

Submission to the Consultation on Legal Intervention on Religion or Belief Rights¹

Dr Russell Sandberg,

Lecturer in Law, Centre for Law and Religion, Cardiff University

In relation to religious rights, a distinction can often be drawn between the question of interference and the question of justification. This is true of both Article 9 of the ECHR and indirect discrimination under the Equality Act 2010:² whilst Article 9(1) is concerned with whether there has been an interference with the right to manifest religion or, Article 9(2) is concerned with whether that interference was justified; similarly, once it has been established that the claimant has suffered a disadvantage, it is a defence to claims of indirect discrimination if the actions were justified.

This distinction between interference and justification allows us to draw a line between the cases of *Eweida*³ and *Chaplin*⁴ on the one hand (which were dismissed on grounds of interference) and *Ladele*⁵ and *McFarlane*⁶ on the other hand (which were dismissed on grounds of justification).

Dealing with *Eweida* and *Chaplin*, which are the subject of the first question which the Commission asks, it may be argued that there are principled reasons why courts and tribunals should refrain from deciding the dispute on grounds of interference. It should be noted that there has been a marked trend towards deciding disputes on grounds of interference in relation to both Article 9 and indirect discrimination, which can be traced back to the reasoning of the House of Lords in *Begum*⁷ in which Lord Bingham that interference with Article 9 ‘is not easily established’.⁸ In that case, the majority of their Lordships held that there would not be an interference with religious freedom where ‘a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without

¹ The following is a submission to a consultation by the Equality and Human Rights Commission (September 2011). The views expressed are those of the author.

² See, further, R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapters 5 and 6.

³ *Eweida v British Airways* [2010] EWCA Civ 80.

⁴ *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] ET Case Number: 17288862009 (6 April 2010).

⁵ *Ladele v London Borough of Islington* [2009] EWCA Civ 135.

⁶ *McFarlane v Relate* [2010] EWCA Civ 880.

⁷ *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

⁸ *Per* Lord Bingham, para 24.

undue hardship or inconvenience’.⁹ Following *Begum*, a number of lower court decisions have dismissed Article 9 claims on the basis that there was no interference with the claimant’s right to religious freedom.¹⁰ The restrictive approach taken was underlined by Munby LJ recently in *R (Eunice Johns and Owen Johns) v Derby City Council*¹¹ in which he suggested that in relation to Article 9, ‘interferences in the sphere of employment and analogous spheres are readily found to be justified, even where the members of a particular religious group will find it difficult in practice to comply’.¹²

The reason why courts and tribunals should refrain from determining religious disputes using the question of interference is that this judicial tendency to focus upon questions of interference or disadvantage might not allow the court to examine the merits of the case. Cases concerning religious rights require nuanced, fact-specific judgments, which are best reached by focussing upon the question of justification. The pure focus on the question of interference is crude. For instance, the application of the *Begum* reasoning means that wherever the claimant can go to another school, resign their job or take their custom elsewhere, then they could not rely on Article 9.¹³ This overly restrictive approach is unnecessary because such claims could have been adequately dealt with by focusing upon the question of justification. This is not to say that the ‘religion or belief’ argument always needs to win. The cases may still be ultimately dismissed on grounds of justification – but if they are then the court or tribunal will have examined whether in that particular social situation, that particular interference with the claimant’s rights was justified. The decision in *Azmi v Kirklees Metropolitan Council*¹⁴ provides a good illustration of how the focus on justification can lead to nuanced, fact-specific judgments.

Turning specifically to *Eweida* and *Chaplin*, these two cases were dismissed on the basis that there was no interference (or ‘disadvantage’) because the requirement now found in section 19(2)(b) of the Equality Act 2010 was not met. This states that there will only be a

⁹ *Ibid* para 23.

¹⁰ Eg. *R (on the application of X) v Y School* [2006] EWHC (Admin) 298; *R (on the Application of Playfoot (A Child) v Millais School Governing Body* [2007] EWHC Admin 1698. For a notable recent exception see *R on the Application of Bashir v The Independent Adjudicator and HMP Ryehull and the Secretary of State for Justice* [2011] EWHC 1108 (Admin).

¹¹ [2011] EWHC Admin 375.

¹² At para 102.

¹³ See the criticisms made of this ‘specific situation rule’ in *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932.

¹⁴ [2007] UKEAT 0009 07 30003 (30 March 2007).

disadvantage if ‘it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it’. In other words, an act can only constitute indirect discrimination where it would (hypothetically) disadvantage those who share the victim’s religion or belief. It may be argued that this requirement is more taxing in relation to religion or belief than other equality strands given that religious identities are more malleable: it is possible that two Christians will have significantly different views as to what causes them (say) offence. This raises the question of how small the pool should be drawn: should we say that those who share the same religion or belief must belong to the same religion, the same denomination or the same place of worship? It is not surprising, therefore, that this requirement has proved problematic. However, the line currently drawn in *Eweida* and *Chaplin* is overly restrictive.

The *Eweida* case concerned a member of check-in staff who wore a silver cross in breach of the airline’s then uniform policy which prohibited visible religious symbols unless their wearing was mandatory. The Court of Appeal held that there was no indirect discrimination: the uniform policy did not put Christians at a particular disadvantage. There was no evidence that practising Christians considered the visible display of the cross to be a requirement of the Christian faith and no evidence that the provision created a barrier to Christians employed at the airline.

It could, of course, be argued that the decision should not have been based upon the grounds of interference at all. Sedley LJ suggested *obiter* that if it had been held that there was indirect discrimination then the claim would nevertheless have been defeated on justification. However, even *if* it is accepted that the court was correct to determine the case this way, the approach taken is deeply problematic. The Court of Appeal in deciding what is and what is not a requirement of the Christian faith determined a question of religious doctrine. This goes against the traditional reluctance of the courts to determine questions of religious doctrine.¹⁵

¹⁵ ‘It is not for the court to embark on an inquiry into the asserted belief and judge its “validity” by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual’: *R. v Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15, at para 22. See also *HH Sant Baba Jeet Singh Maharaj v Eastern Media Group Ltd* [2010] EWHC (QB) 1294. These cases suggest that the question of when it is appropriate to determine questions of religious doctrine requires further thought.

Moreover, the fact that other Christian employees had not been affected is not relevant: the reference to the comparator is hypothetical.

The decision in *Chaplin*, which blindly applied *Eweida*, is even more troubling. This case concerned a nurse who wished to wear a crucifix around her neck. Despite evidence that another nurse had been asked to remove her cross and chain, the Employment Tribunal held that this other nurse had not been put at a particular disadvantage since her religious views were not so strong as to lead her to refuse to comply with the policy. It was held that in order for there to be a ‘particular disadvantage’, the disadvantage needed to be ‘noteworthy, peculiar or singular’. This seems to be counter-intuitive. On the face of it, Chaplin was disadvantaged and, unlike in *Eweida*, there was clear evidence that she was not alone. Ignoring the other nurse on the basis that her religious objection was not strong enough jars. Even *if* it is accepted that the courts are entitled to conclude that a ban on wearing a cross would not disadvantage Christians as a whole, these cases suggest that beliefs held by a few individuals (including beliefs held by a minority of believers within a larger religious group) are not protected. This contradicts the text of Article 9 which protects both religious groups and religious individuals.

Turning to the second question that the Commission asks which deals with *Ladele* and *McFarlane*, it is significant that these cases were not dismissed on grounds of interference. The fact that other Christians are comfortable with same-sex unions was not used to deny these claims. This is surely right and underlines how the law has taken an incorrect turn in *Eweida* and *Chaplin*. The emphasis upon the question of justification in *Ladele* and *McFarlane* is to be applauded but these judgments are not unproblematic.¹⁶ The reasoning in these cases is problematic since the question of justification has been reduced to a ‘battle of rights’ analysis. An ‘either/or’ approach has been taken: protection is either we protect freedom of religion or we protect the right not to discriminate on grounds of sexual orientation. When this analysis is applied, religious rights becomes easily ‘trumped’ by the right not to discriminate on grounds of sexual orientation.

For instance, in *Ladele*, in reaching the conclusion that there had not been discrimination on grounds of religion, the Court of Appeal seemed to emphasize the laudable aim of preventing

¹⁶ See further R Sandberg, ‘The Right to Discriminate’ (2011) 13 *Ecclesiastical Law Journal* 157–181.

discrimination on grounds of sexual orientation whilst downplaying the claim of religious discrimination. For Dyson LJ,

‘the aim of the Dignity for All policy was of general, indeed overarching, policy significance to Islington, and it also had fundamental human rights, equality and diversity implications, whereas the effect on Ms Ladele of implementing the policy did not impinge on her religious beliefs: she remained free to hold those beliefs, and free to worship as she wished.’¹⁷

In short, the obligations on the employer not to discriminate on grounds of sexual orientation trumped the rights of the employee not to be discriminated against on grounds of religion or belief. There seems to be no recognition that equality policy protects discrimination on grounds of religion as well as on grounds of sexual orientation. And the understanding of religious freedom in this case seems to be very narrow: as Article 9 makes clear, religious freedom is not limited to the right to hold beliefs and worship. Discrimination on grounds of sexual orientation is clearly wrong but so too is discrimination on grounds of religion. The Court of Appeal does not appear to have struck the correct balance in its reasoning.

The approach in *Ladele* was also followed in *McFarlane*. In *R (Eunice Johns and Owen Johns) v Derby City Council*¹⁸ Munby LJ stated that *Ladele* and *McFarlane* were authorities for the proposition that the need not to discriminate on grounds of sexual orientation will always serve as justification to a religious discrimination claim:

‘it is clear on the authorities that compliance with anti-discrimination legislation prohibiting sexual orientation discrimination and the defendant’s equal opportunities policies to the same effect, together with the need to ensure the non-discriminatory service provisions ... will amount to justification.’¹⁹

In short, these decisions suggest that there a hierarchy of rights now exists with religious discrimination coming below sexual orientation.²⁰ This approach may well be in breach of Article 9 ECHR. This is not to say that the actions of the respondents in these cases were not in fact justified; it is the suggestion that their actions would always be justified by the need not to discriminate on grounds of sexual orientation that is being contested.

¹⁷ *Ibid*, at para. 51.

¹⁸ [2011] EWHC Admin 375.

¹⁹ Para 101.

²⁰ L Vickers, ‘Religious Discrimination in the Workplace: An Emerging Hierarchy’ (2010) 12 *Ecclesiastical Law Journal* 280-303.

Turning towards the third question posed, the desirability of adopting the Canadian concept of ‘reasonable accommodation’, it can be suggested that such a move would be unnecessary provided that the focus of judicial decision-makers is on the question of justification rather than interference. On my understanding, focussing properly on the question of justification by looking at the facts, risks and contexts of the particular case would have the same result as applying the question of reasonable accommodation. Asking whether an interference with religious freedom is necessary in a democratic society and asking whether it would be reasonable to accommodate a particular religious manifestation should lead to the same conclusion. An interference with a person’s religious rights is justified if it would be unreasonable to accommodate them in that particular case. Using the language of reasonable accommodation rather than justification may be undesirable as it puts an extra gloss upon the legal provisions. However, if this gloss is necessary to ensure that the focus is upon justification as opposed to interference, then the concept would be helpful. It should not be needed. The letter of the law provides for a test of justification. But the reasoning expressed in the four cases discussed above (and several other recent judgments) seems to suggest that the concept may well be required.