EWEIDA AND OTHERS: A NEW ERA FOR ARTICLE 9?

Abstract *Eweida and others* considered the claims of four religious individuals whose employers had rejected their requests for accommodation of their religious practices at work, and who had failed in their attempts to contest those decisions before English courts. However, as a judgment it speaks to a wider array of questions of principle, particularly the appropriate interpretation of Article 9 claims. The case provided the ECtHR with an opportunity to clarify a number of discrete doctrines and interpretative approaches within Article 9 jurisprudence, and the Court decided to use this occasion to elucidate the issues raised by the applicants' cases.

Keywords: Article 9 European Convention on Human Rights, employment rights, *Eweida v United Kingdom*, freedom of religion and conscience.

This paper examines the European Court of Human Right's (ECtHR) most recent articulation of the extent of the European Convention on Human Rights' (ECHR) protection of individual religious believers. Judgment in the joined case of Lillian Ladele, Gary McFarlane, Nadia Eweida and Shirley Chaplin was handed down on 15 January 2013.[1] These cases gave the Chamber the opportunity to clarify and redefine one of the most controversial areas of its jurisprudence. The Court's response to these challenges is to be welcomed. The *Eweida and others*[2] judgment provides a clear break with the Strasbourg institutions' traditional approach towards Article 9 of the EHCR, emphasizing the need to resolve claims at the justification rather than interference stage. The judgment raises many interesting questions in relation to Article 9, not least with regard to its interaction with the non- discrimination provisions of Article 14 and the doctrine of a State's positive obligations. However, this article will focus on the Court's approach to a number of key issues which have emerged in its jurisprudence under Article 9, specifically the distinction between religious acts and beliefs, the 'free-contract' doctrine and the 'specific-situation' rule. It will consider the context and consequences of its changing approach to these issues, whilst also scrutinizing the guidance given by the judgment to domestic authorities on how best to strike a 'fair balance' between competing interests in Article 9 cases.

[1] The applicants were challenging the English courts' findings in a series of judgments relating to the rights of religious employees under Article 9 of the Convention and under the religious discrimination provisions of the English statutory discrimination scheme: *Eweida v British Airways Plc* [2010] EWCA Civ 80, [2010] ICR 890; *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] UKET 1702886/09; *Ladele v Islington LBC* [2009] EWCA Civ 1357, [2010] 1 WLR 955; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880, [2010] IRLR 872.

[2] *Eweida and others v UK* [2013] ECHR 37. Throughout this paper the Strasbourg judgment will be referred to as *Eweida and others*, while the domestic Court of Appeal judgment involving Ms Eweida, *Eweida v British Airways* (n 1) will be referred to simply as *Eweida*.

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Section I provides a brief outline of the factual and legal context of the cases. Section II looks at the response of the Court to the applicants' arguments that their cases should not have been determined solely by reference to the question of whether a prima facie interference with Article 9 had occurred. This line of argument questioned both the English courts' limited definition of religious manifestation and the ECtHR's restrictive jurisprudence on employees' Article 9 rights. The Court's response not only answered these criticisms, but also made clear that in general it viewed the determination of Article 9 cases at an interference rather than proportionality stage to be unsatisfactory. Section III considers what role the ECtHR sees itself as having when monitoring Member States' attempts to achieve a 'fair balance' between competing interests in Article 9 cases. Section IV outlines some areas of Article 9 jurisprudence that still warrant clarification from the Court, before summarizing and concluding the analysis.

I. INTRODUCTION

Whilst the Convention protections of religious freedom and religious discrimination had become somewhat intertwined in English case law, with judges in religious discrimination cases at times invoking issues of greater relevance to Article 9 than religious discrimination,[3] the cases joined in *Eweida and others* explicitly and separately address arguments based on Article 14 detached from Article 9. Though each of these claims arose from the similar context of an employer's refusal to accommodate religious practices in the workplace, they gave rise to two distinct sets of legal arguments before the European Court of Human Rights. Counsel for Lillian Ladele relied solely on Article 14 arguments, whilst the remaining applicants relied primarily on Article 9, referring to Article 14 as a secondary ground of claim.

A. The Legal Context of the Challenges in Eweida, Chaplin, Ladele and McFarlane

The issues that arise when a religious practice is restricted can be understood as relating to two separate strands of legal protection. The traditional view of such conflicts characterized them as relating to questions of religious freedom but more recently the religious discrimination aspect of such restrictions has also come to the fore. Article 9 of the EHCR, incorporated into UK domestic law under the Human Rights Act 1998, is the primary form of legal regulation in relation to religious freedom. Article 14 of the ECHR, concerning non-discrimination in the enjoyment of a Convention right, buttresses this protection from a non-discrimination perspective and is reflected in the UK by a statutory scheme adopted to give effect to European Community legislation.

1. Article 9: Religious freedom

1. 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

[3] See, for example, references to the lack of impact on Ms Ladele's freedom to worship and to the issue of whether her view on marriage was a core part of her religion, *Ladele* (n 1) [52].

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community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9 makes a distinction between the absolute freedom to believe and the qualified freedom to practise or otherwise manifest belief. This distinction is most often typified as the distinction between the absolute *forum internum* and the qualified *forum externum*. The freedom to manifest belief is subject to 'such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.[4]

The base level of protection that the Convention provides to the individual religious believer under Article 9(1) is relatively clear. The protection of the *forum internum* safeguards the individual's freedom to choose their own beliefs, creating a clear layer of protection from state coercion of belief, including non-religious forms of thought, conscience and belief. Article 9 is buttressed by the protections available under Article 2 of the First Protocol to the Convention, relating to the right of parents to educate their children in accordance with their religious views.[5] The State is prohibited from engaging through its education system in moral or religious indoctrination contrary to parents' wishes.[6] Equally, the State is prohibited from limiting the freedom of individuals to practise or not practise religion, for instance by requiring individuals to act in accordance with the practices of a religion to which they do not adhere.[7] Direct evidence of coercion to change religion emanating from private actors will likewise amount to unjustified interference with the rights enshrined in Article 9.[8] Whilst the *forum internum*'s protection is absolute, its scope is incredibly narrow, being primarily concerned with freedom to believe and freedom from coercion to change one's belief. The freedom to manifest religion may be confined in a whole host of ways without infringing the absolute protections of Article 9(1).[9] This paper will not, however, dwell on this absolute internal dimension of religious freedom. Rather, it primarily focuses on Article 9's qualified protection of religious manifestations and the judicial interpretations that have shaped the meaning and strength of the text's protection of them. In particular, this paper is concerned with the balances struck by courts when the desire

[4] Art 9(2).

[5] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979) 1 EHRR 711; *Folgerø and others v Norway* (2007) ECHR 546.

[6] However, it seems such coercion much reach a relatively high level for it to be deemed an interference, see *Angeleni v Sweden* (1988) 10 EHRR 123.

[7] *Buscarini v San Marino* (2000) 30 EHRR 208.

[8] For instance, where an employee is dismissed from their job solely because of their religious beliefs.

[9] Some would argue, and at times the ECtHR has seemed to imply (in cases such as *Buscarini v San Marino* (n 7)) that forcing a religious individual to act contrary to their beliefs is in breach of the *forum internum*. Space precludes any assessment of the merits of such arguments. For a detailed exposition see PM Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005) Chapter 3.

of individuals to manifest their religious beliefs comes into conflict with other objectives.

2. Article 14: Prohibition of discrimination

The issues of discrimination and equality are inexorably linked to any attempt to strike a fair balance between such conflicting concerns. Article 14 of the Convention lays down the principle of non-discrimination in the following terms:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is crucially not a free-standing right and may only be invoked in conjunction with another substantive Convention right.[10] That right need not itself have been breached for a successful Article 14 claim to be founded. Thus far, Article 14 has only been infrequently used as a basis for a finding of religious discrimination.[11] This is partially explained by the Court's practice of avoiding consideration of Article 14 complaints where the claimant has already established a breach of another Convention right.[12] Article 1 of Protocol 12 provides a general and free-standing anti-discrimination provision. However, it has limited legal effect, given that the UK and the vast majority of Council of Europe member states have so far failed to ratify it.

The UK's statutory scheme on discrimination is contained in the Equality Act 2010, an amalgamation of numerous previously separate strands of equality protection. Under this scheme indirect discrimination occurs where A applies or would apply a provision, criterion or practice equally (i) which puts persons of B's religion or belief at a particular disadvantage compared with others; (ii) which puts B at that disadvantage; and (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.[13]

3. Facts of the cases

In *Eweida v British Airways* the claimant was sent home from work without pay following repeated infringements of her employer's uniform policy by attending work wearing a visible Christian cross.[14] Her employer, British Airways, subsequently altered their policy and she returned to work, though BA refused to compensate her for earnings lost during the period in which she had been away from work.[15] Her claim that Christian symbols were being treated less favourably than those of other religions such as Sikhism and Islam, which were allowed under BA's policy,[16] was rejected by the Court

[10] This includes rights contained in Protocols which have been signed and ratified by the Member States in question.

[11] In the context of religious discrimination, though found to be an interference with Article 14 in conjunction with Article 8 (right to private life), see *Hoffmann v Austria* (1994) 17 EHRR 293. (involving the denial of custody to a Jehovah's Witness mother). In relation to conscientious objection to military service, see *Thlimmenos v Greece* (2001) 31 EHRR 15.

[12] Where discriminatory treatment is a fundamental aspect of the case the Court will be more likely to address Article 14 arguments. See, for instance, *Dudgeon v UK* (1982) 4 EHRR 149.

[13] Equality Act 2010, section 19.

[14] *Eweida and others*, para 12.

[15] ibid para 13.

[16] ibid para 11.

of Appeal. In *Eweida* the EAT and the Court of Appeal each interpreted the 2003 non-discrimination regulations,[17] now incorporated into Section 19 of the Equality Act 2010, as requiring that for indirect discrimination to be established the claimant must identify other persons sharing their protected characteristic who are also disadvantaged by the provision, criterion, or practice applied to them.[18] The Court of Appeal endorsed the EAT's statement that 'it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group'.[19] The absence of any requests from other Christian employees was evidence that supported the conclusion that the cross was not a manifestation but merely a 'personal choice'.[20] Article 9 was judged to lend little assistance to the applicant's claim, in light of the Court of Appeal's interpretation of Strasbourg's restrictive jurisprudence on the issue of what qualifies as a manifestation.[21] *Chaplin* involved a nurse, Shirley Chaplin, who was challenging her dismissal[22] which had resulted from her refusal to cease wearing a cross around her neck whilst at work. The hospital justified its uniform policy with reference to fears about the risk of injury to patients and hygiene concerns. Ms Chaplin lost her claim in an employment tribunal and the *Eweida* judgement made any appeal to higher domestic courts unlikely to succeed.[23]

Ladele involved the disciplining and dismissal of a Christian registrar who refused on grounds of conscience to officiate at civil partnership ceremonies because she believed she could not 'facilitate the formation of a union which [she] sincerely believe[d] was contrary to God's law'.[24] Ms Ladele had been employed for a number of years before the introduction of civil partnerships and was not contractually obliged to undertake civil partnership duties. However, her employers were entitled to alter those terms and had designated her a civil partnership registrar.[25] The Court of Appeal had found any indirect discrimination she had suffered was justified as her employers had acted proportionately in pursuit of their legitimate aim of promoting equality on grounds of sexual orientation.[26] The Court of Appeal cited the offence caused to her colleagues and the fact that she was being 'required to perform a purely secular task' in their proportionality analysis.[27] *McFarlane* involved a psychosexual counsellor who regarded same-sex sexual relationships as contrary to God's law because of his conservative Christian beliefs.[28] Mr McFarlane had been providing general, not specifically sexual, counselling to same-sex partners. However, a conflict with his employers arose when he undertook a training course in psychosexual therapy.[29] He was dismissed for gross misconduct after it became clear he did not intend to comply with his employer's policies by providing sexual counselling to same-sex couples.[30]

[17] Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660.
[18] *Eweida* (n 1) [18]–[19].
[19] [2008] UKEAT/0123/08 [60], endorsed by Court of Appeal in *Eweida* (n 1) at [24].
[20] *Eweida* (n 1) [9].
[21] ibid [22].
[22] Ms Chaplin was initially moved to a non-nursing temporary position for eight months before the position concluded, *Eweida and others*, para 20.
[23] *Eweida and others*, para 21–22.
[24] *Ladele* (n 1) [10].
[25] The introduction of the Statistics and Registration Act 2007 altered Ms Ladele's employment status, making her an employee of the local authority rather than an office holder of the Registrar General, *Eweida and others*, para 27.
[26] *Ladele* (n 1) [52].
[27] ibid.
[28] *McFarlane* (n 1).
[29] ibid [4].
[30] *Eweida and others*, para 37.

The outcome of his case domestically was largely determined by the application of the earlier Court of Appeal judgment in *Ladele*.[31]

4. Legal context: The English approach

In recent years English courts have faced recurring criticism over the manner in which Article 9 disputes have been adjudicated. Whilst the ultimate results of such cases were rarely disputed, many felt that English courts were too willing to rely on the question of interference as a filter to discharge claims, when the questions in issue would have been better determined under the justification limb of Article 9.[32] This line of criticism maintained that since the judgment of the House of Lords in *Begum*,[33] the limits of Article 9's protection of religious individuals under the HRA had been interpreted in an overly restrictive fashion which denied that any interference arose under Article 9 and blocked any consideration of the merits of specific claims. In *Begum* the Lords applied Strasbourg precedents, including some that had previously been regarded as controversial and inconsistent by English courts,[34] to find that no *prima facie* interference with Article 9 had occurred when a school refused to accommodate a schoolgirl's desire to dress in accordance with her religious beliefs.[35]

Whilst the *Begum* judgment related to 'a particular pupil and a particular school in a particular place at a particular time',[36] the majority's findings have shaped the approach of English courts to religious claimants across a wide variety of cases. A common feature of the cases in *Eweida and others* is that the domestic outcome of each claim was determined by the English courts' interpretation of statutory discrimination provisions rather than of Article 9. This situation reflects the effects of *Begum* upon litigation strategies and judicial approaches in these types of cases. The applicants' reliance on domestic discrimination legislation before domestic courts reflects past expectations that statutory protection against religious discrimination could bridge the gap left by English courts' adoption of a non-interference approach to Article 9.[37] These cases primarily relied on the 2003 Religion or Belief Regulations, a precursor to the Equality Act 2010. *Watkins-Singh*, a case successfully argued on the basis of equality alone without reference to religious freedom, appeared to indicate that this was the way forward for

[31] ibid para 40.

[32] See M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' (2007) Public Law 488; N Gibson, 'Faith in the Courts: Religious Dress and Human Rights' (2007) 66 CLJ 657; L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008); P Cumper and T Lewis, '"Public Reason", Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998' (2011) 22(2) Kings Law Journal 131–56.

[33] *R (on the application of Begum) v Denbigh High School* [2006] UKHL 15, [2006] 2 All ER 487.

[34] *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] HRLR 32. See in particular the Lord's reliance on *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* 2009 BHRC 27, App no 27417/95 (ECtHR, 27 June 2000) (Commission decision).

[35] *Begum* (n 33) [25].

[36] ibid [2].

[37] Early successful statutory discrimination cases included *Williams-Drabble v Pathway Care Solutions* ET Case No 2601718/2004 (2 December 2004); *Khan v G & S Spencer Group* ET Case No 1803250/2004 (12 January 2005); *Noah v Sarah Desrosiers (Wedge)* ET, Case No: 2201867/07 (29 May 2008).

other litigants.[38] However, the current challenges stem from the English higher courts interpreting the statutory anti-discrimination scheme as not only subject to the restrictive precedents established in *Begum*, but as also limited in a number of additional respects.[39] Having failed to convince national courts that this interpretation was contrary to national law, including the HRA, the applicants turned to Strasbourg, contending that the approach of the domestic courts was contrary to the Convention.

B. The Strasbourg Judgment

By a margin of 5 votes to 2 the ECtHR ruled that Ms Eweida's treatment had amounted to an unjustified interference with Article 9, but rejected the claims of the remaining applicants. The Court unanimously found that there had been no violation of Article 9, taken alone or in conjunction with Article 14, as concerned Ms Chaplin and Mr McFarlane; and by 5 votes to 2, that there had been no violation of Article 14 taken in conjunction with Article 9 as concerned Ms Ladele.

In Ms Eweida's case the Court determined that the English courts had failed to strike a fair balance when weighing the applicant's desire to manifest and communicate her religious belief against British Airways' wish to project a certain corporate image. The Court found that the strength of her employer's justification was undermined by evidence that they had previously authorized employees to wear items of religious clothing and by their subsequent alteration of the contested uniform policy to allow religiously symbolic jewellery.[40] The Court found no evidence of any real encroachment on the interests of others in her case, and accordingly judged that in those circumstances the domestic authorities had failed to sufficiently protect Ms Eweida's right to manifest her religion, in breach of their positive obligations to secure the rights under Article 9 of those in their jurisdiction.[41]

The ECtHR distinguished Ms Eweida's case from the other religious symbol claims before them, finding that in relation to Ms Chaplin, the nurse who wished to wear a crucifix at work, the countervailing consideration—protection of health and safety at work—was 'inherently of a greater magnitude'.[42] The Court similarly found the domestic courts' handling of the claims of Ms Ladele and Mr McFarlane to be fairly balanced. It contended that 'the most important factor to be taken into account' was the important and legitimate aim of the applicants' employers in pursuing policies of non-discrimination against service users.[43] In analysing the proportionality of the means used in Ms Ladele's case the Court balanced the serious detriment that followed from her refusal of tasks to which she had not voluntarily contracted[44] against the worthy aim of the policy at issue and the State's margin of appreciation. The special status of sexual orientation as requiring particularly serious justification was emphasized by the Court.[45]

[38] *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin), [2008] ELR 561.

[39] On the solitary believer's practice not qualifying as a ground of disadvantage, see *Eweida* (n 1) [15].

[40] *Eweida and others*, para 94.

[41] ibid para 95.

[42] ibid para 99.

[43] ibid para 109.

[44] ibid para 106.

[45] *Eweida and others*, para 105.

In taking this case to Strasbourg the applicants were undoubtedly aware that, as religious employees seeking to manifest their religious beliefs at work, they faced several significant hurdles in order to establish an interference with Article 9. In challenging the English approach to Article 9 counsel for Eweida, Chaplin and McFarlane adopted two primary arguments (i) that English courts' interpretation of Article 9 was such that it provided a lesser standard of protection than that envisaged under the Convention, and (ii) that the restrictions placed on Article 9's protections by the ECtHR's free-contract doctrine were unjustified and inconsistent with the Court's approach to other Convention rights. The Court's response to these arguments probably took many by surprise. Though the majority of the claimants were ultimately unsuccessful in establishing their claims, the Court responded positively to much of the applicants' arguments, outlining the need for justification analysis in Article 9 claims, rejecting the narrow definition of religious practice adopted by English courts, and radically rethinking its position on the scope and application of the free-contract doctrine.

A. Use of the Definition of Manifestation of 'Religion or Belief, in Worship, Teaching, Practice and Observance' as a Filter

In seeking to establish interference with Article 9 counsel for Eweida, Chaplin and McFarlane first suggested that the English courts' interpretation was less permissive than that of the European Court in terms of recognizing interference. The question of what acts qualify as religious manifestations had become a significant barrier to gaining relief before English courts under either Article 9 or the UK's statutory non-discrimination scheme. The applicants disputed the English courts' interpretation of Strasbourg's case law on the distinction between act and belief. The traditional interpretation of Article 9 was that not every act or form of behaviour motivated or inspired by religion or belief is protected by Article 9, but only those acts that can be shown to be 'intimately linked' to belief. Before the English courts, the *Eweida* and *Chaplin* cases centred on whether a desire 'to wear the cross visibly as a matter of personal expression of faith, and not in response to a scriptural command'[46] was protected under English discrimination law or alternatively under Article 9. The UK Government argued that acts such as the wearing of a visible cross, or in Mr McFarlane's case the objection to providing psychosexual therapy to same-sex couples, were not 'a recognised religious practice or requirement of Christianity, and did not therefore fall within the scope of Article 9'.[47]

1. The case law prior to Eweida and others

The existence of such a distinction in the case law of the Strasbourg court had been suggested by some commentators,[48] and appears to be relied upon in some early

[46] ibid para 58.

[47] ibid.

[48] J Martinez-Torron, 'Religious Liberty in European Jurisprudence' in M Hill (ed), *Religious Liberty and Human Rights* (University of Wales Press 2002) 119.

judgments, such as *Arrowsmith v UK*[49] and *C v UK*.[50] However, the Court's uneasiness at excluding claims based on the 'intimately linked' test has become increasingly explicit in recent years. The Court cursorily accepted interference with Article 9 in a number of cases involving restrictions on the wearing of a Muslim headscarf, most notably in the Grand Chamber judgment in *Sahin*.[51] Though the applicants in these cases were all ultimately unsuccessful, the Court did not attempt to use the definition of 'manifestation' to exclude their claims. In accepting that such restrictions interfered with Article 9, no reference was made to the centrality or otherwise of the symbol or whether its manifestation was required under Muslim law.[52] A line of recent case law, primarily involving the claims of religious prisoners, more explicitly cast doubt on the English courts' requirement of doctrinal obligation. In *Jakobski v Poland* the refusal of a Buddhist prisoner's request for vegetarian food, not generally considered a mandatory requirement of Buddhism, resulted in a finding of interference with Article 9. The Court stated that the request could be 'regarded as motivated or inspired by a religion and was not unreasonable'.[53] Similarly, in *Bayatyan v Armenia* opposition to military service where motivated by sincere religious beliefs engaged Article 9.[54] In *Skugar v Russia*[55] the Court noted that though the applicants' interpretation was at variance with that of the leadership of their church, it accepted that their rejection of taxpayer identification numbers was protected under Article 9. Whilst noting that the Court may legitimately inquire into whether a claimed belief is genuinely and sincerely held, it warned that:[56]

> It is ill-conceived to delve into discussion about the nature and importance of individual beliefs, for what one person holds as sacred may be absurd or anathema to another and no legal or logical argument can be invoked to challenge a believer's assertion that a particular belief or practice is an important element of his religious duty.

The *Eweida and others* judgment is important in that it marks a clear and decisive break with early Commission case law, indicating to national courts that the question of whether an act qualifies as a manifestation cannot be interpreted as a requirement that the applicant establish that they were fulfilling a duty mandated by their religion.[57] The Court stated that, though acts of worship forming part of the practice of religion or belief in a generally recognized form were an example of the type of acts which may be considered manifestations of religion, 'the manifestation of religion is not limited to such acts'.[58] Instead, the key question is whether 'a sufficiently close and direct nexus between the act and the underlying belief [can] be determined on the facts of each case'.[59] The ECtHR's reference to a 'nexus' invokes the terminology of the Canadian case of *Syndicat Northcrest v Amselem*,[60] which was cited as a comparative authority. The Court judged that such a nexus had been established in each of the applicants' cases. An insistence on visibly wearing a cross in order to 'bear witness' to Christian

[49] (1981) 3 EHRR 218.

[50] (1983) 37 DR 142. See also *Valsamis v Greece* (1997) 24 EHRR 294 and S Stavros, 'Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from across the Pond?' (1997) EHRLR 607.

[51] *Sahin v Turkey* (2007) 44 EHRR 5.

[52] *Dahlab v Switzerland* DR ECHR 2001-V, App no 42393/98; *Dogru v France* (2009) 49 EHRR 8.

[53] App no 18429/06 (ECtHR, 7 December 2010) para 45.

[54] (2012) 54 EHRR 15.

[55] *Skugar and others v Russia* [2009] ECHR 2159.

[56] ibid, 'The Law'.

[57] *Eweida and others*, para 82.

[58] ibid.

[59] ibid para 82.

[60] [2004] 2 SCR 551, cited by the ECtHR at para 49 of the *Eweida and others* judgment.

faith met the test,[61] as did Mr McFarlane's objection to counselling same-sex partners and Ms Ladele's objection to participating in the creation of same-sex civil partnerships.[62]

2. Rejection of an institutionally controversial and practically problematic test for establishing interference

From a principled perspective, the Court's response on this issue is welcome. Applying a filter on Article 9 claims at this level was always inherently controversial, not least because questions concerning the 'centrality' of a particular practice or belief are almost impossibly subjective,[63] but also because such inquiries break with English judges' traditional abstention from assessing questions of religious doctrine. The Court's explicit rejection of the English authorities' interpretation of the 'intimately linked' test is for this reason highly positive. Whilst previous cases had indicated that English courts might be out of step with the ECtHR's more permissive approach towards this issue, *Eweida and others* provides a clear rejection of any interference test based on an applicants' conformity with religious doctrines.

Judges acting as 'arbiters of scriptural interpretation' is a role for which many would argue they are unqualified.[64] Indeed, the applicants contended that such a vague test as had been adopted by English courts 'would require courts to adjudicate on matters of theological debate, which were clearly outside the scope of their competence'.[65] Some have argued that where courts have adopted such a role their approaches to assessing evidence of religious practices and belief have been less than satisfactory. Didi Herman has suggested that judges have handled engagement with non-Christian faiths in a problematic fashion, highlighting judicial tolerance of negative stereotypes[66] and reliance on assumptions about Jews and Jewishness in a number of trust and child custody cases.[67] Herman points to evidence of judges applying a Christian understanding of religious faith as 'predominantly belief evidenced by practice' to religions, in particular Judaism, that do not define religion in those terms.[68] Such judgments are problematic regardless of which religions are under inspection, with some commentators fearing that minority religions will be less likely to have their core doctrines recognized as religious manifestations,[69] whilst others note that where Christianity is in question there is a danger that courts may see the content of an applicants' belief as 'self-evident'.[70] This issue may have been a feature in these cases. Certainly it seems that elements of the Court of Appeal's reasoning in both *Eweida* and

[61] Eweida and others, paras 89 and 97.
[62] ibid paras 103 and 108.
[63] See Scalia J's comments in *Employment Division v Smith* 494 US 872 (1990), 886–887.
[64] *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707, 716 (1981).
[65] *Eweida and others*, para 64.
[66] D Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (Oxford University Press 2011), 46–8.
[67] ibid 68, 82–5.
[68] On this point see also JC McCrudden, 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered' (2011) 9(1) ICON 200–29 on the failure of English judges to adopt a 'cognitively internal' perspective.
[69] TJ Gunn, 'Adjudicating Rights of Conscience under the European Convention on Human Rights' in JD Van der Vyver and J Witte (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff 1996).
[70] PW Edge, 'Determining Religion in English Courts' (2012) OJLR 412.

Ladele involved assessments of more devout or orthodox minority beliefs in accordance with mainstream conceptions of Christianity.[71]

The interpretation of the 'intimately linked' test of Article 9[72] and the 'group disadvantage' test of the UK's statutory discrimination scheme[73] in such a manner is problematic for reasons beyond institutional competency. Not only are judges receiving evidence on and assessing the content of individuals' beliefs, but the test they have adopted requires them to assess what practices are mandated by religious doctrine, a question as inherently irresolvable as it is contentious. The submissions of the UK Equality and Human Rights Commission questioned what evidence must be adduced to prove a religious requirements' existence and the cogency of a religion's beliefs.[74] Judge Nicholas Bratza implied similar concerns, asking the UK Government at the oral hearing how judges in Strasbourg are to determine what qualifies as an obligatory practice under the their test in cases where the applicant asserts that the impugned act is a manifestation and the respondent denies this.[75]

B. Rejection of the Question of Interference as an Appropriate Article 9 Filter: The Free-Contract Doctrine

In essence, the free-contract doctrine holds that no interference with Article 9 occurs where a religious employee voluntarily accepts to abide by rules which restrict the manifestation of their religion. The doctrine represented a major barrier to religious employees successfully establishing interference with their Article 9 rights, with employees consistently coming up against the argument that freedom of religion is guaranteed by the 'right to resign'. In addition, it might also be added that the Convention does not guarantee the right to employment. Given that the options available to the employee are those of resigning or contravening their understanding of their religious duties, the rule necessarily accepts that the employee may have to 'pay a price' for adherence to their beliefs.[76] This reasoning has been followed in several cases involving freedom of religion, resulting in findings of no *prima facie* interference with Convention rights.[77]

[71] See references to Ms Ladele's belief in traditional marriage not being a 'core' Christian belief, *Ladele* (n 1) [52]. Similarly see Sedley LJ's analysis of group versus individual disadvantage, *Eweida* (n 1) [24].

[72] See *R (Playfoot) v Millais School Governing Body* [2007] EWHC 1698 (Admin), [2007] HRLR 34 where the High Court rejected a student's challenge to her school's refusal to allow her to wear a purity ring because it was not 'intimately linked' to her Christian beliefs. In *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin), [2009] WLR (D) 151 the High Court held that whilst open air cremation was a manifestation of Hindu belief as it was 'sufficiently close to the core of one strand of orthodox Hinduism', this was not so for Sikhs finding the practice to be a mere matter of tradition and not belief.

[73] In *Eweida* (n 1) [24].

[74] Equality and Human Rights Commission, 'Submission in *Eweida and Chaplin v UK* App nos 48420/10 and 59842/1' available at <http://www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf> [27].

[75] An audio recording of the hearing is available at <http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?id=20120904-1&lang=en&flow=high>.

[76] MD Evans, *Religious Liberty and International Law in Europe* (Cambridge University Press 1997) 300–3.

[77] *Stedman v UK* (1997) 23 EHRR CD168, para 28; *Konttinen v Finland* App no 24949/94 (1996) Series A no 87, 3 December 1996 Commission, 75; *Kalaç v Turkey* (1997) 27 EHRR 552.

A typical instance of the free-contract doctrine can be seen in the remarks of the Commission in *Ahmad v UK*.[78] The Commission noted that the applicant, a teacher who wished to attend religious worship on a Friday, 'remained free to resign if and when he found that his teaching obligations conflicted with his religious duties'.[79] His claim was dismissed as 'manifestly ill-founded'. As the application of the doctrine prevents a consideration of the merits of an applicant's claim, the reasonableness of the employer's refusal is never questioned. In *Konttinen v Finland*, for example, the employee had offered to work other shifts to make up for the hours that he missed after sundown on Fridays and his duties were normal administrative ones that were not of urgent importance.[80]

The English Court of Appeal's position was that the law on this point was quite clearly settled: no interference with Article 9 arises where an employee is dismissed or faces work-related detriment because of their desire to act in accordance with their religion during working hours.[81] Unlike the other grounds argued by the applicants in *Eweida and others* there was little occasion to claim that English courts had adopted an overly strict interpretation or failed to match the ECtHR's evolving interpretation of the Convention, with the doctrine being affirmed as recently as 2006 in *Kosteki*.[82] In order to establish an interference with Article 9 counsel for Ms Eweida, Mr McFarlane and Ms Chaplin needed to convince the ECtHR to fundamentally alter their interpretation of Article 9's application in the workplace.

1. A Long Overdue Reconsideration of the Application of Article 9 in the Workplace

The Court acknowledged the numerous Commission cases where the freedom to resign was held to bar a finding of interference with an employee's religious freedom.[83] However, the Court also noted that the application of such a doctrine was anomalous, with employment sanctions giving rise to findings of interference in respect of other Convention rights. The Court accordingly found that, given the importance of freedom of religion, a better approach when faced with complaints that individuals had faced restrictions on their religious freedom in the workplace was to weigh the possibility of changing job as a part of the proportionality analysis.[84]

The Court's explicit statement that the freedom of the employee to resign is not an appropriate filter to apply at the interference stage is perhaps not so surprising a development as might be thought. The Court's approach to the application of fundamental rights in the workplace had once been similar to that reflected in the free-contract doctrine.[85] However, over the years the Court established that work-based

[78] *Ahmad v UK* (1982) 4 EHRR 126. [79] ibid para 11.
[80] *Konttinen* (n 77) paras 74–75.
[81] In *Eweida* (n 1) the UK Court of Appeal noted that opposition to religious manifestation in the workplace might conceivably justify a 'blanket ban' on such practices, [40]. In relation to detriment suffered because of an employee's out-of-work activities the English courts have been more protective, finding a breach of contract in *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).
[82] See *Kosteki v Former Yugoslav Republic of Macedonia* [2006] ECHR 403 affirming *Stedman* (n 77) and *Ahmad* (n 78). [83] *Eweida and others*, para 83. [84] ibid.
[85] *Kosiek v Germany* Series A No 105 (1986) 9 EHRR 328; *Glasenapp v Germany* Series A No 104 (1987) 9 EHRR 25 (refusal of permanent employment because of membership of extreme

detriment could amount to an interference with a number of Convention rights. In relation to Article 10, *Van der Heijden v Netherlands* established that dismissal can restrict free speech and can penalize the exercise of a right. The Commission found dismissal for exercising free speech to have as strong a deterrent effect as total prohibition.[86] In *Vogt v Germany*, another freedom of speech case, the ECtHR mirrored the Commission's approach, establishing that a teacher's dismissal created an interference with her Article 10 rights. In relation to Article 8, *Smith and Grady v UK* found that interference arose from a ban on gay personnel in the armed forces.[87] The fact that the applicants chose to join the army was no bar to there being an interference.[88]

Crucially, the free-contract doctrine failed to distinguish between situations where an employee was aware of the restrictions upon religious manifestation prior to agreeing to undertake a particular job role and situations where this was not the case. As such the free-contract doctrine in practice went beyond merely ensuring that employees should not be allowed to subsequently challenge job conditions that they had voluntarily contracted to. This flaw had long been a source of criticism.[89] Indeed, prior to the House of Lord's judgment in *Begum*, Rix LJ had noted this point, interpreting Commission case law as drawing a distinction between cases where the contract signed by the employee included the disputed terms and cases where the employer had varied the terms and as such caused the dispute.[90] It can be hoped that now that these kinds of contextual factors are part of the broader proportionality analysis such important distinctions can play a more central role.

2. The Availability of Alternative Options

In numerous cases the ECtHR has held that the individual must take their 'specific situation' into account.[91] Thus where a student is refused enrolment because of her headscarf, as was the case in *Sahin*,[92] the specific-situation rule applies, as the applicant is viewed to have voluntarily submitted themselves to a system of norms limiting their freedom to manifest their religion.[93] The level of inconvenience one might be expected to bear in order to avoid restriction varies. The strongest interpretation of the applicant's burden to take their situation into account sees no interference arising where there is an alternative option open to the applicant, however unpleasant or onerous that alternative may be. *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*[94] has often been cited in support of this interpretation of Article 9. In that case the Commission determined that the denial of permission to slaughter animals in accordance with the

political parties did not interfere with art 10). See Vickers Religious Discrimination and the Workplace (n 32) 87–91.

[86] (1985) DR 101.

[87] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

[88] Contrast *Kalaç v Turkey* (n 77).

[89] Vickers Religious Discrimination and the Workplace (n 32) 88, 117; Gibson, 'Faith in the Courts' (n 32).

[90] *Copsey* (n 34) [65]–[66].

[91] *Sahin* (n 51); *Dahlab* (n 52). It is often used in conjunction with the free-contract doctrine discussed in the next section.

[92] *Sahin* (n 51). See also *Karaduman v Turkey* (1993) 74 DR 93, App no 16278/90 (Commission, 3 May 1993).

[93] In the military context see *Kalaç* (n 77).

[94] *Jewish Liturgical Association* (n 34).

applicants' religious precepts did not constitute an interference with their freedom of religion or belief, since it was possible to source the relevant meat products from another country.[95] This reasoning relied on the alternative options open to the applicants not being 'impossible', although they were undoubtedly less attractive.[96]

This 'impossibility test', largely viewed as an outlier in the Court's jurisprudence which the Court had declined to follow in later decisions,[97] had, however, become a central feature of the jurisprudence of English courts relating to Article 9 and was key to the UK Government's arguments in the current challenges.[98] The House of Lords revived the *Jewish Liturgical* interpretation of interference in the *Begum* case, with the majority holding that the fact that the applicant could go to other schools which would permit her to wear her religious dress meant that no interference with her Article 9 rights arose.[99] The simple fact of alternative options, even though these were not particularly attractive from the applicant's perspective, was key to the rebuttal of her claim that her rights under Article 9 had been subject to interference. Subsequent English cases have viewed the availability of alternative options as a strong ground for rejecting claims of interference with Article 9, even where the applicant had no prior awareness of the restrictions they would face, and as such had not 'voluntarily submitted' to a restrictive regime.[100] The Government argued in *Eweida and others* that ECtHR case law reflected a consistent position that interference was only assumed or established 'where, even by resigning and seeking alternative employment or attending a different educational establishment, individuals had been unable to avoid a requirement which was incompatible with their religious beliefs'.[101] As the applicants were free to work elsewhere, and in addition Ms Eweida and Ms Chaplin had been offered alternative roles within their employment, the UK argued that the restrictions placed upon their religious manifestation did not amount to an interference.

Addressing the UK Government's reliance on the *Jewish Liturgical* case, the European Court's statement suggests that that case's applicability is limited to its specific facts. The Court seems to have viewed the claimed interference in that case to be essentially indirect, stressing that the facts did not relate to 'any personal involvement in the ritual slaughter and certification process itself'.[102] In the same paragraph the ECtHR addressed the Commission case law on the free-contract doctrine,[103] noting that 'the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention'.[104] Crucially the Court stated that, given the importance of religion in a democratic society, the possibility of changing job should not be seen to negate any interference with the right. Instead 'the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate'.[105]

[95] ibid para 81.
[96] ibid paras 81–84.
[97] See Lord Nicholls analysis of the Strasbourg jurisprudence in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246, [38].
[98] *Eweida and others*, para 59.
[99] *Begum* (n 33).
[100] *R (X) v The Headteachers of Y School* [2007] EWHC 298 (Admin), [2008] 1 All ER 249, Silber J.
[101] *Eweida and others*, para 59 citing *Kokkinakis v Greece* (1994) 17 EHRR 397, *Arslan v Turkey* (2001) 31 EHRR 9 and *Sahin* (n 51).
[102] *Eweida and others*, para 83.
[103] *Konttinen* (n 77); *Stedman* (n 77).
[104] *Eweida and others*, para 83.
[105] ibid.

The ramifications of these two statements are significant. The first speaks to the development of the 'other available options' limitation in English law, firmly restricting the relevance of such considerations to the justification rather than interference stage. This view is in line with the minority opinions of Lord Nicholls and Lady Hale in *Begum*[106] and answers a frequent criticism of English case law on Article 9.[107] In terms of the Court's remarks on the application of the free-contract doctrine, it is no overstatement to say that paragraph 83 of the *Eweida and others* judgment fundamentally rewrites the protections of Article 9 in the workplace. The recasting of the free-contract doctrine as relevant to the question of a restriction's proportionality rather than the issue of interference might be seen as mere window dressing were it not for one point. The Court has now established a factual scenario where the rights of the religious employee in a secular work environment trump the desires of her employer. At a minimum, the substantive finding in *Eweida and others* signals that an employer is unlikely to succeed in future cases if 'maintaining corporate image' is the sole justification for an unqualified uniform policy. The meaning of 'fair balance' is still largely unclear, but at the very least it may be hoped that the shift away from a non-interference approach heralds the Court's adoption of a more nuanced and context-specific approach towards the claims of religious employees.

III. THE COURT'S INTERPRETATION OF LIMITATIONS 'NECESSARY IN A DEMOCRATIC SOCIETY FOR THE PROTECTION OF THE RIGHTS AND FREEDOMS OF OTHERS'

The judgment in *Eweida and others* clearly indicates that balancing will be at the centre of future Article 9 cases. The key question thus seems to be what kind of supervisory role the Court will adopt when doing so. The Court's statements and its findings in relation to each of the plaintiffs give a suggestion of the kind of supervision it will be likely to provide.

A. The Nature of the Court's Supervision of Balancing

The Court's statements outlining the rationales behind the outcomes in each of the applicants' cases reveal the Court's understanding of its role in overseeing the reconciliation of individuals' Article 9 rights with other competing concerns. Undoubtedly, the role of the margin of appreciation within the proportionality analysis is still strong, as the findings in the cases of Ms Eweida's co-applicants demonstrate.

On one hand it seems clear that the Court is not going to investigate the justifications offered by domestic authorities in any great detail. In Shirley Chaplin's case her managers feared that a disturbed patient might grab the chain on which her cross was worn or that the cross might swing forward and come into contact with an open wound.[108] The Chamber was unwilling to dismiss these fears as unlikely. Deferring to the hospital authorities' judgement, they distinguished her claim from that of Ms Eweida, noting that concerns about health and safety on a hospital ward were 'inherently of a greater magnitude' than the reasons cited by Ms Eweida's employers. '[E]vidence of … encroachment on the interests of others' will thus weigh against

[106] *Begum* (n 33) [93]–[94], [41].
[107] Gibson 'Faith in the Courts' (n 32); Hill and Sandberg 'Is Nothing Sacred?' (n 32).
[108] *Eweida and others*, para 91.

an individual's Article 9 interests. Though in Shirley Chaplin's case the specific fears cited by her employer appeared relatively weak and speculative, the Court nonetheless took these fears seriously and, in line with the margin of appreciation doctrine, treated the seriousness of the health and safety implications as a matter best decided by her employers.[109]

It is also clear that the encroachment on the rights of others need not be concrete or tangible. In Gary McFarlane's case the Court found that the balance to be struck between his rights and those of gay couples again fell within the UK's margin of appreciation. The facts of Mr McFarlane's case were never particularly strong, given his awareness of the conflict between his beliefs and his employer's non-discrimination policy when he first entered his employment.[110] In addition, he had specifically sought out a role as a psychosexual counsellor and in so doing significantly increased the likelihood of a conflict with his religious beliefs arising.[111] The court rightly took account of these factors in its proportionality analysis.[112] In this sense it might be argued that his case would be distinguishable from that of Ms Ladele. However, the Court explicitly states that in their view 'the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination'.[113] This suggests that even where there is a stronger fact pattern, the refusal of an employee in a secular job role to condone homosexuality would be unlikely to be protected.

The Court's findings in relation to Ms Eweida do, however, demonstrate that the ECtHR views itself as still having an important supervisory role in monitoring domestic authorities' balancing of the competing concerns of religious individuals and their employers. The Court made clear that they felt the domestic courts had accorded too much weight to British Airways' interest in projecting a certain corporate image, particularly given the discreet nature of her cross and the absence of evidence that permitting other religious symbols had detrimentally impacted on the company's corporate brand or image.[114] The Court's dismissal of the justifications offered by Ms Eweida's employers was also informed by the fact that the subsequent change in their policy implicitly accepted that the former restrictions could not be justified.[115] Given the absence of evidence of 'any real encroachment' on her employer's interests, the Court judged that the domestic authorities had failed to sufficiently protect Ms Eweida's right to manifest her religion, breaching their positive obligation under Article 9.[116]

The partially dissenting opinion of Judges Bratza and Björgvinsson contested the majority's conclusion with regard to Ms Eweida. They argued that the specific factual context of the case dissuaded them from finding that either British Airways or the domestic courts had failed to reach a 'fair balance' in her case. They particularly stressed the conciliatory nature of BA's actions in offering the applicant an equally paid temporary administrative job, allowing her to continue wearing her cross in accordance with her beliefs.[117] In contrast, they noted the Court of Appeal's finding that Ms Eweida

[109] ibid para 99.
[110] This point is referred to by the Court, ibid, para 109, and by Judges Vučinić and de Gaetano at para 5 of their partly dissenting opinion.
[111] ibid paras 32–34.
[112] ibid para 109.
[113] *Eweida and others*, para 109.
[114] ibid para 94.
[115] ibid.
[116] ibid para 95.
[117] *Eweida and others*, 'Joint Partly Dissenting Opinion of Judges Bratza and Björgvinsson', para 4.

had accepted the requirement of concealing her cross without complaint before breaching the company's policy by reporting for work with her cross clearly visible and without waiting for the formal grievance complaint she had lodged to be addressed.[118] The dissenting judges argued that BA was right to suspend amendment of their uniform policy until the issue was thoroughly examined. Whilst her employer's subsequent alteration of the policy may suggest the earlier prohibition 'was not of crucial importance', they contended that the majority should not rely on this fact as evidence that BA's failure to immediately accede to Ms Eweida's requests was disproportionate.[119] In Judges Bratza and Björgvinsson's view, the fact that the applicant was not dismissed, but merely offered a different position whilst the uniform policy was swiftly reviewed, before being reinstated, should have 'tipped the balance' in favour of her employer.[120]

The Court may have been more persuaded of the existence of an imbalance in the domestic authorities handling of Ms Eweida's case because of the perfunctory nature of the English Court of Appeal's proportionality analysis when dismissing her initial appeal. Having found no evidence of group disadvantage and deeming the act in question 'an entirely personal objection',[121] the proportionality of her employer's refusal of her request was never seriously addressed. The Employment Tribunal had found the impact upon the applicant to be disproportionate. The Court of Appeal, however, treated the proportionality of her employer's actions as largely self-evident, given BA's reconsideration of their policy, the offer of an alternative job role to Ms Eweida, and the fact that Ms Eweida was the only employee disadvantaged by the policy in the seven years since its adoption.[122] Similarly, Sedley LJ's view that Article 9 was of little use to the plaintiff's bid to gain religious accommodation in her workplace resulted in scant analysis of the necessity of the restrictions on Article 9.[123] If the ECtHR was indeed influenced by this factor, the question of 'fair balance' might require evidence of the domestic authorities fully considering the conflicting interests before them and affording each due consideration.

The key question in situating proportionality at the heart of resolving Article 9 disputes is what weight ought to be attributed to the applicant's wish to manifest their religious belief. Julian Rivers has powerfully argued that recent cases on law and religion in England represent a 'fundamental shift' whereby religious action has 'no publicly cognisable weight' when placed against the pursuit of communal secular goods.[124] As such, he concludes that the current law in England 'is coming to treat religions as merely recreational and trivial'.[125] This point appeared to be evidenced in the Court of Appeal's judgment in *Eweida*, a major criticism of which was the undervaluing of the importance of individual religious convictions.[126] The reasoning and language adopted by the ECtHR in *Eweida and others* suggest that the situation may be less bleak than previously thought. The Court's comments in analysing the proportionality of Ms Eweida's treatment specifically refer to the weight that should be

[118] ibid. [119] ibid para 5. [120] ibid.
[121] *Eweida* (n 1) [34]. [122] ibid [33]–[38]. [123] ibid [22].
[124] J Rivers, 'Promoting Religious Equality' (2012) 1 OJLR 1, 396.
[125] ibid 371.
[126] The case has been compared with the more protective stance in the US case of *Thomas v Review Board* (n 64), see N Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74 MLR 287, 292.

attributed to her right to manifest her religious belief. Going beyond mere reference to the importance of the right to democratic society, they highlight the 'value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others'.[127] In addition, on a number of occasions the Court noted the grave impact of losing one's job.[128] Certainly, any proportionality analysis should take account of the fact that individuals who lose their jobs because of their religious practices may find it especially difficult to obtain alternative employment, particularly in cases involving minority or idiosyncratic beliefs.[129]

IV. CONCLUSIONS

Whilst it is irrefutable that religious manifestation in society must have outer limits, the balancing which determines compromise must be openly reasoned. The ECtHR's judgment has gone a long way towards ensuring that this is so. The Court should be congratulated for seizing this opportunity to clarify its case law in this area. However, there are still a number of problematic issues within Article 9 case law that are deserving of the Court's attention:

A. Religious Symbols Post-Lautsi

The Court did not take this opportunity to address the place of religious symbol post-*Lautsi*.[130] In that case the Grand Chamber had explicitly sought to distinguish the facts of *Lautsi* from the ECtHR's previous case law on religious symbols, particularly that relating to the Muslim headscarf, relying on a much criticized distinction between passive and active symbols.[131] Relying on this distinction, counsel for *Chaplin* sought to distinguish their case from the bulk of religious symbols jurisprudence dealing with the Muslim headscarf by contending that the cross 'conforms to national socio cultural norms'.[132] Despite the Grand Chamber's efforts, one should not assume that *Lautsi*'s influence on religious symbols case law is limited. Just as the domestic Swiss court in *Dahlab* reasoned that 'it is scarcely conceivable to prohibit crucifixes from being displayed in State schools and yet to allow the teachers themselves to wear powerful religious symbols of whatever denomination', the inverse is also true. In countries where the State makes such public displays it would be very hard to reason that the State has a right to manifest its religious preferences in schools while denying that same right to the individual, who, unlike the State, benefits from Article 9's protection of their religious manifestations.[133]

[127] *Eweida and others*, para 94.

[128] For example, the Court refers to Mr McFarlane's loss of his job as a 'severe sanction with grave consequences for the applicant', *Eweida and others*, para 108. See also para 106 (in relation to Ms Ladele).

[129] Harris, O'Boyle and Warbrick note that 'the Christian employee who ultimately 'chooses' to seek alternative employment is likely to find a convivial work environment more easily than someone outside that tradition', DJ Harris, M O'Boyle, C Warbrick and E Bates, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 434.

[130] *Lautsi v Italy* (2012) 54 EHRR 3.

[131] ibid paras 72–73.

[132] 'Application to ECHR', available at <http://www.christianconcern.com/sites/default/files/Chaplin_Full_Submission.pdf> [35].

[133] See the dissenting opinion of Judge Malinverni joined with Judge Kalaydjieva in *Lautsi* (n 130) para 6.

B. Separating Religious Freedom and Religious Discrimination

A more general criticism reflected in these challenges relates to the limiting influence of the secularization thesis on debates surrounding religious pluralism and multiculturalism.[134] The religious discrimination route should in theory free claimants from assumptions about the limited place of religion in public life. However, in English case law these two areas have long been intertwined.[135] As Christopher McCrudden has highlighted, the Court of Appeal's analysis of the indirect religious discrimination in *Ladele* considered issues that were in fact only relevant to a religious freedom context.[136] In its proportionality analysis the Court of Appeal noted that Islington Council's requirement that she partake in civil partnership duties 'in no way prevented her from worshipping as she wished'.[137]

The manner in which counsel for Ms Ladele argued her case seemed to necessitate distinct consideration of the proportionality of her employer's treatment as judged against the Article 14 case law on other substantive grounds.[138] The Court appeared to view the situating of her claim in a religious discrimination rather than religious freedom context as having little impact on their analysis, applying broadly similar considerations to Mr McFarlane and Ms Ladele. In both cases the role of the margin of appreciation in addition to the nature of the aim pursued meant their treatment was deemed not disproportionate.[139] The conflict between Convention rights at the heart of Ms Ladele's case resulted in the UK Government having an even wider margin with regard to determining how best to resolve such a clash.[140] In such circumstances, the Court considered that neither her employer nor the domestic courts had exceeded their margin of appreciation.

Such an application of the margin of appreciation doctrine was predictable once it became clear that the Court was unconvinced by the argument advanced by counsel for Ms Ladele that discrimination on grounds of religion could only be justified by very weighty reasons. Her legal team argued that religion, in common with other suspect grounds recognized by the Court, such as sexual orientation, ethnic origin, sex and gender, constituted 'a core aspect of an individual's identity'.[141] The references to religion as one of these grounds by Bratza, Hirvelä and Nicolaou in their joint dissent in *Redfearn* appeared to support the Article 14 arguments made in *Eweida and others*.[142] Were religious discrimination to be viewed as one such ground, the potential for requiring reasonable accommodation through reliance on Article 14 would have been significant. The consequences of the Court's stricter scrutiny of Government justifications in cases involving such grounds is apparent in recent ECtHR case law

[134] J Ringhelm, 'Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?' in C Ungureanu and L Zucca (eds), *A European Dilemma: Religion and the Public Sphere* (Cambridge University Press 2012) 283.

[135] R Sandberg, 'The Adventures of Religious Freedom: Do Judges Understand Religion?' (SSRN, 21 March 2012) <http://ssrncom/abstract=2032643>.

[136] McCrudden, 'The JFS Case Considered' (n 68) 20, citing *Ladele* (n 1) [52].

[137] *Ladele* (n 1) [52].

[138] *Eweida and others*, para 70.

[139] ibid para 106 (Ladele), 109 (McFarlane).

[140] ibid para 106, citing *Evans v the United Kingdom* (2008) 46 EHRR 34.

[141] ibid para 71.

[142] *Redfearn v UK* [2012] ECHR 1878, 17. Though the judges dissented from the majority, it was not in relation to this point.

on gender,[143] racial,[144] and sexual orientation discrimination.[145] However, the judgment in *Eweida and others* clearly signals that the Court does not yet view religious discrimination as attracting heightened protection. Though the Court did not explicitly reject Ms Ladele's argument, it made clear it did not view religion to be amongst such grounds, focusing solely on the opposing side of the equation in stressing that very weighty reasons are required for discrimination on the grounds of sexual orientation to be justified.[146] Once the argument that religion should be recognized as a ground attracting heightened scrutiny had failed, a finding favouring religious discrimination over sexual orientation was unlikely.

More generally, the Court has yet to develop a nuanced idea of indirect religious discrimination. Beyond the more extreme cases[147] Article 14 in conjunction with Article 9 has only infrequently been relied upon by the Court as a basis for a finding of religious discrimination.[148] There are numerous examples of failed claims of religious discrimination, particularly in relation to restrictions on the wearing of the Muslim headscarf. In *Sahin* the Court found that 'the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation'.[149] Such findings have been criticized as representing an 'underdeveloped, formal equality type of discrimination analysis'.[150] Some academics anticipate that the upcoming challenge to French restrictions on the wearing of the burqa in public spaces[151] will prompt the Court to apply a stronger scrutiny through its Article 14 jurisprudence.[152]

C. Internal and External Judicial Perspectives

It may be argued that the restrictive judicial approaches outlined in this article merely give effect to overarching normative assumptions about the place of religion in society, and reflect a failure to take an internal perspective of the applicant's claim.[153] The assumption that religion is a private matter of conscience,[154] or even a matter of choice,[155] fails to match the reality of religious experience for many. Contributions by academics such as Wendy Brown have highlighted how dominant conceptions of religious freedom and religious discrimination are themselves representative of a larger

[143] *Opuz v Turkey* (2010) 50 EHRR 28.
[144] *Orsus and others v Croatia* (2009) 49 EHRR 26.
[145] *Kozak v Poland* [2010] ECHR 280.
[146] *Eweida and others*, para 105.
[147] See eg *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13.
[148] *Thlimmenos v Greece* (n 11) is generally viewed as a case recognizing a failure to treat different cases distinctly rather than a recognition of indirect discrimination. Few cases based on this approach have been accepted by the court: *Coster v UK* (2001) 33 EHRR 20; *Chapman v UK* (2001) 33 EHRR 18; *Beard v UK* (2001) 33 EHRR 19.
[149] *Sahin* (n 51) para 165.
[150] A Vakulenko, '''Islamic Headscarves'' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 Social & Legal Studies 183, 191.
[151] *SAS v France* App no 43835/11.
[152] S Pei, 'Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights' (2013) 122 YaleLJ 1089.
[153] McCrudden 'The JFS Case Considered' (n 68).
[154] See Ringhelm's criticism of the privatization thesis in the Court's case law on religious freedom (n 134).
[155] See comments such as those of Sedley LJ in *Eweida* (n 1) [40] and Lord Philip's reference to 'normal' religions based on choice in the Supreme Court's judgment in *R (E) v JFS Governing Body* [2009] UKSC 15, [2010] 2 AC 728 [44] highlighted by McCrudden 'The JFS Case Reconsidered' (n 68) 221.

problem of inequality, whereby the majority's definition of religion as private conscience and primarily a matter of worship is privileged and applied as a 'neutral' concept.[156]

D. A Downside to Flexibility?

Finally, it may be added that there is inevitably a downside to flexible and context-specific judgments in employment matters, particularly where the supervision of a transnational court is involved. The fact that the dissent and majority interpreted the particular facts of Ms Eweida's case as 'tipping the balance' in opposite directions demonstrates the fine lines and thin distinctions which will characterize the Court's supervision of such cases. This aspect of the judgment will doubtless cause employers and employment lawyers some concern. From a practical perspective, employers and employees will now also have to engage in analysing whether a workplace's regulation of religious symbols represents a fair and proportionate balance of the competing interests at stake. The vagueness of the test might actually increase the likelihood of workplace disputes concerning religious symbols. Given the potential financial and emotional cost of litigation, many well-meaning employers may well rue the rejection of the Court's clearly delineated approach under the free-contract doctrine.

The convoluted and sometimes dense justifications offered in answer to the numerous failed claims by religious individuals before Strasbourg and English courts did little to quell a sense amongst some that the legal reasoning offered by courts merely concealed support for the furthering of a liberal rights agenda or a general disrespect for religious mores.[157] In this respect, it might perhaps be hoped that the move away from the non-interference approach in *Eweida and others* will clear the ground for more transparent and clearly reasoned judgments in future Article 9 cases. Whilst some will still protest any outcome restricting religious manifestations, judicial expression of the need to balance the competing interests at stake will hopefully go some way towards addressing the concerns of religious communities.[158] In turn, this may facilitate a clearer and more constructive public debate on the potential for compromise where religious norms intersect with legal regulation.

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[156] W Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton University Press 2006). See also J Rivers, 'Promoting Religious Equality' (n 124).

[157] See Cumper and Lewis (n 32).

[158] See, for example, Lord Carey's intervention *McFarlane* (n 1). He proposed the introduction of a special system of courts to address the claims of religious individuals.

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