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## FAITH IN THE PUBLIC SPHERE

*Shami Chakrabarti\**

### INTRODUCTION

When people discuss different equality rights conflicting with each other, they often have in mind conflicts between religious beliefs and gender or sexual orientation rights. Conflicts between other equality rights seem (so far at least) to arise less frequently. Economic difficulties and increased competition for resources may change this, but my right not to be discriminated against (at least directly) on the grounds of my sex or race rarely causes difficulties for others. Equally, it is difficult to think of examples where preventing discrimination on the grounds of disability, sexual orientation, or age will involve significant compromise to someone else's protected rights.

The challenge (and the point) of religious and philosophical beliefs is that they inevitably invoke moral structures, which are not universally shared, and which may not be reflected in modern legal norms. For example, many religions are based on ancient doctrines reflecting patriarchal ideals. This inevitably leads to conflict between those beliefs and the rights of people of different faiths or consciences, women, or gay people.

But these specific and predictable conflicts are not the only problems. Issues of particular faith identity (or the lack thereof) seem to have become particular sore points in our cultural discourse at both the national and local level. You hear of people taking personal exception to accommodations being granted to a fellow employee on the grounds of his or her religion. Their reasoning is that it's "not fair" for someone to be allowed time

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off for religious observance when others are not allowed to leave early, for example, to play sport. I suspect you would not hear the same complaints—at least not so publicly—about accommodations being made for disabled employees or perhaps even for female colleagues with childcare difficulties.

Ten years ago, the Employment Equality (Religion or Belief) Regulations of 2003<sup>1</sup> came into force in the U.K., and have subsequently been superseded by the Equality Act of 2010.<sup>2</sup> It has also been thirteen years since the Human Rights Act of 1998 came into force incorporating Article 9 (freedom of thought, conscience, and religion) of the European Convention on Human Rights into the U.K.'s domestic law.<sup>3</sup> The cases about faith in the public sphere have generated some of the most outspoken commentary, in part because of the huge divergence in views towards religion in the U.K.

Some people have adopted a new breed of aggressive secularism (perhaps an inevitable instinctive response to the rise of international fundamentalist Christian and Islamic movements) that seeks to eradicate religion from public life altogether.<sup>4</sup> Meanwhile, there are substantial minorities of individuals with strongly held religious beliefs involving strict doctrine and practice. Some traditionalists mourn a perceived decline in the Church of England as dominant faith in the land.<sup>5</sup>

Others have encouraged a political and legislative culture that conflates irritation, offence, alarm and distress, as evidenced by our public order and anti-social behavior statute books and

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<sup>1</sup> The Employment Equality (Religion or Belief) Regulations, 2003, S.I. 1660, § 2 (U.K.).

<sup>2</sup> The Equality Act, 2010, c. 15 (U.K.).

<sup>3</sup> Human Rights Act, 1998, c. 42, § 6 (U.K.).

<sup>4</sup> See, e.g., Christina Odone, *The New Intolerance: Will We Regret Pushing Christians Out of Public Life*, NEW STATESMAN (Jan. 14, 2014, 11:12 AM), <http://www.newstatesman.com/2014/01/pushing-christians-out-public-life-new-intolerance>.

<sup>5</sup> See, e.g., George Carey, *An Age When All Faiths are Equal – Except Christianity*, MAIL ONLINE (Oct. 31, 2013, 7:43 PM), <http://www.dailymail.co.U.K./debate/article-2482441/An-age-faiths-equal--Christianity-As-judge-says-Christian-morality-place-courts-stinging-riposte-Archbishop-Canterbury.html>.

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promotes a general fear of difference and dissent.<sup>6</sup> This in turn produces both the nonsense of nervous “Winterval” celebrations<sup>7</sup> and the disgrace of a young British man being arrested for calling Scientology a cult.<sup>8</sup> There has also been an increase in hostility towards religious minorities which has manifested itself recently in calls to ban the wearing of the burkha in public places, most vocally and stringently in continental Europe, but also in the U.K.<sup>9</sup>

Society has three choices in dealing with the question of the extent to which people have the right to express their religion in the public sphere. The first choice is to select and elevate an approved faith to the point of giving it dominant status over all other belief systems. That faith is completely and formally interweaved into the entire legal, political, and social system—every sphere of public life and as much of private life as can be achieved. An extreme example might be Afghanistan under the Taliban, and a more moderate example would be Britain at earlier stages in its history.

The second option is in many ways both equal and opposite. It is based on the view that faith conviction should be viewed as dangerous and divisive. If faith conviction cannot be eradicated altogether, it must be chased from the public to the private sphere—confined to a place of worship, the home, or upstairs under the bed with the pornography. An extreme example would be Stalin’s Russia, and a more moderate one would be the French

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<sup>6</sup> See, e.g., George Monbiot, *At Last, A Law to Stop Almost Anyone From Doing Almost Anything*, THE GUARDIAN (Jan. 6, 2014, 2:30 PM), <http://www.theguardian.com/commentisfree/2014/jan/06/law-to-stop-eveyone-everything>.

<sup>7</sup> Winterval was the name given to Birmingham City Council public events in 1997 and 1998. “Winterval” has since become shorthand in the U.K. for attempts to “rebrand” Christmas so as not to exclude non-Christians.

<sup>8</sup> See Anil Danwar, *Teenager Faces Prosecution for Calling Scientology “Cult,”* THE GUARDIAN (May 20, 2008, 4:53 AM), <http://www.theguardian.com/U.K./2008/may/20/1>.

<sup>9</sup> See, e.g., George Eaton, *Tory MP’s Ban the Burqa Bill Reaches Parliament*, NEW STATESMAN (Sept. 6, 2013), <http://www.newstatesman.com/politics/2013/09/tory-mps-ban-burqa-bill-reaches-parliament>.

Republic.

There is also a third option: a more human rights-based approach and one that resonates well with a society like Britain, a country where the struggle for religious freedom has been so connected with the struggle for democracy itself.

Human beings are creatures of faith and logic, emotion and reason, and this is reflected in the law. It may be true that religion has inspired considerable war and prejudice, but it has also been responsible for art, music, and compassion. While scientists and engineers have produced some of the greatest advancements in human history, their work has also been the stuff of nightmares. If we really believe in freedom of thought, conscience, and religion, then such freedom must include the right to the faith or belief of your choice, the right to no faith, and crucially, to be a heretic to any religion.

Inseparable, enumerated rights like freedom of conscience, expression, and association, and the right to private and family life, all flow from foundational human rights ideals of dignity, equal treatment, and fairness. Lord Nicholls in *Williamson* (a case concerning corporal punishment in schools) said:

Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance.<sup>10</sup>

Some of those historical examples highlight one of the largest dangers that can arise from religious discrimination, namely religion being used as a proxy for race. Sadly, this is not a

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<sup>10</sup> Regina (Williamson & Others) v. Sec'y of State for Educ. & Emp't, [2005] UKHL 15, at [15] (appeal taken from Eng.).

phenomenon confined to history, as is amply demonstrated by the evolving—and increasingly toxic—debate on the wearing of the burkha in public spaces, which is considered below.

As with other forms of individual expression and autonomy, we should be slow to interfere with the expression or manifestation of any religious or other belief—doing so only when such intervention is necessary and proportionate to protecting the rights and freedoms of others. This can of course be a difficult exercise in practice, and there are a collection of core issues which have proved consistently controversial.

In this Article, I focus on two issues. First, I consider what religious and philosophical beliefs the law deems to be worthy of protection. I will look at cases that discuss the scope of “philosophical belief” in the U.K. Employment Appeal Tribunal, the seminal decision of the European Court of Human Rights in *Eweida v. United Kingdom*,<sup>11</sup> which considers the issue of beliefs held by relatively few people, and a subsequent decision in a U.K. Tax Tribunal on the same issue. Second, I consider how far the law requires us to go to protect the manifestation of those beliefs. Specifically, I will analyze the legal position of public officials and business owners providing services to the public and the rights of individuals to wear religious clothing in public, both in the U.K. and in France. Finally, I will conclude by analyzing recent developments in the European Court of Human Rights’ approach to religious freedom.

#### I. WHICH RELIGIONS, BELIEFS, OR MANIFESTATIONS ARE WORTHY OF PROTECTION?

How serious does a belief have to be in order to deserve protection? While U.K. courts and the European Court of Human Rights have said such a belief must “attain a certain level of cogency, seriousness, cohesion and importance,”<sup>12</sup> what does that mean? How do you draw the line between “beliefs” and

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<sup>11</sup> *Eweida v. United Kingdom*, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

<sup>12</sup> *Williamson*, [2005] UKHL 15 at [23]; *Eweida*, 2013 Eur. Ct. H.R. at para. 81.

convictions that are idealistic, scientific, or political? What about beliefs that are offensive or discriminatory? What if you are the only person who holds your particular belief or you interpret your religion in an idiosyncratic way?

These are questions that some find contentious. But in general, a human rights-based approach lends itself to a generous interpretation of the concept of what constitutes religion and belief for the purposes of defining the scope of legal protection. The seriousness of the belief, the extent to which it affects others, and the number of people sharing it might all be relevant factors in deciding whether any interference is justified, but it is surely better not to shut out certain beliefs from being protected at all. The last thing we want are judges—or employers, for that matter—making value judgments about the types of beliefs that are worthy of respect.

This is broadly what the House of Lords, formerly Britain's highest domestic court, was contemplating in *Williamson*.<sup>13</sup> One of the judges in the court below, the Court of Appeal, had thought that a belief in the principle of “spare the rod and spoil the child” did not qualify for protection as a religious belief at all.<sup>14</sup> However, that view was firmly rejected by the House of Lords.<sup>15</sup> Lord Nicholls said:

When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. 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

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<sup>13</sup> See *Williamson*, [2005] UKHL 15.

<sup>14</sup> *Regina (Williamson & Others) v. Sec'y of State for Educ. & Empl't*, [2002] EWCA (Civ) 1926, [23], [2003] QB 1300 at 1310 (Eng.).

<sup>15</sup> *Williamson*, [2005] UKHL 15 at [87].

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the claimant finds 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. [R]eligious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.<sup>16</sup>

*A. What Beliefs Are Worthy of Protection: The Approach of the U.K. Employment Appeal Tribunal*

The U.K. Employment Appeal Tribunal ("EAT") considered the scope of the concept of "philosophical belief" in *McClintock v. Department of Constitutional Affairs*.<sup>17</sup> The case concerned a magistrate who refused to officiate because he might have had to decide whether children should be placed for adoption with same-sex partners and then resigned from his role in family law cases.<sup>18</sup> The magistrate claimed that, in breach of the 2003 Regulations, he had been discriminated against on the basis of his philosophical beliefs. He did not say that he believed adoption by same sex couples was wrong as a matter of principle; just that he thought that there was no convincing evidence that it could be in a child's best interests.<sup>19</sup> It also appears that the magistrate would have been willing to change his mind in light of further research.<sup>20</sup>

The EAT adopted the test for "philosophical belief" set out by the European Court of Human Rights in *Campbell & Cosans v.*

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<sup>16</sup> *Id.* at [22].

<sup>17</sup> *McClintock v. Dep't of Constitutional Affairs*, [2007] I.R.L.R. 29, available at 2007 WL 3130902.

<sup>18</sup> *Id.* at [4].

<sup>19</sup> *Id.* at [7].

<sup>20</sup> *Id.*



*United Kingdom*.<sup>21</sup> that the belief must have sufficient cogency, seriousness, cohesion, and importance, and be worthy of respect in a democratic society.<sup>22</sup> The EAT found that because Mr. McClintock had never framed his objections on the basis of any religious or philosophical belief, he fell outside the scope of the 2003 Regulations. The tribunal had correctly observed that it is not enough “to have an opinion based on some real or perceived logic or based on information or lack of information available.”<sup>23</sup>

*McClintock* demonstrates that while the courts will not judge the “validity” of a claimant’s belief—a possibility ruled out in *Williamson*—it will consider whether the purported belief is in fact a belief based on principle, rather than a *mere opinion* based on the available evidence. As it happens, if Mr. McClintock had maintained a protected belief that it was simply wrong for same-sex couples to adopt, then the outcome would surely have been the same. But if religion is to enjoy neither a punished nor privileged status in society, and accepting that all human beings are to some extent creatures of logic and emotion, faith and reason, there is no real justification for attempting to distinguish a deeply held belief based on evidence from one taken on faith.

The scope of protection for religious and philosophical beliefs in the U.K. has undoubtedly been extended by *Grainger Plc v. Nicholson*, the “green martyr” case.<sup>24</sup> Mr. Nicholson had been dismissed by the defendant and the defendant claimed that the dismissal was due to redundancy.<sup>25</sup> Mr. Nicholson claimed that he was discriminated against based on his asserted philosophical belief in relation to climate change and the environment.<sup>26</sup> The question for some might be: why would a climate change campaigner want a tribunal to treat his convictions as a “philosophical belief” rather than as a scientific fact? The cynical

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<sup>21</sup> *Campbell & Cosans v. United Kingdom*, App. No. 7511/76 , 4 Eur. H.R. Rep. 293 (1982).

<sup>22</sup> *Id.* at para. 36.

<sup>23</sup> *McClintock*, [2007] I.R.L.R. 29 at [45].

<sup>24</sup> *Grainger Plc v. Nicholson*, [2010] I.C.R. 360, *available at* [http://www.bailii.org/U.K./cases/U.K.EAT/2009/0219\\_09\\_0311.html](http://www.bailii.org/U.K./cases/U.K.EAT/2009/0219_09_0311.html).

<sup>25</sup> *Id.* at [2].

<sup>26</sup> *Id.*

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answer would be that it was the only way he could challenge his dismissal. But actually, it seems the belief in issue was much more than just a belief in climate change itself. It was also a belief that we are all morally obliged to take urgent steps to address the causes of climate change through our lifestyles and any other means available. The EAT said that a belief of this kind—provided it was of a similar cogency or status to a religious belief—could fall within the legal framework designed to protect faith and conscience in the workplace.<sup>27</sup> If Mr. Nicholson was made redundant simply for holding this belief, then why shouldn't he be entitled to a remedy from the Tribunal?

In his judgment, Justice Burton summarized the limitations on the concept of “philosophical belief”:

- (i) The belief must be genuinely held.
- (ii) It must be a belief and not . . . an opinion or viewpoint based on the present state of information available.
- (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
- (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.<sup>28</sup>

The scope of protection was considered again in *Power v. Greater Manchester Police Authority*.<sup>29</sup> Alan Power, a former employee of the Police Authority, claimed that he was dismissed because of his spiritualist faith and that his belief that psychics should be used in criminal investigations.<sup>30</sup> The judge in the Employment Tribunal found that a belief in life after death and the capacity to communicate with spirits “on the other side” had

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<sup>27</sup> *Id.* at [26].

<sup>28</sup> *Id.* at [24].

<sup>29</sup> *Power v. Greater Manchester Police Auth.*, [2010] U.K.EAT 0087\_10\_0810, available at 2010 WL 4790841.

<sup>30</sup> *Id.* at [3]–[7].

the necessary cogency, seriousness, cohesion, and importance to qualify as a belief worthy of respect in a democratic society. The EAT upheld this decision and found that the test adopted in *Grainger* was satisfied.<sup>31</sup>

*B. Beliefs Held by Few People: The Approach of the European Court of Human Rights*

The cases decided by the U.K. EAT, discussed above, demonstrate the breadth of the different types of beliefs that are capable of protection in the U.K. What, though, about those beliefs held by very few people? As Lord Nicholls recognized in *Williamson*, religious belief is “intensely personal,”<sup>32</sup> and it would seem odd for protection to depend on whether the belief in question is shared by others who are also put at a disadvantage.

However, that appeared to be the effect of the EAT’s judgment in the case of *Eweida v. British Airways Plc.*<sup>33</sup> The issue in that case was whether British Airways’ (“BA”) uniform policy—which prohibited Ms. Eweida from wearing a small cross around her neck—was indirectly discriminatory on religious grounds and therefore needed justification. Although it was not in dispute that Ms. Eweida was a committed Christian, and that it was a genuine and important part of her faith to wear her cross visibly, the EAT found that there was no indirect discrimination because Ms. Eweida had not shown that BA’s uniform policy disadvantaged Christians as a group.<sup>34</sup>

The Court of Appeal upheld the decision of the EAT<sup>35</sup> because there was no evidence that any other BA employee had ever requested to wear a visible cross, or been deterred from

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<sup>31</sup> *Id.* at [17].

<sup>32</sup> *Regina (Williamson & Others) v. Secretary of State for Educ. & Empl’t*, [2005] UKHL 15, [2005] 2 A.C. 246 [22].

<sup>33</sup> *Eweida v. British Airways Plc.*, [2009] I.C.R. 303 (Eng.), *available at* 2008 WL 4975445. Liberty represented Nadia Eweida in proceedings before the national courts.

<sup>34</sup> *Id.* at [62]–[63].

<sup>35</sup> *Eweida v. British Airways Plc.*, [2010] EWCA (Civ) 80, [2010] I.C.R. 890 (Eng.), *available at* 2010 WL 442383.

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doing so.<sup>36</sup> Liberty argued that indirect discrimination should not require a manifestation of belief to be shared between a group of people with the same protected characteristic.<sup>37</sup> Specifically, that religion and the manifestation of belief is a deeply personal matter and a human rights-based approach should be sensitive to a genuine personal assessment of the requirements a faith places on its adherents.<sup>38</sup> Whether an act is a “manifestation” of what is found to be a sincerely held religious belief should be judged by the believer, him or herself. Care must be taken to avoid engaging in any assessment of the validity of the belief that drives certain actions.

Ms. Eweida successfully pursued her claim in the European Court of Human Rights, under claims found through Article 9, the right to freedom of thought, conscience, and religion, and Article 14, the right to be free from discrimination.<sup>39</sup> During its judgment, the court considered the scope of the right to freedom of thought, conscience, and religion. It reiterated that this right protects views that attain a certain level of cogency, seriousness, cohesion, and importance. The court indicated that the view reaches this level, and the state’s duty of neutrality and impartiality is incompatible with any action by the state to assess the legitimacy of someone’s religious beliefs or the way in which those beliefs are expressed.<sup>40</sup>

However, the court acknowledged that not every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, 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. In order to count as a “manifestation” within the meaning of Article 9, the act in question must be

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<sup>36</sup> *Id.* at [8], [38].

<sup>37</sup> *Id.* at [7].

<sup>38</sup> *See* Eweida v. United Kingdom, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

<sup>39</sup> *Id.* at para. 95.

<sup>40</sup> *Id.* at para. 81.

intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognized form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, 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>41</sup>

The court considered that Ms. Eweida's insistence on wearing a cross visibly at work was a manifestation of her religious belief and that "the domestic authorities failed sufficiently to protect the first applicant's right to manifest her religion."<sup>42</sup> This was the case notwithstanding that there was no evidence that any other BA employee wished to manifest his or her religion in this way.<sup>43</sup>

The court found that BA's uniform policy pursued a legitimate aim "to communicate a certain image of the company and to promote recognition of its brand and staff."<sup>44</sup> However, it noted that Ms. Eweida's desire to manifest her religious belief was a fundamental right "because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tent of his or her life to be able to communicate that belief to others."<sup>45</sup> The court found that the domestic courts had given too much weight to BA's desire to maintain a certain corporate image, especially since Ms. Eweida's cross was discrete and did not detract from her appearance, and there was no evidence that it would have impacted BA's brand or image.<sup>46</sup> Moreover, BA was able to amend its uniform policy to allow for the wearing of

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<sup>41</sup> *Id.* at para. 82 (citations omitted).

<sup>42</sup> *Id.* at para. 95.

<sup>43</sup> *Id.* at para. 94.

<sup>44</sup> *Id.* at para. 93.

<sup>45</sup> *Id.* at para. 94.

<sup>46</sup> *Id.*

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religious symbolic jewelry, which demonstrated that the prohibition was not fundamentally important.<sup>47</sup>

The European Court's finding that Ms. Eweida's rights were breached even though no other BA employee had been shown to have been affected by the rule is the correct approach. A particular method of manifesting a belief does not need to be widely shared to be worthy of protection.

*C. Beliefs Held by Few People: The Approach of the U.K. Tax Tribunal*

The European Court of Human Rights' decision in *Eweida* was applied by the first-tier Tribunal (Tax Chamber) in *Blackburn v. Revenue and Customs Commissioners*.<sup>48</sup> The claimants were members of the Seventh-day Adventist Church who were refused an exemption from a requirement to file VAT returns online on religious grounds.<sup>49</sup> The judge found if he had to make a decision purely using the normal rules of construction, without reference to the Human Rights Act 1998, he would have found that the claimants were *not* entitled to an exemption.<sup>50</sup> While the claimants were members of the Seventh-day Adventist Church, the Church did not consider its beliefs to be incompatible with the use of electronic communications.<sup>51</sup> Indeed, the claimants did not object to the use of all electronic communications, but just to the use of computers, the internet, television, and mobile phones.<sup>52</sup> However, the judge reached a different conclusion in light of the claimants' rights under Article 9.<sup>53</sup>

Continuing the reasoning applied in *Eweida*, the judge took a

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<sup>47</sup> *Id.*

<sup>48</sup> *Blackburn v. Revenue & Customs Comm'rs*, [2013] U.K.FTT 525 (TC), available at <http://www.bailii.org/U.K./cases/U.K.FTT/TC/2013/TC02913.pdf>.

<sup>49</sup> *Id.* at [12], [16].

<sup>50</sup> *Id.* at [33].

<sup>51</sup> *Id.* at [12].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at [44]–[62].

broad approach to the assessment of whether the claimant's Article 9 rights were violated and found that the claimants were manifesting their religious beliefs through their refusal to use computers.<sup>54</sup> While the Revenue and Customs Commissioners did accept that the claimants' beliefs attained the necessary "level of cogency, seriousness, cohesion, and importance to obtain protection" under Article 9<sup>55</sup> they still argued that there was not a "sufficiently close and direct nexus between the act and the underlying belief."<sup>56</sup> The judge rejected this argument saying:

Indeed, as [the claimant] explained it, in shunning computers he and his wife are acting in what they see as fulfilment of a duty mandated by their religion, in that he and his wife believe that they must act in accordance with their conscience in order to be judged righteous at the second coming. And their conscience dictated that they shun computers. In this, therefore, it is apparent to me the manifestation of their religious beliefs in shunning computers *is* acting in fulfilment of a duty mandated by their religion as they perceive it to be. This is clearly within the meaning of "manifestation" in Article 9 as explained by the ECHR in [*Eweida v. United Kingdom*].<sup>57</sup>

The judge found that the requirement to file VAT returns online was in fact a restriction on the claimants' rights under Article 9 and that there was no justification for the restriction.<sup>58</sup> These cases demonstrate the effectiveness of a practical human rights based approach to the protection of religious and philosophical beliefs. The courts correctly acknowledge that it would be inappropriate to adopt a narrow definition of "belief" in order to exclude protection of certain groups. Furthermore, the courts recognize that a measure does not need to affect a wide

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<sup>54</sup> *Id.* at [52].

<sup>55</sup> *Id.* at [50].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at [51]–[52].

<sup>58</sup> *Id.* at [59]–[62].

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group of people who share the same beliefs in order to infringe on a person's right to express his or her belief; even beliefs held by a small minority are worthy of protection.

## II. HOW FAR MUST WE GO TO ACCOMMODATE THE MANIFESTATION OF BELIEFS?

Real respect for freedom of thought, conscience, and belief requires that we be slow to interfere, doing so only when such intervention is necessary and proportionate to protecting the rights and freedoms of others. Generally, it is easier to justify intervention in the context of young children than with adults. It is also easier to justify intervention in the context of employment when a public official, in particular, cannot practically perform his or her reasonable duties or refuses to apply the law of the land and the principle of non-discrimination to those that he or she serves. Intervention is also easier to justify with regard to the provision of goods and services when those engaged in commercial activity seek to discriminate when deciding who they will and will not serve.

### *A. The Religious Beliefs of Public Officials*

The question of how to deal with religious beliefs that are discriminatory in nature has recently come to the forefront in a number of important cases involving public officials. One such case involved Ms. Ladele, a Christian registrar in Islington Council who said that she could not conduct Civil Partnerships because it would involve her participation in creating a union that was "contrary to God's laws."<sup>59</sup> Although an Employment Tribunal originally upheld Ms. Ladele's claim that she had been directly and indirectly discriminated against on grounds of her religion, that decision was reversed by the EAT.<sup>60</sup> Ms. Ladele's appeal was dismissed by the Court of Appeal, since the local

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<sup>59</sup> *Ladele v. Islington London Borough Council*, [2009] EWCA Civ. 1357, at [10] (Eng.).

<sup>60</sup> *Id.* at [3]. It is believed that Liberty was the first NGO to ever intervene in the Tribunal in the public interest.



authority was pursuing the legitimate aim of providing effective service by requiring Ms. Ladele to be designated as a registrar for civil partnerships.<sup>61</sup> The court also found that the local authority was complying with its overarching policy of being committed to the promotion of equal opportunities, which required its employees to act in a way that does not discriminate against others.<sup>62</sup>

Ms. Ladele complained to the European Court of Human Rights,<sup>63</sup> which found that there had been no breach of Ms. Ladele's rights under Article 14 in conjunction with Article 9.<sup>64</sup> Unfortunately, while the European Court upheld the U.K.'s position, it found that the issue fell within the Contracting States' margin of appreciation.<sup>65</sup> The court noted that the consequences for Ms. Ladele were particularly serious as her refusal to be designated as a civil partnership registrar resulted in her facing disciplinary action and losing her job.<sup>66</sup> However, the national authorities were pursuing a legitimate aim and they had not exceeded the wide margin of appreciation that the court generally allows national authorities when balancing competing rights.<sup>67</sup> The local authority had offered Ms. Ladele a compromise whereby she would be required to carry out straightforward

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at [40].

<sup>63</sup> *Eweida v. United Kingdom*, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

<sup>64</sup> Article 14 of the European Convention on Human Rights states:

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.

Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 230 [hereinafter European Convention on Human Rights]. Article 14 does not provide a freestanding right not to be discriminated against, and in order to rely on Article 14, a claimant must be able to show that another of their rights under the Convention is engaged.

<sup>65</sup> *Eweida*, 2013 Eur. Ct. H.R. at para. 61.

<sup>66</sup> *Id.* at para. 102.

<sup>67</sup> *Id.* at para. 106.

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signings of the civil partnership register and administrative work in connection with civil partnerships, but she would not be required to conduct ceremonies.<sup>68</sup>

This case is perhaps a paradigm of a justified interference with someone's expression of his or her religion. Ms. Ladele was a public official who would not carry out functions which she thought conflicted with her beliefs, notwithstanding that those functions had been introduced by a democratically elected Parliament, and the refusal to do the work amounted to unlawful discrimination. Islington's stance was not based on practicality—it could have provided the civil partnerships service without her—but was a matter of principle. The local authority could not be seen as condoning unlawful discrimination.

It would be nonsense if Islington were obliged to accommodate Ms. Ladele's belief on the one hand, and have a duty not to discriminate on grounds of sexual orientation on the other. Discrimination on grounds of sexual orientation is now unlawful in the U.K. and is treated equally with discrimination based on race, sex, and indeed religious discrimination. It would undermine the whole system of equality protection if public officials were allowed to engage in what would otherwise be unlawful discrimination because of their personal beliefs.

*B. The Religious Beliefs of Those Providing Goods and Services to the Public*

In a recent case the U.K. Supreme Court had to decide the issue of how far we should go to accommodate religious belief. The case of *Bull v. Hall*<sup>69</sup> involved Christian bed and breakfast owners who turned away a gay couple—who had booked a double room—because of a sincerely held belief that sexual intercourse outside of traditional marriage is sinful.<sup>70</sup> The court used the broad approach to the assessment of Article 9<sup>71</sup> rights taken in

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<sup>68</sup> *Id.* at para. 26.

<sup>69</sup> *Bull v. Hall*, [2013] U.K.S.C 73, available at 2013 WL 6148231.

<sup>70</sup> *Id.* at [9]–[10].

<sup>71</sup> Article 9 of the European Convention on Human Rights provides:

*Eweida* and *Blackburn*, but while the court accepted that the right to manifest religious belief was clearly engaged, the reasoning in *Ladele* prevailed.<sup>72</sup> Supreme Court Justice Lady Hale, strongly made the case that the moniker of religious freedom did not sanction discrimination in the provision of goods and services:

Homosexuals . . . were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised. Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires “very weighty reasons” to justify discrimination on the grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.<sup>73</sup>

This conclusion aligned with Liberty’s intervention before the U.K. Supreme Court in this case. Liberty argued that the better approach to balancing competing rights is to broadly read Article 9, treat the limitation as interference, and when it comes to the

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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, 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.

European Convention on Human Rights, *supra* note 64, art. 9.

<sup>72</sup> *Bull*, [2013] U.K.SC 73.

<sup>73</sup> *Id.* at [53].

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issue of justification, give significant weight to the importance of affording lesbians and gay men equality in accessing services and in the enjoyment of other social privileges. The court also made it clear that its decision was not a matter of preferring one protected characteristic or one set of rights to another. The result would have been the same if a gay hotel owner sought to turn away a Christian couple on the grounds of their beliefs.<sup>74</sup>

When sexual orientation regulations first came into force in the U.K., there was considerable debate about whether exemptions should be allowed on religious grounds leading to some concessions. Religious bodies continue to be allowed to discriminate on the grounds of sexual orientation in certain limited circumstances.<sup>75</sup> Those lines are drawn by Parliament and those individuals who disagree with those lines should lobby for a change in the law. However, no individual can ask their employer or the courts to extend the scope of the exemptions. I accept that it is difficult for people who are in public or business roles to adapt to changes in the law with which they fundamentally disagree, but which also have a significant impact on how they conduct their role or business. But that's what it means to live in a democracy and you either accept it or, if you feel that strongly about it, you should find another job. There comes a time when the pacifist has to leave the army rather than insist on his pacifism therein.

There will be many other cases that are not as clear cut as those described above, and it is the task of employers and courts to try to come to sensible conclusions. One such example is the case of the Christian bus driver who refused to drive buses carrying the slogan "There's probably no god."<sup>76</sup> His employer recognized that this might be upsetting for him and agreed to try

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<sup>74</sup> *Id.* at [54].

<sup>75</sup> For example, the exemptions from employment equality legislation allow religious employers to discriminate against potential applicants for jobs on grounds of religion or belief and of sexual orientation, and to discriminate against current employees on those same grounds. The Equality Act, 2010, c. 15, § 196, sch. 23 (U.K.).

<sup>76</sup> *Man Refuses to Drive "No God" Bus*, BBC NEWS (Jan. 16, 2009), [http://news.bbc.co.U.K./2/hi/U.K.\\_news/england/hampshire/7832647.stm](http://news.bbc.co.U.K./2/hi/U.K._news/england/hampshire/7832647.stm).

to put him on other routes, as long as this did not inconvenience other drivers.<sup>77</sup> The driver accepted this and agreed that if it became impracticable to accommodate him, he would have to find another job.<sup>78</sup> Sadly, those sorts of stories of tolerance and common sense are either rare, or more likely, rarely reported.

The cases of *Ladele* and *Bull v. Hall* demonstrate that interference with respect for religious freedom in the provision of public and business services can be justified. For example such interferences may be justified in particular security or safety scenarios where an item of clothing must be temporarily removed to allow for a respectful identity check at an airport or sterile conditions in parts of a hospital. But the rights and freedoms of others, in my view, do not include protection from difference, irritation, and offense, as opposed to real harm, whether the individual concerned is in a religious, political, or other minority.

*C. The Right to Wear Religious Clothing in Public: The French Approach*

An example of grossly disproportionate interference with religious freedom is the recent introduction in France of a law banning the wearing of clothing designed to conceal the face in public spaces.<sup>79</sup> The law imposes penalties on individuals who coerce others into wearing clothing that covers their face and on those wearing such clothing.<sup>80</sup> There are only limited exceptions to the ban, for example: clothing permitted by law or on medical or other grounds, worn for sport, festivities, or artistic or traditional events.<sup>81</sup> Although the law is framed in neutral terms, one effect is to prohibit the wearing of the burkha in public

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 on the Prohibition of Concealing the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344.

<sup>80</sup> *Id.* arts. 3, 4.

<sup>81</sup> *Id.* art. 1.

places, and it is a troubling example of the rising anti-Islamic sentiment in Europe.<sup>82</sup>

The French law has been challenged in the European Court of Human Rights and was recently transferred to the Grand Chamber where judgment is pending.<sup>83</sup> The challenge was brought by a devout Muslim French national who wears a burkha and niqab<sup>84</sup> because of her faith, culture, and personal convictions, and who is not pressured to do so by her husband or her family. The applicant is happy not to wear the niqab in certain circumstances, but would like to have the option of wearing it in public. The applicant is relying on Articles 3 (prohibition of torture and inhuman and degrading treatment), 8 (right to respect for private and family life), 9 (right to freedom of thought, conscience and religion), 10 (right to freedom of expression), 11 (right to freedom of assembly and association), and 14 (prohibition on discrimination) of the European Convention on Human Rights.<sup>85</sup> Liberty has intervened in the application and argued that the French ban is an unjustified interference with various human rights.<sup>86</sup> Our submission was based on three propositions.

First, the law clearly interferes with freedom of religion. Following the decision of the European Court in *Eweida*,<sup>87</sup> it is

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<sup>82</sup> See, e.g., Homa Khaleeli, *Islamophobic Hate Crime: Is It Getting Worse?*, THE GUARDIAN (June 5, 2013), <http://www.theguardian.com/U.K./2013/jun/05/islamophobic-hate-crime-getting-worse>; Christine Ogan, et al., *The Rise of Anti-Muslim Prejudice: Media and Islamophobia in Europe and the United States*, 76 INT'L COMM. GAZETTE 46 (2014);

<sup>83</sup> Press Release, European Court of Human Rights, Grand Chamber Hearing Concerning the Prohibition on Wearing the Full-Face Veil in Public in France (Nov. 27, 2013).

<sup>84</sup> *Id.* There are many different recognized spellings of "niqab." I will adopt this spelling throughout this article, except in quotations that use another recognized spelling.

<sup>85</sup> See Brief for Intervenor at 5–7, *S.A.S. v. France*, App. No. 43835/11, available at <http://www.liberty-human-rights.org.U.K./sites/default/files/SAS%20v%20France%20-%20Written%20Subs.pdf>; see also European Convention on Human Rights, *supra* note 64, art. 3, 8–11, 14.

<sup>86</sup> Brief for Intervenor, *S.A.S. v. France*, at 5–7.

<sup>87</sup> *Eweida v. United Kingdom*, 2013 Eur. Ct. H.R., available at

clear that it is not for a court to decide whether the applicant's choice to wear a veil is a valid manifestation of her religion. Nor is it a court's role to question the extent to which other members of the applicant's religious group share her belief in the importance of wearing the burkha and niqab. In previous cases, the European court had dismissed claims for religious discrimination in the employment context because the applicants could choose to resign from their position if it conflicted with their religious beliefs.<sup>88</sup> The court moved away from this approach in *Eweida*, but even if it had not done so, these cases can be distinguished from the French ban—women who wish to wear a burkha in public do not have the option of resigning to avoid the impact of the law; it affects every aspect of their lives.

Second, the ban interferes with an applicant's right with respect to her private and family life under Article 8 because it affects her ability to establish a social life and develop relationships with others. The ban also affects the applicant's right, under Article 10, to express her faith by wearing a burkha.

Third, the effect of the law is discriminatory as it significantly disadvantages Muslim women who choose to wear the burkha. The French law appears to have three potential justifications: (1) it is contrary to Republican values for a person to be cut off from others; (2) there may be a danger to public safety; and (3) the wearing of the burkha is a public manifestation of a lack of equality between men and women. Liberty, however, argued that these interferences with individuals' human rights cannot be justified.

On closer inspection, these justifications are flawed. Whilst secularism is an important value in France, the law specifically affects the wearing of the burkha but does not prevent people from wearing other religious dress or symbols. There is no sound reason for this difference in treatment. Security concerns also do not provide an answer. A requirement to remove a face covering in certain circumstances may be justified, but a complete ban on

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<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

<sup>88</sup> See, e.g., *id.* at para. 83; *Stedman v. United Kingdom*, 23 Eur. H.R. Rep. 20 (1997); *Konttinen v. Finland*, App. No. 24949/94, 87 Eur. Comm'n H.R. Dec. & Rep. 68 (1996).

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wearing the burkha is clearly disproportionate. Many women who wear the burkha would be willing to show their faces for identification purposes and it is not clear that the existing French laws regarding identity checks provide insufficient protection for public security. Finally, while promoting equality is an important aim, punishing women for expressing their faith does not support equality. A law based on clumsy assumptions about what drives a woman to wear the veil disregards her individual autonomy. By forcing women to comply with a particular notion of equality, the law undermines their dignity as women and as Muslims and has the effect of barring them from some public spaces altogether.<sup>89</sup>

*D. The Right to Wear Religious Clothing in Public: the U.K. Approach*

The issues surrounding the wearing of religious clothing in public are not limited to France and have been considered in the U.K. One example is the case of *Azmi*, which concerned a classroom assistant who was not allowed to wear a niqab.<sup>90</sup> Although the school's decision to refuse to allow Azmi to wear the niqab was ultimately found to be justified, the EAT rigorously scrutinized the school's reasons.<sup>91</sup> This was an unusual case because a religious dress requirement arguably did have a negative impact on others. Ms. Azmi's job primarily involved language support for pupils for whom English was not their first language. She was permitted to wear the niqab outside the classroom but not while teaching. General research and observation of her teaching showed that language support could be carried out more effectively if her face was visible. On that basis, the EAT decided that the school's approach was not unlawful.<sup>92</sup>

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<sup>89</sup> It is important to note that the applicants in these cases do not consider themselves to be pressured into wearing the burkha and the niqab, but rather, it is an expression of their religious faith.

<sup>90</sup> *Azmi v. Kirklees Metro. Borough Council*, [2007] I.C.R. 1154 (Eng.).

<sup>91</sup> *Id.* at [62]–[74].

<sup>92</sup> *Id.* at [66], [80]. One interesting aspect of the case was that Ms. Azmi suggested that the situation could be resolved by isolating her from male



A similar issue was considered by the House of Lords, formerly the U.K.'s highest court, in the cases of *R (SB) v. Head Teacher and Governors of Denbigh High School*<sup>93</sup> and *R (X) v. Head Teacher and Governors of Y School*.<sup>94</sup> These cases concerned claims by Muslim girls who asserted a right to wear a jilbab and a niqab, respectively, at school. The court dismissed these claims on the basis that there was no interference with the girls' right to freedom of religion under Article 9 because they could have gone to schools that would have allowed them to wear the religious garments.<sup>95</sup>

A more recent example involves the issue of whether a defendant charged with witness intimidation should be allowed to wear the niqab during a trial in the Crown Court.<sup>96</sup> In his judgment on September 16, 2013, H.H. Judge Peter Murphy set out general principles on when defendants in the Crown Court should be allowed to wear clothing that covers their face.<sup>97</sup> The judge gave detailed consideration to the human rights issues involved. He noted the importance of the right to freedom of religion, but stated that the corollary of this right is a duty to respect legal institutions and a court's rules and practices. The judge also considered the fundamental requirements of an adversarial trial and the need for the court to be able to judge the defendant's reaction and to prevent the defendant from being immunized from effective cross-examination. Furthermore, in order to protect the administration of justice, the court—and not

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teachers. The school refused to do this, which was surely right because it could have led to claims of direct sex discrimination by male teachers.

<sup>93</sup> *R (on the Application of Begum) v. Headteacher & Governors of Denbigh High Sch.*, [2006] UKHL 15, *available at* 2006 WL 690559.

<sup>94</sup> *R (on the application of X) v. Headteachers of Y Sch.*, [2007] EWHC 298 (Admin) (Eng.), *available at* 2007 WL 675365.

<sup>95</sup> *See Begum*, [2006] UKHL 15, at [25]; *Application of X*, [2007] EWHC, 298 at [40].

<sup>96</sup> *The Queen v. D(R)*, Judgment of H.H. Judge Peter Murphy In Relation to Wearing Niqaab by Defendant During Proceedings in Crown Court (Sept. 16, 2013) (U.K.), *available at* [http://www.judiciary.gov.UK./Resources/JCO/Documents/Judgments/The%20Queen%20-v-%20D%20\(R\).pdf](http://www.judiciary.gov.UK./Resources/JCO/Documents/Judgments/The%20Queen%20-v-%20D%20(R).pdf).

<sup>97</sup> *Id.*

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the defendant—must be in control of its procedure.<sup>98</sup>

The judge recognized the importance of wearing a niqab to many Muslim women. He said:

I also recognise the intrinsic merit which the niqaab has in the eyes of women who wear it. I reject the view, which has its adherents among the public and the press, that the niqaab is somehow incompatible with participation in public life in England and Wales; or is nothing more than a form of abuse, imposed under the guise of religion, on women by men. There may be individual cases where that is true. But the niqaab is worn by choice by many spiritually-minded, thoughtful and intelligent women, who do not deserve to be demeaned by superficial and uninformed criticisms of their choice. The Court must consider the potential positive benefits of the niqaab.<sup>99</sup>

In the end, the judge conducted a balancing exercise between the defendant's right to freedom of religion and the rights of others involved in the trial such as the victims, the jurors, and the rights of the public generally. He concluded that it would be appropriate to have some restrictions on when a niqab could be worn during the trial and set out principles on how the issues should be dealt with. For example, a female officer could be asked to confirm the defendant's identity to the court, and while the defendant would have to remove the niqab to give evidence, she could give evidence behind a screen or by video link so that she could not be seen by the general public.

The H.H. Judge Peter Murphy found that restrictions on the niqab in court furthered the legitimate aim of protecting the fair and effective running of the criminal courts. He also held that some restrictions on the defendant's right to freedom of religion were necessary and proportionate to uphold the rule of law in a

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at para. 67.

democratic society.<sup>100</sup> This judgment is an example of a court adopting a nuanced, principled, and practical approach that respects a defendant's religious convictions while protecting the administration of justice. This can be contrasted with the blanket ban in France on wearing the burkha or niqab in public, which is dismissive of an individual's right to express his or her religious convictions.

Unfortunately, not everybody in the U.K. adopts such a sensible approach to this issue. There have been calls for the U.K. to introduce a ban—similar to the one introduced in France<sup>101</sup>—on wearing a burkha in public. A Conservative Member of Parliament, Philip Hollobone, has introduced a private member's bill, the Face Coverings (Prohibition) Bill, which would make it an offense for a person to wear a garment with the primary purpose of obscuring one's face in a public place.<sup>102</sup> While the U.K. government does not support the Bill, and it currently has little prospect of success, its mere introduction demonstrates the rising tide of intolerance that is sweeping across Europe.<sup>103</sup> This trend is further evidenced by a recent YouGov poll conducted in the U.K. in September 2013 that showed that 61% of British adults agreed with the statement: "the burka should be banned in Britain."<sup>104</sup> It is to be welcomed, therefore, that the European Court of Human Rights has been developing a more thoughtful approach to religious freedom in its recent cases.

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<sup>100</sup> *Id.* at paras. 81–85.

<sup>101</sup> See Law 2010-1192 of October 11, 2010 (Fr.), *supra* note 79.

<sup>102</sup> Face Coverings (Prohibition) Bill, 2013-14, H.C. Bill [31] (Eng.).

<sup>103</sup> See, e.g., Morgane Hoarau & Patrycja Sasnal, *The Rise of Islamophobia in Europe*, POLISH INST. INT'L AFFAIRS BULLETIN, May 27, 2013, at 1.

<sup>104</sup> William Jordan, *Most Still Want to Ban the Burka in Britain*, YOUgov (Sept. 18, 2013), <http://yougov.co.U.K./news/2013/09/18/most-still-want-ban-burka-britain/>.

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*E. The Approach of the European Court of Human Rights to Religious Freedom*

The European Court's approach, which is perhaps inevitable for an international court grappling with such diverse national traditions, initially seems to favor secularism. There are a number of cases in which the court said that a person is entitled to his or her beliefs, but there are limitations on his or her right to express those beliefs in the public sphere. Following this reasoning the court found no interference with Article 9 in the case of a woman who was refused permission to graduate from university unless she was prepared to be photographed without a headscarf,<sup>105</sup> or in the case of a teacher who was not allowed time off to attend religious worship on a Friday.<sup>106</sup> Even when the court did find that there was interference, it was often accepted that the restrictions were justified. One example is the court's refusal to hear a complaint about a requirement mandating turban removal during airport security screening.<sup>107</sup>

The European Court's approach of favoring secularism is best demonstrated by the case of *Dahlab v. Switzerland*.<sup>108</sup> In this case the European Court found that a refusal to allow a primary school teacher to wear the hijab (not the niqab, just the headscarf) was justified in view of the "powerful external symbol" that wearing a headscarf represented, specifically that the hijab could be seen as having a kind of proselytizing effect since it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality.<sup>109</sup> The court found that wearing the hijab undermined the message of tolerance, respect for others, and equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>110</sup>

However, in more recent cases the European Court has begun

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<sup>105</sup> *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993).

<sup>106</sup> *Ahmad v. United Kingdom*, 4 Eur. H.R. Rep. 126 (1981).

<sup>107</sup> *See Phull v. France*, 2005-I Eur. Ct. H.R. 409.

<sup>108</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447.

<sup>109</sup> *Id.* at 450.

<sup>110</sup> *Id.*

to show a greater tolerance for religion in the public sphere. A recent example is the case of *Lautsi v. Italy*,<sup>111</sup> which concerned a state school in Italy that had a crucifix fixed to the wall in each of its classrooms.<sup>112</sup> The applicant wanted to give her two children, who attended the school, a secular upbringing, and thought that the crucifix displays interfered with that goal.<sup>113</sup> She claimed that the crucifix presentation breached her right under Article 2 of Protocol No. 1<sup>114</sup> to educate her children in accordance with her religious and philosophical beliefs. She also claimed that it breached her right to freedom of religion under Article 9 and was discriminatory and contrary to Article 14.<sup>115</sup>

In 2009, a chamber of the court adopted the secularist approach and found that there had been a breach of Article 2 of Protocol No. 1 and Article 9.<sup>116</sup> The court found that the state had “an obligation to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it or in places where they were particularly vulnerable.”<sup>117</sup> It noted that in countries where the majority of the population is members of one religion, the use of the symbols of that religion without restriction as to place and manner could constitute pressure on students who do not practice that religion.<sup>118</sup> The court found that while the crucifix had a number of meanings, the predominant meaning was a religious one.<sup>119</sup> The crucifixes could be considered “powerful external symbols” and could be emotionally disturbing for children of other religions or those who were not religious at

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<sup>111</sup> *Lautsi v. Italy*, 54 Eur. Ct. H.R. Rep. 3 (2012).

<sup>112</sup> *Id.* at para. 11.

<sup>113</sup> *Id.* at para. 12.

<sup>114</sup> European Convention on Human Rights, *supra* note 64, art. 2 (“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.”).

<sup>115</sup> *Lautsi*, 54 Eur. Ct. H.R. at para. 29.

<sup>116</sup> *Id.* at para. 30.

<sup>117</sup> *Id.* at para. 31.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

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all.<sup>120</sup> The court could not see “how the display of a symbol that it is reasonable to associate with Catholicism . . . could serve the educational pluralism which is essential for the preservation of ‘democratic society’ . . . .”<sup>121</sup>

This decision was reviewed by the Grand Chamber, which came to the conclusion that there had been *no* violation of Article 2 of Protocol No. 1 or of Article 9.<sup>122</sup> The Grand Chamber acknowledged that states are responsible for ensuring neutral and impartial exercise of various religions, faiths, and beliefs. It also noted though that states are not prohibited from imparting religious or philosophical knowledge either directly or indirectly.<sup>123</sup> In addition, the aim of Article 2 of Protocol No. 1 is to safeguard pluralism in education and to ensure that knowledge is conveyed in “an objective, critical, and pluralistic manner, enabling pupils to develop a critical mind.”<sup>124</sup>

The Grand Chamber thus held that the decision to display crucifixes in state schools fell within the state’s “margin of appreciation and therefore was allowed.”<sup>125</sup> The court said that they had a duty to respect states’ decisions relating to the organization of the school environment, and the setting and planning of the curriculum, provided that they did not lead to a form of indoctrination.<sup>126</sup> Since the crucifix is essentially a passive symbol, its display alone is insufficient to denote a process of indoctrination and did not have the same effect as “didactic speech or participation in religious activities.”<sup>127</sup>

The court’s softer approach is also demonstrated by the cases of *Eweida* and *Ladele*, discussed above, as well as *Chaplin*, and

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<sup>120</sup> *Id.* at para. 73.

<sup>121</sup> *Id.* at para. 31.

<sup>122</sup> The Grand Chamber is made up of seventeen judges: the court’s President and Vice-Presidents, the Section Presidents and the national judge, together with other judges selected by drawing of lots. The judgment of the Grand Chamber is final.

<sup>123</sup> *Lautsi*, 54 Eur. Ct. H.R. 3 at para. 60.

<sup>124</sup> *Id.* at para. 62.

<sup>125</sup> *Id.* at para. 70.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at para. 72.

*McFarlane*, which were all heard simultaneously by the European Court of Human Rights.<sup>128</sup> In its decision, the European Court noted that previously it had held that the possibility of resigning from a job meant that there was no interference with the employee's religious freedom.<sup>129</sup> However, it suggested that those decisions were not consistent with the court's approach to other rights, such as the right to respect for private life under Article 8, or the right to freedom of expression under Article 10, and said:

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 jobs would negate any interference with the right, the better approach would be to weigh the possibility in the overall balance when considering whether or not the restriction was proportionate.<sup>130</sup>

It is therefore clear that, from the perspective of the Strasbourg jurisprudence, employers with policies that restrict their employees' ability to manifest their religious beliefs will potentially be interfering with their employees' rights under Article 9. The employer must then demonstrate that its policies are justified. The court applied this approach to the individual circumstances of the four claimants with differing results. The facts of *Eweida* and *Ladele* have already been discussed above.<sup>131</sup> The facts of the other two cases, *Chaplin* and *McFarlane*, also illustrate the court's approach.

Ms. Chaplin was a nurse on a geriatric ward who wished to wear a cross on a chain around her neck; however, this was contrary to the ward's uniform policy.<sup>132</sup> Her managers believed that there was a risk of injury if one of the patients pulled the chain or if it swung forward and came into contact with an open

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<sup>128</sup> *Eweida v. United Kingdom*, 2013 Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>.

<sup>129</sup> *Id.* at para. 83.

<sup>130</sup> *Id.*

<sup>131</sup> See *supra* Part I.A.

<sup>132</sup> *Eweida*, 2013 Eur. Ct. H.R. at para. 96.

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wound.<sup>133</sup> The court found that here the hospital's goal of protecting health and safety was more important than British Airways' goal of protecting its corporate image.<sup>134</sup> In this instance, the court gave the domestic authorities a wide margin of appreciation since the hospital managers were best placed to make decisions about clinical safety.

Mr. McFarlane was a counselor who, because of his orthodox Christian beliefs, refused to provide psycho-sexual counseling to same-sex couples.<sup>135</sup> This breached his employer's policy that required employees to provide services equally to heterosexual and homosexual couples and McFarlane was let go. The court did note that the loss of Mr. McFarlane's job was a serious sanction.<sup>136</sup> However, when Mr. McFarlane had begun his training course, he was aware of his employer's equal opportunities policy and that he would not be able to filter clients on the ground of sexual orientation. The most important factor for the court was that the employer's action was intended to secure its policy of providing services without discrimination.<sup>137</sup> The state authorities therefore had a wide margin of appreciation.

These cases provide grounds for optimism that, when the Grand Chamber gives its judgment in *S.A.S. v. France*,<sup>138</sup> it will take the opportunity to build on its recent jurisprudence in *Eweida* and *Lautsi*.

## CONCLUSION

I have sympathy with a human rights-based approach to grappling with discrimination arguments, particularly in the context of belief. Domestic law governing faith and belief in the U.K. and all sensible workplace policies should be applied with

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at paras. 98–100; see also *supra* Part I.B discussing *Eweida v. British Airways Plc*, [2009] I.C.R. 303 (Eng.), available at 2008 WL 4975445.

<sup>135</sup> *Eweida*, 2013 Eur. Ct. H.R. at para. 107.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at paras. 108–10.

<sup>138</sup> *S.A.S. v. France*, App. No. 43835/11, 2014 Eur. Ct. H.R.



the fundamental right to freedom of thought, conscience, and religion in mind.

I advocate for a broad and generous approach to what is considered a “protected religion or belief,” such as the approach adopted by the U.K. EAT. This approach minimizes unattractive, divisive, and counterproductive arguments about which personal beliefs are worthy and unworthy of protection per se.

Having adopted a broad approach to what constitutes a protected religion or belief, it is then necessary to accommodate the manifestation of those beliefs and to only interfere with them when it is necessary and proportionate to do so in order to protect the rights of others. Deciding what is and is not a proportionate interference or unreasonable accommodation can of course be a tricky task in the workplace and the public sphere. There will of course be situations in which it is appropriate to interfere with those rights, the cases of *Ladele* and *Bull v. Hall* being obvious examples. However, the best discipline comes from testing alternative scenarios with the principle of non-discrimination and equal treatment itself. Would British Airways have banned the wearing of a headscarf or turban amongst its workforce? On the evidence, patently not. Should a council accommodate a registrar who refuses to officiate over mixed-race weddings? Is an atheist who believes that Christian doctrine is counter to the “laws of physics” best qualified to be a minister of that religion? I suspect most of us would answer my last two questions in the negative.

It is encouraging to see the European Court of Human Rights moving away from a secularist approach and adopting a more balanced approach to issues of religious freedom that gives appropriate weight to individuals’ religious convictions. However, it is unfortunate that some national governments have moved the other way, as is demonstrated by the French ban on the wearing of the burkha or niqab in public, which undermines many Muslim women’s rights to express their religious beliefs.

Nobody ever said that life in a rich, diverse democracy was easy, or that the public sphere and workplace wouldn’t be a place of occasional tension and strife. Our human rights framework offers a robust tool for negotiating the limits of otherwise vague terms like “tolerance” and “cohesion.” Inevitably, the laws that

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afford some protection to those whose beliefs are irritating, or even offensive to us, protect us as well. To quote St. Matthew's Gospel: "Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again."<sup>139</sup> Or, if you prefer a secular Matthew, try the words of fictional Congressman Matt Santos from the Gospel according to Aaron Sorkin's *The West Wing*:

The framers of our Constitution believed that if the people were to be sovereign and belong to different religions at the same time then our official religion would have to be no religion at all. It was a bold experiment then as it is now. It wasn't meant to make us comfortable, it was meant to make us free.<sup>140</sup>

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<sup>139</sup> *Matthew* 7:1-2.

<sup>140</sup> *The West Wing: Mr. Frost* (NBC television broadcast Oct. 16, 2005).