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COMMENT

Is the National Health Service a Religion?

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During the COVID-19 lockdown the initial British Government mantra of 'Stay home. Protect the NHS. Save lives', the ritualistic weekly public clapping for the National Health Service (NHS) and the overall tone of the media coverage led several commentators to raise the question of whether the NHS had become a religion.[2] This question is legally significant. The question of whether the lockdown breached Article 9 has already been the subject of litigation. *R (on the application of Hussain) v Secretary of State for Health* [2020] EWHC 1392 (Admin) concerned the then prohibition on private prayer in places of worship. Swift J refused an application for interim relief to allow Friday prayers at Barkerend Road Mosque. Lockdown did infringe the claimant's Article 9 rights but this interference was only with one aspect of religious

1 I am grateful to Frank Cranmer, Dr Sharon Thompson and Dr Caroline Roberts for their comments on an earlier draft of this comment.

2 See N Spencer, 'Clapping for the NHS, our new religion', *THEOS*, 27 March 2020, <https://www.theosthinktank.co.uk/comment/2020/03/27/clapping-for-the-nhs-our-new-religion>; L Woodhead, 'The NHS, our national religion', *Religion Media Centre*, 1 April 2020, <https://religionmediacentre.org.uk/news-comment/the-nhs-our-national-religion-2/>. Such an analogy is not new and was famously used by Nigel Lawson in his memoirs. The *British Medical Journal* featured an editorial on the topic in 1999 (J Neuberger, 'The NHS as a theological institution' (1999) 319 *BMJ* 1588–1589) and the NHS had a starring role in the opening ceremony of the Olympics in 2012. A study into the cultural history of the NHS by Warwick University is exploring how people believe in the NHS: see <https://warwick.ac.uk/fac/arts/history/chm/research/current/nhshistory>. The analogy has been used by commentators both to praise and to criticise the NHS: P Toynbee, 'The NHS is our religion: it's the only thing that saves it from the Tories', *Guardian*, 3 July 2018, <https://amp.theguardian.com/commentisfree/2018/jul/03/nhs-religion-tories-health-service>; cf B Spencer, 'The NHS is the closest thing we have to a religion–and that's why it must be privatised', *Independent*, 7 February 2017, <https://www.independent.co.uk/voices/nhs-crisis-jeremy-hunt-health-service-religion-privatise-to-save-it-a7567056.html>. Perhaps most notably, the then Health Secretary Jeremy Hunt is reported to have said that the treatment of the NHS as a 'national religion' meant that anyone who questioned its orthodoxy could be left 'facing the Spanish inquisition': see L Donnelly, 'NS reforms are "like the Reformation" of the church says Jeremy Hunt', *Daily Telegraph*, 16 July 2015, <https://www.telegraph.co.uk/news/nhs/11744633/NHS-reforms-are-like-the-Reformation-of-the-church-says-Jeremy-Hunt.html>. All URLs accessed 29 June 2020.

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observance and the interference had a finite duration. The legitimate difference of opinion between the claimant and the British Board of Scholars and Imams was relevant to the question of justification. There was no real prospect that the claimant would succeed at obtaining a permanent injunction at trial because the pandemic presented 'truly exceptional circumstances' that meant that the interference would be justified on grounds of public health. Swift J was satisfied that there was a sufficiently arguable case to grant permission to apply for judicial review but he did not order that the claim be expedited. In *Dolan, Monks and AB v Secretary of State for Health* [2020] EWHC 1786 (Admin), an application of a judicial review of the lockdown regulations and schools closure was refused. However, in relation to Article 9, Lewis J adjourned consideration of this discrete issue because regulations had just been made that allowed communal worship which may have made the argument academic. English law provides the right to manifest religion or belief under the Human Rights Act 1998 and the right not to be discriminated against on grounds of religion or belief in relation to employment and the provision of goods and services under the Equality Act 2010. This raises the point: during the lifting of lockdown, when authorities require people to go back to their workplace or send their children to school, could individuals who refuse say they were legally entitled to decline on the basis that such a requirement breached their belief in protecting the NHS?

This brief comment explores whether such an argument could be made. A belief in protecting the NHS would potentially fall under the definition of belief rather than religion. There is confused and contradictory case law on the meaning of belief for the purpose of religion or belief discrimination law.[3] This is underscored by four recent cases. The first two are contradictory decisions on vegetarianism and veganism: the decision in *Conisbee* that a belief in vegetarianism was not capable of being protected;[4] and the decision by the same judge in *Casamitjana* that ethical veganism is a belief that qualifies for protection.[5] The second two cases concerned beliefs that sex is biologically immutable, in *Forstater*[6] and *Mackereth*,[7] which both held that such beliefs were not protected by the Equality Act 2010.[8]

This comment will explore the case law on the definition of belief and the tests that employment tribunals have used as a whole, collating and comparing

3 See further R Sandberg, 'Clarifying the definition of religion under English law: the need for a universal definition', (2018) 20 *Ecclesiastical Law Journal* 132–157.

4 *Mr G Conisbee v Crossley Farms Ltd & Ors* [2019] ET 3335357/2018. See F Cranmer and R Sandberg, 'A critique of the decision in *Conisbee* that vegetarianism is not a belief', (2020) 22 Ecc LJ 36–48.

5 *Casamitjana v The League of Cruel Sports* [2020] ET 3331129/2018. Compare the earlier decision in *Alexander v Farmtastic Valley Ltd and others* [2011] ET 2513832/10, in which a belief in the treatment of animals which included vegetarianism and aspects of Buddhism was held to be a protected belief.

6 *Forstater v CGD Europe & Ors* [2019] ET 2200909/2019.

7 *Mackereth v The Department for Work and Pensions & Ors* [2019] ET 1304602/2018.

8 On which see A Hambler, 'Beliefs unworthy of respect in a democratic society: a view from the employment tribunal', (2020) 22 Ecc LJ 234–241.

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with these recent decisions, as well as paying particular to the decisions which are most analogous to the question set here: the cases of *McEleny*,[9] in which it was held that a belief in Scottish independence was capable of being protected, and of *Maistry*,[10] in which the employment tribunals held (and the Court of Appeal did not challenge[11]) the finding that a belief in public service broadcasting was capable of being protected as a belief (though the claim then failed on substantive grounds). This comment will explore the preliminary tests that a belief in the NHS would need to satisfy in order to be potentially capable of being protected under the Equality Act. In so doing, it will become apparent how malleable and therefore unsatisfactory the current approach to the definition of belief under discrimination law is.[12]

The turning point in the case law on the definition of belief was the decision of the employment appeal tribunal (EAT) in *Grainger*,[13] which concluded that a belief in manmade climate change was capable of constituting a 'philosophical belief' because it met the criteria laid out by the case law of the European Court of Human Rights, which was directly relevant. This was important for two reasons. The first was the EAT's insistence that the Strasbourg case law was to be followed. This was noteworthy because the Equality Act only protects 'any religious or philosophical belief',[14] while the European Court makes no distinction between philosophical or non-philosophical beliefs and has taken an expansive approach, even considering political beliefs like communism and Nazism.[15] The case law as a whole has invariably considered claims without questioning whether they fit the definition of religion or belief and this suggests that a belief in the NHS would fall under Article 9 of the European Convention on Human Rights.[16] *Grainger* suggests that the same broad approach is to be taken to domestic equality law.

The second reason why the decision in *Grainger* is important is because it provided five tests which employment tribunal chairs have subsequently applied as if they were statutory tests.[17] As *Forstater* noted, these five criteria are also

9 *McEleny v Ministry of Defence (Scotland: Disability Discrimination, Religion or Belief Discrimination)* [2018] UKET 4105347/2017.
10 *Maistry v The BBC* [2011] ET 1213142/2010.
11 [2014] EWCA Civ 1116.
12 It is worth noting at the outset that employment tribunal decisions are not binding on each other. Much depends upon the evidence adduced.
13 *Grainger PLC v Nicholson* [2009] UKEAT 0219/09/ZT.
14 Equality Act 2010, s 10.
15 *Hazar, Hazar and Acik v Turkey* (1991) 72 D&R 200; *X v Austria* (1981) 26 D&R 89.
16 There is no case on point of whether a belief in the healthcare system would be protected as a belief, but in *Nyyssönen v Finland* [1998] App no 30406/96 (ECHR 15 January 1998) the European Commission of Human Rights held that 'alternative medicine as a manifestation of medical philosophy falls within the ambit of the right to freedom of thought and conscience'. The claim failed because no evidence had been submitted that could lead to the conclusion that he was prevented from manifesting his belief.
17 *Grainger* at para 24.

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expressed in the Equality and Human Rights Commission's Employment Statutory Code of Practice[18] and 'the Tribunal is required to take the code into account where it is relevant but is not bound by it'.[19] Nonetheless, subsequent employment tribunal decisions have followed the texts to the letter.[20] However, some decisions have stressed that 'the threshold for establishing the *Grainger* criteria should not be set "too high"'.[21] The following will therefore explore each of the five tests in turn to see how they could be applied to the question of whether a belief in the NHS and the need to protect it could constitute a belief for the purposes of the Equality Act 2010 (and so whether interference with that belief could amount to discrimination, harassment and/or victimisation).

THE BELIEF MUST BE GENUINELY HELD

The first test – that the belief must be genuinely held – is usually easily met. In *Conisbee*[22] and *Casamitjana*[23] this point was conceded by the respondents and accepted by the tribunal. It was also accepted in *Mackereth* and *Forstater*, which reiterated the principle found in the House of Lords decision in *Williamson*[24] that this inquiry was limited to considering whether the belief is held in good faith.[25] However, despite *Williamson* also stating that

> 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

a number of employment tribunal decisions, including *Casamitjana*, have said that they have based their finding on the evidence submitted.[26] This is compliant with *Williamson* if this assessment is based on quantity rather than quality. In *Streatfield* it was held that the claimant's humanist beliefs were genuinely held

18 Available at <http://www.equalityhumanrights.com/sites/default/files/employercode.pdf>, accessed 29 June 2020.
19 *Forstater* at para 51.
20 An exception is *Conisbee*, where counsel put forward additional tests but the only additional test that the tribunal referenced in its decision was that 'the belief must have a similar status or cogency to religious beliefs' (para 43). This is questionable, given that the word 'similar' has been removed from the statutory definition of belief under the Equality Act 2010: see the discussion in Cranmer and Sandberg, 'Critique of the decision in *Conisbee*'.
21 Eg *Forstater* at para 52, citing *Harron v Chief Constable of Dorset Police* [2016] IRLR 481, EAT at para 34.
22 *Conisbee* at para 38.
23 *Casamitjana* at para 33.
24 *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at para 22.
25 *Forstater* at para 53.
26 *Casamitjana* at para 33.

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because there was evidence that she had held these beliefs from an early age and had 'lived her life adopting a general adherence to those principles'.[27] That decision also confirmed that a belief would still be treated as genuine even if it was not manifested by the claimant at all times. A belief in protecting the NHS, provided that the claim was not made in a vexatious way in order to avoid legal obligations, would surely be able to meet the first *Grainger* test. In *Maistry* the fact that the belief was 'of great personal significance' to the claimant, given his career and experiences, was mentioned as part of Employment Judge Hughes's finding that there was 'no reason whatsoever to doubt the strength of the claimant's feelings about this',[28] but it is questionable whether this is to be taken as requiring such significance for this test to be met in all cases.

IT MUST BE BELIEF RATHER THAN AN OPINION OR VIEWPOINT

The second requirement is that a belief must not be merely an opinion or a viewpoint based on the present state of information available, but this has been applied in an inconsistent way. The requirement originated in *McClintock*[29] concerning a justice of the peace who resigned since he could not in conscience agree to place children with same-sex couples because he felt further research was needed on the effect that this would have upon the children. Both the employment tribunal and the EAT held that the claimant's objection did not constitute a belief because he had not as a matter of principle rejected the possibility that single-sex parents could ever be in the child's best interest: it was not sufficient 'to have an opinion based on some real or perceived logic or based on information or lack of information available'.[30] In *Farrell v South Yorkshire Police Authority* it was held that this requirement was met since, unlike in *McClintock*, the claimant had come to a conclusion that the evidence pointed one way and not another.[31] The crucial factor was that, while he was prepared to admit that he might be wrong, he did not believe himself to be wrong. This was applied in *Forstater*, where it was accepted that the claimant's belief was 'more than an opinion or viewpoint based on the present state of information available' and that she was 'fixed in it, and appears to be becoming more so'.[32]

However, in other cases this requirement has been taken further to suggest that, even where the claimant has reached a settled conclusion, this will not

27 *Streatfield v London Philharmonic Orchestra Ltd* [2012] 2390772/2011 at para 38.
28 *Maistry* at para 8. It was also confirmed (para 16) that the extent to which the claimiant had raised the question of belief during capability or grievance proceedings, though relevant to the quesiton of liability, did not affect the question of whether the belief was genuine unless it could be inferred that the failure to mention it demonstrated that it was not a genuine belief at all.
29 *McClintock v Department of Constitutional Affairs* [2007] UKEAT/0223/07/CEA.
30 Ibid at para 54.
31 *Farrell v South Yorkshire Police Authority* [2011] ET 2803805/2010 at para 6.
32 *Forstater* at para 54. The point does not seem to be discussed in the judgment in *Mackereth*.

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be sufficient. Notably in *Conisbee* Employment Judge Postle held that this test had not been met because 'it is simply not enough to have an opinion based on some real, or perceived, logic'.[33] This refers to the first limb of the *McClintock* test but does not explain *why* the tribunal found that the belief was an opinion or viewpoint rather than a belief capable of protection. Employment Judge Postle seems to have posed questions about the validity of belief that *Williamson* warned against. This is underlined by his decision in *Casamitjana* that this test had been met because 'ethical veganism carries with it an important moral essential', 'is founded on a longstanding tradition' and therefore is 'not simply a viewpoint, but a real and genuine belief and not some irrational opinion'.[34] Such an approach is not only deeply conservative but is fundamentally inappropriate: it is not for judges to decide whether beliefs are rational or not and to hold that irrational beliefs are mere opinions and so not protected. It would appear that the discussion of this in *Conisbee* and *Casamitjana* is a misstatement of the law.

Even allowing for this ambiguity in the case law, it would appear that a belief in protecting the NHS could satisfy the second requirement, provided that the claimant's belief was fixed and not dependent on (say) whether the NHS could cope at a particular time. Other decisions have stressed that there is a low threshold to satisfying this second test. *Grainger* itself insisted that a 'philosophical belief does not need to amount to an "-ism"'[35] and *Hashman* confirmed that beliefs regarding specific matters can meet this threshold if they form part of a larger philosophy: beliefs concerning hunting met this requirement because the claimant's beliefs were to be 'considered within the parameters of his general beliefs … in the sanctity of life'.[36] In *Maistry* the test was met on the basis of statements about the purpose of public broadcasting and the fact that the importance of the independent public space had 'attracted commentary by philosophers and academics'.[37] It is likely that the same conclusion would be reached in relation to the NHS, on grounds of its importance for public healthcare and the role of the welfare state. It is difficult to imagine an employment tribunal chair dismissing a belief to protect the NHS as being a mere opinion subject to change. Indeed, in *McEleny* the tribunal rejected the respondent's argument that a belief in Scottish independence failed this test because all political beliefs were 'up for debate' and 'cannot be held as a matter of principle'.

33 *Conisbee* at para 39. The reference to 'an opinion based on some real, or perceived logic' comes from *McClintock* at para 45 but this does not create a distinction, since protected beliefs too will presumably be based on a real or perceived logic.
34 *Casamitjana* at para 34.
35 *Grainger* at para 28.
36 *Hashman v Milton Park (Dorset) Ltd* [2011] ET 3105555/2009 at para 55.
37 *Maistry* at para 17.

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The tribunal insisted that the belief was not 'susceptible to change if challenged by empirical evidence' but was instead 'unshakeable' and so the test was met.[38]

IT MUST BE A BELIEF AS TO A WEIGHTY AND SUBSTANTIAL ASPECT OF HUMAN LIFE AND BEHAVIOUR

In most cases the third requirement – that the belief needs to relate to a weighty and substantial aspect of human life and behaviour – is easily satisfied. In *Forstater* it was simply accepted[39] while in *Grainger* itself it was stated that this did not exclude '"one-off" beliefs such as pacifism and vegetarianism which do not govern the entirety of a person's life'.[40] In *McEleny* it was stated that, while it was not necessary for others to share the belief, 'it must have an impact on others'.[41] This does not mean that it needs to affect the whole of humanity: short shrift was given to the respondent's argument that a belief in Scottish independence would not 'extend far beyond Scotland', meaning that 'since it had no substantial impact upon the lives of citizens in for example Tanzania, Peru or India, it is not a substantial aspect of human life or behaviour'.[42]

Again, the decisions in *Conisbee* and *Casamitjana* took a more restrictive approach. In *Conisbee* it was concluded that 'vegetarianism is not about human life and behaviour, it is a lifestyle choice'.[43] While vegetarianism was 'an admirable sentiment', it could not 'altogether be described as relating to weight and substantial aspect of human life and behaviour'. By contrast, in *Casamitjana* the same employment judge concluded that veganism is 'at its heart between the interaction of human and non-human animal life' and that

> The relationship between humans and other fellow creatures is plainly a substantial aspect of human life, it has sweeping consequences on human behaviour and clearly is capable of constituting a belief which seeks to avoid the exploitation of fellow species.[44]

It is difficult, however, to see why the same could not be said of vegetarianism and this contradiction means that it is difficult to extrapolate points of principle from how these two decisions dealt with this test; indeed, if it were possible it would be questionable whether such points would be legally correct: again,

38 *McEleny* at para 32.
39 *Forstater* at para 82.
40 *Grainger* at para 27.
41 *McEleny* at para 33.
42 Ibid at para 17.
43 *Conisbee* at para 40.
44 *Casamitjana* at para 35.

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we see employment judges entering into questions of validity and worth. In any case, it is difficult to see how the *Conisbee* precedent could lead to the conclusion that this test is not capable of being met in relation to a belief in the NHS.

By contrast, the decision in *Maistry* seems to suggest that such a belief would satisfy the third test. Employment Judge Hughes held that:

> A belief in the importance of providing a non-commercial, non-Governmental, independent public space in which cultural, social and political tensions can be debated and explored and in which tolerance of other viewpoints is fostered, clearly relates to weighty and substantial aspects of human life and behaviour.[45]

The respondent's case had been that this test was not met because 'the legislation could not have been intended to cover a belief of this nature because really it was no more than a "mission statement"'.[46] The respondent argued that, 'if the claimant was right, then it would follow that beliefs in the aims and values of a whole host of public organisations, if genuinely held, could amount to philosophical beliefs'. The example given by the respondent is important given the subject matter of this comment: 'the respondent suggested that a belief that the aim of the NHS should first and foremost be to look after the health and welfare of its patients could, if the claimants were correct, amount to a belief'. The respondent argued that this would be 'absurd' but Employment Judge Hughes held that the public aims of an organisation could amount to a philosophical belief if those aims were the results of an underlying philosophical belief. For Hughes, that the beliefs

> might fairly be characterised as idealistic in nature and/or as a 'mission statement' ... does not negate fact that the evidence before me was that those purposes arise because of a shared belief in the importance of public service broadcasting in a democratic society.[47]

This suggests that a similar belief about public healthcare would satisfy the third test.

IT MUST ATTAIN A CERTAIN LEVEL OF COGENCY, SERIOUSNESS, COHESION AND IMPORTANCE

The requirements of the fourth test – that the belief needs to attain a certain level of cogency, seriousness, cohesion and importance – are taken from the human

45 *Maistry* at para 18.
46 Ibid at para 9.
47 Ibid at para 18.

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rights jurisprudence. The leading case on this is the EAT decision in *Harron*, in which Langstaff J confirmed that 'there is no material difference between the domestic approach and that under Article 9' and that Lord Nicholls' speech in *Williamson*[48] is to be followed.[49] For Langstaff J, this meant that 'the belief must relate to matters more than merely trivial' and coherence 'is to be understood in the sense of being intelligible and capable of being understood'.[50] This is uncontroversial. However, Langstaff added that 'where a belief has too narrow a focus it may, depending upon the width of that focus, not meet the standards at the appropriate level identified'.[51] He stated that this followed Lord Nicholls' rubric that the belief needs to be on a fundamental problem: 'That might be thought to exclude beliefs that had so narrow a focus as to be parochial rather than fundamental.'

This has, however, led some employment tribunal chairs to conclude that the fourth requirement is not met because the belief is 'parochial' without explaining why they have considered it so and therefore again potentially breaching *Williamson* by determining the validity of the belief. In *Lisk*[52] Employment Judge George held that belief that one should wear a poppy to show respect to serviceman failed this test because he would characterise the claimant's belief as 'a belief that we should express support for the sacrifice of others and not as a belief in itself' and this was 'too "narrow" to be characterised as a philosophical belief'. Similarly in *Mackereth* the employment tribunal ran the third and fourth tests together and held that, although a belief in Genesis 1:27 and a lack of belief in transgenderism met these requirements 'given the low threshold', a belief that it would be irresponsible and dishonest for (say) a health professional to accommodate and/or encourage a patient's impersonation of the opposite sex did not meet these requirements 'because of the narrowness of the issue they represent'.[53] No further explanation was given.

In *Conisbee* it was held that this test was not met because there were 'numerous, differing and wide varying reasons for adopting vegetarianism' in contrast to veganism.[54] Not only is this monolithic understanding of veganism suspect,[55] it is debatable whether this is relevant to the question of whether the belief is cogent and seriously held. Imposing a requirement that it cannot be too narrow or that there needs to be an agreed, singular reason for the belief is

48 *Williamson* at para 22.
49 *Harron v Chief Constable of Dorset Police* [2016] UKEAT/0234/15/DA at para 33.
50 Ibid at para 34.
51 Ibid at para 37.
52 *Lisk v Shield Guardian Co Ltd & Others* [2011] ET 3300873/2011.
53 *Mackereth* at paras 195–196.
54 *Conisbee* at para 41.
55 P Edge, 'Vegetarianism as a protected characteristic: another view on *Conisbee*', *Law & Religion UK*, 21 September 2019, <https://www.lawandreligionuk.com/2019/09/23/vegetarianism-as-a-protected-characteristic-another-view-on-conisbee/>, accessed 29 June 2020.

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far too conservative.[56] It also raises problematic questions of how this is to be determined by the tribunal. In *Farrell* Employment Judge Rostant held that some sort of objective assessment of the cogency and cohesion of the philosophical belief is expected of the tribunal.[57] He stated that 'the assessment of cogency and coherence must take into account the broadly accepted body of knowledge in the public domain'. He held that the test had not been met in the case of the claimant's belief in conspiracy theories regarding 9/11.

This is difficult, however, to reconcile with the human rights jurisprudence, including *Williamson*. Other tribunal decisions have taken a much more lenient approach. In *McEleny* it was held that this test was met where a belief is taken seriously and 'is intelligible and capable of being understood'.[58] In *Forstater* it was held that the need for coherence 'mainly requires that the belief can be understood' and that this test would not be failed even when there was 'significant scientific evidence that it is wrong'.[59] This is correct: the fourth requirement is about how important and serious the belief is to the claimant; it is not concerned with the objective question of how important or serious the belief is considered to be. The fact that, objectively, such beliefs are unlikely to be true is irrelevant. Atheists would maintain that all religions would fail to meet this test. The type of claim which the fourth test seeks to exclude is the deliberate sham religion.[60] There is, therefore, no reason why a belief in protecting the NHS could not satisfy this requirement. It is notable that this requirement was seen to be easily met in *Maistry*: 'a strongly held belief in the purpose of mission statement of their public or private sector employer would be protected'.[61]

IT MUST BE WORTHY OF RESPECT IN A DEMOCRATIC SOCIETY

The fifth and final requirement is that the belief must be worthy of respect in a democratic society, must be compatible with human dignity and must not be in conflict with the fundamental rights of others.[62] Beliefs will meet this threshold unless they abuse the rights of others. As Baroness Hale noted in *Williamson*: 'A

56 See also *Casamitjana* at para 37, in which it was held that ethical veganism met this test because 'a community within businesses and restaurants clearly exists 'which adheres to this ethical principle'.
57 *Farrell* at para 6.
58 *McEleny* at paras 18 and 34.
59 *Forstater* at para 83.
60 An example of such a claim can be found in the US case of *United States v Kuch* 288 F Supp 439 (1968).
61 *Maistry* at para 19. It was held that the claimant's belief was not a political belief and, even if it was, this did not mean that it was not protected. There is a significant and contradictory case law on the issue of whether political beliefs are protected under the Equality Act: see R Sandberg, 'Are political beliefs religious now?', (2015) 175 *Law and Justice* 180–197.
62 *Grainger* at para 24.

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free and plural society must expect to tolerate all sorts of views which many, even most, find completely unacceptable.'[63] In *Conisbee*, *Casamitjana*, *McEleny* and *Maistry* it was readily accepted that this condition had been met.[64] Indeed, in the case law to date there are mostly only hypothetical examples of when this test would not be met. Lord Nicholls in *Williamson* gave the example that beliefs that 'involved subjecting others to torture or inhuman punishment would not qualify for protection';[65] in *Grainger* it was suggested that 'a racist or homophobic political philosophy' would be excluded.[66]

However, *Mackereth* and *Forstater* now provide actual examples of this test being failed. In *Mackereth* a belief in Genesis 1:27, a lack of belief in transgenderism and a belief that it would be irresponsible and dishonest for (say) a health professional to accommodate and/or encourage a patient's impersonation of the opposite sex were all held to be 'incompatible with human dignity and [to] conflict with the fundamental rights of others, specifically here, transgender individuals'.[67] Similarly in *Forstater* Employment Judge Tayler concluded that the 'claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others' since it denied 'the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned'.[68] This test was the ground upon which the claimant lost. It is difficult to disagree with Hambler's conclusion that the emphasis upon the 'absolutist' nature of the belief is misplaced in that this flies in the face of the other tests under *Grainger*.[69] Equally compelling is Hambler's argument that this is a misinterpretation of the fifth test on the grounds that it 'seems to conflate the notion of harassment, as understood under discrimination law, with incompatibility with human dignity (under *Grainger*)' and does this without any authority.[70] If they are correctly decided, *Mackereth* and *Forstater* suggest that balancing of competing rights is a consideration under the fifth test. It would appear that a belief that leads the claimant not to respect the law would fail under the fifth test. It would seem, however, that this controversy would be unlikely to affect any claim concerning a belief in the NHS. It is difficult to

63 *Williamson* at para 77.
64 *Conisbee* at para 42; *Casamitjana* at para 38; *McEleny* at para 35; *Maistry* at para 17.
65 *Williamson* at para 23.
66 *Grainger* at para 28.
67 *Mackereth* at para 197, though in a 'footnote' to the judgment it was stressed that: 'It is important given the public interest in this case that we make clear this case did not concern whether Dr Mackereth is a Christian and if that qualifies for protection under the Equality Act. That was never in dispute' (para 261).
68 *Forstater* at para 84.
69 He noted that, ironically, 'Judge Tayler took something of an "absolutist" view of the issue himself': Hambler, 'Beliefs unworthy of respect', p 239.
70 Ibid, p 240.

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conceive of a situation where a belief in protecting the NHS would fail this fifth requirement.

CONCLUSION

Whether a claim that forcing the claimant out of lockdown discriminates against them on grounds of their belief in the NHS would be successful in a tribunal would depend upon the evidence adduced, including how the claimant had been disadvantaged. This comment, however, has suggested that the current state of the case law concerning the *Grainger* tests shows that such an argument is capable of being made and falling for protection under the Equality Act 2010. If 'BBC values' can be protected, as *Maistry* confirmed,[71] then a belief in NHS values could also be protected. If a belief in Scottish independence falls under the Equality Act, as *McEleny* confirmed, then a belief in the need to protect and maintain a public health service will also qualify. This would raise a further interesting potential scenario. Given that in such a claim some consideration is bound to be afforded to Article 9 considerations, there would need to be discussion of Article 9(2), which states that freedom to manifest one's religion or belief can be subject to limitations that are necessary in the interests of, inter alia, public health.

This comment has also highlighted how inconsistent the case law on the definition of belief under the Equality Act 2010 is. Many of the tests are not only elastic in nature but have forced tribunals to reach binary judgments that are inappropriate in relation to genuinely held convictions. And these judgments are sometimes made by reference to the tribunal's supposedly objective determination of the worth of the belief rather than focusing on what it means to the claimant. That ought to be the test. It is ironic that, while *Grainger* said that the case law of the European Court of Human Rights was relevant and used this to fashion the tests, the interpretation of the *Grainger* tests has sometimes strayed far from a human rights approach. The NHS may well be a religion – sociologically, theologically, philosophically and even potentially legally – but it is also true that the law on the definition of belief itself needs to be nursed back to health.

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71 *Maistry* at para 2.