EQUAL IS NOT ENOUGH

Discriminatierecht in theorie en praktijk / Discrimination law in theory and practice

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INDIRECT DISCRIMINATION, REASONABLE ACCOMMODATION AND RELIGION*

Erica Howard

1. INTRODUCTION

In this chapter, it is argued that there is no reason why the duty to make reasonable accommodation for people with disabilities, which exists in European Union (EU) law,[1] could not be extended to include religious people and people with other characteristics which attract protection under anti-discrimination law. However, even if this duty is not extended, it is suggested that something which comes close to such a duty is part of the provision of indirect discrimination. This chapter specifically focuses on the accommodation of religious manifestations and practices, but the duty could be expanded to include all grounds of discrimination covered by EU law (sex, race, religion or belief, age and sexual orientation). It can be said that EU law itself makes certain accommodations in relation to sex, for example, in the regulations protecting pregnant and breast-feeding women, and in relation to age, where it protects younger workers.

2. EXISTING DUTIES OF REASONABLE ACCOMMODATION

In EU law, a duty of reasonable accommodation in relation to disabled people is laid down in Article 5 of Directive 2000/78/EC. Employers must 'take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment,

* This chapter is a shortened and updated version of an article published in 2013 the European Law Review. See: E. Howard 'Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law' (2013) 38, 3, *European Law Review*, 360–375.

1 See Article 5 of Directive 2000/78/EC of 27 November 2000, Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L 303/16.

or to undergo training, unless such measures would impose a disproportionate burden on the employer'. The first sentence of Article 5 provides that reasonable accommodation must be made 'in order to guarantee compliance with the principle of equal treatment', so this duty is clearly placed within a discrimination context and a failure to provide accommodation can thus be seen as a form of discrimination. However, this duty applies only in relation to disability and does not extend to any of the other grounds covered by Directive 2000/78/EC (religion or belief, age and sexual orientation), nor does it extend beyond the employment field.

In contrast, in the USA, a duty of reasonable accommodation short of 'undue hardship' was first laid down in law for cases of discrimination on the ground of religion and then later extended to cases of disability discrimination.[2] The duty made its way over from the USA to Canada, and, in *Simpson-Sears*, the Canadian Supreme Court accepted a duty of reasonable accommodation in relation to religion short of undue hardship, explaining the latter as meaning 'without undue interference in the operation of the employer's business and without undue expense to the employer'.[3] In 1998, the duty of reasonable accommodation was laid down in Section 15(2) of the Canadian Human Rights Act 1985. This duty is not restricted to cases of discrimination based on religion or creed but is applicable to all the grounds of discrimination prohibited in the Human Rights Act.[4] In both the USA and in Canada, the duty is thus linked to a finding of discrimination.

It has been suggested that EU law and national law in European countries should contain a duty of reasonable accommodation for all the grounds covered by anti-discrimination law. This duty would be subject to the proviso that this should not impose a disproportionate burden on employers or service providers.[5] There does not appear any reason why the provisions for reasonable accommodation in relation to disability in EU anti-discrimination legislation could not be extended to include religion or belief or any of the other grounds covered by this legislation. But does it need to be extended?

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2 Section 701j, Title VII, Civil Rights Act 1964.

3 *Ontario Commission of Human Rights and Theresa O'Malley (Vincent) v Simpson-Sears Ltd* [1985] 2 S.C.R. 536, para 23.

4 Race, national or ethnic origin, colour, religion, age, sex (including pregnancy and childbirth), sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered (S 3).

5 See, for example, Council of Europe, Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, CommDH(2011)2, under 6.1, point 2, https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66_5638; and, Equinet (2008) *Beyond the Labour Market New Initiatives to Prevent and Combat Discrimination,* Equinet, Brussels, at 8, www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf (both last visited 22 May 2015).

3. EXISTING DUTIES OF ACCOMMODATION REQUIRE A BALANCING OF INTERESTS

As Waddington writes, most EU Member States provide for a duty of reasonable accommodation in relation to disabled people only and thus do not go beyond the minimum requirement of Directive 2000/78/EC.[6] But Bulgaria, Poland and Spain have recognised a (limited) right to accommodation in the employment context for people who wish to practice their religion, while the Decree for the Flemish Community in Belgium of 8 May 2002 contains a general right to claim reasonable adjustments in employment which is not confined to people with disabilities.[7] The fact that some EU Member States have included a duty of reasonable accommodation in relation to religion or belief or other grounds suggests that there is no reason why this could not also be done in the legal provisions at EU level or at national level in the other EU Member States, as has been done in Canada and the USA.

In 1976, long before the duty to accommodate the needs of disabled people was introduced by Directive 2000/78/EC, the Court of Justice of the European Union (CJEU) had held that the EU administration, when setting dates for competitive examinations for jobs, should inform itself in a general way of dates which might be unsuitable for religious reasons and should seek to avoid fixing such dates for these exams.[8] This might be seen as a duty on EU institutions to reasonably accommodate religious practices. However, Directive 2000/78/EC only contained a duty in relation to disability.

In *Ring and Werge,* the CJEU held that a reduction in working hours could be a reasonable accommodation but that it was up to the national court to decide on the facts of the case whether this imposed a disproportionate burden on the employer.[9] So the CJEU did not indicate when a burden would be disproportionate. It did, however, state that the concept of 'reasonable accommodation' must be interpreted broadly, in accordance with Article 2(2) of the UN Convention on the Rights of Persons with Disabilities, which determines that '"reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights

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6 L. Waddington, 'Reasonable Accommodation', in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law* (Oxford, Hart Publishing, 2007), at 629 and 755.

7 Ibid., Bulgaria, Poland and Spain: at 697–699; Belgium: at 667 and 701.

8 Case C-130/75, *Vivien Prais v Council of the European Communities,* EU:C:1976:142, para 18.

9 Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab* and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in Liquidation,* EU:C:2013:222, para 64.

and fundamental freedoms'.[10] Article 2 of the Convention also makes clear that discrimination on the basis of disability includes the denial of reasonable accommodation.

Recital 20 of the Preamble to Directive 2000/78/EC gives as examples of accommodations: effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources. Recital 21 then states that 'to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance'. Advocate General Jääskinen opined that 'it is worth recalling that Article 5 of Directive 2000/78 merely requires employers to provide 'reasonable accommodation' to persons with disabilities'.[11] All the above and the terms used in Article 5 of Directive 2000/78/EC itself – *reasonable* accommodation, *appropriate* measures and *disproportionate* burden – strongly suggest that a balancing of the interests of both parties is required and the benefit for the employee must be weighed against the burden for the employer and his organisation. If the latter is disproportionate, no accommodation has to be made. The test can thus be seen as a proportionality test: the burden on the employer must be proportionate to the benefits to be achieved for the employee.

This is the same for the duties in US law and Canadian law. These also require a balancing of the interests of both parties to establish whether there is 'undue hardship'. Thus, the rights of the employee or service user must be weighed against those of the employer or service provider and the efficient management of their organisation. The Canadian Supreme Court indicated in *Simpson-Sears* that there is also a duty on the employee to take 'some accommodating steps on his own part'.[12] This, again, points to a proportionality test but it also suggests that there is an onus on both parties to compromise and to make concessions and this could be at some cost to both parties. As Vickers points out, the non-discrimination principle does not require that 'religious adherence be cost-free for the employee'.[13] So the duty is clearly a mutual duty and requires a proportionality test or balancing exercise to be carried out.

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10 Ibid. para 53.

11 Opinion Advocate General Jääskinen, Case C-354/13, *Fag og Arbejde acting on behalf of Karsten Kaltoft v Kommunernes Landsforening, acting on behalf of the Municipality of Billund*, EU:C:2014:2106, para 49.

12 *Simpson-Sears Ltd,* above note 3, para 23.

13 L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford, Hart Publishing, 2008), at 199.

Chakrabarti gives a good example which can be used to illustrate the above.[14] This is:

> the case of the Christian bus driver who refused to drive buses carrying the slogan "There's probably no god." His employer recognized that this might be upsetting for him and agreed to try to put him on other routes, as long as this did not inconvenience other drivers. The driver accepted this and agreed that if it became impracticable to accommodate him, he would have to find another job.

So, here an accommodation is made, taking into account its impact on other drivers. The religious employee accepted that there were limits to the accommodation and that he might, if accommodation is no longer possible, have to change jobs.[15]

All the above suggests that there is no reason why a duty of reasonable accommodation in law could not cover grounds of discrimination other than disability. But is there a need to extend the duty in EU anti-discrimination law in such a way? Or, could a consideration whether a religious (or other) practice or manifestation can be accommodated be seen as part of the justification test for indirect discrimination?

4. INDIRECT DISCRIMINATION IN EU LAW

EU anti-discrimination law makes a distinction between direct and indirect discrimination. Article 2(2)(a) of Directive 2000/78/EC determines that direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on one of the grounds covered by the Directive (religion or belief, disability, age or sexual orientation). According to Article 2(2)(b), indirect discrimination, for example on the ground of religion or belief, shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. So, in EU law, indirect discrimination can be objectively justified and the test for this is given in Article 2(2)(b). It will be clear that this justification test also contains a proportionality test. But can this justification test be interpreted as including an implicit duty to make reasonable accommodation?

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14 S. Chakrabarti, 'Faith in the Public Sphere', (2014) 22, 2 *Journal of Law and Policy,* 483, at 501.

15 See on this case also: *Man Refuses to Drive "No God" Bus*, BBC NEWS (Jan. 16, 2009): http://news.bbc.co.uk/1/hi/england/hampshire/7832647.stm (last visited 22 May 2015).

There appears to be a clear link between the concepts of indirect discrimination and reasonable accommodation. As Jackson-Preece points out, reasonable accommodation entered the USA jurisprudence via the indirect discrimination provisions.[16] And from the *Simpson-Sears* case[17] it is clear that this was the same in Canada. Other authors have mentioned this link as well. For example, Vickers writes that 'it is arguable that the Directive [2000/78/EC] creates an indirect duty to make reasonable accommodation',[18] as 'a failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal to accommodate is justified'.[19] And, Waddington writes that 'the obligation not to discriminate indirectly against a worker or other individual can, on occasions, result in positive duties to accommodate difference'.[20] This already suggests that a duty of reasonable accommodation could be part of the test whether indirect discrimination is justified.

Bribosia and Rorive express this even more clearly where they point out that reasonable accommodation has resurfaced in the EU as an issue in certain cases involving indirect religious discrimination. They continue that:

> in order to assess the justification of indirect discrimination, judges are sometimes called on, when applying the proportionality test, to examine whether the legitimate objective underlying the difference in treatment can be achieved by measures that are less detrimental to the principle of equality or religious freedom.[21]

Elsewhere, Rorive writes 'the question is nowadays whether an indirect discrimination could be justified where reasonable accommodation is conceivable'[22] and argues that EU anti-discrimination law has developed with 'the emergence of the concept of reasonable accommodation to test whether an indirect discrimination is objectively and reasonably justified'.[23] All this

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16 J. Jackson-Preece 'Emerging Standards of Reasonable Accommodation towards Minorities in Europe?' in Council of Europe, *Trends in Social Cohesion, No 21, Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Strasbourg, Council of Europe Publishing, 2009), at 123.

17 *Simpson-Sears Ltd*, above note 3.

18 L. Vickers, *Religion and Belief Discrimination in Employment – EU Law* (Luxembourg, Office for Official Publications of the European Communities, 2006), at 22.

19 Ibid. at 21.

20 L. Waddington, above note 6, at 754.

21 E. Bribosia and I. Rorive, *In search of a Balance between the Right to Equality and Other Fundamental Rights,* EU DG Employment, Social Affairs and Equal Opportunities (Luxembourg, Publications Office of the European Union, 2010), at 9. See also E. Bribosia, J. Ringelheim and I. Rorive, 'Reasonable Accommodation for Religious Minorities: a Promising Concept for European Antidiscrimination Law?', (2010) 17, 2 *Maastricht Journal of European and Comparative Law*, 137at 156–158.

22 I. Rorive, 'Religious Symbols in the Public Space: in Search of an European Answer' (2009) 30 *Cardozo Law Review*, 2669, at 2693.

23 Ibid. at 2695.

suggests that an implicit duty of reasonable accommodation can be read in the EU provisions against indirect discrimination.

5. CASE LAW

In *Bilka Kaufhaus*[24] which concerned indirect sex discrimination, the CJEU explained that there are three parts to the objective justification test for indirect sex discrimination: first of all, the means chosen must correspond to a real need; secondly, these means must be appropriate with a view to achieving the objective pursued; and, thirdly, they must be necessary to that end. Schiek writes that 'from this, one can conclude that where there is a less discriminatory alternative, the measure is not objectively justified'.[25] So, if the legitimate aim can be achieved in an alternative, less discriminatory way, the provision is not necessary and thus not justified. The objective justification test for indirect sex discrimination is worded in the same way as the tests for indirect discrimination on the other grounds protected by EU law and thus there appears to be no reason why this should not also apply to indirect discrimination on those other grounds.[26] It is argued here that considering whether there is a less discriminatory alternative is very similar to considering whether the religious (or other) practice which does not conform to the measure taken, can be accommodated.

Some support for the above can be found in case law from EU Member States. For example, in cases concerning indirect discrimination, national courts sometimes suggest that alternative ways should have been explored, or, in other words, that possible accommodation should have been examined. The following case from the Swedish Equality Ombudsman can be given to illustrate this. In this case, a female student was not allowed to take part in an educational training programme for pre-school teachers because she wanted to wear a *niqab* (a face covering veil) in class for religious reasons. The school claimed that the *niqab* made it harder to teach since the teacher could not read the student's face. The Equality Ombudsman decided that a prohibition of *niqabs* could amount to indirect discrimination unless it was objectively justified, for example, for safety reasons. It was held that a general ban was not acceptable and that the education

24 Case C-170/84, *Bilka Kaufhaus GMBH v Karin Weber von Hartz*, EU:C:1986:204, para 36.

25 D. Schiek, 'Indirect Discrimination', in D. Schiek, L. Waddington and M. Bell (2007), above note 6, at 357.

26 Compare Articles 2(1)(b) Council Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L 204/23, and 2(b) Council Directive 2004/113/EC implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37 with Articles 2(2)(b) of both Council Directives 2000/78/EC and 2000/43/EC of 29 June 2000 implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin [2000] OJ L 180/22.

provider must try to solve any pedagogical problems by measures less obtrusive for the student if possible. In other words, the provider must consider whether the wearing of the *niqab* by students could be accommodated. In this case, the student and the education provider agreed on a practical solution: the student sat at the front and could remove her *niqab*. The teacher could see her face, but male students were seated behind her so that they could not see her face.[27]

Another case to illustrate this is the British case of *Fugler v MacMillan–London Hair Studios Ltd*.[28] Here, a hair salon introduced a rule that no leave could be taken on Saturdays, as this was the busiest day of the week. Mr Fugler, who was Jewish, requested to have a Saturday off to celebrate *Yom Kippur* but this was refused. The Employment Tribunal (ET) held that the rule indirectly discriminated against Jewish people and that the refusal was not justified because the employer had failed to consider whether the staffing needs on this particular occasion could have been met in some other way.

In some other cases, courts or adjudicating bodies have gone further: not only did they hold that indirect discrimination was not objectively justified because there were alternative and less restrictive ways to achieve the aim of the measure but they also made suggestions as to alternative ways. So the court or body makes it clear that the practice can be accommodated or can be dealt with in a less discriminatory way. A good example of this is a case of the Dutch Equal Treatment Commission, where a local council swimming pool refused access to someone who was wearing a *burkini*[29] because the pool dress rules prohibited body covering clothing during public swimming times. The aim of the dress rule was to maintain a good atmosphere – differences in cover could create uneasiness amongst swimmers – and to maintain security in the swimming pool, by making the person in charge stand out through being dressed fully, which would be undermined by swimmers wearing *burkinis*. The Commission held that the rule was indirectly discriminatory and was not objectively justified because there were other ways of maintaining the atmosphere and the security. The person in charge could stand out, for example, by wearing clothes with a distinctive colour, text or logo.[30] This would achieve the same objective without the need for a ban on the wearing of *burkinis* and, as the Commission stated, would also be more in keeping with the inclusive policies of the pool as a municipal swimming pool. So, here the Equal Treatment Commission suggested

27 Equality Ombudsman, Case 2009/103, 30 November 2010.

28 *Fugler v MacMillan–London Hair Studios Ltd,* Employment Tribunal, Case Number: 2205090/2004. For another example see the article referred to in footnote 1 above.

29 A *burkini* is a swimsuit which covers the body up to the wrists and ankles and with a hood to cover the hair.

30 *Commissie Gelijke Behandeling*, Judgment 2009–15. Since 2 October 2012 the Equal Treatment Commission has become part of the *College voor de Rechten van de Mens* (Netherlands Institute for Human Rights). All judgments of the Commission are available (in Dutch) from the Institute's website: mensenrechten.nl. For more examples see the article referred to in footnote 1 above.

a way of accommodating the wish to wear a *burkini* without endangering the achievement of the legitimate aim of the pool dress policy.

So, in these cases, a duty to consider accommodation can be said to be implicitly accepted in the analysis of whether the indirectly discriminatory measure is justified. The British *Azmi* case[31] is an example where a measure was considered justified because alternative means to achieve the legitimate aim had been considered. Ms Azmi was a teaching assistant, employed by a school as a bilingual language support worker, who wanted to wear a *niqab* while teaching when male teachers were present. The school did not immediately prohibit her from wearing the *niqab*, but only did so after two classroom observations during which it was found that the children were seeking visual clues from Ms Azmi and that her diction was not as clear as it would have been without the face veil. The school also only banned her from wearing the *niqab* when she was working with children and she was allowed to wear it at all other times. So the Employment Tribunal held that the ban on the wearing of the *niqab,* although indirectly discriminatory, was justified taking into account the fact that the school had considered alternatives and had made great efforts to accommodate Ms Azmi's wishes. On appeal, the Employment Appeal Tribunal agreed.

Based on the above, it can be argued that the objective justification and proportionality test for indirect discrimination is not only similar to the test used for reasonable accommodation in EU, US and Canadian law, but also that this test includes a consideration of the attempts made to accommodate the religious practices or manifestation of an employee or service user. Whether the employer or service provider has considered ways of accommodating a religious practice would thus be one of the issues to be taken into account to establish whether the means used to achieve a legitimate aim are appropriate and necessary and thus whether the indirect discrimination is objectively justified. If this is the case, then there would be no need for a separate provision for reasonable accommodation in relation to religion and belief, and, by analogy, in relation to the other grounds of discrimination covered by EU anti-discrimination law. But are there any arguments against this?

6. GROUP DISADVANTAGE

It has been argued that indirect discrimination is defined by and requires evidence of group disadvantage. Vickers, for example, points out that there might be a problem with using the concept of indirect discrimination to create a duty to accommodate a religious individual because 'indirect discrimination is defined in terms of group disadvantage. Thus the claimant must show that a requirement would put *persons* [emphasis in original] of a particular religion

31 *Azmi v Kirklees Metropolitan Borough Council* [2007] IRLR 484 (EAT).

or belief at a particular disadvantage compared with others'.[32] In contrast, reasonable accommodation as described in Directive 200/78/EC is made for an individual disabled person. However, the latter does not have to be the case: many countries also impose anticipatory duties of reasonable accommodation, for example for service providers, who are required to take proactive steps to make their services accessible for disabled people. A good example would be libraries installing access ramps or allowing access for guide dogs. Therefore, the concept of reasonable accommodation is not necessarily linked to an individual person.

But does the fact that indirect discrimination is defined by group disadvantage mean that we cannot use the concept of indirect discrimination to create a duty to accommodate a religious individual? First of all, in most cases, an individual requesting reasonable accommodation of their religious manifestation will do so because they believe that this is required by their religion and they generally share this belief with at least some other people of the same religion or belief. As mentioned, indirect discrimination, for example on the ground of religion or belief, shall, according to Article 2(2)(b)of Directive 2000/78/EC, be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This article mentions 'persons' but does not give any indication of how many 'persons' should be put at a disadvantage. Neither does it prescribe that the whole of a religious group should be affected, so it could presumably be a very small sub-group. But could it even refer to an individual?

The requirement of group disadvantage for a successful claim of indirect (religious) discrimination was discussed in the British case of *Eweida v British Airways Plc*.[33] Ms Eweida worked for British Airways as check-in staff. She was a devout Christian and wanted to wear a small silver cross with her uniform in a visible manner, but this was against the uniform policy prohibiting visible religious symbols unless their wearing was required by the particular religion involved and could not be concealed under the uniform. Both the Employment Tribunal and the Employment Appeal Tribunal rejected the claim of indirect discrimination because Eweida had not shown that the uniform requirement put persons of the same religion at a disadvantage.[34] So, as there was no evidence

32 L. Vickers, above note 18, at 21, footnote 59. See also: L. Waddington, above note 6, at 742.

33 *Eweida v British Airways Plc* [2009] IRLR 78 (EAT); [2010] IRLR 322 (CA).

34 The Employment Equality (Religion and Belief) Regulations 2003 were applicable at the time. Reg. 3(1)(b) on indirect discrimination determined that a provision, criterion or practice which 'puts or would put persons of B's [the person suffering the discrimination] religion or belief at a particular disadvantage compared with others' could be indirectly discriminatory

of group discrimination, there was no indirect discrimination.[35] The Court of Appeal rejected Eweida's appeal and held that the term 'persons', both in the British Regulations and in Directive 2000/78/EC, could not be read as including a single person.[36] The detriment in this case was suffered by Eweida alone: neither evidentially nor inferentially was anyone else similarly disadvantaged.[37]

Although, in *Eweida,* the absence of group disadvantage led to the conclusion that there was no indirect discrimination and thus there was no need to examine any justification, the Employment Tribunal did consider justification. It held that, although the uniform policy had a legitimate aim, the means used to achieve this aim were not proportionate. The Tribunal considered that, in this context, it was 'important to assess whether the respondent has demonstrated that any discriminatory impact has been assessed and reduced to the barest minimum'.[38] It continued that it did not consider that 'the blanket ban on everything classified as "jewellery" struck the correct balance between corporate consistency, individual need and *accommodation of diversity*[39] [emphasis added]'. So here, again, it is suggested that alternative, less discriminatory means must be considered and that the accommodation of diversity is seen as part of the justification test for indirect discrimination.

Recently, the British Court of Appeal, in *Home Office v Essop*, confirmed that, under the British Equality Act 2010, group disadvantage is required and that it is 'necessary in indirect discrimination claims for the claimant to show *why* the PCP [provision, criterion or practice] has disadvantaged the group [emphasis in original]' and that 'group disadvantage cannot be proved in the abstract'.[40]

So, is group disadvantage required for a finding of indirect discrimination? It is submitted that the wording of Directive 2000/78/EC differs from the wording in the British Employment Equality (Religion and Belief) Regulations 2003 and the Equality Act 2010. The latter two instruments use the words 'puts or would put persons … at a particular disadvantage…', while the Directive only states: 'would put persons…'. This could suggest, as Bamforth et al. argue,[41] that:

> the new UK definition is more restrictive by appearing to require evidence that there is a *group* defined by a particular characteristic which is disadvantaged, while under the wording of the Directives, indirect discrimination could potentially occur when only *one person* defined by the particular characteristic was put at a disadvantage.

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unless the provision, criterion or practice was objectively justified. The same formulation can now be found in S 19(2) of the Equality Act 2010.

35 *Eweida* (EAT), above note 33, paras 61–64.

36 *Eweida* (CA), above note 33, para 15.

37 Ibid. para.28.

38 *Eweida* (EAT), above note 33, para 18.

39 Ibid. para 19.

40 *Home Office (UK Border Agency) v Essop and Ohters* [2015] EWCA Civ 609, paras 57 and 59.

41 N. Bamforth, M. Malik and C. O'Cinneide, *Discrimination Law: Theory and Context Text and Materials* (London, Sweet and Maxwell, 2008), at 307–308.

The British Equality and Human Rights Commission also contends that the definition of indirect discrimination in Directive 2000/78/EC 'does not require a person to show that others who share the religion are actually put at a disadvantage by the employer's actions'.[42] Therefore, it appears that group disadvantage is not a requirement for indirect discrimination under EU law.[43]

Vickers points to a possible problem with the approach to indirect religious discrimination of allowing a claim in situations where there is only one person who has been put at a disadvantage: there could be a 'danger that a wide range of behaviours linked to individual beliefs could generate claims of discrimination'. However, she continues that 'employers need not anticipate and meet every wish of employees with any belief, as indirect discrimination can always be justified where proportionate'.[44] In other words, this problem is solved by the fact that indirect discrimination can be justified by a legitimate aim and the use of proportionate means to achieve this aim. And, as Vickers writes, 'it is arguable that the number of individuals affected by any requirement can be taken into account in assessing proportionality'.[45]

The requirement of group disadvantage, therefore, does not seem to be part of the EU definition of indirect discrimination and there is thus no reason why the objective justification test for indirect discrimination in EU law should not be seen as including a duty of reasonable accommodation. Can support for inclusion possibly be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its interpretation by the European Court of Human Rights (ECtHR)?

7. EUROPEAN COURT OF HUMAN RIGHTS

The ECHR contains a number of guarantees of fundamental rights as well as a prohibition of discrimination on a large number of grounds in the enjoyment of these rights (Article 14). Article 14 itself does not contain any reference to

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42 Submission of the Equality and Human Rights Commission in the European Court of Human Rights Eweida and Chaplin v the United Kingdom, App. Nos 48420/10 and 59842/10, (2012), para 28.

43 This author has argued elsewhere that the Court of Appeal in *Eweida v British Airways,* above note 33, should have referred the question whether group disadvantage is required for indirect discrimination under Directive 2000/78/EC, to the CJEU, see: E. Howard, 'Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxembourg?', (2014) 32, 2, *Netherlands Quarterly of Human Rights,* 159 at 161–163.

44 L. Vickers 'Religious Discrimination in the Workplace: an Emerging Hierarchy?', (2010) 12, 3, *Ecclesiastical Law Journal*, at 289; see also: M. Rubenstein 'Banning Cross not Directly Discriminatory', (2010) 199, *Equal Opportunities Review*, 199, at 25–26.

45 L. Vickers, ibid. at 289. This appears to have been confirmed for the British Equality Act 2010 in *Mba v London Borough of Merton* [2013] EWCA Civ 1562, paras 31 and 33 (Lord Justice Elias).

justification. The ECtHR has held that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. And, to be objectively justified, a difference in treatment must not only pursue a legitimate aim, there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[46] Bosset and Foblets write about the ECtHR that

> there is every reason to believe that the Court's requirement for proportionality between the means applied and the purpose sought when supervising the application of the Convention plays a role similar to that of reasonable accommodation.[47]

This suggests that something similar to the (American and Canadian) reasonable accommodation duty might implicitly be present in the justification and proportionality test under Article 14 ECHR.

It has been argued that the ECtHR came close to accepting a concept of reasonable accommodation of religious practices in *Thlimmenos v Greece*.[48] Thlimmenos, who, as a Jehovah's Witness, conscientiously objected to military service, was convicted for his failure to wear military uniform. Six years later, after passing the exams necessary to become a chartered accountant, he was refused entry into the profession because of this criminal conviction. The ECtHR stated that the right under Article 14 not to be discriminated against was not only violated 'when States treat differently persons in analogous situations without providing an objective and reasonable justification' but also 'when States without an objective and reasonable justification fail to treat differently persons whose

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46 ECtHR, 23 July 1968, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium*, nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, under THE LAW, B, para 10.

47 P. Bossett and M-C. Foblets, 'Accommodating Diversity in Quebec and Europe: Different Legal Concepts, Similar Results?' in Council of Europe (2009), above note 16, at 61.

48 ECtHR, 6 April 2000, *Thlimmenos v Greece,* no. 34369/97. See: O. De Schutter, *The Prohibition of Discrimination under European Human Rights Law Relevance for EU Racial and Employment Equality Directives*, EU Directorate General, Employment, Social Affairs and Equal Opportunities, (Luxembourg, Office for Official Publications of the European Communities, 2005), at 16–17; L. Vickers, above note 18, at 21; L. Vickers, above note 13, at 221; M. Bossett and M.-C. Foblets, above note 47, at 59; F. Ast, 'European Legal Frameworks Responding to Diversity and the Need for Institutional Change. Indirect Discrimination as a Means of Protecting Pluralism: Challenges and Limits', in Council of Europe (2009), above note 16, at 97; E. Ruiz Vieytez, 'Reasonable Accommodation: Going Beyond the European Convention on Human Rights to Reflect the Plurality in National Institutional Settings', in Council of Europe (2009), above note 16, at 133; J. Wright, 'European Legal Frameworks that Respond to Diversity and the Need for Institutional Change: To what Extent are the Canadian Concept of "Reasonable Accommodation" and the European Approach to "Mutual Accommodation" Reflected in those Frameworks? Which Conceptual Approach Provides the Better Way Forward in the European Context?', in Council of Europe (2009), above note 16, at 150–151; E. Bribosia, J. Ringelheim and I. Rorive, above note 21, at 160; and, Bribosia and Rorive, above note 21, at 64.

situations are significantly different'.[49] This recognises that Article 14 covers not only direct but also indirect discrimination. The ECtHR then considered that:

> it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so *by failing to introduce appropriate exceptions to the rule* barring persons convicted of a serious crime from the profession of chartered accountants [emphasis added].[50]

Greece's failure to treat Mr Thlimmenos differently, its failure to accommodate difference therefore amounts to unequal treatment, because it amounts to a refusal to treat different people differently'.[51]

This may thus be seen as approaching a duty to accommodate religious practices as part of the justification test under Article 14 ECHR: if no attempt is made to accommodate a religious manifestation, the means used to achieve a legitimate aim cannot be considered appropriate. The ECtHR also appears to have accepted that a duty of reasonable accommodation exists in relation to disability discrimination.[52]

Jakobski v Poland[53] seems to suggest that the ECtHR is moving towards a duty of reasonable accommodation as part of the justification test under Article 9(2) ECHR. This article allows for restrictions on the right to freely manifest one's religion if the restriction is prescribed by law and is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights of others. The expression 'necessary in a democratic society' has been interpreted to mean that the interference complained of must correspond to a pressing social need; be proportionate to the legitimate aim pursued and be justified by relevant and sufficient reasons.[54] So, here again, there is a justification test which includes whether the means used are proportionate to the legitimate aim pursued. This test is thus similar to the objective justification test under Article 14 ECHR and for indirect discrimination in EU law.

In *Jakobski*, a Buddhist prisoner requested to be served meat-free meals in order to follow his religious dietary requirements. When this request was refused, he claimed that this was a violation of his right to manifest his religion under

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49 *Thlimmenos v Greece,* above note 48, para 44.

50 Ibid., para 48.

51 L. Vickers, above note 18, at 21.

52 ECtHR 30 April 2009, *Glor v Switzerland*, no. 13444/04, paras 96–97. See also on this case: F. Ast, above note 48, at 98.

53 ECtHR, 7 December 2010, *Jakobski v Poland*, no. 18429/06.

54 ECtHR, 7 December 1976, *Handyside v. the United Kingdom*, no.5493/72, paras 48–50. This case concerned a claim under Article 10(2) ECHR (freedom of expression), but the test has been held to be applicable to Article 9(2) as well. See, for example, ECtHR, 15 February 2001, *Dahlab v. Switzerland*, no. 42393/98, at 12.

Article 9 ECHR. The ECtHR considered that, whether the case was analysed in terms of a positive duty on the state to take reasonable and appropriate measures to secure the rights guaranteed under Article 9(1) or in terms of an interference justified under Article 9(2):

> *the applicable principles are broadly similar.* In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole [emphasis added].[55]

Therefore, the ECtHR saw the analysis of the duty to take reasonable and appropriate measures and the justification test under Article 9 ECHR as broadly similar.

The Polish Government in *Jacobski* argued that the preparation of meat-free meals for one person would have been too expensive (because of extra costs and hygiene requirements) and would have placed an excessive burden on the prison's kitchen staff, but the ECtHR was not 'persuaded that the provision of a vegetarian diet to the applicant would have entailed any disruption to the management of the prison or to any decline in the standards of meals served to other prisoners'.[56] The ECtHR concluded that no fair balance had been struck between the interests of the prison authorities and those of the applicant and thus that the interference was not justified and was a breach of Article 9.[57] These considerations are very similar to the considerations which must be made to establish 'undue hardship' or a 'disproportionate burden' in relation to a duty of reasonable accommodation. Much of what was said in *Jakobski* was repeated in *Gatis Kovalkovs*.[58] Therefore, the ECtHR appears to have gone some way towards accepting that a duty of reasonable accommodation is part of the justification test under Article 9(2) and under Article 14 ECHR.

However, not all ECtHR judges followed this line. In *Francesco Sessa v Italy,*[59] a Jewish lawyer was not able to represent his client at a domestic hearing because the two dates offered by the Court were both Jewish religious festivals. The majority of the ECtHR's judges (4 out of 7 judges) held that Sessa's right to manifest his religion had not been infringed and, even if it had, this would have been justified for the protection of the rights and freedoms of others, in particular the public's right to a proper administration of justice and the principle that cases be heard within a reasonable time. However, the three dissenting judges

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55 *Jakobski v Poland,* above note 53, para 47.

56 Ibid. para 52.

57 Ibid. paras 54 and 55.

58 ECtHR, 31 January 2012, *Gatis Kovalkovs v Latvia*, no. 35021/05, para 64. This case also concerned the exercise of religious practices in prison, this time loud chanting and reading of prayers and burning of incense sticks in a prison cell shared with other prisoners, but the outcome of the balancing exercise was different and no violation of Article 9 ECHR was found.

59 ECtHR, 3 April 2012, *Francesco Sessa v Italy*, no. 28790/08.

stated that proportionality requires that, where there are several alternative means to achieve the pursued legitimate aim, the authorities should choose the one that is least restrictive to the rights and liberties protected. The search for reasonable accommodation could lead to a less restrictive means to achieve the aim sought, and, in this case, such a reasonable accommodation could have been made quite easily and this would have avoided an interference with the freedom of religion of the applicant, according to the dissenting judges.[60]

In *Eweida and Others v. the United Kingdom*,[61] the ECtHR referred to the duty of reasonable accommodation as it exists in US and Canadian law[62] and mentioned that a number of interveners had argued that a proportionality analysis by the ECtHR should take account of the possibility of an accommodation of an individual's beliefs and practices.[63] However, the ECtHR did not mention this again when it assessed the individual cases, nor did it indicate whether such a duty was part of the justification tests under Articles 9 and 14 ECHR. The ECtHR has been criticised for not clarifying this issue in this case,[64] although it could very tentatively be argued that the ECtHR appeared to suggest that British Airways could and should have accommodated Ms Eweida's wish to wear a small cross where it considered that:

> Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend its uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.[65]

The ECtHR came to the conclusion that, in relation to Ms Eweida, a fair balance had not been struck between her right to freely manifest her religion and British Airways's wish to protect its corporate image and that the domestic courts had given too much weight to the latter.[66]

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60 Ibid. dissenting opinion, paras 9 and 10. A request for deferral to the Grand Chamber in this case was rejected so the judgment is final.

61 ECtHR, 15 January 2013, *Eweida, Chaplin, Ladele and McFarlane v. the United Kingdom*, nos 48420/10, 59842/10, 51671/10 and 36516/10.

62 Ibid. paras 48–49.

63 Ibid. para 78.

64 See, for example: D. McIlroy, 'A Marginal Victory for Freedom of Religion, Case Comments' (2013) 2,1, *Oxford Journal of Law and Religion*, at 213; S. Smet, '*Eweida, Part II: The Margin of Appreciation Defeats and Silences All*', Blog Strasbourg Observers, 23 January 2013; and, R. Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusal to Serve Others', (2014) 77, 2, *Modern Law Review*, at 243.

65 *Eweida and Others v UK*, above note 61, para 94.

66 Ibid.

As mentioned, the ECtHR has been criticised for not clarifying this issue in this case. For example, Smet criticises the ECtHR for not settling this argument as the case 'was the perfect case to both firmly ground reasonable accommodation of religion in the Convention *and* at the same time explain its limitations'.[67] McIlroy finds that the lack of discussion of reasonable accommodation is 'the most unsatisfactory part of the decision',[68] while Wintemute writes that the ECtHR 'chose an ambiguous, potentially neutral position: accommodation is not required but might be permitted'.[69]

On the other hand, *Eweida v the United Kingdom* appears to have been read and explained by both the British Supreme Court and by the British Equality and Human Rights Commission as meaning that something close to a duty of reasonable accommodation can be part of the proportionality test which has to be performed to establish whether an interference with the Article 9 ECHR right is justified. In the Supreme Court case of *Bull and Another v. Hall and Another*,[70] Lady Hale stated:

> I am more than ready to accept that *the scope for reasonable accommodation is part of the proportionality assessment*, at least in some cases. This is reinforced by the decision in Eweida v United Kingdom (2013) 57 EHRR 8, where the Strasbourg court abandoned its previous stance that there was no interference with an employee's right to manifest her religion if it could be avoided by changing jobs. Rather, that possibility was to be taken into account in the overall proportionality assessment, *which must therefore consider the extent to which it is reasonable to expect the employer to accommodate the employee's right* [my italics].[71]

The British Equality and Human Rights Commission issued guidance to employers after the *Eweida* judgment.[72] In this guidance it is stated that employers are not required to comply with religious requests on all occasions, but that they need to consider such requests seriously.[73] Employers are 'encouraged to take as their starting point consideration as to how to accommodate the request, unless there are cogent and compelling reasons not to do so … '.[74] The factors that should be taken into account are the impact of accommodation on other employees, on customers and on service users and on the operation of the business, including costs, disruption and health and safety issues. The employer

67 S. Smet, above note 64.
68 D. McIlroy, above note 64, at 213.
69 R. Wintemute, above note 64, at 243.
70 *Bull and Another v. Hall and Another* [2013] UKSC 73.
71 Ibid, para 47.
72 Equality and Human Rights Commission, Religion and Belief in the Workplace: A Guide for Employers Following Recent European Court of Human Rights Judgments, equalityhumanrights.com.
73 Ibid, at 5.
74 Ibid.

should also consider whether work policies and practices to ensure uniformity and consistency are justifiable.[75]

So, *Eweida v the United Kingdom* appears to be open to interpretation on the question whether something close to a duty of reasonable accommodation can be part of the proportionality test which has to be performed to establish whether an interference with the Article 9 ECHR right is justified. But, this case and some of the other cases could suggest that the ECtHR is slowly moving towards the view that a duty of reasonable accommodation is part of the proportionality test under both Articles 9 and 14 ECHR, although the Court itself has not expressed itself very clearly on this. But this development could also support the argument that it is part of the objective justification test for indirect discrimination in EU law.

8. CONCLUSION

In this chapter, the question whether the duty of reasonable accommodation, as found in EU anti-discrimination law for disability, should be expanded to include religious manifestations and practices has been analysed The duties as these exist in EU, US and Canadian law have been used to illustrate how such a duty can be laid down in law. All three duties are linked to a finding of discrimination and all three require a balancing of all different interests involved. The duty in the US and Canada is seen as a mutual duty which requires some accommodation on the side of the religious employee or service user as well, and accommodation does not have to be made if the hardship for the employer or service provider is undue. In EU law, accommodation does not have to be made if the burden on the employer is disproportionate. The CRPD also mentions 'disproportionate or undue burden'. So the balancing test required in all these instruments can be seen as a proportionality test; the burden on the employer or service provider must be proportionate to the benefits to be achieved for the employee or service user.

The analysis of existing duties suggested that there is no reason why the duty should only exist in relation to disability and why it should not be extended to religion or belief and other grounds of discrimination. However, it was argued that such an extension might not be necessary as an implicit duty to make reasonable accommodation could be seen as part of the justification test for indirect discrimination under EU law. Under EU law a measure is not indirectly discriminatory if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. So, here too, a proportionality test is applied. In *Bilka Kaufhaus*,[76] the CJEU has held that the justification test

75 Ibid, 5–6.

76 *Bilka Kaufhaus*, above note 24, para 36.

for indirect discrimination includes examining whether less discriminatory alternatives are available and this, it was concluded, is very similar to considering whether a practice which does not conform to the measure taken, can be accommodated. This is supported by the fact that very similar tests need to be performed to establish whether the burden of accommodation is disproportionate or whether indirect discrimination is justified: both require proportionality tests and a balancing of all interests involved. Further support for the proposition that an implicit duty of reasonable accommodation is part of the justification and proportionality test for indirect discrimination can be found, albeit tentatively, in the case law of the ECtHR.

It is thus submitted that the objective justification test for indirect discrimination includes a consideration of the attempts made to accommodate the religious or other practices of an employee or service user and, if no attempts to accommodate are made, the discrimination should not be held to be justified. Extending the duty of reasonable accommodation beyond disability to other grounds of discrimination explicitly in law is thus not necessary as such a duty is already part of the justification test for indirect discrimination. On the other hand, there does not seem to be any objection to extending the law. An anti-discrimination law which would clearly state that the duty of reasonable accommodation applies to all grounds of discrimination covered by that law, would make it absolutely clear that accommodation should be attempted and that reasonable requests from employees or service users should be considered. But, based on the above, the author would argue that reasonable accommodation needs to be considered, even if the anti-discrimination law does not state this.