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Religious Symbols, Conscience, and the Rights of Others

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This article considers some of the features of the judgment in *Eweida and Others v United Kingdom*, which are positive from a religious claimant's perspective—not least the welcome removal of unhelpful definitional 'filters' preventing individuals from making successful Article 9 ECHR applications, and we explore the implications of this for both European and domestic law. We also consider the arguably less satisfactory features of the judgment, particularly the absence of a full consideration of proportionality balancing, most obviously with regard to Ladele's application. We argue that the helpful analysis of a minority judgment correctly conceptualizes the claim as one of individual conscience rather than the right to discriminate against others. To illustrate this point, we propose a 'reversibility test' requiring the court to identify which other individuals' rights would be violated if the religious claimant was accommodated. In Ladele's case we argue that the harm to others was purely notional and amounted to no more than 'bare knowledge offence' at the idea of accommodation (which is not protected under the ECHR). Finally, we consider the extent to which, after the judgment, a public authority might be compelled to require staff to act in conformity with its non-discriminatory goals.

1. *Introduction*

On 15 January 2013, the Second Chamber of the European Court of Human Rights (ECtHR) issued a significant judgment concerning freedom of religion in the cases of four applicants against the UK government (*Ewedia, Chaplin, Ladele,* and *McFarlane*) who argued that their Convention rights had not been protected by the domestic courts in unsuccessful claims for religious discrimination brought against their employers.[1] The claims can be broadly categorized into those concerned with the right to visibly manifest religious belief by wearing a Christian cross in the workplace (*Eweida* and *Chaplin*) and those concerned with a desire to opt out of duties involving perceived promotion of same-sex relationships because of Christian convictions (*Ladele* and *McFarlane*).

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[1] *Eweida and Others v United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) (hereafter *'Eweida and Ors'*).

The Chamber concluded that the right to manifest one's religion was engaged in each of these cases. In the case of *Eweida* it found that the domestic courts had given undue weight to her employer's commercial interests, which, although a legitimate reason for restricting her right, had been given disproportionate attention. In *Chaplin* the Court deferred to the judgment of the national authorities over the need for the restriction for health and safety reasons. In *Ladele* and *McFarlane* the domestic decisions were found to fall within the margin of appreciation of the national authorities in protecting the rights and freedoms of others.

The aim of this article is to offer a systematic analysis of the judgment of the Court from a religious liberty perspective. Particular attention will be paid to the welcome shift in the reasoning of the Court away from a focus on the filtering of claims under Article 9(1) towards an earlier consideration of restrictions for legitimate aims and proportionality balancing under Article 9(2). The possible implications of this at both the European and domestic levels will be explored. How adequately the Court addressed the balancing exercise it set for itself will then be scrutinized. Deficiencies will be considered, particularly in respect of *Ladele*, where it will be suggested that the Court failed to fully analyse the applicant's claim, a claim for accommodation on the grounds of religious conscience, which we argue outweighed the other interests involved. Finally, consideration will be given to the extent to which this judgment refutes the proposition that a public employer might be legally obliged to require employees to act against religious conscience in support of sexual orientation equality.

2. *The Findings of the Court*

In this section we briefly set out the findings of the Court in respect of the four applicants and offer some overarching analysis.

A. *Eweida and Chaplin*

The Court concluded that the desire by these respective applicants to wear a visible cross was a manifestation of religious belief (and thus engaged Article 9(1)).[2] It held that, in both cases, the domestic courts had correctly identified a 'legitimate aim' on behalf of the employer for refusing to accommodate the applicants: for Eweida's employer, British Airways, this was the desire 'to project a certain corporate image';[3] for Chaplin's employer, Royal Devon and Exeter NHS Foundation Trust, this was 'to protect the health and safety of nurses and patients'.[4] The question for the Court to determine in both cases was whether or not a fair balance had been struck by the domestic courts between the rights of the applicants on the one hand and the employers on the other.

[2] ibid [89], [97].
[3] ibid [94].
[4] ibid [98].

With regard to *Eweida,* the Court determined that the UK courts had failed to strike the right balance by affording too much weight to British Airways' imperative to display a consistent corporate image as balanced against Eweida's right to manifest her religion and her natural desire 'to communicate [her] belief to others' (something which should be encouraged in a healthy democratic society).[5] The factors it considered relevant were: the 'discreet' size of Eweida's cross;[6] that there appeared to be no adverse impact on British Airways of the wearing of 'permitted' religious dress such as *hijabs* or turbans; and that the company had encountered no difficulties when it reversed its original policy. The Court found in her favour as there had been no evidence of any 'real encroachment' on the rights of others arising as a result of Eweida's stance.[7]

In *Chaplin* the Court reached a rather different conclusion. Noting from evidence submitted to the Employment Tribunal that Chaplin's managers feared that her cross on its chain might be seized by a disturbed patient or come into contact with an open wound, it observed that 'the protection of health and safety on a hospital ward was inherently of a greater magnitude than that which applied in respect of Ms Eweida.'[8] It considered that health and safety was a field where a wide margin of appreciation should be afforded to domestic authorities and considerable weight should be given to the decisions of hospital managers. On that basis, any interference with Chaplin's Article 9 rights was justified as necessary in a democratic society.

It is interesting to note how the Court chose to constrain its own discretion by affording overwhelming weight to the employer's assessment of the health and safety risks associated with Chaplin's religious expression. Such an approach, taken to its logical conclusion, risks giving a *carte blanche* to employers to invoke 'health and safety' in order to choke off religious manifestation without proper scrutiny by national courts. In other jurisdictions courts have shown more willingness to examine health and safety arguments more closely (and, on occasion, to prefer religious manifestation when balancing the two imperatives).[9] Whereas there is obvious wisdom in giving due weight to the decisions of domestic authorities, there is no reason why the Court should give such a wide margin of appreciation in the field of health and safety and to some extent this is a new (and regrettable) development. In the UK some curious decisions have been handed down in the past, the courts giving priority to health and safety over religious obligations, and it would be disappointing if an avenue for legitimate challenge before the ECtHR were curtailed.[10] In earlier decisions the Court and the former Commission felt able

[5] ibid [94].

[6] 'Discreet religious symbols' have, in the past, attracted a more favourable reaction from the ECtHR than 'powerful external symbols' such as the Islamic headscarf; see *Dahlab v Switzerland* App no 42393/98 (15 February 2001) 7.

[7] *Eweida and Ors* [95].

[8] ibid [99].

[9] See, especially, the Supreme Court of Canada, *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, [59]–[67], emphasizing the lack of violent incidents in Canadian schools arising from pupils' wearing the kirpan (the Sikh ceremonial dagger) and the failure of the authorities to justify the need for an absolute prohibition.

[10] For example, the indirect race discrimination decisions in *Singh v Rowntree Mackintosh* [1979] IRLR 199 (EAT Sc) and *Panesar v Nestle* [1980] ICR 60, (EAT), 64 (CA), in which Sikh job applicants were turned down

to form their own assessment of national practices as either necessary[11] or 'not unreasonable'[12] in protection of health and safety, and this is the preferable course.

B. *Ladele and McFarlane*

In *Ladele,* the Court noted that the applicant held the 'orthodox Christian view' of exclusively heterosexual marriage and that she believed it would be wrong for her to participate in the creation of a same-sex union equivalent to marriage.[13] It agreed that both Articles 9 and 14 ECHR were engaged as Ladele's stance was 'directly motivated by her religious beliefs'.[14] She had been designated a 'civil partnerships registrar' against her wishes and it was her refusal to accept this which had directly led to her losing her job.

In considering whether Ladele's employer, Islington Borough Council, had a legitimate aim, the Court noted that the Court of Appeal had accepted that the aim was not simply the provision of an effective civil partnerships service (which it could provide without Ladele's involvement[15]), but rather a wider aim of requiring all employees to 'act in a way which does not discriminate against others', in accordance with its own equal opportunities policy, to which it was 'wholly committed'.[16] These two ways of constructing what would amount to a legitimate aim in the context of indirect discrimination were at the root of some significant legal argument before the domestic courts.[17] In finding this wider aim to be legitimate, the Court declared that its Article 14 jurisprudence had established that 'differences in treatment based on sexual orientation require particularly serious reasons by way of justification.'[18] It also noted that same sex couples were in a 'relevantly similar situation' to heterosexual couples in terms of requiring legal recognition, although, because this situation was evolving amongst contracting states, a wide margin of appreciation was to be afforded to domestic authorities.[19] Whilst neither observation appears to clearly address the issue at stake, the Court nevertheless concluded that, given the 'background' which it had outlined, the wider aim of the local authority could be said to be legitimate.

Moving on to assess the proportionality of the means used to fulfil this legitimate aim in respect of *Ladele,* the Court observed that Ladele had not

on 'hygiene' grounds after indicating their refusal to remove facial hair for religious reasons (although alternative forms of facial covering might have been safely utilized).

[11] *X v United Kingdom* App no 7992/77 (ECmHR, 12 July 1978) 235 (rejecting a Sikh's application concerning the compulsory wearing of motorcycle crash helmets).

[12] *Dogru v France* App no 27058/05 (4 December 2008) [73] (declaring inadmissible an application by a Muslim schoolgirl required to remove her headscarf during Physical Education classes).

[13] *Eweida and Ors* [102].

[14] ibid [103].

[15] Indeed it was accepted by the Court of Appeal that the employer was able to offer an 'effective' civil partnerships service without Ladele's contribution; see *Ladele v Islington BC* EWCA Civ 1357 (CA) [2009]; IRLR 211 [2010] [44].

[16] *Eweida and Ors* [105].

[17] *Ladele v Islington BC* (CA) [43]–[53].

[18] *Eweida and Ors* [105], citing *Karner v Austria* App no 40016/98 (24 July 2004), *Smith and Grady v United Kingdom* App no 20605/92 (25 June 1997) and *Schalk and Kopf v Austria* App no 30141/04 (24 June 2010).

[19] *Eweida and Ors* [105].

voluntarily put herself in a position in which she would be required to perform civil partnerships, and this apparently weighed in her favour; nevertheless, as the local authority's policy aimed 'to secure the rights of others who are protected under the Convention', and as both it and the domestic authorities enjoyed a wide margin of appreciation, then, on balance, there was no violation of Article 14 or Article 9.[20]

In its disposal of *McFarlane*, the Court accepted that an objection, by the applicant, to providing psycho-sexual counselling to same-sex couples was motivated by his orthodox Christian beliefs and thus the state had a positive obligation to secure his Article 9 rights. Whilst it did not address the question of a legitimate aim specifically, it did go on to consider the extent to which different interests had been balanced, noting *inter alia* that McFarlane had voluntarily sought to engage in the role which subsequently led to the objection and that the employer's policy was one aimed at 'providing a service without discrimination'.[21] In the light of the margin of appreciation to be afforded in such cases, the Court determined that there had been no violation of Article 9, alone or alongside Article 14.

C. *The Minority Judgments*

There were two partially dissenting judgments. In the first, Judges Bratza and Björgvinsson disagreed with the majority decision in respect of *Eweida*. In their view, the domestic Court of Appeal had taken a broad, but not incorrect, approach to balancing the interests involved in deciding in favour of BA. These were: that Eweida herself had observed the company dress code for two years without objection and, having changed her position, had been unwilling to wait for the outcome of her internal grievance before wearing her cross visibly; BA's 'conscientious' approach in dealing with the grievance, including the offer of temporary back office work for Eweida whilst the uniform policy was reviewed; and, finally, the relaxation of the policy to accommodate Eweida in her original job role.[22]

The judges also gave consideration to the way in which the principle of indirect discrimination had been applied by the domestic courts to require evidence of 'group disadvantage' which Eweida was unable to demonstrate.[23] Indeed Eweida argued that to require such evidence was in itself discriminatory against a religion such as Christianity which is less prescriptive in matters of external manifestation of faith than other religions.[24] They agreed that these arguments had some force; however, given their conclusion that the decision of the domestic courts was correct for other reasons, they saw no necessity to resolve the issue.

The second partially dissenting judgment by Judges Vučinić and De Gaetano related to *Ladele*. Their analysis locates the nature of the problem in *Ladele* not

[20] ibid [106].
[21] ibid [109].
[22] Partially Dissenting Opinion of Judges Bratza and Björgvinsson [7].
[23] At the time, under the Employment Equality (Religion and Belief) Regulations 2003, Reg 3(1)(b); now under the Equality Act 2010, s 19.
[24] Partially Dissenting Opinion of Judges Bratza and Björgvinsson [9].

simply as one of religion and belief but as one primarily of moral conscience. The consequences of their insight are potentially significant. The judges note that conscience is referred to for protection under Article 9(1), but is 'conspicuously absent' from the qualifications available to Member States in Article 9(2).[25] They conclude therefore that conscience, once a certain threshold is reached, is an absolute right (akin, it may be said, to the *forum internum*), which cannot be qualified (*inter alia*, with respect to the rights of others) in the way that religious manifestation more generally might be.[26]

In adopting the language of conscience and affording such a high view to this as an absolute right, the judges consider that there was consequently no requirement to engage in any kind of balancing exercise in consideration of sexual orientation rights—the majority had misdirected themselves in this respect. This is because the fundamental human right to exercise moral conscience cannot give way to an 'abstract' right. They treated sexual orientation rights as 'abstract' because there had been no actual complaint relating to specific discrimination by a service user seeking a same-sex civil partnership.[27]

Even if there was scope to qualify Ladele's right, the employer had 'effectively sought to force the applicant to act against her conscience or face the extreme penalty of dismissal', an action which could not be 'deemed necessary in a democratic society'.[28] The dissenting judges conclude therefore that 'it was incumbent upon the local authority to treat [Ladele] differently' to other registrars, something which could easily be achieved at a practical level.[29] It did not do so and as a result subjected Ladele to discriminatory treatment, thus violating Article 14 taken in conjunction with Article 9.

3. *The Primacy of Conscience?*

In this section we explore the implications of the insights of Judges Vučinić and De Gaetano arising from their analysis of *Ladele*.

In our view, the characterization of Ladele's claim as one of 'conscience' is helpful for understanding her behaviour and motivation.[30] As Rawls notes, claims of conscience are not generally made by radicals who want to impose their views on others, but instead they are made by people who would prefer to remain unobtrusive; any conflict with authorities will only arise if they are thrust into a situation where a requirement to do something which violates

[25] Partially Dissenting Opinion of Judges Vučinić and De Gaetano [2].

[26] An alternative reading is that there is no convention right to 'manifest' conscience at all: Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2000) 52–3.

[27] There was no reason why Ladele's stance should have been made known beyond the internal organization of Islington BC; see Andrew Hambler, 'Recognising a right to "conscientiously object" for registrars whose religious beliefs are incompatible with their duty to conduct same-sex civil partnerships' (2012) 7 Religion and Human Rights 157 [171].

[28] Partially Dissenting Opinion of Judges Vučinić and De Gaetano [7].

[29] ibid.

[30] Contrast the EAT's unsympathetic characterization of Ladele as a 'discriminator' who wanted to 'pick and choose' which duties to perform; see *Islington BC v Ladele* [2008] UKEAT 0453/08, [2009] ICR (EAT) [111] (Elias LJ).

conscience arises.[31] This is a helpful construction of the situation of Ladele, whose profound moral difficulties first emerged when her employer indicated that it intended to put her in the position (to 'designate' her a civil partnerships registrar) where she would have no choice but to perform the act giving rise to the moral dilemma. The moral dilemma for Ladele can be characterized as one which would involve personal culpability. In performing a civil partnerships ceremony, she personally would be engaging in disobedience to God by sanctioning relationships which she believed incurred his great displeasure. Ladele had no desire to try to prevent civil partnership ceremonies from going ahead (she was happy initially to engage in informally 'swapping' the registration of civil partnership ceremonies with colleagues in exchange for marriage ceremonies)[32]—her one concern was to act personally in accordance with her own conscience.[33] In designating her a civil partnerships registrar, Ladele's employer could be said to have chosen to violate her conscience and she opted for the path of individual resistance.

It might be argued that such 'conscientious objection' should not be indulged in the workplace, either because public officials do not have a personal veto over implementing policies or providing services to the public that they disagree with,[34] or because the nature of their work involves an implicit agreement to implement new legislation and policies.[35] These objections are not nearly so plausible as they first appear and, arguably, they do not apply clearly to Ladele's case. In brief: accommodation of an official's conscientious objection is not tantamount to a veto where the policy can be implemented effectively notwithstanding (as it could in her case); some public officials do indeed swear an oath to implement law and so have explicitly surrendered the option of conscientiously based objection (police officers, magistrates[36] and judges, for example), but it is not self-evident that an implicit understanding of this kind should be applied across the public sector as a whole; indeed in other fields when introducing controversial legislation, Parliament has provided for conscientious objection, not necessarily limited to current employees or office holders.[37] The argument that the public-sector

[31] John Rawls, 'A Theory of Civil Disobedience' in Ronald Dworkin (ed), *The Philosophy of Law* (OUP 1977) 94. For a useful discussion of the various facets of conscientious objection, see Charles Moskoks and John Chambers (eds), *The New Conscientious Objection* (OUP 1993).

[32] *Ladele v Islington BC* (CA) [8].

[33] There is perhaps a parallel here with the legal right of GPs to refuse to make referrals to abortion clinics where they have a conscientious objection to abortion; however, they are required to make 'prompt referral to another provider of primary medical services who does not have such conscientious objections' (The National Health Service (General Medical Services Contracts) Regulations 2004 s 3(e)). The result is that that the GP does not prevent the abortion going ahead, but can satisfy conscience to the extent of not being party to it *personally*.

[34] For discussion of the failure to recognize questions of conscience, see Javier Martínez-Torrón, 'The (Un) protection of Individual Religious Identity in the Strasbourg Case Law' (2012) 2 OJLR 363.

[35] National Secular Society, *Submissions in the cases of Eweida and Chaplin v United Kingdom and Ladele and McFarlane v United Kingdom* (14 September 2011). Note that the Civil Service Code [11] requires civil servants not to 'frustrate the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions'. Ladele was a local government officer (Court of Appeal [5]) and there is no general equivalent duty for such officers.

[36] See *McClintock v Department of Constitutional Affairs* [2007] UKEAT/0223/07/CEA (31 October 2007); [2008] IRLR 29.

[37] See especially Abortion Act 1967 s 4(1) (participation in abortion); Human Fertilisation and Embryology Act 1990, s 38 (participation in embryo research). As an example of protection limited to those in post when

workplace has no room for officials' freedom of conscience is over-broad therefore.

It must be conceded that Parliament rejected attempts to include conscience clauses in equality legislation for the benefit of registrars with objections to officiating at civil partnership ceremonies; however, this may have been partly because of unwillingness to impose a uniform solution to the problem regardless of local circumstances.[38] And of course that refusal is nothing to the point when considering the Article 9 claim. A number of countries have recognized the conscientious objections of officials like Ladele when introducing comparable legislation.[39] Internationally courts have taken mixed stances: claims to exemption have been rejected in the Canadian Province of Saskatchewan[40] and Spain,[41] whereas they have been upheld in the Netherlands.[42]

It is notable that the judges explicitly exclude McFarlane from protection on the grounds of conscience (he is compared to a volunteer for the army who then expects to be exempted from fighting). Thus, it would seem that conscience, paramount though it is, can be voluntarily suspended in a 'specific situation', something which the Court had already rejected as a general principle where Article 9 is invoked.[43] Such an approach would serve to limit the reach of protection for conscience to work situations where an individual has a requirement unexpectedly imposed on him or her. There may also be implications for new converts and for those whose religious convictions, which might inspire conscientious objection, undergo significant changes during their period of employment.[44]

4. *Broader Significance for Article 9 ECHR Jurisprudence*

In our view this judgment provides timely clarity concerning the admissibility of Article 9 claims in the workplace and, by extension, in other contexts. This point will be developed in the section that follows.

Prior to this case there have been two approaches which have been applied, not without contradiction, by the ECtHR. Of these the dominant model has been to

legislation changed, shop workers are protected from being asked to work on Sundays and any dismissal for refusing to do so is deemed unfair): Employment Rights Act 1996, Part IV.

[38] See the unsuccessful amendment to the Equality Bill 2005 moved by Lady O'Cathain: HL Deb 13 July 2005, vol 684 col 1147. Responding for the government, Baroness Scotland stated (ibid col 1153): 'While an authority may of course take what practical measures it can to respect the private views of its staff, we do not feel that it is right to forbid the authority ... to require those staff to perform their functions if it is necessary.'

[39] See Bruce MacDougall, Elsje Bonthuys, Kenneth Mck.Norrie and Marjolein van der Brink, 'Conscientious Objection to Creating Same-Sex Unions: An International Analysis' (2012) 1 Canadian Journal of Human Rights 128, discussing the position in Canada, the Netherlands, Scotland, and South Africa.

[40] *In the Matter of Marriage Commissioners Appointed Under The Marriage Act, 1995*, 2011 SKCA 3 (10 January 2011), holding in a preliminary ruling on the legality of a proposed statutory exemption, that it would be contrary to the s 15 of the Charter of Rights to allow a conscience provision for a marriage commissioner not to solemnize a same-sex marriage.

[41] *Tribunal Supremo, de la Rubio Comos*, No 69/2007 (11 May 2009).

[42] Council of State (*Kamerstukken* II 2011/12, 32 550, nr 35).

[43] *Eweida and Ors*, [83]; see discussion below.

[44] See Sheldon Leader, 'Freedom and Futures: Personal Priorities, Institutional Demands and Freedom of religion' (2007) 70 MLR 713.

exclude claims at the point of admissibility under Article 9(1)—essentially a 'definitional' exercise (which, when the rights of others are in play, might be termed 'definitional balancing').[45] Such definitional balancing, having the effect of filtering out claims before any more substantive balancing of interests might be required, has clustered around two contentions.

First, claims have been excluded from admissibility because they do not engage a religious practice considered 'mandatory' to that religion by the Court. As the European Commission on Human Rights put it in its well-known ruling in *Arrowsmith v United Kingdom,* 'Article 9(1) does not cover each act which is motivated or influenced by a religion or belief.'[46] Looked at from the perspective of the applicant, this has meant that an individual must show that the particular practice, for which he or she wishes to obtain protection as a 'manifestation' of religion or belief, is necessary to, or mandated by, the religion or belief system espoused.[47]

Secondly, claims have been excluded on the basis that the right to 'manifest' religion does not apply in all contexts, or in Lord Hoffman's words 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'.[48] This approach serves to limit the exercise of Article 9 rights in 'specific situations',[49] perhaps the most important of which would appear to be the workplace, although it has also been applied more widely in the context of education.[50] The rationale for this is twofold: either employees can be considered to have surrendered their Article 9 rights on entry to the workplace;[51] alternatively they have the right to resign from their 'situation' in order to preserve their Article 9 rights.[52]

The second approach by the Court has been to accept Article 9(1) claims without applying a definitional filter (or at least calibrating the filter very widely), but without necessarily providing a principled justification for this approach. In respect of the 'necessity' test, in its decision in *Jakóbski v Poland,*[53] for example, the ECtHR found that the refusal of a Buddhist prisoner's request for vegetarian food engaged Article 9 (even though vegetarianism is not a requirement of the Buddhist religion). In *Bayatyan v Armenia,*[54] the same court accepted that when opposition to military service is

[45] This concept originated in discussion of US jurisprudence, but can be applied to the ECHR; see Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 OLJR 109, 117.

[46] App no 7050/75 (ECmHR, 12 October 1978) para 71.

[47] See also *Valsamis v Greece* App no 21787/93 (ECtHR, 27 November 1996).

[48] *Begum v Denbigh High School* [2006] UKHL 15 [50] (Lord Hoffman).

[49] *Kalac v Turkey* App no 20704/92 (23 Jun 1997) [27]. See also discussion in Mark Hill, Russell Sandberg and Norman Doe, *Religion and Law in the United Kingdom* (Wolters-Kluwer 2011) 53.

[50] For example, in the context of a university student, see *Karaduman v Turkey* App no 16278/90 (3 May 1993).

[51] For example, in *Ahmad v United Kingdom* (1982) 4 EHRR 126 [App no 8160/78 (ECmHR, 1 March 1981)], the applicant was considered to have entered into a contract, under which a conflict arose with his desire to attend Muslim Friday prayers, of his 'own free will' and his Article 9(1) application therefore failed. See also: *Kontinnen v Finland* App no 24949/94 (3 December 1996); *Pichon and Sajous v France* App no 49853/99 (2 October 2001).

[52] In *Stedman v United Kingdom* App no 29107/95 (ECmHR, 9 April 1997), the Applicant, a Christian, had suffered unilateral variation of her working hours by her employer such that a conflict arose over Sunday working. However, the Commission determined that she had a right to resign and this alone was sufficient to secure her Article 9 rights.

[53] App no 18429/06 (7 December 2010).

[54] App no 23459/03 (7 July 2011).

motivated (rather than required) by sincerely held religious beliefs then it falls within the protection of Article 9. Similarly, some applications have been admitted contrary to normal operation of the specific situation rule,[55] a rule which, it should also be noted, has been only rarely applied to other Convention rights, thus creating inconsistency in the application of the Convention as a whole.[56]

Despite the inconsistencies and, arguably increasing challenge to the use of definitional filtering to screen out Article 9 applications, the submissions to the Court concerning *Eweida and Ors* by both the National Secular Society[57] and the UK government[58] indeed advocated an approach of this kind under which Article 9 would have been found not to have been engaged. According to the Government submission, 'behaviour or expression that is *motivated* or *inspired* by religion or belief, but which is not an act of *practice* of religion in a *generally recognised form*, is not protected by Article 9'; equally, 'employees who face work requirements incompatible with their faith, and have the option of resigning and seeking alternative employment, cannot claim for a breach of Article 9.'[59]

As a result of the decision in *Eweida and Ors*, it is clear that such arguments have been definitively rejected. What the Court has achieved is to provide clarity over the future of the definitional balancing approach. The most significant overall point is that the definitional filter, if it applies at all, has been significantly watered down in respect of accessing Article 9 rights. The Court has explicitly called time on the necessity test by stating '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.'[60] It has instead established that 'a sufficiently close and direct nexus between the act and the underlying belief',[61] assuming that belief is also judged to be both cogent and important, is sufficient to establish that the Article 9 claim is a bona fide one.[62] By admitting all of the instant claims, the Court has made clear that the 'close and direct nexus' is to be interpreted broadly, albeit that the outer limits of that breadth may require testing in the future.

[55] For example, in *Pitkevich v Russia* App no 47936/99 (8 February 2001), the Court determined that Article 9 was *prima facie* engaged in respect of a judge dismissed for expressing her religion in the court room; in *Siebenhaar v Germany* App no 18136/02 (3 February 2011), an application was admitted in the case of an employee dismissed as a day care worker by a church (having been found to be a member of a religious group with views incompatible to those of her employer).

[56] For examples of cases where applications under other Convention articles were declared admissible include *Halford v United Kingdom* App no 20605/92 (25 June 1997); *Smith and Grady* v *United Kingdom* App nos 33985/96 and 33986/96 (27 September 1999); *Sidabras v Lithuania* App nos 55480/00 and 59330/00 (27 July 2004); *Sorensen and Rasmussen v Denmark* App nos 52562/99 and 52620/99 (11 January 2006); *Obst v Germany* App no 425/03 (23 September 2010); and *Schuth v Germany* App no 1620/03 (23 September 2010). The rare exceptions include: *Kosiek v Germany* App no 9704/82 (28 August 1986); *Glasenapp v Germany* App no 9228/80 (28 August 1986); and *Bozhilov v Bulgaria* App no 41978/98 (22 November 2001).

[57] National Secular Society, *Submissions*.

[58] Foreign and Commonwealth Office, *Respondent's Observations in the cases of Ewedia and Chaplin v United Kingdom* 14 October 2011.

[59] ibid [6] and [35] (emphasis in original).

[60] *Eweida and Ors* [82].

[61] ibid [82].

[62] Interestingly, the importance of considering individual sincerity before admitting a claim is not emphasized in this judgment, although the jurisprudence of the Canadian Supreme Court, which attaches some significance to it, is quoted as a reference point, ibid [49].

In respect of the specific situation rule, the Court has removed this as a filtering device for Article 9(1). Instead, it has repositioned it, in a way that it notably has not done with the now defunct necessity test, as a reference point in weighting the claim under Article 9(2).[63] This is surely to be welcomed at least in the way it was applied in the instant cases. McFarlane's decision to seek a role which would conflict with his religious beliefs (insofar as he might be reasonably expected to realise this would occur) rightly weighs against him to a certain extent.[64] Equally, in a full reversal of the application in *Stedman,* it was surely right that, since the employer had unilaterally varied the contract of employment to create the religious objection, this was to be weighed in Ladele's favour.[65] However, it is notable that in both cases the situational context was lightly weighted compared to other relevant factors. Why this should be so was not clearly articulated.

Ultimately, the effect of abandoning definitional balancing will be to admit more Article 9(1) claims relating to situations, particularly in relation to employment and education, hitherto excluded. This in turn will give rise to an increased requirement for the Court to focus on applying Article 9(2) and to engage in the more sophisticated process of seeking to balance potentially competing rights, such as those connected to religion and those connected to sexual orientation.[66] This is a process which is well established in ECHR jurisprudence in general,[67] but which is at an early stage in relation to Article 9.[68]

5. *Dealing with Clashes of Rights Within the Convention Framework*

In this section we address the implications of the ruling for dealing with the apparent conflict between the right to manifest one's religiously derived beliefs about marriage and sexual orientation equality.

A preliminary point is that it is far from clear from the brief and somewhat vague treatment of the issue in four paragraphs of the Court's judgment concerning Ms Ladele just exactly how it went about dealing with the conflicting rights question in her case. The issue was undoubtedly complicated because she had complained of a breach of Article 14 in conjunction with Article 9 but not of Article 9 itself.[69] The standard that the Court set for itself of comparing under Article 14 the treatment of Ladele with a registrar with no

[63] ibid [83].
[64] ibid [109].
[65] ibid [106].
[66] See discussion in Ian Leigh, 'Homophobic Speech, Equality Denial and Religious Expression' in Ian Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) ch 19.
[67] See Aaron Baker, 'Proportionality and Employment Discrimination in the UK' (2008) 37 Ind L J 305.
[68] See Leigh, 'Balancing Religious Autonomy' for a discussion of the early indicators of this change in approach.
[69] In McFarlane's case the question was more straightforward since he had also complained of a breach of Article 9.

religious objections to same-sex unions[70] was not therefore fully applied. Oddly also, in finding for the state, the Court appears not to have relied on the Article 14 jurisprudence allowing for a difference in treatment by national authorities based on reasonable and objective grounds, which, although cited, is not applied.[71] The Chamber's reasoning contrasts unfavourably, for example, with the more structured approach of the Fourth Chamber to the question in *Grzelak v Poland*,[72] where two agnostic parents challenged the failure of their son's primary school to offer a course on ethics as an alternative to religious education and Court found that there had been a violation of Article 14 in conjunction with Article 9 because of the implications of the lack of a recorded mark for religion/ethics in the context of the prevailing educational arrangements and the social realities in Poland.[73] *Grezlak* is notable for applying a much more clearly structured and probing approach[74] to a claim under Article 14 in conjunction with Article 9 than the Chamber in its *Ladele* decision.[75]

If the reasonable and objective justification test had been applied arguably it would have worked in Ladele's favour. By analogy with *Thlimmenos v Greece*[76] a religiously motivated marriage registrar should be treated differently to one with other objections to performing civil partnership ceremonies and the national authorities' failure to recognize this difference based on her conscientious objection amounts to a violation of Article 14.[77]

In practice, however, rather than following an Article 14 approach, the Chamber in *Ladele* seems to have impliedly engaged in a proportionality exercise under Article 9(2) or some composite of Article 9(2) and Article 14. For this purpose the applicant's claimed right to manifest her religion was counter-posed with the actions of the national authorities aimed at securing the enjoyment of the Convention rights of others.[78]

One approach to clashing rights which we can say has been conclusively rejected in *Eweida* is a definitional approach. Essentially, as we have explained, a definitional approach avoids rather than resolves conflicts of rights cases.[79] For example, by distinguishing between the (inviolable) right to hold religious beliefs and the putative (non-) right to act on those beliefs in ways prohibited

[70] *Eweida and Ors* [104].
[71] Although this test is referred to in the preliminary statement of the relevant law, ibid [87]–[88].
[72] App no 7710/02, (15 June 2010).
[73] ibid [95].
[74] In particular at [89]–[100]. In an otherwise predominantly Roman Catholic society the absence of a mark for 'religion/ethics' on the applicant's school certificates therefore amounted to 'unwarranted stigmatisation' by, in effect, clearly signalling the applicant's religious affiliation (ibid [99]). The Court was 'not satisfied that the difference in treatment between non-believers who wished to follow ethics classes and pupils who followed religion classes was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued'(ibid [100]).
[75] See *Eweida and Ors* [103]–[106].
[76] App no 34369/97 (Grand Chamber, 6 April 2000).
[77] This is also a response to the argument that the employer had a distinct interest in allowing no exceptions by designating all marriage registrars.
[78] *Eweida and Ors* [106].
[79] For discussion of the definitional and ad hoc balancing approaches with regard to the treatment of religiously motivated speech that offends equality norms, see Leigh, 'Homophobic Speech, Equality Denial and Religious Expression'.

by equality legislation. This is a technique that can be seen at work in both the domestic proceedings in *Ladele*[80] and in other UK court and tribunal cases in which religion and sexual orientation claims have mixed.[81]

As we have seen, the UK government submission to the ECtHR indeed advocated a definitional approach of this kind under Article 9 (which it argued was not engaged). This argument was inconsistent with the text of Article 9 from which it is clear that *manifesting* one's religious beliefs is a qualified right—but a right nonetheless. This rules out a definitional approach to conflict-avoidance in clashing rights cases that rest on reimagining Article 9 as nothing more than a right *to worship or to believe*. There is no mandate from the Convention text to draw a sharp belief-action distinction of the kind invoked by the Court of Appeal in *Ladele*.[82]

As a result of the decisive rejection of a definitional approach by the Court in *Eweida and Ors*, it is now clear that once an Article 9 claim based on *manifestation* comes into conflict with another human right the appropriate means of resolution is through Article 9(2). Approached systematically for the claim for limitation to be made out this requires: (i) that the limitation be 'prescribed by law'; (ii) that the state identify a legitimate aim within Article 9(2)—most likely here 'the protection of the rights and freedoms of others'; and (iii) that the ECtHR finds that the restriction is 'necessary in the interests of democratic society'. The critique below will focus on stages (ii) and (iii).

The question was whether protection of 'the rights and freedoms of others' gave good reason here for limiting the right to manifest one's beliefs about same-sex partnerships (in Ladele's case)[83] or about same-sex intercourse and counselling concerning it (in McFarlane's).[84] The Court's approach to determining the legitimate aim for the restriction based on the necessity[85] of protecting the rights and freedoms of others is deeply problematic. The imprecision arises from the doubly wide margin of appreciation that the Chamber allows to states—first with regard to how sex orientation equality

[80] Note the Court of Appeal's characterization:

> Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform *a purely secular task*, which was being treated as part of her job; Ms Ladele's *refusal to perform that task involved discriminating against gay people in the course of that job*. . . .. Ms Ladele's objection was based on her view of marriage, which was *not a core part of her religion*; and Islington's requirement *in no way prevented her from worshipping as she wished*.
>
> (*Ladele v Islington BC* [2010] (CA), [52], Neuberger LJ, emphasis added).

Similarly, the EAT had referred to her 'hostility to giving effect to the legal rights of same sex couples' (*London Borough of Islington v Ladele* [2008] EAT Case No UKEAT/0453/08/RN (10 December 2008) [124]) and 'it necessarily follows that the manifestation of the belief must give way when it involves discriminating on grounds which Parliament has provided to be unlawful' (ibid [127]).

[81] See the comments of Rafferty LJ (finding discrimination in the provision of goods and services by Christian bed and breakfast proprietors with objections to offering double-bedded accommodation to same-sex couples): 'I do not consider that the Appellants face any difficulty in manifesting their religious beliefs, they are merely prohibited from so doing in the commercial context they have chosen.' (*Bull and Bull v Hall and Preddy* [2012] EWCA Civ 83, [56]).

[82] *Eweida and Ors* [83]. See also Joint Partly Dissenting Opinion of Judges Bratza and David Thor Björgvinsson [2].

[83] *Ewieda and Ors* [23] ('she sincerely believes same-sex civil partnerships are contrary to God's law').

[84] ibid [31] ('He holds a deep and genuine belief that the bible states that homosexual activity is sinful and that he should do nothing which directly endorses such activity.').

[85] Under Article 9(2) it has to be shown that it is *necessary in a democratic society* to do so.

rights are secured[86] and then with regard to how they are balanced with freedom of religion.[87]

There are various situations in which rights could be said to clash. The strongest is where the state in effect has to mediate between two *obligations* owed to individuals or groups to protect their Convention rights. Examples are the policing of protest and counter-demonstrations or the conflict between intrusive investigative journalism and privacy. Weaker are situations in which the obligation owed by the state to one party is opposed to an entitlement of another person protected by domestic law which does not itself have the status of a Convention right (eg the contractual rights of an employer). Intuitively and as a matter of principle one might expect the Court to take a more rigorous approach to examining the balance struck by the domestic authorities in cases of a weak clashing right,[88] since there is a danger that non-mandatory legislation granting domestic rights could otherwise indirectly undermine the mandatory protection of Convention rights.[89]

A key way to distinguish between strong and weak clashes of rights is to employ what we call the *reversibility test*—the Court should ask itself whether if the state were to give priority to the less favoured right (here the Article 14 in conjunction with Article 9 right) would another disappointed person have an admissible Convention claim?[90] Put another way, can we identify the 'others' whose rights and freedoms are being protected by the state at the cost of applicants like Ladele? Had the UK courts upheld her case under domestic discrimination law could another claimant have stepped forward with a claim that either their right to respect for their private life (Article 8), their right to marry (Article 12) or non-discrimination (Article 14) had been violated? This is a much more specific and structured exercise than the Chamber engages in[91] and the answer to the question is, we submit, 'no'.

At first sight it might appear from the Court's analysis that *Ladele* is an example of a strong clashing rights case, whereas *Eweida* is an instance of a weaker clashing right. After all in its disposal of both *Ladele* and *McFarlane*, the Court simply accepted, without apparent reservation, that the respective employers involved had a legitimate aim—to secure the rights of others which are also protected under the Convention.[92] However, more careful analysis of the relevant Convention jurisprudence shows that this is an over-simplification and does not satisfy the reversibility test.

The status of same-sex partnerships varies considerably across the Council of Europe and recognizing this reality the Court of Human Rights has adopted a cautious and nuanced approach to claims to legal recognition by same-sex

[86] *Eweida and Ors* [105].
[87] ibid [106].
[88] We discuss the margin of appreciation in clashing rights in the section following.
[89] cf S Greer, *The European Court of Human Rights: Achievements, Problems and Prospects* (CUP, 2006) 266. He also argues that this follows from the decision to include some rights and exclude others from the Convention text.
[90] For use of the reversibility test to elucidate ostensible clashes of freedom of expression and freedom of religion in the Court's jurisprudence see: Ian Leigh, 'Damned If They Do, Damned If They Don't: The European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 Res Publica 55.
[91] *Eweida* [105]–[106].
[92] ibid [106].

couples. The Court has repeatedly held (and very recently reiterated)[93] that a state's decision failure to provide for the marriage of same-sex couples does not violate the right to marry (Article 12) since this applies explicitly to marriage between people of different sexes.[94] Moreover, it has confirmed that these textual references in Article 12 to marriage between a man and a woman are deliberate and cannot be reinterpreted, even allowing that the Convention is a 'living instrument'.[95] States enjoy discretion over how or whether to give an entitlement to an alternative form of legal recognition for same-sex partnerships.[96] It is clear then that the UK Civil Partnerships Act 2004, which Ladele was required to apply, was *not* enacted because there was an obligation under the Convention to provide state recognition for same-sex couples in this way.[97] Once the discretionary nature of recognition of civil partnerships is appreciated the clash of rights in *Ladele* is seen to resemble *Eweida* more than first appears or the majority's reference to protecting the Convention rights of others would suggest. It is clearly an example of a weak clashing right rather than a strong clashing right.

The dissenting opinion of Judges Vučinić and De Gaetano partly reflected the distinction that we have developed here when they argued that the majority of the Court erred and should not have reached the balancing stage of the exercise because there was no legitimate aim in sight for a restriction on either freedom of religion or non-discrimination on grounds of religion.[98] This conclusion is a logical outworking of a strict separation between strong and weak clashing rights, with the added dimension that, even treating access to civil partnerships as a weak (non-Convention) right, to accommodate Ladele did not involve denial of the right. Logically appealing as this approach may be it can be seen as overly purist, bearing in mind the rather imprecise way in

[93] *H v Finland* App no 37359/09 (13 November 2012) [38]: 'While it is true that some Contracting States have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.' See also *X and Others v Austria* App no 19010/07 (19 February 2013) [106].

In *Wilkinson v Kitzinger* [2006], EWHC 2022, [2007] 1FLR 295 a domestic human rights challenge in the UK courts to the non-availability of same-sex marriage failed.

[94] *Schalk and Kopf v Austria* App no 30141/04 (24 June 2010), [57]–[58] and [63]–[64]. Nor can this be derived from Article 14 in conjunction with Article 8 (the right to respect for private life): ibid [101] and n 96 below.

[95] ibid [55].

[96] ibid [108]. In *Case of Vallianatos and Others v Greece* Appl nos 29381/09 and 32684/09 (Grand Chamber, 7 November 2013), the ECtHR found a breach of Article 14 in conjunction with Article 8 arising from the non-availability of civil unions to same-sex couples in Greek law. The Grand Chamber indicated clearly that this did not imply that there was a positive obligation upon states under Article 8 to provide for legal recognition of same-sex partnerships (ibid [75]). Rather, the Grand Chamber based itself squarely on the Greek government's failure to justify the difference in treatment as necessary or proportionate (ibid [80]–[90]) and observed that Greece was one of only two Council of Europe states (out of 19 in total) in which in opting to introduce civil partnerships as an alternative to marriage had limited them to different sex couples (ibid [91]). While this decision does not rule out the future tightening of the margin of appreciation by the ECtHR so as to establish a positive obligation to recognize same-sex partnerships, it suggests, nonetheless, that any such development is not imminent.

[97] In *MW v UK* App no 11313/02 (23 June 2009), rejecting a claim that denial of bereavement benefit to a surviving same-sex partner violated Article 14 (the benefit was only payable to spouses and the facts occurred prior to the Civil Partnership Act), the Court stated: 'The applicant's complaint that it was impossible during his partner's lifetime to gain formal recognition of their commitment to one another is in effect criticism of the length of time it took the United Kingdom to enact the necessary legislation. However, … the Government cannot be criticised for not having introduced the Civil Partnership Act at an earlier date . … Instead, by acting as they did and when they did, the United Kingdom authorities remained within their margin of appreciation.'

[98] We argue therefore that the dissenting judgments of Judges Vučinić and De Gaetano are to be preferred to the majority's approach.

which the Court has often in the past referred to the rights and freedoms of others. An alternative approach that perhaps fits the Court's practice more comfortably is for weak clashing rights to be given less weight in the balancing exercise when the proportionality of limitations on Convention rights is considered.

That being the case we argue that the majority should have applied something like the same rigour in considering the feasibility of the employer accommodating Ladele that it did in Eweida's case.[99] If there is no Convention right for a same-sex couple to enter a civil partnership, *a fortiori* there is no right that a particular registrar perform the ceremony or (assuming that it would not make achieving civil partnership status impossible or more difficult) that the public body in question should not accommodate a dissenting employee.[100]

The situation is materially different to that in the French pharmacists' case of *Salous and Pichon*. A state might conclude that there are circumstances in which accommodating religious objections of pharmacists could amount to outright denial of certain kinds of contraception (for example, the morning after pill in the case of women in rural areas). Here, however, it was both easily possible for other registrars to cover for Ladele and the employer had allowed this on other occasions without any loss of service—proof of precisely the kind that was used by the Court to determine that protection of British Airways' interests was disproportionate in *Eweida*.

On close analysis the case against accommodating Ladele on the basis of the 'rights and freedoms of others' instead resembles a claim that same-sex couples have a right not to be offended by someone else's manifestation of their beliefs or by the knowledge or mere possibility that a public body has accommodated them.[101] As the Court has pointed out, however, in its jurisprudence on blasphemy, religious hatred and religious education, there is no Convention right not to be offended[102] and no right not to be exposed to convictions other than one's own.[103] The margin accorded to the national authorities to project themselves as 'wholly committed to the promotion of equal opportunities'[104] should be read restrictively in the light of these statements, so that national authorities do not take an overly broad view of what promoting equal

[99] See the Court's treatment of the potential impact on Eweida's employer, British Airways, of accommodating her: *Eweida and Ors* [94].

[100] Equally (in relation to *McFarlane*), there is no Convention right to sexual counselling in the sense that a state which failed to make it available would breach a person's Article 8 or Article 10 rights. So applying the reversibility test, the Article 14 argument would seem spurious. Taking a weaker approach to 'the rights and freedoms of others' it might be argued that this could encompass protection of another person's interests under domestic non-discrimination law even where such legislation was not required to protect Convention rights (as with protection from discrimination on grounds of sexual orientation in the enjoyment of goods and services such as counselling, under the Equality Act 2010). This appears to be what the ECtHR has in mind with regard to McFarlane (at *Eweida and Ors* [109]).

[101] This could be likened to what Feinberg calls 'bare knowledge' offence, see: Joel Feinberg, *Offense to Others* (OUP 1985); see also Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2008) 64.

[102] *Otto-Preminger Institute v Austria* App no 13470/87 (20 Sep 1994) [47].

[103] *Appel-Irrgang v Germany* App no 45216/07 (20 October 2009) (unsuccessful by Protestant parents objecting to requirement of Berlin schools that pupils attend a compulsory course in ethics).

[104] *Eweida and Ors* [105].

opportunities for sexual minorities entails at the expense of the rights of dissenters.[105]

Moreover, we argue that additional arguments about discrimination, although they complicate the picture, do not materially alter this analysis—if anything when they are properly considered the case against Ladele appears weaker still. It is certainly the case that the Court has employed the concept of discrimination to the benefit of same-sex applicants to soften the otherwise straightforward implications that would follow from its clear Article 12 analysis, described above. Thus, in a decision in November 2013 the Grand Chamber found that the non-availability of civil unions to same-sex couples in Greek law violated Article 8 in conjunction with Article 14. The Grand Chamber reasoned that such recognition fell within 'the ambit' of Article 8 (notwithstanding there is no such positive entitlement) and that Article 14 applies to discrimination within 'the ambit' of Convention rights.[106]

The 'ambit' test is a rather clumsy and unconvincing attempt to circumvent the clear wording of Article 14, which prohibits only 'discrimination in the enjoyment of the rights set forth in this Convention'. Somewhat implausibly the Court invariably intones when applying it that Article 14 is not a freestanding right against discrimination . . . . before proceeding to apply it as though it were. Nevertheless, the use of the ambit doctrine is a well-established feature of the Article 14 jurisprudence and its application for the benefit of same-sex *applicants* is therefore relatively uncontroversial.

Much more contentious, we argue, is its deployment in a clashing rights context—especially in a weak clashing rights case—to limit the protection of another Convention right, as occurred in Ladele. There is, however, a potential way out of the conundrum caused by the Court's over-generous deployment of the ambit under Article 14. This would be would be to adopt a variation on the narrow approach to balancing rights that we have advocated—this is that Article 14 should be interpreted more widely when it is used as a sword than when it is used as a shield. The practical implication would be that the generous ambit test that has allowed civil partnerships to fall within Article 12 would stand but that when this right is balanced against others it should be treated more narrowly.

Arguably, when balancing an Article 14 claim to non-discrimination on grounds of religion against the state's invocation of Article 14 on grounds of sexual orientation, weight should be given to the specific nature of the respective interferences with the rights. In Ladele's case the complaint was not merely within the ambit of Article 9 (so as to trigger Article 14), rather, it is clear from the Court's new approach to complaints in the workplace,[107] that there was squarely a prima facie interference with Article 9.[108] On the other

[105] For a similar argument in relation to US constitutional law see: Robin Fretwell Wilson, 'Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws' (2010) 5 Nw J L & Soc Pol'y 318.

[106] Case of *Vallianatos and Others v Greece*, n 96 above. See also *Schalk and Kopf v Austria* App no 30141/04 (24 June 2010). Contrast *Gas and Dubois v France* App no 25951/07 (15 March 2012).

[107] ibid [83]; see Part 4 above.

[108] This could not have been clear beforehand and presumably was why an application relating solely to Article 9 was not also lodged.

hand, the Court's argument about rights and freedoms of others rested on the fact that civil partnerships were within the ambit of Article 12 (notwithstanding that there was no strict right to one). The dissenting opinion of Judges Vučinić and De Gaetano refers to a distinction between 'abstract' and 'concrete' rights which, although couched in language that some commentators have found to be 'intemperate',[109] is nonetheless persuasive. So it can be argued that the majority of the Chamber was wrong to accord a state a margin to prioritise protection from ambit discrimination over discrimination in the enjoyment of a Convention right as such.

6. *Conflicting Rights and the State's Margin of Appreciation*

Many contemporary societies are in conflict about the status and nature of sexual orientation and same-sex partnerships. Healthy and robust constitutional jurisprudence from other jurisdictions recognizes that in coming down on side or another in the debate it is illiberal for the state to do so such that one point of view is allowed to obliterate the other.[110] As Justice Albie Sachs of the South African Constitutional Court has said in ruling that despite religious objections to such unions, the denial of same-sex marriage was unconstitutional:

> The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.[111]

The Strasbourg Court has itself followed this approach in relation to freedom of assembly, and rightly taken a strict view of the state's responsibilities, in holding that public officials cannot rely on religious sensibilities of others in order to prohibit Gay Pride marches.[112] In *Alekseyev v Russia* the Court found a breach of the right to peaceful assembly (protected by Article 11 of the Convention) when the authorities in Moscow banned marches aimed at promoting public awareness and toleration of homosexuals. Religious opposition from Orthodox and Muslim groups at the very notion of public visibility of sexual minorities was not a legitimate interest that the state could invoke in preventing the marches on grounds of public safety or protection of morals. The Court's reasoning applies equally, however, to protect religiously motivated protest against such measures, as does its call for states to permit

[109] Mark Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in Eweida and others v United Kingdom' (2013) 15 Ecc L J 191; and Ronan McCrea, 'Strasbourg Judgment in Eweida and Others v UK' <http://ukconstitutionallaw.org/2013/01/16/ronan-mccrea-strasbourg-judgement-in-eweida-and-others-v-united-kingdom/> accessed 11 November 2013.

[110] *Chamberlain v Surrey School District No. 36* [2002] 4 SCR 710, 788 (Gonthier J dissenting, joined by Bastarache J).

[111] Constitutional Court of South Africa, *Minister of Home Affairs and Another v Fourie*, Case CCT 60/04 (1 December 2005) [94].

[112] *Alekseyev v Russia* App nos 25924/08 and 14599/09 (21 October 2010) [59]–[60], [81], [83]; *Bączkowski and Others v Poland* App no 1543/06 (2 May 2007); *Genderdoc-M v Moldova* App no 9106/06 (12 June 2012).

'fair and public debate' 'ensuring that representatives of all views are heard' on the 'complex issues' surrounding the social status of sexual minorities.[113]

Arguably, *Ladele* raises a comparable inverse problem with regard to the state's treatment of religious dissenters. It is regrettable then that the Court did not build on its Gay Pride marches jurisprudence by emphasizing the duty of the state to hold the balance by allowing strongly held dissenting views to be expressed and indeed manifested, provided that the conflicting right is not denied. This was a missed opportunity to give substance to the numerous statements about pluralism as a foundation for Convention rights that appear in the Court's jurisprudence.

Given that, as we have seen, there is no Convention right not to be offended, it is unclear why is it permissible for a state to cite offence to same-sex couples as an acceptable reason for not accommodating a religious employee's conscientious objection. The imbalance in treating religious dissent appears to be consistent with a view emerging in the Strasbourg jurisprudence that differences in treatment at the national level based on sexual orientation are especially suspect.[114] The Court ignored the invitation to treat religious differences in the same way.[115] The elevation of sexual orientation equality is, we submit, unwarranted in that opens the door to a hierarchy among Convention rights.

If states are permitted a wide margin of appreciation, both in determining the means of protecting Convention rights and in balancing them the net result (as here) will be that the minimum protection guaranteed by the Convention to persons claiming conflicting rights will be severely diminished and the ECtHR will be failing in its task of ensuring minimal supervision. By contrast, the area in which the Court has gone furthest in scrutinizing the balance struck by domestic courts between competing Convention rights—the interface of Articles 8 and 10—points to a preferable approach.

In that context the Court has examined much more closely and contextually the precise interests at stake and the Grand Chamber has stressed that 'as a matter of principle these rights deserve equal respect … Accordingly, the margin of appreciation should in theory be the same in both cases.'[116] In our view a more rigorous approach to restrictions under Article 9(2) for clashing rights would have the following features. First, it would satisfy the reversibility test outlined earlier, rather than the broad approach followed by the Strasbourg Court. Strictly, following a reversibility approach a state employer's interests should not count, since they could not be separately asserted by means of an admissible Convention claim.[117] Following this approach, argument in *Ladele* would have been much more narrowly focused, although *Chaplin* might have

[113] *Alekseyev* [86].

[114] *JM v United Kingdom* App no 7060/06 (28 September 2010) [54]–[55]; *Genderdoc-M v Moldova* App no 9106/06 (12 June 2012) [51]; *Vejdeland v Sweden* App no 1813/07 (9 February 2012) [55].

[115] Contrast *Hoffmann v Austria* App no 12875/87 (26 May 1993), [36]: 'a distinction based essentially on a difference in religion alone is not acceptable.'

[116] See *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (Grand Chamber, 7 February 2012) [106].

[117] In addition to individuals, only organizations that are *non*-governmental may petition the court as victims under Article 34 of the European Convention. Hence in *Eweida* the interests of Chaplin's and Ladele's employers themselves would not as public sector bodies fall within 'the rights and freedoms of others'.

followed the same course. Secondly, the approach would be context-specific. A focus on context might, for example, more easily accept restrictions in the *Ladele* case than in *McFarlane* because of the public nature of the employee's role. On the other hand, this need not be determinative, since a contextual approach should also be sensitive to the ease with which an employer's interests or those of a service user might be accommodated by means less restrictive of the applicant's rights, depending on the feasibility of alternative ways of ensuring that the service users' rights are not diminished.

7. *Implications for Domestic Case Law in the UK*

In this section we consider the effects of the decision in *Eweida and Ors* on domestic law.

Courts in the UK have historically adopted definitional balancing, in particular the specific situation rule filter. In *Copsey v Devon Clays Ltd*,[118] the Court of Appeal justified this on the basis of the obligation to apply an apparent 'clear line of decisions by the Commission to the effect that Article 9 is not engaged where an employee asserts Article 9 rights against his employer in relation to his hours working'.[119] Similar reasoning was employed by the House of Lords in *Begum* when it observed that 'there remains a coherent and remarkably consistent body of authority ... which shows that interference is not easily established.'[120] These statements did represent a rather narrow reading of the European jurisprudence[121] and set a somewhat unfortunate pattern whereby Article 9 arguments have been swiftly dismissed as inadmissible in domestic cases where the applicant has alternate means of manifesting his or her religion.[122]

The decision in *Eweida and Ors* will clearly have an unsettling impact on the current legal position in the domestic courts: rather than being invoked to demonstrate that an interference with Article 9(1) is not easily established, the innovation of *Eweida and Ors* is the polar opposite—interference is now easily established and judges will be obliged henceforth to give Article 9 full consideration.

There are also likely to be implications for the interpretation of discrimination law. In several recent religious discrimination cases, tribunals have concluded that a claimant has not been less favourably treated on grounds of religion and belief because what the claimants took to be part of manifesting their religion actually constituted non-performance of their duties,[123] for

[118] [2005] EWCA Civ 932.
[119] ibid [31].
[120] [23] (Lord Bingham).
[121] As recognized, for example, by Rix LJ in his dissenting opinion in *Copsey*.
[122] See among many examples: *Eweida v British Airways* [2010] EWCA Civ 80, [2010] IRLR 322 [22]–[23]; *Ladele v Islington BC* (CA) [58]; and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR 872 [20]. A recent exception was *R (Imran Bashir)* v *The Independent Adjudicator and Anor* [2011] EWHC 1108 (Admin), where the High Court accepted that a prisoner's decision to fast prior to a court appearance was motivated by his religious beliefs and as a result consideration should have been given to his Article 9 rights. This was in spite of the fact that his decision to fast was a personal one rather than a requirement of his Islamic faith.
[123] See the Employment Appeal Tribunal's ruling in *McFarlane v Relate Avon Ltd* at [17]–[20]; and see *McClintock v Department of Constitutional Affairs* at [31].

example, by wearing religious dress,[124] not complying with contractual hours[125] or by proselytizing other staff or clients,[126] and that any employee (regardless of their religious motivation) would have been treated in the same way. The EAT argued in *Ladele* that '[I]t cannot constitute direct discrimination to treat all employees in precisely the same way.'[127] Whether direct discrimination claims can be dismissed so straightforwardly in future is open to question. It will be clearly open to a claimant to argue that a Convention-friendly interpretation of the test of less favourable treatment on grounds of their religion[128] must in future take into account the Court's ruling in *Eweida and Ors* that Article 9 is engaged in employment cases, with consequently greater attention than hitherto to the right to manifest one's religion. The potential effect is complex because direct discrimination does not allow for a defence of justification and it may be that courts and tribunals will prefer to consider manifestations of religion in the context of indirect discrimination instead.[129] Arguably, however, a tribunal hearing a comparable direct discrimination claim in future should consider the qualified nature of the Article 9 right in determining whether there was less favourable treatment.

The judgment also has clear implications for the future interpretation of indirect discrimination. In its submission to the ECtHR the Equality and Human Rights Commission claimed[130] that the domestic litigation demonstrated that the focus of indirect discrimination claims on group disadvantage[131] put some individual litigants at a disadvantage because of the stance of the courts in requiring evidence of collective disadvantage when religious beliefs are subject to autonomous interpretation by individuals. Thus the Court of Appeal in *Eweida* treated her wish to wear a small visible cross over the staff uniform as a manifestation of individual belief rather than that of a religious group.[132] Similarly, in *Chaplin,* the claim was dismissed by the tribunal not for reasons of justification but because she had failed to establish prejudice in the first place.[133] In a more recent decision the EAT has endorsed the alternative but equally problematic strategy of treating the 'non-core' religious beliefs (as

[124] *Azmi v Kirklees MBC* [2007] UKEAT 0009 07 30003 (30 March 2007) (dismissal of school support worker for insisting on wearing the *niqab*, inhibiting effective communication with pupils); see also *McFarlane v Relate Avon Ltd* at [18] noting that the same approach could apply to a company's grooming policy and that the direct discrimination claim in *Eweida* was not pursued at the EAT (*Eweida v British Airways*).

[125] *Patrick v IH Sterile Services Ltd* (2011) Employment Tribunal Case no 3300983/2011.

[126] *Chondol v Liverpool CC* [2009] UKEAT/0298/08 (11 February 2009) [23]; *Monaghan v Leicester YMCA* [2004] Employment Tribunal Case no 1901839/2004 (26 November 2004).

[127] *Islington BC v Ladele* (EAT) [53].

[128] Equality Act 2010, s 13.

[129] The potential for overlap between direct and indirect religious discrimination claims (in the context of a 'manifestation' of religion) was considered in *Azmi v Kirklees Metropolitan Borough Council* (2007) UKEAT/ 0009/ 07, the EAT suggesting that direct discrimination claims were most likely to be successful if there was evidence that an employer was deliberately attempting to disadvantage a religious employee through the application of a *primae facia* 'neutral' criterion; otherwise claims involving manifestations of religion were most likely to find redress under the provisions of indirect discrimination [76]. It may be that courts and tribunals continue to adopt this rather restrictive approach in their disposal of direct discrimination claims but we argue that this is less easy to justify post-*Eweida and Ors.*

[130] Equality and Human Rights Commission, *Submission in Eweida v United Kingdom* (September 2011).

[131] Indirect discrimination concerns the adverse impact of a provision, practice, or criterion on a group (of which the employee is a member) where, although not necessarily directed against the group on grounds of religion, it puts them at a 'particular disadvantage' compared to others and which the employer cannot show to be 'a proportionate means of achieving a legitimate aim' (Equality Act 2010, s 19).

[132] *Eweida v British Airways,* [9] describing it as a 'personal choice'.

[133] *Chaplin v Royal Devon & Exeter Hospital NHS Trust*, Employment Tribunal Case no 1702886/2009.

determined by the tribunal) of the group to which the employee belongs as of lesser weight than more widely shared 'core' beliefs in balancing against employers' interests.[134] The ECtHR's in *Eweida and Ors* made no reference, when assessing proportionality under Article 9(2), to the distinctions made by the domestic courts between core and non-core beliefs.[135] This is by no means unique: there are other recent examples where the Court has declined taking this route,[136] which has certain similarities with the mandatory/non-mandatory distinction.[137] We can safely say that this distinction is not supportable from the Article 9 jurisprudence and that domestic courts should not employ it, especially if the effect is to undermine Article 9 protection.

8. *Public Authorities and Public Officials*

In this final section, we focus on an implicit feature of the judgment in *Eweida and Ors* which has been largely overlooked but which could be its most important legacy from a religious liberty perspective—how far the public authority can argue it is *compelled* to require its officials to act against their conscience so as not to vicariously 'discriminate'.

The Court of Appeal in *Ladele* accepted the submission of Liberty as an intervener that since the claimant was a statutory officer it would constitute unlawful discrimination on grounds of sexual orientation to accommodate her refusal to officiate at civil partnership ceremonies.[138] In the light of the Strasbourg's Court's finding that her Article 9 rights were engaged, a more nuanced approach is needed to this question. It is certainly open to a state to create a statutory discrimination scheme that binds individual officials in this way, although it is less clear that this was the intention in this instance. The effect of doing so would arguably put an official like Lillian Ladele into the same position as the Jewish Free School in that the religious motive for her behaviour would be irrelevant in the face of a claim for direct discrimination.[139] Once it is accepted, however, that the individual has Convention rights of their own that must not be violated the picture becomes much more complex: the duties existing in domestic discrimination must be interpreted 'so far as possible to do so' in a way that is Convention-compatible. As in the Strasbourg judgment this would appear to require balancing under Article 9(2) by councils (who will be under a duty to do so by as 'public authorities' under Human Rights Act). In terms of the Human Rights Act 1998 the official

[134] See *Mba v London Borough of Merton* (2012) UKEAT /0332/12 (13 December 2012) esp [46]. One reason why this approach is badly flawed is that is potentially so easy for a claimant to avoid, by the simple expedient of self-identifying with a smaller religious group whose beliefs exactly match her own, so eliminating any difference between core and non-core.

[135] *Eweida and Ors* [91] and [97] (referring to Eweida and Chaplin). In the cases of Ladele and McFarlane the Court noted the 'orthodox' nature of their beliefs and that their actions were 'directly motivated' by them: [103] and [108].

[136] *Jakowbski v Poland.*

[137] See generally Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, OUP 2013) 166–75.

[138] *Ladele v Islington BC* (CA) [70].

[139] *R(E) v Governing Body of JFS* [2009] UKSC 15.

should be regarded as 'hybrid' public authority. [140] At the very least one can say there is no basis here for an automatic position that conscience claims by marriage registrars should never be accommodated, regardless of the circumstances. Moreover, as explained above, the employer's 'rights' should not feature in the Convention rights-balancing analysis at all, since as a state body it is precluded from victim status under the ECHR. Hitherto domestic courts and tribunals considering indirect discrimination claims have given a wide reading to 'legitimate aim'[141] in referring to an employer's interests—whether commercial or otherwise. The latitude given to Islington by the domestic courts to invoke a self-made equality policy[142] was symptomatic of this approach; it has been criticized by some commentators[143] and, arguably, would not be permitted under a post-*Eweida* Convention-compatible reading of the Equality Act. The approach adopted at first instance, which focused on the straightforward provision of a civil partnership service as the legitimate aim to be pursued by the Council, appears preferable.[144] The criticism levelled by many at conscientious objectors like Ladele applies—we contend—with greater force to her employer. Public bodies should not be allowed to 'pick and choose', which human rights they prefer by prioritizing one stream of equality law (sexual orientation) over another (religion or belief) rather than to hold the two in balance.[145] We could go further of course—the logic of our critique of Strasbourg's treatment of the rights and freedoms of others is to cast doubt on whether on closer analysis there would be legitimate grounds for invoking 'the rights and freedom of others' in the first place.

Although the Grand Chamber has rejected Ladele's application[146] this argument is nonetheless likely to resurface, not least because the introduction of same-sex marriage in England, Wales, and Scotland will pose an acute crisis of conscience for a number marriage registrars.[147] Until the Strasbourg Court resolves the ambiguities glossed over in *Eweida and Ors* debate will continue to rage.

[140] The fact that an individual registrar is a person with Convention rights would be a reason for not treating her as a pure 'public authority' under s. 6 HRA: *Aston Cantlow and Wilmcote with Billesly PCC v Wallbank* [2003] UK HL 37; [2004] 1 AC 56.

[141] Equality Act 2010, s 19.

[142] See the treatment of the Council's 'Dignity for All' policy: *Ladele v Islington BC* (CA), [46]–[52]; *Islington BC v Ladele* (EAT) [111] and [117].

[143] Lucy Vickers, 'Religious Discrimination in the Workplace: an Emerging Hierarchy?', (2012) 12 Ecc LJ 280, 294: 'In failing to consider the legitimacy of Islington's aim, the Court of Appeal seems to have subjected the Council to a low level of scrutiny, in comparison to the high standard usually required in discrimination cases.'

[144] *Ladele v Islington BC* [2008] ET Case No 2203694/2007 (20 May 2008).

[145] We disagree therefore with Aileen McColgan, 'Class Wars?: Religion and (in)Equality in the Workplace' (2009) 38 Ind LJ 1, who favours a hierarchy under which some equalities are less equal than others. See further: Carl Stychin, 'Faith in the Future: Sexuality and Religion in the Public Sphere' (2009) 29 OJLS 729; Patrick Parkinson, 'Accommodating Religious Beliefs in Secular Age: The Issue of Conscientious Objection in the Workplace' (2011) 34 UNSWLJ 281.

[146] ECHR 161 (27 May 2013).

[147] The Marriage (Same Sex Couples) Act 2013, contains conscience provisions for individuals from being compelled to participate in a same-sex marriage according religious rites or in a place of worship where a religious domination has 'opted-in' (s 2(2)), but these do not apply to marriage registrars (s 2(4)). The Scottish Bill is silent on the question of conscientious objection by registrars: Marriage and Civil Partnership (Scotland) Bill 2013 (SP Bill 36), except for clause 14 which states that 'for the avoidance of doubt' that 'so far as it makes provision for marriage by persons of the same sex and as the persons who may solemnise such marriage' does not affect 'the exercise of the Convention right of thought, conscience and religion'.