Human rights: religious freedom

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Article 9 of the European Convention on Human Rights, guaranteeing "freedom of thought, conscience and religion" (and now given further effect through Sch.1 of the Human Rights Act 1998), reads:

> (1) everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public and private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) freedom to manifest one's religion or beliefs shall be subject only to 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.

The structure of the article, elaborated upon by s.3(1) of the Human Rights Act 1998, indicates the following:

the freedom is very broad, including thought and conscience as well as religion;
the second particularisation in art.9(1) relates to the manifestation of "religion or belief", through essentially worship;
the limitation in art.9(2) bites only on the manifestation of religion or belief (as permitted); and
the justification permitting interference by public authorities is not as broad as in art.8 (private and family life), art.10 (freedom of expression) and art.11 (freedom of assembly and association).

Overview of Topic

1. Religious freedom in the United Kingdom ("UK"), in the wake of the second world war, meant a predominant plurality of Christian churches, with Anglicanism the state religion in England (but not the other three countries). In the twenty-first century, there is a wider plurality of religions and beliefs, with a growing, at times militant, secularism in the original "host" community, while old and new immigrant groups have introduced not just other religions - mainly Islam and Hinduism from the sub-continent, but also more popular Pentecostalist churches with Caribbean, south American and African inspirations.
2. Religious freedom, which could not be taken for granted in the UK until the second half of the nineteenth century is, today, a simmering controversy - with new proponents of sexual puritanism (originally an English phenomenon) - in an age of human rights and international Islamic terrorism, as exemplified by 9/11 in 2001 in the United States and 7/7 in 2005 in the UK.
3. This article: (1) looks at four important religious freedom cases in England in the 2000s; (2) discusses those believers' reliance upon art.9 in employment tribunals, under s.3 of the Human Rights Act 1998; (3) alludes to the absence of mutual tolerance generally, and the common sense failings of the law of England and Wales; (4) bemoans the failure of human rights in those four cases in the face of domestic equality law (gold-plated European Union ("EU") anti-discrimination law); (5) contrasts the multi-cultural respect for some religious practices (such as women's dress), with the hostility to white and black evangelical protestantism; (6) points out that religious believers

- in the then absence of a Supreme Court case on religious freedom - did slightly better by going to Strasbourg, having exhausted their domestic remedies: *Eweida v United Kingdom (48420/10) [2013] I.R.L.R. 231* ("Eweida"); and (7) and finally suggests that the leading case, even in work, may be *Lee v Ashers Baking Co Ltd [2018] UKSC 49; [2018] 3 W.L.R. 1294*, a goods and services case originating in Northern Ireland.

The four English cases

4. Gary McFarlane, Nadia Eweida, Lillian Ladele and Shirley Chaplin (in that order) made separate applications to Strasbourg in 2010. All are Christians. Eweida and Ladele had gone separately to the Court of Appeal; the former failed to get to the Supreme Court. Chaplin stopped after the employment tribunal, and McFarlane after the Employment Appeal Tribunal (the Court of Appeal refusing him permission). The respondent in each case in Strasbourg was the UK. The ECtHR listed them by year of birth, and I follow that practice (using their family names only): Eweida (1951); Chaplin (1955), Ladele (1960); and McFarlane (1961).
5. Representation is interesting. James Dingemans QC (now a High Court judge) represented Ladele domestically, and then switched to Eweida in Strasbourg. Dinah Rose QC represented Ladele in Strasbourg. Liberty changed its position seemingly, instructing Karon Monaghan QC, in 2008-10: initially, it intervened in Ladele, to advocate equality law (in support of Islington); it then represented Eweida in the Court of Appeal, to take art.9. Chaplin and McFarlane (and Eweida in the employment tribunal) were represented by Paul Diamond.
6. As always, the facts are important. Some facts did not make it through to Strasbourg, because of the heavy legal reasoning of English judges. Others have had to be sought outside the judgments.
7. Eweida was an immigrant from Egypt in the late 1960s, who continued to practise Coptic Christianity - a minority religion in her country of origin - in the UK. Chaplin was born a (white) British national, and is a practising Christian. Ladele is black British, and also a practising Christian. McFarlane is black British, and a practising Christian. Their Christianity tends toward evangelicalism, but none - significantly - proselytised at work.
8. Their religious beliefs led to problems in their respective workplaces. Eweida worked for British Airways at Heathrow, and took to wearing a chain and cross round her neck. Chaplin, a nurse in an Exeter hospital, also wore a chain and cross round her neck. The other two cases were more problematic. Ladele was a registrar of births, deaths and marriages in Islington (London) and - in circumstances which are relevant - ended up declining to conduct civil partnerships. McFarlane worked for Relate in Bristol, the relationship counsellors, and - again in relevant circumstances - was believed to be opposed, not to same-sex couples, but to conducting psycho-sexual therapy with them.
9. At first blush, and applying common sense, one would have predicted: first, that Eweida and Chaplin would have gone the same way; second, that their religious freedom might have been respected, in a context of multicultural tolerance of some other religions; third, that Ladele and McFarlane might also have gone the same way; and fourth, that their religious freedom would have been weighed against any consequential disruption to the public and private services provided.
10. As things were to turn out, domestic English courts dismissed all four claims, for different reasons. Strasbourg would allow Eweida (by five to two), but not Chaplin. What was the domestic law deployed by the employers? And why did Strasbourg place such little weight on art.9 (though Ladele was to have the support of two of the seven judges)?

Domestic (English) law on thought, conscience and religion

11. We are concerned - taking a human rights approach - with thought, conscience and religion. Freedom of thought - the first concept - is taken for granted (perhaps too readily, and there is no relevant domestic law - though hate-crime legislation does impact).
12. Not so conscience (the second concept) where there is some law. When the Abortion Act 1967 was enacted, for England and Wales plus Scotland, but not Northern Ireland, s.4 ("conscientious objection to participation in treatment") gave doctors and nurses a defence if they could prove (mainly) religious belief. This, it is important to note, did not extend to: "any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman" (s.4(2)). In 1998 (and later), when Westminster devolved powers to Scotland and Wales, it protected, inter alia, this conscience clause by making abortion a matter reserved to the UK parliament (Scotland Act 1998 Sch.5 para.J1; Government of Wales Act 2006 Sch.7 para.9). (There was a little-noted conscience clause in devolved Northern Ireland law, insofar as limited abortion was a health matter there). Such a reserved, or excepted, conscience clause, it may be argued, helped

prevent religious frustration over the years of the provision of abortion services in Great Britain. However, the fact that it is express in the Abortion Act 1967 is a strong argument for not implying conscience clauses into other statutes in analogous situations.

13. Religion - the third concept - is protected by domestic law, insofar as religious discrimination is now prohibited. (Again, Northern Ireland has been treated separately. It first secured protection against direct (later indirect) religious or political discrimination, in public law in 1973, and in private law in 1976). The rest of the UK had to await: Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, as a result of a major legislative initiative in Brussels: an intended framework measure for all anti-discrimination law. This Directive was transposed, for England and Wales and Scotland, by inter alia, the Employment Equality (Religion or Belief) Regulations 2003/1660 ("the 2003 Religion Regulations"). The 2003 Religion Regulations - which entered into force on 2 December 2003 - prohibited direct and indirect religious discrimination in employment and training. Direct discrimination is A treating B "less favourably…on the grounds of religion or belief" (reg.3(1)(a)). Indirect discrimination is A applying "a provision, criterion or practice…which puts…persons of the same religion or belief as B at a particular disadvantage…" (reg.3(1)(b)). There was an exception for "genuine occupational requirement", regardless of whether or not the employer had an ethos based on religion or belief (reg.7). There were three further exceptions: national security; positive action (under reg.25); and turban-wearing Sikhs on construction sites not wearing safety helmets (already racial discrimination).
14. Domestic anti-discrimination law was recast by the Equality Act 2010 - with the eight protected characteristics of age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation - with royal assent on 8 April 2010, and (after a change of government) commencement mainly on 1 October 2010. We are concerned here with the law before the Equality Act 2010, and therefore with the transposition of EU law in the 2000s.
15. Eweida, Chaplin, Ladele and McFarlane had domestic access to art.9 from 2 October 2000. Religious freedom was justiciable domestically. On 2 December 2003, the 2003 Regulations became available. Discrimination became a separate possibility.
16. Unfortunately, human rights were to be eclipsed by equality law. Little did Eweida, Chaplin, Ladele and McFarlane appreciate - when they began their claims of religious discrimination in employment tribunals in 2006-09 - that English judges (especially, and surprisingly, the then Master of the Rolls, Lord Neuberger) would end up portraying them as acting in defiance of employer equality policy (on principally gay rights) and even equality law itself.
17. Much English equality law (terminology which dates from c.2000), was justiciable in employment tribunals. These had emerged from the Industrial Training Act 1964, the Redundancy Payments Act 1965 and the Industrial Relations Act 1971. Employment law, given the history of poor industrial relations in parts of the UK, was premised on good relations between employees and employers. But no employment judge, or appellate judge, in these four cases, asked how their decisions might improve workplace relations generally.

The Four Domestic Cases (in date order):

18. British Airways' new dress code for uniformed employees, in 2004, prohibited jewellery, but permitted anything for "mandatory religious reasons", after approval. Hitherto, Eweida's chain and cross had been covered by the uniform. Approval was given for a (male) Sikh turban and bracelet and a (female) Islamic headscarf or hijab. In 2006 (the day after unsympathetic diversity training), Eweida asserted that her chain and cross could be worn equally. She was disciplined for wearing jewellery, this attracting considerable adverse publicity about the banning of Christian symbols. Eventually, with effect from 1 February 2007, British Airways announced a new policy, now permitting the Christian cross and the star of David, and any other authorised religious and charity symbols. Eweida returned to work having won the battle; whatever of her martyrology (and the attendant publicity), her employer effectively admitted direct religious discrimination by the change of policy.
19. However, Eweida had made a legal claim for damages in December 2006, before the change of policy. She did not go quietly. British Airways resisted her vigorously in: the employment tribunal in November 2007; the Employment Appeal Tribunal ("EAT") in November 2008 (*Eweida v British Airways Plc [2009] I.C.R. 303)*); and the Court of Appeal in February 2010 (*Eweida v British Airways Plc [2010] EWCA Civ 80; [2010] I.C.R. 890*). The various judges, when one reads their judgments together, clearly considered Eweida an unworthy victim.
20. Elias J., the president of the EAT, became caught up in religious issues, even though there had been no expert evidence below. He concluded principally that there had been no group of Christians which had suffered indirect discrimination, because the chain and cross was not mandatory. He seemed to accept British Airways' other

argument, that Sikhs and Muslims did have mandatory religious reasons. Karon Monaghan QC, then arguing for unlawful indirect religious discrimination, tried to suggest that "persons" in the 2003 Religious Regulations - citing the definition of indirect discrimination in the Equality Bill before Parliament - could be read as person. British Airways endeavoured to cross-appeal on justification.

21. Sedley L.J., in the Court of Appeal, was even more anti-Eweida, referring to her "sectarian agenda". For indirect discrimination, there had to be a group of victims. As for art.9, it did not apply to voluntary employment.
22. It is therefore ironic that, of the four applicants to Strasbourg, *Eweida* was the only one to succeed.

Ladele and Islington (2007-09)

23. The Ladele case is very different, as it was about who should do what at work. First, she had become a registrar in 2002, as an office holder, but only an Islington employee on 1 December 2007 (when she became dismissible). Second, marriage in 2002 was heterosexual only, and civil partnerships only began on 15 December 2005. Third, Islington designated her a civil partnership registrar immediately, unlike other local authorities which respected conscientious objection. Fourth, Islington then conciliated Ladele, by permitting her to swap out of officiating at civil partnerships. Fifth, two gay registrars - Dion Goncalves and Viktoria Kingsley - raised the banner of homophobia in March 2006, by alleging that they were victims of her (sexual orientation) discrimination - based presumably upon the Employment Equality (Sexual Orientation) Regulations 2003/1661, which had come into force on 1 December 2003 (the "Sexual Orientation Regulations"). This idea was to run until accepted judicially, the two gay activists nevertheless being criticized for their intolerance. Sixth, Islington proved itself a very poor manager of its staff, seeking ultimately to appease "Dion and Viktoria" by resorting to its equality and diversity policy entitled "Dignity for All". Ladele, for whom conducting civil partnerships was contrary to conscience, was disciplined in August 2007; she was required to agree to the administrative, but not ceremonial, aspect of civil partnership registration, a compromise which had been implemented elsewhere in London. Ladele had no martyr complex, but this too was unconscionable for her personally.
24. She made a claim at the employment tribunal on 28 November 2007. On 30 May 2008, after four days at London Central, Ladele succeeded on direct and indirect discrimination and harassment. It is clear that the employment tribunal was critical of Islington's poor management, which saw it colluding with gay staff in a workplace culture war against a believing Christian: "The Respondent placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community (than) it placed on the rights of Ms Ladele as one holding an orthodox Christian belief" (para.87). This finding would echo in Strasbourg.
25. The decision was reversed completely by the Employment Appeal Tribunal in December 2008 (*Ladele v Islington LBC [2009] I.C.R. 387*). Elias J. held - avoiding the idea of a comparator - that there was no direct religious discrimination, because Islington treated Ladele like the other registrars, requiring all to perform civil partnerships. Effectively, Ladele wanted special treatment (to avoid indirect discrimination?). The EAT did not seriously consider her unfair treatment by managers as direct discrimination, when Ladele was considered as primarily the cause of a problem for gay activists: "the ostensible reason for most of the conduct…stemmed from the council's refusal to accept that the claimant should be permitted to refuse to do the relevant duties" (para.54). Nor did the EAT properly consider indirect discrimination (despite Liberty intervening), rushing to the defence of justification - Islington's treatment of Ladele was a proportionate means to a legitimate aim, namely the making of civil partnerships (even though the council was able to "marry" all the gay people who registered using other registrars. This was in advance of the Marriage (Same Sex Couples) Act 2013). The decision on harassment was also reversed. Though it is difficult to follow, Elias J. attributed to Liberty's counsel, the argument - which the two gay activists had raised originally - that Ladele was the discriminator, by virtue of her beliefs leading to her refusnik conduct. Ultimately, the EAT canvassed a pragmatic solution, of the sort that Islington had offered, but Ladele had declined (registering but not officiating).
26. The Court of Appeal dismissed Ladele's appeal in December 2009 (Ladele having resigned from her employment on 30 September 2009) (*Ladele v Islington LBC [2009] EWCA Civ 1357; [2010] 1 W.L.R. 955*). Islington, now following Liberty in the EAT, sought to strengthen its position by relying upon the Equality Act (Sexual Orientation) Regulations 2007/1263, which had only entered into force on 30 April 2007 (the "2007 Sexual Orientation Regulations"). Lord Neuberger MR considered the 2007 Sexual Orientation Regulations "as a potentially overriding argument": "Islington had no alternative but to require Ms Ladele to perform civil partnership duties along with all the other registrars" (para.62). So, while the EAT had downplayed Ladele's beliefs (in Christian marriage only) with reference to her conduct (refusing to conduct civil partnerships), the Court of Appeal now stressed her beliefs (or

thought) against those of the gay activists rather than Ladele's conduct in the context of Islington's collusion with the two other registrars. The employee was equated with the public authority, in terms of responsibility. Suffice to say, Ladele, by articulating a conscientious objection, did not treat anyone, gay or straight, less favourably for the purposes of anti-discrimination law. Elias J's canvassing of a pragmatic solution gave way to legal imperative: Ladele - so Lord Neuberger hinted - should have been dismissed, once designated as a civil partnership registrar, because of sexual orientation anti-discrimination law. Presumably aware of where logic had taken him, the Master of the Rolls ended: "it is only right to record that many people may feel sympathy for the position in which she finds herself, and that, in some respects - most notably the unjustifiable characterisation of her letter of 18 April 2006 as "gross misconduct" and the unwarranted breach of her confidence in Mr Lynch's letter of 15 November 2006 - Islington did not treat her fairly" (para.75).

McFarlane and Relate (2008-10)

27. McFarlane is similar to Ladele, but is distinguishable. He had become a counsellor with Relate Avon in 2003. Relate Avon's equal opportunities policy (which was considered contractual), did not include religion or belief! No judge spotted this. McFarlane's clients included several lesbian couples, but his hesitancy about gay psycho-sexual therapy led eventually to difficulties. On 7 January 2008 (following a letter from some other therapists), the general manager accepted that McFarlane had no fundamental objection to doing this work, if asked. Eleven days later, however, Ms Bennett, his supervisor, following a telephone conversation with McFarlane, reported: "I feel he is either split or internally confused or possibly manipulative on the issue". On 18 March 2008, McFarlane was dismissed summarily. The case is distinguishable, because McFarlane never refused a management instruction. His religion was perceived to be a problem by his supervisor.
28. McFarlane lost his claim for direct and indirect religious discrimination, and unfair dismissal, in the Bristol employment tribunal, in January 2009 (he succeeded on wrongful dismissal, which had been conceded inadvertently). His appeal was dismissed by Underhill J., now the Pesident of the EAT, in November 2009 (*McFarlane v Relate Avon Ltd [2010] I.C.R. 507*). The President relied upon the Ladele decision of Elias J. Given the weak factual basis of the case for summary dismissal, it is extraordinary that the EAT did not consider that speculative therapeutic reasoning, by Ms Bennett, might have spilled over into bad industrial relations: McFarlane's words were surely more thought than action.
29. Elias L.J. refused permission to appeal in January 2010, and Laws L.J., after an oral hearing, followed suit on 29 April 2010 (*McFarlane v Relate Avon Ltd [2010] EWCA Civ 880; [2010] I.R.L.R. 872*). This was because of Ladele in the Court of Appeal, which had been decided the previous December. However, a witness statement from Lord Carey, the former Archbishop of Canterbury, led Laws L.J. to answer the growing clerical criticism of the courts in a reserved judgment (para.18):

> Lord Carey's observations are misplaced. The judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as disreputable, nor have they likened Christians to bigots. They administer the law in accordance with the judicial oath, without fear or favour, affection or ill will. It is possible that Lord Carey's mistaken suggestions arise from a misunderstanding on his part as to the meaning attributed by the law to the idea of discrimination.

Chaplin and the NHS (2009-10)

30. Chaplin is not really distinguishable from Eweida, though she was a nurse in a NHS hospital. She claimed that she had worn a chain and cross under her uniform throughout her career. The case turned on a new, 2007, uniforms policy. This permitted jewellery, but not necklaces. But it also permitted clothes and other jewellery for "religious or cultural reasons" if approved, this not to be withheld unreasonably. Further, some staff chose to wear their removable identity badges on a quick-release lanyard round their necks. It became relevant that Chaplin was a ward sister with elderly patients, "whose skin tends to be thin and fragile and accordingly more liable to damage". However, the health and safety concerns of managers turned out to be primarily for her, and the damage a disturbed patient might inflict with her necklace. Two female Muslim doctors had complied with hospital policy while on duty, by wearing so-called sports hijabs with no lose ends. Chaplin expressly pleaded religious discrimination, by reference to the treatment of (female) Muslims.
31. The Exeter employment tribunal (by two to one) followed Eweida in the Court of Appeal, in February 2010. It failed

to fully reason its decision: Chaplin's jewellery could have been accommodated under "religious or cultural reasons"; the two Muslim doctors were permitted to wear sports hijabs for cultural reasons. The tribunal seems to have detected that she became inspired by comparison, and criticised her desire to wear the cross openly. Further, she had been given alternative work as an admissions and discharge co-ordinator in November 2009, but Chaplin wanted to continue with her clinical duties.

Strasbourg and Human Rights:

32. The domestic cases are notable for the way art.9 came and went. The tribunals had no jurisdiction to consider human rights claims as such. In Eweida, Elias J. considered it as a preliminary observation. Sedley L.J., as noted, gave it short shrift in the Court of Appeal. In Chaplin, the employment tribunal frankly erred on European law. In Ladele, James Dingemans QC focussed on the 2003 Religion Regulations. Elias J., in the EAT, made the same point about s.3 of the Human Rights Act 1998 (interpretation of legislation). Lord Neuberger in the Court of Appeal essentially agreed with Sedley L.J. on voluntary employment, in a survey of Strasbourg cases. In McFarlane, Paul Diamond majored on art.9 in the EAT (to the annoyance of Underhill J.), leaving his junior to deal with the discrimination points. In the ex parte permission hearing before Laws LJ, the same counsel was preoccupied with the challenge to Ladele in the Court of Appeal.
33. With the benefit of hindsight, one may submit that Eweida, Chaplin, Ladele and McFarlane should have been argued on the basis of art.9, and only consequently through the 2003 Religion Regulations (and the 2003 Sexual Orientation Regulations - if actually relevant, which I do not believe - in Ladele and McFarlane).

United Kingdom law on article 9

34. Following the entry into force of the Human Rights Act 1998, the House of Lords considered art.9 in two English cases - as regards religious freedom only. (A more recent third case is considered below.)
35. The first is *R. (on the application of Williamson) v Secretary of State for Education and Employment [2005] UKHL 15; [2005] 2 A.C. 246*. There, the claimants were parents and teachers in four private Christian schools. Citing the bible, they wanted the right to administer mild corporal punishment on their school students, contrary to education law. This was permitted within the family context. They relied upon art.9 and Protocol 1 art.2. Their counsel, in December 2004, were James Dingemans QC and Paul Diamond. The claimants were unsuccessful in the High Court (Elias J.) and in the Court of Appeal (Buxton, Rix and Arden L.J.J.). In the House of Lords, they succeeded on art.9(1): their claimed right to express and manifest their view was absolute; a court needed to conduct only a "limited inquiry" on the question of good faith. Lord Bingham presided, but Lord Nicholls of Birkenhead took the lead, ably applying Strasbourg jurisprudence. But the claimants failed on art.9(2): interference by parliament was justified; the legitimate aim was the promotion of the welfare of children; it was proportionate to override those such as the claimants who took a different view on the means as necessary in a democratic society.
36. The second case is *R. (on the application of Begum) v Denbigh High School Governors [2006] UKHL 15; [2007] 1 A.C. 100*. The claimant was an excluded pupil at a Luton school - who failed in front of Bennett J but succeeded in the Court of Appeal (Brooke, Mummery and Scott Baker L.J.J.) - , having demanded the right to wear a jilbab ("a long coat-like garment") at school. Shabina Begum was represented by Cherie Booth QC, the wife of Tony Blair the Prime Minister. Her counsel was instructed by the Children's Legal Centre. An older brother was her litigation friend. Again, Lord Bingham presided. And again, he found that interference under art.9 (with the Secretary of State supporting the school) was justified. The findings of fact relied upon by the House of Lords were precise: the head teacher (appointed in 1991) was a female Bengali muslim from the sub-continent; the school had reviewed its dress code in 1993, consulting parents, students, staff and local imams; it had decided to retain the shalwar kameeze (with variations) as one of three options; later, the governors permitted the addition of head scarves. The school had developed a uniform policy responsibility, and the House of Lords overturned the Court of Appeal's support for Ms Begum's particular manifestation of her religious belief.
37. A dictum of Lord Bingham expressed the limit of judicial power constitutionally in this fraught area (para.2):

> It is important to stress at the outset that this case concerns a particular pupil and a particular school in a particular place at a particular time. It must be resolved on facts which are now, for purposes of the appeal, agreed. The House is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country. That would be a most inappropriate question for the House in its judicial capacity and it is not one which I shall seek to address.

38. This stricture did not inspire any of the English judges hearing the Eweida, Chaplin, Ladele and McFarlane cases in the following three years. As noted, Ladele, in the EAT and the Court of Appeal, became the authority to be follow slavishly.

The Eweida case in Strasbourg

39. This case was heard by a chamber of seven judges, with Judge Bjorgvinsson (Iceland) presiding. Judge Bratza, from the UK, sat as the ex officio member. Eweida and Chaplin, and then Ladele and McFarlane, were joined on 12 April 2011 (the four applications being joined at judgment). All four relied upon arts 9 and 14 together, but Eweida, Chaplin and McFarlane also took art.9 on its own. There was a mixed bag of twelve written interventions (including by Anglican clerics relying upon the Italian crucifix case, where the grand chamber, by 15 votes to two, had allowed a pro-religious appeal: *Lautsi v Italy (30814/06) (2012) 54 E.H.R.R. 3*). There was a public hearing on 4 September 2012, and the court deliberated in private on 11 December 2012. Judgment was on 15 January 2013 (*Eweida v United Kingdom (48420/10) [2013] I.R.L.R. 231*). It became final on 27 May 2013, there being no appeal to the Grand Chamber.
40. The ECtHR held by five votes to two (Judges Bratza and Bjorgvinsson), that Eweida's art.9right had been violated (it not being necessary to consider art.14); Chaplin, Ladele and McFarlane lost: the Chaplin and McFarlane decisions were unanimous; but two judges (Judge Vucinic of Montenegro and Judge De Gaetano of Malta) voted for Ladele.
41. Why had Chaplin not followed Eweida? And why did no one vote for McFarlane? The judgment, though 51 pages long, does not really explain, because of the nature of Strasbourg reasoning.
42. Judgments, drafted by staffers, follow a pro forma structure (which aids reading), but allow neither for extensive factual analysis nor, of course - given the absence of precedent (there is consistency with the Convention as a living instrument) - the serious discussion of principle. Common lawyers may only find the voice of a deciding judge, which they take for granted in their own jurisdictions, in the two joint partly dissenting opinions.

Eweida

43. The ECtHR decided this case in paras 89 to 95 (*Eweida v United Kingdom (48420/10)*). It concluded: "…in these circumstances where there is no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to protect the first applicant's right to manifest her religion, in breach of the positive obligation under Article 9" (para.95). British Airways was a private body, and Strasbourg was censuring the UK for not having guaranteed religious freedom - a positive obligation - for her. How? Through the employment tribunal? The court, though it was not applying domestic discrimination law (and did not apply art.14), came close to describing this as a case of direct religious discrimination.

Chaplin

44. Chaplin was distinguished in paras 96 to 101 (*Chaplin v United Kingdom (59842/10)*). Strasbourg decided: "…the Court is unable to conclude that the measures of which Ms Chaplin complains were disproportionate. It follows that the interference with her freedom to manifest her religion was necessary in a democratic society and that there was no violation of Article 9 …" (para.101). The reason is clear: "…the protection of health and safety on a hospital ward(,) was inherently of a greater magnitude than that which applied in respect of Ms Eweida". But was this not to underestimate the importance of religious expression? Human rights were overridden by the following: "…the applicant's managers considered there was a risk that a disturbed patient might seize and pull the chain, thereby injuring herself (sic) or the applicant, or that the cross might swing forward and could, for example, come into contact with an open wound" (para.98).

Ladele

45. Ladele - the arts 9 and 14 case - was decided in paras 102 to 106 (*Ladele v United Kingdom (51671/10)*). The ECtHR relied upon margin of appreciation, a sort of declining of jurisdiction: "The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights….the Court does not consider that the national authorities…exceeded the margin of appreciation available to them" (para.106). So, because of the Court of Appeal decision (and the application to the ECtHR) - religious

discrimination versus sexual orientation discrimination - Strasbourg did not balance religious freedom with any concern of Islington council.

McFarlane

46. McFarlane was not distinguished in paras 107 to 110 (*McFarlane v United Kingdom (36516/10)*). The ECtHR held (para.109):

> …for the Court the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The State authorities (with a positive obligation, Relate being a private body) therefore benefited from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others.

But would the rights of clients have been affected by any managerial accommodation of McFarlane? The answer is most likely not.

Dissenting opinions

47. Judges Bratza and Bjorgvinsson wanted to dismiss all four applications. They disagreed over the particular circumstances of Eweida (para.4):

> The Court of Appeal…took a broader view of the matter…. These included the fact that the company's dress code had for some years caused no known problems to any employee including the applicant herself…; the fact that the applicant had originally accepted the requirement of concealing the cross before reporting for work in breach of it, without waiting for the results of a formal grievance complaint which she had lodged with the company; the fact that the issue was conscientiously addressed by BA, which offered the applicant a temporary administrative position within the company which would have allowed her to wear the cross openly without loss of pay; the fact that the procedures within the company were properly followed in the light of the applicant's complaint and that the dress code was reviewed, and within a matter of months relaxed, so as to permit the wearing of religious and other symbols; and the fact that, in consequence, the applicant was reinstated in her original post and able to continue openly to wear the cross from February 2007 onwards.

48. Fortunately, Judges Vucinic and De Gaetano dissented on the third case, finding a violation of arts 9 with 14. They categorised Ladele as a conscience case and not a religion one. There was a fundamental difference. They quoted the European centre for law and justice (in Strasbourg), a Christian body, distinguishing prescriptions of conscience, that is questions of morality, from religious prescriptions, which were subject to art.9(2) limitations. A court, however, had to work harder to find genuine conscientious objection than simply a question of religious belief. The analogy of persons refusing to fight in wars was in these two judges' minds (and McFarlane was seen as equivalent to a cowardly soldier who knew what he was joining up to do). "Freedom of conscience has in the past", they argued, "all too often been paid for in acts of heroism, whether at the hands of the Spanish Inquisition or of a Nazi firing squad" (para.3).
49. Whatever of the latter instance (the Nazis practised genocide), these two dissenting judges did capture the English workplace relations exactly: "In (Ladele's) case a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights) eventually led to her dismissal" (para.5).
50. Both of these opinions may be considered somewhat harsh, but it can be argued back-stabbing and political correctness were also present in McFarlane. It is deeply regrettable that too many judges, including in Ladele after the employment tribunal, were able to overlook what went on in the workplace. That is why these four cases (aside from Eweida in Strasbourg), which were cited immediately as precedent by employers in religious freedom cases, deserve not to be followed because of their failure to grasp that a fundamental freedom was at stake. The serious legal error, in the cases of Ladele and McFarlane, was to apply religious, versus sexual orientation, anti-discrimination law when human rights should have been considered.
51. There is no evidence that, especially Ladele and McFarlane, were intolerant of anyone, despite their beliefs. On the contrary, they, and to a lesser extent, Eweida and Chaplin, were victims of varying anti-Christian prejudices by employers and other employees. As Lord Nicholls of Birkenhead commented in Williamson in 2005 (para.15):

> Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral

> part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerance has had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious and other intolerance.

Here, the intolerance came, not from Eweida, Chaplin, Ladele or McFarlane, but from their employers and other employees.

Eweida after Strasbourg

52. Since 15 January 2013, and without any appeal to the Grand Chamber, these four English employment cases have not resonated as they might have done, domestically or internationally.
53. Eweida has been cited fsix times in England and Wales, and once in Northern Ireland: it was followed in *Black v Wilkinson [2013] EWCA Civ 820; [2013] 1 W.L.R. 2490*; it was considered in *Blackburn (t/a Cornish Moorland Honey) v Revenue and Customs Commissioners [2013] UKFTT 525 (TC)*); it was applied in *Wasteney v East London NHS Foundation Trust [2016] I.C.R. 643* and in *Gareddu v London Underground Ltd, EAT, 15 December 2016*; it was referred to in the opinion of the board in *Commodore of the Royal Bahamas Defence Force v Laramore [2017] UKPC 13*; it was applied in *Smyth's Application for Judicial Review, Re [2018] NICA 25* and referred to in *Gray v Mulberry Co (Design) Ltd [2019] EWCA Civ 1720*.
54. The first case- an unsuccessful appeal by a bed and breakfast landlady against a finding of (direct) sexual orientation discrimination - cited Eweida against her defence under art.9: the Court of Appeal held that there was no justification for discriminating indirectly because the landlady had not been at risk of suffering serious damage.
55. The second case - while only a first-instance decision (of the Tax Chamber of the First-tier Tribunal) - does rely upon art.9. Here, some members of the Seventh-day Adventist church, eschewing computers and the internet for religious reasons, refused to file their VAT returns online. The VAT regulations allowed for a religious exemption, but HMRC refused to recognise it in this case. The tax judge was not unsympathetic to the revenue, but cited Eweida as the basis of allowing the believers' appeal.
56. The third case - where a born-again Christian occupying a senior post proselytized, inter alia, a junior Muslim colleague - failed against her employer (in a religious discrimination claim), the employer having judged that the conduct went improperly beyond religious discussion.
57. The fourth case is not particularly important. It concerned an Italian catholic from Sardinia, who returned each summer for five weeks. The employment tribunal had found that the purpose was not religious pilgrimage (as claimed), but a long family holiday.
58. The fifth case, where a convert to Islam successfully alleged religious discrimination in the Bahamian defence force, saw Lord Mance cite Eweida in Strasbourg as authority for workplace cases being treated more sympathetically: '…Strasbourg thinking has moved on' (para 21).
59. The sixth case concerned a humanist who wanted a humanist celebrant for her wedding in Northern Ireland. The Court of Appeal there, construing marriage law, held that that there had not been religious discrimination (as defined in arts 9 and 14) under one provision, because another would have permitted a humanist to be employed as a registrar. The reasoning appears doubtful. Eweida was not critically examined.
60. The seventh case, in the English Court of Appeal, cites Eweida domestically and in Strasbourg, to establish elements of indirect religious discrimination and art.9 (here, a failed attempt to argue that a concern for copyright in an employment context was a philosophical belief).

The Supreme Court again

61. A third key Supreme Court case may in time eclipse the English employment cases discussed here at length: *Lee v Ashers Baking Co Ltd [2018] UKSC 49; [2018] 3 W.L.R. 1294* (a goods and services case). This case originated in Northern Ireland, where Protestant and Catholic religious identity now competes with other, newer, identitities.
62. In May 2014, a gay man there, Gareth Lee, ordered a cake, bearing a pro-gay graphic (icing on the top), from Ashers, a retail bakery, run by a young couple, Colin and Karen McArthur. Ashers subsequently refused to meet the order, pleading the owners' Protestant religious beliefs (the name of the company is from the bible). Thus was born the so-called gay cake case.
63. Was this discrimination against a gay man, in the provision of goods or services? Or did the McArthurs have a right

to religious belief? What if a male rugby club had (innocently or not?) ordered a cake with a sexually attractive woman iced on the top from a feminist cooperative? Other examples may be suggested.

64. The Equality Commission for Northern Ireland rushed to the legal aid of Gareth Lee. The McArthurs came to be backed by the Christian Institute in Newcastle upon Tyne.
65. The latter lost in the County Court of Northern Ireland, on 19 May 2015. On 24 October 2016, the Court of Appeal in Northern Ireland dismissed their appeal: *Lee v McArthur [2016] NICA 39*.
66. The Court of Appeal concluded with a strong criticism of the Equality Commission: "It should not have been beyond the capacity of the Commission to provide or arrange for the provision of advice to the appellants at an earlier stage and we would hope that such a course would be followed if a situation such as this were to arise in future". (para.106).
67. The Ashers's appeal was heard by the Supreme Court, on 1 and 2 May 2018 (Lady Hale in the chair). It unanimously allowed Ashers's appeal on 10 October 2018, Lady Hale giving the only judgment (with Lord Mance dealing with a separate jurisdiction point) on the particular Northern Ireland delegated legislation: Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006/439.
68. It held that, in terms of discrimination on the grounds of sexual orientation, there was no finding that the reason for refusing to supply the cake was that the respondent was thought to associate with gay people. The reason was the appellants' religious objection to gay marriage. The objection was to the message and not to any particular person or persons. Nor could it be said that the benefit from the message or slogan on the cake could only accrue to gay or bisexual people (see paras 25, 28-34 of judgment).
69. In terms of discrimination on the grounds of religious belief or political opinion, the court held that obliging a person to manifest a belief which he did not hold was a limitation on his art.9(1) rights to freedom of thought, conscience and religion. The right to freedom of expression included the right not to express an opinion. The bakery could not refuse to provide a cake to the respondent because he was gay or because he supported gay marriage. But that did not amount to a justification for something completely different, namely obliging them to supply a cake iced with a message with which they profoundly disagreed. The relevant Northern Irish legislation should not be read in such a way as to compel providers of goods, facilities and services to express a message with which they disagreed, unless justification was shown. It had not been shown in the instant case (paras 50-52, 56, 62).
70. In a postscript to the judgment, Lady Hale addressed a US Supreme Court decision that dealt with similar facts: Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission 44 BHRC 535. The Supreme Court of the US held (seven to two) that the Colorado civil rights commission, in supporting a gay couple against a Christian baker who had refused to make their gay wedding cake, had violated the latter's first amendment (religious) rights. "The important message from the [US Supreme Court] case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics. One can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on grounds of sexual orientation. If and to the extent that there was discrimination on grounds of political opinion, no justification has been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order." (para.62).
71. Ashers is now being cited in employment cases: see, for example, *Gan Menachem Hendon Ltd v De Groen [2019] 2 WLUK 156*.

Legislation

Key Acts
Human Rights Act 1998

Key Subordinate Legislation
Employment Equality (Religion or Belief) Regulations 2003/1660

Employment Equality (Sexual Orientation) Regulations 2003/1661

Equality Act (Sexual Orientation) Regulations 2007/1263

Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006/439

Key Quasi-Legislation
None.

Key European Union Legislation
European Convention on Human Rights

Key Cases

Eweida v United Kingdom (48420/10) [2013] I.R.L.R. 231

Reading

Key Texts
None.

Further Reading
See Religious discrimination