

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**WEIDA AND CHAPLIN v UNITED KINGDOM**

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**SUBMISSION OF THE EQUALITY AND HUMAN RIGHTS COMMISSION**

**pursuant to Article 36 §2 of the European Convention on Human Rights and Rule 44 §2 of the Rules of the European Court of Human Rights**

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**A. INTRODUCTION**

1. This submission is respectfully made on behalf of the Equality and Human Rights Commission (“the Commission”) pursuant to leave granted by the President of the Chamber on 5 August 2011 in accordance with Rule 44 §2 of the Rules of Court.
2. These cases concern the scope of the protection afforded by Articles 9 and 14 to the manifestation of religious belief in the workplace. The Court is asked to examine whether the United Kingdom’s anti-discrimination legislative framework as interpreted by United Kingdom courts and tribunals guarantees sufficient respect for religious rights and protection against discrimination on religious grounds. The outcome of the cases will have a significant influence on the place of religion in public life in the United Kingdom.
3. The Commission’s submission considers the questions attached to the Statement of Facts, focusing on the scope of the right to freedom of religion and belief under Article 9(1), establishing an interference with the right and the prohibition on indirect religious discrimination under Article 14, and justification. Domestic legislation prohibiting discrimination based on religion and belief is not the source of the problems in these cases. The Commission is concerned that the interpretation of domestic discrimination legislation by the United Kingdom courts does not satisfy

Article 9, in particular by setting too high a threshold for interference and therefore failing properly to address justification.

## **B. THE EQUALITY AND HUMAN RIGHTS COMMISSION**

4. The Commission is a non-departmental public body established under the Equality Act 2006. It has operated as the single equality and human rights body in Britain since October 2007. As the independent advocate for equality and human rights in Britain, the Commission aims to reduce inequality, eliminate discrimination, strengthen good relations between people and promote and protect human rights.

## **C. DOMESTIC LAW**

5. Since the domestic decisions in the Applicants' cases, the legal framework prohibiting discrimination was consolidated and clarified under the Equality Act 2010 ("EA 2010"). The Employment Equality (Religion or Belief) Regulations 2003 ("the 2003 Regulations") were repealed. Religion or belief are now protected characteristics under section 4 of the EA 2010.
6. Section 19 prohibits indirect discrimination in relation to all protected characteristics. It is cast in essentially the same terms as Regulation 3(1) of the 2003 Regulations: a provision, criterion or practice is indirectly discriminatory if it puts or would put people who share the religion or belief at a particular disadvantage when compared with people who do not share it and the provision, criterion or practice cannot be shown to be a proportionate means of achieving a legitimate aim. The judicial interpretation of indirect discrimination under the 2003 Regulations in these cases will therefore apply in the same way to claims under the EA 2010.
7. In these cases, the applicants' challenges to their employer's practices were rejected on the basis that indirect discrimination could not be established because the 2003 Regulations required them to identify other persons sharing their religion who would be put at a particular disadvantage. The courts held that the fact that the

applicants could not identify others suffering particular disadvantage as a result of their employers' dress codes was fatal to their claims.

8. Article 9 was not considered to assist the applicants in either case.
9. As the Commission explains below, in its view domestic case law fails to give proper effect to Articles 9 and Article 14.

#### **D. SCOPE OF ARTICLE 9(1)**

10. The legal protection of beliefs, religious or non-religious, is a fundamental guarantee of a civilised society. Article 9 (1) absolutely protects the right to hold beliefs; these rights cannot be interfered with. The right to hold beliefs is distinguished under Article 9 from the right to manifest beliefs, which can be limited under Article 9(2). Belief is a core aspect of personality; it is “one of the most vital elements that go to make up the identity of believers and their conception of life” (*Kokkinakis v Greece* (1993) 17 EHRR 397, §31) and respecting an individual's beliefs accords respect for human dignity. In the words of Lord Nicholls in *R (Williamson) v Secretary of State for Education and Skills* [2005] UKHL 15, [2005] 2 AC 246, §15:

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony.”

11. The existence of religious conviction is intrinsically bound up with the expression of that conviction: *Kokkinakis v Greece* (above). By protecting manifestations of religion, subject to legitimate limitations placed upon those rights, practical effect is given to the absolute right to hold a belief.
12. As the Court stated in *Sahin v Turkey* (2007) 44 EHRR 5, §105, “Article 9 does not protect every act *motivated or inspired by* a religion or belief.” The belief itself

must have “a certain level of cogency, seriousness, cohesion and importance”.<sup>1</sup> This test prevents the protection of Article 9 from being expanded beyond reasonable limits.<sup>2</sup> UK case law (see *R (Williamson)* above) also requires the belief to be “worthy of respect in a democratic society”.

13. Manifestation of a religious belief has also traditionally only been protected if it is *required* by the particular religion.<sup>3</sup> More recently, however, the Court has held that non-prescribed religious practices can engage Article 9. In *Jakobski v Poland* (2010) 30 BHRC 417 the refusal of a Buddhist prisoner’s request for vegetarian food fell within the protection of Article 9 even though vegetarianism was not a mandatory requirement of Buddhism. The Court stated that Article 9 was engaged where the applicant’s decision could be “regarded as motivated or inspired by a religion and was not unreasonable”.<sup>4</sup> The Grand Chamber applied a similar test in its recent decision in *Bayatyan v Armenia* (App no 23459/03, 7 July 2011) finding that where opposition to military service is motivated by genuinely held religious beliefs, Article 9 will be engaged.<sup>5</sup>

14. In *Lautsi v Italy* (2011) 30 BHRC 429 the Grand Chamber found that the display of the crucifix in Italian schools did not violate parents’ right to have their children educated in conformity with their own philosophical desires under Protocol 1, Article 2. The state’s decision whether or not to choose to display the crucifix as a reflection of the country’s religious and cultural identity fell within its margin of appreciation.

15. The *Court’s early* restrictive approach to manifestation has led to a narrow interpretation of Article 9 by the United Kingdom courts, which rarely accept that a restriction on an individual’s religious practice must be justified under Article 9(2).<sup>6</sup>

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<sup>1</sup> *Jakobski v Poland* (2010) 30 BHRC 417, at §44.

<sup>2</sup> See, eg *Farrell v South Yorkshire Police Authority* [2011] EqLR 934 in which the Employment Tribunal held that a belief in a global conspiracy theory to establish a new world order did not “meet even a bare minimum standard of coherence and cohesion”.

<sup>3</sup> See, eg *Arrowsmith v United Kingdom* (1980) 19 DR.

<sup>4</sup> At §45.

<sup>5</sup> See §§110-111.

<sup>6</sup> See, eg *R (Playfoot) v Governing Body of Millias School* [2007] EWHC 1698 (Admin) rejecting a student’s challenge to the school’s refusal to allow her to wear a purity ring because it was not “intimately linked” to her Christian beliefs. In *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin), [2009] NLJR 713 the High Court held open air cremation was a manifestation of Hindu belief because it was “sufficiently close to the core of one strand of orthodox Hinduism”, but for Sikhs it was only a matter of tradition and not belief. By contrast, see the recent decision in *R (Imran Bashir) v The Independent Adjudicator and Anor* [2011] EWHC 1108 (Admin). The High Court adopted a broader

In these cases, the domestic courts did not reach any conclusions on this issue, but the Commission is concerned by the tendency in domestic law to narrowly construe the scope of manifestation. The fact that not all Christians choose to wear a cross should not necessarily undermine the rights of those Christians for whom the display of the cross is an essential and reasonable aspect of their autonomous interpretation of their faith.

16. In the Commission's submission, recognition of the principles of dignity and autonomy requires an approach to the definition of manifestation that focuses primarily on the conviction of the adherent, providing the manifestation is carefully scrutinised if it is not a requirement of the religion and belief. Subject to this, the Commission invites the court to find that Article 9 applies in these cases and that, as a matter of general principle, it applies if an individual's desire to manifest a belief is motivated by a genuinely held belief that attains a certain level of cogency and seriousness and is not unreasonable.

## **E. INTERFERENCE WITH ARTICLE 9(1)**

17. Strasbourg decisions on what constitutes an interference with Article 9 in the employment context traditionally restricted the application of the right. The Commission found in *Ahmad v United Kingdom* (1982) 4 EHRR 126, *Konttinen v Finland* Application 24949/94, 3 December 1996 and *Stedman v United Kingdom* (1997) 23 EHRR CD 168 that the refusal by employers to alter employees' working hours to accommodate religious practices did not interfere with Article 9. The Court has also suggested "in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account".<sup>7</sup> Thus when people have voluntarily accepted particular restrictions in their working lives they cannot expect to avail themselves of the Convention's protection.
18. In light of more recent decisions of the Court in which an interference has been found despite the applicant's apparent acceptance of a restriction, it is questionable

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approach following *Jakobski v Poland* (above). It held that a prisoner's decision to fast before a court appearance was motivated by his Islamic faith and disciplinary sanctions taken against him for failure to give a urinary sample had to be justified.

<sup>7</sup> See, eg *Kalaç v Turkey* (1997) 27 EHRR 552, §27; *Karaduman v Turkey* (1993) 74 DR 93.

whether the Court any longer endorses such an approach. In two recent cases concerning the prohibition on wearing the headscarf, the Court accepted that the ban constituted an interference and considered the question of justification under Article 9(2).<sup>8</sup>

19. The extent to which there is a substantive interference will include taking into account the extent to which the particular manifestation is not a requirement of the religion/belief in question. Where a person has accepted a job knowing their manifestation of religion or belief will conflict with the job, this is a factor that should be carefully considered at the interference stage. Whether or not a person has accepted particular restrictions on their beliefs and whether accommodations could or should have been made are issues that should also be considered in the context of proportionality.

20. The approach to interference has not been consistent in domestic law. In *R (Williamson)* (above) the House of Lords accepted that a ban on corporal punishment in schools interfered with parents' Article 9 rights. By contrast, the early restrictive case law of this Court prompted Lord Bingham's comment, cited frequently in domestic decisions, in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, (2006) 23 BHRC 276, §23, a case concerning a school's prohibition on pupils wearing the jilbab:

"The Strasbourg institutions have not been at all ready to find an interference with the right to manifest a religious belief in practice or observance 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 undue hardship or inconvenience."<sup>9</sup>

21. A majority of the House of Lords found that the school dress policy did not constitute an interference with the claimant schoolgirl's Article 9 rights. The minority were uneasy with determining the question of interference by reference to the

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<sup>8</sup> See *Dahlab v Switzerland* App No 42393/98, 15 February 2001; *Sahin v Turkey* (2007) 44 EHRR 5.

<sup>9</sup> See also *Copsey v WWB Devon Clays Ltd* [2005] IRLR 811. In a case concerning changes to an employee's working hours to his accommodate religious beliefs, the Court of Appeal held that but for the Commission decisions it would have found an interference with the Claimant's Article 9 rights.

concept of choice and preferred to determine the case under Article 9(2).

22. The Commission is particularly concerned by the inconsistency of outcome between cases in which the manifestation of a person's religious belief is also a manifestation of their racial identity and can therefore be brought under the statutory race discrimination provisions and those cases which do not raise any element of race discrimination. For example, in *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), [2008] ELR 561 the claimant schoolgirl brought a complaint under the Race Relations Act 1976 alleging that the school had discriminated against her in refusing to allow her to wear the Sikh Kara. Distinguishing *R (SB) v Denbigh High School* as a case brought purely under Article 9, the court held that the school had unlawfully racially discriminated against the claimant.<sup>10</sup>

23. These judgments illustrate the unsatisfactory legal position whereby the high threshold for establishing an interference with Article 9 leads to a failure to guarantee the same level of protection for individuals asserting a purely religious identity as it does for those whose religious and racial identities are intertwined.

## **F. INDIRECT DISCRIMINATION**

24. This Court has held that Article 14 guarantees respect for individual differences. It stated in *Thlimennos v Greece* (2000) 31 EHRR 411, §44:

“The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

25. In the Commission's submission, domestic case law fails to accord with these

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<sup>10</sup> See also *G v Head Teacher and Governors of St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin). The High Court ruled that a school policy forbidding cornrow hairstyles was unlawful race discrimination on the basis that such hairstyles were a part of Afro-Caribbean culture and tradition.

principles. In their approach to indirect religious discrimination, the United Kingdom courts have placed the focus on group rather than individual disadvantage. It is open to the courts to construct a hypothetical comparator, but they have instead demanded evidence of actual group disadvantage. In the First Applicant's case, the Employment Appeal Tribunal ("EAT") stated:

"In our judgment, in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group."<sup>11</sup>

26. Group disadvantage may be difficult to identify in the context of diverse religious beliefs that, unlike other protected characteristics such as race or national origin, are legitimately subject to autonomous interpretation by individual adherents. In the context of religious belief, the courts have been reluctant to make generalisations in the same way that they have in cases of sex and race discrimination. In the First Applicant's case, for example, the Court of Appeal relied on the fact that no other employee had ever made a request to wear a crucifix over their uniform in order to find that the First Applicant's desire to wear the crucifix was merely "a personal choice".<sup>12</sup> This reasoning overlooked the serious individual detriment that can be caused by a general rule prohibiting a manifestation of religious belief. In the Second Applicant's case, another Christian nurse had been asked to remove her crucifix/necklace, but the disadvantage of being required to do so was found not to be "particular" enough to warrant legal protection.

27. The difficulty of identifying a comparator group for the purposes of establishing disparate impact continues to cause problems for the courts.<sup>13</sup> It remains unclear what size of group is required and what evidence must be adduced to prove its existence and the cogency of its beliefs. In the Commission's view, when asking whether a person has been discriminated against because of their beliefs, the

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<sup>11</sup> First Applicant, EAT, §60. Endorsed by the Court of Appeal, §24. See also the comments by the Court of Appeal on the difficulties of assessing the size of the group at §18.

<sup>12</sup> Court of Appeal, §9. This approach is in stark contrast with that adopted by the High Court in *R (Watkins-Singh) v Governing Body of Aberdare Girls' School* (above).

<sup>13</sup> In *Chatwal v Wandsworth Borough Council* UKEAT/0487/10/JOJ, for example, the Claimant was a Sikh who claimed that his beliefs meant he could not have any contact with meat. The Employment Tribunal concluded there were others of his faith who shared the same beliefs. The EAT disagreed and voiced its concerns about the lack of legal consensus on the size of the group (§26).

beliefs of others of their faith are relevant to establish the hypothetical comparator group that is required to demonstrate disparate impact. This accords with the case law of this court under Article 14, which (as above) has accepted that differential treatment can arise where there has been a failure to treat a person differently.

28. The high threshold for establishing disparate impact also appears contrary to provisions of European Union law set out in Framework Directive for Equal Treatment in Employment and Occupations 2000/78/EC, which prohibits indirect discrimination on the grounds of religion or belief in the workplace. Article 2(b) defines indirect discrimination as follows: "indirect discrimination shall be taken to occur where an apparently neutral provision, criteria or practice put persons having a particular religion or belief.....at a particular disadvantage compared with other persons . This does not require a person to show that others who share the religion are actually put at a disadvantage by an employer's actions.
29. As a consequence of the interpretation of the comparator requirement for establishing indirect discrimination, the courts in these cases did not rigorously assess the question of proportionality. It is incumbent on domestic courts to apply the proportionality test where rights have been limited. In the Commission's view, there is a difference between being permitted to wear a religious symbol that does not have an adverse effect on doing a job, and not being permitted to wear a religious symbol that does have such an adverse effect. The obligation to strike a fair balance between an employee's and a public or private sector employer's legitimate aims may be an onerous one, but as the Court stated in *Sahin v Turkey* (2007) 44 EHRR 5, §108: "a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position." (Emphasis added).
30. For these reasons, the Commission considers that United Kingdom case law currently fails adequately to protect individuals from religious discrimination in the workplace. The obligation on domestic courts under the Human Rights Act 1998 to interpret legislation compatibly with the Convention should be invoked to ensure that the comparator requirement does not overwhelm individual rights.

## CONCLUSION

31. In conclusion, the Commission submits that the following legal propositions are supported by general principles and by the case law of this Court:

- a. Article 9 does not demand that the manifestation of a belief is a requirement of a religion. Manifestation is protected by Article 9 if it is motivated or inspired by a genuinely held belief that attains a certain level of seriousness and cogency and is not unreasonable. Manifestations that are less closely connected to requirements of a religion or belief should be carefully considered at the interference and proportionality stages.
- b. The question whether there has been an interference with a person's Article 9 rights is not to be determined solely by reference to the choices the person has made in accepting particular employment but also by reference to the actions of the employer.

EQUALITY AND HUMAN RIGHTS COMMISSION

September 2011

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**LADELE AND MCFARLANE v UNITED KINGDOM**

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**SUBMISSION OF THE EQUALITY AND HUMAN RIGHTS COMMISSION**

**pursuant to Article 36 §2 of the European Convention on Human Rights and Rule 44 §2 of the Rules of the European Court of Human Rights**

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**A. INTRODUCTION**

32. This submission is respectfully made on behalf of the Equality and Human Rights Commission (“the Commission”) pursuant to leave granted by the President of the Chamber on 5 August 2011 in accordance with Rule 44 §2 of the Rules of Court.

33. This case concerns the scope of the protection afforded by Articles 9 and 14 to the manifestation of religious belief in the workplace. The Court is asked to examine whether the United Kingdom’s anti-discrimination legislative framework guarantees sufficient respect for religious rights and protection against discrimination on religious grounds. The outcome of the case will have a significant influence on the place of religion in public life in the United Kingdom.

34. The Commission’s submission focuses on the scope of the right to freedom of religion and belief under Article 9(1), establishing an interference with the right and the proper approach to proportionality under Article 9(2). It is the Commission’s view that respecting religious rights is an essential aspect of a pluralistic, tolerant and democratic society and that guaranteeing the freedom to manifest religious belief, subject to legitimate limits, promotes the interests of society as a whole.

35. The Commission recognises the acute difficulties that arise when religious beliefs

conflict with others' right to receive equal treatment. It supports the decisions of the domestic courts in these cases. In the Commission's view, refusing to accommodate the manifestation of a person's discriminatory religious belief in the workplace always pursues the legitimate aim of non-discrimination. It is necessary to conduct a proportionality enquiry in cases such as this, approaching the question with due deference to the employer's decision where the employer has made its decision with conscientious regard to appropriate equality policies. Giving due deference to employers is supplemented, in the Commission's view, by needing to be mindful of the margin of appreciation given to States in which the domestic law has been created through the democratic process, that takes religious exemptions into account and has been interpreted by domestic appeal courts after extensive argument. It will generally be proportionate to refuse to accommodate manifestations of discriminatory religious beliefs in the workplace whether public or private, but particularly so when the employee serves a public function. Very strong arguments and evidence are required to prove the employer has acted disproportionately in cases such as these.

## **B. THE EQUALITY AND HUMAN RIGHTS COMMISSION**

36. The Commission is a non-departmental public body established under the Equality Act 2006. It has operated as the single equality and human rights body in Britain since October 2007. As the independent advocate for equality and human rights in Britain, the Commission aims to reduce inequality, eliminate discrimination, strengthen good relations between people and promote and protect human rights.

## **C. DOMESTIC LAW**

37. Since the domestic decisions in the Applicants' cases, the legal framework prohibiting discrimination was consolidated and clarified under the Equality Act 2010 ("EA 2010"). The Commission welcomed the introduction of the EA 2010 as a positive development in the protection of equality in the UK. It successfully simplifies and harmonises the strands of discrimination law and provides a comprehensive legal framework for promoting equality. The public sector equality duty, in particular,

ensures that equality is made a priority for public institutions.<sup>14</sup> This duty requires public authorities to have due regard to the need to eliminate discrimination, harassment and victimization, advance equality of opportunity and foster good relations between people who share a protected characteristic and those who do not. A similar duty existed in relation to disability, gender and race under previous discrimination legislation. It came into force in relation to religion and belief and sexual orientation for the first time in April 2011.

38. The Employment Equality (Religion or Belief) Regulations 2003 (“the 2003 Regulations”) applied in these cases were repealed by the EA 2010. Religion or belief are now protected characteristics under section 4 of the EA 2010. Section 19 prohibits indirect discrimination in relation to all protected characteristics in essentially the same terms as Regulation 3(1) of the 2003 Regulations. Religion and belief are guaranteed the same respect and priority as other protected characteristics and, in the Commission’s view, the EA 2010 provides an adequate basis on which courts can determine public authorities’ compliance with Articles 9 and 14.
39. In these cases, it was accepted by the courts that the Applicants’ employers had indirectly discriminated against them under the 2003 Regulations. The critical issue for the courts was the correct approach to proportionality under the 2003 Regulations and Article 9 in circumstances where the employees’ own beliefs were discriminatory. In both cases, the courts held that it automatically followed from the legitimate aim of providing non-discriminatory services that the refusal to accommodate the employees’ manifestation of their beliefs was proportionate.

#### **D. SCOPE OF ARTICLE 9(1)**

40. The legal protection of beliefs, religious or non-religious, is a fundamental guarantee of a civilised society. Belief is a core aspect of personality; it is “one of the most vital elements that go to make up the identity of believers and their conception of life” (*Kokkinakis v Greece* (1993) 17 EHRR 397, §31) and respecting an individual’s beliefs accords respect for human dignity. In the words of Lord Nicholls in *R (Williamson) v Secretary of State for Education and Skills* [2005] UKHL 15, [2005] 2

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<sup>14</sup> EA 2010, s.149.

AC 246, §15:

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony.”

Article 9 (1) absolutely protects the right to hold beliefs; these rights cannot be interfered with. The right to hold beliefs is distinguished under Article 9 from the right to manifest beliefs, which can be limited under Article 9(2).

41. The existence of religious conviction is intrinsically bound up with the expression of that conviction: *Kokkinakis v Greece* (above). By protecting manifestations of religion, subject to legitimate limits, practical effect is given to the absolute right to hold a belief.
42. As the Court stated in *Sahin v Turkey* (2007) 44 EHRR 5, §105, “Article 9 does not protect every act motivated or inspired by a religion or belief.” The belief itself must “a certain level of cogency, seriousness, cohesion and importance”.<sup>15</sup> This test prevents the protection of Article 9 from being expanded beyond reasonable limits.<sup>16</sup>
43. Manifestation of a religious belief has also traditionally only been protected if it is *required* by the particular religion.<sup>17</sup> More recently, however, the Court has held that non-prescribed religious practices can engage Article 9. In *Jakobski v Poland* (2010) 30 BHRC 417 the refusal of a Buddhist prisoner’s request for vegetarian food fell within the protection of Article 9 even though vegetarianism was not a mandatory requirement of Buddhism. The Court stated that Article 9 was engaged where the applicant’s decision could be “regarded as motivated or inspired by a religion and was not unreasonable”.<sup>18</sup> The Grand Chamber applied a similar test in its recent decision in *Bayatyan v Armenia* (App no 23459/03, 7 July 2011) finding that where opposition to military service is motivated by genuinely held religious beliefs, Article 9

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<sup>15</sup> *Jakobski v Poland* (2010) 30 BHRC 417, at §44.

<sup>16</sup> See, eg *Farrell v South Yorkshire Police Authority* [2011] EqLR 934 in which the Employment Tribunal held that a belief in a global conspiracy theory to establish a new world order did not “meet even a bare minimum standard of coherence and cohesion”.

<sup>17</sup> See, eg *Arrowsmith v United Kingdom* (1980) 19 DR.

<sup>18</sup> At §45.

will be engaged.<sup>19</sup>

44. The Court's early restrictive approach to manifestation has led on occasion to a narrow interpretation of Article 9 by the UK courts.<sup>20</sup> In the Commission's submission, recognition of the principles of dignity and autonomy requires an approach to the definition of manifestation that focuses primarily on the conviction of the adherent, providing the manifestation is closely scrutinised if less closely aligned with the requirements of religion and belief. Taking this into account, the fact that the manifestation of a person's belief may be unpalatable or offensive should not automatically deny them the protection of Article 9(1).<sup>21</sup> UK case law (see *R (Williamson)* above) also requires the belief to be "worthy of respect in a democratic society". Subject to this, the Commission invites the court to find that Article 9 applies in these cases and that, as a matter of general principle, it applies if an individual's desire to manifest a belief is motivated by a genuinely held belief that attains a certain level of cogency and seriousness and is not unreasonable.

## **E. INTERFERENCE WITH ARTICLE 9(1)**

45. Strasbourg decisions on what constitutes an interference with Article 9 in the employment context traditionally restricted the application of the right. The Commission found in *Ahmad v UK* (1982) 4 EHRR 126, *Konttinen v Finland* Application 24949/94, 3 December 1996 and *Stedman v UK* (1997) 23 EHRR CD 168 that the refusal by employers to alter employees' working hours to accommodate religious practices did not interfere with Article 9. The Court has also suggested "in exercising his freedom to manifest his religion, an individual may need to take his

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<sup>19</sup> See §§110-111.

<sup>20</sup> See, eg *R (Playfoot) v Governing Body of Millias School* [2007] EWHC 1698 (Admin) rejecting a student's challenge to the school's refusal to allow her to wear a purity ring because it was not "intimately linked" to her Christian beliefs. In *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin), [2009] NLJR 713 the High Court held open air cremation was a manifestation of Hindu belief because it was "sufficiently close to the core of one strand of orthodox Hinduism", but for Sikhs it was only a matter of tradition and not belief. By contrast, see the recent decision in *R (Imran Bashir) v The Independent Adjudicator and Anor* [2011] EWHC 1108 (Admin). The High Court adopted a broader approach following *Jakobski v Poland* (above). It held that a prisoner's decision to fast before a court appearance was motivated by his Islamic faith and disciplinary sanctions taken against him for failure to give a urinary sample had to be justified.

<sup>21</sup> See, by analogy, the case law under Article 10 in this regard: *Handyside v UK* (1976) 1 EHRR 737; *Jersild v Denmark* (1994) 19 EHRR 1.

specific situation into account”.<sup>22</sup> Thus when people have voluntarily accepted particular restrictions in their working lives they cannot expect to avail themselves of the Convention’s protection.

46. In light of more recent decisions of the Court in which an interference has been found despite the applicant’s apparent acceptance of a restriction, it is questionable whether the Court any longer endorses such an approach. In two recent cases concerning the prohibition on wearing the headscarf, the Court accepted that the ban constituted an interference and considered the question of justification under Article 9(2).<sup>23</sup>

47. The extent to which there is a substantive interference will include taking into account the extent to which the particular manifestation is less closely aligned with the requirements of the religion/belief in question. Where a person has accepted a job knowing their manifestation of religion or belief will conflict with the job, this is a factor that should be carefully considered at the interference stage. Whether or not a person has accepted particular restrictions on their beliefs and whether accommodations could or should have been made are issues that should also be considered in the context of proportionality.

48. The approach to interference has not been consistent in domestic law. In *R (Williamson)* (above) the House of Lords accepted that a ban on corporal punishment in schools interfered with parents’ Article 9 rights. By contrast, the early restrictive case law of this Court prompted Lord Bingham’s comment, cited frequently in domestic decisions, in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, (2006) 23 BHRC 276, §23, a case concerning a school’s prohibition on pupils wearing the jilbab:

“The Strasbourg institutions have not been at all ready to find an interference with the right to manifest a religious belief in practice or observance 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 undue hardship or

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<sup>22</sup> See, eg *Kalaç v Turkey* (1997) 27 EHRR 552, §27; *Karaduman v Turkey* (1993) 74 DR 93.

<sup>23</sup> See *Dahlab v Switzerland* App No 42393/98, 15 February 2001; *Sahin v Turkey* (2007) 44 EHRR 5.

inconvenience.”<sup>24</sup>

49. A majority of the House of Lords found that the school dress policy did not constitute an interference with the claimant schoolgirl’s Article 9 rights. The minority were uneasy with determining the question of interference by reference to the concept of choice and preferred to determine the case under Article 9(2).

## G. JUSTIFICATION

50. The text of the qualified rights provides for a three-stage justification process.

Limitations on rights can be justified only when they (a) provided by law (b) serve a legitimate aim and (c) are necessary in a democratic society. In cases in which an individual’s request for accommodation of religious beliefs in the workplace discriminates against people on the basis of the sexual orientation, a public or private sector employer’s decision not to make accommodations will always serve the legitimate aim of advancing equality for lesbian and gay people under Article 14. For public sector employers in the United Kingdom, such as the London Borough of Islington, they are *obliged* by the equality duties under the EA 2010 to positively advance equality of opportunity and have laudably sought to do so through equality policies such as the “Dignity for All” policy applied in the First Applicant’s case.

51. The purpose of the third, proportionality stage, is to provide a legal mechanism by which conflicting rights and interests can be reconciled. As the Court stated in *Soering v United Kingdom* (1989) 11 EHRR 439, §89:

“Inherent in the whole of the Convention is a search for the fair balance between the demands of the general interest of the community and the requirements and protections of the individual’s human rights.”

52. It is incumbent on domestic courts to apply the proportionality test where rights have

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<sup>24</sup> See also *Copsey v WWB Devon Clays Ltd* [2005] IRLR 811. In a case concerning changes to an employee’s working hours to his accommodate religious beliefs, the Court of Appeal held that but for the Commission decisions it would have found an interference with the Claimant’s Article 9 rights.

been limited. The obligation to strike a fair balance may be an onerous one, but should not be shirked. As the Court stated in *Sahin v Turkey* (2007) 44 EHRR 5, §108: “a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.” (Emphasis added).

53. This sensitive balancing exercise is one that the courts are eminently capable of undertaking. They do so frequently in the context of Articles 8 and 10. The House of Lords explained in *Re S* [2004] UKHL 47, [2005] 1 AC 593, §17 “where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.”

54. In the context of cultural conflict, the Court has recognised that its role is to promote a society in which a shared understanding of diversity and the values of pluralism enables the different groups to live with one another. The Court explained in *Serif v Greece* (2001) 31 EHR 561, §53:

“... Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism but to ensure that competing groups tolerate each other.”

55. In the words of Judge Tulkens in *Sahin v Turkey* (2007) 44 EHRR 5, §4: “it necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.” Nonetheless, this Court has recognised that interfering with some rights will require particularly strong justification. The right to equal treatment on the grounds of sexual orientation is one such right.<sup>25</sup>

56.

In these cases the domestic courts held that the refusal to accommodate discriminatory religious beliefs would always be proportionate.

In the Commission’s view, it will generally be proportionate to refuse to make an accommodation in cases where a public sector employee seeks to be exempted from providing a public service on discriminatory grounds. Very strong arguments

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<sup>25</sup> *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 47; *Karner v Austria* (2004) 38 EHRR 24; *EB v France* [2008] 47 EHRR 21; *Schalk and Kopf v Austria* App No 30141/04, 24 June 2010.

and evidence are required to prove the employer has acted disproportionately in cases such as these. State services must be provided on an impartial basis and employees cannot expect their public functions to be shaped to accommodate their personal religious beliefs.<sup>26</sup> Sufficient margin of appreciation should be given, in the Commission's view, to the United Kingdom, which has the necessary legislation in place that has been created through the democratic process, which explicitly addresses questions of religious exemption, and which has been interpreted by the United Kingdom appeal courts following extensive legal arguments.

## CONCLUSION

57. In conclusion, the Commission submits that the following legal propositions are supported by general principles and by the case law of this Court:

- a. Article 9 does not demand that the manifestation of a belief is a requirement of a religion. Manifestation is protected by Article 9 if it withstands careful scrutiny if less aligned with the requirements of the religion or belief, and is motivated or inspired by a genuinely held religion or belief that attains a certain level of seriousness and cogency and is not unreasonable.
- b. The question whether there has been an interference with a person's Article 9 rights is not to be determined solely by reference to the choices the person has made in accepting particular employment but also by reference to the actions of the employer.
- c. An employer's refusal to accommodate the manifestation of a discriminatory religious belief in cases where discrimination in the provision of public services results will generally be justified by reference to the legitimate aim of eliminating discrimination and advancing equality, giving due deference to the employer's decision and the United Kingdom's margin of appreciation.

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<sup>26</sup> See the decision of the Court of Appeal for Saskatchewan in *In the Matter of the Marriage Commissioners appointed under the Marriage Act 1995* [2011] SKA 3 at [97].