

RESPONSE TO THE EQUALITY AND HUMAN RIGHTS COMMISSION
CONSULTATION
“Legal intervention on religion or belief rights: seeking your views”

Response from the Department for Christian Responsibility and Citizenship,
Catholic Bishops’ Conference of England and Wales

GENERAL POINT

- 1) In the UK Court hearings which are now the subject of Appeal Articles 9 and 14 were being considered alongside the Religious Discrimination provisions of the Employment Equality (Religion or Belief) Regulations 2003 (now codified in the Equality Act 2010). This submission, prepared with legal advice, concentrates on the issues relating to Article 9 which are related to but not identical to issues relating to Discrimination.

- 2) A major problem in the area of Religious Discrimination law is the issue of indirect discrimination through the application of ostensibly neutral working practices and whether these are a proportionate means of achieving a legitimate aim (reg 3, Act s19). The issue of proportionality was a crucial point in all 4 cases but it should not be confused with the test under Article 9 which is whether any restrictions are “necessary in a democratic society” which is the test required by Article 9.2.

MISAPPLICATION OF ARTICLE 9 BY BRITISH COURTS

- 3) Article 9 gives an absolute right *“either alone or in community with others and in public or private, to manifest religion or belief, in worship, teaching, practice and observance.”* subject only to the restrictions laid down in Article 9.2:
“such limitations as are prescribed by law and are 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 and freedoms of others.”
Therefore any restrictions which are not necessary are not lawful and “necessary” means more than merely “desirable”. It is clear from these cases now before the European Court that the UK Courts have not been applying the principles of 9.2 correctly. In particular they

have not ensured that any limitations have been objectively proven to be necessary as opposed to merely desirable. Instead of correctly applying the legal test required by 9.2, the UK Courts have applied a much lighter and vaguer test devised by themselves. In the case of **Begum v. Denbigh High School [2006] UKHL 15**, which dealt with the case of a Muslim Schoolgirl wanting to wear a Jilbab at school Lord Hoffman said in para 50 “Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing.”

And this principle was subsequently quoted and applied by the Court of Appeal in para 54 of the case of Ladele which is now before the European Court. It is worth noting that the words of Lord Hoffman with regard to the application of Article 9 were also applied in the cases of **Playfoot v Millais School [2007] EWHC 1698 (Admin)**, (para 21), **Johns v Derby City Council[2011] EWHC 375 (Admin)** (para 79) and the Northern Ireland case of **West [2006] NIQB 39 (04 May 2006)** (para 11)

- 4) This test created by Lord Hoffman and subsequently applied by the UK Courts is an incorrect approach to Article 9. Under Article 9.1 everyone has an absolute right to manifest their religion at a time and place of their own choosing unless the specific form of manifestation is prohibited by “*limitations prescribed by law and necessary in a democratic society.*” The test being applied by the UK Courts to the manifestation of religion is therefore ignoring and short circuiting the specific and carefully laid down limitations authorised by Article 9.2. For that reason alone the decisions in question in this application to the European Court are suspect.
- 5) In addition in the cases of Ladele, Eweida and Chaplin the UK courts have entered into areas of theological speculation which are inappropriate areas for determination by secular Courts. This point will be dealt with in more detail below

RELIGIOUS SYMBOLS - EWEIDA and CHAPLIN

- 6) It is to be welcomed that the Commission is to support these cases and is to defend the right of Christians to wear religious symbols. The two ladies in these cases are not Catholics but their cases caused particular concern amongst Catholics because the Catholic religion

has always laid an emphasis on the importance of sacred religious symbols in particular the Cross. Whilst the wearing or display of a Cross is not a requirement of the Catholic faith the wearing of items such a Cross or Crucifix,¹ religious medals showing the Virgin Mary or the Saints or the wearing of religious scapulars is a long established and deeply respected tradition within the Catholic community and it is common for such items to be blessed by a Priest before they are worn. Whilst there are differences in emphasis and practice between various strands of Christianity, respect for the Cross is universal among them.

- 7) In these two cases however the Courts UK applied a test of whether the wearing of the Cross was a requirement of the Christian religion and then rejected the claims in part because it was not. There is nothing in Article 9 or in the case law of the European Court to justify such a distinction being made. The wearing of a religious item of clothing, such as a Cross, a Sikh Turban or Kara Bracelet, a Jewish Yarmulka or Muslim Hijab are all manifestations of Religion and as such their wearing is protected under Article 9 unless one of the limitations set out in 9.2 can be applied. The fact that in applying Article 9 the UK Courts have sought to distinguish between religions which have mandatory clothing rules and those which do not is itself a breach of Article 14 in that it discriminates between members of different religions on the basis of the doctrines and theology of those religions. The real test should be whether the individual person themselves sincerely regards the wearing of the item as an important manifestation of their religion, which both these ladies did.
- 8) In both these cases the UK Courts have found against manifestations of religion by Christians wearing a Cross or Crucifix however the UK Courts have at the same time protected the wearing of the Sikh Kara Bracelet and the Sikh Turban **Watkins-Singh v Aberdare Girls' High School [2008] EWHC 1865 (Admin)** and **Mandla v Dowell Lee [1983] 2 AC 548**. The difference between the way UK Courts have treated the wearing of the religious symbols of the Sikh Religion and the wearing of religious symbols of the Christian religion is striking and a prima facie breach of Article 14. This submission does not in any way object to or disagree with the decisions of the UK Courts in these two cases and

¹ A Crucifix is a Cross with the image of the Crucified Christ upon it as distinguished from a bare Cross. From a Catholic perspective there is no theological or religious distinction between them in terms of holiness or religious importance

indeed the Catholic Church unhesitatingly supports the right of Sikhs to manifest their religion by wearing these items. What we submit is that the UK Courts should apply the same respect to the wearing of Christian symbols.

LILLIAN LADELE and MORAL COMPLICITY

- 9) The Commission has said that it will oppose the appeals in the cases of McFarlane and Ladele and clearly considers that the issues in the two cases are the same. This submission would disagree and suggest that the two cases are clearly distinguishable on their facts and in the legal principles applicable to them. This submission will concentrate solely on the case of Ladele which we would suggest shows an inability on the part of the Courts, and thus far the Commission as well, to distinguish between on the one hand permitting an individual to discriminate, and on the other hand accommodating an individual who has a sincere conscientious objection to something they are being asked to do. In addition the case demonstrated an unwillingness on the part of the UK Courts to properly consider or apply the limitations in Article 9.2 in particular the question whether the limitations were “necessary in a democratic society”
- 10) In respect of her desire not to participate in same sex partnership ceremonies Ms Ladele was manifesting her religion and belief in “practice and observance”. She believed that same sex relationships are sinful and she further sincerely believed that by participating in the registration of a same sex civil partnership she would herself be morally complicit. Therefore any attempt to force her to participate in them was contrary to her rights under Article 9 because it was an attempt to force her to act in a way that was inconsistent with her moral beliefs in which case her objections should only have been overridden if that was “necessary in a democratic society”
- 11) In para 56 of its judgment the Court of Appeal said
Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished. “
What Article 9 requires of the court is an assessment of the strength and sincerity of the views held by the religious person. In this context it is not for the court then to impose its

own judgment or opinion as to whether or not something is a “core” part of that person’s religion. In addition Article 9 is concerned with freedom of religion which is far more than freedom of worship. Like all elements of the Convention Article 9 protects both positive and negative freedom. To force someone to act in a way contrary to their religious or conscientiously held moral beliefs is surely as wrong as preventing someone acting, or worshipping in accordance with their religious beliefs. But that is what Islington Council and the Court of Appeal required of Ms Ladele.

- 12) In Ms Ladele’s case there is absolutely no evidence that it was necessary to make her participate in registering civil partnerships. The evidence in the case showed that the registration service provided by Islington was not in any way affected by the actions taken by Ms Ladele to ensure that she was not rostered for the registration of civil partnerships. In this situation compelling her to register Civil Partnerships was not “necessary” in any meaningful sense of that word. The fact that her views may have been contrary to the Equality policy of the Council, which is arguable both ways,² still did not make it necessary to force her to act in a manner which was contrary to her religious beliefs. When, as in this case, the services provided by the Employer would not have been compromised or affected by accommodating a conscientious objection it cannot be said to be necessary to require the employee to act contrary to their conscience a point which was never properly addressed by the Court.

REASONABLE ACCOMMODATION

- 13) The Commission has asked for views regarding whether the law should be changed to explicitly require reasonable accommodation in cases of religious discrimination. Whilst such a change may be desirable there are understandable objections to making a change which might appear to be privileging claims of Religious Discrimination over other forms of discrimination. For that reason either the change should be applied to all forms of discrimination or the change should not be made.

² The Equality Policy of the Council also prohibited discrimination on the grounds of religion which should have protected Ms Ladele.

- 14) It is in any event questionable how necessary the proposed change is and whether the problem is not that the wording of the law is inadequate so much as that the Courts have not been applying the law correctly. The law, as already outlined above, requires that a provision, criterion or practice must be a proportionate means of achieving a legitimate aim. In addition as already discussed Article 9.2 requires that any limitation on Religious Freedom must be necessary. It is suggested that what has gone wrong in the various religious freedom cases that have concerned Christians is that the Courts have taken an unduly restrictive view of what is proportionate or necessary and have not engaged in any real balancing exercise when different rights are in conflict. The best way of dealing with this may be for the Commission to issue guidance under s14 Equality Act 2006 making it clear that Employers must ensure that their requirements are proportionate and necessary and also making the point that where different rights are in conflict no particular set of rights can take precedence.
- 15) The Commission has asked for comments as to whether some form of mandatory mediation would be sensible in these Religious Freedom cases. We would support any attempt to have these types of cases resolved without litigation through common sense and mutual give and take; in a way which respects both the proper rights of employers, the sincere conscience of employees and the need for both to work together for the common good.

5th September 2011