# PROTECTING FREEDOM TO MANIFEST ONE'S RELIGION OR BELIEF: STRASBOURG OR LUXEMBOURG?

Erica Howard*

***Abstract***

*Persons who want to manifest their religion through the wearing of religious symbols but who are prohibited from doing so appear to be unlikely to be successful in challenging these prohibitions under Articles 9 or 14 ECHR before the European Court of Human Rights in Strasbourg, although very recent case law might tentatively suggest a shift in this approach. This article gives an overview of this case law, including the recent judgment in Eweida and others v. the United Kingdom, and this is followed by an analysis of a number of arguments which suggest that a challenge to bans on the wearing of religious symbols would have more chance of being successful in the Court of Justice of the European Union in Luxembourg.*

**Keywords**: ECHR; EU law; freedom of religion; manifestations of religion or belief; religious discrimination

## 1. INTRODUCTION

In a number of cases, the European Court of Human Rights in Strasbourg (the Strasbourg Court or ECtHR), the Court tasked with overseeing the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR), has been asked to decide whether bans on the wearing of religious symbols[1] are a breach of the freedom to manifest one's religion contrary to Article 9 ECHR and/or the right to non-discrimination in Article 14 ECHR. The Strasbourg Court has left a wide margin of appreciation to States in these cases and, although it generally finds an interference with these rights, it usually considers this interference to be

* All websites were last visited on 1 March 2014.

1 The term 'religious symbol' will be used to indicate a symbol which signifies an important part of a person's religious identity. It includes symbols worn because of a religious obligation or linked to or inspired by a person's religion or belief.

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justified. The Strasbourg Court seems, as will be discussed below, to readily accept the justification brought forward by the State Party. A person affected by the bans is therefore unlikely to be successful in claiming an infringement of their human rights before this Court, although very recent case law might tentatively suggest a shift in this approach. But would a challenge of bans on the wearing of religious symbols have more chance of being successful in the Court of Justice of the European Union[2] in Luxembourg? Will the latter decide these cases differently and be more willing to find a breach of human rights or anti-discrimination law? A number of arguments suggest that the Luxembourg Court might deal with bans on religious symbols in a different way from the Strasbourg Court and find that these are not justified under EU law.

This article starts with an overview of the case law of the Strasbourg Court on bans on the wearing of religious symbols, including an examination of the justification test applied under both Articles 9 and 14 ECHR. It then proceeds with an analysis of the arguments which suggest that the Luxembourg Court, if called upon to do so, could very well deal with these bans in a different way by applying a stricter justification test, which makes a finding that these bans are not justified under EU law more likely. These arguments are, first, that EU law does not generally allow for justification of direct discrimination except in certain, clearly prescribed circumstances. Second, the Luxembourg Court has consistently held that restrictions on the rights laid down in the EU anti-discrimination directives must be interpreted strictly. Third, the EU Charter of Fundamental Rights expressly states that the EU can go beyond the provisions of the ECHR. And, fourth, the Luxembourg Court is generally more concerned with a uniform application of EU law, while the Strasbourg Court gives States a certain margin of appreciation. In the conclusion, an attempt is made to answer two questions: whether it is likely that the Luxembourg Court will provide a better route to successfully claim a violation against bans on the wearing of religious symbols and whether the recent tentative shift in approach in the Strasbourg Court might mean that the latter route could, in the future, be more successful as well. In other words, which court, Strasbourg or Luxembourg, would provide the best protection for those people who want to wear a religious symbol but who are prohibited from doing so?

It must be noted that it is much easier for an individual to reach the Strasbourg Court, because that Court can 'receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto' (Article 34 ECHR). Therefore, an individual affected by a ban on the wearing of religious symbols can apply directly to the Strasbourg Court, once all domestic remedies are exhausted. In contrast, the right

[2] There are three strands to the court system in the EU: the Court of Justice, the General Court and the specialised courts in specific areas. The Court of Justice gives rulings on requests for preliminary rulings and, as mentioned below, a case on bans of religious symbols would reach the EU courts in this way, so, in the following, 'the Luxembourg Court' refers to the Court of Justice of the EU. Any references in quotes to the ECJ are also to this Court.

of individuals to take direct action in the Luxembourg Court is limited to situations where EU decisions or actions are addressed to them or are of individual or direct concern to them (Article 263 TFEU). This does not cover cases where public or private institutions in a Member State have limited the wearing of religious symbols, so this procedure cannot be used.

Another way a case can reach the Luxembourg Court is via a preliminary reference from a national court. Article 267 TFEU determines that where a question is raised before any court or tribunal of a Member State about the interpretation of the Treaties or about the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, that court or tribunal may (or sometimes must[3]), if it considers that a decision on the question is necessary to enable it to give judgment, request the Luxembourg Court to give a ruling on the question. However, it is ultimately up to the national court to decide on this and an individual claimant cannot force a court to do so.

Another problem could arise from the fact that the national court, when requesting a preliminary ruling, formulates questions for the Luxembourg Court to answer. Therefore, even if a national court requests a preliminary ruling, the question(s) asked by the national court might limit what the Luxembourg Court can decide on. Although, it has been argued that this Court does not always hold itself to be strictly bound by the referred questions from the national court.[4]

So it might be difficult to get a case referred to the Luxembourg Court, and, although cases concerning the interpretation of Directive 2000/78/EC,[5] do reach this Court,[6] none of these cases, to date, relate to religious discrimination. However, this is not to say that a reference relating to religious discrimination and its interpretation will not be made in the future.

An example of a case that could – and, it is suggested, should – have been referred to the Luxembourg Court is the British case of *Eweida v. British Airways*.[7] Eweida was

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3 If such a question is raised before a court/tribunal against whose decisions there is no judicial remedy under national law, the court/tribunal must bring the matter before the Luxembourg Court.

4 See on this Sarah Haverkort-Speekenbrink, *European Non-discrimination Law A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia Ltd 2012) 82–83 and 254.

5 Council Directive (EC) 2000/78 *Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16. This Directive prohibits discrimination on the ground of religion or belief, disability, age and sexual orientation.

6 See, for example, Case 144/04 *Mangold v Helm*, [2005] ECR I-9981 (age); Case 13/05 *Chacon Navas v Eurest Colectividades SA,* [2006] ECR I-6467 (disability); Case 555/07 *Kucukdeveci v Swedex GmbH & Co KG*, [2010] ECR I-365 (age); Case 147/08 *Jurgen Romer v Freie und Hansestadt Hamburg,* [2011] ECR I-3591 (sexual orientation); Cases 335/11 and 337/11 *Ring and Skouboe Werge,* judgment 11/04/2013 (disability).

7 *Eweida v British Airways Plc* [2009] IRLR 78 (EAT); [2010] EWCA Civ 80 (CA). Eweida took her case to the Strasbourg Court, where it was heard with 3 other cases against the UK, see *Eweida and Others v the United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 10 (ECHR, 27 May 2013). This case will be discussed further below.

employed by British Airways as check-in staff. When a new uniform was adopted, Eweida was not allowed to wear a small silver cross in a visible manner with her uniform. She complained, among other issues, of indirect discrimination on the ground of her religious belief. This claim was rejected by both the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) because Eweida had not shown that the uniform requirement put persons of the same religion at a disadvantage.[8] The EAT held that, for a finding of indirect discrimination, the disadvantage must be suffered by others who share her religion or belief and thus that indirect discrimination required group disadvantage.[9] This was confirmed by the Court of Appeal which concluded that the term 'persons', both in the British Regulations and in Directive 2000/78/EC, could not be read as including a single person.[10]

However, it can be argued that Directive 2000/78/EC does not require group disadvantage for a finding of indirect discrimination. According to Bamforth *et al*. and the British Equality and Human Rights Commission, the wording in the Directive 'would put persons […]' suggests that indirect discrimination could potentially occur when only one person defined by the particular characteristic was put at a disadvantage and thus that there is no requirement of group disadvantage.[11] This would mean that British law is interpreted in a more restrictive way than EU law.

It is suggested that the question of whether indirect discrimination requires group disadvantage should have been referred to the Luxembourg Court via a preliminary reference. Counsel for Eweida should have raised this question about the interpretation of Directive 2000/78/EC and the compatibility of the British definition of indirect discrimination with the Directive. Although it would still have been up to the national court to decide to do so or not, if it had done so, this could have led to a clarification by the Luxembourg Court of indirect discrimination, one of the central terms in EU anti-discrimination law.

Therefore, cases could reach the Luxembourg Court via a preliminary ruling and there is a clear role for advocates/representatives in national cases to raise questions concerning EU law. But, as mentioned above, because an individual can take cases

8 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'. The same formulation can now be found in S 19(2) of the Equality Act 2010.

9 *Eweida* (EAT) (n 7) paras 11 and 61.

10 *Eweida* (CA) (n 7) para 15. This was followed in *Chaplin v. Royal Devon & Exeter NHS Foundation Trust* [2010] Employment Tribunal, Case no: 17288862009 (6 April 2010).

11 Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context Text and Materials* (Sweet and Maxwell 2008) 307–308; *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, (ECHR 2012) < www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf; See further on this Erica Howard, 'Reasonable Accommodation of Religion and Other Discrimination Grounds in EU law' (2013) 38(3) European Law Review, 360, 367–370.

directly to the Strasbourg Court, it is much easier and thus much more likely for a case to reach the Strasbourg Court than the Luxembourg Court.

In the following the difficulties in getting to the Luxembourg Court will be ignored and the discussion will be restricted to what could happen if a ban on the wearing of religious symbols arrives at that Court. This does mean that a comparison is made between real cases from the Strasbourg Court and possible future litigation on freedom of religion and on religious discrimination in the Luxembourg Court but, in this comparison, cases of the Luxembourg Court in relation to the other grounds of discrimination covered by EU law will be used where relevant.

## 2. BANS ON THE WEARING OF RELIGIOUS SYMBOLS UNDER THE ECHR

### 2.1. ARTICE 9 ECHR

Article 9(1) ECHR guarantees the freedom of thought, conscience and religion, which includes the freedom to manifest one's religion or belief. Article 9(2) ECHR determines that the freedom to manifest one's religion or belief can be restricted but only if the restriction is prescribed by law and is necessary in a democratic society for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others. Therefore, the right to freedom of conscience, thought and religion cannot be restricted by a State, but, in certain circumstances, an interference with one's manifestation of religion or belief can be justified.

Because the justification test under Article 9 is very similar to the justification test under Article 14 ECHR and to the justification tests under the EU Charter of Fundamental Rights and under EU anti-discrimination law, this test will be examined in more detail.

Analysing the conditions for justification, 'prescribed by law' means that the law must be accessible and sufficiently precise to make its effects foreseeable.[12] In two cases where French girls were excluded from school because they did not want to take off their Muslim headscarves during sports lessons, the Strasbourg Court held that, according to its settled case law, 'the concept of "law" must be understood in its "substantive" sense, not its "formal" one. It therefore includes everything that goes to make up the written law, including enactments of lower ranks than statutes'.[13]

Restrictions on the freedom to manifest one's religion or belief must pursue a legitimate aim as summed up in Article 9(2) ECHR: the interests of public safety, the protection of public order, health and morals, and the protection of the rights and freedoms of others. A restriction must also be 'necessary in a democratic society'. This means that the interference complained of must correspond to a pressing social

12 See *Sunday Times v the United Kingdom* App no 6538/74 (ECHR, 26 April 1979) para 42.

13 *Kervanci and Dogru v France* App nos 31645/04 and 27058/05 (ECHR, 4 December 2008) para 62.

need; be proportionate to the legitimate aim pursued and be justified by relevant and sufficient reasons.[14] Evans writes that 'by proportionate measures the [Strasbourg] Court means measures taken by authorities that strike a fair balance between the interests of the community and the interests of the individual'.[15]

The Strasbourg Court explained the concept of necessity in *Handyside v. the United Kingdom*, where it noted that the adjective 'necessary' is not synonymous with 'indispensable'; neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. The States Parties enjoy a certain margin of appreciation to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context, because the national authorities are considered to be better placed to assess what is necessary in a democratic society.[16] But this margin is not unlimited and the Strasbourg Court is empowered to give the final ruling.[17] In other words, the domestic margin of appreciation goes hand in hand with European supervision.

However, the width of this margin is not always the same and it seems that the Strasbourg Court allows a wider margin of appreciation in relation to restrictions on the freedom to manifest one's religion in Article 9(2) ECHR than in relation to restrictions on rights in other articles, like Article 8 (right to respect for private and family life), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association), which also contain the condition that a restriction must be 'necessary in a democratic society'.[18] A number of factors appear to play a role in determining the width of the margin of appreciation afforded to States by the Strasbourg Court: the level of pan-European consensus or the existence of a common standard on the issue in Europe, the extent to which the matter interferes with the core of an applicant's private life and the circumstances of the case.[19]

However, it appears that the level of consensus plays the most important role and, in relation to religious issues, the Strasbourg Court has held that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in

14 *Handyside v the United Kingdom* App no 5493/72 (ECHR, 7 December 1976) 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, *Dahlab v Switzerland* App no 42393/98 (ECHR, 15 February 2001) under THE LAW, point 1.

15 Malcolm Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe Publishing 2009) 125.

16 *Handyside v the United Kingdom* (n 14) para 48.

17 Ibid para 49.

18 See for example, Tom Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56(2) International and Comparative Law Quarterly, 395, 397–401; and Samantha Knights, *Freedom of Religion, Minorities and the Law* (Oxford University Press 2008) 138.

19 See Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Human Rights Files 17) (Council of Europe Publishing 2000) 10; and, Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press 2001) 143.

society […] even within a single country such conceptions may vary'.[20] This absence of a common European consensus has led the Strasbourg Court to afford States a wide margin of appreciation in relation to restrictions on the Article 9 right to manifest one's religion or belief.

## 2.2. CASE LAW UNDER ARTICLE 9 ECHR

The Strasbourg Court now generally holds that the wearing of a religious symbol is a manifestation of a person's religion or belief and then proceeds to an examination of the question whether the ban is justified under Article 9(2) ECHR.[21]

In *Dahlab v. Switzerland*,[22] a teacher in a primary school, after converting to Islam, started wearing long loose clothing and a hijab or Islamic headscarf. The director of public education, after an inspection, directed her to stop wearing the headscarf in school because it was against the strict denominational neutrality of a public, secular education system. Dahlab applied to the Strasbourg Court, claiming a violation of Articles 9 and 14 (right not to be discriminated against) ECHR.

The Strasbourg Court concluded that the wearing of the headscarf was a manifestation of Dahlab's belief but that, under Article 9(2), the interference was justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, namely the rights of the children in the school.[23] The wearing of the headscarf might have some proselytising effect and was hard to square with the principles of tolerance and respect for others and of gender equality.[24]

In *Leyla Sahin v. Turkey,* a medical student was not allowed to take her exams because she refused to remove her headscarf. The Strasbourg Court proceeded on the assumption that the regulations in questions constituted an interference with Sahin's manifestation of her religion. The Court (both Chamber and Grand Chamber) considered that this interference was justified under Article 9(2) because it had a legal basis and pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order.[25] The interference was necessary in a democratic society and met a pressing social need by seeking to achieve the constitutional principles of secularism and equality.[26] The State Party (Turkey) was afforded a wide

20 *Otto-Preminger-Institute v Austria* App no 13470/87 (ECHR 20 September 1994) para 50.

21 See *Dahlab v Switzerland* (n 14); and *Leyla Sahin v Turkey* App no 44774/98) (ECHR Chamber 29 June 2004 and ECHR Grand Chamber 10 November 2005). But see the earlier cases of *Karaduman and Bulut v Turkey* App no 16278/90 and 18783/91 (1993) 74 DR 93, where the European Commission of Human Rights held that wearing a headscarf is not a manifestation of religion or belief. Protocol 11 ECHR, which came into force in 1998, abolished the Commission, enlarged the Strasbourg Court and allowed individuals to take cases directly to the Court.

22 *Dahlab v Switzerland* (n 14).

23 Ibid, under THE LAW, point 1.

24 Ibid.

25 *Leyla Sahin v Turkey* (n 21) paras 66–116 (Chamber) and paras 110–122 (Grand Chamber).

26 Ibid paras 107–109 (Chamber) and para 115 (Grand Chamber).

margin of appreciation because there was a diversity of approaches taken by the national authorities on the wearing of religious symbols in educational institutions.[27]

In both cases, the Strasbourg Court appeared to defer to the decision of the respective State Party that the headscarf formed a threat to State neutrality and the secular character of the State and also to the principle of gender equality. There does not appear to have been any balancing of the interests of the State with the interests of the applicants, nor did the Strasbourg Court pay any attention to what the headscarf meant for Ms Dahlab and Ms Sahin themselves. The Strasbourg Court thus afforded the States Parties a very wide margin of appreciation and it did not undertake a rigorous or objective examination of the necessity or proportionality of the ban in a democratic society.[28]

In *Leyla Sahin v. Turkey,* judge Tulkens, the dissenting judge in the Grand Chamber, criticised the Strasbourg Court where she said that the European supervision that must accompany the margin of appreciation 'seems quite simply to be absent from the judgment' and that this European supervision cannot 'be escaped simply by evoking the margin of appreciation'.[29] She also criticised the justification of the wide margin of appreciation by the (16) majority judges in this case, namely the lack of European consensus about the wearing of religious symbols in educational institutions, because 'the comparative-law materials do not allow of such a conclusion, as in none of the member States has the ban on wearing religious symbols extended to university education, which is intended for young adults, who are less amenable to pressure'.[30] This suggests that the absence of a consensus across Europe is used by the Strasbourg Court in this case to reduce its scrutiny of the arguments of the (Turkish) State to such a low level that it is (almost) absent. This seems to confirm the point made by Edge that 'there is a danger that the broad margin of appreciation justified by European

27 Ibid para 102 (Chamber) and para 109 (Grand Chamber).

28 See for criticism of these cases: Christopher Decker and Marnie Lloyd, 'Case Comment Leyla Sahin v Turkey' (2004) 6 European Human Rights Law Review, 672–678, 677; Dawn Lyon and Debora Spini, 'Unveiling the Headscarf Debate' (2004) 12 Feminist Legal Studies, 333–345, 338; Antje Pedain, 'Case Comment: Do Headscarfs Bite?' (2004) 63(3) Cambridge Law Journal, 537–540; Kerem Altiparmak and Onur Karahanogullari, 'European Court of Human Rights After Sahin: The Debate on Headscarves is not Over' (2006) 2 European Constitutional Law Review, 268–292, 277–284; Carolyn Evans, 'The "Islamic Scarf" in the European Court of Human Rights' (2006) 7(1) Melbourne Journal of International Law 52, 6 and 11–15; Imen Gallala, 'The Islamic Headscarf: An Example of Surmountable Conflict between Shari'a and the Fundamental Principles of Europe' (2006) 12(5) European Law Journal, 593–612, 601; Sylvie Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR' (2006) 55(4) International and Comparative Law Quarterly, 929–944, 930–931 and 936–937; Jill Marshall, 'Freedom of Religious Expression and Gender Equality: Sahin v Turkey' (2006) 69(3) Modern Law Review, 452–461; Lewis (n 18) 408–409; Peter Cumper and Tom Lewis, '"Taking Religion Seriously"? Human Rights and Hijab in Europe –Some Problems of Adjudication' (2008–2009) 24 Journal of Law and Religion, 599–627, 609; and Isabelle Rorive, 'Religious Symbols in the Public Space: in Search of a European Answer' (2009) 30(6) Cardozo Law Review, 2669–2698, 2683.

29 *Leyla Sahin v Turkey* (n 21) (Grand Chamber), Judge Tulkens, dissenting opinion, para 3.

30 Ibid. For the same criticism: Evans (n 28) 5 and 6; Lewis (n 18) 408; and Rorive (n 28) 2682.

diversity in religious issues could become no more than a mechanism by which the Court and Commission can avoid political sensitivities which follow from that diversity'.[31]

Despite the criticism raised against these two cases, the Strasbourg Court appears to have continued to afford States a wide margin of appreciation in relation to bans on the wearing of religious symbols, including headscarves and turbans, and has generally held these to be justified in the interest of public order and/or the protection of the rights and freedoms of others or public safety.[32]

However, the Strasbourg Court's judgments in two recent cases might show that the margin of appreciation is not unlimited, that there is some European supervision after all and that the Strasbourg Court is starting to examine the justification brought forward by the State Party in a slightly more rigorous way. In *Ahmet Arslan and Others v. Turkey*,[33] 127 members of a religious group were convicted for touring the streets of Ankara while wearing turbans and distinctive trousers and tunic, a dress code based on their religious beliefs. The Strasbourg Court found a violation of Article 9 because the Turkish Government had not convincingly established the necessity of the disputed restriction and the interference was not based on sufficient reasons and thus not justified.[34] The Strasbourg Court emphasised that there was a distinction between wearing religious dress in public areas open to all and wearing it in schools or other public establishments where religious neutrality might take precedence over the right to manifest one's religion or belief.[35] The Strasbourg Court also considered that there was no evidence that the applicants had represented a threat to public order or that they had been involved in proselytising by exerting inappropriate pressure on passers-by.[36] This not only suggests that the Strasbourg Court might hold general bans on religious symbols in all public areas

31 Peter Edge, 'The European Court of Human Rights and Religious Rights' (1998) 47(3) International and Comparative Law Quarterly, 680–687, 685.

32 See: *Kōse and 93 Others v Turkey* App no 26625/02 (ECHR, 24 January 2006) (headscarves) and *Kurtulmus v Turkey* App no 65500/01 (ECHR, 24 January 2006) (headscarf); *Kervanci and Dogru v France* (headscarves) (n 13); *Aktas, Bayrak, Gamaleddyn, Ghazal, J. Singh and R. Singh v. France* App nos 43563/08, 14308/08, 18527/08, 29134/08, 25463/08 and 27561/08 (ECHR, 30 June 2009) (headscarves and under-turbans) hereafter: *Aktas and Others v. France*; *Phull v. France* App no 35753/03 (ECHR, 11 January 2005) (turban); *El Morsli v France* App no 15585/06 (ECHR, 4 March 2008) (veil); and *Mann Singh v France* App no 24479/04 (ECHR 27 November 2008) 152. The latter case concerned a Sikh man who was refused a duplicate driving licence because he did not want to submit a photo of himself without his turban. Note that the United Nations Human Rights Committee found a violation of the freedom of religion under Article 18 International Covenant on Civil and Political Rights in a case with very similar facts regarding a photo for a residence permit (HRC *Ranjit Singh v France* (22 July 2011) CCPR/C/102/D/1876/2009.

33 *Ahmet Arslan and Others v Turkey* App no 41135/98 (ECHR, 23 February 2010) (full judgment available in French only).

34 Ibid para 52.

35 Ibid para 49.

36 Ibid para. 50.

to be an unjustified interference and thus a violation of Article 9,[37] but this case also shows a greater willingness to balance the interest of applicants in their freedom to manifest their religion or belief with the interests of the State Party in restricting this freedom.

This willingness was also apparent in *Eweida and Others v. the United Kingdom*,[38] where the Strasbourg Court had to deal with two Christian applicants who both wanted to wear a cross in a visible way with their uniform. Eweida, who, as stated above, worked as check-in staff for British Airways, and Chaplin, who worked as a nurse, were both prohibited from wearing a cross in this way because this was against their employer's uniform policy. The Strasbourg Court held that their wish to wear a cross in a visible manner was a manifestation of their belief and that the respective uniform policies were an interference with this right.[39] When it came to the question of justification, the Strasbourg Court concluded that, in Eweida's case, a fair balance had not been struck between her right to freely manifest her religion and British Airways' wish to protect its corporate image and that the domestic courts had given too much weight to the latter.[40] However, in relation to Chaplin, the balance between the interests involved was held to have been struck in the right way because the reason for asking Chaplin to remove her cross was the protection of health and safety on a hospital ward, and this was inherently of much greater importance than that which applied in respect of Eweida.[41]

The Strasbourg Court thus considered the justification and proportionality question in more detail than it has often done in the past and gave greater weight to the importance of the manifestation for the applicants themselves, something that was completely absent in *Dahlab v. Swtizerland*[42] and *Leyla Sahin v. Turkey.*[43] The Strasbourg Court considered that 'on one side of the scales was Eweida's desire to manifest her religious belief'[44] and that 'as in Eweida's case, the importance for the

37 The Strasbourg Court (Grand Chamber) will get a chance to decide on this in *SAS v France* App no 43835/11, which concerns a challenge to the French legal ban on all face covering clothing in public places. A violation of Arts. 3 (prohibition of torture and inhumane and degrading treatment), 8, 9, 10, 11 and 14 is claimed. The case was heard by the Grand Chamber on 27 November 2013, after the Chamber, in May 2013, relinquished jurisdiction (for a summary of this hearing see: http://strasbourgobservers.com/2013/11/29/s-a-s-v-france-a-short-summary-of-an-interesting-hearing/). It is, at time of writing (March 2014), not known when the judgment will be published.

38 *Eweida and Others v the United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR, 27 May 2013). These four cases (Eweida, Chaplin, Ladele and McFarlane) were heard together but the latter two did not concern the wearing of religious symbols and will therefore not be discussed here.

39 Ibid paras 89, 91 and 97.

40 Ibid para 94.

41 Ibid para 99.

42 *Dahlab v Swtizerland* (n 14).

43 *Leyla Sahin v Turkey* (n 21).

44 *Eweida and Others v the United Kingdom* (n 38) para 94.

second applicant [Chaplin] of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance'.[45]

*Ahmet Arslan and Others v. Turkey*[46] and to an even greater extent, *Eweida and Others v. the UK*,[47] can thus be seen as significant because in these cases the Strasbourg Court, for the first time in cases relating to bans on the wearing of religious symbols as manifestation of a person's religion or belief under Article 9 ECHR, applied a stricter proportionality test which included giving weight to the importance of the religious manifestation for the individual applicant. This is a significant development and, if the Strasbourg Court continues on this route, persons affected by bans on the wearing of religious symbols would have more chance of challenging such bans successfully or, at least, will have their interests in being able to manifest their beliefs taken into account by the Strasbourg Court. It can be assumed that the judgment in *Eweida and Others v. the UK* is leading, as the Chamber held a public hearing, indicating that the issues at stake in this case were rather important. And, referral to the Grand Chamber was refused, which seems to indicate that the judgment did not raise a serious question affecting the interpretation or application of the Convention (Article 43 ECHR).

## 2.3. ARTICLE 14 ECHR

Article 14 ECHR prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention on a large number of grounds.[48] Bans on the wearing of religious symbols could possibly be a violation of Article 14 as they could constitute religious or other forms of discrimination. Article 14 does not give any indication whether and in what circumstances discrimination can be justified, but the Strasbourg Court has held that it does not forbid every difference in treatment. The equal treatment principle in Article 14 is violated if the distinction has no objective and reasonable justification. And, to be 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.[49] This

45 Ibid para 99. On 27 May 2013, the Grand Chamber rejected a request for referral to the Grand Chamber, so the judgment is final: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003–4372554–5248315#{%22itemid%22:[%22003–4372554–5248315%22]}.

46 *Ahmet Arslan and Others v Turkey* (n 33).

47 *Eweida and Others v the United Kingdom* (n 38).

48 Article 14 does not provide a freestanding right to non-discrimination, it only prohibits discrimination in the enjoyment of the rights in the ECHR. Protocol 12 ECHR does provide a free-standing right to non-discrimination of 'any right set forth by law'. The Strasbourg Court, in, *Sejdic and Finci v Bosnia Herzegovina* App nos 27996/06 and 34836/06 (ECHR, 22 December 2009) has held that Protocol 12 should be interpreted in the same way as Article 14. So the following on justification under Article 14 would apply to Protocol 12 as well. Protocol 12 has only been ratified by 18 Council of Europe Member States, of which eight EU Member States.

49 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (ECHR 1979–1980) 1 EHRR 252, under THE LAW, at B, para 10.

test is, therefore, very similar to the justification test of Article 9(2) ECHR analysed above, especially as, here again, 'the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment'.[50] The EU uses similar justification tests under the EU Charter of Fundamental Rights and under EU anti-discrimination law as will be clear from the following, and thus it is useful to discuss some of the Article 14 case law.

## 2.4. CASE LAW UNDER ARTICLE 14 ECHR

As mentioned, Article 14 can only be invoked in conjunction with one or more other articles of the ECHR. Because of this, the Strasbourg Court often does not find it necessary to consider whether there is a breach of Article 14 or it will find that no separate question arises under Article 14.[51] In some of the cases concerning bans on the wearing of religious symbols discussed before, where the Strasbourg Court has considered the discrimination claim, it has held that the rules banning the religious symbol were not specifically concerned with religious affiliation or sex. Instead, the Strasbourg Court examined the aims of the rules and decided that these were legitimate and that there was, thus, no discrimination.[52] In *Dahlab v. Switzerland* and *Kurtulmus v. Turkey*, the Strasbourg Court stated that the rule on the wearing of religious symbols applied to men as well as women and in *Kōse and Others v. Turkey*, the rule was said to be applicable equally to boys.[53] For example, in *Dahlab v. Switzerland,* the Court held that 'the measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith'.[54] In *Aktas and Others v. France*, it was held that the rules were applicable to all religious symbols and thus did not constitute religious discrimination.[55] Therefore, even where Article 14 is considered, there does not seem to be any consideration of whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The above suggests that a claim that bans on the wearing of religious symbols are discriminatory under Article 14 is unlikely to be successful and therefore does not

50 *Willis v the United Kingdom* App no 36042/97 (ECHR 11 September 2002) para 39.

51 See, for example, *Eweida and Others v the United Kingdom* (n 38), where, in relation to Eweida, the Strasbourg Court did not find it necessary to examine the claim under Article 14 in conjunction with Article 9 separately (para 95). While, in relation to Chaplin, it considered that, as the factors to be weighed in the balance when assessing proportionality under Article 14 taken in conjunction with Article 9 would be similar, there was no basis to find a violation of Article 14 (para 101).

52 *Dahlab v Switzerland* (n 14); *Leyla Sahin v Turkey* (n 21); and *Kōse and Others v Turkey*; *Kurtulmus v Turkey*; and *Aktas and Others v France* (n 32).

53 *Dahlab v Switzerland supra* note 14, under THE LAW, point 2; *Kurtulmus v Turkey* (n 32) at C of the considerations of the law; *Kōse and Others v Turkey* (n 32) at D of the considerations of the law.

54 *Dahlab v Switzerland* (n 14) under THE LAW, point 2.

55 *Aktas and Others v France* (n 32) para 3.

assist persons who want to wear religious symbols as a manifestation of their religion or belief in overturning such bans. Until recently, this also appeared to be the case for claims of a violation of Article 9, but *Ahmed Arslan and Others v. Turkey*[56] and *Eweida and Others v. the United Kingdom*[57] appear to indicate that the Strasbourg Court is more willing to examine whether such bans are justified and proportionate and to give more weight to the importance of the religious manifestation for the person concerned. However, the first case was different from the other cases of the Strasbourg Court on bans on the wearing of religious symbols, as it concerned a ban in public areas open to all rather than a specific ban in public establishments. But what would the Luxembourg Court decide if it was asked to examine this issue?

## 3. BANS ON THE WEARING OF RELIGIOUS SYMBOLS IN EU LAW

Bans on the wearing of religious symbols could possibly breach Article 10 (freedom of religion) and Article 21 (prohibition of discrimination) of the EU Charter of Fundamental Rights. Furthermore, such bans could constitute discrimination on the ground of religion or belief, but also on other grounds such a gender and racial or ethnic origin. They could also be considered discrimination on a combination of these grounds. A ban on all religious symbols can be seen as direct religion or belief discrimination between those with and those without a religion. Banning religious symbols of one religion only and allowing symbols from others would also amount to direct religious discrimination. Dress rules banning Muslim headscarves and face veils but allowing Sikh turbans and Jewish skull caps would be directly discriminatory against women on the grounds of both gender and religion. Furthermore, neutral dress codes which prohibit all religious symbols could be indirectly discriminatory on the grounds of religion because they disproportionally affect non-Christian religions which are more likely to have specific dress requirements. This could also amount to indirect race discrimination, as the majority of the people affected by such bans would be of non-Western origin. Bans on such dress codes could also be indirectly discriminatory against women[58] because, as Blair writes, 'the dress requirements of males from ethnic minority groups (Sikhs apart) have seldom caused problems. Women much more than men are subject to highly restricted dress codes'.[59]

56 *Ahmed Arslan and Others v Turkey* (n 33).

57 *Eweida and Others v the United Kingdom* (n 38).

58 See further Titia Loenen, 'The Headscarf Debate Approaching the Intersection of Sex, Religion and Race under the European Convention on Human Rights and EC Equality Law' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish, 2009) 313–328, 320–323; and Sarah Haverkort-Speekenbrink (n 4) 90–96.

59 Ann Blair, 'Case Commentary: R (SB) v Headteacher and Governors of Denbigh High School – Human Rights and Religious Dress in Schools' (2005) 17(3) Child and Family Law Quarterly, 399–413, 411.

In the following, the specific focus will be on the justification test, including the proportionality requirement, used in the EU Charter of Fundamental Rights and in EU anti-discrimination law, as these tests are similar to the tests under Articles 9 and 14 of the ECHR and a comparison will be made between the way the Strasbourg Court has used the justification test and the likely use of the similar test by the Luxembourg Court.

## 3.1. EU CHARTER OF FUNDAMENTAL RIGHTS

Article 10(1) of the EU Charter of Fundamental Rights echoes Article 9(1) ECHR, but there is no second paragraph similar to Article 9(2). However, Article 52(1) of the Charter determines that any limitation on the exercise of the rights and freedoms in the Charter must be 'provided for by law and respect the essence of those right and freedoms'. Any limitations must be 'subject to the principle of proportionality' and they 'may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. According to the Explanations,[60] this is based on the case law of the Luxembourg Court which held, in *Karlsson and Others*, that restrictions may be imposed on the exercise of fundamental rights provided that those restrictions 'do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights'.[61] Therefore, here again, the measure must be proportionate and necessary and must pursue a legitimate aim.

As already pointed out, this justification test is similar to the objective justification tests under Articles 9 and 14 ECHR and, therefore, it might very well be interpreted by the Luxembourg Court in the same way because Article 52(3) of the EU Charter determines that, if rights in the Charter correspond to rights guaranteed in the ECHR, the meaning and scope of those rights shall be the same as those in the Convention. The Explanations make it clear that this includes limitations and that the reference to the ECHR includes the text and the Protocols as well as the case law of the Strasbourg and the Luxembourg Courts.[62]

This could suggest that the Luxembourg Court would follow the Strasbourg Court and would, if called upon to do so, consider bans on the wearing of religious symbols easily justified under both Articles 10 and 21 of the EU Charter, without much examination or a proper proportionality test, a proper balancing of all the interests involved – unless it follows the Strasbourg Court in *Eweida and Others v. the United Kingdom*. But, not only the latter case can be used as an argument for the Luxembourg Court not to follow the Strasbourg Court's earlier case law, another argument can be found in Article 52(3) of the EU Charter which determines that 'this provision shall

60 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/33.

61 Case 292/97 *Karlsson and Others* [2000] ECR I-2737, para 45.

62 *Explanations* (n 60). See also Case 400/10 *J. McB. v L.E.* [2010] ECR I-8965, para 53.

not prevent Union law providing more extensive protection'. A third argument could be that the Luxembourg Court has always held that restrictions and limitations to individual rights in EU law, including the right not to be discriminated against, should be interpreted strictly.[63] For example, in *Johnston*, the Luxembourg Court stated that 'a derogation from an individual right laid down in the directive[64] must be interpreted strictly' and that the principle of proportionality 'requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view'.[65] Therefore, there are a number of arguments which would suggest that the Luxembourg Court will be stricter in its application of the justification and proportionality test of Article 52(1) of the Charter.

### 3.2. EU ANTI-DISCRIMINATION LAW

As stated above, bans could amount to discrimination on the ground of religion or belief, gender and racial or ethnic origin or on a combination of these grounds. All these forms of discrimination are prohibited under EU law, but the areas covered for each ground are different. Religious discrimination is prohibited by Directive 2000/78/EC,[66] which is only applicable in the area of employment and occupation, including vocational training.[67] Gender discrimination is prohibited in the same area by Directive 2006/54/EC and in the area of access to and supply of goods and services by Directive 2004/113/EC.[68] The latter Directive explicitly excludes education from its material scope (Article 3(3)). So, for example, the French school pupils who challenged bans on the wearing of religious symbols in school at the Strasbourg Court in the cases mentioned above, would not be able to claim sex discrimination under

63 See Case 222/83 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 36; Case 273/97 *Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403, para 23; Case 285/98 *Kreil v Bundesrepublik Germany* [2000] ECR I-69, para 20; Case 341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] IRLR 254, para 60; and Case 447/09 *Prigge and Others v Deutsche Lufthansa AG* [2011] ECR I-8003, paras 56 and 72. The first three cases concerned sex discrimination and the EU sex discrimination directives, while the latter two concerned age discrimination and Directive 2000/78/EC.

64 Council Directive (EC) 76/207 *on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational training and Promotion, and Working Conditions* [1976] OJ L 39/40. This Directive has been repealed by Directive (EC) 2006/54 *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.

65 *Johnston* (n 63) paras 36 and 38. Recently repeated in *Prigge* (n 63) paras 56 and 72.

66 Directive (EC) 2000/78 (n 5).

67 There is a Proposal from the European Commission to extend the material scope of Directive (EC) 2000/78 beyond this but this proposal has not been adopted to date. See COM (2008) 426 *Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*.

68 Directive (EC) 2004/113 *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.

Directive 2004/113/EC or religious discrimination under Directive 2000/78/EC.[69] Racial or ethnic origin discrimination is prohibited by Directive 2000/43/EC,[70] not only in employment and in access to and supply of goods and services, but also in the areas of social protection, including social security and health care, social advantages and education. It must be noted that all these Directives expressly state that they contain minimum standards which must be implemented by the EU Member States but that these States can introduce or maintain more favourable provisions. Therefore, national law could prohibit all grounds of discrimination covered by EU law (and others) in all areas covered by Directive 2000/43/EC and in many Member States this is indeed the case.

All EU anti-discrimination Directives prohibit both direct and indirect discrimination. 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 discrimination grounds covered. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular protected characteristic – gender, racial or ethnic origin, religion or belief, disability, age, or sexual orientation – 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. Although, as discussed, the test for justification of indirect discrimination is very similar to the tests used for justifications on restrictions of fundamental rights in the ECHR and in the EU Charter of Fundamental Rights, there are some arguments in favour of the expectation that the Luxembourg Court will apply this test to bans on the wearing of religious symbols in a stricter way. Two of these arguments have already been mentioned: according to settled case law of the Luxembourg Court, restrictions and limitations to individual rights in EU law should be interpreted strictly and this includes the right not to be discriminated against as laid down in the EU anti-discrimination directives.[71] And, the EU can provide more extensive protection for fundamental rights, which includes the right to equality and non-discrimination, than the ECHR does.

There is a further argument in favour of the expectation that the Luxembourg Court is likely to scrutinise justifications of bans on the wearing of religious symbols more carefully and apply a more rigorous proportionality test than the Strasbourg Court generally does. This is the argument that, under Article 14 ECHR, justification of both direct and indirect discrimination is possible, but EU law is stricter in this and does not, generally, allow for justification of direct discrimination unless in specific circumstances clearly mentioned in the directives. In relation to religion and belief

69 *Kervanci and Dogru v France* (n13) and *Aktas and Others v France* (n 32).

70 Directive (EC) 2000/43 *Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin* [2000] OJ L 180/22.

71 This is clear from the cases (n 63).

discrimination, Directive 2000/78/EC only mentions, as such exceptions, genuine occupational requirements (Article 4 (1) and (2)) and positive action (Article 7). Genuine occupational requirements are subject to a justification test similar to the ones discussed earlier: the objective must be legitimate and the requirement must be proportionate. However, Directive 2000/78/EC also contains a general exception clause, applicable to all grounds of discrimination covered by the Directive. Article 2(5) determines:

> This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

However, despite the fact that the justification and proportionality tests for indirect discrimination, for genuine occupational requirements and under Article 2(5), are very similar to the justification tests under Articles 9 and 14 ECHR, here too, there are a number of indications that the Luxembourg Court will apply these tests more strictly. First of all, the justification test for indirect sex discrimination comprises, according to the Luxembourg Court in *Bilka Kaufhaus*,[72] three parts: the means chosen must correspond to a real need; they must be appropriate with a view to achieving the objective pursued; and they must be necessary to that end. This is a strict test and it includes a consideration of the question of whether there is an alternative, less far-reaching and less discriminatory way of achieving the aim pursued.[73] This clearly means that the interests of the individual applicant must be taken into account and weighed in the balance and if there is an alternative which affects the individual less, than that alternative should be chosen. It is submitted that this test is stricter than the justification and proportionality test as applied by the Strasbourg Court. Moreover, as the objective justification test for indirect sex discrimination is formulated in the same way as the tests for indirect discrimination on the other discrimination grounds covered by EU law, there appears to be no reason why this should not also apply to indirect discrimination on those other grounds, including religion or belief.[74] Or should there be a less strict test in relation to religion and belief? Vickers discusses this issue and writes:

> It is arguable that such a high standard of justification is not appropriate in cases of religion and belief discrimination, as it would lead to difficulties for employers who attempt to

72 Case 170/84 *Bilka Kaufhaus GMBH v Karin Weber von Hartz* [1986] ECR 1607, para 36.

73 Dagmar Schiek, 'Indirect Discrimination' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law* (Hart Publishing, 2007) 323–475, 357. See also on this 'other means test' or 'least onerous means test': Haverkort-Speekenbrink (n 4) 76.

74 Compare Article 2(1)(b) Directive (EC) 2006/54 and 2(b) Directive (EC) 2004/113 with Article 2(2)(b) of both Directives (EC) 2000/78 and 2000/43.

> achieve a fair balance between the different interests identified above. Yet if different standards of justification develop with respect to religious discrimination and gender discrimination this will lead to inconsistencies in treatment as between different grounds of discrimination within European Law.[75]

As the Luxembourg Court is generally concerned with a uniform application of EU law, it will want to avoid such inconsistencies and it is, thus, likely to hold that the same standard of justification should be applied to all grounds of discrimination, including religion and belief.

There is another point that would support a strict justification test in relation to religion and belief (and all other grounds on which discrimination is prohibited under EU law): Article 6(1) of Directive 2000/78/EC determines that direct age discrimination can be justified, that such direct discrimination shall not constitute discrimination if the difference in treatment is objectively and reasonably justified by a legitimate aim and if the means to achieve that aim are appropriate and necessary. In a number of cases concerning age discrimination, the Luxembourg Court has discussed this objective justification test.[76] In *Heyday*, the Luxembourg Court stated that Article 6(1) of Directive 2000/78/EC imposes on the Member States the burden of establishing to a high standard of proof the legitimacy of the aim pursued.[77] Therefore, the Luxembourg Court will not easily accept that a measure which directly discriminates on the grounds of age is justified.[78] That a high standard of proof is also required for the justification of genuine occupational requirements in relation to age is confirmed in *Wolf* and *Prigge*.[79] In both *Petersen* and *Prigge*, the Luxembourg Court held that Article 2(5), as an exception to the principle of the prohibition of discrimination, must be interpreted strictly and that the terms used in Article 2(5) also suggest such an approach.[80] It can be argued that if a high standard of proof is required for justifications of direct age discrimination, where Directive 2000/78/EC allows for a fairly wide range of justifications, the Luxembourg Court will very likely require a high standard of proof for justifications

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75 Lucy Vickers, *Religion and Belief Discrimination in Employment – EU Law* (Office for Official Publications, 2006) 14.

76 See, for example Case 144/04 *Mangold v Helm* (n 6); Case 411–05 *Felix Palacios de la Villa v Cortefiel Servicios* [2007] ECR I-8481; Case 555/07 *Kucukdeveci v Swedex GmbH & Co KG* (n 6); and, Case 388/07 *R on behalf of the Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569 (hereafter referred to as the *Heyday* case).

77 *Heyday* (n 76) para 65.

78 See for a more extensive discussion of this: Erica Howard, 'EU Equality Law: Three Recent Developments' (2011) 17(6) European Law Journal, 785–803.

79 Case 229/08 *Wolf v Stadt Frankfurt am Main* [2010] ECR I-1; and *Prigge* (n 63) para 72.

80 *Petersen* (n 63) para 60; and *Prigge* para 56 (n 63).

on other grounds provided for in the anti-discrimination directives. As Henrard mentions:

> The baseline level of scrutiny of the ECJ tends to be rather high, even for a ground such as age […] whereas there are many more legitimate reasons to distinguish on the basis of age than, for example, on the basis of gender or race.[81]

Haverkort-Speekenbrink suggests that the scrutiny might be even higher for other grounds where she writes that 'the fact that the legislature included a general justification clause for only age discrimination may be considered a sign that the ECJ would be more lenient towards this ground compared to other grounds'.[82]

Therefore, all the above arguments support the application of a strict justification test in EU law which would thus lead the Luxembourg Court to scrutinise the proportionality of bans on the wearing of religious symbols more rigorously than the Strasbourg Court often appears to do.

A fourth argument in favour of the expectation that the Luxembourg Court is likely to scrutinise justifications of bans on the wearing of religious symbols more carefully than the Strasbourg Court can be found in the fact that the Strasbourg Court, as discussed above, leaves a margin of appreciation to the States Parties and thus leaves room for a possible different interpretation in different States, while the Luxembourg Court is generally more concerned with uniform application and interpretation of EU law and there is less scope for a diverse application.[83] This difference is related to the fact that the two courts were set up for different purposes and have different functions, as Douglas-Scott points out: the Strasbourg Court was set up as a human rights court to protect individuals against human rights abuses by the States Parties, while the Luxembourg Court was established with a much broader jurisdiction.[84] Alidadi also mentions the different roles of these courts and writes that the fact that, according to article 288(3) TFEU:

> the EU Directives are binding as to the result achieved justifies a much more guided case law from the ECJ in the area of religious employment discrimination. Arguments based on the free movement of workers in the private sector, an important objective of the EU, could strengthen the case for clarity of guidance and require a level of uniformity across the Member States.[85]

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81 Kristin Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (2012) 5(1) Erasmus Law Review 71–72, footnote 88.

82 Haverkort-Speekenbrink (n 4) 230.

83 See Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing Human Rights *Acquis*' (2006) 43 Common Market Law Review, 645–682, 650; and Loenen (n 58) 316.

84 Douglas-Scott, ibid 632.

85 Katayoun Alidadi, 'Muslim Women made Redundant: Unintended Signals in Belgian and Dutch Case Law on Religious Dress in Private Sector Employment and Unemployment' in Katayoun

The fact that bans on the wearing of religious symbols could impede free movement is another argument in favour of the expectation that the Luxembourg Court will scrutinise justifications of such bans very thoroughly. As Haverkort-Speekenbrink writes 'a field in which the ECJ applies the strictest assessment of all is where a difference in treatment touches upon the freedom of movement'.[86]

Moreover, not only the objective of free movement of workers could be hindered by bans on the wearing of religious symbols at work, other objectives of the EU could be affected as well. Recital 11 of the Preamble to Directive 2000/78/EC states that discrimination may undermine the achievement of the objectives of the EU, 'in particular the attainment of a high level of employment and social protection, raising the standard of living, economic and social cohesion and solidarity, and the free movement of persons'. Bans could hinder the achievement of all these objectives: if people cannot wear their religious symbols at work, they might not get a job or they might lose their job and become unemployed and therefore, might not be able to earn enough to maintain a certain standard of living or take part in society and thus they might get isolated from that society. Bans on the wearing of religious symbols in some Member States and not in others might also hinder the freedom of movement of the persons affected by these bans. This might therefore be another reason why the Luxembourg Court might decide that bans on the wearing of religious symbols are discriminatory and thus prohibited by EU law.

## 4. CONCLUSION

In this article, it has been argued that persons who are affected by bans on the wearing of religious symbols, if they can get their case referred for a preliminary reference to the Luxembourg Court – and, there is a clear role for advocates/representatives in national cases to raise questions concerning EU anti-discrimination law which could lead to such a reference, as was discussed above – might have a better chance of a successful challenge to such bans in that Court than in the Strasbourg Court. This is based on the expectation that the Luxembourg Court will apply a stricter justification and proportionality test than the Strasbourg Court has done in most cases. It is submitted that a stricter application of this test is desirable because it means that the Court will perform a more rigorous balancing of all the interests involved and will give more weight to the importance of the right of the individual who wants to manifest his or her religion through the wearing of religious symbols. The Strasbourg

Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds) *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate, Farnham/Burlington, 2012) 258–259.

86 Haverkort-Speekenbrink (n 4) 237. See also the same author at 109, where she writes that a more rigorous scrutiny is applied in cases that touch upon the fundamental principle of the freedom of movement.

Court has, in many cases, been rather deferential to the opinion of the State Party without giving attention to the interest of the individual affected.

Four main arguments have been brought forward to support the expectation that the Luxembourg Court will apply a stricter justification and proportionality test in cases where it is claimed that bans on the wearing of religious symbols constitute a violation of human rights or a breach of anti-discrimination law. First, the EU Charter of Fundamental Rights states explicitly, in Article 52(3), that Union law can provide more protection than that provided by the ECHR and thus the Luxembourg Court does not have to follow the restrictions in the case law on the freedom to manifest one's religion of the Strasbourg Court. Second, the Luxembourg Court has consistently held that restrictions and limitations to individual rights in EU law, including the right to equality and non-discrimination, should be interpreted strictly.

Third, EU law does not generally allow for justification of direct discrimination except in certain circumstances prescribed by the anti-discrimination directives, while Article 14 ECHR allows for justification of both direct and indirect discrimination. This could already indicate that the EU is stricter in applying the justification test. More support for this can be found in the fact that, in relation to indirect sex discrimination, a strict justification test has been applied.[87] Because the indirect discrimination provisions under all EU anti-discrimination directives are formulated in the same way and because the Luxembourg Court is very likely to want to avoid inconsistencies in EU law, it can be expected that the same standard of justification would be applied to all grounds of discrimination, including religion and belief. This is further supported by the Luxembourg Court's case law on age discrimination which shows that, even though justification of direct age discrimination is specifically provided for in Article 6 of Directive 2000/78/EC, the Luxembourg Court requires a high standard of proof to find age discrimination justified. If the Luxembourg Court does so in relation to age discrimination, where a fairly wide range of justifications are allowed, then this Court would very likely require a high standard of proof for other justifications in the anti-discrimination directives. All this supports the argument that the application of the justification test in EU law will be stricter and this stricter application will lead the Luxembourg Court to scrutinise the proportionality of bans on the wearing of religious symbols more rigorously than the Strasbourg Court appears to do.

Fourth, the Strasbourg Court leaves a margin of appreciation to the States Parties, while the Luxembourg Court is generally more concerned with uniform application and interpretation of EU law and there is less scope for a diverse application. This reduced scope is compounded by the fact that religious and other forms of discrimination – and bans on the wearing of religious symbols can be seen as such – may undermine the achievement of a number of the objectives of the EU, including the fundamental principle of freedom of movement.

87 See *Bilka Kaufhaus* (n 72).

All of the above arguments suggest that the Luxembourg Court might well apply a more rigorous justification test and scrutinise claims against bans on the wearing of religious symbols more thoroughly. On the other hand, as Haverkort-Speekenbrink writes about the Islamic headscarf specifically,

> it is not improbable that the ECJ would be very cautious with the issue of the Islamic headscarf. After all, there is a clear approach by the ECtHR on this issue. The ECJ might consider that it does not want to get in the way of the ECtHR. In addition, as said, Member States are very sensitive when it comes to this subject.[88]

It is submitted that the Luxembourg Court should not be cautious at all with the manifestation of religion or belief through the wearing of religious symbols nor should it follow the Strasbourg Court but, instead, it should apply a strict and rigorous justification and proportionality test to bans on the wearing of religious symbols as this would ensure a better balancing of the interests of individuals in being able to manifest their religion. Or, as Pitt writes:

> As many commentators regard the European Court of Human Rights as having taken an unduly narrow view of the protection offered by Article 9 [ECHR] in relation to claims by employees, if a similar approach is taken to the legal interpretation of the Directive [2000/78/EC], the Directive may be found to have a disappointingly limited impact.[89]

There is another reason why it is submitted that the Luxembourg Court should apply a strict justification and proportionality test. Iglesias Sanchez refers to the 'boomerang' effect of the EU Charter of Fundamental Rights on the Strasbourg and Luxembourg Courts, where both influence each other's case law.[90] If the Luxembourg Court applies a stricter test for both the justification under the EU Charter of Fundamental Rights and under the anti-discrimination directives, this might then lead the Strasbourg Court to scrutinise the justifications brought forward by States for bans on the wearing of religious symbols in a more rigorous way. *Ahmet Arslan v. Turkey*[91] and *Eweida and Others v. the United Kingdom*[92] could be an indication that the Strasbourg Court is moving in that direction anyway. Especially in *Eweida,* the Strasbourg Court gave more weight to what is at stake for the individual applicant who wants to manifest their religion through the wearing of a religious symbol. This decision

88 Haverkort-Speekenbrink (n 4) 292.

89 Gwyneth Pitt, 'Religion and Belief: Aiming at the Right Target?' in Helen Meenan (ed.) *Equality Law in an Enlarged European Union Understanding the Article 13 Directives* (Cambridge University Press, 2007) 202–230, 209.

90 Sara Iglesias Sanchez, 'The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 Common Market Law Review, 1565–1612, 1570.

91 *Ahmet Arslan and Others v Turkey* (n 33).

92 *Eweida and Chaplin v the United Kingdom* (n 38).

contrasted with the way the Strasbourg Court had dealt with its earlier cases on the wearing of religious symbols, where it had been rather deferential to the arguments of the States Parties and afforded them a very wide margin of appreciation. So, the Strasbourg Court appears to be already moving towards more scrutiny and a stricter justification test and the Luxembourg Court applying such a test could encourage this development.

The Luxembourg Court's decisions might influence the Strasbourg Court's judgments in another way. If the Luxembourg Court applies a stricter justification test to bans on the wearing of religious symbols and, by doing so, provides more guidance and requires a certain level of uniformity across the EU Member States, this might then be taken by the Strasbourg Court as a very tentative move towards the emergence of a common European consensus in this area, although the Council of Europe has 47 Member States and the EU has only 28. The Strasbourg Court might then apply a narrower margin of appreciation and scrutinise justifications more closely.

However, a caveat needs to be added, as the 'boomerang' effect could also mean that the Luxembourg Court will be influenced by the Strasbourg Court's case law in this area. As Loenen points out, the Luxembourg Court could follow the Strasbourg Court and leave some measure of discretion to the Member States in implementing and applying the provisions against religious discrimination.[93] Loenen writes that a deferential approach by the Luxembourg Court could lead to 'widely diverging outcomes of transposing the equality directives in this area: they may come to mean entirely different things in different countries'.[94] As the issue engages sex discrimination as well, a relaxation of the standards in relation to sex discrimination, and subsequently other forms of discrimination, could follow. It is submitted that this would lead to reduced protection against discrimination on all the grounds covered by EU anti-discrimination law and that this is thus not a path the EU or the Luxembourg Court should follow. Avoiding this would, therefore, be another argument for the Luxembourg Court to apply the strict justification test from *Bilka Kaufhaus*[95] to bans on the wearing of religious symbols.

Therefore, persons affected by bans on the wearing of religious symbols appear to have a better chance of successfully challenging such a ban, both as a breach of the freedom to manifest their religion and as a breach of anti-discrimination legislation, before the Luxembourg Court. This leads to a possible anomaly: while the Strasbourg Court is the court specifically tasked with upholding human rights, it is the Luxembourg Court that would appear to provide greater protection in relation to manifesting one's religion through the wearing of religious symbols. However, the recent cases of *Ahmet Arslan v. Turkey*[96] and, more specifically, *Eweida and Others v.*

93 Titia Loenen, 'Accommodation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice' in Alidadi et al (n 85) 103–120, at 117.

94 Ibid. 119.

95 *Bilka Kaufhaus* (n 72).

96 *Ahmet Arslan and Others v Turkey* (n 33).

*the United Kingdom*[97] could be an indication that the way the Strasbourg Court deals with such bans might be changing towards applying a more rigorous justification and proportionality test.

It is submitted that both Courts should apply a strict justification and proportionality test to bans on the wearing of religious symbols to ensure that the interests of the person who wants to manifest their religion in this way and the importance of these symbols for this individual are given proper weight when balanced against the interests of the State or private organisations in restricting such manifestations. The Luxembourg Court should apply the strict test it employs in sex discrimination cases and the Strasbourg Court should follow *Eweida and Others v. the United Kingdom*[98] and further develop the stricter justification test used in that case. This approach would lead to a stronger protection of manifestations of religion and belief through the wearing of religious symbols in both Courts and thus avoid the anomaly.

97 *Eweida and Others v the United Kingdom* (n 38).

98 Ibid.