

importance of the legal concept of consecration in English law, despite the remoteness of its historical origins.

doi:10.1017/S0956618X09001963

## Indirect Discrimination and Individual Belief: *Eweida v British Airways plc*

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### INTRODUCTION

The decision in *Eweida v British Airways*<sup>1</sup> that there was no discrimination where a Christian member of check-in staff was not allowed to wear her cross visibly at work has received much publicity, despite the fact that BA changed its policy before the case even reached the tribunal. The case raises many questions about the equal treatment of religions and the question of whether religious practices must be mandatory before they are protected, issues which have been discussed elsewhere in this *Journal*.<sup>2</sup> The focus of this article, however, is the implications of the decision for the application of indirect discrimination to those who hold minority religious views.

Ms Eweida was a member of the check in staff for BA. She wished to wear a cross over her BA uniform but was refused because this was in breach of the BA uniform policy. The BA policy did not prevent all religious affiliation being visible: the company allowed 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. However, Ms Eweida's cross could have been concealed and, in any event (as she accepted), wearing the cross was not a 'mandatory' requirement of her religion, but a personal expression of faith.<sup>3</sup> Ms Eweida claimed direct and indirect discrimination

1 *Eweida v British Airways plc* [2008] UKEAT 0123\_08\_2011.

2 See the case note on the employment tribunal decision: *Eweida v British Airways plc* (2008) 10 Ecc LJ 256, ET. See also I Leigh, 'Recent developments in religious liberty', (2009) 11 Ecc LJ 65, and R Sandberg, 'Underrating human rights: *Gallagher v Church of Jesus Christ of Latter-Day Saints* (2009) 11 Ecc LJ 75. A case note on the employment appeal tribunal decision is at p 240 of this issue.

3 Contrast *R (on the applications of Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWHC 1865, noted in (2009) 11 Ecc LJ 126–127.

and harassment, but was unsuccessful at the employment tribunal. She appealed the finding on indirect discrimination.

## THE DECISION

Indirect discrimination is defined in the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660 (the Regulations) as the application of a provision, criterion or practice that is applied, or would apply, equally to those not of the same religion, but which puts, or would put, persons of the religion in question at a particular disadvantage compared to others, and which cannot be shown to be a proportionate means of achieving a legitimate aim. There were a number of grounds for appeal, most of which were fairly narrow in scope and largely fact-dependent. The focus of the discussion here is the Employment Appeal Tribunal (EAT)'s decision regarding the nature of indirect discrimination in cases of individual belief.

The significant point relates to whether Ms Eweida could claim indirect discrimination, given that she seemed to be alone in her religious view that it was necessary, as an expression of the Christian faith, to wear the cross in a visible manner. The EAT found that individual views about matters of faith do amount to a 'religion and belief' under the Regulations and thus are protected, but that the protection does not extend to protection against indirect discrimination, the essence of which is group disadvantage. On this basis, her indirect discrimination claim failed.

The reason for the decision was that the wording of the Regulations requires that people of the same religion as the claimant are put at a particular disadvantage by the requirement in question (here the requirement not to wear visible jewellery). As there were no others who were put at such a disadvantage – Ms Eweida being the only person identified who held the particular belief – there could be no indirect discrimination. The EAT was explicit in recognising that the result of this was that there could be no indirect discrimination against a person who holds individual religious views that are not shared by others. Although they recognised that such individual views were protected as 'religion and belief', there being no minimum number of adherents before protection can be granted, such protection was limited to direct discrimination, rather than indirect discrimination, the latter form of discrimination being aimed at protecting against group disadvantage. In the absence of any identified group disadvantage, there could be no indirect discrimination.

It is perhaps surprising that the EAT felt the need to make such a sweeping decision about the nature of indirect discrimination. Although undoubtedly the traditional view is that indirect discrimination addresses group disadvantage rather than individual disadvantage, this may be inappropriate in the context of discrimination on grounds of religion and belief, where such belief can be very personalised.

There are a number of reasons why the decision may be questionable. First, relating to the wording of the Regulations: the employment tribunal asked itself the question whether persons of the same religion or belief were put at a particular disadvantage. Once they had decided that no others with the same belief had been identified, the answer was inevitable: no others had been disadvantaged, and so there could be no indirect discrimination. However, the wording of the Regulations is not that the provision must put others of the same religion at a disadvantage. The wording is:

A applies to B a provision, criterion or practice which he applies *or would apply* equally to persons not of the same religion or belief as B, but—  
(i) which puts *or would put* persons of the same religion or belief as B at a particular disadvantage when compared with other persons.<sup>4</sup>

Although the wording clearly suggests that a group must be disadvantaged, the inclusion of the conditional ('would apply'; 'would put') means that it can, technically, apply to provisions that disadvantage an individual applicant and that would also put persons of the same view, were there to be any, at a disadvantage. Indeed, the parent directive is worded solely in the conditional ('where an apparently neutral provision . . . would put persons of a particular religion or belief . . . at a particular disadvantage . . .'),<sup>5</sup> leading some to suggest that it may cover individual disadvantage.<sup>6</sup> Clearly an interpretation of the domestic regulations relying on the conditional wording to this effect is somewhat strained, but it is a possible interpretation and does allow those who hold religious or other beliefs, which may not be shared by others, to be protected against indirect discrimination. Whether or not such an interpretation is desirable depends on what is understood to be the correct scope of the protection against religious discrimination and, in particular, indirect religious discrimination.

Two preliminary issues were recognised by the EAT. First, the question of whether protection is limited to mandatory religious requirements; and second, whether protection against discrimination should extend to those who hold religious views that are not shared by others. The EAT held that

it is not necessary for a belief to be shared by others in order for it to be a religious belief, nor need a specific belief be a mandatory requirement of an established religion for it to qualify as a religious belief.<sup>7</sup>

4 The Employment Equality (Religion or Belief) Regulations 2003, regulation 3(b). Emphasis added.

5 European Union, Council Directive 2000/78/EC, Article 2.2.b.

6 N Bamforth, M Malik and C O'Conneide (eds) *Discrimination Law: theory and context* (London, 2008), pp 307–308.

7 *Eweida v British Airways plc*, para 29.

Thus, the fact that Ms Eweida was alone, as far as the EAT was concerned, in her belief did not prevent her belief being protected. Nor did the fact that even Ms Eweida accepted that her belief was not that she was required as a matter of religious observance to wear the cross, but that she believed it was an important part of her personal expression of faith.<sup>8</sup>

By recognising the individual nature of religious belief in this way, the EAT interpreted the Regulations in accordance with Article 9 of the European Convention on Human Rights. Indeed, the tribunal pointed to the need to interpret domestic legislation this way so as to accord with section 3 of the Human Rights Act 1998.<sup>9</sup> Freedom of religion is protected under Article 9 of the Convention, as an individual right as well as a collective right, based on the importance of religion for individual identity and autonomy. It is therefore right for the existence of a religious belief to be judged subjectively rather than objectively by a court. To the extent that the EAT upheld the individual nature of religious beliefs for the purposes of protection against discrimination, the decision must be correct.

What is therefore somewhat surprising is that what is given by this individualised interpretation of the meaning of religion is taken away immediately by its limitation to direct discrimination protection. The effect of this limitation is that protection becomes restricted to the right to believe (the *forum internum*), and leaves the manifestation of belief (the *forum externum*) unprotected.<sup>10</sup> The fact that direct discrimination protects only against discrimination based on a person's beliefs rather than on their manifestation of belief can be seen in the EAT decision of *Azmi*,<sup>11</sup> where a teaching assistant was refused permission to wear the niqab or face veil when in the presence of male colleagues. Her claim that discrimination on grounds of a wearing the veil is direct discrimination was unsuccessful. In effect, the result of the decision was that discrimination against an individual on the grounds that he or she has manifested a belief is indirect rather than direct discrimination. Again, this must be correct: allowing discrimination on grounds of a manifestation of religion to be direct discrimination would mean that it would not be capable of justification. Given that manifestations of religion are only protected under the ECHR to the extent that they are proportionate when in conflict with others' rights, it would be surprising to create an absolute right to manifest religion at work via the rules on direct discrimination. The discrimination was, instead, indirect in nature as the refusal to allow a face covering was applied to all, but put *Azmi*, as a Muslim

8 For discussion of recent case law on the manifestation of belief, see Leigh, 'Recent developments in religious liberty'.

9 Human Rights Act 1998, s 3(1).

10 See Leigh, 'Recent developments in religious liberty' for further discussion of the restrictive interpretation of the right to manifest religion in the ECHR jurisprudence.

11 *Azmi v Kirklees MBC* [2007] ICR 1154.

woman, at a particular disadvantage when compared with others. Azmi was ultimately unsuccessful in her claim because the indirect discrimination was justified, but what is clear from the case is that manifestation of belief should be protected as indirect discrimination rather than direct, and this is, again, the approach of the EAT in *Eweida*.

However, the additional requirement (accepted by the EAT in *Eweida*), that the disadvantage experienced by the claimant be shared with others, means that the right to manifest religions remains unprotected when an individual holds a belief that is not shared by others. The reason given for this approach by the employment tribunal was that ‘the whole purpose of indirect discrimination is to deal with the problem of group discrimination’.<sup>12</sup> Moreover, they reiterated, denying an individual protection against indirect discrimination creates ‘hardly any injustice . . . if the purpose of indirect discrimination is to counter group disadvantage’.<sup>13</sup>

This, of course, begs the question of what the purpose of indirect discrimination is in the context of religious discrimination. Certainly, in the context of race and sex discrimination, indirect discrimination was introduced to protect against group disadvantage.<sup>14</sup> Without it, protection against group disadvantage would be limited and group disadvantage was clearly something that needed to be addressed. However, there may be no need to limit the role of indirect discrimination solely to group disadvantage, particularly in the context of religious discrimination, because indirect discrimination is the mechanism by which manifestation of belief is protected under the Regulations. There is no reason to limit protection for the manifestation of belief to those who share their beliefs with others. The protection in Article 9 of the Convention for the manifestation of belief ‘alone or in community with others’ is not limited to those who share their beliefs with others. Furthermore, Article 14 prohibits discrimination on grounds of religion in the enjoyment of Convention rights, and it would be discriminatory to limit protection for religious freedom to those who hold majority religious views and to deny it to those whose beliefs, while recognised as religious beliefs under the Convention, are not shared with others.

It seems necessary then, if our law is to provide adequate protection against religious discrimination, that it should protect the manifestation of individual beliefs. Moreover, as suggested above, it is possible to interpret the Regulations to protect manifestation of belief, albeit by a somewhat strained interpretation.

<sup>12</sup> *Eweida v British Airways plc*, para 59.

<sup>13</sup> *Ibid*, para 61.

<sup>14</sup> See *Griggs v Duke Power* (1971) 410 US 424, and Bamforth, Malik and O’Cinneide, *Discrimination Law*.

There are clearly some disadvantages to this approach, and the difficulties that individual claims of religious discrimination can cause for employers can be readily identified<sup>15</sup> – in particular, the threat that a wide range of behaviours linked to individual beliefs could generate claims of discrimination. However, although it is undoubtedly the case that individual claims can cause difficulties for employers, it remains the case that to remove the protection for individual manifestation of belief leaves a wide gap in the domestic protection against religious discrimination.

Of course, allowing indirect discrimination to be used in such circumstances does not mean that employers will need to meet every stated wish of religious employees, since indirect discrimination can be justified. But it would mean that individual employees would be able to get over the first hurdle in making a claim, so that its merits could be considered when assessing justification. Such an approach would, effectively, mean that questions of justification would need to be considered more carefully.

With regard to justification, it is arguable that the assessment of the proportionality of imposing a provision that disadvantages the single holder of a particular religious or other belief should take into account the number of individuals affected. If an employer refuses to adapt a uniform rule to reflect the dress codes of a large proportion of the local workforce, such a refusal may be viewed as disproportionate; failure to accommodate one employee's religious views may be more easily regarded as proportionate. In any event, it is in the context of proportionality that the debate about the extent to which the manifestation of religion should be accommodated at work should take place, rather than through a decision that indirect discrimination cannot occur for single adherents.

## CONCLUSION

Under the European Convention on Human Rights, it is clear that protection should not be limited merely to the right to hold beliefs but also to the right to manifest them. The right to manifest belief under Article 9 is limited, where necessary, to uphold the rights of others; similarly, the right not to be discriminated against indirectly is limited by the ability of the employer to justify any treatment where proportionate for a legitimate aim.

The best way to achieve protection for individual beliefs would be to allow individual claims of indirect discrimination in religion cases, in the absence of group disadvantage, and to enable the proportionality of any restrictions on

15 See for example, G Moon and R Allen, 'Substantive rights and equal treatment in respect of religion and belief: towards a better understanding of the rights, and their implications', (2000) *European Human Rights Law Review* 580–601.

religions manifestation at work to be dealt with by considering justification. Such an approach is compatible with the current drafting of the Regulations, and compatible with the protection of Articles 9 and 14 of the Convention.

doi:10.1017/S0956618X09001975

## Religion and Public Benefit

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The Charity Commission's final guidance on *The Advancement of Religion for the Public Benefit*<sup>1</sup> met with cautious approval, not least because it is considerably more user-friendly than the rather tortuous exposure draft that preceded it. Several aspects of that draft were arguable:<sup>2</sup> the final version resolves many of the uncertainties.

The guidance makes it clear that although, to be charitable, an organisation advancing religion must demonstrate belief in a supreme being or entity, it does not have to use that terminology in its objects: for Buddhists, for example, 'supreme being or entity' is inappropriate because Buddhism is a 'realised' religion rather than a 'revealed' one. Nor is it obligatory to talk of 'worship' if that expression is inappropriate for that religion. In short, the guidance has moved much closer to the definition in the Charities Act 2006.<sup>3</sup> There has also been a welcome move away from reference to moral or ethical codes: instead, the document tends to refer, much less prescriptively, to moral or ethical *frameworks*.

The guidance also makes it clear that is not necessary for a faith community to proselytise in order to 'advance' religion; advancement may include the 'personal and social effects' of religious practice. The guidance accepts, however, that seeking converts can be a valid means of advancing belief – and can therefore be for the public benefit – always providing that proselytising does not cause harm. It is also acceptable for a charity to promote particular tenets of a

1 Available at <<http://www.charitycommission.gov.uk/Library/publicbenefit/pdfs/pbreligiontext.pdf>>, accessed 20 January 2009.

2 And at one point simply wrong: the assertion in the draft that it was impossible to become a Sikh by conversion.

3 Charities Act 2006, s 2(3): 'religion' includes: (i) a religion that involves a belief in more than one god, and (ii) a religion that does not involve a belief in a god.