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A No-Win Situation for Public Officials with Faith Convictions

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This article considers two recent high-profile employment cases to investigate the peculiar dilemma faced by certain public officials who are called upon to implement public policy in situations where their consciences are made uneasy due to their faith-based convictions. Such officials face, among other options, the dilemma of choosing between an appeal to rational objections, based on 'public reasons' that are non-religious in character, or citing their own faith-based conscientious objections. In McClintock v Department of Constitutional Affairs*, by initially basing his objections on a form of public reason, McClintock arguably muddied the waters for his subsequent unsuccessful claim of religious discrimination. In* Ladele v Islington Borough Council*, however, the appeal to conscience alone also failed as religious convictions were 'trumped' by the superior claims of particular policy objectives. This article thus concludes that the 'religious' public official may, ultimately, have nowhere to turn except either to silence conscience and acquiesce or to exercise that 'minimum' employment right under ECHR case law – the right to resign.*

INTRODUCTION

There are a number of contentious areas of public policy where religious and secular values clash. A prime example in recent years has concerned rights connected to sexual orientation vis-à-vis rights connected to religion and belief. As Leigh notes, there have been a number of parliamentary battles over legislation affecting the two interests concerned, and religious groups have often failed to achieve their objectives.[2] Examples include the Equality Act (Sexual Orientation) Regulations 2007,[3] which, inter alia, threatened to force Roman Catholic adoption agencies to close; and, before that, the Civil Partnerships Act 2004, which introduced new legal rights for same-sex couples in the

1 This article is based on a paper presented to the Law and Religion Scholars Network 2009 Conference at Cardiff Law School on 5 May 2009. My sincere thanks to Professor Ian Leigh of the University of Durham, for his invaluable suggestions at the conceptual stage of this article, and for his helpful comments on an earlier draft.
2 I Leigh, 'Hatred, sexual orientation, free speech and religious liberty', (2008) 10 Ecc LJ 337–347.
3 SI/2007/1263, available at <http://www.opsi.gov.uk/si/si2007/uksi_20071263_en_1>, accessed 17 June 2009.

face of opposition from religious groups.[4] Although those who advance such legislation may well perceive it as morally and politically neutral,[5] many religious people perceive it as hostile to religious values.[6] As a result, such legislation has caused moral dilemmas for a number of employees with religious convictions and perhaps particularly for those public officials involved in some way in implementing it.

The two-part question that this article will address is how might public officials with religious convictions respond when faced with an issue of conscience as a result of what they have been asked to do in their job role, and how far does the law protect them? The approach taken in this article will involve, first, a consideration of five possible responses by the public official concerned to such an issue of conscience. Second, the success or otherwise of these responses in the eyes of the law will be considered in the context of two high-profile employment cases: *McClintock v Department of Constitutional Affairs*[7] and *Ladele v Islington Borough Council*.[8] *McClintock* was the one of the first cases to reach an Employment Appeals Tribunal (EAT) under the Employment Equality Religion and Belief Regulations 2003 ('the 2003 Regulations')[9] and the first in which a claimant had sought to use the provisions of those regulations to establish a right to 'opt out' of an aspect of his work role on the grounds of conscience. This case was widely reported in the media but has subsequently been eclipsed by *Ladele*, a case also seeking to employ, inter alia, the 2003 Regulations to establish a right to 'conscientiously object' on religious grounds.

FIVE POSSIBLE RESPONSES

How might such 'religious' public officials react when faced with such an issue of conscience? It is submitted here that there are five possible options:

i. To acquiesce;
ii. To protest on the basis of arguments omitting religious convictions;
iii. To protest and appeal to the need to respect conscience;

4 See, for example, the online archives of the Christian Institute, which include briefing documents that were used for lobbying from an evangelical Christian perspective over these (and other) issues, <http://www.christian.org.uk/rel_liberties/index.htm>, accessed 11 May 2009.
5 See, for example (on civil partnerships), Lord Falconer of Thoroton, 'Church, state and civil partners', (2007) 9 Ecc LJ 5–9. See also, on this issue, J Humphreys, 'The Civil Partnership Act 2004, same-sex marriage and the Church of England', (2006) 8 Ecc LJ 289–306; and, with a different perspective, M Scott-Joynt, 'The Civil Partnership Act 2004: dishonest law?', (2007) 9 Ecc LJ 92–94.
6 WA Galston, *Liberal Purposes: goods, virtues and diversity in the liberal state* (Cambridge, 1991), pp 13–14.
7 (2007) EAT 0223/07. See also case comment, (2008) Ecc LJ, 10, 375.
8 (2008) EAT 0453/08. See also case comment, (2009) Ecc LJ, 11, 122–123.
9 SI/2003/1660, available at <http://www.opsi.gov.uk/si/si2003/20031660.htm>, accessed 17 June 2009.

iv. To resign;
v. To refuse to carry out the morally questionable demands of the role and await any sanctions by the public employer. [10]

The first option is for the public official to resist the demands of conscience and acquiesce in the 'morally troubling' demands of the role. This may be an immediate response, in which case the conscience may be only mildly aroused and the issue perceived as a minor one, or the individual's faith convictions may be insufficiently strong at that time for positive action to be a possibility.[11] Alternatively, it may be a response after considered reflection, and perhaps some tentative action, following which the individual concerned may have calculated that the obstacles towards following conscience (and the potential sacrifices involved) are too great. This may be the case, for example, if there is a likelihood of losing a position, with disastrous personal and financial effects.[12] Such people, perhaps with needy dependents, face a real dilemma and can only hope to 'harmonize the various moral demands as best they can'.[13]

The second option is for the public official to seek to continue in his or her role but to present arguments against the 'negative' effects of the law or public policy, either to seek changes in the policy itself or to seek personal exemptions from the offensive consequences of this policy within the job role.[14] In framing such arguments, the public office-holder may be tempted to rely on secular arguments alone. This would be in line with the view advanced by John Rawls that, in pursuit of a civil society, there should be clear constraints on the introduction of religious-based arguments in public discourse.[15] Rawls believes that it is necessary, when engaging in debate on what he calls 'constitutional essentials', to refrain from presenting arguments based on

10 A possible (if very unlikely) additional option would be to acquiesce superficially but then seek to sabotage the morally troubling policy. Greenawalt, for example, in discussing the role of judges, identifies rare occasions when the judge finds the law so 'abominable' (in the sense of extremely illiberal) that it becomes his or her duty to subvert it: K Greenawalt, *Private Consciences and Public Reasons* (Oxford, 1995), p 149.

11 For an analysis of the changing priorities afforded to their own religious convictions by 'religious' people, see S Leader 'Freedom and futures: personal priorities, institutional demands and freedom of religion', (2007) 70 *Modern Law Review* 713–730.

12 Deakin, among others, has sketched the likely (and unattractive) labour market realities for employees who feel compelled to resign. See S Deakin, 'Equality, non-discrimination, and the labour market: a commentary on Richard Epstein's critique of anti-discrimination laws', in R Epstein (ed), *Equal Opportunity or More Opportunity? The good thing about discrimination* (London, 2002), p 49.

13 E Wolgast, 'The demands of public reason', (1994) 94 *Columbia Law Review* 1942.

14 It should be noted that there may be risk (of disciplinary action) involved in merely voicing objections on some issues, even when 'measured and reasoned': see J Rivers, 'Law, religion and gender equality', (2007) 9 Ecc LJ 52.

15 Rawls' argument is first articulated in his book, J Rawls, *Political Liberalism* (New York, 1993), p 227; and then, with some revisions, in J Rawls, 'The idea of public reason revisited', (1997) 64 *University of Chicago Law Review* 765–807.

'comprehensive views', a term embracing both religious and other worldviews and defined helpfully by Greenawalt as 'overall perspectives that provide a (relatively) full account of moral responsibilities and fulfilling human lives'.[16] Constitutional essentials include 'equal basic rights and liberties of citizenship'.[17] Although Rawls does not expressly state this, rights connected to the scope of, for instance, same-sex relationships are likely to be included in this category.

Rawls believes that, on these issues, legislators and public office-holders have a duty of civility to employ arguments that rest on foundations that are accepted as legitimate by all 'reasonable' citizens. These foundations are rooted in a so-called 'overlapping consensus' of opinion between holders of various different comprehensive views, with a consensus emerging from a disciplined effort to identify those 'values that the others can reasonably be expected to endorse'[18] – public discussion based on anything else is *ultra vires*, as it fails the test of 'public reason'. Although much criticised, not least for the disenfranchising effects of denying religious people an authentic voice in the public square,[19] Rawls' view has been very influential and a number of political philosophers have developed similar ideas.

Although this approach may be attractive to the 'religious' public official, there is a significant attendant problem in relying on arguments founded on 'public reason': what happens if the arguments advanced are rejected? If the public official then reverts to arguments based explicitly on religious values, he or she runs the risk of being thought to have been disingenuous, even dishonest, in the original argument and of encountering hostility in the new position on that basis.[20]

The third option is for the public official to seek to continue in his or her role but to protest on the specific grounds of individual religious conscience against the issue that is causing offence. It is conceivable that the aim of such a protest might be to effect a change in the direction or implementation of a particular public policy, but it would surely be far more realistic for the individual to request to 'opt out' of those aspects of the role that cause the conscience issue. Clearly the religious value is the driving motivation for the public official in making such a request. However, there is no requirement to rely on the employer sympathising with that same value. The employer may accept the request to avoid internal complaints, or even legal action for discrimination, if it refuses. More positively, the employer might feel it had an interest in

16 Greenawalt, *Private Consciences and Public Reasons*, p 5.
17 Rawls, *Political Liberalism*, p 227.
18 Ibid, p 226.
19 There are a number of criticisms of Rawls on this point; one of the most strident is P Campos, 'Secular fundamentalism', (1994) 94 *Columbia Law Review*, 1814–1827.
20 See Wolgast, 'The demands of public reason'.

upholding the 'dignity' and 'autonomy' of its office-holders or employees.[21] Both of these (albeit sometimes elusive) concepts would involve a recognition of the importance to the very identity of many individuals of their religious beliefs. Following this through to its logical conclusion, the employer would therefore have an interest (albeit among other, sometimes competing, interests) in supporting, rather than hindering, the manifestation of religious beliefs, including the 'negative manifestation' of opting out on the basis of conscience.[22]

The fourth option is for the public official to resign. For Wolterstorff, despite writing from a position generally supportive of religious expression, this appears to be the only solution:

> Accordingly, when people are functioning in the role of executive or judge, the question of whether they personally approve the laws and provisions never arises … If anyone in the role has moral or religious scruples … then, depending on how serious the scruples, he or she must get out of the role.[23]

Under this view, the public official is merely charged with implementation, not moral reflection; there is therefore no space for the voicing of objections. This is not to say that Wolterstorff does not accept and welcome the influence of religious 'comprehensive views' in areas where there may be discretion given to the public official. There is a critical literature on this subject in respect of North American judges and all current writers are broadly agreed that judicial opinion must at times find a basis outside the boundaries of the usual legal materials and arguments.[24] Writers then differ as to what is acceptable on that basis and whether religious insights should be largely excluded.[25] This is not, of course, the real issue here, where the issue of conscience is (almost axiomatically) outside the range of personal discretion. Within this context, Wolterstorff's conclusion does seem bleak, allowing no space for the possibility of temporary rather than permanent self-exclusion through the exercise, for instance, of an opt-out.

The final option is for the public official to refuse to carry out the morally troubling aspects of the role in the face of an employer's insistence to the contrary and then await the consequences, which are likely to be dismissal (in one

21 For discussion of this point, see L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford, 2008), pp 36–40.

22 For a typology of forms of such manifestation in the workplace, and an explanation of so-called 'negative manifestation', see A Hambler, 'A private matter? Evolving approaches to the freedom to manifest religious convictions in the workplace', (2008) 3 *Religion and Human Rights*, 111–133.

23 N Wolterstorff, 'The role of religion in decision and discussion of political issues', in R Audi and N Wolterstorff, *Religion in the Public Square* (London, 1997), p 117.

24 See, for example, R Dworkin, *Taking Rights Seriously* (London, 1977), pp 68–71.

25 Perhaps the most representative writers on the two sides of this particular debate are Greenwalt (*Private Consciences and Public Reasons*) and Carter (see, for example, S Carter, 'The religiously devout judge', (1989) 64 *Notre Dame Law Review* 932–944).

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form or another, depending upon employment status). In a sense, therefore, the fifth option is very similar to the fourth; the end result is that the public official loses his or her position.

Having sketched out these suggested five responses to the dilemma of conscience, the discussion will now turn to identify their application in the two cases, *McClintock* and *Ladele*. In so doing, the second part of the question should come into sharp relief – how far does the law support those who adopt these positions? This will be considered following a brief presentation of the facts of the two cases.

McCLINTOCK v DEPARTMENT OF CONSTITUTIONAL AFFAIRS

The first case was brought by Andrew McClintock, who was a Justice of the Peace in Sheffield and a practising Christian. He served on the family bench and one of his duties was to place children for adoption. He became aware in 2004 that, as a result of the Civil Partnership Bill, he might be required to place children for adoption with gay and lesbian couples. This was a cause of concern to him, and he expressed this in the form, initially, of a letter to the manager of the magistrates' court.[26] This letter was reproduced in full in the written judgment of the initial employment tribunal (and in part in the EAT judgment).[27] It centres on McClintock's fear that, as a magistrate, he might be involved in what he later described as an 'experiment in social science' – that of placing children with same-sex couples – without the necessary research to dispel fears that this might emotionally harm the children concerned.[28] McClintock states that, as a JP, his responsibility is to answer to 'the law' (the Children Act 1989, requiring magistrates to act in the best interests of the child) and 'not to the policy of any particular government'.[29]

After a delay of some 21 months, McClintock again raised his concerns by letter, this time requesting that he be excused from sitting in cases with a risk of needing to place a child with a same-sex couple, owing to the incompatibility, in his view, between this obligation and his obligations under the Children's Act 1989.[30] This was also explicit in his resignation letter, which followed when his request was turned down.

Following his resignation, McClintock began legal proceedings. He did so, primarily, on the rather different basis that a refusal to accommodate his request amounted to discrimination on the grounds of religion or belief.

26 And, later, a separate letter to the Chairman of the Family Panel making similar points.
27 *McClintock v Department of Constitutional Affairs* (2007) ET2800834/06, para 7; *McClintock*, EAT 0223/07, para 7.
28 *McClintock*, EAT 0223/07, para 9.
29 Ibid, para 7.
30 Ibid, para 9.

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The role of the tribunal and the EAT was thus to determine whether or not McClintock had suffered direct and/or indirect discrimination on the basis of his religion or belief under the provisions of the 2003 Regulations.[31] Under these Regulations, direct and indirect discrimination are defined as follows:

> 3. (1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if –
>
> (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but –
>
> (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,
>
> (ii) which puts B at that disadvantage, and
>
> (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

McClintock also claimed that his treatment amounted to a violation of his rights under Article 9(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice or observance.

The initial employment tribunal concluded that there had been no direct discrimination, for two main reasons: first, that there had been no detriment or dismissal (which equates to 'less favourable treatment') since McClintock had resigned voluntarily; and second, because he had not made clear that his objection was related to his religious or philosophical beliefs. In support of this conclusion, reference was also made by the tribunal to McClintock's oral evidence to the effect that 'he might, in certain circumstances, given sufficient information, be properly able to adjudicate even to the point of placing a child with a same-sex couple, much though he might deep down regret having to do so'.[32] This

31 He also claimed discrimination by way of harassment but, in the words of the EAT, this claim 'went nowhere since there was no evidence that anything, even remotely relating to harassment, had occurred' (ibid, para 23).

32 *McClintock*, ET2800834/06, para 52.

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emphasised to the tribunal that the employer was entitled to think that the root of McClintock's concerns was 'a lack of information' rather than a principled objection based on religious values.[33]

The tribunal also rejected his indirect discrimination claim, although with limited legal reasoning, such that this became the main point of appeal. The EAT, however, upheld the tribunal judgment with particular emphasis on the fact that McClintock's position was not explicitly based on religious or philosophical grounds and so fell at the first hurdle for any kind of discrimination claim. Even if this was not so, the EAT concluded that it was a proportionate means to achieve a legitimate aim (the employer's defence in indirect discrimination claims) for the employer to insist that

> magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws to which they have a moral or other principled objection.[34]

The EAT, applying European Court of Human Rights jurisprudence, also rejected McClintock's attempt to invoke ECHR Article 9 on the basis that the right to manifest religious convictions does not apply 'where a party voluntarily places himself or herself in a position where a conflict might arise between his or her religious or philosophical beliefs and the duty imposed by an employment or office'.[35]

LADELE v ISLINGTON BOROUGH COUNCIL

The second case was brought by Lilian Ladele, a committed Christian, who worked at the London Borough of Islington and became a registrar of births, deaths and marriages on 14 November 2002. When the Civil Partnerships Act came into force in December 2005, Ladele, in common with her fellow-registrars, was required by her manager to be formally 'designated' a civil partnerships registrar. She objected and was offered a limited compromise, which she rejected, although the judgment records that a similar compromise had been accepted by a Muslim registrar, who had comparable religious objections, in another borough.[36] Ladele was then threatened with disciplinary action. She responded by letter to the effect that she was 'placed in a dilemma and had either to honour her faith or the demands of the council'.[37] From then on, the council turned a blind eye as Ladele managed to avoid any civil partnerships work. The

33 *McClintock*, EAT 0223/07, para 45.
34 Ibid, para 62.
35 Ibid, para 61.
36 *Ladele*, EAT 0453/08, para 7.
37 Ibid, para 9.

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intervention of two gay members of staff, complaining about the situation and identifying Ladele's attitude as 'homophobic', appears to have brought matters to a head, as the council began to put pressure on Ladele to accept that its 'Dignity for All' policy required her to undertake civil partnerships and so, in their view, not to discriminate against a section of the community.[38] Ladele, under pressure from management and colleagues, also claimed to be a victim of harassment and could later point to various incidents to support this.[39] Following a subsequent disciplinary investigation, Ladele began her claim for discrimination on the grounds of religion and belief.

This was initially successful on all counts at the employment tribunal, but the judgment was overturned by the EAT, which ruled that Ladele was not (directly) discriminated against on the grounds of her religious belief but rather because of her refusal to carry out civil partnerships; nor was she harassed on the basis of her beliefs, although the council's behaviour was criticised. Finally, and most importantly, she was not indirectly discriminated against, as the council could meet the test of proportionality (which the employment tribunal had misunderstood), because requiring staff to act in a 'non-discriminatory manner' was connected to the legitimate aim of providing a satisfactory service to all in keeping with its 'Dignity for All' policy.[40] A possible violation of ECHR Article 9 was also rejected for similar reasons to those given in *McClintock*.

At the time of writing, the case is awaiting a possible hearing at the Court of Appeal.

ANALYSIS

These two judgments cast light on how far the law supports public officials who are offended by an aspect of their work role, and who opt for one (or more) of the five possible approaches outlined earlier.

In brief, it can be seen that Ladele adopted position 3, initially, by objecting quite candidly on the basis of her faith-based moral objection; following the failure of this, she adopted position 5, deciding to continue in post without carrying out the disputed aspects of her work role and await the employer's sanctions. In a sense, Ladele's approach was straightforward and easily comprehensible. McClintock, on the other hand, initially adopted position 2, objecting on the basis of secular reasoning, without reference to any personal religious or moral concern. He then moved to position 4 (resignation) and then, finally, position 3 – objection on the grounds of religion and belief. Along the way, he also conceded that there might be circumstances in which he might adopt position 1 and acquiesce in the

38 Ibid, paras 12–14.
39 Ibid, paras 44–45.
40 Ibid, para 100.

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arrangements troubling his conscience. All the positions are, therefore, in some way covered by the claimants in these two cases, which provides a helpful opportunity to analyse the legal support for each.

1. Acquiescence

Turning first to the option of acquiescence, it is perhaps unsurprising that there is neither legal support nor impediment. However, acquiescence can undermine a later decision to adopt a less accepting position. The admission by McClintock, while giving evidence, that he might be willing to continue in the role and place children with same-sex couples in certain circumstances was taken by the EAT as evidence to support the conclusion that his objection was not on religious grounds, presumably as it injected a note of moral flexibility incompatible with the faith-based moral position he had then adopted. Another problem is the possible effect of acquiescence on others who seek to take a stand. It was pointedly noted in *Ladele* that a Muslim registrar had been willing to accept a compromise arrangement and withdraw her conscientious objections. Although not explicit in the judgment, there is perhaps a hint that the employer was entitled to think that Ladele was being somehow slightly obstinate in refusing to act in a similar, 'reasonable' way.

2. 'Public reason'

The second position is illustrated quite clearly in *McClintock*. McClintock's objections to placing children for adoption with same-sex couples were entirely based on secular arguments, but were unsuccessful. His concern about the difficulties of reconciling making adoption orders to same-sex couples with his duties under the Children Act was, in the view of the EAT, an issue for Parliament, 'which must be taken to have assumed that there was no inherent conflict in the legal position it had created.'[41] Again, when he shifted his position upon his resignation to position (3), his earlier engagement of public reason meant that he was unable to even establish a case for religious discrimination as his religion had never been raised as a reason for his views.

His counsel creatively attempted to run two different arguments to overcome this. The first was to suggest, based on the judgment in *Williamson v Secretary of State for Education and Employment*, where Lord Justice Rix opined that 'the deed does not have to express the belief in proclaiming it',[42] that McClintock did not need to make an express link between his objection and his religious belief.[43]

41 *McClintock*, EAT 0223/07, para 54.
42 *Williamson v Secretary of State for Education and Employment* [2003] QB 1300, para 164.
43 It is perhaps worth noting that the example given by Rix LJ to support this statement was the 'passive' example of a Muslim or Jew adhering to a particular dietary law without the 'need for request or explanation'. McClintock did make a request and the employer was entitled to an explanation: see *McClintock*, EAT 0223/07, para 46.

The EAT thought that this was an 'absurd' argument in this context, given the burden it would generally place on the employer to second-guess the employee's true reasons for requests, especially if the employee had actively chosen to 'conceal' these.[44] The second argument was to suggest that McClintock's original position amounted to a 'philosophical belief', and an expert witness was called to give support to McClintock's original concerns, presumably to advance McClintock's case once this argument had been accepted. The EAT rejected this argument on the basis that an opinion based on (quoting the employment tribunal) 'some real or perceived logic or based on information or lack of information' was contrary to the meaning of 'philosophical belief'.[45]

In sum, the net effect for McClintock in employing public reasons was, with hindsight, to gain him nothing. He may have met the Rawlsian requirement for 'civility' but this carries no protections in law. Instead, he compromised his own case later when his underlying religious motivations, which in theory *might* have been protected, emerged.

3. Objections on religious grounds

Option 3 informed the line of argument taken by Ladele from the outset and by McClintock following his resignation.[46] There is potential support for such a position under discrimination law under the definitions of direct and indirect discrimination.[47] A case based on direct discrimination would involve arguing that a 'religious' claimant was treated less favourably than a 'non-religious' claimant might be in response to his or her objection. In both *Ladele* and *McClintock* this argument was given short shrift. The EAT was quick to determine that there was no detriment on the grounds of religion or belief because the action taken by the respective employers was on the grounds of refusal to carry out aspects of the job, and the same sanctions would have been applied to staff without religious beliefs.[48] This is likely to be the point on which subsequent cases will also fall.

A case based on indirect discrimination would initially need to identify a 'provision, criterion or practice' that creates an impediment to the employment of someone with particular religious beliefs. This is arguably relatively easy to show and, in this sense, is a more enticing line of argument. It then remains for the employer to show that the provision, criterion or practice represents 'a proportionate means to achieve a legitimate aim'. In both *McClintock* and

44 Ibid.
45 Ibid, para 45.
46 The EAT in *McClintock* considered this hypothetically only, having determined that the 2003 Regulations were not, in fact, engaged at all.
47 Set out above, pp 9–10.
48 This conclusion is surely contentious in the case of *Ladele*, where there appears to be strong evidence to support a direct discrimination claim, given the seemingly more favourable responses to objections (to Ladele) by gay staff than the responses given to Ladele's own religious objections; see M Rubenstein, 'In the courts', (2009) 186 *Equal Opportunities Review* 29–30.

Ladele, the employers' respective 'legitimate aim' was not seriously disputed. The issue was whether requiring an employee to be fully involved in helping to achieve that aim was proportionate.[49] Nevertheless, the EAT judgments in both *Ladele* and *McClintock* reach the same substantial conclusion: that the respective employers could indeed show that they had met the test of proportionality. In McClintock's case, his employer's belief that there was an overriding public interest that he should abide by his judicial oath and deal impartially with any and every case that might come before the family bench was considered sufficient justification for the refusal to countenance an opt-out. This reasoning would perhaps be more convincing had evidence been offered as to whether and how the Department of Constitutional Affairs had assessed exactly how the public interest would in fact be compromised by acceding to McClintock's request. However, no such evidence was thought to be required.[50] In Ladele's case, the council's policy objectives of providing a universal service, on the principles of equality and diversity as determined by its own policies, entitled it to insist that all officials be required to perform their role in conformity to these objectives, such that religious objections could be overridden, particularly if these objections offended other staff, and even in circumstances, as in this case, where the service provided to the public was unaffected. This, rather unsatisfactorily, is the extent of the reasoning offered on this vital point: the EAT itself surely failing to provide the 'careful and sophisticated analysis of the employer's justification defence' that it claimed the original tribunal had omitted.[51] In sum, it would appear in both cases that the EAT was rather predisposed to accept, with limited critical assessment, the employers' respective justifications, setting a concerning precedent for future cases.

In addition, it is surely highly significant that, in both cases, the EAT opined that the respective employer *could* have made arrangements to allow the respective official to opt-out, at little or no cost, but that it was not *obliged* to.[52] This illustrates, inter alia, the relative weakness of the test of proportionality in comparison to, for example, a statutory obligation (akin to the constitutional obligation in the USA) to accommodate the rights of religious employees, as long as this accommodation does not cause 'undue hardship'.[53]

49 This was clearly perceived in *Ladele* by an intervenor, 'Liberty', albeit that the intervention, specifically regarding the indirect discrimination claim, was in support of the stance taken by the employer.
50 *McClintock*, EAT 0223/07, para 51.
51 *Ladele*, EAT 0453/08, para 110.
52 *McClintock*, EAT 0223/07, para 52; *Ladele*, EAT 0453/08, paras 23 and 117.
53 42 USC 2000e-(j) (1994). The Independent Review of the Enforcement of Anti-discrimination Legislation recommended that the UK should adopt this alternative approach, given the additional protections it offers: see B Hepple, M Coussey and T Choudhury, *Equality: a new framework. The Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation* (Oxford, 2000).

4. Resignation

Andrew McClintock availed himself of option 4 and resigned from his role as a magistrate on the family bench. There was no legal impediment to this and, indeed, he was able to continue as a magistrate, albeit in different spheres of law. The EAT judgment referred to McClintock exercising his choice to resign, which was 'his right'.[54] This sits within an established tradition of ECHR jurisprudence, under which the employee's Article 9 right to manifest his or her religious beliefs, is only protected in the work sphere in so far as he or she is free to resign and seek other work on perceiving a conflict between his or her religious beliefs and work role.[55]

5. Continue working and await sanctions

Ladele decided to continue working without obeying the Council's instruction and was able to remain in employment, albeit only for so long as the internal and external processes, aimed ultimately at her dismissal, were to last. The requirement that the employer should follow appropriate processes for discipline and dismissal is the extent of the protection offered under the law for this course of action. In the longer term, the end result will be the same as that of resignation – the loss of a job or office – with the employee perhaps also enduring the hostility of managers and colleagues in the meanwhile.

CONCLUSION

In the final analysis, the position of the religious public official when faced with a dilemma of conscience in his or her work role is an unenviable one. The enticing option of seeking to mount challenges or request opt-outs on the basis of secular reasoning enjoys no legal protection and may help to invalidate a subsequent discrimination claim. The choice of requesting an opt-out of aspects of the work role specifically on the grounds of conscience is likely to engage the indirect discrimination provisions of the 2003 Regulations but only at face value. The weight attached by the EAT in *Ladele* to public policy considerations has set a precedent that is likely to tip the proportionality equation against the religious official in a wide range of circumstances (should this reasoning survive on appeal).

The religious public official is therefore left with the hope that the employer will respond to moral suasion or individual pressure, and agree to allow him or her the option of conscientious objection, knowing that the law is unlikely to provide a means of enforcing this request. When faced with an employer,

54 *McClintock*, EAT 0223/07, para 20.
55 See C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2000).

such as Islington Council, that is not prepared to yield, there remains for the public official the stark choice – to acquiesce and live with his or her conscience, or to get out of the role (either through resignation or dismissal). It is submitted that this is a deeply unsatisfactory state of affairs. There is a great sacrifice involved for the individual – either of conscience and self-respect, or of a valued role and consequent income. There is also a negative effect on society in general as a number of public offices and roles become closed to religious people, further marginalising religious 'voices' and undermining the very 'diversity' that, in *Ladele*, was afforded so much weight as an overriding policy goal.

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