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The love of law, and the law of love: Jonathan Cooper and LGBT human rights advocacy

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Abstract

Throughout his professional life, Jonathan Cooper was involved in important legal cases before the UK courts and the European Court of Human Rights that challenged discrimination on the grounds of sexual orientation. In this article, I examine three such cases in which Jonathan acted as an advocate, and one such case in which he intervened as a third party. These cases demonstrate key aspects of Jonathan's approach to human rights law as a means of expanding legal protections for LGBT people, and they offer important lessons for those who wish to continue his legacy of advocating for the human rights of LGBT people. More generally, Jonathan's work in these cases shows why it is vital to maintain a belief in human rights law as the basis for building societies in which LGBT people can live, and love, in freedom.

Introduction

> *I would say that there exist a thousand unbreakable links between each of us and everything else, and that our dignity and our chances are one.*
> - Mary Oliver[1]

In one of his last publications on a subject very dear to his heart – human dignity – Jonathan Cooper wrote:

> The right to human dignity has been recognised as being particularly relevant to LGBT people. For millennia LGBT people have been tormented, criminalised and erased. The ability of LGBT people to form intimate, loving sexual relations has been ridiculed and rebuffed. The levels of violence LGBT people have been subjected to are unimaginable. LGBT people have lived the lives of outlaws, with no state protection. As recently as the 1950s a British Home Secretary had committed to "remove the scourge" of LGBT people from society. Such threats continue to be made by governments across the globe. It is not an over exaggeration to assert that if LGBT people could have been deliberately and systematically destroyed, they would have been. Except they keep being born.[2]

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[1] M. Oliver, *Upstream: Selected Essays* (New York: Penguin Press, 2016), p.154.

This epitomises Jonathan's lifelong concern with the relationship between law and the lives of LGBT people. Jonathan recognized the fundamental role that law can play in defending the human dignity of LGBT people and, vice versa, the capacity of law to destroy such human dignity. Throughout his professional career, Jonathan understood that law was a principal mechanism for enabling LGBT people to live freely and form the loving, intimate relationships that are essential to human existence. More than anyone else I have ever met, Jonathan recognized the vital role that law can play in protecting love between LGBT people and, conversely, the devastating role law can play in degrading such love.

At the time of his death, Jonathan's husband, Kevin Childs, movingly said:

> Many will tell you what a great and very human human rights defender he was, how determined, how fearless, how brilliant and how deeply, deeply caring about people he was. And this is true, he was all those things and more, but he also had a capacity for love which seemed endless and it was that, his capacity for love, which made him the great defender of people's rights, whether Biafra, which he cared hugely about, or Belarus or LGBTQ people around the world.[3]

Love was central to Jonathan's life. His love of people, and his desire to help create the conditions in which love between people can flourish, was at the heart of his passion for law. It was his deep knowledge of the ways that law can force LGBT people into darkness, or bring light to our lives, that sustained Jonathan's commitment to the law. I believe that Jonathan loved the law because he recognized that law is central to the experience and practice of human love. If, as Bayard Rustin once said, "the power of love in the world is the greatest power existing",[4] I think Jonathan understood that law was the key means through which that power could be either fettered or freed.

Jonathan was very much committed, throughout his life and work, to playing his part in ensuring that law, and particularly human rights law, supported LGBT people to live the fullest lives possible, whether in Europe or Africa, the Caribbean (where, at the time of his death, he was engrossed in advocacy for marriage equality in the Cayman Islands) or elsewhere. To this end, Jonathan was involved in several important legal cases before the UK courts and the European Court of Human Rights (hereinafter, the ECtHR) that challenged discrimination on the grounds of sexual orientation. In this article, I examine three cases in which Jonathan acted as an advocate, and one case in which he intervened as a third party. These four cases, in my view, demonstrate important aspects of Jonathan's approach to law and, in particular, his

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[2] J. Cooper, "The Human Rights Act: Delivering Rights and Enhancing Dignity", in K. Dzehtsiarou, S. Falcetta, D. Giannoulopoulos and P. Johnson (eds), *Human Rights in Action: Assessing the positive impact of the Human Rights Act 1998 in the UK*, https://human-rights-in-action.blogspot.com/2021/03/human-rights-in-action-evidence-to.html [Accessed 29 November 2021], p.24.

[3] BBC News, "Human rights campaigner Jonathan Cooper dies" (21 September 2021), https://www.bbc.co.uk/news/uk-england-devon-58625327 [Accessed 29 November 2021].

[4] B. Rustin, "Nonviolence vs. Jim Crow", in D.W. Carbado and D. Weise (eds), *Time on Two Crosses: The Collected Writings of Bayard Rustin* (San Francisco: Cleis Press, 2003), p.2.

approach to using human rights law as a means of expanding legal protections for LGBT people. There are important lessons to be learned from Jonathan's work in these cases by those who wish to continue his legacy of advocating for the human rights of LGBT people.

Graeme Grady, in the Court of Appeal

There have been few legal cases in the UK concerning LGBT human rights that are more important than those brought by four people – John Beckett, Graeme Grady, Duncan Lustig-Prean, and Jeanette Smith – challenging their discharge from the armed forces because of their sexual orientation. All four had fallen foul of the then policy of the Ministry of Defence that being gay or lesbian was incompatible with service in the armed forces and that personnel known to be gay or lesbian would be administratively discharged. Consequently, all four had been discharged between November 1994 and January 1995 on the sole ground that they were known to be either gay or lesbian.

In response to their treatment, all four individuals undertook proceedings for judicial review to challenge the decision to discharge them and the policy on which it was based, on the three principal grounds that this was irrational, contrary to the European Convention on Human Rights (hereinafter, the ECHR) and in breach of Council Directive 76/207/EEC (hereinafter, the Equal Treatment Directive). As such, the four applicants were taking novel steps to create, from existing European law, protections for gay and lesbian people that were then absent in the UK. The stakes could not have been higher: victory for the four would potentially transform the lives of all gay and lesbian people in the workplace; failure would reinforce the validity of discriminating against people in employment.

Jonathan's formal participation in this case began as one of the representatives of Graeme Grady, alongside Laura Cox Q.C. and Stephanie Harrison, in the Court of Appeal in 1995. Mr Grady, who had been discharged from the Royal Air Force after it was discovered that he was gay, told me, in an oral history interview that I conducted with him, that he had been treated "like a criminal" by the air force authorities.[5]

By the time that Jonathan reached the Court of Appeal with Mr Grady's case, it and the other three applications had already been dismissed by the High Court. Simon Brown L.J. had opened the High Court's judgment with what must count as one of the best lines in judicial history: "Lawrence of Arabia would not be welcome in today's armed forces".[6] This gently provocative opening line encapsulated Brown's sympathy with the applicants. It was his view that "the balance of the argument […] appears […] to lie clearly with the applicants" and that it was "improbable […] that the existing policy can survive for much longer".[7] The key question facing the High Court, as Brown put it, was:

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[5] P. Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford: Oxford University Press, 2016), p.114.
[6] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 523.
[7] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 533.

> are we in this court entitled, whatever view we may ourselves have formed of the general merits of the present policy, to declare it unlawful and to quash the decisions to discharge these four applicants, in effect requiring Her Majesty's armed forces in future to recruit and retain their service personnel without regard to sexual orientation?[8]

Brown did not think the High Court was so entitled, but he gave extensive reasons for his decision. The two most interesting aspects of Brown's reasoning, at least in terms of how European law went on to later develop, are in relation to the ECHR and the Equal Treatment Directive.

In respect of the ECHR, the English courts were, at this time, operating in an environment before the Human Rights Act 1998 (hereinafter, the HRA). This was before, as Jonathan put it, the HRA "for the first time as a matter of UK law" recognised "that all within the country have certain minimum and fundamental human rights".[9] Brown acknowledged the "undoubted responsibility" of the English courts to protect human rights, but also the "duty" of the courts "to remain within their constitutional bounds and not trespass beyond them".[10] Without the incorporation of the ECHR into UK law later brought about by the HRA, the constitutional limits placed on the courts prevented Brown from giving primacy to the human rights issues at the heart of the case:

> If the [ECHR] were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown proportionate to its benefits, then clearly the primary judgment (subject only to a limited "margin of appreciation") would be for us and not others: the constitutional balance would shift. But that is not the position. In exercising merely a secondary judgment, this court is bound, even though adjudicating in a human rights context, to act with some reticence.[11]

Brown clearly felt strongly that "so far as this country's international obligations are concerned, the days of this policy are numbered"[12] but, at that time, such international obligations could only be enforced by the applicants going to the ECtHR.

Brown gave less consideration to the Equal Treatment Directive because he felt the arguments that it protected gay and lesbian people at work "founder on the plain and unambiguous language of the Directive, an instrument which says everything about gender discrimination, but to my mind nothing about orientation discrimination".[13] The Equal Treatment Directive stated that "the principle of equal treatment shall mean that there shall be no discrimination

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[8] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 533.
[9] J. Cooper, "The Human Rights Act 1998" (1999), 15 *Amicus Curiae* 8, p.8.
[10] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 541.
[11] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 541.
[12] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 542.
[13] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 542.

whatsover (sic) on grounds of sex"[14] and that, with regard to working conditions including dismissal, this "means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex".[15] Brown was not convinced that "sex" in this context encompassed sexual "orientation":

> I have no doubt that the ordinary and natural meaning of "sex" in this context is gender. Of course the word is apt to encompass human characteristics as well as people's anatomical qualities; […] discrimination is very often based on stereotypical assumptions as to gender characteristics. Orientation, however, is quite another thing. If, of course, an employer were willing to employ lesbians but not male homosexuals, that would be discrimination on grounds of sex. Where, however, as here, an employer refuses to accept homosexuals of either sex, that is discrimination on grounds of orientation.[16]

It was in this context that Jonathan and his colleagues sought to persuade the Court of Appeal to find for the applicants.

The Court of Appeal did not prove more amenable than the High Court to the arguments made in respect of the ECHR or the Equal Treatment Directive. In respect of the ECHR, Sir Thomas Bingham M.R. noted that its relevance was as "background to the complaint of irrationality" and, whilst "to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear […] to show respect for that person's private and family life",[17] it was not for the Court of Appeal to decide on ECHR issues. Because of this, as Bingham put it, it would be necessary for the applicants "to incur the expense and endure the delay of pursuing their claim in Strasbourg" to establish a violation of their ECHR rights.[18] As to the Equal Treatment Directive, the Court of Appeal would not accept the contention that the prohibition on gay people serving in the armed forces discriminated on the ground of sex contrary to the Directive. Jonathan and his colleagues had argued:

> The Directive is to be interpreted broadly so that it prohibits discrimination on the ground of sexual orientation, although sexual orientation is not expressly referred to in the Directive […] [I]f article 1 is to be interpreted as meaning equal treatment "as between" men and women, sexual orientation discrimination is nevertheless within the Directive since a man engaging in a relationship with a man will be treated under the policy differently and less favourably than a woman who engages in a sexual relationship with a man.[19]

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[14] Council Directive 76/207/EEC of 9 February 1976 (OJ L 39/40), art.2(1) (no longer in force).
[15] Council Directive 76/207/EEC of 9 February 1976 (OJ L 39/40), art.5(1) (no longer in force).
[16] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 543-44.
[17] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 558.
[18] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 559.
[19] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 548-49.

Thorpe L.J. dismissed this, stating that "any common sense construction of the Directive in the year of its issue leads in my judgment to the inevitable conclusion that it was solely directed to gender discrimination and not to discrimination against sexual orientation".[20]

Having had their appeals dismissed by the Court of Appeal, and following the Appeal Committee of the House of Lords dismissing their petitions for leave to appeal, the applicants were left with no choice but to pursue their claims in the European courts. The European Court of Justice (hereinafter, ECJ) proved to be of no utility to the applicants. This is because a reference had been made by the High Court to the ECJ, in relation to a similar case against the armed forces brought by Terence Perkins, seeking a preliminary ruling on whether the prohibition of discrimination on the grounds of sex in the Equal Treatment Directive extended to sexual orientation,[21] and was subsequently withdrawn in light of the ECJ establishing that the prohibition of discrimination on the grounds of sex contained in the Equal Pay Directive[22] did not extend to sexual orientation.[23] It therefore remained for the applicants to ask the ECtHR to determine whether their treatment amounted to a violation of their ECHR rights. In judgments issued in 1999, the ECtHR held that the investigations conducted into the applicants' sexual orientation, and their discharge on the grounds of sexual orientation, violated Article 8 ECHR (right to respect for private and family life).[24] In response to this, the UK government announced in January 2000 that "homosexuality will no longer be a bar to service in Britain's armed forces".[25]

In addition to compelling the UK government to end the policy of prohibiting gay and lesbian people from serving in the armed forces, the ECtHR's judgments had another significant impact. The ECtHR had found that Mr Grady and Ms Smith had suffered a violation of their Article 13 ECHR rights (right to an effective remedy) because the test of "irrationality" applied by the domestic courts – which, in essence, meant that a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker – had such a high threshold that it effectively excluded any consideration of the key ECHR questions asked by the ECtHR.[26] As such, the ECtHR found that the applicants had no effective remedy in the domestic courts in relation to the violation of their right to respect for their private lives guaranteed by Article 8 ECHR.[27] In reaching this conclusion, the ECtHR sent the strongest message that the UK did not, at least as far as these applicants were concerned, have an adequate judicial system for ensuring the protection of human rights and fundamental freedoms.

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[20] *R. v Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 565.
[21] *R. v Secretary of State for Defence, ex parte Perkins* [1997] 3 C.M.L.R. 310.
[22] Council Directive 75/117/EEC of 10 February 1975 (OJ L 45/19) (no longer in force).
[23] *R. v Secretary of State for Defence, ex parte Perkins* [1998] 2 C.M.L.R. 1116.
[24] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493; *Lustig-Prean and Beckett v United Kingdom* (2000) 29 E.H.R.R. 548.
[25] G. Hoon MP, HC Debate, 12 January 2000, vol.342, col.288.
[26] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493 at [137] and [138].
[27] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493 at [139].

These cases highlighted that the ECHR was completely ineffective, when applied in the UK domestic courts, for challenging odious discrimination based on sexual orientation. They demonstrated the laborious and expensive process that individuals were forced to go through – taking a case to the ECtHR – to address violations of their human rights. As such, these cases played an important role in national conversations about the need for the HRA to, as the then Lord Chancellor put it, "bring human rights home" because "[o]ur legal system has been unable to protect people" and those people needed to be able to "argue for their rights and claim their remedies under the convention in any court or tribunal in the United Kingdom".[28] These cases were, therefore, high-profile examples of the inadequacy of the UK's legal systems in respect of the protection of human rights and remain powerful reminders today of the situation that individuals in the UK may return to if the HRA is ever repealed.

These cases are also examples of the failure of the courts to evolve the concept of "sex" to include sexual orientation and, on this basis, protect gay, lesbian and bisexual people from discrimination. In 2020, the Supreme Court of the United States explained, like Jonathan and his colleagues had explained a quarter of a century earlier, why a prohibition of discrimination because of an individual's sex does encompass an individual's sexual orientation and gender identity:

> it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.[29]

Given the failure of the domestic courts and the ECJ to adopt such an understanding of the relationship between sex and sexual orientation, the armed forces cases showed the need for European Union and UK law to develop. They highlighted the need for the development of Council Directive 2000/78/EC of the European Union which established a general framework for equal treatment in employment and occupation that included sexual orientation.[30] That Directive, in respect of sexual orientation, was given effect in the UK in legislation in 2003[31] and, since that time, individuals have been protected against discrimination on the grounds of sexual orientation in employment. Again, the armed forces cases stand as a reminder of how individuals can be treated – dismissed from their employment solely on the grounds of their

[28] Lord Irvine of Lairg, HL Debate, 3 November 1997, col.1228.
[29] *Bostock v Clayton County*, 590 U. S. ____ (2020) pp.9-10.
[30] Council Directive 2000/78/EC of 27 November 2000 (OJ L 303/16).
[31] Employment Equality (Sexual Orientation) Regulations 2003 (now revoked and replaced by provisions in Equality Act 2010); Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003.

sexual orientation and irrespective of any conduct – when appropriate legal protections are not in place.

Margaret Fleming, in the European Commission of Human Rights

Although there is now some public awareness of the nature of the previous ill-treatment of LGBT people in the UK armed forces, what has been less discussed and acknowledged is the effect this had on the partners and family members of LGBT service personnel. In this respect, Jonathan's role as representative of Margaret Fleming, the partner of a service woman discharged from the armed forces on the grounds of her sexual orientation, was important in shining a light on how the armed forces treated the same-sex partners of serving LGBT people. Jonathan represented Ms. Fleming before the former European Commission of Human Rights (EComHR) whilst working with Liberty, the civil liberties group based in London.[32]

Ms. Fleming and her partner were in a relationship and lived together whilst Ms. Fleming's partner was serving in the Royal Air Force. Ms. Fleming's partner was Jeanette Smith, one of the applicants in the armed forces cases described in the previous section.[33] In June 1994, when the air force authorities interviewed Ms. Fleming's partner regarding an allegation that she was a lesbian she, confirming this to be the case, was subject to a range of intrusive and degrading questions about the most intimate details of her private life which included questions about her sexual practices with Ms. Fleming. The air force authorities also decided to interview Ms. Fleming:

> [Ms. Fleming] was approached and asked if she could be interviewed. She was taken to an interview room where she was to be questioned by the air force authorities. [She] requested to see her partner who was subsequently brought into the room visibly distressed and gave [Ms. Fleming] her consent to answer the air force authorities' questions. [Ms. Fleming's] partner was then led away. [Ms. Fleming] was asked whether she and her partner were homosexual and [she] replied in the affirmative. [Ms. Fleming] was then asked whether her partner slept with other women in the armed forces, what sexual acts she and her partner performed and whether she and her partner had had sex with their foster daughter. [Ms. Fleming] states that she was profoundly distressed, that she felt abused and shamed and that she was given no warning or notice of the nature or content of the questions which were to be raised.[34]

Ms. Fleming's partner, following her discharge from the armed forces on the basis of her sexual orientation, pursued the legal action described in the previous section, which led to the ECtHR

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[32] *Fleming v United Kingdom* (App. No. 33987/96), Commission decision of 20 May 1997.
[33] The decision in *Fleming* and the judgment in *Smith and Grady* do not name the applicants' partners, but the facts in each case strongly suggest that Ms. Fleming and Ms. Smith were partners. For a discussion, see: L. Hodson, "Sexual orientation and the European Convention on Human Rights: What of the 'L' in LGBT?" (2019), 23(3) *Journal of Lesbian Studies* 383. See also: BBC News, "Scotland Nurse celebrates gay ban victory" (28 September 1999), http://news.bbc.co.uk/1/hi/scotland/459025.stm [Accessed 29 November 2021].
[34] *Fleming v United Kingdom* (App. No. 33987/96), Commission decision of 20 May 1997, "The Facts".

finding that she had suffered a violation of her rights under Article 8 and Article 13 ECHR.[35] However, what was not directly addressed in those proceedings was the violation of Ms. Fleming's ECHR rights created by the air force authorities as a consequence of the interview they conducted with her.

Jonathan's approach to Ms. Fleming's case was to invoke Article 3 ECHR (prohibition of torture) as well as Article 8 ECHR, alone and in conjunction with Article 14 ECHR (prohibition of discrimination), in respect of the investigation carried out by the air force authorities into Ms. Fleming's private life and, in particular, in relation to her sexual orientation and activities.[36] The reliance on Article 3 ECHR demonstrates that Jonathan understandably felt that Ms. Fleming's treatment constituted, at the very least, a form of degrading treatment prohibited by the ECHR. Jonathan may have had in mind the general principle that treatment may be said to be degrading if it "grossly humiliates" a person "before others".[37] It is not difficult to see how the facts of Ms. Fleming's treatment could be said to meet that threshold. In combining Article 3 ECHR with Article 14 ECHR, Jonathan obviously felt it important to demonstrate that the degrading treatment complained of was rooted in discrimination on grounds of sexual orientation. It is important to note that, at the time the application was lodged with the EComHR, no complaint about sexual orientation discrimination had previously been successful under Article 3 ECHR or Article 14 ECHR in the ECtHR.[38]

Scandalously, the EComHR never considered Ms. Fleming's substantive complaints since it took issue with the timeliness of the submission of her application. Ms. Fleming had stated that, since she had no domestic remedy available to her, she had awaited the outcome of the judicial review proceedings commenced by her partner – the success of which, she submitted, would have made her feel personally vindicated – but, following the final decision in those failed proceedings by the House of Lords on 19 March 1996, she submitted her application to the EComHR on 18 September 1996 and, therefore, met the six month time-limit set down by the ECHR.[39] This was entirely reasonable because, in the absence of any domestic remedy available to her, and in the context of her partner seeking through judicial review proceedings to be reinstated in the Royal Air Force, it is understandable that Ms. Fleming felt that the treatment she had been subjected to would have been adequately redressed if her partner's domestic proceedings had been successful. However, when Ms. Fleming's partner's judicial review proceedings finally failed and she was not reinstated, it is understandable that Ms. Fleming continued to feel aggrieved and sought redress through her application to the EComHR.

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[35] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493.
[36] *Fleming v United Kingdom* (App. No. 33987/96), Commission decision of 20 May 1997, "The Law".
[37] *The Greek case* (1969) 12 Y.E.C.H.R. 186.
[38] It was not until 2012 that a complaint brought under Article 3 ECHR about sexual orientation discrimination succeeded in the ECtHR. See P. Johnson and S. Falcetta, "Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities" (2018), 43(2) *European Law Review* 167.
[39] Former art.26 ECHR.

The EComHR declared Ms. Fleming's application inadmissible on the basis that it was introduced outside of the six-month time limit set down by the ECHR. It reached this conclusion by recalling its jurisprudence that, where no domestic remedy is available, the six-month time limit runs from the date of the act which is alleged constitutes a violation of the ECHR. The EComHR stated that, even if it assumed that the six-month time limit began to run from December 1994 – the time at which Ms. Fleming's partner had been discharged from the air force – the introduction of the application in September 1996 was outside of that time limit.[40]

This interpretation of the six-month time limit in the context of Ms. Fleming's case can be seen as, at the very least, ungenerous given her reasonable explanation for the timing of the application. It can also be seen as the result of a very narrow application of existing EComHR jurisprudence because it ignored the established principle that, where the violation complained of consists of a "continuing situation" against which no domestic remedy is available, the six month period "runs from the end of this continuing situation".[41] On this basis, it was open to the EComHR to conclude that Ms. Fleming had no domestic remedy available to her[42] and that, whilst her partner continued to pursue legal action in the domestic courts – to address the issue that was the basis for the treatment that Ms. Fleming complained of – that Ms. Fleming was subject to continuing discrimination. In other words, the EComHR could have acknowledged that Ms. Fleming was subjected to the ongoing consequences of discrimination for as long as her partner, on grounds of their relationship, continued to remain discharged from the armed forces and to take legal measures to be reinstated. Such an approach would have enabled the EComHR to conclude that Ms. Fleming's complaint concerned a "continuing situation" and, on this basis, to regard her application as having been submitted within time. The EComHR's failure to explicitly consider such an approach suggests an obtuse understanding of the position that same-sex couples, such as Ms. Fleming and her partner, found themselves in at this time.

The EComHR's decision in respect of Ms. Fleming's application is not well known and remains little commented upon.[43] Yet it provides an important insight into how the same-sex partners of armed forces personnel were treated at that time, and the completely inadequate response of the EComHR to that treatment. More generally, it shows the serious failure of the EComHR to understand and address the discrimination that same-sex couples and their families were subjected to.

In this respect, the EComHR's decision in Ms. Fleming's case is similar to another little-known decision by the ECtHR three years later in respect of an application made by Helen Craig.[44] Ms. Craig was in a same-sex relationship with "L" at a time when the custody and care of L's

[40] *Fleming v United Kingdom* (App. No. 33987/96), Commission decision of 20 May 1997, "The Law".
[41] *X. v Netherlands*, 15 D.R. 5, 10.
[42] Ms. Fleming had herself invoked art.13 ECHR in her application.
[43] For a rare discussion, see: L. Hodson, "Sexual orientation and the European Convention on Human Rights: What of the 'L' in LGBT?" (2019), 23(3) *Journal of Lesbian Studies* 383. See also: P. Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford: Oxford University Press, 2016), p.61.
[44] Jonathan, as far as I know, was not involved in this case.

four children from her former marriage were the subject of High Court proceedings.[45] As part of those High Court proceedings it was agreed, for example, that L "would not permit the children to come into contact with or remain in the company of [Ms. Craig] or of any other person known to L to be lesbian", would instruct Ms. Craig "not to call at her home at any time when she had access to the children", and would not "answer or open the door if [Ms. Craig] called at her house during a scheduled access visit".[46] Ms. Craig complained to the ECtHR that, inter alia, these restrictions constituted a disproportionate interference with her Article 8 ECHR rights to her private and family life with L. The ECtHR dismissed this complaint in the following terms:

> the Court notes the limitations imposed by the High Court on L's contact with [Ms. Craig]. However, the Court finds it significant, given that the basis of her complaint is the maintenance of her relationship with her partner, that it was that partner who agreed to these limitations on their relationship and that the impugned provision of the High Court orders in question simply repeated the terms of her partner's agreement with her former husband in order to facilitate access to her children. In such circumstances, the Court concludes that, even assuming that the High Court orders in question constituted interferences with her private or family live, they did not constitute disproportionate interferences within the meaning of Article 8 § 2 of the Convention.[47]

This decision is outrageous, given that the ECtHR did not consider the reasons why L may have agreed to these limitations. The ECtHR did not stop to question, for instance, whether L may have agreed to these limitations because a consultant psychiatrist had stated during the High Court proceedings that, because of the "stigmatisation attached in our society to homosexuality", it would not be wise to raise the issue of L's homosexuality with her children.[48] Had the ECtHR paused to consider that the agreement by L to these restrictions in respect of Ms. Craig may have been concluded in circumstances in which she felt fear and vulnerability, and in a broader social context she experienced as homophobic, it may have reached a different conclusion. To my mind, the decision in Ms. Craig's case, like the decision in Ms. Fleming's case, demonstrates a general lack of judicial empathy towards same-sex couples suffering homophobic discrimination and highlights the importance of Jonathan's ambition to generate such empathy, in order to advance protections for same-sex couples under the ECHR.

H. Ç., in the European Court of Human Rights

In 2012, during his time as Chief Executive of Human Dignity Trust, Jonathan, with Mr Polili, represented Mr H. Ç., a citizen of the Turkish Republic of Northern Cyprus (hereinafter,

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[45] *Craig v United Kingdom* (App. No. 45396/99), Decision of 21 March 2000. It may be presumed that domestic proceedings were in the High Court of Northern Ireland, rather than the High Court of England and Wales, since Ms. Craig was a resident of Northern Ireland.
[46] *Craig v United Kingdom* (App. No. 45396/99), Decision of 21 March 2000, "The Facts".
[47] *Craig v United Kingdom* (App. No. 45396/99), Decision of 21 March 2000, "The Law".
[48] *Craig v United Kingdom* (App. No. 45396/99), Decision of 21 March 2000, "The Facts".

TRNC), who complained to the ECtHR about the existence of laws in the TRNC which had the effect of criminalising certain homosexual acts between consenting adult males.[49] The laws in question were contained in certain Articles of the Criminal Code of the TRNC and criminalized, inter alia, any person who has "carnal knowledge of any person against the order of nature" or "permits a male person to have carnal knowledge of him against the order of nature".[50] Mr H. Ç., a gay man, complained that he suffered "great strain, apprehension and fear of prosecution on account of the legal provisions in question".[51]

The obvious complaint for Mr H. Ç. to make, and which he did make, under the ECHR was that the relevant provisions of the Criminal Code violated his rights under Article 8 ECHR, and made him a victim of discrimination in violation of Article 14 ECHR taken in conjunction with Article 8 ECHR. This complaint, in terms of the right to respect for private life under Article 8 ECHR alone, was almost certain to succeed given the long-established jurisprudence of the ECtHR on the criminalization of consensual same-sex sexual acts between adults in private.[52] However, Jonathan and his colleague were obviously more ambitious in their approach to this application and, in addition, submitted that the criminalisation of homosexual relations constituted an interference with Mr H. Ç.'s human dignity amounting to degrading treatment within the meaning of Article 3 ECHR.

Invoking Article 3 ECHR in this application was important and visionary. It can be seen as an attempt to secure a judgment from the ECtHR in which the complete criminalization of same-sex sexual acts was found to violate the absolute and unqualified rights contained in Article 3 ECHR, rather than the qualified rights contained in Article 8 ECHR. This would have established, for the first time, that odious, homophobic criminal laws that single out gay people's intimate relationships for specific regulation and punishment cause, what the ECtHR would describe as, "considerable mental suffering" that diminishes "human dignity" and arouses "feelings as to cause humiliation and debasement".[53] Establishing a violation of Article 3 ECHR would, therefore, have shown how such laws strike at the human dignity of individuals – respect for which is the "very essence of the Convention"[54] – rather than merely interfere with the right to respect for private life. This would have eliminated, once and for all, any opportunity for governments to argue in the future that the type of criminal laws complained of by Mr H. Ç. can ever be justified, within the terms of Article 8 ECHR, as being necessary in a democratic society to meet a legitimate aim.

It is noteworthy that the ECtHR, when it communicated the case, did not mention Article 3 ECHR in its question to the parties.[55] Instead, in its question to the parties the ECtHR focused solely on whether there had been a violation of Mr H. Ç.'s right to respect for his private life

[49] *H.Ç. v Turkey* (App. No. 6428/12), Communicated Case of 14 February 2013.
[50] The relevant domestic law was arts.171, 172 and 173 of the Criminal Code of the TRNC.
[51] *H.Ç. v Turkey* (App. No. 6428/12), Communicated Case of 14 February 2013, "The Facts".
[52] *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149.
[53] *Moldovan v Romania* (No.2) (2007) 44 E.H.R.R. 16 at [110].
[54] *Bouyid v Belgium* [GC] (2016) 62 E.H.R.R. 32 at [89].
[55] *H.Ç. v Turkey* (App. No. 6428/12), Communicated Case of 14 February 2013, "Question to the Parties".

contrary to Article 8 ECHR. This strongly suggests that the ECtHR had no intention of considering whether to evolve its jurisprudence to find that the laws complained of were in violation of Article 3 ECHR. The ECtHR was not, in the end, called upon to find any violation because, following the communication of the case, the Government stated that the relevant provisions of the TRNC Criminal Code criminalising homosexuality had been amended and, in light of that, Mr H. Ç. withdrew his application.[56] As such, then, Mr H. Ç.'s application was successful because, in effect, it compelled the TRNC to change its legislation to avoid the ECtHR finding a violation of the ECHR – a situation similar to that in the case taken by Euan Sutherland regarding the unequal "age of consent" in the UK.[57]

Mr H. Ç.'s application, and Jonathan and his colleague's shaping of it, can be seen as one of many important attempts, over a period of several decades, to establish that the complete criminalization of same-sex sexual acts amounts to a violation of Article 3 ECHR. The first attempt to establish such a violation dates back to an application of 1959 and, since that time, the ECtHR has never held that the existence of laws criminalizing consensual same-sex sexual acts between adults violates Article 3 ECHR.[58] Recently, the ECtHR held that returning an individual from a Council of Europe state to a country that completely criminalizes same-sex sexual acts would, in view of the domestic courts' failure to sufficiently assess the risks of ill-treatment and the availability of State protection against ill-treatment emanating from non-State actors, and without a fresh assessment of these aspects by the domestic authorities, violate Article 3 ECHR.[59] However, the ECtHR also reiterated its established view that the "mere existence of laws criminalising homosexual acts in the country of destination does not render an individual's removal to that country contrary to Article 3 of the Convention".[60] This conclusion, which places a significant burden on applicants to show that they are at real risk from such laws being applied in practice, is outrageous and it is to be hoped that, in the future, the ECtHR agrees with Jonathan that the mere existence of laws criminalizing consensual same-sex sexual acts between adults, regardless of the level of enforcement, strikes at the human dignity of individuals and is, in all cases, in violation of Article 3 ECHR.

Gareth Lee, in the European Court of Human Rights

Few recent LGBT issues vexed Jonathan as much as the treatment of Gareth Lee by the Supreme Court of the United Kingdom (hereinafter, SCUK) in the so-called "gay cake case".[61] This case concerned the refusal by Ashers Baking Company Limited to fulfil Mr Lee's order for a cake iced with the statement "Support Gay Marriage". This refusal had led the County Court to conclude that Mr Lee had been unlawfully discriminated against on the ground of his sexual orientation, as well as his religious belief and political opinion, contrary to equality law

[56] *H.Ç. v Turkey* (App. No. 6428/12), Decision of 3 June 2014.
[57] *Sutherland v United Kingdom* [GC] (App. No. 25186/94), Judgment (striking out) of 27 March 2001.
[58] For a discussion see: P. Johnson and S. Falcetta, "Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities" (2018), 43(2) *European Law Review* 167.
[59] *B and C v Switzerland* (App. Nos. 889/19 and 43987/16), Judgment of 17 November 2020 at [63].
[60] *B and C v Switzerland* (App. Nos. 889/19 and 43987/16), Judgment of 17 November 2020 at [59].
[61] *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49.

in force in Northern Ireland.[62] The relevant law relating to sexual orientation states that a person (A) discriminates against another person (B) if, "on grounds of sexual orientation", A treats B less favourably than he treats or would treat other persons,[63] and prohibits such discrimination in the provision of goods, facilities or services to the public.[64] The County Court held that

> the [bakery and its owners] cancelled this order as they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs. Same sex marriage is inextricably linked to sexual relations between same sex couples which is a union of persons having a particular sexual orientation.[65]

On this basis the County Court held that Mr Lee suffered direct discrimination on grounds of sexual orientation for which there can be no justification.[66]

The Court of Appeal subsequently reached the same conclusion on direct discrimination in respect of sexual orientation, albeit by a different route:

> The benefit from the message or slogan on the cake could only accrue to gay or bisexual people. The [bakery and its owners] would not have objected to a cake carrying the message "Support Heterosexual Marriage" or indeed "Support Marriage". We accept that it was the use of the word "Gay" in the context of the message which prevented the order from being fulfilled. The reason that the order was cancelled was that the [bakery and its owners] would not provide a cake with a message supporting a right to marry for those of a particular sexual orientation […] There was an exact correspondence between those of the particular sexual orientation and those in respect of whom the message supported the right to marry. This was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community. Accordingly this was direct discrimination.[67]

However, the SCUK advanced a very different view when it unanimously held that "[t]his was a case of associative discrimination or it was nothing" and that it was not associative discrimination because, in essence, the association was not "close enough".[68] The SCUK stated that just because the reason for refusing to supply Mr Lee with the cake had "something to do with the sexual orientation of some people" this did not mean that the refusal was "'on grounds of' sexual orientation".[69] "There must", stated the SCUK, "be a closer connection than that".[70]

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[62] *Lee v Ashers Baking Co Ltd and Others* [2015] NICty 2 at [46] and [66]-[68].
[63] Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, reg. 3.
[64] Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, reg. 5.
[65] *Lee v Ashers Baking Co Ltd and Others* [2015] NICty 2 at [43].
[66] *Lee v Ashers Baking Co Ltd and Others* [2015] NICty 2 at [46].
[67] *Lee v McArthur and Others* [2016] NICA 39 at [58].
[68] *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49 at [34].
[69] *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49 at [33].
[70] *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49 at [33].

The SCUK concluded: "In a nutshell, the objection [of the bakery and its owners] was to the message and not to any particular person or persons".[71]

Jonathan was incensed by the SCUK's judgment and wrote several pieces strongly condemning it. He stated that he could not "stop thinking about Mr Lee and how devastated he must be" because "Mr Lee's very identity has been publicly disparaged and that shame – not to be served – has been compounded by the highest court in the land".[72] Jonathan was absolutely clear that he thought that the judgment was a disaster not only for Mr Lee but for the LGBT community as a whole:

> The Ashers judgment is more than a wasted opportunity to bolster the status quo. It is grim. Its implications cannot be underestimated and are more worrisome than the judgment itself. Our defences have been breached. Can we shore them up? Social media is already ablaze with those set to exploit it. There will be case after case seeking to use religious freedom to trump LGBTI equality. Can we have confidence in the ability of the Supreme Court to do the mental gymnastics to make sense of it all? Probably, but what about the rest of us? A new era has been ushered in and LGBTI people's mental health will pay the price.[73]

Jonathan felt incredibly motivated to be involved in this case, which he clearly regarded as catastrophic for LGBT equality. He was not directly involved in representing Mr Lee[74] but, when Mr Lee decided to take his case to the ECtHR, Jonathan felt strongly that he wanted to intervene. Therefore, following the communication of the case by the ECtHR,[75] Jonathan and I applied together for and were granted leave to intervene as a joint third party in the case. Consequently, we submitted our joint third party intervention to the ECtHR in October 2020.

In our joint third party intervention Jonathan and I argued that the SCUK had failed to uphold the UK Parliament's intention that a person, when seeking commercial goods and services, should be protected from discrimination on grounds of sexual orientation. Jonathan felt very strongly that a key failure of the SCUK's judgment was its narrow and constrained approach to equality law that did not sufficiently appreciate the clear intention of the law to root out anti-gay hostility in certain aspects of social life, such as commercial activity. The SCUK's approach did not, in his view, take sufficient account of the general context in which the attempted purchase of the cake took place, both in terms of the hostility often experienced by gay people in Northern Ireland – hostility that is fuelled by the beliefs of many in religious

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[71] *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49 at [34].
[72] J. Cooper, "Ashers Baking Company and the Shaming of Mr Lee" (13 October 2018) https://www.gaystarnews.com/article/ashers-baking-company-and-the-shaming-of-mr-lee [Accessed 29 November 2021].
[73] J. Cooper, "Ashers Baking Company and the Shaming of Mr Lee" (13 October 2018) https://www.gaystarnews.com/article/ashers-baking-company-and-the-shaming-of-mr-lee [Accessed 29 November 2021].
[74] Mr Lee is represented by Ciaran Moynagh, and was represented in the SCUK by Robin Allen QC and Sinead Eastwood.
[75] *Lee v United Kingdom* (App. No. 18860/19), Communicated Case of 6 March 2020.

communities – and the importance of securing the right to same-sex marriage as a mechanism for challenging that hostility. Although Jonathan recognized that drawing analogies can be clunky and unhelpful, he felt that drawing an analogy with anti-miscegenation laws in the United States of America, before these were invalidated by the Supreme Court of the United States,[76] illuminated the issues at the heart of Mr Lee's case. He imagined a hypothetical scenario in which, with odious anti-miscegenation laws in force, a person went into a bakery and asked for a cake with a message iced on it saying "support multi-racial marriage"[77] and what a refusal from the bakery to provide that cake would mean:

> The message on that cake would be inextricably linked to the identities and race of those who were not permitted to marry. It would not matter who is seeking to purchase this particular hypothetical cake. To deny the cake with its iced message would be to discriminate on grounds of race, which can never be justified. The faith arguments to justify the outlawing of inter-racial marriage [should] be given no weight.[78]

Jonathan felt that it was important to make this analogy because the analogies used in the SCUK's judgment – "support for living in sin, support for a particular political party, support for a particular religious denomination"[79] – trivialized the issues involved in Mr Lee's case.

Unsurprisingly, Jonathan's greatest criticism of the SCUK's judgment was of its selective and limited engagement with the human rights issues relevant to the case. He felt that concepts which lie at the heart of the ECHR, such as the search for fair balance, were ignored. Moreover, he felt that the judgment favoured the faith and beliefs of the owners of the bakery and attached little or no weight to Mr Lee's beliefs. Most crucially, Jonathan felt that the SCUK had failed to adequately grapple with the core issue at the heart of Mr Lee's case, which is the competing right of Mr Lee to not be discriminated against on grounds of sexual orientation and the right of the owners of the bakery to freedom of religion. Jonathan felt that the SCUK had not sufficiently understood the weight that the ECtHR, if it considered the case, would give to the right to respect for Mr Lee's private life which, in his view, would lead the ECtHR to conclude that any interference with the right of the owners of the bakery to freedom of religion was justified. That conclusion would be reached, Jonathan felt, because of the importance that the ECtHR consistently attaches to protecting individuals from discrimination on grounds of

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[76] *Loving v Virginia*, 388 U.S. 1 (1967).

[77] In using the concept of "race" I am drawing on the framework of the Equality Act 2010 in which "race" is a protected characteristic that includes colour, nationality, and ethnic or national origins. I recognize, however, that "race" is a deeply problematic socially constructed concept which, as the Law Society recently summarized, is "rooted in White supremacy and efforts to prove biological superiority and maintain dominance over others" (https://www.lawsociety.org.uk/en/topics/ethnic-minority-lawyers/a-guide-to-race-and-ethnicity-terminology-and-language [Accessed 29 November 2021]). The example given, therefore, of a message saying "support multi-racial marriage" is an attempt to highlight how this message (in a similar way to "support gay marriage") would seek to challenge discrimination based on the ground of what is now a legally protected characteristic.

[78] *Lee v United Kingdom*, Joint Third Party Intervention by Mr Jonathan Cooper OBE and Prof Paul Johnson, at [22].

[79] *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49 at [55].

sexual orientation, which is a most intimate[80] and vulnerable[81] aspect of private life. In this respect, the ECtHR has clearly stated that when a difference in treatment is based solely on sexual orientation, this will amount to discrimination under the ECHR.[82]

At the time of writing, Mr Lee's case had just failed in the ECtHR.[83] The ECtHR declared, by a majority, Mr Lee's application inadmissible on the ground that he had failed to exhaust domestic remedies.[84] The principal reason given by the ECtHR for its decision was that Mr. Lee "did not invoke his Convention rights expressly at any point in the domestic proceedings" and, by "relying solely on domestic law" in the domestic proceedings, he had "deprived the domestic courts of the opportunity" to address the ECHR issues raised in his application.[85] Or, put more strongly, that "[i]n choosing not to rely on his Convention rights" Mr Lee had deprived the domestic courts of the opportunity to consider his ECHR rights and then asked the ECtHR to "to usurp the role of the domestic courts by addressing these issues itself" – an approach that is "contrary to the subsidiary character of the Convention machinery".[86]

The ECtHR's conclusion – in the context of Mr Lee having claimed that he had relied on his ECHR rights in substance in the domestic proceedings (which the ECtHR has long recognized as a valid approach[87]) and that his ECHR rights had been expressly recognized by the domestic courts – is problematic because it appears to place "blame" on Mr Lee, rather than the SCUK, for failing to appropriately consider the relevance of his ECHR rights to the issues in dispute. The ECtHR stated that it is "axiomatic" that Mr Lee's ECHR rights should have been "invoked expressly before the domestic courts" and it was "incumbent on him" to contend how a finding of the SCUK against him would violate his own rights under Articles 8, 9, 10 or 14 of the ECHR.[88] This is problematic in the context of the ECtHR having repeatedly held that it is not necessary for ECHR rights to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance", that arguments are raised to the same or like effect on the basis of domestic law, and that the national courts are given the opportunity to redress the alleged breach in the first place.[89] Mr Lee argued that he met these criteria. The ECtHR's approach is made more problematic by the requirement of the HRA that "[s]o 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".[90] Jonathan and I argued that it was the SCUK's limited and perfunctory analysis that did not adequately address the core human rights issue in this case and, as such, failed to meet the HRA requirement that all law in the UK

[80] *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493 at [90].
[81] *Kozak v Poland* (2010) 51 E.H.R.R. 16 at [92].
[82] *Kozak v Poland* (2010) 51 E.H.R.R. 16 at [92].
[83] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 (notified in writing 6 January 2022).
[84] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [78].
[85] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [69] and [74].
[86] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [77]-[78].
[87] See for example *Castells v Spain* (App. No. 11798/85), Judgment of 23 April 1992 at [32].
[88] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [77].
[89] For a discussion and list of relevant case see European Court of Human Rights, *Practical Guide on Admissibility Criteria* (1 August 2021), at [93].
[90] Human Rights Act 1998, s.3(1).

– including the equality law relevant to Mr Lee's case – must be interpreted compatibly with the ECHR.[91] Indeed, as Mr Lee argued, it was the judgment of the SCUK that "crystallised" the violations of the ECHR that he complained about in the ECtHR.[92] In my view, the principal task of the ECtHR was to assess whether the domestic courts had met their obligation to secure Mr Lee's ECHR rights and freedoms, not to assess the extent to which Mr Lee had explicated those rights and freedoms.

A concerning aspect of the ECtHR's decision is its statement that it was "not self-evident that the facts of the present case […] fall within the ambit of Article 8, 9 or 10 of the Convention" and that it was "not immediately apparent how the findings of the Supreme Court and the consequences of those findings for [Mr Lee] either constitute one of the modalities of or are linked to the exercise of a right guaranteed by any of those Articles".[93] The ECtHR conceded that it was not saying that "the facts of the case could not fall within the ambit of Articles 8, 9 and 10 of the Convention" but that what was principally at issue in the domestic proceedings was not the effect on Mr Lee's private life or his freedom to hold or express his opinions or beliefs, but rather whether the bakery was required to produce a cake expressing Mr Lee's political support for same-sex marriage – and, in this sense, the ECtHR held Mr Lee accountable for having deprived the domestic courts of the opportunity, or not having "tasked" them, to consider his ECHR rights.[94] Yet, for the ECtHR to conclude that it was not self-evident or immediately apparent how the judgment of the SCUK impacted on Mr Lee's ECHR rights is extremely concerning. The essence of Mr Lee's complaint was that he had been discriminated against on grounds of sexual orientation, and sexual orientation has long been recognized by the ECtHR to fall within the ambit of Article 8 ECHR.[95] Moreover, the ECtHR has recognized that the "momentous interests" of same-sex couples to gain legal recognition and protection of their relationships is within the scope of and protected by Article 8 ECHR.[96] It seems deeply problematic, therefore, that some ECtHR judges could not immediately and clearly see how the treatment of Mr Lee, and the judgment of the SCUK about that treatment, fell squarely within the ambit of, at a minimum, Article 8 ECHR – concerning, as it did, sexual orientation – and therefore rendered Article 14 applicable.

The ECtHR's decision in Mr Lee's case is significantly flawed. The ECtHR recognized the importance of balancing Mr Lee's ECHR rights with those of the bakers – a balancing exercise it said was "a matter of great import and sensitivity to both LGBTIQ communities and to faith communities" – and noted that, given the heightened sensitivity of the balancing exercise in Northern Ireland, the domestic courts were better placed than the ECtHR to strike the balance.[97] Therefore, in my view, the key question facing the ECtHR was whether the SCUK had adequately and effectively struck that balance by taking into account the competing ECHR

[91] *Lee v United Kingdom*, Joint Third Party Intervention by Mr Jonathan Cooper OBE and Prof Paul Johnson, at [2], [36]-[37].
[92] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [57].
[93] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [73].
[94] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [73]-[75].
[95] For example, see *Smith and Grady v United Kingdom* (2000) 29 E.H.R.R. 493 at [90].
[96] *Oliari v Italy* at (2017) 65 E.H.R.R. 26 at [185].
[97] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [75]-[76].

rights of Mr Lee and the bakers. Instead of answering that question, the ECtHR acknowledged that the SCUK had not undertaken this balancing exercise and blamed Mr Lee for this omission. This seems the wrong approach, not least because it appears to place an unreasonable responsibility on applicants to ensure that domestic courts carry out an assessment of ECHR rights in a manner which the ECtHR considers meets the requirement for an applicant to have exhausted domestic remedies. Mr Lee contends, reasonably in my view, that it was correct and proper for him to have formulated his initial claim in the domestic courts by reference to the relevant domestic law and to have relied on his ECHR rights in substance.[98] The ECtHR should, in my opinion, have more strongly held the SCUK to account for its approach, rather than Mr Lee.

Obviously, Jonathan and I very much hoped that Mr Lee's case would succeed and, as a result, the ECtHR would restore the protection from discrimination on grounds of sexual orientation as intended by the UK Parliament. We were strongly of the view that the law in Northern Ireland, which prohibits discrimination on grounds of sexual orientation in the provision of goods, facilities or services to the public, was intended to protect Mr Lee from the treatment he was subjected to. The refusal to provide Mr Lee with the commercial service that he requested was indisputably, in our view, based solely on grounds of sexual orientation because what the bakery objected to was the word "gay" in the statement "support gay marriage", and "gay" is unquestionably a "sexual orientation". It was our belief, therefore, that Mr Lee suffered unlawful direct discrimination. Now that the ECtHR has dismissed Mr Lee's application, it is for the Northern Ireland Assembly to consider whether it needs to legislate further to prohibit the type of treatment Mr Lee complained of.

Conclusion: keeping the love of law alive

Jonathan's involvement in the cases that I have discussed in this article brings to mind James Baldwin's insight that the "victim who is able to articulate the situation of the victim has ceased to be a victim: he, or she, has become a threat".[99] Jonathan's primary purpose in these cases was to assist victims of human rights violations to articulate their suffering and, in doing so, challenge those who inflicted the suffering. To achieve this purpose, law was Jonathan's armament. Human rights law was Jonathan's means to appeal to the highest ideals of human civilisation and, in doing so, combat the lowest behaviours of humankind. In this sense, to recall Albie Sachs, Jonathan approached law not merely as a "barricade of injustice" to be "stormed and torn down", but as a "primary instrument for accomplishing peaceful revolution".[100]

Jonathan's commitment to law endured because he recognized its great potential to reshape and transform human lives for the better. He once said to me that human rights law cannot work if only lawyers are interested in it; that for human rights law to work effectively, everyone

[98] *Lee v the United Kingdom* (App. No. 18860/19), Decision of 7 December 2021 at [56].
[99] J. Baldwin, *The Devil Finds Work* (London: Corgi Books, 1978) p.114.
[100] A. Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) pp.2-3.

in society must be interested in it. Not being a lawyer myself, I listened carefully to those words. And what I take from those words, and from Jonathan's life as a practising lawyer, is that a commitment to law, and human rights law in particular, must remain at the centre of all our aspirations to live in better societies. A commitment to the rule of law as a means of protecting human rights, as the Preamble to the Universal Declaration of Human Rights forever tells us, is essential to protecting all human beings from tyranny and oppression. The rule of law, as Robert Spano, current President of the ECtHR, recently remarked, remains the lodestar guiding the protection and development of fundamental human rights in contemporary societies.[101]

For LGBT people, law has been and, in some contexts, remains a source of oppression and immiseration. LGBT people around the world have, for centuries, been systematically fettered within vile and oppressive regimes of legal regulation that have sought to prevent them living full and happy lives. As the cases discussed in this article demonstrate, when LGBT people seek legal recourse to discrimination they sometimes go into courts and find, as Marc de Werd recently put it, the "nasty face of a legal system that shows little interest in justice".[102] Yet, in the face of hateful laws and inadequate systems of justice, LGBT people continue to regard and rely on human rights law as a "beacon" that provides the "hope" of "freedom".[103] This is because, as Edwin Cameron puts it, rights "confer the dignity of moral citizenship" upon individuals and human rights law, when "invoked with creativity and integrity", can "play a humanising, expansive and inspiring role in human society".[104] Jonathan was constantly alive to the vital necessity of ensuring that human rights law existed and was appropriately utilized to protect the human dignity of LGBT people:

> In the absence of an enforceable right to human dignity, the [ill] treatment of LGBT people was justified because they were labelled unequal. And this inequality was reinforced by rules and law. And whilst the law recognised that inequality, and reinforced it, there was no reason to believe LGBT people were worthy of dignity.[105]

Jonathan, more than anyone else, was aware of the centrality of human rights law in providing the safety and security that LGBT people need in contemporary societies. Therefore, even in the darkest of times, when our belief in human rights and law comes near to being extinguished, Jonathan would urge us to keep our love of law alive as the basis for building societies in which LGBT people can live, and love, in freedom.

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[101] R. Spano, "The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary" (2021), *European Law Journal*, advance online access.
[102] M. de Werd, "Duas mãos e o sentimento do mundo – Some uneasy thoughts on our national justice systems", presentation at the "Rule of Law in Europe Conference", Lisbon, 9 December 2021.
[103] From a speech given at the signing of the ECHR by Sir David Maxwell Fyfe, quoted in Human Rights Information Bulletin, "The European Convention on Human Rights at 50" (Council of Europe, 2000), p.47.
[104] E. Cameron, "What you can do with rights", *Law Commission of England and Wales: The Fourth Leslie Scarman Lecture*, 25 January 2012, at [65] and [112].
[105] J. Cooper, "The Human Rights Act: Delivering Rights and Enhancing Dignity", in K. Dzehtsiarou, S. Falcetta, D. Giannoulopoulos and P. Johnson (eds), *Human Rights in Action: Assessing the positive impact of the Human Rights Act 1998 in the UK*, https://human-rights-in-action.blogspot.com/2021/03/human-rights-in-action-evidence-to.html [Accessed 29 November 2021], p.24.