The European Court of Human Rights Gets It Right: A Comment on Eweida and Others v the United Kingdom

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The European Court of Human Rights has delivered its Chamber judgment in the case of Eweida and Others v. the United Kingdom application nos. 48420/10, 59842/10, 51671/10 and 36516/10).

These cases concerned four practicing Christians. Ms Eweida, who worked for British Airways as check in staff, and Ms Chaplin, who worked as a nurse, both wanted to wear a cross in a visible way with their uniforms. Ms Ladele, a registrar of births, deaths and marriages, and Mr McFarlane, a relationship and psycho-sexual counsellor, both believed that homosexual relationships are contrary to God's law and complained that they had been dismissed for refusing to carry out certain parts of their duties which they considered condoned homosexuality.

The European Court of Human Rights held that Ms Eweida's and Ms Chaplin's wish to wear a cross in a visible manner was a manifestation of their belief (paragraphs 89 and 97). In relation to Ms Eweida, the Court held that 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 (paragraph 94). Therefore, her right to manifest her religion under Article 9 was violated and it was not necessary to examine the claim under article 14 separately (paragraph 95).

However, in relation to Ms Chaplin, the Court held that the balance between the interests involved had been struck in the right way because, in that case, the reason for asking Ms 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 Ms Eweida (paragraph 99). Therefore, the Court could not conclude that the measure was disproportionate and thus the interference with Ms Chaplin's right to manifest her religion under Article 9 was necessary in a democratic society. And, 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.

In contrast with the other three applicants, Ms Ladele did not claim a breach of Article 9 alone, but complained that she had suffered discrimination due to her Christian beliefs in breach of Article 14 taken in conjunction with Article 9 (paragraph 103). In examining whether the local authority's policy pursued a legitimate aim and was proportionate, the Court reiterated that a difference in treatment based on sexual orientation requires very serious reasons to be justified. It found that the aim pursued was legitimate (paragraph 105). The Court considered that the policy aimed to secure the right not to be discriminated against on the ground of sexual orientation which was also protected under the Convention and that the national authorities are allowed a wide margin of appreciation when it comes to striking a balance between competing Convention rights. The national authorities did not exceed this margin of appreciation and thus there could be no violation of Article 14 in conjunction with Article 9.

In relation to Mr McFarlane, the Court accepted that his objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships and held that his refusal to counsel homosexual couples was a manifestation of his religion and belief (paragraph 108). Again, the Court examined whether a fair balance had been struck between the competing interests at stake and considered that the employer's actions was intended to secure the implementation of its policy of providing its service without discrimination. The State authorities have a

wide margin of appreciation in deciding where to strike the balance and this margin had not been exceeded in the present case (paragraph 109). Thus, there was no violation of Article 9, taken alone or in conjunction with Article 14.

A few points can be made about the cases. Firstly, the Court accepted that in order to establish that an act is a manifestation of religion or belief for the purposes of Article 9, the applicant does not have to establish that he or she acted in fulfilment of a duty mandated by the religion in question. It is sufficient to establish the existence of a sufficiently close and direct nexus between the act and the underlying belief (paragraph 82).

Secondly, the Court considered that, where an individual complains of a restriction on his or her freedom of religion in the workplace, rather than holding that the possibility of changing jobs would negate any interference with the right, the better approach would be to weigh this possibility in the overall balance when considering whether or not the restriction is proportionate (paragraphs 83 and 109). This is a welcome departure from its previous case law, which suggested that the freedom to resign was sufficient to accept that there was no violation of Article 9. It recognises that choosing between your religious principles and your job is not as simple as it was previously made out and that resigning is not a realistic option for many people.

Thirdly, in relation to the discrimination claims of Ms Eweida, Ms Chaplin and Mr McFarlane under Article 14, the Court seems to have dismissed these rather perfunctorily by holding that there was no need to examine these claims separately, something the Court often does with Article 14 claims. Even in the case of Ms Ladele, who only claimed a breach of Article 14, the Court did consider very similar issues in relation to justification as it did in the other three cases. Moreover, as discrimination claims were made in all four cases in the domestic courts and as the justification test for both violations of Article 9 and breaches of Article 14 are quite similar and require a balancing of interests, the case will be important for the domestic anti-discrimination laws in Council of Europe member countries.

It is submitted that this judgment is a signal to employers that they have to set sensible policies regarding the wearing of religious clothing and symbols if they do not want to act in breach of anti-discrimination law or be held to violate an employee’s freedom to manifest his or her religion. The decision demonstrates that reasonable requests from employees cannot be refused without seriously considering them and that uniform policies and dress codes need to be made with attention being given to the issues of religious dress and symbols.

The rights of employees and the duty of employers are closely linked – it is a matter of balancing the interests of individual employees and the interests of the employer. A proportionality test is at the heart of this balancing exercise: any rule or policy must have a legitimate aim and the means used to achieve this aim must be proportionate (for more information on this see the book above). This is test is used to justify both limitations on the freedom to manifest your religion and discriminatory actions which would otherwise breach anti-discrimination law. The cases of the registrar and the relationship counsellor show that employees cannot expect every request to be allowed: especially not if it interferes with a human right of another person – not to be discriminated against on grounds of sexual orientation, for example.