

promising than making unhistoric and vapid claims of faith protection. Coronations – which recognise rather than make sovereigns – could rise to new challenges in what Andrew Brown has called an ‘emotional or effective establishment, where the church is a natural theatre of society’s self-understanding’.<sup>13</sup>

## CONCLUSION

The relative complexity – emotional, political, legal, administrative – of these issues is no doubt glimpsed by government. Of course, the Government does not wish to plunge into these deep waters. It wants a quick, limited fix without too much argument. Commentators are right that there has been too little public discussion, but not all the blame can be laid at the Government’s door. What is needed is fresh, bound-breaking thinking and most of that can best come only from within the Church itself.

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# Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg’s Judgment in *Eweida and others v United Kingdom*

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The judgment of the European Court of Human Rights in *Eweida and others v United Kingdom*<sup>1</sup> related to two pairs of cases.<sup>2</sup> The first pair concerned a British Airways check-in clerk and a nurse, each of whom complained that

13 A Brown, ‘Church of England traditionalists are running out of hiding places’, *The Guardian*, 18 December 2012, <<http://www.guardian.co.uk/commentisfree/andrewbrown/2012/dec/18/church-of-england-traditionalists-hiding-places?INTCMP=SRCH>>, accessed 13 January 2013.

1 *Eweida and others v United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013, Fourth Section).

2 The author acted for the Bishop of Chester, the (then) Bishop of Blackburn and the Premier Christian Media Trust, who were among those granted permission to intervene in the proceedings. This Comment is based upon a paper delivered as part of Francis Taylor Building’s *Breakfast Briefing*

dress codes at their respective places of work prevented them from openly wearing a small cross on a chain around their neck. In the second pair, a registrar of marriages and a relationship counsellor refused to offer their respective services to same-sex couples on the basis that homosexual acts were incompatible with their religious beliefs. Having failed to obtain relief in the domestic courts, all four applicants took their claims to Strasbourg, which heard oral argument last September. Judgment was pronounced on 15 January 2013. This Comment considers the broad thrust of the judgment, particularly the threefold manner by which the Court has clarified and embedded the right to freedom of religion, the practical outcome in the individual cases, and the likely effect of the judgment upon future litigation in the domestic courts of the United Kingdom.

### AFFIRMATION OF RELIGIOUS LIBERTY

In common with any judgment of the European Court of Human Rights, the most significant part lies in the articulation by the majority of the emergent principles in accreted Strasbourg case law, interpreting and applying the relevant Articles of the European Convention on Human Rights (ECHR).<sup>3</sup> What one finds is the adoption of language that, when sufficiently repeated over time, develops into a mantra not unlike a species of common law for application in (mostly) civil law jurisdictions.

In these conjoined applications the principles were already well known and had earlier been adverted to by Sir Nicolas Bratza, then President of the Court, when he addressed a joint gathering of the Ecclesiastical Law Society and the European Consortium for Church and State Research in Oxford in October 2011.<sup>4</sup> They are helpfully gathered up in paragraphs 79 and 80 of the Court's judgment, which, for convenience, can be broken down into the following succinct propositions:

- i. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention.

series on 16 January 2013 and is an expanded version of M Hill, 'Religion at work' (2013) 163 *New Law Journal* 89–90, available at <<http://www.newlawjournal.co.uk/nlj/content/religion-work>>, accessed 8 February 2013. I am grateful to the participants at the *Briefing*, particularly Mark Jones of Ormerods Solicitors, and to Dr Russell Sandberg and Charles George QC, each of whom generously commented upon an early draft.

3 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950.

4 N Bratza, 'The "precious asset": freedom of religion under the European Convention on Human Rights', in M Hill (ed), *Religious Discrimination in the European Union* (Trier, 2012), pp 9–26, reproduced in (2012) 14 *Ecc LJ* 256–271. Judge Bratza's title borrows from the Court's own jurisprudence. His concluding words were indeed prophetic: 'What I am sure of is that, whatever the result [in *Eweida and others v UK*], the Court's decisions will provide ample material for another article in the future.'

- ii. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life.
- iii. But it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>5</sup>
- iv. Religious freedom is primarily a matter of individual thought and conscience.
- v. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified.
- vi. However, as further set out in Article 9(1), freedom of religion also encompasses the freedom to manifest one's belief, alone and in private, but also to practise in community with others and in public.
- vii. The manifestation of religious belief may take the form of worship, teaching, practice and observance.
- viii. Bearing witness in words and deeds is bound up with the existence of religious convictions.<sup>6</sup>
- ix. Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9(2).
- x. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be (a) prescribed by law and (b) necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

After setting out these broad, well-established and non-controversial statements of principle, the majority opinion then proceeds to identify three subtle but significant elucidations through which the Article 9 right to freedom of religion is both clarified and reinforced.

#### EXTENDED AMBIT OF ARTICLE 9

In re-articulating the ambit of Article 9, through this carefully voiced judgment, the effective reach of the Article as an instrument for securing religious liberty for Christian litigants is increased.<sup>7</sup> Individually these developments are

5 See *Kokkinakis v Greece*, App no 14307/88 (ECtHR, 25 May 1993).

6 See *Kokkinakis*, para 31; also *Leyla Şahin v Turkey* App no 41774/98 (ECtHR, 10 November 2003) (Grand Chamber).

7 Significantly, this is the first adverse determination for the United Kingdom on Article 9 since it became a signatory to the Convention. It also runs counter to the trend identified by Professor Silvio Ferrari in his systematic analysis of Strasbourg judgments on pan-European violations of religious freedom: S Ferrari, 'Law and religion in a secular world: a European perspective', (2012) 14 *Ecc LJ* 363 ff. For an authoritative analysis of the history of the Court's treatment of Article 9 applications,

significant; collectively they mark a discernible strengthening of religious liberty, which is likely to be reflected in more nuanced determinations by the domestic judiciary and even, in certain instances, in the revisiting of some earlier judgments that may no longer represent an accurate statement of Strasbourg jurisprudence.<sup>8</sup> At the very least, the *approach* of domestic courts to alleged violations of Article 9 will be irrevocably altered, with the focus shifting from the gateway filters of Article 9(1) to the complex balance of competing rights and limitations found in Article 9(2). It is helpful, therefore, to identify these three aspects individually before evaluating their combined effect.

### Legitimacy

First, the Strasbourg Court has made plain that, provided a religious view demonstrates a certain level of cogency, seriousness, cohesion and importance, the state's duty of neutrality 'is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the way those beliefs are expressed'.<sup>9</sup> This clarification might legitimately be applied, for example, in the pending case of *Church of Jesus Christ of Latter-day Saints v United Kingdom*,<sup>10</sup> where a local valuation officer refused to grant an exemption from business rates (which was enjoyed by other churches) on the basis that Mormon doctrine restricted admission to its temples only to those in good standing. For entitlement to a tax exemption to be determined by reference to the Court's assessment of the polity and practices of a faith community is invidious and runs contrary to this explicit enunciation of principle by the Court.

Several major domestic cases have already grappled with this principle. In *Williamson*, for example, Lord Nicholls stated

The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice' . . . But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. Each individual is at liberty to hold his own religious

see J Martínez-Torrón, 'Religious liberty in European jurisprudence', in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff, 2002) pp 99–127.

8 As understood and interpreted by certain domestic courts, as to which see the more detailed discussion below.

9 *Eweida and others v UK*, at para 81.

10 App no 7552/09, communicated to the Government on 26 April 2011. The challenged decision of the Judicial Committee of the House of Lords can be found at *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56.

beliefs, however irrational or inconsistent they may seem to some, however surprising. . . . The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.<sup>11</sup>

With similar clarity, Lord Walker of Gestingthorpe put it as follows:

I doubt whether it is right for the court . . . to impose an evaluative filter at the first stage, especially when religious beliefs are involved. For the Court to adjudicate on the seriousness, cogency and coherence of theological beliefs is . . . to take the Court beyond its legitimate role.<sup>12</sup>

This reference to the legitimate role of the court has echoes of the long-established principle of judicial deference whereby matters of religious doctrine are non-justiciable. This was recently reaffirmed by the Court of Appeal in *Khaira v Shergill*.<sup>13</sup>

### Doctrinal mandate

In recent years, the principle has taken root in English law that only manifestations of belief that are doctrinally mandated attract protection under Article 9 of the European Convention on Human Rights.<sup>14</sup> Thus Sikh litigants earned the right to wear the *kara* (bracelet)<sup>15</sup> and *kirpan* (dagger)<sup>16</sup> and Muslims (in some instances) the right to wear a veil or headscarf.<sup>17</sup> The judgment of the Court has outlawed this narrow interpretation of religious manifestation, which had never been a proper reflection of Strasbourg jurisprudence in any event. As the Court affirmed, even where the belief in question attains the required level of cogency and importance, it cannot be said that every act that

11 *R v Secretary of State for Education and Employment and others ex parte Williamson and others* [2005] UKHL 15, at para 22.

12 *Ibid*, at para 57.

13 *Khaira v Shergill* [2012] EWCA Civ 983. Note that permission to appeal was granted by the Supreme Court on 4 February 2013.

14 In this regard, the decision of Michael Supperstone QC sitting as a Deputy Judge of the High Court in *R (On the application of Playfoot (A Child)) v Millais School Governing Body* [2007] EWHC Admin 1698 no longer represents the law. The judge's test on manifestation was founded on a requirement of 'perceived obligation' (in this instance, concerning a 'purity' ring), which was itself derived from a misreading of Lord Nicholls' speech in *Williamson* (above). Note also the distinction drawn by Cranston J between Hindu and Sikh cremation rituals in a detailed judgment in *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin) at paras 99–102, where open air funeral pyres were found to be doctrinally mandated under Hindu teaching but not Sikh. This lengthy and erudite analysis was rendered entirely nugatory by the Court of Appeal's disposal of the matter on an entirely different basis: [2010] EWCA Civ 59.

15 *R (Watkins-Singh) v Aberdare Girls High School* [2008] EWHC 1865.

16 Statutory defence to criminal charge of possession of a bladed article under section 139 of the Criminal Justice Act 1988.

17 *Noah v Desrosiers* [2008] UKET 2201867/07, 29 May 2008.

is in some way inspired, motivated or influenced by it constitutes a ‘manifestation’ of the belief.<sup>18</sup> It continued: ‘acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9(1)’.<sup>19</sup>

While rightly acknowledging that liturgical acts are self-evidently outward expressions of belief, the Court makes clear that the manifestation of religion is much wider than this. What must be demonstrated is ‘a sufficiently close and direct nexus between the act and the underlying belief’.<sup>20</sup> The majority judgment could not be more explicit: ‘there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question’.<sup>21</sup> The first of the minority opinions<sup>22</sup> is equally plain, addressing directly the question of the cross:

Provided a sufficiently close and direct nexus between the act and the underlying belief exists, there is no obligation on an applicant to establish that he or she acted in fulfilment of a duty mandated by the religion. In the present case, we have no doubt that the link between the visible wearing of a cross (being the principal symbol of Christianity) and the faith to which the applicant adheres is sufficiently strong for it to amount to a manifestation of her religious belief.<sup>23</sup>

Thus the domestic courts were wrong in *Eweida* and *Chaplin* to regard the display of a cross as a personal choice and no more than a fashion accessory.<sup>24</sup> The decision in Strasbourg perhaps also amounts to a vindication of Mr Justice Collins, who, in *G v St Gregory’s Catholic Science College*, commented that the requirement in *Watkins-Singh* to show that a particular practice was of

18 *Eweida and others v UK*, at para 82.

19 *Ibid*, citing *Skugar and others v Russia* App no 41615/98 (ECtHR, 18 January 2001); *Arrowsmith v The United Kingdom*, Commission’s report of 12 October 1978, Decisions and Reports 19, p 5; *C v The United Kingdom*, Commission decision of 15 December 1983, DR 37, p 142; *Zaoui v Switzerland* App no 40010/04 (ECtHR, 3 December 2009).

20 *Eweida and others v UK*, at para 82.

21 *Ibid*.

22 Judges Bratza and David Thór Björgvinsson, dissenting on the disposal of the *Eweida* application (which they would have dismissed) but otherwise concurring in the result. The UK government, both in its written submissions and in oral argument before the Court, had strenuously argued that the desire of Ms Eweida and Ms Chaplin to wear a visible cross, ‘while it may have been inspired or motivated by a sincere religious commitment, was not a recognised religious practice or requirement of Christianity, and did not therefore fall within the scope of Article 9’: see the summary of the parties’ arguments at para 58 of the judgment.

23 *Eweida and others v UK*, dissenting opinion, para 2(a). In addition to the written submissions on behalf of the Bishops of Chester and Blackburn and Premier Christian Radio, there was an intervention by Bishop Michael Nazir-Ali setting out the history of the cross as a Christian symbol.

24 For an incisive critique of the Court of Appeal judgment in *Eweida*, see N Hatzis, ‘Personal religious beliefs in the workplace: how not to define indirect discrimination’, (2011) 74 MLR 287–305.

‘exceptional importance’ put the threshold too high.<sup>25</sup> Similarly, in *R (On the application of Bashir) v The Independent Adjudicator and HMP Ryehill and the Secretary of State for Justice*,<sup>26</sup> HHJ Pelling QC, sitting as a Deputy High Court Judge, rightly rejected a submission that the claim should not be entertained because fasting, in this instance, was not obligatory but voluntary, stating, ‘There is nothing within Article 9 that requires there to be a perceived, much less an objectively demonstrable, obligation for the manifestation of religious belief to be protectable’.<sup>27</sup> This previously uncertain element of domestic jurisprudence ought therefore to become a matter of historic interest only.

### Resignation as guarantee of religious freedom?

The most significant aspect of the Court’s judgment is the laying to rest of a principle that had been gaining currency in both Strasbourg and domestic jurisprudence, to the effect that if a person can take steps to circumvent a limitation placed upon him or her, such as resigning from a particular job, then there is no interference with the Article 9 right.<sup>28</sup> It follows that the employer’s defence of ‘my way or the highway’ will no longer be available.<sup>29</sup> As the Court states in the opinion of the majority:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.<sup>30</sup>

As with the doctrinal mandate point, it is to the minority opinion<sup>31</sup> that one must look for the most uncompromising statement of this sea change in Strasbourg jurisprudence:

25 [2011] EWHC 1452 (Admin) at para 37.

26 [2011] EWHC 1108 (Admin).

27 *Ibid*, at para 21.

28 This has conventionally been styled the ‘specific situation’ rule: its flawed logic and questionable outworking has been subject to sustained academic criticism, not least for the unevenness of its application in the domestic courts. See, by way of example, M Hill and R Sandberg, ‘Is nothing sacred? Clashing symbols in a secular world’, (2007) *Public Law* 488–506; M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (Alphen aan den Rijn, 2011), paras 77–82; R Sandberg, *Law and Religion* (Cambridge, 2010), pp 84 ff.

29 This argument had also been robustly advanced by the UK government: see *Eweida and others v UK*, at para 59, where its submissions are summarized as follows: ‘The fact that these applicants were free to resign and seek employment elsewhere, or to practice [*sic*] their religion outside their work, was sufficient to guarantee their Article 9 rights under domestic law’.

30 *Eweida and others v UK*, at para 83.

31 See n 22 above.

A restriction on the manifestation of a religion or belief in the workplace may amount to an interference with Article 9 rights which requires to be justified even in a case where the employee voluntarily accepts an employment or role which does not accommodate the practice in question or where there are other means open to the individual to practise or observe his or her religion as, for instance, by resigning from the employment or taking a new position. ... Insofar as earlier decisions of the Commission and the Court would suggest the contrary, *we do not believe that they should be followed*.<sup>32</sup>

It is often stated that the European Convention on Human Rights is a 'living instrument'<sup>33</sup> and that its interpretation may evolve over time in keeping with social mores and other factors. It may be that the depressed labour market at the present time was a factor militating in favour of this new approach,<sup>34</sup> or it may simply be recognition of the harshness of the former decisions.<sup>35</sup> The minority opinion suggests that the earlier decisions were wrongly decided. The text omitted from the foregoing quotation reads as follows:

any other interpretation would not only be difficult to reconcile with the importance of religious belief but would be to treat Article 9 rights differently and of lesser importance than rights under Articles 8, 10 or 11, where the fact that an applicant can take steps to avoid a conflict between Convention rights and other requirements or restrictions imposed on him or her has been seen as going to the issue of justification and proportionality and not to the question of whether there has been an interference with the right in question.<sup>36</sup>

It follows that several domestic cases decided on the impugned basis now outlawed by Strasbourg can no longer be considered to be reliable statements of legal principle. These include the House of Lords decision in *Begum*, where the Muslim schoolgirl in question had the option of moving to another school

32 *Eweida and others v UK*, dissenting opinion, at para 2(b) (emphasis added).

33 See, for example, M Hill, 'A new dawn for freedom of religion', in M Hill (ed), *Religious Liberty and Human Rights* (Cardiff, 2002), pp 1–13.

34 Although this is not mentioned in either the majority or minority opinion.

35 In *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 BHRC 27, it was held that the French prohibition on ritual slaughter did not amount to an interference with the manifestation of Jewish religious beliefs, because supplies of meat, appropriately slaughtered, could be sourced from Belgium. The majority sought to justify this ostensibly harsh decision by distinguishing between mere consumption in relation to which there was no interference, and slaughter *per se*: para 83. It has never been considered a wholly satisfactory decision and the better view would be that it should no longer be followed, even on this limited fact-specific basis.

36 *Eweida and others v UK*, dissenting opinion, at para 2(b). This could be seen as tacit acknowledgment that a hierarchy of rights had been developing in Strasbourg with freedom of religion becoming of lesser importance. To the extent that this may have been the case, its express disavowal is to be welcomed.



with a more relaxed uniform policy.<sup>37</sup> In fairness to the English judiciary, several judges – including Neuberger LJ (as he then was) and Mummery LJ – had been critical of the earlier authorities, Mummery regarding them as ‘arguably surprising and the reasoning hard to follow’.<sup>38</sup>

Although the Court indicates that an individual’s decision to enter voluntarily into a contract of employment that will require him to act against his religious beliefs would not necessarily be determinative,<sup>39</sup> it will clearly be a very weighty factor in considering whether a fair balance was struck by the employer in its policy of providing a service without discrimination.

### SHIFTING THE JUDICIAL FOCUS IN DOMESTIC COURTS

While the three distinct matters outlined above will serve, both individually and cumulatively, to clarify and extend the ambit of Article 9, they will not necessarily lead to a seismic shift in litigation outcomes.<sup>40</sup> The reason for this is that each of these three matters are ‘gateway considerations’, or filters that determine whether or not Article 9 is engaged in the first place: that is, whether there has been an interference with the enjoyment of the right as articulated in Article 9(1). No longer will it be open to defendants to seek a ‘knockout blow’ by challenging the authenticity of the belief or whether its outward manifestation is doctrinally mandated or by demonstrating that resignation from a particular job would allow the individual the uninhibited practice of his or her religion. Instead, the majority of future cases are likely to satisfy these gateway criteria with relative ease and far fewer will be filtered out at the first stage.

In consequence, the juridical battleground will henceforward be firmly sited within Article 9(2) and, in particular, the requirement to demonstrate that any limitation on freedom of religion is (a) prescribed by law and (b) 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.<sup>41</sup> In considering the concepts of reasonableness and proportionality, the strength of doctrinal

37 *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15. See also *R (On the application of X) v Y School* [2006] EWHC (Admin) 298, Silber J.

38 See *Copsey v WBB Devon Clays Limited* [2005] EWCA Civ 932, particularly Mummery LJ at para 3 and Neuberger LJ at para 91.

39 *Eweida and others v UK*, at para 109.

40 The analytical approach for the future will be that of Lord Nicholls and Baroness Hale in *Begum* (see above), as opposed to that of Lord Bingham of Cornhill, Lord Hoffmann and Lord Scott of Foscote. In the cases such as *Begum* where certain judges rejected claims under one or more of the gateway filters under Article 9(1), they nevertheless went on to consider how they would have disposed of the cases under Article 9(2), which discussion (through strictly *obiter*) will nonetheless inform future determinations.

41 Since many domestic judgments despite rejecting the claim as not engaging Article 9(1) went on to consider the 9(2) factors on an *obiter* basis in any event, there is still a rich vein of judicial comment profitably to be mined.

compulsion and the prospect of resignation will be relevant factors but not determinative, and in any event they will feature alongside a constellation of other matters of varying relevance and weight. Most significantly, however, the burden of proof will shift to the employer to justify the interference.<sup>42</sup> It is imprudent, particularly for a practitioner, to speculate upon whether the ever-expanding volume of religious liberty claims to be adjudicated by the courts and tribunals of England and Wales will now be differently determined in consequence of this seminal Strasbourg judgment. The cases are fact-specific, and shifting the theatre of dispute from Article 9(1) to Article 9(2) might well produce identical results but with different and more sophisticated reasoning. Since, however, there is a greater subjective element to Article 9(2), judicial outcomes may become less predictable.

### THE SPECIFIC CASES

The actual disposal of each of the four applications is of far less importance than the issues of principle and the revised judicial approach. Each case turns on its own facts and it is foolhardy to extrapolate principles of general application from the result of one case. It is, however, possible to venture some general observations on the Strasbourg judgment in its totality.

The fact that four applications were determined in the course of the same judgment allows a number of comparisons to be made, some of which raise more questions than they answer. First, it is noteworthy that the judgment recites, properly, the law and practice of several foreign jurisdictions (notably Council of Europe member states, the USA and Canada), which demonstrates the absence of any consistent approach to the state regulation of wearing religious symbols in the workplace.<sup>43</sup> However, no reference was made to the law of those jurisdictions on the reasonable accommodation of conscientious objection without undue hardship where there is a greater consistency of approach, nor to the law of certain countries such as South Africa that provide a conscience clause permitting a doctrinal opt-out to registrars of civil partnerships.<sup>44</sup>

Secondly, while the Court prays in aid the margin of appreciation in deferring to the state the balancing exercise in relation to the competing rights in *Ladele* and *McFarlane* (refusal on religious grounds to provide a service to same-sex

42 This evolution was correctly predicted in D Whistler and D Hill, *Religious Discrimination and Symbolism: a philosophical perspective* (Liverpool, 2012) being the final report of the scoping study *Philosophy of Religion and Religious Communities: defining beliefs and symbols*, although the expression ‘practical turn’ coined by the authors for this refocusing of judicial approach has yet to gain traction. The report is available at <<http://pcwww.liv.ac.uk/~worc2329/rdreportfinal.pdf>>, accessed 21 January 2013.

43 *Eweida and others v UK*, at paras 47–49.

44 See section 6 of the Civil Union Act 2006 (South Africa).

couples),<sup>45</sup> no such latitude was afforded to the domestic courts in *Eweida*. The majority concluded that a fair balance had not been struck by the domestic courts. On one side of the scales was Ms Eweida's desire to manifest her religious belief; on the other was the employer's wish to project a certain corporate image. The Court considered that,

while this aim was undoubtedly legitimate, *the domestic courts accorded it too much weight*. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.<sup>46</sup>

Here the Court openly substituted its own discretion for that of the domestic courts, in an exercise of micromanagement that many would consider inappropriate for an international court responsible for enforcing treaty obligations of national governments.<sup>47</sup> The Court did not show the same level of micromanagement in relation to the application of nurse Shirley Chaplin. It determined that, on the particular facts of her case, the scales fell the other way. Her workplace was a hospital, where concerns of health and safety amounted to a compelling and proportionate reason for a restriction on her freedom otherwise to manifest her religious beliefs. Although it may have been a rather slender justification,<sup>48</sup> the majority considered 'the protection of health and safety on a hospital ward was inherently of a greater magnitude' than the projection of a certain corporate image.<sup>49</sup> The judgment continued:

45 See *Eweida and others v UK*, at para 106 (Ladele) and para 109 (McFarlane).

46 *Ibid*, at para 94 (emphasis added).

47 In essence, the majority considered that insufficient weight was given to one factor in the balancing exercise. It is unlikely that a domestic appellate court would overturn a first instance decision on so slender a ground. See generally part 52 of the Civil Procedure Rules 1998 (as amended), particularly para 52.11.4 of the *White Book*: authorities such as *Tanfern Limited v Cameron MacDonald* [2000] 1 WLR 311 indicate that an appellate court may only substitute its own exercise of discretion if the first instance court 'has exceeded the generous ambit within which a reasonable disagreement is possible'. The facts of *Eweida* permit of a number of interpretations but it would be difficult to categorise the domestic courts' decision as 'plainly wrong' or 'an error of principle', which are alternative formulations of this test.

48 The judgment recites at para 98 that: 'The evidence before the Employment Tribunal was that the applicant's managers considered there was a risk that a disturbed patient might seize and pull the chain, thereby injuring herself or the applicant, or that the cross might swing forward and could, for example, come into contact with an open wound.'

49 The quotation is lifted from *ibid*, at para 99, while the reference to projection of a corporate image is at para 94.

Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.<sup>50</sup>

It would be an oversimplification to assert that in the future the Court will defer to hospital managers but overrule corporate executives, but an excess of elasticity in the application of the margin of appreciation could prove harmful to the effective functioning of the Court in the long term.

Thirdly, there are the unintended consequences of the judgment, namely a possible chilling effect for human resources in the workplace. One highly material factor (possibly even determinative) was the fact that British Airways changed its uniform policy to remove the ban on the wearing of religious symbols. The *Eweida* judgment is symbolic only: the applicant had already been successful in a higher court – that of public opinion – which had coerced British Airways to relent. This, the Court concluded, demonstrated that the earlier prohibition ‘was not of crucial importance’. Condemning the one employer that had made an adjustment<sup>51</sup> might make employers less inclined in the future to make the pragmatic adjustments that hitherto have been done routinely, for fear they will be condemned for so doing in courts and tribunals. This would be an unfortunate side effect of the otherwise successful outcome of the litigation in its furtherance of religious toleration.<sup>52</sup>

Fourthly, there is what many consider to be the real loser in the four conjoined applications, that of Lillian Ladele. The Court failed to differentiate between Miss Ladele and Gary McFarlane, the Relate counsellor, whose application was rightly rejected because he voluntarily put himself in a position where he would be expected to provide psycho-sexual counsel to both straight and gay couples; and because accommodating him by filtering clients was not possible. It was very different for Miss Ladele. An unanticipated and unilateral change in a fundamental term of her employment gave her a stark choice: to act against her religious convictions (which the court accepted were conscientiously and sincerely held) or to leave her employment. Miss Ladele’s conscience could have been accommodated by Islington without any detriment to Islington’s civil partnership service.<sup>53</sup> Staff employed subsequently would not have the benefit of

50 Ibid, at para 99.

51 In fairness, the hospital trust in *Chaplin* offered an alternative post and ways of displaying Christian symbolism other than a cross on a necklace.

52 See M Hill, ‘Strasbourg marks a sea-change in tolerance’, *Church Times*, 25 January 2013.

53 The Employment Tribunal at para 87 of *Eweida and others v UK* noted ‘We heard evidence that there was no diminution in the service offered by reason of Ms Ladele not undertaking civil partnership duties. [Islington’s witnesses] confirmed in their evidence that they could provide the first class service without Ms Ladele undertaking civil partnership duties.’

conscientious objection and thus there would be a sunset element to this modest level of accommodation. The two dissenting judges in their minority opinion re-crafted Miss Ladele's claim as one of freedom of conscience rather than religion. But the intemperate tone of parts of their judgment<sup>54</sup> serves to detract from the compulsion of its analysis. It is in balancing the protection of the conscience of the employee (taking into account the harm caused to her as an individual by non-accommodation) against the promotion of principles of equality in the provision of a public service (taking into account the absence of harm caused to any individual by accommodation) that these conjoined applications reach their flashpoint. A variety of legitimate but divergent views can reasonably be held on this question. It is perhaps the superficiality of the Court's analysis that is most disappointing in this regard.<sup>55</sup> In the light of the powerfully expressed dissenting opinion, it is hoped that the Grand Chamber may be afforded the opportunity of reviewing the decision in *Ladele* and engaging more thoroughly with the issues of law and principle that were advanced on her behalf and not addressed or resolved in the judgment.

Finally, there is a growing tension between Article 9 rights and the anti-discrimination provisions of the Equality Act 2010. Both are justiciable in United Kingdom courts: the former are also subject to the interpretative jurisdiction of the European Court of Human Rights in Strasbourg, while the latter are dealt with by the European Court of Justice in Luxembourg.<sup>56</sup> Just as the *Eweida* judgment has been long awaited, the time must surely be coming when the clash of religious conscience and discrimination on the ground of sexual orientation is exhaustively considered in the Luxembourg court. And doubtless any dissonance between the approaches of these two pan-European institutions will be the subject of future articles in this and other journals.

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54 Judges Vučinič and Gaetano clumsily referred at para 5 to the 'backstabbing of [Ms Ladele's] colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights)', giving the impression (not least from the use of inverted commas) of trivializing the issue of equal treatment and sexual orientation.

55 Barely seventeen lines in para 106 of the majority opinion.

56 See generally, M Rynkowski, 'The background to the European Union Directive 2000/78/EC', in Hill, *Religion and Discrimination Law*, pp 395–408. For some hints on collaborative practice as between the Strasbourg and Luxembourg courts, see the views expressed by a former President of the European Court of Human Rights when delivering the 2013 Sir David Williams Lecture: J-P Costa, 'The relationship between the European Court of Human Rights and national constitutional courts', University of Cambridge, 15 February 2013.