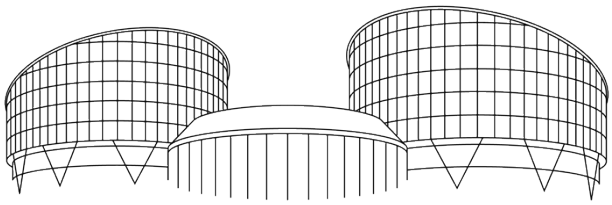

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF EWEIDA AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)

JUDGMENT

STRASBOURG

15 January 2013

FINAL

27/05/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Eweida and Others v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

David Thór Björgvinsson, *President,*
Nicolas Bratza,
Lech Garlicki
Päivi Hirvelä,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 4 September and 11 December 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in four applications (nos. 48420/10, 59842/10, 51671/10 and 36516/10) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four British nationals, Ms Nadia Eweida, Ms Shirley Chaplin, Ms Lillian Ladele and Mr Gary McFarlane ("the applicants"), on 10 August 2010, 29 September 2010, 3 September 2010 and 24 June 2010 respectively.

2. The applicants were represented by Aughton Ainsworth, a firm of solicitors in Manchester, (Ms Eweida), Mr Paul Diamond, (Ms Chaplin and Mr McFarlane), and Ormerods, a firm of solicitors in Croydon, Surrey, (Ms Ladele). The United Kingdom Government ("the Government") were represented by their Agent, Ms Ahila Sornarajah.

3. The applicants complained that domestic law failed adequately to protect their right to manifest their religion. Ms Eweida and Ms Chaplin complain specifically about restrictions placed by their employers on their wearing of a cross visibly around their necks. Ms Ladele and Mr McFarlane complained specifically about sanctions taken against them by their employers as a result of their concerns about performing services which they considered to condone homosexual union. Ms Eweida, Ms Chaplin and Mr McFarlane invoked Article 9 of the Convention, taken alone and in conjunction with Article 14, while Ms Ladele complained only under Article 14 taken in conjunction with Article 9.

4. On 12 April 2011 the application of Ms Chaplin was joined to that of Ms Eweida and the application of Mr McFarlane was joined to that of Ms Ladele. All four applications were communicated to the Government.

The Court also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1). At the date of adoption of the present judgment, it further decided to join all four applications.

5. The following individuals and organisations were given leave by the President to intervene as third parties in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2): the Equality and Human Rights Commission; The National Secular Society; Dr Jan Camogursky and The Alliance Defense Fund; Bishop Michael Nazir-Ali; The Premier Christian Media Trust; the Bishops of Chester and Blackburn; Associazione Giuseppi Dossetti: i Valori; Observatory on Intolerance and Discrimination against Christians in Europe; Liberty; the Clapham Institute and KLM; the European Centre for Law and Justice; Lord Carey of Clifton; and the Fédération Internationale des ligues des Droits de l'Homme (FIDH, ICJ, ILGA-Europe).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 September 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms Ahila SORNARAJAH	*Agent for the Government*
Mr James EADIE QC	*Counsel*
Mr Dan SQUIRES	*Counsel*
Ms Suzanne LEHRER	*Adviser*
Mr Hilton LESLIE	*Adviser*
Mr Wally FORD	*Adviser*

(b) *for the first applicant*

Mr James DINGEMANS QC	*Counsel*
Ms Sarah MOORE	*Counsel*
Mr Thomas ELLIS	*Solicitor*
Mr Gregor PUPPINCK	*Adviser*

(c) *for the third applicant*

Ms Dinah ROSE QC	*Counsel*
Mr Ben JAFFEY	*Counsel*
Mr Chris McCRUDDEN	*Counsel*
Mr Mark JONES	*Adviser*
Mr Sam WEBSTER	*Adviser*

(d) *for the second and fourth applicant*s

Mr Paul DIAMOND	*Counsel*
Mr Paul COLEMAN	*Counsel*
Mr Pasha HMELIK	*Counsel*
Ms Andrea WILLIAMS	*Adviser*
Mr Andrew MARSH	*Adviser*

The Court heard addresses by Mr Eadie QC for the Government, Mr Dingemans QC for Ms Eweida, Ms Rose QC for Ms Ladele and Mr Diamond for Ms Chaplin and Mr McFarlane.

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Ms Eweida, was born in 1951 and lives in Twickenham. The second applicant, Ms Chaplin, was born in 1955 and lives in Exeter. The third applicant, Ms Ladele, was born in 1960 and lives in London. The fourth applicant, Mr McFarlane, was born in 1961 and lives in Bristol.

8. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Ms Eweida

9. The first applicant, who spent the first eighteen years of her life in Egypt, is a practising Coptic Christian. From 1999 she worked as a member of the check-in staff for British Airways Plc, a private company.

10. British Airways required all their staff in contact with the public to wear a uniform. Until 2004 the uniform for women included a high-necked blouse. In 2004 British Airways introduced a new uniform, which included an open-necked blouse for women, to be worn with a cravat that could be tucked in or tied loosely at the neck. A wearer guide was produced, which set out detailed rules about every aspect of the uniform. It included the following passage, in a section entitled "Female Accessories":

> "Any accessory or clothing item that the employee is required to have for mandatory religious reasons should at all times be covered up by the uniform. If however this is impossible to do given the nature of the item and the way it is to be worn, then approval is required through local management as to the suitability of the design to ensure compliance with the uniform standards, unless such approval is already contained in the uniform guidelines. ... *NB No other items are acceptable to be worn with the uniform. You will be required to remove any item of jewellery that does not conform to the above regulations.*"

11. When an employee reported for work wearing an item which did not comply with the uniform code, it was British Airways' practice to ask the employee to remove the item in question or, if necessary, to return home to change clothes. The time spent by the employee in putting right the uniform would be deducted from his or her wages. Of the items of clothing considered by British Airways to be mandatory in certain religions and which could not be concealed under the uniform, authorisation was given to male Sikh employees to wear a dark blue or white turban and to display the Sikh bracelet in summer if they obtained authorisation to wear a short-sleeved shirt. Female Muslim ground staff members were authorised to wear hijab (headscarves) in British Airways approved colours.

12. Until 20 May 2006 Ms Eweida wore a cross at work concealed under her clothing. On 20 May 2006 she decided to start wearing the cross openly, as a sign of her commitment to her faith. When she arrived at work that day her manager asked her to remove the cross and chain or conceal them under the cravat. Ms Eweida initially refused, but eventually agreed to comply with the instruction after discussing the matter with a senior manager. On 7 August 2006 Ms Eweida again attended work with the cross visible and again agreed to comply with the uniform code only reluctantly, having been warned that if she refused she would be sent home unpaid. On 20 September 2006 she refused to conceal or remove the cross and was sent home without pay until such time as she chose to comply with her contractual obligation to follow the uniform code. On 23 October 2006 she was offered administrative work without customer contact, which would not have required her to wear a uniform, but she rejected this offer.

13. In mid-October 2006 a number of newspaper articles appeared about Ms Eweida's case which were critical of British Airways. On 24 November 2006 British Airways announced a review of its uniform policy as regards the wearing of visible religious symbols. Following consultation with staff members and trade union representatives, it was decided on 19 January 2007 to adopt a new policy. With effect from 1 February 2007, the display of religious and charity symbols was permitted where authorised. Certain symbols, such as the cross and the star of David, were given immediate authorisation. Ms Eweida returned to work on 3 February 2007, with permission to wear the cross in accordance with the new policy. However, British Airways refused to compensate her for the earnings lost during the period when she had chosen not to come to work.

14. Ms Eweida lodged a claim with the Employment Tribunal on 15 December 2006, claiming, *inter alia,* damages for indirect discrimination contrary to regulation 3 of the Employment Equality (Religion and Belief) Regulations 2003 ("the 2003 Regulations": see paragraph 41 below) and complaining also of a breach of her right to manifest her religion contrary to Article 9 of the Convention. The Employment Tribunal rejected Ms Eweida's claim. It found that the visible wearing of a cross was not a mandatory requirement of the Christian faith but Ms Eweida's personal choice. There was no evidence that any other employee, in a uniformed workforce numbering some 30,000, had ever made such a request or demand, much less refused to work if it was not met. It followed that the applicant had failed to establish that the uniform policy had put Christians generally at a disadvantage, as was necessary in order to establish a claim of indirect discrimination.

15. Ms Eweida appealed to the Employment Appeal Tribunal, which dismissed the appeal on 20 November 2008. The Employment Appeal Tribunal held that it was not necessary for Ms Eweida to show that other Christians had complained about the uniform policy, since a person could

be put at a particular disadvantage within the meaning of regulation 3(1) of the 2003 Regulations even if he or she complied, unwillingly, with the restrictions on visible religious symbols. Nevertheless, the Employment Appeal Tribunal concluded that the concept of indirect discrimination implied discrimination against a defined group and that the applicant had not established evidence of group disadvantage.

16. Ms Eweida appealed to the Court of Appeal, which dismissed the appeal on 12 February 2010. It was argued on her behalf that the Employment Tribunal and Employment Appeal Tribunal had erred in law and that all that was needed to establish indirect discrimination was evidence of disadvantage to a single individual. The Court of Appeal rejected this argument, which it did not consider to be supported by the construction of the 2003 Regulations. It endorsed the approach of the Employment Appeal Tribunal, when it held that:

> "... in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group."

Moreover, even if Ms Eweida's legal argument were correct, and indirect discrimination could be equated with disadvantage to a single individual arising out of her wish to manifest her faith in a particular way, the Employment Tribunal's findings of fact showed the rule to have been a proportionate means of achieving a legitimate aim. For some seven years no one, including Ms Eweida, had complained about the rule and once the issue was raised it was conscientiously addressed. In the interim, British Airways had offered to move the applicant without loss of pay to work involving no public contact, but the applicant had chosen to reject this offer and instead to stay away from work and claim her pay as compensation. In addition, the Court of Appeal did not consider that this Court's case-law under Article 9 of the Convention would assist Ms Eweida. It referred to the judgment of the House of Lords in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, where Lord Bingham analysed the case-law of the Court and Commission and concluded:

> "The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience".

17. On 26 May 2010 the Supreme Court refused Ms Eweida leave to appeal.

B. Ms Chaplin

18. The second applicant is also a practising Christian. She has worn a cross visibly on a chain around her neck since her confirmation in 1971, as an expression of her belief. She believes that to remove the cross would be a violation of her faith.

19. Ms Chaplin qualified as a nurse in 1981 and was employed by the Royal Devon and Exeter NHS Foundation Trust, a State hospital, from April 1989 to July 2010, with an exceptional employment history. At the time of the events in question she worked on a geriatric ward. The hospital had a uniform policy, based on guidance from the Department of Health. The hospital's uniform policy provided in paragraph 5.1.5 that "If worn, jewellery must be discreet" and in paragraph 5.3.6:

> "5.3.6 To minimise the risk of cross infection will be [sic] keep jewellery to a minimum (see 5.1.11). That is:
>
> One plain smooth ring which will not hinder hand hygiene,
>
> One pair of plain discreet earrings.
>
> No necklaces will be worn to reduce the risk of injury when handling patients.
>
> Facial piercing if present should be removed or covered."

Paragraph 5.1.11 provided:

> "Any member of staff who wishes to wear particular types of clothes or jewellery for religious or cultural reasons must raise this with their line manager who will not unreasonably withhold approval."

There was evidence before the Employment Tribunal that, on health and safety grounds, another Christian nurse had been requested to remove a cross and chain and two Sikh nurses had been informed that they could not wear a bangle or kirpan, and that they had complied with these instructions. Two female Muslim doctors were given permission to wear close-fitting "sports" hijab, resembling a balaclava helmet.

20. In June 2007 new uniforms were introduced at the hospital, which for the first time included a V-necked tunic for nurses. In June 2009 Ms Chaplin's manager requested her to remove her "necklace". Ms Chaplin insisted that the cross was a religious symbol and sought approval to wear it. This was refused, on the ground that the chain and cross might cause injury if an elderly patient pulled on it. Ms Chaplin then proposed wearing the cross on a chain secured with magnetic catches, which would immediately break apart if pulled by a patient. However, the health authority rejected this on the ground that the cross itself would still create a risk to health and safety if it were able to swing free; for example, it could come into contact with open wounds. Finally, it was suggested that she could secure her cross and chain to the lanyard which held her identity

badge. All staff were required to wear an identity badge clipped to a pocket or on a lanyard. However, they were also required to remove the badge and lanyard when performing close clinical duties and, for this reason, the applicant rejected this suggestion also. In November 2009 Ms Chaplin was moved to a non-nursing temporary position which ceased to exist in July 2010.

21. She applied to the Employment Tribunal in November 2009, complaining of both direct and indirect discrimination on religious grounds. In its judgment of 21 May 2010, the Employment Tribunal held that there was no direct discrimination since the hospital's stance was based on health and safety rather than religious grounds. As regards the complaint of indirect discrimination, it held that there was no evidence that "persons", other than the applicant, had been put at particular disadvantage. Moreover, the hospital's response to Ms Chaplin's request to wear the crucifix visibly had been proportionate.

22. The applicant was advised that, in the light of the Court of Appeal's judgment in the Ms Eweida's case, an appeal on points of law to the Employment Appeal Tribunal would have no prospect of success.

C. Ms Ladele

23. The third applicant is a Christian. She holds the view that marriage is the union of one man and one woman for life, and sincerely believes that same-sex civil partnerships are contrary to God's law.

24. Ms Ladele was employed by the London Borough of Islington, a local public authority, from 1992. Islington had a "Dignity for All" equality and diversity policy, which stated *inter alia*:

> "Islington is proud of its diversity and the council will challenge discrimination in all its forms. 'Dignity for all' should be the experience of Islington staff, residents and service users, regardless of the age, gender, disability, faith, race, sexuality, nationality, income or health status. ...
>
> The council will promote community cohesion and equality for all groups but will especially target discrimination based on age, disability, gender, race, religion and sexuality. ...
>
> In general, Islington will:
>
> (a) Promote community cohesion by promoting shared community values and understanding, underpinned by equality, respect and dignity for all. ...
>
> It is the council's policy that everyone should be treated fairly and without discrimination. Islington aims to ensure that:
>
> - Staff experience fairness and equity of treatment in the workplace
> - Customers receive fair and equal access to council services

- Staff and customers are treated with dignity and respect

> The council will actively remove discriminatory barriers that can prevent people from obtaining the employment opportunities and services to which they are entitled. The council will not tolerate processes, attitudes and behaviour that amount to discrimination, including harassment, victimisation and bullying through prejudice, ignorance, thoughtlessness and stereotyping. ...
>
> All employees are expected to promote these values at all times and to work within the policy. Employees found to be in breach of this policy may face disciplinary action."

25. In 2002 Ms Ladele became a registrar of births, deaths and marriages. Although she was paid by the local authority and had a duty to abide by its policies, she was not employed by it but instead held office under the aegis of the Registrar General. The Civil Partnership Act 2004 came into force in the United Kingdom on 5 December 2005. The Act provided for the legal registration of civil partnerships between two people of the same sex, and accorded to them rights and obligations equivalent to those of a married couple. In December 2005 Islington decided to designate all existing registrars of births, deaths and marriages as civil partnership registrars. It was not required to do this; the legislation simply required it to ensure that there was a sufficient number of civil partnership registrars for the area to carry out that function. Some other United Kingdom local authorities took a different approach, and allowed registrars with a sincerely held religious objection to the formation of civil partnerships to opt out of designation as civil partnership registrars.

26. Initially, Ms Ladele was permitted to make informal arrangements with colleagues to exchange work so that she did not have to conduct civil partnership ceremonies. In March 2006, however, two colleagues complained that her refusal to carry out such duties was discriminatory. In a letter dated 1 April 2006 Ms Ladele was informed that, in the view of the local authority, refusing to conduct civil partnerships could put her in breach of the Code of Conduct and the equality policy. She was requested to confirm in writing that she would henceforth officiate at civil partnership ceremonies. The third applicant refused to agree, and requested that the local authority make arrangements to accommodate her beliefs. By May 2007 the atmosphere in the office had deteriorated. Ms Ladele's refusal to carry out civil partnerships was causing rota difficulties and putting a burden on others and there had been complaints from homosexual colleagues that they felt victimised. In May 2007 the local authority commenced a preliminary investigation, which concluded in July 2007 with a recommendation that a formal disciplinary complaint be brought against Ms Ladele that, by refusing to carry out civil partnerships on the ground of the sexual orientation of the parties, she had failed to comply with the local authority's Code of Conduct and equality and diversity policy. A

disciplinary hearing took place on 16 August 2007. Following the hearing, Ms Ladele was asked to sign a new job description requiring her to carry out straightforward signings of the civil partnership register and administrative work in connection with civil partnerships, but with no requirement to conduct ceremonies.

27. Ms Ladele made an application to the Employment Tribunal, complaining of direct and indirect discrimination on grounds of religion or belief and harassment. On 1 December 2007 the Statistics and Registration Act 2007 came into force and, instead of remaining an office holder employed by the Registrar General, Ms Ladele became an employee of the local authority, which now had the power to dismiss her. It was advanced before the Employment Tribunal that if the applicant lost the proceedings, it was likely that she would be dismissed.

28. On 3 July 2008, the Tribunal upheld the complaints of direct and indirect religious discrimination, and harassment, holding that the local authority had "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". The local authority appealed to the Employment Appeal Tribunal, which on 19 December 2008 reversed the decision of the Employment Tribunal. It held that the local authority's treatment of Ms Ladele had been a proportionate means of achieving a legitimate aim, namely providing the registrar service on a non-discriminatory basis.

29. The decision of the Employment Appeal Tribunal was appealed to the Court of Appeal, which on 15 December 2009 upheld the Employment Appeal Tribunal's conclusions. It stated, at paragraph 52:

> "...the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; 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."

The Court of Appeal concluded that Article 9 of the Convention and the Court's case-law supported the view that Ms Ladele's desire to have her religious views respected should not be allowed "...to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community." It further

noted that from the time the 2007 Regulations (see paragraph 42 below) came into force, once Ms Ladele was designated a Civil Partnership Registrar, Islington was not merely entitled, but obliged, to require her to perform civil partnerships.

30. The applicant's application for leave to appeal to the Supreme Court was refused on 4 March 2010.

D. Mr McFarlane

31. The fourth applicant is a practising Christian, and was formerly an elder of a large multicultural church in Bristol. He holds a deep and genuine belief that the Bible states that homosexual activity is sinful and that he should do nothing which directly endorses such activity.

32. Relate Avon Limited ("Relate") is part of the Relate Federation, a national private organisation which provides a confidential sex therapy and relationship counselling service. Relate and its counsellors are members of the British Association for Sexual and Relationship Therapy (BASRT). That Association has a Code of Ethics and Principles of Good Practice which Relate and its counsellors abide by. Paragraphs 18 and 19 of the Code provide as follows:

> "**Recognising the right to self-determination, for example**:
>
> 18. Respecting the autonomy and ultimate right to self-determination of clients and of others with whom clients may be involved. It is not appropriate for the therapist to impose a particular set of standards, values or ideals upon clients. The therapist must recognise and work in ways that respect the value and dignity of clients (and colleagues) with due regard to issues such as religion, race, gender, age, beliefs, sexual orientation and disability.
>
> **Awareness of one's own prejudices, for example**:
>
> 19. The therapist must be aware of his or her own prejudices and avoid discrimination, for example on grounds of religion, race, gender, age, beliefs, sexual orientation, disability. The therapist has a responsibility to be aware of his or her own issues of prejudice and stereotyping and particularly to consider ways in which this may be affecting the therapeutic relationship."

Relate also has an Equal Opportunities Policy which emphasises a positive duty to achieve equality. Part of it reads:

> "Relate Avon is committed to ensuring that no person – trustees, staff, volunteers, counsellors and clients, receives less favourable treatment on the basis of personal or group characteristics, such as race, colour, age, culture, medical condition, sexual orientation, marital status, disability [or] socio-economic grouping. Relate Avon is not only committed to the letter of the law, but also to a positive policy that will achieve the objective of ensuring equality of opportunity for all those who work at he Centre (whatever their capacity), and all our clients."

33. Mr McFarlane worked for Relate as a counsellor from May 2003 until March 2008. He initially had some concerns about providing

counselling services to same-sex couples, but following discussions with his supervisor, he accepted that simply counselling a homosexual couple did not involve endorsement of such a relationship and he was therefore prepared to continue. He subsequently provided counselling services to two lesbian couples without any problem, although in neither case did any purely sexual issues arise.

34. In 2007 Mr McFarlane commenced Relate's post-graduate diploma in psycho-sexual therapy. By the autumn of that year there was a perception within Relate that he was unwilling to work on sexual issues with homosexual couples. In response to these concerns, Relate's General Manager, a Mr B, met with Mr McFarlane in October 2007. The applicant confirmed he had difficulty in reconciling working with couples on same-sex sexual practices and his duty to follow the teaching of the Bible. Mr B expressed concern that it would not be possible to filter clients, to prevent Mr McFarlane from having to provide psycho-sexual therapy to lesbian, gay or bisexual couples.

35. On 5 December 2007 Mr B received a letter from other therapists expressing concerns that an unnamed counsellor was unwilling, on religious grounds, to work with gay, lesbian and bi-sexual clients. On 12 December 2007 Mr B wrote to Mr McFarlane stating that he understood that he had refused to work with same-sex couples on certain issues, and that he feared that this was discriminatory and contrary to Relate's Equal Opportunities Policies. He asked for written confirmation by 19 December 2007 that Mr McFarlane would continue to counsel same-sex couples in relationship counselling and psycho-sexual therapy, failing which he threatened disciplinary action. On 2 January 2008 Mr McFarlane responded by confirming that he had no reservations about counselling same-sex couples. His views on providing psycho-sexual therapy to same-sex couples were still evolving, since he had not yet been called upon to do this type of work. Mr B interpreted this as a refusal by Mr McFarlane to confirm that he would carry out psycho-sexual therapy work with same-sex couples and he therefore suspended him, pending a disciplinary investigation. At an investigatory meeting on 7 January 2008 the applicant acknowledged that there was a conflict between his religious beliefs and psycho-sexual therapy with same-sex couples, but said that if he were asked to do such work, then he would do so and if any problems arose then he would speak to his supervisor. Mr B understood by this that Mr McFarlane undertook to comply with Relate's policies, and he therefore halted the disciplinary investigation.

36. Following a telephone conversation with the fourth applicant, his supervisor contacted Mr B to express deep concern. She considered that Mr McFarlane was either confused over the issue of same-sex psycho-sexual therapy or was being dishonest. When these concerns were put to him, Mr McFarlane stated that his views had not changed since the earlier

discussion and that any issue would be addressed as it arose. He was called to a further disciplinary meeting on 17 March 2008, at which he was asked whether he had changed his mind, but he simply replied that he had nothing further to add to what he had said on 7 January 2008.

37. On 18 March 2008 Mr B dismissed Mr McFarlane summarily for gross misconduct, having concluded that the applicant had said he would comply with Relate's policies and provide sexual counselling to same-sex couples without having any intention of doing so. He could therefore not be trusted to perform his role in compliance with the Equal Opportunities Policies. An appeal meeting took place on 28 April. The appeal was rejected on the basis that Mr B's lack of trust in Mr McFarlane to comply with the relevant policies was justified.

38. Mr McFarlane lodged a claim with the Employment Tribunal, claiming, *inter alia,* direct and indirect discrimination, unfair dismissal, and wrongful dismissal. The Tribunal pronounced its judgment on 5 January 2009. It found that Mr McFarlane had not suffered direct discrimination contrary to Regulation 3(1)(a) of the 2003 Regulations (see paragraph 41 below). He had not been dismissed because of his faith, but because it was believed that he would not comply with the policies which reflected Relate's ethos. With regard to the claim of indirect discrimination under Regulation 3(1)(b), the Tribunal found that Relate's requirement that its counsellors comply with its Equal Opportunities Policy would put an individual who shared Mr McFarlane's religious beliefs at a disadvantage. However, the aim of the requirement was the provision of a full range of counselling services to all sections of the community, regardless of sexual orientation, which was legitimate. Relate's commitment to providing non-discriminatory services was fundamental to its work and it was entitled to require an unequivocal assurance from Mr McFarlane that he would provide the full range of counselling services to the full range of clients without reservation. He had failed to give such an assurance. Filtration of clients, although it might work to a limited extent, would not protect clients from potential rejection by Mr McFarlane, however tactfully he might deal with the issue. It followed that his dismissal had been a proportionate means of achieving a legitimate aim. The discrimination claim, therefore, failed. Finally, the Tribunal rejected the claim of unfair dismissal, finding that Relate had genuinely and reasonably lost confidence in Mr McFarlane to the extent that it could not be sure that, if presented with same-sex sexual issues in the course of counselling a same-sex couple, he would provide without restraint or reservation the counselling which the couple required because of the constraints imposed on him by his genuinely held religious beliefs.

39. Mr McFarlane appealed to the Employment Appeal Tribunal against the Tribunal's findings in relation to direct and indirect discrimination and unfair dismissal. On 30 November 2009 the Employment Appeal Tribunal held that the Tribunal had been correct to dismiss the claims. It rejected

Mr McFarlane's argument that it was not legitimate to distinguish between objecting to a religious belief and objecting to a particular act which manifested that belief, and held that such an approach was compatible with Article 9 of the Convention. It noted Relate's arguments that the compromise proposed by Mr McFarlane would be unacceptable as a matter of principle because it ran "entirely contrary to the ethos of the organisation to accept a situation in which a counsellor could decline to deal with particular clients because he disapproved of their conduct", and that it was not practicable to operate a system under which a counsellor could withdraw from counselling same-sex couples if circumstances arose where he believed that he would be endorsing sexual activity on their part. Relate was entitled to refuse to accommodate views which contradicted its fundamental declared principles. In such circumstances, arguments concerning the practicability of accommodating the applicant's views were out of place.

40. Mr McFarlane applied to the Court of Appeal for permission to appeal against the decision of the Employment Appeal Tribunal. On 20 January 2010 the Court of Appeal refused the application on the basis that there was no realistic prospect of the appeal succeeding in the light of the Court of Appeal judgment of December 2009 in *Ladele*. Following the refusal by the Supreme Court to allow leave to appeal in *Ladele*, Mr McFarlane renewed his application for permission to appeal. After a hearing, that application was again refused on 29 April 2010, on the basis that the present case could not sensibly be distinguished from *Ladele.*

II. RELEVANT DOMESTIC LAW

41. Regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003 provides:

> "**3. Discrimination on grounds of religion or belief**
>
> (1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if –
>
> ....
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but –
>
> (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,
>
> (ii) which puts B at that disadvantage, and
>
> (iii) which A cannot show to be a proportionate means of achieving a legitimate aim."

Regulation 2(1) provides that "religion" means any religion and "belief" means any religious or philosophical belief.

42. Regulation 3 of the Equality Act (Sexual Orientation) Regulations 2007 provides:

> "**3. Discrimination on grounds of sexual orientation**
>
> (1) For the purposes of these Regulations, a person ('A') discriminates against another ('B') if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).
>
> ....
>
> (3) For the purposes of these Regulations, a person ('A') discriminates against another ('B') if A applies to B a provision, criterion or practice –
>
> (a) which he applies or would apply equally to persons not of B's sexual orientation,
>
> (b) which puts persons of B's sexual orientation at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances),
>
> (c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there is no material difference in the relevant circumstances), and
>
> (d) which A cannot reasonably justify by reference to matters other than B's sexual orientation."

In connection with the provision of goods, services and facilities, Regulation 4 provides:

> "(1) It is unlawful for a person ('A') concerned with the provision to the public or a section of the public of goods, facilities or services to discriminate against a person ('B') who seeks to obtain or to use those goods, facilities or services—
>
> (a) by refusing to provide B with goods, facilities or services,
>
> (b) by refusing to provide B with goods, facilities or services of a quality which is the same as or similar to the quality of goods, facilities or services that A normally provides to—
>
> (i) the public, or
>
> (ii) a section of the public to which B belongs,
>
> (c) by refusing to provide B with goods, facilities or services in a manner which is the same as or similar to that in which A normally provides goods, facilities or services to—
>
> (i) the public, or
>
> (ii) a section of the public to which B belongs, or

(d) by refusing to provide B with goods, facilities or services on terms which are the same as or similar to the terms on which A normally provides goods, facilities or services to—

(i) the public, or

(ii) a section of the public to which B belongs.

(2) Paragraph (1) applies, in particular, to—

(a) access to and use of a place which the public are permitted to enter,

(b) accommodation in a hotel, boarding house or similar establishment,

....”

Regulation 8(1) provides that it is unlawful for a public authority exercising a function to do any act which constitutes discrimination. Regulation 30 provides that anything done by a person in the course of his employment shall be treated as done by the employer as well as by the person.

43. The EU Framework Directive for Equal Treatment in Employment and Occupation 2007/78/EC underlies both of these sets of regulations. In dealing with the concept of discrimination, it provides in Article 2(2)(b) that:

“... indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.”

44. Within the United Kingdom, domestic courts have considered the issues raised in these applications in some detail. In particular the House of Lords has had occasion in two leading cases to deal with the questions relating to both the manifestation of religious belief and the circumstances in which an interference with Article 9 will be found.

45. In *R (Williamson and Others) v. Secretary of State for Education and Employment* [2005] UKHL 15 the claimants complained that the United Kingdom’s ban on corporal punishment of children in appropriate circumstances violated their right to freedom to manifest their religious belief under Article 9 of the Convention. At paragraph 23, in considering what amounted to a “manifestation” of belief, Lord Nicholls of Birkenhead,

with whom Lords Bingham, Brown and Walker and Lady Hale agreed, set out some basic principles:

> "... a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this prerequisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention...."

Later, at paragraph 32, his Lordship continued:

> "... in deciding whether... conduct constitutes manifesting a belief in practice for the purposes of article 9 one must first identify the nature and scope of the belief. If... the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice. In such cases the act is 'intimately linked' to the belief, in the Strasbourg phraseology...."

46. The case of *R (Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15 concerned a claim that the claimant's exclusion from school, due to repeated violations of the uniform code, unjustifiably limited, *inter alia*, her right under Article 9 of the Convention to manifest her religion and beliefs. Lord Bingham, dealing with the question of whether there had been an interference with the claimant's right under Article 9, said this at paragraphs 23 and 24:

> "23. The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience. Thus in *X v Denmark* (1976) 5 DR 157 a clergyman was held to have accepted the discipline of his church when he took employment, and his right to leave the church guaranteed his freedom of religion. His claim under article 9 failed. ... *Karaduman v Turkey* (1993) 74 DR 93 is a strong case. The applicant was denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf. The Commission found (p 109) no interference with her article 9 right because (p 108) 'by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to

restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs'. In rejecting the applicant's claim in *Konttinen v Finland* (1996) 87-A DR 68 the Commission pointed out, in para 1, page 75, that he had not been pressured to change his religious views or prevented from manifesting his religion or belief; having found that his working hours conflicted with his religious convictions, he was free to relinquish his post. ... In *Stedman v United Kingdom* (1997) 23 EHRR CD 168 it was fatal to the applicant's article 9 claim that she was free to resign rather than work on Sundays. The applicant in *Kalaç* [*v Turkey* (1997) 27 EHRR 552], paras 28-29, failed because he had, in choosing a military career, accepted of his own accord a system of military discipline that by its nature implied the possibility of special limitations on certain rights and freedoms, and he had been able to fulfil the ordinary obligations of Muslim belief. In *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 BHRC 27, para 81, the applicants' challenge to the regulation of ritual slaughter in France, which did not satisfy their exacting religious standards, was rejected because they could easily obtain supplies of meat, slaughtered in accordance with those standards, from Belgium.

24. This line of authority has been criticised by the Court of Appeal as overly restrictive (*Copsey v WWB Devon Clays Ltd* 2005 EWCA Civ 932, [2005] 1CR 1789, paras 31-39, 44-66), and in [*R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15], para 39, the House questioned whether alternative means of accommodating a manifestation of religions belief had, as suggested in the *Jewish Liturgical* case, above, para 80, to be 'impossible' before a claim of interference under article 9 could succeed. But the authorities do in my opinion support the proposition with which I prefaced para 23 of this opinion. Even if it be accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference, there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established."

III. RELEVANT COMPARATIVE LAW

A. Council of Europe Member States

47. An analysis of the law and practice relating to the wearing of religious symbols at work across twenty-six Council of Europe Contracting States demonstrates that in the majority of States the wearing of religious clothing and/or religious symbols in the workplace is unregulated. In three States, namely Ukraine, Turkey and some cantons of Switzerland, the wearing of religious clothing and/or religious symbols for civil servants and other public sector employees is prohibited, but in principle it is allowed to employees of private companies. In five States - Belgium, Denmark, France, Germany and the Netherlands - the domestic courts have expressly admitted, at least in principle, an employer's right to impose certain limitations upon the wearing of religious symbols by employees; however, there are neither laws nor regulations in any of these countries expressly

allowing an employer to do so. In France and Germany, there is a strict ban on the wearing of religious symbols by civil servants and State employees, while in the three other countries the attitude is more flexible. A blanket ban on wearing religious clothing and/or symbols at work by private employees is not allowed anywhere. On the contrary, in France it is expressly prohibited by law. Under French legislation, in order to be declared lawful any such restriction must pursue a legitimate aim, relating to sanitary norms, the protection of health and morals, the credibility of the company's image in the eyes of the customer, as well as pass a proportionality test.

B. Third countries

1. The United States of America

48. For civil servants and Government employees, the wearing of religious symbols is protected under both the United States Constitution (the Establishment Clause and the Free Exercise Clause) and the Civil Rights Act 1964. When a constitutional claim is made by a public employee, the courts apply the standard of intermediate scrutiny, under which the Government can impose restrictions on the wearing of religious symbols if the action is "substantially related" to promoting an "important" Government interest (see *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144, 157 (3rd Cir. 2002)). When a statutory claim is made, the employer must have either offered "reasonable accommodation" for the religious practice or prove that allowing those religious practices would have imposed "undue hardship" on the employer (see *Ansonia Board of Education v. Philbrook*, 479 US 60 (1986); *United States v. Board of Education for School District of Philadelphia*, 911 F.2d 882, 886 (3rd Cir. 1990); *Webb v. City of Philadelphia*, 562 F.3d 256 (3rd Cir. 2009)). For private employees there are no constitutional limitations on the ability of employers to restrict the wearing of religious clothing and/or symbols. However, the restrictions from Title VII of the Civil Rights Act continue to apply so long as the employer has over 15 employees.

2. Canada

49. Religious freedom is constitutionally protected under the Canadian Charter of Rights and Freedoms 1982 (the Charter). Section 1 of the Charter provides the state with authority to infringe on freedom of religion in the least restrictive way possible for a "compelling government interest" (see *B(R) v. Children's Aid Society of Metropolitan Toronto* (1995) 1 SCR 315). Canadian employers, in general, are expected to adjust workplace regulations that have a disproportionate impact on certain religious minorities. The standard applied by the courts in this connection is that of

"reasonable accommodation" (see *R v Big M Drug Mart Limited* (1985) 1 SCR 295). Recent litigation on this point has centred on the rights of Sikh persons to wear a turban or kirpan at work. In *Bhinder v. Canadian National Railway Co.* (1985) 2 SCR 561, the Supreme Court determined that the claimant could not wear a turban at work because it interfered with his capacity to wear a hard helmet. This was found to represent a "*bona fide* occupational requirement". The Canadian courts, rather than purporting to define a religion or religious practice, are more interested in the sincerity of the belief in a practice that has a nexus with a religion (see *Syndicat Northcrest v. Amselem* (2004) 2 SCR 551). In *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256, in which the Supreme Court of Canada upheld a Sikh student's right to wear a kirpan to school, the court did not undertake a theological analysis of the centrality of kirpans to the Sikh faith. Instead, the court considered that the claimant "need[ed] only show that his personal and subjective belief in the religious significance of the kirpan [was] sincere".

THE LAW

I. JOINDER OF APPLICATIONS

50. Given that the applications at hand raise related issues under the Convention, the Court decides to join them pursuant to Rule 42 § 1 of the Rules of Court.

II. ADMISSIBILITY

51. The first, second and fourth applicants complained that the sanctions they suffered at work breached their rights under Article 9 of the Convention, taken alone or in conjunction with Article 14. The third applicant complained of a breach of Articles 14 and 9 taken together.

Article 9 provides:

> "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 or 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."

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

52. The Government disagreed, and invited the Court to find the applications inadmissible or, in the alternative, to find that there had been no violation of the above Articles. In particular, they submitted that the second applicant had failed to exhaust domestic remedies and that her application should therefore be declared inadmissible. They pointed out that she had not sought to bring an appeal to the Employment Appeal Tribunal from the decision of the Employment Tribunal of 6 April 2010, dismissing her claim of religious discrimination under the 2003 Regulations. Her case was different from *Eweida.* Unlike the first applicant, the second applicant was employed by a public authority and could have pursued her arguments under Article 9 of the Convention directly before the national courts. Moreover, the second applicant complained that she was treated less favourably than Sikh and Muslim colleagues, but she did not appeal against the Employment Tribunal's finding that her claim of direct discrimination was not made out on the evidence before it.

53. The second applicant argued that the Court of Appeal's judgment in *Eweida* had been decisive for her case and meant that any further appeals brought by her would have had no prospect of success and would just have wasted time and money.

54. The Court recalls that the purpose of the rule in Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. The rule is based on the assumption, reflected in Article 13 of the Convention, that there is an effective remedy available in the domestic system in respect of the alleged breach. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see, amongst many other examples, *Selmouni v. France* ([GC], no. 25803/94, § 74, ECHR 1999 V). When deciding whether or not an applicant should be required to exhaust a particular remedy, the Court has held that mere doubts on her part as to its effectiveness will not absolve her from attempting it. However, an applicant is not required to use a remedy which, "according to settled legal opinion existing at the relevant time", offers no reasonable prospects of providing redress for her complaint (see *D. v. Ireland* (dec.), no. 26499/02, §§ 89 and 91, 28 June 2006 and *Fox v. the United Kingdom* (dec.), no. 61319/09, §§ 41-42, 20 March 2012).

55. In the present case, the Court agrees with the Government that, to the extent that the second applicant complains under Articles 9 and 14 of direct

discrimination, she has failed to exhaust domestic remedies. The Employment Tribunal held that it was not established on the evidence before it that Sikh and Muslim medical staff who wished to wear religious clothing and other items were treated more favourably than Christians by the heath authority. It is clear that, if the applicant had grounds on which to challenge these findings of fact, she would have been able to raise them in an appeal to the Employment Appeal Tribunal. Since she did not bring such an appeal, this part of the application is inadmissible under Article 35.

56. However, the Court does not find it established that the applicant had available an effective domestic remedy in respect of her principal complaint under Article 9, that the requirement to remove or cover her cross amounted to a disproportionate interference with her right to manifest her religious belief. The Court of Appeal in *Eweida* was clear that Article 9 was inapplicable since the restriction on wearing a cross visibly at work did not constitute an interference with the manifestation of religious belief. The Court does not find it established that, had the second applicant also sought to appeal to the Employment Appeal Tribunal and the Court of Appeal, her case would have been decided differently on this point.

57. Leaving aside the second applicant's complaint about direct discrimination, the Court finds that the remainder of her complaints, and those of the first, third and fourth applicants, are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on other grounds. The Court therefore declares admissible the first, third and fourth applicants' complaints and the second applicant's complaint partially admissible.

III. MERITS

A. The parties' arguments

1. The Government

58. In respect of the complaints by the first, second and fourth applicants under Article 9 taken alone, the Government relied on case-law of the Court to the effect that the provision does not protect each and every act or form of behaviour motivated or inspired by religion or belief. They argued that behaviour which was motivated or inspired by religion or belief, but which was not an act of practice of a religion in a generally recognised form, fell outside the protection of Article 9. The Government referred to the undisputed findings of the Employment Tribunal in respect of the first and second applicants, that each wished to wear the cross visibly as a personal expression of faith. It was not suggested that the visible wearing of a cross

was a generally recognised form of practising the Christian faith, still less one that was regarded as a mandatory requirement. The first and second applicants' desire to wear a visible cross, while it may have been inspired or motivated by a sincere religious commitment, was not a recognised religious practice or requirement of Christianity, and did not therefore fall within the scope of Article 9. Similarly, Mr McFarlane's objection to providing psycho-sexual therapy to same-sex couples could not be described as the practice of religion in a generally recognised form.

59. In the alternative, the Government argued that even if the visible wearing of the cross, or the refusal to offer specific services to homosexual couples, were a manifestation of belief and thus a right protected by Article 9, there had been no interference with this right in respect of any of the applicants. They referred to the House of Lords' judgment *R (Begum) v. Governors of Denbigh High School* (see paragraph 46 above), where Lord Bingham analysed the Strasbourg jurisprudence applicable to cases where individuals voluntarily accept employment that does not accommodate religious practice, but where there are other means open to them to practise or observe their religion without undue hardship or inconvenience. Lord Bingham had concluded that the Strasbourg case-law formed a "coherent and remarkably consistent body of authority" which made clear that there would be no interference with Article 9 in such circumstances. The cases in which an interference with Article 9 had been assumed or established arose where, even by resigning and seeking alternative employment or attending a different educational establishment, individuals had been unable to avoid a requirement which was incompatible with their religious beliefs (for example, *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A; *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI; *Ahmet Arslan v. Turkey,* dec., no. 41135/98, 23 February 2010). By contrast, in the present cases the first and second applicants were permitted by their employers to wear a cross at work provided it was covered up when dealing with customers or patients. The third applicant's case was indistinguishable from *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X, where the Court had found that pharmacists who did not want to supply contraceptives suffered no interference with their Article 9 rights because they were able to manifest their religious beliefs in many ways outside work. Each of the present applicants had been free to seek employment elsewhere; moreover, the first and second applicants had been offered other posts by their current employers at the same rate of pay which involved no restriction on their freedom visibly to wear a cross.

60. The Government further emphasised that the first and fourth applicants were employed by private companies. Their complaints did not, therefore, involve any allegation of direct interference by the State, but instead the claim that the State did not do all that was required of it under Article 9 to ensure that their private employers permitted them to give

expression to their religious beliefs at work. The Government underlined that the possibility of positive obligations being imposed by Article 9 should only be countenanced where the State's failure to adopt measures prevented an individual from freely practising his or her religion. To date there was only one case where the Court had found a State in breach of a positive obligation under Article 9, namely *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, 3 May 2007, where the State authorities had taken no action following a violent attack on a congregation of Jehovah's Witnesses by a group of Orthodox believers. The present applications were not comparable. The fact that these applicants were free to resign and seek employment elsewhere, or to practise their religion outside work, was sufficient to guarantee their Article 9 rights under domestic law. In any event, even if the State did have some positive obligation under Article 9 in relation to the acts of private employers, that obligation was fulfilled in the United Kingdom during the relevant period by the Employment Equality (Religion or Belief) Regulations 2003 (see paragraph 41 above). Regulation 3 defined "discrimination" to include direct religious discrimination (that is, treating an employee less favourably on grounds of his or her religion or belief) and indirect religious discrimination (applying a provision, criterion or practice that places persons of the same religion as the employee at a particular disadvantage and which the employer cannot show was a proportionate means of achieving a legitimate aim).

61. In the alternative under Article 9 the Government argued that the measures taken by the employers had been proportionate to a legitimate aim in each case. As regards the first applicant, British Airways was entitled to conclude that the wearing of a uniform played an important role in maintaining a professional image and strengthening recognition of the company brand, and it had a contractual right to insist its employees wore a uniform. Prior to the events in question, the restriction on visible items being worn around the neck had caused no known problem among its large uniformed workforce. The first applicant did not raise her objection to the uniform code by seeking its revision, or an authorisation to wear a cross, but instead turned up for work in breach of it. While British Airways was considering the applicant's grievance complaint, it offered her a post on identical pay with no customer contact, but she chose instead to stay at home. In November 2006, five months after the first applicant had launched the grievance procedure, British Airways announced a review of its policy on the wearing of visible religious symbols and, following consultation with staff members and trade union representatives, a new policy was adopted in January 2007, permitting the wearing of visible religious symbols.

62. In relation to the second applicant, the Government emphasised that the purpose of the restriction was to reduce the risk of injury when handling patients. Restrictions were also placed on the wearing of religious items by

non-Christians on health and safety grounds: for example, Sikh nurses were not allowed to wear the kara bracelet or the kirpan sword, and Muslim nurses had to wear closely fitted, rather than flowing, hijab. This was a legitimate aim, pursued in a proportionate manner, particularly as the health trust had offered the second applicant a non-clinical post on the same pay.

63. The Government accepted that the third applicant sincerely believed that civil partnerships were contrary to God's law and that Mr McFarlane sincerely believed that homosexual activity was sinful and that he should do nothing directly to endorse it. However, the Government also recognised that the London Borough of Islington and Relate were committed to the provision of services on a non-discriminatory basis. This was plainly a legitimate aim for a local authority or a relationship counselling service to pursue. It was proportionate to that aim in each case for the employer to require all employees to perform their roles without discriminating on grounds of sexual orientation. The 2003 Regulations and the 2007 Regulations (see paragraphs 41-42 above) struck a balance in the United Kingdom between the right to manifest religious beliefs and the rights of individuals not to be discriminated against on grounds of sexual orientation. It was a matter falling within the margin of appreciation allowed to the national authorities under Article 9 exactly how that balance should be struck. Moreover, the Court should take the same approach towards proportionality and the margin of appreciation whether it considered these cases under Article 9 alone or under Article 14 taken in conjunction with Article 9.

2. The first applicant

64. The first applicant submitted that the wearing of a visible cross was a generally recognised form of practising Christianity. In any event, she further submitted that the Government's formulation of the test that must be satisfied to engage Article 9 by reference to an "act of practice of a religion in a generally recognised form" was incorrect. Such a test was too vague to be workable in practice and would require courts to adjudicate on matters of theological debate, which were clearly outside the scope of their competence. Moreover, it was not supported by the Court's case-law.

65. In addition, she argued that a restrictive interpretation as to what constituted an interference with Article 9 rights would be inconsistent with the importance which the Court placed on freedom of religion. No other fundamental right was subjected to the doctrine that there would be no interference where it was possible for the individual to avoid the restriction, for example by resigning and finding another job, nor should an individual be considered to have "waived" his or her rights by remaining in employment. The Court should interpret the Convention in the light of current conditions. The availability to the applicant of any means of avoiding the restriction should be taken into account under Article 9 § 2,

when considering whether the restriction was justified, rather than under Article 9 § 1 as grounds for holding that there was no interference. In the present case, there had clearly been an interference: the first applicant was prohibited from wearing a cross visibly, which she considered to be the central image of her faith; she found the enforcement of the uniform code deeply humiliating and offensive; in addition, the loss of her salary for four months created significant financial hardship.

66. The first applicant submitted that domestic law, as it was interpreted and applied by the English courts in her case, failed to give adequate protection to her rights under Article 9. She was denied protection under national law for her entirely sincere and orthodox desire to manifest her faith by wearing a cross, because she was unable to adduce evidence that this was a scriptural requirement or a widely practised manifestation of belief. In addition, the test under national law based on the establishment of group disadvantage was legally uncertain and inherently vulnerable to returning arbitrary results. The Court had never suggested that a positive obligation on the State should only be imposed under Article 9 in exceptional cases and there was no reason of principle why this should be so. In the present case, there had been an on-going failure on the part of the United Kingdom Government to put in place legislation adequate to enable those in the position of the applicant to protect their rights.

3. The second applicant

67. The second applicant argued that the visible wearing of a cross or crucifix was clearly an aspect of the practice of Christianity in a generally recognised form. It was incorrect to distinguish between "requirements" and "non-requirements" of a religion, giving the protection of Article 9 only to religious "requirements". Such an approach would place the threshold for protection too high and it was inconsistent with the approach of the domestic courts in such cases as *R (Watkins Singh) v. Aberdare High School* and *Williamson* (see above) and this Court in *Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, ECHR 2006-XI; *Jakóbski v. Poland*, no. 18429/06, 7 December 2010; and *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011. Moreover, to hold that only mandatory religious practices fell within the scope of Article 9 would give a higher level of protection to religions which include specific rules which must be adhered to, and a lower level of protection to religions without similar rules, such as Christianity.

68. The second applicant contested the Government's argument that a requirement to remove or cover her cross at work did not constitute an interference with her right to manifest her religion or belief. While the earlier case-law of the Commission and Court might support the Government's contention, in more recent cases concerning restrictions on the wearing of religious items in educational institutions and at work the

Court had found that there had been an interference (see, for example, *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V; *Leyla Şahin*, cited above; *Dogru v. France*, no. 27058/05, 4 December 2008).

69. Finally, the second applicant reasoned that the interference was not justified under Article 9 § 2. Although the purported aim of the restriction was to reduce the risk of injury when working with elderly patients, no evidence was adduced before the Employment Tribunal to demonstrate that wearing the cross caused health and safety problems. The second applicant further argued that these facts gave rise to a breach of her rights under Article 14 taken in conjunction with Article 9, relying on the alleged difference in the health authority's treatment of her compared to the followers of other religions (in respect of which, see paragraph 55 above).

4. The third applicant

70. The third applicant complained under Article 14 taken in conjunction with Article 9, rather than under Article 9 taken alone, because she considered that she had been discriminated against on grounds of religion. She submitted that her acts, for which she was disciplined, were a manifestation of her religion and that the claim certainly reached the lower threshold required for applicability of Article 14, namely that it fell within the ambit of Article 9. She further contended that, in failing to treat her differently from those staff who did not have a conscientious objection to registering civil partnerships, the local authority indirectly discriminated against her. The local authority could reasonably have accommodated her religious beliefs, and its refusal to adopt less restrictive means was disproportionate under Articles 14 and 9.

71. The third applicant contended that the Court should require "very weighty reasons" in order to justify discrimination on grounds of religion. As with suspect categories so far identified by the Court as requiring "very weighty reasons" (such as sex, sexual orientation, ethnic origin and nationality) religious faith constituted a core aspect of an individual's identity. Moreover, race, ethnicity and religion were often inter-connected and had been linked by the Court (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 43, ECHR 2009 and *Cyprus v. Turkey* [GC], no. 25781/94, § 309, ECHR 2001-IV).

72. The third applicant accepted that the aims pursued by the local authority were legitimate, namely to provide access to services, irrespective of sexual orientation and to communicate a clear commitment to non-discrimination. However, she did not consider that the Government had demonstrated that there was a reasonable relationship of proportionality between these aims and the means employed. She emphasised that she was employed as a marriage registrar prior to the change in legislation permitting civil partnerships to be established, and that the basis on which she was employed was fundamentally altered. The local authority had had a

discretion not to designate her as a registrar of civil partnerships and could still have provided an efficient civil partnership service while accommodating the applicant's conscientious objection. That objection was to participating in the creation of a legal status based on an institution that she considered to be a marriage in all but name; the applicant did not manifest any prejudice against homosexuals. In any event, it could not be assumed that, had the local authority accommodated the applicant, it would have been seen as approving of her beliefs. For example, when the State permitted doctors whom it employed to opt out of performing abortions, the State was not necessarily seen as approving of the doctors' views; instead it was a sign of tolerance on the part of the State. In this case, however, the local authority did not adequately take into account its duty of neutrality. It failed to strike a balance between delivering the service in a way which would not discriminate on grounds of sexual orientation, while avoiding discriminating against its own employees on grounds of religion.

5. The fourth applicant

73. Mr McFarlane took issue with the Government's position that his adherence to Judeo-Christian sexual morality was not a manifestation of religious belief, despite the fact that, universally, religion promulgates clear moral and sexual boundaries. He submitted that it was trite law to assert that not every act motivated or inspired by religious belief is protected; this was true of any other Convention right that could be limited, such as freedom of speech or the right to respect for private life. The proper standard used by the Court was that any interference with freedom of thought, conscience or religion had to be necessary in a democratic society and proportionate to a legitimate aim being pursued. When determining the margin of appreciation to be allowed to the State in respect of restrictions on freedom of religion, the Court had to take into account what was at stake, namely the need to maintain true religious pluralism, which was inherent to the concept of a democratic society. The protection of Article 9 would be empty of content if it did not go beyond merely safeguarding private manifestation of faith or belief, in a generally recognised form, where it was the State that determined this very issue.

74. Mr McFarlane emphasised that dismissal from employment and damage to professional reputation was one of the most severe sanctions that could be imposed on an individual, and this had to be taken into account when determining the available margin of appreciation. The applicant was employed by a private company which was not under any statutory requirement to provide the service in question. It would have been possible to refer homosexual clients to another counsellor. It was unrealistic to require the applicant to change job or career because of his moral opposition to homosexual behaviour; the same would not be required of a homosexual who lost his job on discriminatory grounds.

6. The third parties

75. A total of twelve third parties received permission under Rule 44 § 2 of the Rules of Court and Article 36 § 2 of the Convention to submit written comments (see paragraph 5 above).

76. A number of the interveners submitted comments on the issue whether the wearing of the cross could be considered a manifestation of religious belief. The submissions by the Premier Christian Media Trust; Dr Peter Forster, Bishop of Chester; Nicholas Reade, Bishop of Blackburn and Bishop Michael Nazir-Ali, in addition to relying on the Court's recent decision in *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011 (extracts), observed that the cross is a universally-recognised Christian symbol and a "self-evident manifestation" of Christian faith. Further, along with the Equality and Human Rights Commission, the Associazione "Giuseppi Dossetti: i Valori" and Lord Carey of Clifton, they submitted that the proper approach to assessing manifestations of religious belief was a subjective one. In particular, they argued, the idea of a "mandatory requirement" was too high and overly-simplistic. The Premier Christian Media Trust, the Associazione "Giuseppi Dossetti: i Valori" and Bishop Michael Nazir-Ali invited the Court to find that it is not for the State or an employer to assess the veracity of a religious conviction or manifestation. The Equality and Human Rights Commission recommended that the appropriate test, deriving from the Court's more recent case-law, maintained a primary focus on the conviction of the adherent. In contrast, the National Secular Society indicated that the domestic courts made findings of fact on the question whether any given religious practice was driven by a "command of conscience" or by a "mere desire to express oneself". They suggested that the Court should be extremely reluctant to interfere with these factual determinations.

77. On the question when an interference with Article 9 will be found, the Equality and Human Rights Commission submitted that the courts in the United Kingdom have, in effect, guaranteed different levels of protection for individuals asserting a purely religious identity as opposed to those whose religious and racial identities are intertwined (see *R (Watkins-Singh) v. Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin)). Additionally, they stressed that the question of interference must take into account not only the choices a person has made, such as the choice of particular employment, but also the actions of the employer. A number of other interveners made clear their view that it was quite wrong for an employee to be forced to make the invidious choice between his or her job and faith. The National Secular Society took a different approach, emphasising that the "freedom to resign is the ultimate guarantee of freedom of conscience". Building on this, they suggested that there existed no positive obligation on a State to protect employees against uniform or other requirements.

78. In connection with the question of proportionality and justification of an interference with Article 9, a number of interveners (the European Centre for Law and Justice; Dr Jan Carnogurksy and the Alliance Defence Fund; the Equality and Human Rights Commission; the Associazione "Giuseppi Dossetti i Valori"; Bishop Michael Nazir-Ali; Lord Carey; and the Clapham Institute and KLM) referred to the concept of "reasonable accommodation" or, as Lord Carey put it, a "mutuality of respect". They argued, in general terms, that a proportionality analysis by the Court should take into account the possibility of an accommodation of an individual's beliefs and practices. They stressed that some compromise between competing rights was necessary in a democratic and pluralistic society. On this understanding, so long as an individual's religious practices did not detrimentally affect service provision or unduly affect an employer, those religious practices should be permitted and protected at work. In this respect, the Court's attention was drawn by the Alliance Defence Fund to case-law from the United States of America, which required reasonable accommodation of religious beliefs and practices, insofar as that accommodation did not cause "undue hardship" to the employer. Liberty submitted that, in considering the justification for a restriction of Article 9 rights, a Contracting State should be permitted a "significant" margin of appreciation. This was affirmed in the contribution of the National Secular Society which sought to draw the Court's attention to the passage of the Equality Bill 2010 through the Houses of Parliament. Through this process, it was submitted, the United Kingdom had given detailed consideration to possibility of a "conscientious objection" exception. That this exception was finally withdrawn following full debate, they say, demonstrated that the relevant margin of appreciation should be broad. The International Commission of Jurists, Professor Robert Wintemute, the Fédération Internationale des Ligues des Droits de l'Homme and ILGA-Europe referred the Court to comparative materials, indicating that, where they are granted, statutory exceptions to discrimination laws are generally for religious institutions and organisations rather than individuals. By contrast to the views of other interveners, Liberty invited the Court to find that, when looking at the linked issues of proportionality and accommodation, the impact of any accommodation on others, particularly where those others are themselves of minority and/or disadvantaged status should be taken into account. They went further and invited the Court to rely on Article 17 of the Convention, if necessary and appropriate.

B. The Court's assessment

1. General principles under Article 9 of the Convention

79. The Court recalls that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it (see *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A).

80. Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions (see *Kokkinakis,* cited above, § 31 and also *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 105, ECHR 2005-XI). Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 § 2. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

81. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance (see *Bayatyan v. Armenia* [GC], no. 23459/03, § 110, ECHR 2011; *Leela Förderkreis e.V. and Others v. Germany*, no. 58911/00, § 80, 6 November 2008; *Jakóbski v. Poland*, no. 18429/06, § 44, 7 December 2010). Provided this is satisfied, the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, judgment of 26 September 1996, Reports 1996-IV, p. 1365, § 47; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000‑XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 1, ECHR 2003-II).

82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some

way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 (see *Skugar and Others v. Russia* (dec.), no. 40010/04, 3 December 2009 and, for example, *Arrowsmith v. the United Kingdom*, Commission's report of 12 October 1978, Decisions and Reports 19, p. 5; *C. v. the United Kingdom,* Commission decision of 15 December 1983, DR 37, p. 142; *Zaoui v. Switzerland* (dec.), no. 41615/98, 18 January 2001). In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question (see *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, §§ 73-74, ECHR 2000-VII; *Leyla Şahin,* cited above, §§ 78 and 105; *Bayatyan*, cited above, § 111; *Skugar*, cited above; *Pichon and Sajous v. France* (dec.), no. 49853/99, *Reports of Judgments and Decisions* 2001-X).

83. It is true, as the Government point out and as Lord Bingham observed in *R (Begum) v. Governors of Denbigh High School* case (see paragraph 46 above), that there is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 § 1 and the limitation does not therefore require to be justified under Article 9 § 2. For example, in the above-cited *Cha'are Shalom Ve Tsedek* case, the Court held that "there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable". However, this conclusion can be explained by the Court's finding that the religious practice and observance at issue in that case was the consumption of meat only from animals that had been ritually slaughtered and certified to comply with religious dietary laws, rather than any personal involvement in the ritual slaughter and certification process itself (see §§ 80 and 82). More relevantly, in cases involving restrictions placed by employers on an employee's ability to observe religious practice, the Commission held in several decisions that the possibility of resigning from the job and changing employment meant that there was no interference with the employee's religious freedom (see, for example, *Konttinen v. Finland,* Commission's

decision of 3 December 1996, Decisions and Reports 87-A, p. 68; *Stedman v. the United Kingdom,* Commission's decision of 9 April 1997; compare *Kosteski v. "the former Yugoslav Republic of Macedonia"*, no. 55170/00, § 39, 13 April 2006). However, the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under Article 8; the right to freedom of expression under Article 10; or the negative right, not to join a trade union, under Article 11 (see, for example, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI; *Vogt v. Germany*, 26 September 1995, § 44, Series A no. 323; *Young, James and Webster v. the United Kingdom*, 13 August 1981, §§ 54-55, Series A no. 44). Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

84. According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (see *Leyla Şahin*, cited above, § 110; *Bayatyan,* cited above, §§ 121-122; *Manoussakis,* cited above, § 44). Where, as for the first and fourth applicants, the acts complained of were carried out by private companies and were not therefore directly attributable to the respondent State, the Court must consider the issues in terms of the positive obligation on the State authorities to secure the rights under Article 9 to those within their jurisdiction (see, *mutatis mutandis, Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, §§ 58-61, ECHR 2011; see also *Otto-Preminger-Institut v. Austria* judgment of 25 November 1994, Series A no. 295, § 47). Whilst the boundary between the State's positive and negative obligations under the Convention does not lend itself to precise definition, the applicable principles are, nonetheless, similar. In both contexts regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State (see *Palomo Sánchez and Others*, cited above, § 62).

2. General principles under Article 14 of the Convention

85. The Court recalls that Article 14 of the Convention has no independent existence, since it has effect solely in relation to the rights and

freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. However, the application of Article 14 does not presuppose a breach of one or more of such provisions and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (see, for example, *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV).

86. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (*Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010). "Religion" is specifically mentioned in the text of Article 14 as a prohibited ground of discrimination.

87. Generally, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008-). However, this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (*Thlimmenos*, cited above, § 44; see also *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, § 35, 10 May 2007).

88. Such a difference of treatment between persons in relevantly similar positions - or a failure to treat differently persons in relevantly different situations - is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden*, cited above, § 60). The scope of this margin will vary according to the circumstances, the subject-matter and the background (*Carson and Others,* cited above, § 61).

3. Application of the above principles to the facts of the present cases

a. The first applicant

89. It was not disputed in the proceedings before the domestic tribunals and this Court that Ms Eweida's insistence on wearing a cross visibly at work was motivated by her desire to bear witness to her Christian faith. Applying the principles set out above, the Court considers that Ms Eweida's behaviour was a manifestation of her religious belief, in the form of

worship, practice and observance, and as such attracted the protection of Article 9.

90. Ms Eweida was employed by a private company, British Airways. On 20 September 2006 she was sent home from work because of her refusal to conceal her cross, in breach of the company's uniform code. Just over a month later she was offered an administrative post which would not have required her to wear a uniform. However, she chose not to accept this offer and instead remained at home without pay until 3 February 2007, when British Airways amended its rules on uniform and allowed her to display the cross.

91. The Court considers that the refusal by British Airways between September 2006 and February 2007 to allow the applicant to remain in her post while visibly wearing a cross amounted to an interference with her right to manifest her religion. Since the interference was not directly attributable to the State, the Court must examine whether in all the circumstances the State authorities complied with their positive obligation under Article 9; in other words, whether Ms Eweida's right freely to manifest her religion was sufficiently secured within the domestic legal order and whether a fair balance was struck between her rights and those of others.

92. In common with a large number of Contracting States (see paragraph 47 above), the United Kingdom does not have legal provisions specifically regulating the wearing of religious clothing and symbols in the workplace. Ms Eweida brought domestic proceedings for damages for direct and indirect discrimination contrary to regulation 3 of the 2003 Regulations (see paragraph 41 above). It was accepted before the Employment Tribunal that it had no jurisdiction to consider any separate or free-standing claim under Article 9 of the Convention. The applicant was able to invoke Article 9 before the Court of Appeal, although that court held that there had been no interference with her rights under Article 9. Nonetheless, while the examination of Ms Eweida's case by the domestic tribunals and court focused primarily on the complaint about discriminatory treatment, it is clear that the legitimacy of the uniform code and the proportionality of the measures taken by British Airways in respect of Ms Eweida were examined in detail. The Court does not, therefore, consider that the lack of specific protection under domestic law in itself meant that the applicant's right to manifest her religion by wearing a religious symbol at work was insufficiently protected.

93. When considering the proportionality of the steps taken by British Airways to enforce its uniform code, the national judges at each level agreed that the aim of the code was legitimate, namely to communicate a certain image of the company and to promote recognition of its brand and staff. The Employment Tribunal considered that the requirement to comply with the code was disproportionate, since it failed to distinguish an item

worn as a religious symbol from a piece of jewellery worn purely for decorative reasons. This finding was reversed on appeal to the Court of Appeal, which found that British Airways had acted proportionately. In reaching this conclusion, the Court of Appeal referred to the facts of the case as established by the Employment Tribunal and, in particular, that the dress code had been in force for some years and had caused no known problem to the applicant or any other member of staff; that Ms Eweida lodged a formal grievance complaint but then decided to arrive at work displaying her cross, without waiting for the results of the grievance procedure; that the issue was conscientiously addressed by British Airways once the complaint had been lodged, involving a consultation process and resulting in a relaxation of the dress code to permit the wearing of visible religious symbols; and that Ms Eweida was offered an administrative post on identical pay during this process and was in February 2007 reinstated in her old job.

94. It is clear, in the view of the Court, that these factors combined to mitigate the extent of the interference suffered by the applicant and must be taken into account. Moreover, in weighing the proportionality of the measures taken by a private company in respect of its employee, the national authorities, in particular the courts, operate within a margin of appreciation. Nonetheless, the Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.

95. The Court therefore concludes that, 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. In the light of this conclusion, it does not consider it necessary to examine separately the applicant's complaint under Article 14 taken in conjunction with Article 9.

b. The second applicant

96. Ms Chaplin is also a practising Christian, who has worn a cross on a chain around her neck since her confirmation in 1971. At the time of the events in question she worked as a nurse on a geriatric ward which had a uniform policy based on guidance from the Department of Health. That policy provided, *inter alia,* that "no necklaces will be worn to reduce the risk of injury when handling patients" and that any member of staff who wished to wear a particular item for religious or cultural reasons had first to raise this with the line manager who would not unreasonably withhold approval. In 2007 new tunics were introduced, which replaced the previous collar with a V-neck, so that the applicant's cross was now more visible and accessible, both at the back of her neck and in front. The applicant was asked to remove the cross and chain. When she refused, she was moved in November 2009 to a non-nursing position, which ceased to exist in July 2010. She complained to the Employment Tribunal of direct and indirect discrimination. The Tribunal rejected the complaint of direct discrimination since it found that there was no evidence that the applicant was treated less favourably than colleagues who wished to wear other items on religious grounds. It also rejected the claim of indirect discrimination, finding that the health authority's policy was proportionate to the aim pursued.

97. As with Ms Eweida, and in accordance with the general principles set out above, the Court considers that the second applicant's determination to wear the cross and chain at work was a manifestation of her religious belief and that the refusal by the health authority to allow her to remain in the nursing post while wearing the cross was an interference with her freedom to manifest her religion.

98. The second applicant's employer was a public authority, and the Court must determine whether the interference was necessary in a democratic society in pursuit of one of the aims set out in Article 9 § 2. In this case, there does not appear to be any dispute that the reason for the restriction on jewellery, including religious symbols, was to protect the health and safety of nurses and patients. The evidence before the Employment Tribunal was that the applicant's managers considered there was a risk that a disturbed patient might seize and pull the chain, thereby injuring herself or the applicant, or that the cross might swing forward and could, for example, come into contact with an open wound. There was also evidence that another Christian nurse had been requested to remove a cross and chain; two Sikh nurses had been told they could not wear a bangle or kirpan; and that flowing hijabs were prohibited. The applicant was offered the possibility of wearing a cross in the form of a brooch attached to her uniform, or tucked under a high-necked top worn under her tunic, but she did not consider that this would be sufficient to comply with her religious conviction.

99. The Court considers that, as in Ms Eweida's case, the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance. However, the reason for asking her to remove the cross, namely 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. Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.

100. It follows that 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 in respect of the second applicant.

101. Moreover, it considers that the factors to be weighed in the balance when assessing the proportionality of the measure under Article 14 taken in conjunction with Article 9 would be similar, and that there is no basis on which it can find a violation of Article 14 either in this case.

c. The third applicant

102. The Court notes that the third applicant is a Christian, who holds the orthodox Christian view that marriage is the union of one man and one woman for life. She believed that same-sex unions are contrary to God's will and that it would be wrong for her to participate in the creation of an institution equivalent to marriage between a same-sex couple. Because of her refusal to agree to be designated as a registrar of civil partnerships, disciplinary proceedings were brought, culminating in the loss of her job.

103. The third applicant did not complain under Article 9 taken alone, but instead complained that she had suffered discrimination as a result of her Christian beliefs, in breach of Article 14 taken in conjunction with Article 9. For the Court, it is clear that the applicant's objection to participating in the creation of same-sex civil partnerships was directly motivated by her religious beliefs. The events in question fell within the ambit of Article 9 and Article 14 is applicable.

104. The Court considers that the relevant comparator in this case is a registrar with no religious objection to same-sex unions. It agrees with the applicant's contention that the local authority's requirement that all registrars of births, marriages and deaths be designated also as civil partnership registrars had a particularly detrimental impact on her because of her religious beliefs. In order to determine whether the local authority's decision not to make an exception for the applicant and others in her situation amounted to indirect discrimination in breach of Article 14, the

Court must consider whether the policy pursued a legitimate aim and was proportionate.

105. The Court of Appeal held in this case that the aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being "an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others". The Court recalls that in its case-law under Article 14 it has held that differences in treatment based on sexual orientation require particularly serious reasons by way of justification (see, for example, *Karner v. Austria*, no. 40016/98, § 37, ECHR 2003-IX; *Smith and Grady*, cited above, § 90; *Schalk and Kopf v. Austria*, no. 30141/04, § 97, ECHR 2010). It has also held that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, although since practice in this regard is still evolving across Europe, the Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order (*Schalk and Kopf*, cited above, §§ 99-108). Against this background, it is evident that the aim pursued by the local authority was legitimate.

106. It remains to be determined whether the means used to pursue this aim were proportionate. The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights (see, for example, *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I). In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.

d. The fourth applicant

107. Mr McFarlane's principal complaint was under Article 9 of the Convention, although he also complained under Article 14 taken in conjunction with Article 9. Employed by a private company with a policy of requiring employees to provide services equally to heterosexual and homosexual couples, he had refused to commit himself to providing psycho-sexual counselling to same-sex couples, which resulted in disciplinary proceedings being brought against him. His complaint of indirect discrimination, *inter alia,* was rejected by the Employment Tribunal and the Employment Appeal Tribunal and he was refused leave to appeal by the Court of Appeal.

108. The Court accepts that Mr McFarlane's objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships, and holds that his refusal to undertake to counsel homosexual couples constituted a manifestation of his religion and belief. The State's positive obligation under Article 9 required it to secure his rights under Article 9.

109. It remains to be determined whether the State complied with this positive obligation and in particular whether a fair balance was struck between the competing interests at stake (see paragraph 84 above). In making this assessment, the Court takes into account that the loss of his job was a severe sanction with grave consequences for the applicant. On the other hand, the applicant voluntarily enrolled on Relate's post-graduate training programme in psycho-sexual counselling, knowing that Relate operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible (see paragraphs 32-34 above). While the Court does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck (see paragraph 83 above). However, 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 therefore benefitted 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. In all the circumstances, the Court does not consider that this margin of appreciation was exceeded in the present case.

110. In conclusion, the Court does not consider that the refusal by the domestic courts to uphold Mr McFarlane's complaints gave rise to a violation of Article 9, taken alone or in conjunction with Article 14.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

112. Ms Eweida claimed compensation for loss of earnings, totalling GBP 3,906.69 and interest on the loss of earnings. She also claimed non-pecuniary damages in respect of the injury to her feelings. Because of the State's failure to provide an adequate domestic remedy, she had suffered a lengthy campaign of discriminatory treatment, which would have entitled her to an award up to GBP 30,000 at domestic level.

113. The Government submitted that the sums claimed were excessive, given that British Airways conducted a review and changed its uniform policy shortly after Ms Eweida's complaint, and that the finding of a violation would be sufficient just satisfaction.

114. The Court has found a violation in respect of Ms Eweida, on the basis that domestic law, as applied in her case, did not strike the right balance between the protection of her right to manifest her religion and the rights and interests of others. It does not, however, consider that the evidence before it supports Ms Eweida's claim to have suffered financial loss as a result of the violation. She was refused permission to wear the cross visibly at work on 20 September 2006, and decided to return home and remain there, unpaid, until British Airways changed its position in February 2007. On 23 October 2006 she was offered the option of non-uniformed administrative work, at her former rate of pay, pending the resolution of the grievance procedures; an offer which she chose not to accept. Moreover, the Employment Tribunal noted in its judgment that it was common ground between the parties to the proceedings before it that, during the period September 2006 to February 2007, the applicant had enjoyed an income of well over twice her loss of earnings, some of it through gifts and donations, some as earnings from other sources. In these circumstances, the Court does not consider that the respondent State should be required to compensate Ms Eweida in respect of her lost earnings. However, the Court considers that the violation of her right to manifest her religious belief must have caused Ms Eweida considerable anxiety, frustration and distress. It therefore awards EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

115. Ms Eweida also claimed costs and expenses incurred before the Court, amounting to approximately EUR 37,000 (inclusive of value added tax) including GBP 9,218 in solicitors' costs and GBP 15,000 in counsels' fees.

116. The Government did not comment in detail on this claim, except to point out that it was not clear that all the costs had been necessarily incurred.

117. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, and in the absence of detailed comments by the Government, the Court considers it reasonable to award the sum of EUR 30,000 for the proceedings before the Court, together with any tax that may be chargeable to Ms Eweida.

C. Default interest

118. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;

2. *Declares* unanimously the second applicant's complaint about direct discrimination inadmissible and the remainder of all four applications admissible;

3. *Holds* by five votes to two that there has been a violation of Article 9 of the Convention in respect of the first applicant and that it is not necessary to examine separately her complaint under Article 14 taken in conjunction with Article 9;

4. *Holds* unanimously that there has been no violation of Article 9, taken alone or in conjunction with Article 14, in respect of the second applicant;

5. *Holds* by five votes to two that there has been no violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant;

6. *Holds* unanimously that there has been no violation of Article 9, taken alone or in conjunction with Article 14, in respect of the fourth applicant;

7. *Holds* by five votes to two that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of non-pecuniary damage, to be converted into pounds sterling at the rate applicable at the date of settlement, and that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Holds* unanimously that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 30,000 (thirty thousand euros) in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement, and that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 15 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

David Thór Björgvinsson
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions of Judges Bratza and David Thór Björgvinsson and of Judges Vučinić and De Gaetano are annexed to this judgment.

DTB
TLE

JOINT PARTLY DISSENTING OPINION OF JUDGES BRATZA AND DAVID THÓR BJÖRGVINSSON

1. While we share the view of the majority of the Chamber that, save in respect of one complaint of the second applicant, the applications are admissible as a whole and that there has been no violation of the Convention rights of the second, third and fourth applicants, we cannot agree that the rights of the first applicant under Article 9 of the Convention were violated in the particular circumstances of her case.

2. We endorse the general principles set out in the judgment governing the complaints under both Articles 9 and 14. We attach particular importance to three of these principles:

(a) The "manifestation" of religion or belief within the meaning of Article 9 is not limited to acts of worship or devotion which form part of the practice of a religion or belief "in a generally recognised form". Provided a sufficiently close and direct nexus between the act and the underlying belief exists, there is no obligation on an applicant to establish that he or she acted in fulfilment of a duty mandated by the religion. In the present case, we have no doubt that the link between the visible wearing of a cross (being the principal symbol of Christianity) and the faith to which the applicant adheres is sufficiently strong for it to amount to a manifestation of her religious belief.

(b) A restriction on the manifestation of a religion or belief in the workplace may amount to an interference with Article 9 rights which requires to be justified even in a case where the employee voluntarily accepts an employment or role which does not accommodate the practice in question or where there are other means open to the individual to practise or observe his or her religion as, for instance, by resigning from the employment or taking a new position. As pointed out by the applicants, any other interpretation would not only be difficult to reconcile with the importance of religious belief but would be to treat Article 9 rights differently and of lesser importance than rights under Articles 8, 10 or 11, where the fact that an applicant can take steps to avoid a conflict between Convention rights and other requirements or restrictions imposed on him or her has been seen as going to the issue of justification and proportionality and not to the question of whether there has been an interference with the right in question. Insofar as earlier

decisions of the Commission and the Court would suggest the contrary, we do not believe that they should be followed.

(c) Where, as in the case of the first and fourth applicants, the acts complained of were not directly attributable to the respondent State, the central question is not whether the interference was necessary in a democratic society or whether the State complied with its negative obligations flowing directly from Article 9, but whether the State was in breach of its positive obligations to secure Article 9 rights through its legal system. In determining whether or not the State complied with those obligations, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, including the interests of the employer. The Court has frequently made clear that, in striking the balance, the aims mentioned in the second paragraph of the Article may be of a certain relevance.

3. As is noted in the judgment, in common with a large number of Contracting States, the wearing of religious clothing and/or religious symbols in the workplace is not specifically regulated by law in the United Kingdom, either in the private or in the public sector. The first applicant brought domestic proceedings for damages for direct and indirect discrimination contrary to Regulation 3 of the 2003 Regulation. It was accepted by BA that the Employment Tribunal had no power to consider any separate or free-standing claim under Article 9 of the Convention. In the Court of Appeal, Article 9 was invoked but it was held that the Article did not advance the applicant's case since, in the view of that court, there had been no interference with the applicant's rights under that Article.

4. Despite this lack of specific protection, it does not in our view follow that in the particular circumstances of this case the applicant's Article 9 rights were not adequately secured. While at the national level the examination of the applicant's claim focused on the complaint of discrimination, it is clear that both the Employment Tribunal and the Court of Appeal examined in detail not only the legitimacy of the aim of the uniform code adopted by BA but the proportionality of the measures taken by the company in respect of the applicant. It was held unanimously that the aim was legitimate. The Employment Tribunal considered that the requirement was not proportionate since it failed to distinguish an item such as a religious symbol from an item worn purely frivolously or as a piece of cosmetic jewellery. The Court of Appeal, in reversing this finding, took a broader view of the matter, referring specifically to the particular features of the case which had been found established by the Employment Tribunal. 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, who from 2004 until May 2006 appears to have worn a cross concealed under her clothing without objection; 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 a few 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.

5. While a different view could doubtless be held – and was held by the Employment Tribunal itself – we do not find it possible to say that the Court of Appeal failed to carry out a fair balance of the competing interests or that their review of the factual circumstances of the case failed adequately to secure the applicant's Article 9 rights. It is argued in the judgment that too much weight was given by the domestic court to BA's wish to project a certain corporate image and too little to the applicant's desire to manifest her religious belief and to be able to communicate that belief to others. We do not think that this does justice to the decision or reasoning of the Court of Appeal. Had the uniform code been stubbornly applied without any regard to the applicant's repeated requests to be allowed to wear her cross outside her clothing or had her insistence on doing so resulted in her dismissal from employment, we could readily accept that the balance tipped strongly in favour of the applicant. But, as the facts summarised above show, that was not the case. The fact that the company was able ultimately to amend the uniform code to allow for the visible wearing of religious symbols may, as the judgment claims, demonstrate that the earlier prohibition was not "of crucial importance". It does not, however, begin in our view to demonstrate that it was not of sufficient importance to maintain until the issue was thoroughly examined.

6. In view of our conclusion that Article 9, read alone, was not violated, we have found it necessary to examine separately the applicant's complaint under Article 14 read in conjunction with Article 9.

7. In the domestic proceedings the applicant claimed direct discrimination and indirect discrimination under the 2003 Regulations. The claim of direct discrimination was rejected on the ground that, on the

evidence, the applicant was treated identically to all possible comparators: to an adherent of any non-Christian faith or of no faith, displaying a cross for cosmetic and non-religious reasons; to an adherent to a faith other than Christianity, wearing a symbol of that faith visibly on a silver chain round the neck; and to an employee wearing a visible silver necklace without any form of Christian or other religious adornment. We see no ground for challenging this finding or for concluding that there was direct discrimination.

8. The principal claim before the Court appears to be one of indirect discrimination, the argument being that, because of her religion, the applicant was in a different situation from other employees who wished to wear jewellery and that she should have been accorded different treatment as far as the company's uniform policy was concerned. The applicant does not directly criticise the 2003 Regulations which, on their face, appeared to provide in Regulation 3(1)(b) protection against any form of indirect discrimination. The applicant's complaint relates rather to the way in which that Regulation was applied by the national tribunal and court, which held that the concept of indirect discrimination implied discrimination against a defined group and that the applicant had not produced evidence of an identifiable group disadvantage on the part of Christians but only disadvantage to herself, arising out of her wish to manifest her Christian faith in a particular way. The Court of Appeal noted that, of the uniformed work force of 30,000, none other than the applicant had ever made such a request or demand, much less refused to work if it was not met. The applicant argues that to require an applicant to show group disadvantage discriminates against the adherents of religions that are less prescriptive as regards the manner of dress or other outward manifestations of faith (such as Christianity) than other religions.

9. We see force in both arguments. While it is true that the purpose of indirect discrimination is to deal principally with the problem of group discrimination, it is also true that to require evidence of group disadvantage will often impose on an applicant an excessive burden of demonstrating that persons of the same religion or belief are put at a particular disadvantage. This may be especially difficult, as the applicant argues, in the case of a religion such as Christianity, which is not prescriptive and which allows for many different ways of manifesting commitment to the religion.

10. In the end, we have not found it necessary to resolve this question, since even if the measure had an unequal impact and could in principle give rise to indirect discrimination, there was in our view in the particular circumstances of the case an objective and reasonable justification for the measure, which was a proportionate means of achieving a legitimate aim. In

this respect we are brought back to the specific factual circumstances already referred to under Article 9 read alone.

11. For these reasons we would find that the applicant's rights under Article 9, read alone or in conjunction with Article 14, were not violated. While we would not accordingly have awarded compensation to the applicant, in deference to the view of the majority, we do not contest the award of costs and expenses.

JOINT PARTLY DISSENTING OPINION OF JUDGES VUČINIĆ AND DE GAETANO

1. We are unable to share the majority's opinion that there has been no violation of the Convention in respect of the third applicant (Ms Ladele). Our vote under operative head no. 9 of the judgment must be read only in light of the fact that, in view of the majority decision regarding the third applicant, it would have served no practical purpose to have a separate head on just satisfaction in respect of the said applicant.

2. The third applicant's case is not so much one of freedom of religious belief as one of freedom of conscience – that is, that no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience. Although freedom of religion and freedom of conscience are dealt with under the same Article of the Convention, there is a fundamental difference between the two which, in our view, has not been adequately made out in §§ 79 to 88 of the judgment. Even Article 9 hints at this fundamental difference: whereas the word "conscience" features in 9 § 1, it is conspicuously absent in 9 § 2. Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and to avoid evil. In essence it is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives. The pre-eminence (and the ontological roots) of conscience is underscored by the words of a nineteenth century writer who noted that "...Conscience may come into collision with the word of a Pope, and is to be followed in spite of that word."[1]

3. As one of the third party intervenors in this case – the European Centre for Law and Justice (ECLJ) – quite pointedly put it: "[J]ust as there is a difference in nature between conscience and religion, there is also a difference between the prescriptions of conscience and religious prescriptions." The latter type of prescriptions – not to eat certain food (or certain food on certain days); the wearing of the turban or the veil, or the display of religious symbols; attendance at religious services on certain days – may be subject to limitations in the manner and subject to the conditions

[1] John Henry Cardinal Newman in ***A letter to His Grace the Duke of Norfolk*** C.P.S. (New York), 1875, chapter 5, p.71. The chapter ends with the words (p. 86): "I add one remark. Certainly, if I am obliged to bring religion into after-dinner toasts, (which indeed does not seem quite the thing) I shall drink -- to the Pope, if you please, -- still, to Conscience first, and to the Pope afterwards."

laid down in Article 9 § 2. But can the same be said with regard to prescriptions of conscience? We are of the view that once that a *genuine* and *serious* case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector[2]) and negatively (by refraining from actions which punish the objector or discriminate against him or her). Freedom of conscience has in the past all too often been paid for in acts of heroism, whether at the hands of the Spanish Inquisition or of a Nazi firing squad. As the ECLJ observes, "It is in order to avoid that obeying one's conscience must still require payment in heroism that the law now guarantees freedom of conscience."

4. The respondent Government accepted that the third applicant's objection to officiating at same-sex civil partnership ceremonies was a genuine and serious one, based as it was on her conviction that such partnerships are against God's law. In this sense her conscientious objection was *also* a manifestation of her deep religious conviction and beliefs. The majority decision does not dispute this – indeed, by acknowledging that "[t]he events in question fall within the ambit of Article 9 and Article 14 is applicable" (see § 103), the majority decision implicitly acknowledges that the third applicant's conscientious objection attained a level of cogency, seriousness, cohesion and importance (see § 81) worthy of protection.

5. It is at this point pertinent to observe that when the third applicant joined the public service (as an employee of the London Borough of Islington) in 1992, and when she became a registrar of births, deaths and marriages in 2002, her job did not include officiating at same-sex partnership ceremonies. There is nothing to suggest, and nor has it been suggested by anyone, that it was to be expected (perhaps by 2002) that marriage registrars would have to officiate at these ceremonies in the future. If anything, both the law (the Civil Partnership Act 2004) and the practice of other local authorities allowed for the possibility of compromises which would not force registrars to act against their consciences (see § 25). In the third applicant's case, however, 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. The *iter lamentabilis* right up to the Court of Appeal is described in §§ 26 to 29. We underscore these facts because the third applicant's situation is substantially different from the situation in which the fourth applicant found himself, or, more precisely,

[2] Thereby at the same time ensuring in a practical, and not merely theoretical, way unity in diversity.

placed himself. When Mr McFarlane joined Relate he must have known that he might be called upon to counsel same-sex couples. Therefore his position is, for the purposes of the instant case, not unlike that of a person who *volunteers* to join the army as a soldier and subsequently expects to be exempted from lawful combat duties on the grounds of conscientious objection. While we agree that with regard to the fourth applicant his dismissal did not give rise to a violation of Article 9, whether taken alone or in conjunction with Article 14, we do not fully subscribe to the reasoning in § 109, and in particular to the statement to the effect that "[t]he State authorities...benefitted from a wide margin of appreciation in deciding where to strike the balance between the applicant's right to manifest his religious belief and the employer's interest in securing the rights of others." In our view the State's margin of appreciation, whether wide or narrow, does not enter into the equation in matters of individual moral conscience which reaches the required level mentioned in paragraph 4, above. In our view the reason why there was no violation of Article 9 in respect of the fourth applicant is that he effectively signed off or waived his right to invoke conscientious objection when he voluntarily signed up for the job.

6. As the majority judgment correctly notes, the third applicant did not complain of a violation of Article 9 taken alone, but rather that "she had suffered discrimination as a result of her Christian beliefs, in breach of Article 14 taken in conjunction with Article 9" (§ 103). We also agree that for the purposes of Article 14 the relevant comparator in the third applicant's case is a registrar with no religious objection – we would rather say, no conscientious objection – to officiating at same-sex unions. It is from here that we part company with the majority. First of all, the reasoning and arguments in § 105 are at best irrelevant and at worst a case of inverted logic: the issue in Ms Ladele's case is not one of discrimination by an employer, a public authority or a public official *vis-à-vis a service user* of the Borough of Islington because of the said service user's sexual orientation. Indeed, no service user or prospective service user of the Borough seems to have ever complained (unlike some of her homosexual colleagues) about the third applicant. The complainant is not a party or prospective party to a same-sex civil partnership. The aim of the Borough of Islington to provide equal opportunities and services to all without discrimination, and the legitimacy of this aim, is not, and was never, in issue. No balancing exercise can, therefore, be carried out between the third applicant's concrete right to conscientious objection, which is one of the most fundamental rights inherent in the human person – a right which is not given by the Convention but is recognised and protected by it – and a legitimate State or public authority policy which seeks to protect rights in the abstract. As a consequence, the Court was not called upon to determine whether "the means used to pursue this aim were proportionate" (§ 106).

7. What *is* in issue is the *discriminatory treatment of the third applicant* at the hands of the Borough, in respect of which treatment she did not obtain redress at domestic level (except before the first instance Employment Tribunal, § 28). Given the cogency, seriousness, cohesion and importance of her conscientious objection (which, as noted earlier, was *also* a manifestation of her deep religious convictions) it was incumbent upon the local authority *to treat her differently* from those registrars who had no conscientious objection to officiating at same-sex unions – something which clearly could have been achieved without detriment to the overall services provided by the Borough including those services provided by registrars, as evidenced by the experience of other local authorities. Instead of practising the tolerance and the "dignity for all" it preached, the Borough of Islington pursued the doctrinaire line, the road of obsessive political correctness. It effectively sought to force the applicant to act against her conscience or face the extreme penalty of dismissal – something which, even assuming that the limitations of Article 9 § 2 apply to prescriptions of conscience, cannot be deemed necessary in a democratic society. Ms Ladele did not fail in her duty of discretion: she did not publicly express her beliefs to service users. Her beliefs had no impact on the content of her job, but only on its extent. She never attempted to impose her beliefs on others, nor was she in any way engaged, openly or surreptitiously, in subverting the rights of others. Thus, even if one were to undertake the proportionality exercise referred to in § 106 with reference to whatever legitimate aim the Borough had in view, it follows that the means used were totally disproportionate.

8. For the above reasons, our conclusion is that there was a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.