Case Summary

CASE OF EWEIDA AND OTHERS v. THE UNITED KINGDOM Application numbers:

48420/10, 59842/10, 51671/10 and 36516/10

1. Reference Details

Jurisdiction: European Court of Human Rights (ECtHR) – Chamber Decision

Date of Decision: 15 January 2013

Case status:

Link to full case and judgment: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":["001-115881"]}

2. Facts of the case

The case originated in four applications which were brought against the UK by Christians who believed that they had suffered unlawful discrimination at the hands of their respective employers on the grounds of their religious beliefs. Each applicant argued that the state had violated their right to freedom of religion under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and/or their right to be free from discrimination in the exercise of this freedom under Article 14 together with Article 9 ECHR. They argued variously that the state had either failed to take action to protect these rights or had taken actions which violated the rights. All applicants complained that domestic law failed adequately to protect their right to manifest their religion.

Two of the applicants, Ms Eweida and Ms Chaplin, are Christians who believe that their faith requires them to wear a small cross on a chain visibly around their neck. In both cases, the women's respective employers had refused to allow them to continue in their role unless they removed their cross.

Ms Eweida worked for a private employer, British Airways (BA), in a customer facing role and was told that the cross was a breach of BA's uniform policy. In 2006, Ms Eweida began to display her cross and, after refusing to remove or cover it, she was sent home without pay. In October 2006, after a month's absence, Ms Eweida was offered a non-customer facing role in which she could have worn the cross but she refused this offer and remained at home without pay. In November 2006, BA announced a review of its uniform policy and, in January 2007, BA amended the policy so that religious or charity symbols would be permitted where authorised in future. In February 2007, Ms Eweida was reinstated in her old job, able to wear her cross. She brought claims of unlawful discrimination and sought compensation for the period of time she was without pay. In particular she claimed that the company had indirectly discriminated against her because its uniform policy put her, on the basis of her beliefs, at a significant disadvantage as compared to colleagues with other beliefs, and this could not be justified. Her claims were rejected by the UK courts.

Ms Chaplin worked for a state hospital, the Royal Devon and Exeter NHS Foundation Trust, from 1989 to July 2010. The hospital's uniform policy, which was based on guidance from the state Department of Health, prohibited the wearing of necklaces "to reduce the risk of injury when handling patients". It stated that staff would not unreasonably be denied approval for the wearing of religious jewellery if they made such a request. In 2009 a change in uniform meant that Ms Chaplin's cross was visible. Her requests to wear it were refused on health and safety

grounds. The hospital suggested that Ms Chaplin attach the cross to a badge but, as the badge was not worn at all times, Ms Chaplin refused. In November 2009, Ms Chaplin was moved to a non-nursing temporary position which ceased to exist in July 2010. Ms Chaplin claimed unlawful direct and indirect discrimination. She claimed direct discrimination on the basis that the policy targeted Christians and that Sikhs and Muslims were not treated in the same way in relation to the policy. Her indirect discrimination claim was on similar grounds to those raised by Ms Eweida. Ms Chaplin's claims of unlawful direct and indirect discrimination were rejected by the UK Employment Tribunal and she was advised that, given the Court of Appeal's decision in Ms Eweida's case, any appeal would have no prospect of success.

The other two applicants, Mr MacFarlane and Ms Ladele are Christians who believe that homosexual activity/relationships cannot be condoned.

Ms Ladele was a registrar for a local authority. She believes that same-sex civil partnerships are contrary to God's law. She had been employed by the authority since 1992 and as a registrar since 2002. The authority had a "Dignity for All" policy in which the authority agreed to challenge discrimination in all its forms. This applied to staff, residents and services users and covered discrimination on the grounds of sexuality. The policy stated that the authority had no tolerance for discrimination. In 2005 the Civil Partnership Act 2004 came into force, providing for legal registration of civil partnerships between same-sex couples. In December 2005 the authority designated all registrars as civil partnership registrars, a role that Ms Ladele felt she could not undertake given her beliefs. Initially Ms Ladele avoided conducting civil partnerships by making informal arrangements with colleagues. However, in 2006, two of her colleagues complained that this was discriminatory. The authority informed Ms Ladele that her refusal to conduct the partnerships was a breach of its Code of Conduct and equality policy. Formal disciplinary proceedings were taken and Ms Ladele lost her job. Ms Ladele brought claims of direct and indirect discrimination. Although the Employment Tribunal found in her favour, the UK's appeal courts both found against her.

Mr MacFarlane was employed by a private organisation, Relate Avon Limited (Relate), which provides confidential sex therapy and relationship counselling. Mr MacFarlane believes that the Bible states that homosexual activity is sinful and that he should do nothing which directly endorses such activity. Relate's equal opportunities policy stated that, amongst other things, the company was committed to ensuring that no clients receive less favourable treatment on the basis of their sexual orientation. Mr MacFarlane worked for the company from 2003 to 2008. In 2007, there was a perception in the company that Mr MacFarlane was unwilling to work on sexual issues with homosexual couples. The matter was investigated and, following a procedure during which Mr MacFarlane's statement that he would provide such services was considered to be false, he was dismissed in March 2008. Mr MacFarlane's claims of direct and indirect discrimination were rejected by the UK courts.

The applicants brought their cases to the ECtHR on various dates in 2010. In April 2011, the applications were communicated to the government and the ECtHR decided to rule on their merits and admissibility at the same time. At the date of its judgment, the Court decided to join all four applications as they raised related issues. A number of third parties intervened in the case including, amongst others, the UK's Equality and Human Rights Commission (EHRC), The National Secular Society, the Bishops of Chester and Blackburn and the Fédération Internationale des lingues des Droits de l'Homme (FIDH, ICJ, ILGA-Europe), with views across a spectrum, identifying the contentious nature of the issues raised by the applications.

3. <u>Law</u>

Relevant Domestic Law

- Employment Equality (Religion or Belief) Regulations 2003
- Equality Act (Sexual Orientation) Regulations 2007
- The Court also paid particular attention to a number of judgments of the UK's Appellate courts on the interpretation of Article 9 of the ECHR including *R* (Williamson and Others) v. Secretary of State for Education and Employment [2005] UKHL 15 and *R* (Begum) v. Headteacher and Governors of Denbigh High School [2006] UKHL 15

Regional Laws

- EU Framework Directive for Equal Treatment in Employment and Occupation 2007/78/EC
- Articles 9 and 14 ECHR

Comparative Law

The Court also conducted a comparative analysis of the approaches taken at a national level by other European states, the United States and Canada to the issue of the wearing of religious symbols at work.

4. Decision

a) Admissibility

The Court found all claims admissible with the exception of the claim by Ms Chaplin that she had been subjected to direct discrimination. It was held that Ms Chaplin had failed to exhaust domestic remedies in relation to this claim before bringing it before the Court.

b) Merits

Before ruling in relation to each of the four cases, the Court provided its assessment of the general principles under Article 9 and Article 14 of the ECHR.

Article 9

Article 9 of the ECHR reads as follows:

- 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 community with others and in public or private, and 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.

The Court accepted that the right to hold and to change religious belief under Article 9(1) is absolute and no interference with it can be justified. However, the Court then noted that the freedom to *manifest* one's belief (e.g. through worship, practice in public etc), to which all four applications relate, is not unqualified. The Court noted that a person's manifestation of their belief may impact on others and that this is the reason why this right is qualified in Article 9(2) so that it may be limited if such limitation is "necessary in a democratic society" including "for the protection of the rights and freedoms of others".

The Court heard a variety of arguments as to how it should determine whether a particular practice constitutes a "manifestation" of a person's belief. The government argued that only behaviour which was "an act of practice of a religion in a generally recognised form" fell within this protection. As, in its view, the visible wearing of a cross and the objection to providing psycho-sexual therapy to same-sex couples did not fall within this, the applicants were not entitled to Article 9 protection in relation to these behaviours. Ms Eweida and Ms Chaplin argued that wearing a cross visibly was a generally recognised form of practising Christianity. However, in any event the women together with the other applicants rejected the government's restriction of "manifestation" to include only such practices, stating variously that the proposed interpretation was too restrictive to be in the spirit of the Convention and that it was too vague to be workable in practice. The EHRC, in its intervention, suggested that the correct test as to whether something was a manifestation was whether a given religious practice was driven by a "command of conscience" or by a "mere desire to express oneself", the former falling within Article 9 the latter outside it.

The Court did not accept the government's test. It noted that the protected freedom was primarily a matter of individual thought and conscience. Relying on previous ECtHR judgments the Court stated that, to fall within Article 9(1), views must attain a certain level of cogency, seriousness, cohesion and importance. Where this is met, it is incompatible with a state's neutrality for it to assess the legitimacy of religious beliefs. An act will be a "manifestation" if it is "intimately linked to the religion or belief" i.e. there is a "sufficiently close and direct nexus between the act and the underlying belief". It will not suffice if the act does not directly express the belief or is only "remotely connected to a precept of faith". Whether or not the act is mandated by a recognised religion is irrelevant.

The Court went on to consider an argument that had been made and accepted in some previous case law that, if the restriction on freedom of religion takes place in the workplace, the fact that an individual can avoid it by changing jobs means that their Article 9 right has not been interfered with. It rejected this line of argument, stating that, given the importance of freedom of religion, the right approach is to acknowledge that the individual's right has been interfered with and rather to factor in any ability to work elsewhere when determining whether the particular restriction was proportionate under Article 9(2).

In assessing the appropriate test to be taken when applying Article 9(2) in a particular case, the Court acknowledged that the state has a margin of appreciation in deciding whether and to what extent interference is necessary.

Finally, the Court addressed the state's positive obligations under Article 9 which had allegedly been violated in the cases of Ms Eweida and Mr MacFarlane, who were employees of private companies. The government argued that there was only one previous case in which a breach of a positive obligation under Article 9 had been found, in relation to a state's failure to take action following a violent attack on Jews, and that the cases of Ms Eweida and Mr MacFarlane were not comparable. The Court stated that the applicable principles are similar whether the Court is dealing with positive or with negative obligations and that "in both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole."

Article 14

Article 14 provides that:

"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."

The Court's analysis of Article 14 and its restatement of the parties' arguments in relation to the Article in the judgment is minimal. The Court restated its earlier authority by acknowledging that Article 14 will be applicable if the facts of the case fall "within the ambit" of another Convention right and acknowledges that "religion" is specifically mentioned in Article 14 as a prohibited ground of discrimination.

It confirmed earlier findings that the right not to be discriminated against may be violated where a state, without objective and reasonable justification, fails to treat persons differently whose situations are significantly different. It acknowledged that the state is afforded a margin of appreciation in assessing whether and to what extent difference in otherwise similar situations justify a different treatment and that the scope of this margin of appreciation will vary according to the circumstances, subject-matter and background.

Specific findings on the four applications

The state then applied these principles to the four cases and found that there had been a violation of Ms Eweida's Article 9 rights (and that this finding meant there was no requirement to consider the allegation under Article 14 together with 9) but that there was no violation in the three other cases.

In relation to the uniform policy cases, the Court held that the wearing of a cross by both Ms Eweida and Ms Chaplin amounted to a manifestation by each of their religious belief and that their employers' refusal to allow them to remain in their post whilst wearing the cross was an interference with each claimant's freedom to manifest her religion. However, the outcomes following the Court's assessment of whether that interference was justified on the particular facts in each case were different.

Ms Eweida

The ECtHR noted that, given that Ms Eweida's employer was private, the question was whether the UK had upheld its positive obligations under Article 9. It found that the law regulating discrimination on the grounds of religious belief was not, in itself, insufficient to uphold this positive obligation. However, it held that the UK courts, in applying the law, had violated Ms Eweida's rights under Article 9. Specifically, the ECtHR held that the UK courts, when ruling on Article 9(2) and deciding on the proportionality of the employer's measure to prevent Ms Eweida from wearing the cross, had correctly considered her right to manifest her religious belief and the company's interest in preserving its corporate image as factors to weigh into the balance. However, the ECtHR held that the UK courts had failed to strike the right balance as they had accorded the factor of the company's image too much weight. Ms Eweida's discreet cross could not have detracted much from her corporate appearance and there was no evidence that allowing the wearing of religious dress on previous occasions had detracted from BA's brand or corporate image. In circumstances where there was no evidence of encroachment on the interests of others, the state had failed to adequately protect Ms Eweida's Article 9 right. The Court made this finding with a five to two majority. Ms Eweida was awarded Euro 2000 compensation and Euro 30,000 costs.

The dissenting judges, ECtHR President Judge Björgvinsson and Judge Bratza, considered that there had been no violation of Article 9 and that the courts had dealt appropriately with the examination of whether BA's approach had been proportionate. In particular, the judges did not feel that the majority judgment gave justice to the careful consideration of the balance conducted by the Court of Appeal when considering the proportionality question.

The dissenting judges then went on to consider whether there had been a violation of Article 14 taken with Article 9, which had not been addressed by the majority. On the main claim of indirect discrimination, namely that, as a Christian, Ms Eweida was in a different situation from other employees and should have been treated differently, the judges gave some detailed comments. They noted that Ms Eweida had not criticised the wording of the applicable national Regulations but rather the national tribunal and court in their application of those regulations. The judges set out the particular point of contention: the tribunal and court had held that Ms Eweida had failed to produce evidence of a group disadvantage on the part of Christians but rather only of a disadvantage to herself arising out of her desire to manifest her Christian religion in a certain way: conversely. Ms Eweida had argued that requiring an applicant to show group disadvantage discriminates against adherents of religions which are less prescriptive as regards religious manifestations e.g. religious dress. The dissenting judges saw force in both arguments. They noted that "the purpose of indirect discrimination is to deal principally with the problem of group discrimination" but that "it is also true that to require evidence of group disadvantage will often impose on an applicant an excessive burden of demonstrating that persons of the same religion or belief are put at a particular disadvantage" and that the burden may be especially difficult in the case of less prescriptive religions. However, the judges did not resolve the question because, in any event, in their view there was objective and reasonable justification for the indirectly discriminatory measure in Ms Eweida's case. Accordingly, this important question in relation to the approach to indirect discrimination remains unresolved.

Ms Chaplin

In the case of Ms Chaplin, whose employer was a public authority and therefore directly required to comply with Article 9 ECHR, the Court unanimously held that there had been no violation of her Convention rights, as it could not conclude that the decision to require the removal of the cross was disproportionate. The reason in the case for not allowing her to wear the cross in the manner she requested was for both her health and safety and that of the patients with whom she worked. The Court felt that asking her to remove the cross for a health and safety reason was of "inherently greater magnitude" than for a reason of corporate image (as was the case with Mrs Eweida). In any event, the authorities were entitled to a wide margin of appreciation in relation to safety matters.

In Ms Chaplin's case, the Court also held that there was no violation of Article 14 when taken with Article 9. It did not provide detailed reasoning but rather stated that the factors to be weighed into the balance when considering proportionality under Article 14 would be similar to those it had considered in its Article 9 analysis.

Ms Ladele

Ms Ladele claimed that she had been discriminated against in respect of her right to freedom of religion. The Court, by a five to two majority, rejected that claim. It considered that it was "clear" that Ms Ladele's objection to participating in the creation of same-sex civil partnerships was directly motivated by her religious beliefs. As the events "fell within the ambit" of Article 9, the Article 14 obligations applied.

The Court considered solely whether the local authority had indirectly discriminated against Ms Ladele by applying a provision, criterion or practise which had a "particular detrimental impact" on Ms Ladele because of her religious belief (as compared with a registrar who did not object to same-sex union on religious grounds) and which could not be justified as a proportionate means of achieving a legitimate aim. The Court held that the requirement that all registrars be designated as registrars of civil partnerships as well as marriages, births and deaths had a "particular detrimental impact" on Ms Ladele because of her religious beliefs.

The Court determined that the policy in question was pursued as part of the authority's commitment to equal opportunities which also required that none of its employees acted in a discriminatory manner. The Court accepted that the local authority's aim was legitimate when considered against the backdrop of the need for very serious reasons for discrimination on grounds of sexual orientation and the wide margin of appreciation afforded to states in relation to the regulation of same-sex and different-sex couples.

In considering whether the requirement that all registrars conduct civil partnerships as well as marriages was a proportionate means of achieving its legitimate aim, the Court considered that a balance needed to be struck between Ms Ladele's freedom to religious beliefs and the protection of the Convention rights of others. Acknowledging that the authority's policy was introduced precisely in order to seek to protect the Convention rights of others, and that the authority is to be afforded a wide margin of appreciation in determining how to best go about this, the Court held that it could not find that the state, either in the form of the local authority who enforced the policy or the courts who adjudicated the authority's decision, had violated Ms Ladele's Article 14 right.

The two dissenting judges held that the issue should be seen as one of conscientious objection rather than religious objection to civil partnership. They considered that Ms Ladele had been unjustifiably discriminated against. They disagreed with the majority that there had been any impact on the rights of same-sex service users of the local authority. They pointed out that no same-sex users of the registry service had complained or been unable to access the service. It was the judges' view that the only person to have suffered discrimination was Ms Ladele. She had not made her views public and they had not impacted on the content of her job only its extent. Accordingly, her treatment by the authority was "totally disproportionate".

Mr MacFarlane

Mr MacFarlane, an orthodox Christian who was employed by a private company, complained to a UK employment tribunal that his employer had indirectly discriminated against him on the ground of his religious beliefs in dismissing him after he refused to comply with an equal opportunities policy which required him to provide psycho-sexual counselling services to same-sex couples on an equal basis as to heterosexual couples. His claim was unsuccessful in the UK courts and so Mr MacFarlane argued that the UK had failed to protect his Article 9 right and had also violated his Article 14 right when read with Article 9. The Court unanimously held that there had been no violation of his rights.

The Court accepted that Mr MacFarlane's refusal to provide the counselling to homosexual couples was directly motivated by his orthodox Christian beliefs and was a "manifestation" of his beliefs, meaning the state's positive obligation to protect his Article 9 right applied. The Court went on to analyse whether a correct balance had been struck between the various interests at stake in this scenario. It noted that the loss of his job was a severe sanction with grave consequences for Mr MacFarlane. However, the Court also noted that he had voluntarily signed up to the employer's counselling programme "knowing that [the employer] operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible." Although this choice was not determinative, it was a factor to be considered. However, the Court held that "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." The state had not exceeded its wide margin of appreciation in approaching this case and there was no violation of Article 9 or of Article 14 taken with Article 9.