court of Appeal. In this case as in *Bull*, the establishment is one which is available to all. The Chancellor concluded that the religious beliefs of Mr and Mrs Bull do not exempt them from observing the regulations in their ownership and management of the hotel. The fact that the rooms are separate from their own accommodation appears to be an additional factor rather than a key factor in the reasoning. The Chancellor concludes that Mr and Mrs Bull are not obliged to provide double bedded rooms but if they do they must be prepared to let them to homosexual couples. Adopting that reasoning, the Defendant in this case is not obliged to provide double bedded rooms but if she does, she must be prepared to let them to homosexual couples. The question that would then arise on the Chancellor's conclusion is whether this would be limited to homosexual couples in a civil partnership.
92. I acknowledge that there is some force in the argument that the facts of the present case can be distinguished from the facts in *Bull* such that the decision of the Court of Appeal is not binding on this point. Accordingly I turn to the broader arguments of whether the Defendant's actions are justified under Article 9 (2).
93. The Defendant's submissions on the question of human rights overlap with their submissions in relation to the issue of "justification". In essence Counsel for the Defendant submits that "*it is not, or should not, be the aim and function of modern human rights practice to cause one section of society to withdraw from participation, otherwise all that will have been achieved is to replace one set of predominant orthodox views with another different set of orthodox views. Modern human rights jurisprudence requires, or should require, a careful balancing of all the rights involved in this case."*
"Human rights codes must be interpreted and applied in a manner that respects the broad protection granted to religious freedom. In this respect it is right to note that the importance of the protection of sexual orientation rights has been mentioned in many cases, see Ladele. ..Religious rights are specifically identified in Article 9 of the ECHR and listed in Article 14 of the ECHR. Religion, as is sexual orientation, is a "suspect ground" and therefore weighty reasons are required to justify any interference with it, see R (Carson) v Secretary of State [2006] 1 AC 173 at paragraph 58."
94. Counsel for the Claimants submitted that "particularly cogent reasons" are required in order to justify different treatment on the grounds of sexual orientation and Counsel for the Defendant submitted that "very weighty reasons" are required to justify discrimination on the grounds of religion. Both submissions are supported by authority. However it does not provide a conclusion given, as Counsel for the Defendant accepted, that the Claimants' rights are not compatible with the Defendant's rights in the current circumstances. Accordingly it seems to me that the issue is correctly formulated by Counsel for the Claimants as "the proper balance to be struck between religious beliefs and ....[the] right to freedom from discrimination on grounds of sexual orientation".
95. Counsel for the Defendant submits that religious beliefs are fundamental to individuals and cites *Kokkinakis* at paragraph 31 that

"*freedom of thought, conscience and religion is one of the foundations of a democratic society.... While religious freedom is primarily a matter of conscience, it also implies, inter alia, freedom to manifest [one's] religion*".

Counsel also cites *Otto-Preminger v Austria* at paragraph 47

"*those who choose to exercise the freedom to manifest their religion..... cannot reasonably expect to be exempt from all criticism..... however, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the state, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them."*

96. Whilst accepting the rights protected under Article 9, it seems to me that Article 9(2) expressly accepts that freedom to manifest one's religion or beliefs is subject to limitations. The question remains therefore whether the limitation in this case namely the application of the regulations to the Defendant's bed-and-breakfast establishment and an interpretation that the restriction imposed by the Defendant in relation to double bedded rooms amounts to discrimination under the regulations is "*necessary in a democratic society..... for the protection of the rights and freedoms of others*".
97. Counsel for the Defendant relied on the analysis of the High Court of Justice in Northern Ireland in *An application for judicial review by the Christian Institute and others* [2007] NIQB 66 before Weatherup J. In that case the general position of the applicants was that the orthodox belief of Christians is that homosexual practice is sinful and that the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (the "Northern Ireland regulations") impose on those who hold such orthodox beliefs certain duties that are inconsistent with the practice of their religious belief. In essence the applicants contended that there had not been equality of treatment between the antidiscrimination measures on the grounds of sexual orientation on the one hand and orthodox religious beliefs on the other hand. The judge held that Article 9 was engaged by the belief that the practice of homosexuality is sinful and referred to the dicta of Lord Nicholls in *R (Williamson) v Secretary of State for Education and Employment* to formulate a number of propositions including that the conduct that constitutes the manifestation of the belief must be intimately connected to the belief. In that case the belief was that the practice of homosexuality is sinful and the manifestation in question is by teaching, practice and observance to maintain the choice not to accept, endorse or encourage homosexuality.
98. The applicants contended that the Northern Ireland regulations had the effect that the protection afforded to sexual orientation in accordance with the right to respect for private life under Article 8 and Article 14 outweighed the protection afforded to the manifestation of religious belief and Article 9 and 14 so that there was a lack of fair balance between the respective rights. The judge held that it was not possible to give a considered response to the multitude of circumstances that would require consideration. He said at paragraph 64 "*Accordingly I accept the respondent's approach that the regulations should be examined in fact specific cases and not as an abstract exercise based on chosen examples. However it is possible to outline the general approach that applies to consideration of alleged breaches of rights under the European Convention which might give indications as to how particular instances might be dealt with, while at the same time illustrating the fine dividing lines that may be drawn in particular cases depending on all the circumstances of a particular case*."

At paragraph 66 Weatherup J cited the dictum of Lord Nicholls in Williamson where he said "*It is not every impact on the manifestation of religious belief that constitutes "interference" for the purposes of Article 9. To constitute sufficient interference for the purposes of Article 9 it must be shown that the regulations interfere "materially, that is, to an extent which was significant in practice, with the claimant's freedom to manifest their beliefs in this way*."

He then referred to the House of Lords decision in *Denbigh High School* where a majority of the House of Lords found that there would be no interference with the applicants right to manifest her belief and it was noted that the Strasbourg institutions had not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person had voluntarily accepted an employment or role which did not accommodate that practice or observance and there were other means open to the person to practice or observed his or her religion without undue hardship or inconvenience.

Finally in this context he referred to the decision in *Kalac v Turkey* as authority for the proposition that the position in which persons seeking to manifest religious belief have placed themselves may bear on whether the matter to which they object constitutes interference. He said at 68

"*In choosing a military career the applicant was accepting a military system that placed limitations on individuals that would not be imposed on civilians. In choosing to attend Denbigh High School Ms Begum found limitations imposed on the manifestation of her religious belief, but was otherwise uninhibited in that regard. By electing to participate in certain activities individuals may find that those activities engage others of different sexual orientation. There will be instances where the impact on the individual does not amount to an interference with the right to manifest religious belief."*

99. Counsel for the Defendant stressed that the approach of this court as outlined in Weatherup J's judgement should be the principle of proportionality. At paragraph 72 the judge stated "*The limitations must pursue a legitimate aim and permitted aims are specified in the second part of Article 9. The specified aims include the protection of the rights of others. The limitations must be necessary in a democratic society in the interests of the specified name. The basis of interference with the qualified rights is that of necessity. This introduces the principle of proportionality, although it is not a word used in the convention."*

The principle of proportionality has been restated by the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11. The overarching approach is "*the need to balance the interests of society with those of individuals and groups*."

At paragraph 83 Weatherup J summarised the approach to proportionality as requiring consideration of

(1) The overarching need to balance the interests of society with those of individuals and groups.

(2) The recognition of the latitude that must be accorded to legislative and executive choices in relation to the balance of public and private interests.

(3) The legislative objective being sufficiently important to justify limiting the fundamental right

(4) The measures designed to meet the legislative objective being rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations.

(5) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective……whether the measures fall within a range of reasonable alternatives….

(6) The need for proportionate effect in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective.

100. Counsel for the Defendant referred to the case of *Ontario Human Rights Commission v Brockie [2002] 22 DLR 174* where the company carried on a business as a commercial printer and the Ontario Superior Court of Justice held that Mr Brockie had discriminated against a customer which promoted publications by and about homosexuals but did not require Mr Brockie to print material of a nature that could reasonably be considered to be in direct conflict with the core elements of his religious beliefs. The court in that case did not exclude rights to religious freedom from the commercial arena but did place commercial activity on the periphery of rights to religious freedom.
Weatherup J concluded at paragraph 88 in relation to the Brockie case that
"*On the above approach the believer is not required to undertake action that promotes that which the essence of the belief teaches to be wrong*".
Counsel for the Defendant therefore submitted that the Defendant in this case would have allowed the Claimants to stay in a single room but not to share a double bed.

101. In relation to the "*latitude that must be accorded to legislative and executive choices in relation to the balance of public and private interests*", this seems to me the point that was considered by Rafferty LJ at paragraph 51

> "*the Secretary of State has drawn what she considers the appropriate balance between the competing claims of hoteliers and (amongst others) homosexuals. Her decision has been approved by affirmative resolution. This court would be loath to interfere with her conclusions."*

102. Counsel for the Claimants submitted that the proper balance to be struck between religious beliefs and freedom from discrimination on grounds of sexual orientation was considered by the Parliamentary Joint Committee on Human Rights prior to the introduction of the regulations. Further the Government conducted an extensive consultation process prior to the introduction of the regulations which addressed specifically the issue of bed-and-breakfast accommodation. In its response to the consultation the government noted at page 13 that
"*the majority of responses from religious organisations propose that the exemption [that related to private dwellings] be widened to allow either specifically Christian hostels or commercial bed-and-breakfast establishments with religious owners to turn away same-sex couples..."*
The Government then concluded
"*..[w]here businesses are open to the public on a commercial basis they have to accept the public as it is constituted... This exemption will not apply to commercial services such as bed-and-breakfast establishments (which fall within the prohibitions on discrimination in relation to facilities and services)."*

103. Therefore it seems to me that even if the dictum of Rafferty LJ in *Bull* is distinguished as applying to hotels, the issue before this court of the balance to be struck between a religious owner of a bed-and-breakfast establishment and the rights of homosexuals was specifically considered by the legislature and the executive in relation to these regulations and I should recognise the latitude to be accorded to the legislature and executive. The Defendant submits that the Defendant would not have turned away the Claimants had single rooms been available. However for the reasons stated above as to whether the Claimants were discriminated against,

in my view the provision of a single room would not strike the appropriate balance between the rights of the parties.

104. As to the measures designed to meet the legislative objective not being arbitrary and unfair or based on irrational considerations there is no suggestion of this in this case.

105. The question is then whether the means used are proportionate so as to impair the right or freedom no more than is necessary to accomplish the objective and whether the effect is proportionate. The Claimants submits that the Defendant could choose to let only single or twin rooms and a proper balance can be struck in this case that does not require her to withdraw from the bed-and-breakfast industry.

I have had no evidence before me as to whether or not a bed-and-breakfast business could survive if it only provided single or twin rooms. I imagine that some people would prefer a room with a double bed and therefore it could affect the business but I am prepared to accept that the business could survive on this basis. I am not clear whether this would in fact be acceptable to the Defendant given her religious beliefs; although she stated in her evidence (at paragraph 20 of the witness statement) that she objected to two men sharing a bed , she may equally object to two men sharing a twin bedded room. I imagine that she might object, given the statements at paragraph 24 and 29 of the witness statement about sharing a double room. Therefore in reaching a conclusion on whether or not the restriction is “necessary" within the meaning of Article 9(2) or proportionate, I proceed on the basis that she may have to withdraw from the bed-and-breakfast business if she is not allowed to refuse a double or twin bedded room to a homosexual couple.

106. The Claimants also rely on the rejection of the argument based on *Brockie* advanced by the Defendant in *Bull*. At paragraph 50 of her judgement Rafferty LJ stated

"*However, though in that case the printer was required positively to do something, here the appellants were not. They were not put in a position which would have asked them so to behave as to suggest, wrongly, to an interested public that the views which apparently lay in their mouth were those they genuinely held. Far from it. All that happened here was the desire of the respondents to rent a double bedded room in a public hotel. I have no difficulty concluding that the discrimination here differs little from that in Ladele’s case. The appellants are able, as I have transposed the comments in Pichon’s case, "to manifest [their] beliefs in many ways outside the professional (commercial) sphere*".

At 51 "*I conclude that, to the extent to which under the regulations the restriction imposed by the appellants upon the respondents constitutes direct discrimination, and to the extent to which the regulations limit the manifestation of the appellant's religious beliefs, the limitations are necessary in a democratic society to the protection of the rights and freedoms of others.”*

107. Counsel for the Defendant submits that the restriction applied by the Defendant was proportionate in that she had the legitimate aim to manifest and protect her religious beliefs, that it affected her home particularly as the guest bedrooms were on the same floor as her own bedroom and there were many other establishments where the Claimants would have been able to stay. He submitted that whereas the Claimants could have lived with the disappointment and rejection, if the restriction has to be removed the Defendant would have to remove herself from public life and stop interacting with society. He submitted therefore that this is the wrong answer in balancing the respective rights.

108. In my view the application of the regulations to the Defendant’s bed-and-breakfast establishment does not prevent her from holding her religious beliefs but she has chosen to

operate a commercial business -indeed the primary reason for starting the business as stated in paragraph 8 of the witness statement was financial . The business is conducted from her home but it is still a business with a significant number of guests albeit with a small number of rooms. I do not agree with the submission that if the restriction is unlawful, the Defendant would have to remove herself from public life. She may be content to let single and twin bedded rooms or she may have to withdraw from this business. It seems to me that the Defendant has a choice whether or not to operate this particular business; it is not a case where an employee has had new duties imposed on him by an employer and on this basis it is in line with the approach of the Strasbourg institutions in the cases referred to by Lord Bingham at paragraph 23 of his judgment in *Denbigh High School*.

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

Article 8 claim

110. The Defendant's position is that the Article 8 rights are engaged because she let rooms in her home and this remained her home. She argues that the regulations interfere with that right. The Claimants submit that it was her own decision to run a business from her home which has led to her rights to respect for her home and family life being curtailed.

111. The Claimants submit that if the Defendant's Article 8 rights are interfered with, such interference is entirely justified for the same reasons as were set out above in relation to the Article 9 claim and again rely on the Court of Appeal decision in *Bull*.
At first instance HHJ Rutherford held that "*the Defendant's right to have their private and family life and their home respected is inevitably circumscribed by the decision to use their home in part as a hotel. The regulations do not require them to take into their home (that is the private part of the hotel which they occupy) persons such as the Claimants and arguably therefore do not affect the Article 8 rights of the Defendants*."

112. Although this extract states that the Defendant's right is inevitably circumscribed by the decision to use their home in part as a hotel and therefore supports the submission of the Claimants that it is the Defendant's decision to run a business from her home which has led to the interference with her Article 8 rights, I note that in *Bull* the first instance judge also relied on the fact that the regulations do not require them to take the guests into the private part of the hotel which they occupied and as a result do not affect the Article 8 rights. The facts before this court are different in that the rooms are situated within the part of the house in which the Defendant lives and are not separate.

113. At paragraph 44 of Rafferty LJ's judgement she addresses the question of whether a finding of direct discrimination constitutes a breach of the Article 8 rights of the appellants. It reads "*I can take this shortly. It does not. In my view, to find permissible a refusal to allow homosexual couples to share double bedded accommodation offered to the public would be to breach that couple's rights under Article 8 read in conjunction with Article 14*."
The Chancellor in his judgement in *Bull* at paragraph 64 refers to Article 8 and 14 and concluded "*if any of those rights is engaged then the manifestation of their religious beliefs by Mr and Mrs Bull cannot excuse their direct discrimination of Mr Preddy and Mr Hall*."

114. I agree with the conclusion that the Defendant's rights under Article 8 are inevitably restricted by the decision to use her home as a bed-and-breakfast business. In my view, if *Bull* is distinguished on the basis that the rooms in that case were separate, the same considerations apply in relation to Article 8(2) as discussed in relation to Article 9(2) above. Accordingly in my view for the reasons stated above, the balance lies in upholding the regulation as interpreted above and the interference is in accordance with the law and is necessary and proportionate for the protection of the rights and freedoms of others and in particular the Claimants' Article 14 rights.

5 Indirect Discrimination

115. Regulation 3 (3) states

"*For the purposes of these regulations, a person ("A") discriminates against another ("B") if A applies to B a provision, criterion or practice –*
a which he applies or would apply equally to persons not of B's sexual orientation,
b which puts persons of B's sexual orientation at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),
c which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there is no material difference in the relevant circumstances), and
d which A cannot reasonably justify by reference to matters other than B's sexual orientation."

Taking each of these provisions in turn-

(i) The Defendant's policy of restricting access to the double rooms to those who are "heterosexual and preferably married" amounted to a provision criterion or practice ("PCP") which she applied equally to persons not of the Claimants' orientation under 3 (a) namely unmarried heterosexual couples.

(ii) The Defendant accepts that she has turned away unmarried couples who wanted to use the room during the day for sex.The Defendant argues that since unmarried heterosexual couples were unable to share a double room, homosexuals were not at a disadvantage. However this ignores the fact that as held in *Bull*, homosexuals can never be married and on the facts of this case, unmarried couples who arrived in the evening were not turned away since as the Defendant admitted in her witness statement "*it is impossible to know whether a heterosexual couple is married..... and it would be offensive to pry into their personal lives either when booking or on arrival*."
The test in 3(3)(b) is a PCP which puts homosexuals at a disadvantage compared to "some or all others". It seems to me therefore that this test is satisfied since although not "all" unmarried couples were allowed to stay in the double room (unmarried members of the Defendant's family and unmarried couples turning up during the day were prevented from doing so), the Claimants were at a disadvantage compared to "some" unmarried heterosexual couples namely those who arrived in the evening.

(iii) This therefore puts the Claimants at a disadvantage compared to unmarried heterosexual couples within the meaning of paragraph 3(c)

116. The issue then is whether the test in paragraph 3(d) is satisfied namely that the Defendant cannot reasonably justify the policy by reference to matters other than the Claimants' sexual orientation.

The Defendant submits that the matters could be reasonably justified by reference to the Defendant's religious belief. Further that the court is required to balance the discriminatory effect of the measure in question against the reasonable needs of the religious belief to determine whether it was a proportionate means of meeting a legitimate aim.

117. As to the issue of justification the Claimants referred to the meaning given by the European Court of Justice in *Bilka-Kaufhaus* namely that consideration must be given to whether the means selected to achieve the chosen aim correspond to a real need, whether they are appropriate to achieve that aim and whether they are necessary in order to achieve that end. The Claimants submit there is no real need in a business context for the policy operated by the Defendant: the provision of bed-and-breakfast accommodation is a very public sphere and the restriction is based upon a private belief that the Defendant holds and is able to continue to hold.

Moreover the chosen aim is not appropriate – particularly given that gay couples appear not be prohibited from sharing rooms at all, simply double rooms. The Defendant could choose to let only single or twin rooms and the balance could be struck that does not require her to withdraw from the bed-and-breakfast industry.

118. The Claimants rely on the finding of indirect discrimination in the alternative by HHJ Rutherford in *Bull* at paragraph 54. However I accept the Defendant's submission that it is not clear from this passage whether the judge applied the test that to fall within paragraph 3(d) the Defendant is unable reasonably to justify the PCP by reference to matters other than the Claimants' sexual orientation. The Defendant submits that the PCP is reasonably justified because of her religious beliefs.

As the Court of Appeal in *Bull* found against the appellants on direct discrimination, it did not consider the alternative case of indirect discrimination.

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

Remedies

120. Accordingly I grant a declaration that

120.1. the Claimants have been discriminated against within the meaning of regulation 3(1) in that by refusing the Claimants access to a double room, the Defendant treated the Claimants less favourably than she would treat others, either following the reasoning of the Court of Appeal in *Bull*, namely that a homosexual couple could never be married or alternatively on the basis that the Defendant treated the Claimants less favourably than she would treat unmarried heterosexual couples in the same circumstances, and, following the

Court of Appeal in *Bull*, such discrimination was on the grounds of the sexual orientation of the Claimants;

120.2. in the alternative, the Claimants have been discriminated against within the meaning of regulation 3(3) in that the restriction applied by the Defendant to the double room put homosexuals and in particular the Claimants at a disadvantage compared to heterosexual couples, either on the basis that a homosexual couple could never be married or on the facts, compared to unmarried heterosexual couples and the Defendant cannot reasonably justify the restriction by reference to matters other than the Claimants' sexual orientation;

120.3. the Defendant unlawfully discriminated against the Claimants by refusing to provide the Claimants with a double room in breach of regulation 4(1)(a) and/or 4(1)(d) and for the purposes of regulation 4(1) the Defendant's bed-and-breakfast establishment amounted to a "boarding house" or, alternatively, a "similar establishment" within the meaning of regulation 4(2)(b);

120.4. on the facts, the Defendant is not exempted from regulation 4 by virtue of the operation of regulation 6(1);

120.5. the application of the regulations to the Defendant's bed-and-breakfast establishment and the findings of discrimination under regulation 3 are not in breach of her Article 9(1) rights and the limitations thereby imposed on her freedom to manifest her religion and beliefs under Article 9(2) constitute a limitation which is prescribed by law and is necessary for the protection of the rights and freedoms of others and in the circumstances, is proportionate in its means and effect;

120.6. the application of the regulations to the Defendant's bed-and-breakfast establishment and the findings of discrimination under regulation 3 are not in breach of her rights to respect for her private and family life and her home under Article 8 as the interference thereby caused is in accordance with the law and is necessary in a democratic society for the protection of the rights and freedoms of others and in the circumstances, is proportionate in its means and effect.

121. In relation to damages for injury to feelings under regulation 22 (1) (b) the Claimants referred to the decision of the Court of Appeal in *Chief Constable of West Yorkshire v Vento No 2* [2002]IRLR 177 and the bands for awards for injury to feelings set out in that case. An award of between £500 and £5000 is the band for less serious cases such as where the act of discrimination is an isolated or one off occurrence. The Claimants submits that damages in the lower Vento band in respect of each of them would be appropriate and submits that £1800 would be an appropriate award – the same figure as the first instance judge awarded each Claimant at first instance in *Bull*. I accept the Claimants had to leave the Defendant's premises in circumstances in which they had suffered injury to feelings and they had the inconvenience of having to drive home at the end of the evening rather than stay overnight. However I also take account of the fact that the conversation with the Defendant took place in private in the sense that no third party was present, and the Defendant was polite. I therefore accept that £1800 for each Claimant is an appropriate figure in the circumstances.

Permission to appeal

122. Counsel for both parties indicated at the conclusion of the submissions that since the decision of the Court of Appeal in *Bull* is the subject of an appeal to the Supreme Court and that

certain of the discrimination cases referred to in this judgement are to be considered by the European Court of Human Rights, they seek permission to appeal. Given that therefore the case law that I have relied on in reaching a decision may be reversed in the near future, then in these circumstances the Defendant would have a reasonable prospect of success on an appeal. I therefore grant the Defendant permission to appeal, assuming the Defendant is so advised.