Equality and Human Rights Commission Questionnaire:

Legal intervention on religion or belief rights

Response by:

Christian Concern

The Christian Legal Centre

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Equality and Human Rights Commission: Legal Intervention on Religion or Belief Rights

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E-mail response to: stakeholders@equalityhumanrights.com

About Us

Christian Concern is a policy and legal resource centre that identifies changes in policy and law that may affect the Judeo-Christian heritage of this nation. The team of lawyers and advisers at Christian Concern conduct research into, and campaign on, legislation and policy changes that may affect Christian freedoms or the moral values of the UK. Christian Concern reaches a mailing list of over 34,000 supporters. http://www.christianconcern.com

Christian Concern is linked to a sister and separate organisation, the Christian Legal Centre, which takes up cases affecting Christian freedoms. http://www.christianlegalcentre.com

Andrea Minichiello Williams CEO
Christian Concern & the Christian Legal Centre
020 7935 1488
077 12 59 1164
andrea.williams@christianconcern.com

Question 1: *Do you think the UK tribunals and courts applied the correct principles to the cases of **Eweida** or **Chaplin** to ensure that freedom of religion and belief was properly respected as set out in articles 9 and 14 of the European Convention?*

1. We do not believe that the UK tribunals and courts applied the correct principles to the cases of **Eweida** or **Chaplin**. Sedley LJ stated in **Eweida** that "the jurisprudence on Art. 9 does nothing to advance the claimant's case." However, the Strasbourg Court has consistently held that wearing religious dress or displaying religious symbols is a manifestation of one's religion or belief and is thus protected under Article 9(1). Moreover, the Strasbourg Court has held that a restriction on religious symbols or dress does constitute an interference with Article 9 (**El Morsli v. France**; **Dahlab v. Switzerland**; **Sahin v. Turkey**; **Dogru v. France**.)

2. Regarding justification under Article 9(2), the wearing of the Christian cross clearly does not impact on issues of public order, health or morals, or the rights and freedoms of others. Whilst issues of "gender equality", "inappropriate proselytism", the "principle of secularism" and the rise of "extremist political movements" have previously been evoked before the European Court as reasons for interference, these are not applicable in the case of the Christian cross. Therefore, under the European Convention, we believe there has been an interference with Article 9 that, on the facts, cannot be justified. The UK courts failed to give sufficient weight to Article 9, incorrectly deciding that the Article 9 jurisprudence did nothing to advance the cases of **Eweida** and **Chaplin**.

3. Whilst Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised by the Convention, a difference in treatment based on the ground of religion should, like race or sex, rarely be capable of justification (**Hoffmann v Austria**). In both **Eweida** and **Chaplin** there was evidence before the tribunal that members of other religions had been allowed to wear religious symbols in the workplace. The reason given for such a difference in treatment—that some items are "mandatory requirements" of a religion whilst wearing the cross is not—is, in our view, incapable of reasonable and objective justification. First, no evidence was required in either case to demonstrate that items such as the hijab were "mandatory". Thus there was no accurate basis for distinction. Secondly, even if items such as the hijab were mandatory requirements of one's faith or culture, such a position should not mean it is justifiable to prevent non-mandatory symbols from being displayed. This is especially so when considering that in **Watkins-Singh** the court considered "exceptional importance" to be the relevant threshold and **G v Gregory' Catholic College** the court held that even the need to show exceptional importance puts the threshold too high.

4. Furthermore, the indirect discrimination claims in both **Eweida** and **Chaplin** were defeated on the basis that neither claimant had provided evidence of group discrimination. Such a test places too high a burden on the employee and is open to arbitrariness and an unfettered discretion by the courts. For example, in **Eweida** it was held that such a group

must contain more than one person yet in **Chaplin**, a group of two persons was still not accepted by the tribunal, even though another member of staff gave evidence that she wished to wear a cross in a visible place and was similarly asked to remove her cross and chain.

5. Conversely, the county court considered group discrimination quite differently in **Hall and Preddy v. Bull and Bull**. There the court was not provided with any evidence that a group had suffered a particular disadvantage on the basis of sexual orientation. However, the judge still held that it was "clear that homosexuals as a group are disadvantaged by the practice adopted by the defendants" and therefore placed no burden upon the claimants to adduce evidence. In **Chatwal v. Wandsworth Borough Council**, the employment tribunal heard expert evidence that some Sikhs, out of a number approximated to be between 1000-2000 people, shared the Claimant's belief, yet the tribunal found that a group had not been established. The EAT remitted the case back to the tribunal and indicated that the confusion may have arisen because 'there is no consensus in law as to how large (or small) this cohort of others or "group" must be in order to suffice'. Finally, in the recent case of **G v St Gregory's Catholic College**, the court required the claimant to meet a far lower threshold with regards to the requisite group, and the judge held that he was satisfied that there is was group who could be particularly disadvantaged by a refusal to permit students to wear their hair in cornrows.

Question 2: *Do you think the UK tribunals and courts applied the justification test correctly in the cases of Ladele or McFarlane?*

6. We do not believe the UK tribunals and courts applied the justification test correctly in the cases of **Ladele** or **McFarlane.** Justification should involve a balancing exercise – where the rights of the employee are carefully weighed, on the specific facts of the case, against that of the employer. However, in neither **Ladele** nor **McFarlane** did the courts attempt such an analysis.

7. In both **Ladele** and **McFarlane** it was held that the legitimate aim pursued was, in effect, upholding equality. Hence, in **Ladele** the court held that the aim of the employer was not to provide civil partnership arrangements to members of the public but "the promotion of equal opportunities...requiring all employees to act in a way which does not discriminate against others." And in **McFarlane**, the aim was not a requirement to provide therapy services to members of the public but to comply with "the Equal Opportunities and Ethics Policies". Consequently, the courts have held that in situations where there is a clash between religious freedom and sexual orientation rights, "detailed evaluations" as to whether the Christian can be accommodated are "out of place" as the employer is "entitled to treat the issue as one of principle, in which compromise is inappropriate". As a result, the legitimate aim is only ever achievable by *disproportionate* means—by forcing *all* employees to comply and by refusing to accommodate the Christian employee. Thus, as was argued by counsel for Ms. Ladele, "to conclude otherwise would be to licence disproportionality" (per Maurice Kay LJ in **GMB v Allen**).

8. Hence, if the aim behind the facially neutral rule is one of principle, and that principle can never be compromised, then the rule will always be justifiable. Such a position removes the whole purpose of justification and undermines the protection offered under indirect discrimination.

<u>Question 3</u>: *Do you think some concept akin to reasonable accommodation for individuals wishing to manifest their religion or beliefs in the workplace should be incorporated into the approach to human rights in the UK?*

9. We believe that the concept of reasonable accommodation should be extended to apply to individuals who wish to publicly manifest their faith in the workplace. Accordingly, we propose that there should be a positive duty on employers to take all reasonable steps to accommodate the manifestation of religious belief by their employees. Such a move would help employees who hold deep and genuine and religious convictions from being penalised unnecessarily. Indeed on some occasions (such as those before the Strasbourg Court) employees have been forced to choose between either violating their conscience or losing their livelihood.

10. In the UK a similar form of reasonable accommodation, in the form of *reasonable adjustment,* currently exists in relation to disability discrimination law, and we do not see any reason why the concept cannot be extended to employees who wish to adhere to their sincerely held religious beliefs in the workplace.

11. Whilst welcoming the concept of reasonable accommodation for religious belief, we do not agree with the Commission's preliminary proposals on how the concept should be applied. The Commission suggests that accommodation should not be classified as "reasonable" if it would "result in other unlawful discrimination" or would "cancel out or trump" the rights of another. However, this approach is fundamentally flawed since Christian employees who wish to manifest their deeply held religious convictions on marriage and sexual ethics would always fall foul of the Commission's test for reasonableness (on the basis that, in the Commission's view, they have discriminated on the grounds of sexual orientation). Hence, the position adopted by the Commission, whereby all accommodation which is seen as discriminatory towards others would automatically be regarded as unreasonable, should not be implemented.

12. Instead, we propose that reasonableness should be determined by the extent to which such accommodation would cause "*undue hardship"* to the employer, as this is a fair and workable approach which has been tested in U.S. and Canadian law.

13. As applied in North America, whether or not there has been reasonable accommodation is a practical question and is fact specific. Failure to accommodate may be established by evidence of arbitrariness on the part of the employer, by an unreasonable refusal to provide an individual assessment of the employee, or perhaps in some other way. However, in order to determine whether there has been a failure to accommodate, the court has to decide, on

the facts, what steps have been taken to accommodate the employee. For example, were alternatives investigated which would have met the employer's purpose? Was there a way to accommodate the religious employee that did not discriminate against them, yet still accomplish the employer's purpose? Such questions are of a *practical* nature and seek to find a balance between the employee and the employer. Further, they echo the comments made by a government minister when exemptions for religious employees were debated in the House of Lords in 2005. Baroness Scotland of Asthal, for the government, stated:

> Those who manage such situations sensibly if there is a conscientious genuine belief usually make alternative practical arrangements so that there is not embarrassment for people who come forward for the service, and so that there is not the struggle of conscience for the person who legitimately wants to carry out a good job. **Usually both can be accommodated**. (Baroness Scotland of Asthal, House of Lords, *Hansard*, Col. 1153, 13 Jul 2005).

14. The pursuit of such practical solutions has not happened, nor does it appear to be endorsed by the UK courts (for example, see Neuberger LJ, *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 § 72-3).

15. Whilst in both Canada and the U.S. the courts have stated that a person does not have an absolute right to be accommodated; he does have the right to be assessed to determine if an accommodation is possible. Were such an assessment carried out with regards to Mr. McFarlane and Ms. Ladele, it is quite clear that the respective employers would have fallen short of the test: neither even attempted to accommodate the religious employees, let alone show "every possible accommodation short of undue hardship". On the facts, it is feasible that Ms. Ladele could have been accommodated (there were 19 registrars, 17 of which were prepared to conduct civil partnerships, which in any event equated to about 5% of the work), and the same was true for Mr. McFarlane. Indeed, as was pointed out in his case, counsellors did have the option of not counselling clients in certain circumstances, for example, if there was a conflict of interests. However, in both cases, the practicalities of accommodating the Christian employees were never really considered.

16. Therefore, we welcome a concept akin to reasonable accommodation being introduced into UK law and believe it would be a reasonable and workable mechanism to provide a balance in the law that is currently lacking. However, we are concerned about the Commission's preliminary comments, as we believe the Commission's interpretation of reasonable accommodation would fail to provide this balance and would instead fall into the same flaws as the current interpretation of "justification" under indirect discrimination.

Andrea Minichiello Williams
CEO, Christian Concern and the Christian Legal Centre