

of data on same-sex civil partnership registrations, conversions or dissolutions will cast light on the desire amongst opposite-sex couples for access to civil partnerships.

Thirdly, the use of *Oliari* as a frame for Arden L.J.'s reasoning adds an interesting dimension, particularly as counsel had not cited the case to Andrews J. in the High Court. The use of *Oliari* in *Steinfeld* perhaps militated towards finding against the Government but it must be noted the two cases were factually very different since, in the former, Italy was held to be in breach of Article 8 alone for its failure to provide any meaningful form of recognition of *same-sex* relationships (see A. Hayward, "Same-Sex Registered Partnerships: A Right to Be Recognised?" [2016] C.L.J. 27). Nevertheless, by drawing upon the emphasis placed in *Oliari* on the value of State recognition of relationships, choice and the significance of "labels", there is arguably greater potential for the appellants to argue for a breach of Article 8 alone (see [174], per Briggs L.J.). Whilst combining Article 8 and 14 would perhaps be more advantageous in light of the higher standard required to justify discrimination, this use of *Oliari* domestically may signal a broader conceptualisation of family life underpinning Article 8.

Steinfeld is a bizarre decision. Despite dismissing the couple's challenge, the Court of Appeal unanimously stated that the current position *is* discriminatory and, with varying degrees of patience, all members of the court stated that the status quo cannot be maintained indefinitely. On this basis, the litigants succeeded in a *de facto* manner; indeed, as Arden L.J. succinctly states, "the appellants are right" (at [16]–[17]). The Government clearly must make the next move. It would, however, be a cruel irony if such a move, precipitated by the *Steinfeld* litigants, involves removing the discrimination by simply abolishing access to civil partnerships for *all* couples.

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THE CJEU CONFUSED OVER RELIGION

CASE C-157/15 *Achbita v G4S Secure Solutions NV* ECLI:EU:C:2017:203 and Case C-188/15, *Bouagnaoui v Micropole SA* ECLI:EU:C:2017:204 concerned Muslim women who wanted to wear a headscarf at work. In both cases the women were ultimately dismissed from their employment. In *Achbita* the employer, G4S, initially had an unwritten rule, which was converted into a written rule, prohibiting the wearing of visible signs of political, philosophical and religious beliefs. Ms Achbita refused to comply and was dismissed. In *Bouagnaoui* it was not wholly clear whether the employer,

Micropole, had a general rule requiring visually neutral clothing. Nevertheless Ms Bougnaoui was asked not to wear her headscarf while working at a customer's site and was dismissed for misconduct when she refused.

The questions for the Court were slightly different in each case. In *Achbita* the referring court asked whether it was directly discriminatory within Article 2(2)(a) of Directive 2000/78 (Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation) (OJ 2000 L 303/16) to dismiss someone for wearing a headscarf when there was an internal blanket ban on the visible wearing of any political, philosophical or religious sign. In *Bougnaoui* the Court had to consider within Article 4(1) of the Directive whether the wishes of a customer no longer to have the employer's services provided by a worker wearing an Islamic headscarf constituted a genuine and determining occupational requirement.

These cases raise interesting questions of where the line should be drawn between direct and indirect discrimination. This difficulty comes to the fore when an individual seeks to manifest a particular protected characteristic and to argue that the manifestation is inherent to the protected characteristic. The line of argument is that a ban on visible symbols of religion or belief means that a woman who is a Muslim, or an Orthodox Jewish man, cannot work in that workplace because they would not be allowed to wear a headscarf or Kippah. The wearing of the headscarf or Kippah is so much a part of the religion that the ban effectively bans members of that faith group from taking up certain kinds of employment. Such a ban will not affect those of no religion, or certain other religions where no visible faith symbols are required.

Others argue that the manifestation of religion is a matter of subjective choice and should be treated as such. This line of argument is seen in AG Kokott's Opinion in *Achbita*. She drew a distinction between earlier case law in which direct discrimination was assumed where "a measure was inseparably linked to the relevant reason for the difference of treatment" and the situation in *Achbita*. *Achbita* was not concerned with "individuals' immutable physical features or personal characteristics", but with "modes of conduct based on a subjective decision or conviction" (at [44], [45]).

The Court in *Achbita* held that a rule banning the "wearing of visible signs of political, philosophical or religious beliefs . . . covers any manifestation of such beliefs without distinction" and was thus neutral in its effect (at [30]). Thus this was a matter of indirect discrimination, not direct discrimination. The Court in *Bougnaoui* simply cross-referred to the judgment in *Achbita* and did not undertake any substantive analysis of the point because it was unclear whether a general rule was in place or not. However the Court missed the point: the rule in *Achbita* would not affect

those with no religion or belief, or with a religion or belief that did not require any outward manifestation. Therefore it cannot be said to be neutral. The only truly neutral rule would be one, as posed by A.-G. Sharpston in her Opinion in *Bougnouli*, banning “any item of apparel that reflects the wearer’s individuality in any way” (at [110]).

The idea that manifesting one’s religion or belief is merely a subjective choice represents a dangerous turning by the Court, although UK courts have also followed this line. It significantly downgrades the level of protection given to those relying on religion and belief as a protected characteristic as compared to those relying on other protected characteristics, when under the Directives the characteristics are all of equal value. This is particularly so in light of the ECtHR jurisprudence that the right to manifest one’s belief is a fundamental right “because a healthy democratic society needs to tolerate and sustain pluralism and diversity” (*Eweida, Chaplin and Others v UK* [2013] 57 EHRR 8). A.-G. Sharpston’s Opinion is far more compelling in this regard and an important reminder that an individual’s religion cannot simply be left at the door of the workplace.

Frustratingly the Court in *Achbita* decided to go on and consider justification in indirect discrimination, rather than merely answer the question referred. In so doing, it took a further wrong turn. It held that although it was for the national court to consider whether a general neutrality rule was justified, such a rule had to be considered to be a legitimate aim. This was because it related to the freedom to conduct a business and was recognised in Article 16 of the Charter. This is not the first time the Court has used Article 16 to limit employees’ rights (see e.g. Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd.* [2014] 1 C.M.L.R. 21).

The Court also held that prohibiting wearing signs of political, philosophical or religious beliefs was “appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner” (at [40]). However, if the policy was not pursued in a consistent manner, that would be direct discrimination.

Even when discussing proportionality, the only factor considered by the Court was whether the ban was limited to those in customer facing roles and whether those who wished to manifest their religion could then be moved into non-customer facing roles. This hints at a light touch duty of reasonable accommodation, which would be a novel approach by the Court. However there is no indication by the Court that there needs to be a careful consideration of the legitimate aim pursued and the evidence base for it; nor that there was to be any form of balancing exercise looking at the situation more broadly. Instead, the suggested proportionality exercise hints at ghettoisation: those who want to manifest their religion or belief will be hidden from sight. Such a scenario runs directly contrary to the aims of the Directive as expressed in Recital 11, emphasising the achievement of economic and social cohesion.

The Court's decision in *Achbita* is in direct contrast to that of *Bouagnaoui*. Here the Court was considering the applicability of a Genuine Occupational Requirement ("GOR"), permitted by Article 4 of Directive 2000/78. Article 4 provides that a difference in treatment shall not constitute discrimination if the nature or context of the particular occupational activities at issue genuinely necessitate someone to have a particular characteristic. Given that this is an escape clause from direct discrimination, it is generally considered to be a more limited exception. However the entire approach of the Court was different. The Court appeared to follow A.-G. Sharpston's approach whereby she distinguished between the freedom to manifest one's religion, including the wearing of distinctive apparel, and proselytising on behalf of one's religion and said, "Reconciling the former freedom with the employer's right to conduct his business will . . . require a delicate balancing act between two competing rights" (at [73]). The Court emphasised that it was only in very limited circumstances that a characteristic related to religion may constitute a GOR. Moreover Article 4(1) of Directive 2000/78 required that those circumstances had to be objectively dictated by the nature or context of the work. Subjective considerations were not enough. This is absolutely critical because it does not give an employer carte blanche to decide to introduce a rule banning certain religious symbols without a proper evidence base for doing so. Thus the Court held that simply because a customer did not want to deal with an individual wearing a headscarf was insufficient to found a GOR.

The Court's analysis in *Bouagnaoui* has much to commend it. By contrast it is a great shame that the justification defence in *Achbita* was not analysed in a similar manner. Simply saying that a neutrality rule was inevitably and automatically a legitimate aim fundamentally undermines the role of the court in balancing the rights of employees and employers. It allows an employer to introduce such a rule on a whim.

The decision of the Court in *Achbita* is of serious concern as it fundamentally undermines the role of courts in balancing the rights of employees and employers. It demotes manifestation of religion or belief as compared to the manifestation of other protected characteristics by portraying decisions to wear religious clothing as a purely subjective choice. Moreover the Court's interpretation of the justification defence means that there can be no proper review of the basis for a neutrality rule, elevating the employer's freedom to conduct their business above the fundamental right to freedom of religion. By contrast, the Court's approach in *Bouagnaoui* represents a more careful analysis allowing proper review of difficult decisions and a full evidence-based analysis of the factors in play when a rule banning religious symbols is applied in the workplace.

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