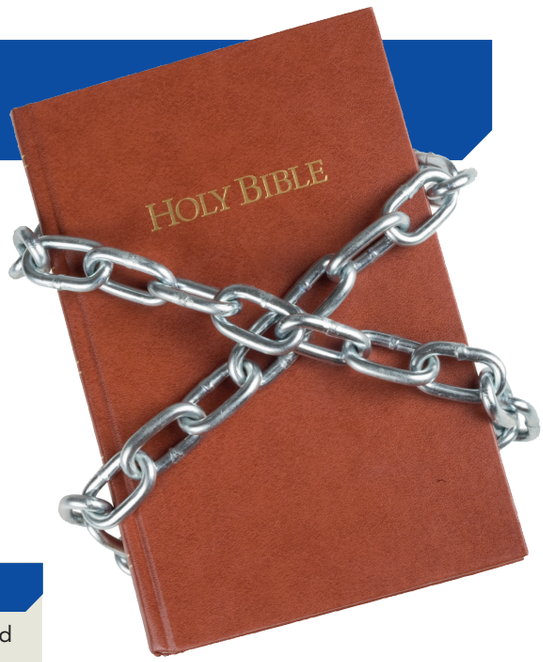
Employment / Religion

Religion at work



Mark Hill QC considers the "reasonable accommodation" of religious belief in UK law

IN BRIEF

- The ECtHR's ruling in *Eweida* clarifies both the reach of freedom of religion and its importance.
- Previously, in English law, only manifestations of belief which were doctrinally mandated attracted protection under Art 9 of the Convention.

The eagerly awaited judgment of the European Court of Human Rights (ECtHR) in *Eweida and Others v The United Kingdom* (App Nos 48420/10, 59842/10, 51671/10 and 36516/10) has sparked considerable media attention. So much so, that the legal principles involved and their nuanced application to an increasing corpus of faith-related litigation may have been lost.

The judgment related to two pairs of cases. The first concerned a British Airways employee and a nurse who both complained that dress codes at their respective places of work prevented them from openly wearing a small cross on a chain around their necks. In the second pair, a registrar of marriages and a relationship counsellor refused to offer their services to same-sex couples on the basis that a homosexual lifestyle was incompatible with their religious beliefs. All four applicants took their case to Strasbourg for oral argument.

Good news for religious liberty

In three seemingly modest, but practically highly significant ways, the judgment promotes freedom of religion, expanding both its reach and its importance.

(i) *Legitimacy of expressions of belief?*
The court has made plain that provided a religious view demonstrates a certain level of cogency, seriousness, cohesion and importance, the state's duty of neutrality "is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the way those beliefs are expressed". This clarification might usefully be applied in the pending case of *Church of Jesus Christ of Latter-day Saints v United Kingdom* (App No 7552/09), which was communicated to the government on 26 April 2011. In this case, a local valuation officer refused to grant an exemption from business rates (which was enjoyed by other churches) on the basis that Mormon doctrine restricted admission to its temples only to those in good standing.

(ii) *Doctrinal mandate for manifestation of belief?*
In recent years, the principle has taken root in English law that only manifestations of belief which are doctrinally mandated attract protection under Art 9 of the European Convention on Human Rights. Thus, in *R (Watkins-Singh) v Aberdare Girls High School* [2008] EWHC 1865, Sikh litigants earned the right to wear the *kara* (bracelet), while a statutory defence to a criminal charge of possession of a bladed article under s 139 of the Criminal Justice Act 1988 has allowed Sikhs to wear a *kirpan* (dagger). Some Muslims have also won the right to wear a veil or head scarf (*Noah v Desrosiers* [2008] UKET 2201867/07, 29 May 2008).

The judgment of the ECtHR has outlawed this narrow interpretation of religious manifestation. It acknowledges that liturgical acts are self-evidently outward expressions of belief, but that the manifestation of religion is much wider than this. What must be demonstrated is "a sufficiently close and direct nexus between the act and the underlying belief". The court could not be clearer: "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." [Para 82].

Thus the domestic courts were wrong to regard the display of a cross as a personal choice and no more than a fashion accessory. This decision in Strasbourg amounts to a vindication of Collins J who, in *G v St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin), commented that the requirement in *Watkins-Singh*, to show that a particular practice was of "exceptional importance" put the threshold too high. It is also doubtful that the reasoning of the High Court decision in *R (Playfoot) v Millais School Governing Body* [2007] EWHC Admin 1698, concerning a "purity ring" can be sustained in the light of this ruling in Strasbourg.

(iii) *Resignation negating interference?*
Perhaps the most significant aspect of the court's judgment is the laying to rest of a principle which had been gaining currency in both Strasbourg and domestic jurisprudence to the effect that if a person can take steps to circumvent a limitation placed upon them, such as resigning from a particular job, then there is no interference with the Art 9 right. It

follows that the employer's defence of "my way or the highway" will no longer to available. As the ECtHR states: "Given the importance in a democratic society of freedom of religion, the court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."

It follows that several domestic cases decided on the impugned basis now outlawed by Strasbourg can no longer be considered to be reliable statements of legal principle. These include the House of Lords decision in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, where the Muslim school girl had the option of moving to another school with a more relaxed uniform policy. In fairness to the English judiciary, several judges, including Neuberger LJ (as he then was) and Mummery LJ were critical of the earlier authorities in *Copsey v WBB Devon Clays Limited* [2005] EWCA Civ 932, with the latter regarding them as "arguably surprising and the reasoning hard to follow".

Although there is a small note of caution where the ECtHR indicates that an individual's decision voluntarily to enter into a contract of employment which will require him to act against his religious beliefs will not necessarily be determinative, it will clearly be a very weighty factor in considering whether a fair balance was struck by the employer in its policy of providing a service without discrimination.

The individual cases

Some might express surprise at how these high-minded statements of principle played themselves out in the individual applications. The Strasbourg court considered that the domestic courts gave too much weight to BA's projection of a certain corporate image and not enough to Eweida's desire to manifest her religious belief. It considered that BA's subsequent amendment to its dress code demonstrated that the visible wearing of religiously symbolic jewellery demonstrated that the earlier ban "had not been of crucial importance". In contrast, nurse Shirley Chaplin lost her claim because, on the particular facts of the case, the scales fell the other way. Her workplace was a hospital where concerns of health and safety amounted to a compelling and proportionate reason for a restriction on her freedom otherwise to manifest her religious beliefs.

The other brace of cases also involved a balancing of rights: promoting equality for same-sex couples against the sincere doctrinal objections of Christian employees. But perhaps the real loser in the four conjoined applications is Lillian Ladele. The court failed to differentiate between Gary McFarlane, the Relate counsellor, whose application was rightly rejected because he knew in advance that he would be expected to counsel both straight and gay couples. But it was very different for Ladele. An unanticipated and unilateral change in a fundamental term of her employment gave her a stark choice: to act against her religious convictions (which the court accepted were conscientiously and sincerely held) or to leave her employment. With creative rostering, Ladele's convictions could have been accommodated by Islington without any detriment to the registration of civil partnerships in the Borough. Staff employed subsequently would not have the benefit of conscientious objection and thus there would be a sunset element to this modest level of accommodation. The two dissenting judges, in their powerful minority opinion, got to the right result despite re-crafting her claim as one of freedom of conscience rather than religion.

The intemperate tone of parts of their judgment, however, serves to detract from the compulsion of its analysis. The Malta and Montenegro judges, for example, clumsily referred to the "backstabbing of [Ladele's] colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured 'gay rights' over fundamental human rights)" giving the impression (not least from the use of inverted commas) of trivialising the equal treatment of same-sex couples.

Some procedural observations

In relation to the condition precedent of admissibility, that an applicant has exhausted his or her domestic remedies, the court has clarified that use of a remedy will not be required when settled legal opinion suggests it offers no reasonable prospects of providing redress. Less helpfully, the court in this instance drew upon relevant comparative law from member states of the Council of Europe, the US and Canada (where it supported the court's stance of there being no settled law on the wearing of religious symbols in the workplace) but made no mention of the substantial corpus of foreign jurisprudence placed before the court which favoured the reasonable accommodation of conscientious objection. This lack of consistency is regrettable.

Of wider concern, however, is that rather than acting as a pan-national tribunal for the securing of fundamental charter rights, what the court did in *Eweida* was to substitute its discretion for that of the domestic court on a matter of judgment which was very finely balanced. This apparent micro-management of national court decisions is an unfortunate precedent; particularly when the court's refusal to redress a manifest injustice in *Ladele* was largely based upon the elastic concept of "margin of appreciation" and deference to the state decision-maker.

Conclusion

The uncompromising reaffirmation of the importance of the Art 9 right to freedom of religion and belief is to be welcomed, as are the three specific ways in which its articulation has been widened and strengthened. How this affects litigation in the domestic courts remains to be seen. The timidity of the court in affording relief only in the BA case, however, may have unintended consequences. There is no bravery in making a declaration against an employer after it has voluntarily lifted its ban. But it may have a chilling effect with employers becoming less likely to respond positively to requests to accommodate religious practices when this may later be used against them. Accommodation is the fruit of compromise best achieved consensually on the shop floor rather than imposed through the blunt instrument of litigation. There is a palpable irony that of the four employers in these cases, it was the one who listened to its staff and made a reasonable adjustment who was condemned. The three intransigent employers were each exonerated. NLJ

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