
Religious Discrimination in the Workplace: An Emerging Hierarchy?

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This article considers some of the more high profile cases decided under the Employment Equality (Religion or Belief) Regulations 2003, to assess whether courts are developing case law which adequately protects religion and belief at work. First, it considers the meaning of religion with particular reference to Nicholson v Grainger PLC and suggests that this may represent a step in the wrong direction in defining 'belief'. It then looks at cases which have involved religious individuals seeking to manifest religion at work in terms of religious dress. It critically examines the way the concept of proportionality has been used to decide these cases, and suggests that at times courts are stepping beyond their usual boundaries in determining religious issues, with particular reference to comments by the courts on issues such whether particular beliefs are 'core beliefs'. The third area of discussion is the question of whether discrimination by religious individuals on grounds of sexual orientation should be tolerated. The case law (Ladele v Islington Borough Council) is considered in detail. In conclusion, the article assesses whether a hierarchy is developing between different grounds of discrimination protection.

INTRODUCTION

In December 2003, the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660 ('the Regulations')¹ came into force in the Great Britain.² The Regulations were introduced to comply with obligations under EU Directive 2000/78 protecting against discrimination at work, and form part of a package which outlaws discrimination on grounds of age, sexual orientation and disability as well as adding to existing protection against sex and race discrimination. To an extent, adding religion to the list of non-discrimination grounds at domestic and EU level was non-contentious, given that religion is listed in human rights documents, constitutions and bills of rights around the world as a ground on which people should enjoy equality.³

- 1 The Equality Act 2010 was given royal assent on 8 April 2010, but it is not expected to come into force until October 2010. As its provisions do not materially change the law on the issues discussed, this article will refer to the 2003 Regulations in force at the time of writing.
- 2 Provisions protecting against discrimination on grounds of religion and political opinion were already in force in Northern Ireland (Fair Employment and Treatment (Northern Ireland) Order 1998).
- 3 For example Art 14 ECHR, Art 13 Treaty of Rome, Art 21 EU Charter of Fundamental Rights, and also the constitutions of South Africa, Canada, US and India (Arts 25–28, Constitution of India).

However, in some important respects, the move to protect a wider range of strands of equality has been the cause of contention. First is the fact that there is no agreement as to the very grounds of protection, namely the meaning of religion and belief. This has created a level of instability at the heart of the protection provided. Second, the extent to which religious individuals should be free to manifest religion in secular workplaces, and when any restrictions might be justified, is not clear. Third, tensions have arisen due to the fact that religious discrimination is multi-dimensional in nature, so that religious individuals may not only be victims of discrimination, but may also discriminate against others. Perhaps the most controversial case law, then, has involved a debate over the extent to which discrimination on other grounds by religious individuals or groups should be tolerated, in particular with regard to discrimination on grounds of gender and sexual orientation.

The tensions between different equality strands have been well documented,⁴ and well litigated in other jurisdictions.⁵ This article considers some of the more high profile cases on these issues in the UK so far. First, it considers the meaning of religion. It then looks at two further issues which have involved resolving whether indirect discrimination is justified as a proportionate means to meet a legitimate aim, and assesses the extent to which courts are developing consistent case law which adequately protects religion and belief at work.

THE MEANING OF 'RELIGION OR BELIEF'

The Regulations do not define 'religion and belief', which provides flexibility to those interpreting the Regulations and avoids either under or over inclusive definitions, but also leaves the Regulations vulnerable to inconsistent interpretations. Although guidance can be found in the case law of the European Convention on Human Rights (ECHR),⁶ many of the cases on the protection of religion and belief under Article 9 of the convention, which relate to the definition of religion and belief, were not fully argued, or were decided on other grounds,⁷ and this has led to some difficulties for courts in cases which have raised issues of definition.

4 For example A McColgan, 'Class wars? Religion and (in)equality in the workplace' (2009) 38 ILJ 1, A Lester and P Uccellari 'Extending the equality duty to religion, conscience and belief: Proceed with caution', (2008) EHRLR 567.

5 For a discussion of the US and Canadian case law see C Stychin, 'Faith in the future: sexuality, religion and the public sphere', (2009) OJLS 729, and L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford, 2008), ch 6.

6 For the approach under the ECHR see C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, 2001), ch 4.

7 G Pitt, *Religion or Belief: Aiming at the Right Target?* In H Meenan (ed), *Equality Law in an Enlarged EU* (Cambridge, 2007).

The first cases involving the definition of religion and belief involved claims about religious beliefs which were too vague to be classified as religious or other beliefs. For example, an applicant for work at the Home Office, who was rejected because of a potential conflict of interest with his previous work advising on potential asylum seekers, claimed that his sympathy for disadvantaged asylum seekers was a demonstration of the Christian virtue of charity, and that his rejection was therefore on grounds of religion. The tribunal took the view that the beliefs were too vague and ill-defined to give rise to a claim of religious discrimination.⁸ Similarly, in *McClintock v Department of Constitutional Affairs*⁹ the claim was not based on religious or other belief, but on doubts resulting from a lack of research into adoption by same sex couples. Although McClintock's views may have been underscored by religious beliefs, his claim had not been made on the basis of religious or other beliefs. It would seem then that to be based on religion and belief, the motivation for actions must be articulated in clear terms by claimants, and claims based on unformulated and rather hazy religious principles will fall at the definitional hurdle. Whilst it is only to be expected that some level of coherence of beliefs will be necessary to achieve legal protection, this could cause difficulties for newer minority religion or belief groups, where principles of belief may be less well developed, and where it is difficult to determine with authority the content of the belief system.¹⁰

A more contentious case involving the definition of belief is the decision in *Nicholson v Grainger PLC*¹¹ in which the EAT held that beliefs about climate change could amount to a protected belief. Mr Nicholson was a surveyor, and head of sustainability at Grainger PLC. He was made redundant and claimed that this was, in part, due to his beliefs on climate change. He argued that he had a 'strongly held philosophical belief about climate change and the environment'. This included the belief that 'we must urgently cut carbon emissions to avoid catastrophic climate change'. He argued that this was not merely an opinion but that it had an effect on how he lived his life, including his choice of home, the way he travels, what he buys, what he eats and drinks, what he does with his waste, and his hopes and fears.

In determining that these views could amount to a 'philosophical belief' under the Regulations, the EAT relied on the decision of the European Court of Human Rights in *Campbell and Cosans v UK* that beliefs must 'attain a certain level of cogency, seriousness, cohesion and importance... and [be]

8 ET Case No 2302061/2004 (9 August 2004).

9 *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

10 See P Cumper, 'The public manifestation of religion or belief: challenges for a multi-faith society in the twenty-first century' in R O'Dair and A Lewis (eds), *Current Legal Issues* (vol 4, Oxford, 2000), p 325. It could also cause difficulties in other cases, for example if individuals are unable to formulate their beliefs in a sufficiently clear way because of a lack of capacity for reasons such as youth or disability.

11 *Nicholson v Grainger plc* UKEAT/0219/09.

worthy of respect in a democratic society.’¹² The EAT held that Nicholson’s views were more than mere opinion, as he had settled views about climate change and they affected the way he lives his life, and his hopes and fears for the future. Thus they were cogent, serious, cohesive and important. In addition, a certain amount of emphasis was given by the EAT to the fact that they were worthy of respect in society.

The decision gives significant weight to the case law of the European Court of Human Rights on the meaning of religion and belief, and this is unsurprising. However, the decision does give rise to some cause for concern. In particular, although clearly the beliefs about climate change are cogent, serious, cohesive and important and very worthy of respect, so are many other views and beliefs in scientifically proven facts, and it becomes difficult to see where boundaries are between the types of belief that should be covered and those that should not. For example, beliefs about the importance of exercise and diet for future health (beliefs which are generally held to be scientifically proven, but which still have their sceptics)¹³ could match the requirement to be cogent, serious, cohesive and important and worthy of respect and a number of related actions and lifestyle choices will follow these beliefs. Clearly one would not condone discriminating against people on the basis of such beliefs, but those who believe in the benefits of exercise may be surprised to find that this amounts to a ‘philosophical belief’. As will be discussed below, there may be additional consequences of designating these ideas as ‘beliefs’ that mean that protection under the Regulations may not be ideal. Instead it may be preferable to deal with dismissals and redundancy relating to such beliefs under the unfair dismissal rules.

An example of some of the difficult consequences of the decision is that, although the EAT made clear in its decision in *Nicholson* that the case relates only to the Regulations, it is likely that it will be read across into other forms of religion and belief protection. After all, the cases relied on from the European Court of Human Rights did not apply to employment discrimination, and so it is unlikely that this case will be used as precedent only in the employment context in which the Regulations operate. Applied in other contexts, the decision could mean that government-sponsored attempts to combat climate change (or promote exercise and a healthy diet) could be viewed as the promotion of a ‘belief’, and arguably it will be viewed as inappropriate for the state or public sector organisations to promote such beliefs. For example, the EAT has held, with regard to the question of whether a local authority (as

12 *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 at para 33.

13 Although belief that exercise and diet are important to health is almost universally held, there are some sceptics: see for example *Exercise may be bad for you* <<http://machineslikeus.com/news/exercise-may-be-bad-you>>, accessed 23 April 2010.

opposed to a particular faith school) can have a ‘religious ethos’ that ‘neither the [city council] nor their education department have any business having an ethos.’¹⁴ Thus, the consequences of the decision for those (such as Nicholson) who are attempting to prevent climate change may be precisely the opposite of that intended: if climate change is viewed as a philosophical belief, rather than a scientific truth, then its promotion may well be viewed as inappropriate in some contexts. Of course, private firms such as Grainger would remain free to develop an ethos based on the belief in a green agenda, and this may allow them to require staff to conform to the belief system where proportionate.¹⁵ However, attempts by the public sector to promote a green agenda or a healthy lifestyle agenda (for example ‘walk to work week’ or ‘healthy schools’ initiatives) could come under suspicion as promoting a particular ethos based on belief. The idea that such initiatives, which are common in schools for example, could be tainted as promoting an ethos based on philosophical belief seems absurd, but the question left by the *Nicholson* case is whether this very absurdity indicates a mistake in the decision reached in the case.

A further worrying aspect of the *Nicholson* case is the emphasis given to the fact that the beliefs were worthy of respect. The concern here was to ensure that the beliefs of the BNP and other such groups would not be protected. The question of whether political opinions are protected by the Regulations has been the subject of some debate, with different member states taking different approaches to the issue when implementing the parent Directive. In Great Britain the decision was taken not to cover political opinion,¹⁶ although it is protected in Northern Ireland.¹⁷ In *Nicholson* it was held that while support for a particular political party may not be protected under the Regulations, particular political philosophies such as ‘Socialism, Marxism, Communism or free-market Capitalism might qualify’.¹⁸ It was suggested that the way to deal with political views which may be objectionable, for example because they are racist or homophobic, would be to limit protection to ‘respectable’ beliefs.

However, to limit protection to beliefs which are ‘respectable’, whilst an understandable way to avoid protecting ‘unacceptable’ political beliefs, may be to limit the protection inappropriately. After all, the protection for freedom of speech under Article 10 ECHR is very clear that the protection of the

14 *Glasgow City Council v McNab* UKEATS/0037/06/MT at para 61.

15 Employment Equality (Religion and Belief) Regulations 2003, SI 2003/1660, reg 7(3).

16 See *Nicholson v Grainger* UKEAT/0219/09 at para 10.

17 Protection for political opinion can also be found in Belgium, Cyprus Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia and Spain. The remaining Member States do not provide specific protection for political opinion.

18 *Nicholson v Grainger* UKEAT/0219/09 at para 28. However, note that a later Employment Tribunal decision (*Kelly v Unison* 28 Jan 2010, ET/2203854-57/08) has confirmed that the Regulations do not protect all political beliefs and opinions, and in particular they do not protect beliefs based on Marxism/Trotskyism and the Socialist Party.

Convention applies to speech that offends, shocks or disturbs, and not just to inoffensive matters,¹⁹ and in the context of religious protection, the House of Lords in *Williamson* was clear that to limit protection only to beliefs which were respectable or of which the court approves is inappropriate.²⁰

The danger of the approach taken in *Nicholson* is that courts could become engaged in determining which religions and beliefs should be protected by virtue of whether or not those views are deemed to be 'respectable'. Courts have usually gone to some lengths to avoid ruling on matters of religious doctrine, such as whether Muslim women are required by Islam to wear certain clothing,²¹ and whether Christians are required to use corporal punishment on children.²² Given these attempts to avoid stepping into religious debates, it would be surprising if a court could deem views not to be covered by the Regulations because they are not 'respectable'. Such an approach could of course short circuit many of the cases which have recently been before the courts, as a decision could be reached that views such as those of Ladele (that same sex unions are contrary to God's law) or Azmi (that women must cover the face in the presence of men) are 'not worthy of respect in a democratic society'. Applied to facts such as these, the focus in *Nicholson* on whether views were worthy of respect can be viewed to be verging on dangerous territory for courts, and territory on which they have traditionally been cautious not to tread.²³

There are two alternative approaches which would avoid these problems. One approach is to protect beliefs whether or not they are respectable. Where a person is discriminated against purely for holding the belief (the *forum internum*), this will be unlawful. However, where discrimination is for expressing or manifesting the belief then it will be unlawful unless the discrimination can be justified, and the respectability of the belief may be a factor in considering justification. After all, the factors which make a belief lack respectability are likely to be factors that would justify limitation: for example, under Article 9 rights can be limited where necessary for the protection of the rights and freedoms of others, thus where a belief would undermine the rights of others its limitation may be justified. Whilst this may be said to give with one hand and

19 *Handyside v United Kingdom*, (1976) 1 EHRR 737.

20 For example in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15. Lord Walker stated 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals' at para 60 also discussed by Christopher McCrudden, 'Religion, Human Rights, Equality, and the Public Sphere' (paper to the Ecclesiastical Law Society, 13 March 2010).

21 *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

22 *Williamson v Secretary of State for Education and Employment* [2005] UKHL 15.

23 *Ibid*, where Lord Walker says 'the court is not equipped to weigh the cogency, seriousness and coherence of theological doctrines'. For a discussion of the trend of the ECtHR to define as religious only those manifestations which support a secular society, see M Evans, 'Freedom of religion and the ECHR: approaches, trends and tensions' in P Cane, C Evans and Z Robinson, *Law and Religion in Theoretical and Historical Context* (Cambridge, 2008).

then take away with the other, it does at least allow for the merits of any decision to be heard, rather than having cases fail at the first hurdle.

However, to take away the ‘respectability’ hurdle and not replace it with anything might be to broaden the definition too far, meaning that the beliefs of the BNP, as well as climate change deniers, would be protected. Hence, the second approach would include the first, but additionally involve narrowing the definition of religion and belief, so that it would not cover factual beliefs or political beliefs. Under this approach, beliefs would only be protected if they are more philosophical or religious in nature, in that they relate in some way to the meaning attached to the world or to fundamental aspects of human existence.²⁴ For example atheism (which is unlikely to be defined as a religion under the Regulations) can be understood still to be a belief ‘about’ the meaning of the world and fundamental aspects of human existence, even if that belief is that there is no meaning. A narrowing of the definition of belief would mean that political beliefs such as those of the BNP would not be protected;²⁵ it would also avoid the danger of ‘unforeseen consequences’ for movements such as the green movement in being designated a philosophical belief, such as the possibility of limits being placed on the extent to which schools, hospitals or local or national government should be promoting such ‘beliefs.’

In sum, although Nicholson was clearly badly treated if selected for redundancy on the grounds of his belief in climate change, the decision of the EAT in the case leaves a number of concerns about its approach to defining religion and belief which could have significant repercussions if relied upon in future cases.

DIRECT AND INDIRECT DISCRIMINATION

Early case law under the Regulations addressed the question of whether discrimination for manifesting religious belief would be protected as direct or indirect discrimination. The courts have been consistent in their conclusion that such discrimination is indirect. The first case to raise this question was

24 For the debate in the US on the definition of religion, see ‘Toward a constitutional definition of religion’, (1978) 91 Harv LR 1056, K Greenawalt, ‘Religion as a concept in constitutional law’ (1984) 72 California LR 753–816, R Frame, ‘Belief in a non-material reality – a proposed first amendment definition of religion’ (1992) *Uni Of Illinois LR* 819, J Choper, ‘Definition of “Religion” in the First Amendment’ (1982) *Univ of Illinois LR* 579, M. See also W Sadurski, ‘On legal definitions of religion’ (1989) 63 *Australia LJ* 834, T Macklem in ‘Faith as a secular value’ (2000) 45 *McGill LJ* 1, P Edge, *Legal Responses to Religious Difference* (The Hague, 2002), ch 1 and L Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, ch 2.

25 However, where such beliefs are framed in more traditionally ‘religious’ terms, (eg a white supremacist religion such as ‘the World Church of the Creator’ in *Peterson v Wilmur Communications* 205 F Supp 2d 1014 (2002)) the protection may still be given, but again, limitations on manifestation could be allowed where the beliefs interfere with the rights of others.

Azmi v Kirklees Metropolitan Borough Council.²⁶ Here a classroom assistant wanted to wear a face veil (*niqab*) when she was in the classroom with a male teacher, helping children for whom English is a second language. She claimed that her suspension for refusing to remove the veil was directly discriminatory, in that she had been treated less favourably on grounds of her religion. She was unsuccessful, the EAT confirming that anyone who covered their face at work would be subject to the same treatment: thus it was not 'on grounds of her religion'. The EAT held instead that the treatment was indirectly discriminatory as the requirement to have her face showing put her, as a Muslim, at a disadvantage. However the discrimination was proportionate: the aim was to enable the children to get the best education and for this they needed to be able to see her face.

Two aspects of the case are worthy of note. First, the court determined that the discrimination was indirect rather than direct. This must be correct. To use the terminology of Article 9 ECHR, Azmi was not treated less favourably because of her beliefs themselves, but because she wished to manifest those beliefs by wearing the headscarf. Moreover, if her treatment was treated as direct discrimination, it would mean that it would not be capable of justification. Within Article 9, when in conflict with others' rights (here, the right of the schoolchildren to the most effective education), manifestations of religion are not granted absolute protection, but are only protected to the extent that they are proportionate. Given this position under the ECHR, it would have been surprising for a court to create an absolute right to manifest religion via the rules on direct discrimination. The acceptance in *Azmi* that discrimination for manifesting religion is indirect discrimination creates a close fit with the scheme of protection under Article 9 ECHR, whereby religion or belief *per se* is granted absolute protection and manifestation of religion and belief receives only qualified protection. With respect to manifestation of religion, restrictions can be imposed where 'necessary in a democratic society', a concept that is usually interpreted to require any restrictions to be proportionate.²⁷ The effect of this decision, however, is far-reaching in practical terms as it means that most of the cases involving religious dress as well as those involving time off for religious observance are dealt with as cases of indirect discrimination. This means that their success or otherwise will depend on the courts' view of proportionality.

The second significant aspect of the *Azmi* case relates to the EAT's approach to proportionality, and the standard of justification that was required of the school. Azmi argued that more could have been done to try to accommodate her: longer observations of her teaching could have verified the claim that her teaching was more effective when not wearing the *niqab*; the school could have timetabled her to avoid helping in a class taught by a man; or she could

26 *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154.

27 *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 48.

have taught the children behind a screen in the classroom. However, the EAT, while agreeing that the standard of review needed to be stringent, accepted that the school's actions were proportionate: they had investigated whether they could accommodate Azmi's requirement to wear the *niqab* and concluded that they could not. The fact that Azmi could identify alternative accommodations that she would have preferred did not change matters. In effect, the EAT took the same approach as the US Supreme Court on accommodating religious claims, where the employer is under no obligation to offer the employee the least disadvantageous accommodation available.²⁸

Although the idea that belief is protected by direct and manifestation by indirect discrimination maps well on to the approach of Article 9 ECHR, there remains a complication, created by the approach of the courts in the second high profile case under the Religion and Belief Regulations, *Eweida v British Airways*.²⁹ Eweida was a member of the check-in staff for BA, who was refused permission to wear a cross over her uniform, as this was in breach of their uniform policy. BA did allow Muslim women to wear the *hijab*, and Sikh men to wear turbans, because the items were required by the particular religions, and they could not be concealed under the uniform, whereas Eweida's cross could have been concealed and she did not believe that wearing the cross was a 'mandatory' requirement of her religion. As with *Azmi*, Eweida's claim of direct discrimination was unsuccessful and this was not appealed. What was more contentious was that her claim of indirect discrimination was also unsuccessful, not on the basis of justification, but on a prior legal point. The Court of Appeal held that the refusal to accommodate the request of a single believer was not covered by the indirect discrimination protection, as the Regulations require that a neutral requirement is imposed which puts, or would put, *persons* of the same religion at a particular disadvantage³⁰ (here the requirement not to wear visible jewellery). This suggests that more than one person must hold the belief. As Eweida was the only person identified who held the particular belief, there could be no indirect discrimination.

It was argued before the Court of Appeal that an alternative reading of the Regulations would allow for individual beliefs, which are protected under Article 9 ECHR, and which the Court of Appeal acknowledged are protected under the Regulations (presumably now only under the direct discrimination, harassment or victimisation provisions) to be covered by indirect discrimination protection. Although the Regulations use the term 'persons' in the plural, they also include the word 'puts or would put' persons of the same belief at a

28 *Ansonia Board of Education v Philbrook* 479 US 60 (1986).

29 *Eweida v British Airways* [2010] EWCA Civ 80. See the comment on the EAT decision: L Vickers, (2009) 11 Ecc LJ 197.

30 Emphasis added.

disadvantage. The inclusion of the conditional ‘would put’ persons at a disadvantage, could mean ‘would also put persons of the same view, were there to be any, at a disadvantage’. Understood this way, the indirect discrimination provisions could be extended to individuals in the absence of a group who hold the same religious or other belief. However, this argument was not accepted by the Court of Appeal, on the basis that ‘the argument loads far too much on to the word “would”’.³¹ Whilst it is undoubtedly the case that the use of the conditional wording of the provision in this way is somewhat awkward, it would have been legitimate, given the duty to interpret legislation to accord with the ECHR, imposed by section 3 of the Human Rights Act 1998.³² Under Article 9, individual beliefs are protected, and the protection includes the right to manifest belief (subject to proportionate exceptions). An interpretation of the Regulations which excludes indirect discrimination claims from sole believers means that such believers are not thereby protected when they manifest their beliefs. Moreover, the parent directive is worded solely in the conditional, suggesting again that it may cover individual disadvantage.³³

There are clearly some disadvantages to this approach,³⁴ in particular the danger that a wide range of behaviours linked to individual beliefs could generate claims of discrimination seemed to be of concern to the Court of Appeal.³⁵ However, allowing indirect discrimination to be used in individual belief cases would not mean that employers would need to anticipate and then meet every wish of employees with any belief, as indirect discrimination can be always justified where proportionate. Moreover, with regard to justification, it is arguable that the number of individuals affected by any requirement can be taken into account in assessing proportionality. Failure to accommodate one employee’s religious request may be more easily regarded as proportionate than insisting on a uniform rule which disadvantages a large proportion of the workforce. It is suggested, then, that, contrary to the view of the Court of Appeal, the debate about the extent to which the manifestation of religion should be accommodated at work should take place in the context of proportionality, rather than by an *a priori* decision that indirect discrimination cannot occur for single adherents of a belief system. The Court of Appeal in *Eweida* made a number of other *obiter* comments which are worthy of comment, in particular regarding the idea that religion, unlike other grounds of equality, is chosen,

31 [2010] EWCA Civ 80 at para 17.

32 On the need to interpret employment law to comply with the ECHR, see *Pay v Lancashire Probation Service* [2004] ICR 187 EAT, and *X v Y* [2004] EWCA Civ 662.

33 N Bamforth, M Malik and C O’Cinneide (eds), *Discrimination Law, Theory and Context* (London, 2008), p 307–308.

34 See for example, R Allen and G Moon, ‘Substantive rights and equal treatment in respect of religion and belief: towards a better understanding of the rights, and their implications’ (2000) EHRLR 580, 601.

35 *Eweida v British Airways* [2010] EWCA Civ 80 at para 18.

and with respect to the question of whether the wearing of a cross was a core religious belief. These aspects of the case will be considered below.

Despite the drawbacks identified above to the approach of the Court of Appeal for cases involving single holders of beliefs, the general approach of the Regulations to the protection of religion and belief in both *Azmi* and *Eweida* (that belief is protected by direct discrimination, and manifestation of belief by indirect discrimination) complies with the approach of Article 9 ECHR. As with the ECHR case law, however, it leaves much work to be done in setting the boundaries of protection by the concept of proportionality. The courts' approach to proportionality is therefore key to gaining a full understanding of scope of protection for religion and belief under the Regulations. As has been seen in *Azmi* and *Eweida* the courts have been clear that identifying alternative accommodations will not prevent a finding that indirect discrimination can be justified. Further guidance on the courts' approach to justification can be found in the decisions of the EAT and Court of Appeal in *Ladele v Islington Borough Council* to follow.³⁶

CLASHES BETWEEN GROUNDS OF DISCRIMINATION: RELIGION AND SEXUAL ORIENTATION

One of the most contentious contexts in which the Religion and Belief Regulations operate is where there is a clash between discrimination on grounds of religion and belief and discrimination on other grounds, most commonly the grounds of gender and sexual orientation. Two high profile cases have involved this clash, *Ladele v Islington Borough Council* and *McFarlane v Relate Avon Ltd*.³⁷ *Ladele* claimed she was discriminated against for refusing, on religious grounds, to carry out civil partnerships as part of her job as a registrar; *McFarlane*, that he was discriminated against for refusing, on religious grounds, to provide psycho-sexual therapy to same sex couples. The decision in *McFarlane* followed *Ladele* and was determined fairly briefly on the same basis, so the decision in *Ladele* will be the focus of what follows. *Ladele* had worked as a registrar of Births, Deaths and Marriages for a number of years, before being designated more recently a civil partnership registrar under the Civil Partnership Act 2004. This caused difficulties for her as she believed that participation in registering civil partnerships would be contrary to her religious beliefs, as it would involve promoting an activity which she believed to be sinful. She sought to be excused from carrying out civil partnerships on this basis,³⁸ but permission was refused. The Council insisted that under its

36 *Ladele v Islington Borough Council* UKEAT/0453/08, EAT; *Ladele v Islington Borough Council* [2009] EWCA Civ 1357, CA.

37 *McFarlane v Relate Avon Ltd* UKEAT/0106/09/3011, 30 November 2009.

38 She was prepared to carry out other services, such as registering births and deaths for LGBT clients, but not civil partnerships.

'Dignity for All' policy, all registrars should be able to carry out all types of ceremony. Ladele was eventually disciplined and threatened with dismissal for refusing to carry out this part of her job.

During the course of events which led to her discipline and dismissal, Ladele experienced some adverse treatment, for example, details of the proposed disciplinary actions against her were discussed with other staff, breaching Ladele's confidence, and this information was then shared with the LGBT forum; and what was agreed by the EAT and Court of Appeal to be a 'moderate' letter requesting to be excused from performing civil partnerships was treated as gross misconduct by the Council. This treatment led the original employment tribunal to conclude that she had been discriminated against on grounds of religion and belief. However, the EAT and Court of Appeal both disagreed, and held that there was no direct discrimination. Both the EAT and the Court of Appeal did note that the Council did not treat Ladele fairly in that there were several unsatisfactory features about the way the Council handled the matter³⁹ and management had not treated Ladele's beliefs with the sensitivity which they might have done.⁴⁰ However, any adverse treatment was not *because of* her religion *per se*, but because of her refusal to conduct civil partnerships, which was a manifestation of her beliefs. Despite the poor treatment of Ladele, her direct discrimination claim therefore failed, and the case was treated as one of indirect discrimination. Thus, as with *Azmi* and *Eweida*, the case turned on the question of justification. With regard to the question of justification a number of factors were relevant: employer autonomy; the fact the case involved public sector employment; the nature of the belief; and the offence caused to other staff.

Employer autonomy

First, it is worth noting that under the Civil Partnership Act 2004, existing registrars were not automatically designated to carry out civil partnerships, which suggests that Islington could have retained Ladele's services as a registrar without registering her for civil partnerships. Indeed it was accepted that some other boroughs had dealt with the issue of religious objection to carrying out civil partnerships in precisely this way. However, Islington was committed to its 'Dignity for All' policy and decided to designate all its registrars as civil partnership registrars. The decision in *Ladele* confirms again that just because an alternative accommodation of religion and belief can be identified by the claimant (here, not designating those with religious objections as civil partnership registrars), this will not mean that the employer cannot justify indirect discrimination. Again, the employer is under no obligation to offer the employee the

39 For example, Elias J stated 'We agree that this characterisation of a thoughtful and temperate letter was extraordinary and unreasonable' UKEAT/0453/08 at para 77.

40 UKEAT/0453/08 at para 130, and [2009] EWCA Civ 1357 at para 75.

least disadvantageous accommodation available. Instead, Islington was entitled to interpret its 'Dignity for All' policy to require all registrars to be registered to perform civil partnerships as well as marriages.

The acceptance that Islington did not have to accommodate Ladele's request not to be designated as a civil partnership registrar (even though other councils had acceded to such requests) provides a good illustration of another factor taken into account in assessing proportionality: the employer's interest in its reputation and its public image. Islington Borough Council was very committed to equality on grounds of sexual orientation and chose to designate all its registrars as civil partnership registrars as part of that commitment. The court was very clear that the fact that other boroughs had not felt the need to do the same did not prevent Islington from justifying their decision. Clearly the interest in upholding employer autonomy cannot always prevail over the religious interests of staff, but the freedom of the Council to determine its own view of the requirements of the 'Dignity for All' policy was maintained in this case.

Public sector employment

A further significant factor in justifying the indirect discrimination against Ladele was that she was employed in the public sector to perform a secular task. The relevance of whether the employer is in the public or private sector for justifying indirect discrimination is not clear-cut. On the one hand, it can be argued that public sector organisations should be secular⁴¹ and should not accommodate religious views, particularly those which do not support equality on grounds of sexual orientation. On the other hand, it can be said that the public sector should reflect its community and so accommodate both sexual orientation and religion and belief.⁴² Just as the public sector should be inclusive in relation to sexual orientation, then, so it should be inclusive in terms of religion and belief.⁴³ In *Ladele* the Court of Appeal clearly took the view that a public sector organisation should promote equality on grounds of sexual orientation. It was thus important symbolically that the services of the state in registering marriages and partnerships be available to all. However, there is some inconsistency on the part of the Court of Appeal on this issue, evidenced by their reluctance to criticise other councils which had taken a different view.

41 While there is no formal separation of church and state in the UK, there is a general acceptance that the public sphere should be largely secular. See for example the comment of the EAT in *Glasgow City Council v McNab* UKEATS/0037/06/MT at para 61, at n 14 above, and the comments of Laws LJ in *McFarlane v Relate* [2010] EWCA Civ B1 at paras 23 and 24.

42 See J Rawls, *A Theory of Justice* (revised edition, Oxford, 1999) 196, which argues that justice as fairness requires equal participation in the state.

43 See C Stychin, 'Faith in the future: sexuality, religion and the public sphere', who raises the concern that denying any workplace 'accommodation' to those with religious objections to homosexuality effectively requires that those views are kept to the private sphere, and this may amount to 'relegating those of faith to the closet from which [the LGBT community] have emerged' (at 733).

It is undoubtedly the case that the service of registering marriage and partnerships must be provided equally to all, regardless of sexual orientation.⁴⁴ Once Islington had decided to designate Ladele as a civil partnership registrar, the fact that she could not discriminate on grounds of sexual orientation is clear. What was not fully explored in the case was whether it was proportionate to designate Ladele as a civil partnership registrar in the first place. As mentioned above, the Court accepted Islington's autonomy on this matter, but did not really explore the implications of this stance for other councils. It is arguable that an equal service can be provided to gay and lesbian couples by ensuring that they can have equal access to civil partnership services as heterosexual couples. Presumably this is the argument that would be put forward by any council which claims to comply with the Equality Act (Sexual Orientation) Regulations 2007 but which has decided not to designate all registrars as civil partnership registrars. If this is the case, then it is difficult to see why the Court viewed the fact that the employer was a public authority as relevant, given that other public authorities would have accommodated Ladele's request. Of course, the fact that the choice of staff to perform the ceremony is limited for gay and lesbian clients may mean that a 'separate but equal' provision is being made, provision which is rarely accepted as truly equal in discrimination law. However, if this was the case, then it would assume that those councils which have made such an accommodation are acting illegally, and the judgments are careful to make no such allegation. For example, Lord Neuberger stated that 'such decisions may well be lawful'⁴⁵ and Elias J in the EAT suggested 'we would be sorry if pragmatic ways of seeking to accommodate beliefs were impermissible'⁴⁶

Given that the Court of Appeal did not criticise other councils for allowing some staff not to carry out civil partnerships (by not being so designated), it would seem that it was accepting that there can be some variation in practice. This makes clear then, that significant weight was given to Islington's freedom to interpret its own policy on equality in its own way. Unlike the case of *Azmi*, where the alternative accommodations were suggestions by the applicant that had not been tested by other employers (eg to teach children in a behind a screen in the classroom), here the suggested accommodation was one that is routinely practised by other service providers. This suggests that employer autonomy is a significant factor in justifying discrimination in this context, and also suggests a fairly moderate approach to justification in this context.

This raises further issues about different approaches by the courts to different strands of equality. In sex and race discrimination cases the standard of scrutiny

44 Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263.

45 [2009] EWCA Civ 1357 at para 75.

46 UKEAT/0453/08 at para 116.

for justification of indirect discrimination is strict: requirements must be ‘correspond to a real need on the part of the undertaking, [be] appropriate with a view to achieving the objectives pursued and [be] necessary to that end’.⁴⁷ In *Hardy & Hansons plc v Lax*, a sex discrimination case, it was accepted that the employer does not have to show that no other proposal is possible, but equally it was held that in assessing proportionality the tribunal must make its own judgment, ‘upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary’.⁴⁸ Although this case law was considered in *Ladele* the Court of Appeal accepted that, as Islington’s aim was to designate all registrars as civil partnership registrars, it was then necessary to require Ladele to carry out civil partnerships. However, although the aim of an equal service to all is clearly legitimate, the Court of Appeal did not seem to question whether this aim reflected a ‘real need’ of the organisation. Was it really necessary to designate all registrars as civil partnership registrars (as opposed to the clear need for all designated registrars to carry out civil partnership registrations)? It is unfortunate that this was not considered, particularly given that Parliament had not automatically designated all registrars under the Civil Partnership Act, and other councils clearly did not feel it was necessary to do so.

The Court of Appeal took the view that it was up to Islington to determine its own aim (that all staff must offer all services). Once that aim was accepted as legitimate, the requirement that Ladele carry out civil partnerships was clearly necessary to achieving it. However, it did not subject to any scrutiny Islington’s decision to make this its aim. In failing to consider the legitimacy of Islington’s aim, the Court of Appeal seems to have subjected the Council to a low level of scrutiny, in comparison to the high standard usually required in discrimination cases,⁴⁹ and this leads to concern about the introduction of a hierarchy within discrimination law as between different grounds, a matter which is discussed further below.⁵⁰

A ‘core’ belief?

A further issue that was relevant to issue of justification was the argument that her request not to perform civil partnerships was not a core part of her religion.⁵¹

47 *Bilka-Kaufhaus GmbH v Weber von Hartz* (Case 170/84) [1987] ICR 110.

48 *Hardy & Hansons plc v Lax* [2005] ICR 1565, CA, para 31.

49 *Bilka-Kaufhaus GmbH v Weber von Hartz* (Case 170/84) [1987] ICR 110. However, see A Baker, ‘Proportionality and employment discrimination in the UK’, (2008) 37(4) ILJ 305–328 for criticism of the standard of review in sex discrimination cases.

50 On the question of hierarchies of rights see C McCrudden, ‘Thinking about the discrimination directives’ (2005) 1 *European Anti-Discrimination Law Review* 17, M Bell and L Waddington, ‘Reflecting on inequalities in European equality law’ (2003) 28 *EL Rev* 349, and L Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, ch 7.

51 *Ladele v Islington Borough Council* [2009] EWCA Civ 1357 at para 52.

This refers to the distinction drawn under Article 9 of the European Convention on Human Rights between behaviour which is motivated by religion or belief, and that which amounts to a manifestation of that religion or belief.⁵² Where behaviour is required by the religion and amounts to a manifestation of it, a refusal to allow the behaviour will involve a greater infringement of religious interests of the employee than a refusal to accommodate religiously motivated behaviour, and therefore it is right that this is taken into account in assessing justification and proportionality.⁵³ Thus if Ladele's beliefs about marriage and sexuality were not core to her Christian beliefs, then restricting their manifestation was more likely to be proportionate than restricting core beliefs.

However, it is not always easy to determine whether a belief is 'core' or not, and it is important that any decision about such a matter be taken carefully, and with proper evidence. It is not for the court to determine the status of religious views as either core or peripheral, as these are matters which are arguably beyond the competence of any secular court. In other cases involving religion, courts have been careful to not determine the validity or status of religious views. For example, in *R v Secretary of State, ex parte Williamson*⁵⁴ it was stated that protection is provided for the subjective belief of an individual, and it is not for the court to judge the validity of a belief. Equally it would seem to be beyond the competence of the court to determine whether a belief is 'core' or not. Thus, although it is right, in assessing proportionality, to consider whether actions are manifestations of belief, or merely behaviour motivated by belief, any such arguments need to be approached with caution, and it is important that courts do not overstep their competence in ruling on matters of faith and doctrine.⁵⁵

A further concern is that there may be a difference in treatment as between different religions and beliefs in terms of how ready courts are to determine such issues. It seems that courts are more ready to determine what is and is not core with regard to Christianity than other faiths.⁵⁶ Thus in *Ladele* the Court of Appeal accepted that the belief regarding marriage was not core, and in *Eweida* the court accepted that the claimant was not required by her religion

52 *Arrowsmith v UK* [1978] 3 EHRR 218.

53 See further the discussion in L Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, ch 3. See also B Bagni, 'Discrimination in the name of the lord: a critical evaluation of discrimination by religious organisations' (1979) 79 *Colum LR* 1514.

54 *R v Secretary of State, ex parte Williamson* [2005] UKHL 15 at para 22.

55 See McCrudden, 'Religion, Human Rights, Equality, and the Public Sphere', discussing the competence of courts to rule on such issues, and the need for judges to develop a 'cognitively internal' point of view when considering religious issues.

56 It is notable that in *Williams v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, some of the judges were prepared to determine what was and what was not required of Christianity, rather than considering the religious views of the particular claimants before them; See Buxton LJ at para 76, and Elias J in the first instance hearing.

to wear the cross. In contrast, in the *Begum* case⁵⁷ the House of Lords held that the sincerely and strongly held opinion about religious dress could be protected and was clear that it was not its role to determine the validity of the view or its doctrinal status (although *Begum* lost her case on other grounds); and in *Watkins Singh*⁵⁸ the High Court upheld the claimant's right to wear the Sikh Kara to school, even though it was also held that she was not obliged by her religion to wear it. It seems then that a difference in approach is being developed with courts more willing to determine religious matters for some faiths than others.

Offence to other staff

One difficult management issue for the Council was that two colleagues, who were members of the LGBT forum, claimed to have been discriminated against by Ladele. Any claim they might have had would have had to have been based on harassment; that they were offended, as gay staff, by Ladele's stance on civil partnership. The claim that a request to be excused from carrying out civil partnerships on religious grounds would discriminate against gay and lesbian staff was not explored by any of the courts, but it seems difficult to suppose that any such claim could have been successful,⁵⁹ without causing significant difficulties for any manager seeking to achieve compromise between competing equality claims, as either side in any dispute involving competing rights could claim that the very fact of attempting to reach an accommodation is offensive to them, and therefore discriminatory.

Cases of this type have not been brought so far in our courts,⁶⁰ but it would seem that if they were to be, they would turn on whether it was reasonable to be offended by the situation. In order to come within the definition of harassment, there must be unwanted conduct which has the purpose or effect of violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim. To succeed in a claim a worker would have to argue that the consideration of a request by a colleague to be removed from duties on religious grounds violated dignity or created a humiliating or offensive environment at work. Although a worker may well feel offended that such a request has been made, or is being considered, this is not the only issue to consider. The Regulations state that 'conduct shall be regarded as [harassment] only if, *having regard to all the circumstances*, including in particular the perception of B, it should *reasonably* be considered as having that effect'. Thus the perception

57 *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

58 *R (Watkins-Singh) v The Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin).

59 Although Lord Neuberger included the fact that staff were offended by her stance in a list of factors which were relevant to the decision that Islington could justify its requirement: *Ladele v Islington Borough Council* [2009] EWCA Civ 1357 at para 55.

60 The issue has been extensively discussed in the US literature Volokh, 'Freedom of speech and workplace harassment' (1992) 39 UCLA L Rev 1791. See also KR Browne, 'Title VII as censorship: hostile environment harassment and the First Amendment' (1991) 52 Ohio St LJ 481.

of the 'victim' that they have been offended is only one of the factors considered in assessing claims of harassment. Other circumstances could include the need to adequately protect the freedom of religion of all parties; the need to promote inclusion, diversity, tolerance and dignity at work including that of the religious individual, and whether the speech was intended to offend the victim.⁶¹

The perception of the victim is rightly important, but it may well be that, in order to correctly balance the competing rights to equality on grounds of religion, sex and sexual orientation, making requests for accommodation should not be treated as harassment, unless this has been done in an offensive manner. In *Ladele's* case, the courts accepted that her request had been 'thoughtful and temperate'.⁶² It is important that managers dealing with competing rights feel confident that they can investigate requests for accommodation without fear that they may thereby be discriminating against others.

However, despite these reservations about the use of harassment protection in religious cases, it remains clear that where individuals make homophobic or sexist remarks to colleagues, with an offensive intent or a lack of care about causing offence, there will not be a 'religious defence' to any claim of harassment. Moreover, after *Ladele* it is clear that even if a requirement to treat others with dignity regardless of gender or sexual orientation puts at a disadvantage those whose religious beliefs do not include a belief in equality on grounds of sex or sexual orientation, any such indirectly discriminatory effect of a requirement to abide by a work code based on respect for others will be justified and proportionate.

THEMES FROM THE CASE LAW

The outcomes in the cases discussed above have, to an extent, been unsurprising. That there would be some debate over the meaning of belief was predictable, given that it was left undefined in the Regulations. Moreover, given the ECHR case law in which pacifism⁶³ and veganism⁶⁴ have been held to be beliefs, it was perhaps not a big step to interpret it to cover other 'single issue' beliefs such as a belief in climate change. Similarly, the decision that manifestations of belief should be treated as indirect discrimination, and thus subject to justification, ties in with the protection available under Article 9 and must be correct. To this extent then, the case law has developed along fairly predictable lines.

61 This issue is discussed in more detail in L Vickers, 'Is all harassment equal? The case of religious harassment' (2006) 65(3) CLJ 579–605. See also S Jamar, 'Accommodating religion at work: a principled approach to Title VII and religious freedom', (1996) 40 New York Law Sch LR 719 on the factors to take into account in assessing harassment cases.

62 UKEAT/0453/08 at para 77, and [2009] EWCA Civ 1357 at para 33.

63 *Arrowsmith v UK* (1978) 19 D&R 5.

64 *H v UK* (1993) 16 EHRR CD 44.

What is of concern in the case law, however, is not so much the conclusions reached, but the basis on which they were reached. A number of concerns can be identified. The first is that significant weight is put on the role of proportionality in determining the outcomes of cases, yet the use of proportionality can itself be contested, as it involves measuring incommensurable interests,⁶⁵ and can lead to legal uncertainty. The second concern is that a number of points were made in *obiter* comments which raise concerns about the courts' handling of some religious issues. The final concern is that a different level of protection may be emerging for discrimination on grounds of religion and belief from that available for other equality grounds. While this may not be a bad development, the reasons for this need to be further explored and better articulated.

The role of proportionality

As has been said above, the courts are correct that difficulties faced at work due to the manifestation of beliefs should be treated as indirect discrimination. As a result, most of the case law has focused on the interpretation of justification and proportionality, such that their meaning becomes the all-important test of whether restrictions on religious freedom at work are lawful. Proportionality is also the decisive factor in determining whether any of the exceptions to the non-discrimination principle are lawful, namely the exception that allows genuine occupational requirements to be of a particular religion or belief to be imposed by employers.⁶⁶ Thus the concept of proportionality effectively does almost all the work of determining when religious discrimination is or is not lawful.

The almost complete reliance on the concept of proportionality to create the boundaries of freedom of religion and belief at work is not without its difficulties, and the concept of proportionality might be said to be too vague and uncertain a concept to be relied on in this context. In particular, it is certainly very fact-dependent, and this tends not to lead to clear and simple precedents and rules on which employers can rely. Perhaps even more serious a criticism of an overreliance on the concept of proportionality is that the test is too subjective, relying on the individual views of those hearing the case, albeit dressed up in the objective language of proportionality. However, although not perfectly objective, it is also far from totally subjective. The proportionality model requires reasoned and principled analysis of the factors at play in a case to determine which factors

65 For a discussion of the theoretical difficulties inherent in any balancing exercise of this type, see L Vickers, *Freedom of Speech and Employment* (Oxford, 2002), ch 2. See also J Rivers, 'Proportionality and variable intensity of review' (2006) 65(1) CLJ 174–207 and D Beatty, *The Ultimate Rule of Law* (Oxford, 2004).

66 Regulation 7(2) and 7(2) of the Employment Equality (Religion and Belief) Regulations 2003. For discussion of these provisions see L Vickers, *Religious Freedom, Religious Discrimination and the Workplace*, ch 5.

are relevant and to give them appropriate weight, and it also means that the factors which have been taken into account have to be articulated and can be subject to review. It is at this level that the criticism of the cases discussed above is made: the reliance on proportionality is correct, but it is suggested that some of the factors relied on by the courts may have been given inappropriate weight.

An additional concern with the reliance on proportionality is that, even if not personal and subjective, the judgments are certainly very fact-sensitive and dependent on the context in which the requests are made. This can mean that what seem to be inconsistent decisions are reached. For example, the cases before tribunals thus far suggest that it is proportionate to restrict the wearing of a cross at work, but not the wearing of the headscarf.⁶⁷ However, it may well be that to argue for more certainty, instead of relying on the fact-sensitive proportionality test, would result in less protection for religion and belief at work. Unless limited by terms such as 'reasonable' or 'proportionate', any rights that might be given with regard to issues such as dress codes are likely to be very limited, as courts will be wary of creating absolute rights to wear the headscarf, or to conscientious objection to undertaking particular tasks which conflict with religious beliefs. Faced with a choice of a right in all circumstances to wear a cross or headscarf at work, or no right to do so, courts are likely to make the decision that there is no such right. In effect, a requirement of certainty from the case law would be likely to lead to more restricted protection from the courts. Although it may lead to fact-sensitive decisions and thus less clear guidance for courts, this nonetheless provides the best protection for religious interests at work.⁶⁸

The treatment of religious issues

The main concerns regarding the decisions of the court have been discussed in detail above. In particular, concerns were expressed about the role that the court in *Nicholson* gave to the idea that beliefs must be worthy of respect before being protected. Similar concerns, albeit in a different context, have been expressed about the courts' readiness to determine whether beliefs are 'core' to a religion or not, as a factor in determining proportionality. In both cases, the concerns relate to the understanding of the court about the definitions of religion and belief itself, and the definition of the role of particular beliefs in the life of the believer.

There are two outcomes of the thinking of the court. First, as has been said, courts can enter dangerous territory when trying to determine exactly what the

67 'Muslim stylist wins £4,000 payout', BBC News Website 16 June 2008, <<http://news.bbc.co.uk/1/hi/england/london/7457794.stm>>, accessed 22 April 2010 and 'Christian nurse loses battle to wear crucifix at work', *The Guardian* 6 April 2010.

68 See C Stychin, 'Faith in the future: sexuality, religion and the public sphere'.

'core' requirements of a religion are. There can be particular difficulties for newer minority religions, where there may be no accepted religious code of behaviour, and so evidence may be very difficult to come by as to whether a particular behaviour is required.⁶⁹ However, there may be equally problematic issues for those of more traditional faiths, where the Court may assume knowledge of the requirements of the religion.

A second outcome of the thinking reflected in the decisions is that it seems to be the case that the more significant the effect of non-compliance with a religious rule in the belief system of the adherent, the more likely it is that employers will be required to accommodate the belief.⁷⁰ This has led to different approaches to the treatment of Muslim women who want to wear headscarf (but not the *niqab*) from Christian women wanting to wear a cross. Although nuanced and case-sensitive decision making has been advocated above, the difference in treatment of these major world religions in the workplace has led to some disquiet among Christian groups, and it may be that courts should articulate more clearly why the treatment has been different. Simple statements that the Christian is not prevented from practising their faith by the restriction do not explain clearly enough the difference of treatment, and do not give sufficient weight to the role of religious observance in the life of religious individuals beyond that of worship.⁷¹

Moreover, an approach focused on whether beliefs are 'core' or not leads to greater protection for more severe and punitive religions, where the consequences of non-compliance with religious rules for adherents are more serious for the individual.⁷² There may be a certain inconsistency here, as when religions become particularly severe and punitive, it may be the case that the beliefs will be less likely to be worthy of respect in a democratic society. Certainly in the case law of the European Court of Human Rights, the definition of the manifestation of religion has increasingly involved considering whether the beliefs are compatible with a tolerant and plural society.⁷³ Yet tolerant belief systems which are accepting of a plural society are likely to get less protection under the current domestic approach, because the consequences of non-compliance are less likely to be serious for a believer.

Although concerns about the courts' approach to determining religious issues have been raised above, and the suggestion made that courts need to beware of overstepping their competence in ruling on matters of faith and doctrine, this is

69 See P Cumper, 'The public manifestation of religion or belief: challenges for a multi-faith society in the twenty-first century' in R O'Dair, and A Lewis (eds), *Current Legal Issues*, p 325.

70 This also, of course, returns again to the question discussed above of the courts' competence to determine such questions.

71 S Webster, 'Misconceptions about the nature of religious belief', EOR April 2010.

72 P Edge, 'The definition and determination of religion in 21st Century English law', Applied Study of Religion and Law Work in Progress Seminar, Oxford Brookes, January 2010.

73 M Evans, 'Freedom of religion and the ECHR: approaches, trends and tensions'.

not to suggest that a separate court needs to be created to deal with religious matters. Such a suggestion is made by Lord Carey, former Archbishop of Canterbury, in evidence to the court in *McFarlane v Relate Avon Ltd*,⁷⁴ but the response from Lord Justice Laws is a robust refusal to countenance a separate court structure for religious cases, with such as move labelled ‘deeply inimical to the public interest’.⁷⁵ Lord Carey’s concern was that court decisions demonstrate that judges are unaware of basic issues in the Christian faith. Whilst criticisms have been made above of courts’ approach to religious issues, however, it is not suggested here that the problem needs to be solved by the creation of a new specialised court. Instead, it is merely suggested that courts need to be aware of the complexities involved in ruling on religious issues, and of the ease with which they can (unwittingly) stray into determining matters which are beyond the boundaries of their usual competence by, for example, ruling on how important particular beliefs are for different religions. Specialist courts may not be in the public interest, but the public interest would surely be served by ensuring that specialist evidence is brought before the courts to enable the complexities and nuances of each case to be properly explored.

The creation of a hierarchy

The final concern arising from the case law is that there seems to be developing a rather moderate level of review of employer decision making.⁷⁶ For example, in *Ladele* the court seemed relatively unperturbed by the fact that other councils had been able to accommodate requests such as the claimant’s, and gave significant weight to Islington’s freedom to decide how to implement its ‘Dignity for All’ policy to accord with its reputation as a progressive council.

The acceptance of fairly moderate review in religion and belief cases may be inevitable given the lack of consensus over so many issues regarding religion,⁷⁷ ranging from its definition, to the extent to which religion should be given any space in public life. However, if a relatively low level of protection is emerging for discrimination on grounds of religion and belief, this creates either a danger of levelling down of protection for other grounds, or the creation of a hierarchy of protection as between grounds of discrimination, something which the ECJ at any event has been keen to discourage.⁷⁸ The emergence of

74 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1.

75 [2010] EWCA Civ B1 at para 26.

76 For a similar point made in relation to disability discrimination, see J Davies, ‘A cuckoo in the nest? A “range of reasonable responses”, justification and the Disability Discrimination Act 1995’, (2003) 32 (3) *ILJ* 164–184.

77 See G Pitt, ‘Religion or belief: aiming at the right target?’ in H Meenan (ed), *Equality Law in an Enlarged EU* (Cambridge, 2007).

78 The early decisions of the European Court of Justice interpreting legislation introduced under a different ground reinforces the idea of a common understanding of equality, and the need for common standards to be introduced across the different equality grounds: *Chacón Navas v Eurest Colectividades SA* (2006) C-13/05, at para 40.

a hierarchy of protection as between grounds may not be too bad an outcome, indeed it has been argued that the removal of hierarchy as between grounds may hinder the proper development of equality law.⁷⁹ However, if a hierarchy is to emerge (and at the very least it would be the lesser of two evils given that the alternative is a levelling down in the protection on grounds such as race and gender) it is important for the reasons for the different level of protection to be clearly articulated.

A number of suggestions have been made in the literature about ways in which the grounds of discrimination are inherently different, such as that some grounds (gender, race, sexual orientation) are truly irrelevant to a person's ability to undertake work while other grounds are relevant some of the time, because they may either limit availability to do a job (pregnancy, religion) or may limit ability to perform a job (disability, age).⁸⁰

Thus far, only Sedley LJ in *Eweida* has proffered a reason why religion and belief may be different from other grounds: 'all of [the other grounds of equality] apart from religion and belief are objective characteristics of individuals; religion and belief alone are matters of choice.'⁸¹ With respect, this is a very brief assertion about a highly contested and complex matter.⁸² A full analysis of the literature on religion as choice is beyond the scope of this paper, but a few difficulties with the notion can be offered. First, a high percentage of religious adherents stay in the religious groups into which they were born, showing little mobility between religious groups and suggesting that for many, in practice, religion is not chosen. Further, to conclude that religion is a chosen characteristic suggests a very individualistic and personal belief-based notion of religion, and ignores more communal and cultural understandings of religious identity.⁸³ Moreover, even if a religion is chosen, it is arguably a 'fundamental choice', and one which should be offered significant respect by the legal system: it is clearly closely related to an individual's concept of identity and self-respect, and the cost to the individual of renouncing religious affiliation should not be underestimated.⁸⁴ Thus, although it may be inevitable that a hierarchy will be created as between different grounds of equality, further thought needs to be given to where religion should sit on the spectrum, and why.

79 C McCrudden, 'Thinking about the discrimination directives'.

80 M Bell and L Waddington, 'Reflecting on inequalities in European equality law' (2003) 28 EL Rev 349.

81 *Eweida v British Airways* [2010] EWCA Civ 80 at para 40.

82 For example, it could be argued that religion is not alone in being a matter of choice; given the availability of gender reassignment procedures, it is arguable that gender can be chosen.

83 C Evans, 'Introduction', in Cane, Evans and Robinson, *Law and Religion in Theoretical and Historical Context*. See also McCrudden, 'Religion, Human Rights, Equality, and the Public Sphere'.

84 See P Edge, 'Religious rights and choice under the European Convention on Human Rights', [2000] 3 Web JCLI, and R Wintemute, *Sexual Orientation and Human Rights* (Oxford, 1995).

CONCLUSION

By dealing in one sentence with the question of whether religion is chosen, the Court of Appeal in *Eweida* gave inadequate attention to an important and complex question. The somewhat simplistic approach to this question is, unfortunately, not out of keeping with the approach of the court on a number of other issues, identified above.

The findings of the courts in the cases to date have largely been unsurprising when compared with the legal protection in the European Court of Human Rights and in other countries which protect religion and belief at work. Clearly, determining the proper parameters for protection of religion and belief at work raises significant difficulties, particularly where they arise from conflict between religion and other equality grounds. However, the reasoning of the courts does raise some concerns, and leaves a number of 'hostages to fortune' as regards future developments, such as the danger that beliefs will be left unprotected if they do not match current thinking on what is 'respectable' in a democratic society; or the possibility that accommodations need not be offered to staff with more tolerant beliefs. Without going so far as to call for a separate courts structure to deal with religious cases, it is to be hoped that in future more nuanced and sensitive reasons will be given for the decisions, so that a more stable foundation can be found for the protection for religious interests, one which gives sufficient weight to the broader issues of equality, multiculturalism, and religious and social identity, to name just a few of the multiple issues which are raised by the protection of religion at belief at work.