IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application Numbers 51671/10 and 36516/10

(1) LILIAN LADELE
(2) GARY MCFARLANE

v

UNITED KINGDOM

OBSERVATIONS OF THE GOVERNMENT OF THE UNITED KINGDOM

Foreign and Commonwealth Office
King Charles Street
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I Introduction

1. The Government are requested to make observations on the following question: "In respect of either applicant, has there been a breach of Article 9, taken alone or in conjunction with Article 14?"

2. For the reasons set out below, the Government invite the Court to hold that both claims are inadmissible as they are manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention. Alternatively, if they are found to be admissible, they should be dismissed on their merits as they do not disclose a breach of any Convention rights.

II Engagement of Article 9

3. The Government submit that Article 9 is not engaged in the present cases because (a) the cases do not concern a manifestation of religion or belief, and (b) in any event, there was no interference with the applicants' rights to manifest their religion or belief.

(a) Manifestation of religion or belief

Legal framework

4. Article 9 protects the right to freedom of thought, conscience and religion. That is the primary focus of the provision and the starting point for consideration of its breach. Article 9, as a secondary matter, also protects the right to manifest religion or belief. It is, however, only manifestations that take one of the forms listed in Article 9(1) that are protected, namely "worship, teaching, practice or observance", and applicants will need to show that the manifestation in question takes one of these forms to come within Article 9.

5. These principles appear in a number of cases of the Court and European Commission on Human Rights. The Commission has held that: "Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*" (see *C v UK* (1983) 37 DR 142, 147 and see also *Van den Dungen v Netherlands* (1995) 147, 150; emphasis added). Similarly, in *Pichon and Sajous v France* App no 49853/99 02/10/2001 p 4, the Court described the "main sphere"

protected by Article 9 as "personal convictions and religious beliefs." The Court has recognised that Article 9 "in addition" protects acts, but only insofar as they are "intimately related" or "closely linked" to personal convictions and religious beliefs, "such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form" (see *C v UK* p 147 and *Pichon* p 4). In *Pichon* the Court reiterated that "Article 9 lists a number of forms which the manifestation of one's religion may take, namely worship, teaching, practice and observance" (p 4). The Court continued:

> "in safeguarding this personal domain [of religious belief of conscience], Article 9 of the Convention does not always guarantee the right to behave in public in a manner governed by that belief. The word "practice" used in Article 9(1) does not denote each and every act or form of behaviour motivated or inspired by a religion or belief." (*Pichon* p 4)

It has been stressed by the Court on a number of occasions that because Article 9 does not protect every act motivated or inspired by a religion or belief "in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account" (*Kalaç v Turkey* (1997) 27 EHRR 552 §27; endorsed by the Grand Chamber in *Sahin v Turkey* (2007) 44 EHRR 99 §105 and see *Koteski v Former Yugoslav Republic of Macedonia* (2007) 45 EHRR 31 §37).

6. Accordingly, behaviour or expression that is motivated or inspired by religion or belief, but which is not an act of practice of a religion in a generally recognised form, is not protected by Article 9. Applying these principles, in *Pichon* the Court held that Article 9 was not engaged in a case concerning pharmacists who, because of their religious beliefs, refused to sell contraceptive pills to members of the public and were prosecuted as a consequence. The Court noted that the pharmacists were able to "manifest [their religious] beliefs in many ways outside the professional sphere," and that although the refusal to prescribe contraception was a consequence of their religious beliefs, it was not protected by Article 9 as it was not a religious practice in a generally recognised form (p 4). In *C v UK* the Commission declared inadmissible a claim by a Quaker that he should not be required to pay tax insofar as it would be used to finance weapons research. He argued that this infringed his Article 9 rights. Again the applicant's conduct was motivated by his religious belief but it could not be said to be a religious practice. In *Arrowsmith v UK* [1976] 3 EHRR 218 the Commission held that the act of

distributing pamphlets urging soldiers not to serve in Northern Ireland was motivated by the applicant's pacifist views, but that the contents of the leaflets and the acts of distributing them were not the practice of pacifism and were thus not protected by Article 9.

Application of law to present cases

7. The present cases are indistinguishable from *Pichon*. The pharmacists in *Pichon* had a sincere religious belief that precluded them from dispensing contraceptives. The Court held that that did not, however, mean that their prosecution for refusing to sell contraceptives was a breach of Article 9. As the Court held:

> "as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such product, since they can manifest those beliefs in many ways outside the professional sphere." (p 4)

8. That applies equally to Ms Ladele. It is only possible to enter civil partnerships through a civil partnership registrar. Ms Ladele cannot give precedence to her religious views as a justification for her refusal to register civil partnerships. In relation to Mr McFarlane, while couples' counselling is not solely provided by Relate, he too could manifest his religious beliefs as he chose outside the professional sphere. Neither Mr McFarlane nor Ms Ladele can justify a refusal to provide services to homosexual couples on the basis of their beliefs, however sincerely held. Both applicants may have been inspired or motivated by their religious beliefs. As with the pharmacists in *Pichon*, however, neither could be said to be practising their religion in a generally recognised form and neither case therefore falls within Article 9.

(b) Was there an interference?

Legal framework

9. In *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100, Lord Bingham set out at §23 the Strasbourg jurisprudence applicable to cases in which individuals voluntarily accept an employment or role that they find does not accommodate their religious practices or beliefs, but where there are other means open to them to practise

or observe their religion without undue hardship or inconvenience. As Lord Bingham noted, the Strasbourg cases form a "coherent and remarkably consistent body of authority" and they make clear that in such cases there is no interference with Article 9 (§24).

10. The relevant cases are as follows:

(i) In *X v Denmark* (1976) 5 DR 157 the State Church of Denmark sought to dismiss a clergyman whose religious practices it objected to. The Commission rejected the clergyman's claim of a breach of Article 9. It held that he had accepted the discipline of the church when he took employment with it, and his right to leave the church if he objected to its teachings guaranteed his freedom of religion.

(ii) In *Kjeldsen v Denmark* (1976) 1 EHRR 711 the Court held that sex education in state schools to which parents objected on religious and philosophical grounds did not breach the parents' Article 9 rights. They could send their children to private schools or educate them at home (see §§54 and 57).

(iii) In *Ahmad v United Kingdom* (1982) 4 EHRR 126 the Commission rejected a claim by a teacher who was required to work on Fridays and so could not attend prayers at Mosque. The Commission assumed that the attendance at Mosque for Friday prayers was a religious requirement (§10). It concluded that there was, nevertheless, no breach of Article 9 in circumstances where the applicant was free to resign and seek alternative employment which accommodated his religious practices (§15).

(iv) In *Karaduman v Turkey* (1993) 74 DR 93 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 so photographed. The Commission found, at p 109, that there was no interference with the applicant's Article 9 rights because: "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" (p 108).

(v) In *Konttinen v Finland* (1996) 87-A DR 68 App no 24949/94 Dec 3.12.96 a Seventh Day Adventist was dismissed by the state railway for refusing to work after sunset on Friday. Such work was forbidden by his faith. The Commission found no interference with the applicant's Article 9 rights. The Commission held that he was not dismissed because of his religious convictions but because of his refusal to work the required hours. The applicant was not "pressured to change his religious views or prevented from manifesting his religion or belief." The Commission concluded that "having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion."

(vi) In *Stedman v United Kingdom* (1997) 23 EHRR CD 168 the applicant was dismissed by a private company for refusing to work on a Sunday. The Commission held that there was no interference with the applicant's Article 9 rights. Relying on *Konttinen*, the Commission held: "the applicant was dismissed for failing to agree to work certain hours rather than for her religious beliefs as such and was free to resign and did in effect resign from her employment." The Commission noted that if the applicant had been employed by the state and dismissed in such circumstances there would be no breach of Article 9. It held: "*a fortiori* the UK cannot be expected to have legislation that would protect employees against such dismissals by private employers."

(vii) In *Kalaç v Turkey* (1997) 27 EHRR 552 the applicant was a judge advocate in the Turkish air force who was dismissed for breach of discipline and misconduct arising from what were described as his fundamentalist religious opinions. The Court held that there was no interference with the applicant's Article 9 rights. It noted that the applicant "was able to fulfil the obligations which constitute the normal forms though which a Muslim practises his religion" (§29). It held that "in choosing to pursue a military career Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms

of members of the armed forces limitations incapable of being imposed on civilians" (§28).

(viii) In *Jewish Liturgical Association Cha'are Shalom ve Tsedek v France* (2000) 9 BHRC 27 the Court held that there was no interference with Article 9 where regulation of ritual slaughter in France prevented the applicant's members slaughtering animals in a manner which satisfied their religious standards. They could, however, import meat from Belgium or come to an agreement with other Jewish ritual slaughterers to produce meat according to their religious specifications. The Grand Chamber held at §80: "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."

(ix) In *Pichon and Sajous v France* App no 49853/99 02/10/2001 it was held that there was no interference with Article 9 where pharmacists were prosecuted for refusing, on religious grounds, to sell contraceptives as they were free to practise their religious beliefs outside the professional sphere (see further above at paragraph 6).

11. In *Begum* the House of Lords considered a claim brought under the UK's Human Rights Act 1998 by a schoolgirl who was not permitted to attend school wearing a "jilbab" (a long coat-like garment that conceals the shape of the female body). The court accepted that the wearing of a jilbab to a mixed school was a manifestation of the claimant's strict Muslim faith. Following the Strasbourg jurisprudence set out above, however, the House of Lords held by a majority that as there were alternative schools which the claimant could attend at which she would be able to wear the jilbab, there was no interference with her Article 9 rights (see per Lords Bingham and Hoffmann §25, 50-54). Lord Scott stated at §87:

> "The [Strasbourg] cases demonstrate the principle that a rule of a particular public institution that requires, or prohibits, certain behaviour on the part of those who avail themselves of its services does not constitute an infringement of the right of an individual to manifest his or her religion merely because the rule in question does not conform to the religious beliefs of that individual. And in particular this is so where the individual has a choice whether or not to

> avail himself or herself of the services of that institution, and where other public institutions offering similar services, and whose rules do not include the objectionable rule in question, are available."

In *Begum* the claimant entered the school knowing its uniform policy did not permit the wearing of the jilbab. The courts in the UK have held that, even where a uniform policy is changed after a child has entered a school, there is still no interference with Article 9 where the child who objected to the policy was able freely to move to a different school with a different uniform policy (see *X v Y School* [2007] EWHC Admin 298).

12. The cases in which an interference with Article 9 have been assumed or established are ones in which individuals cannot avoid a requirement that is incompatible with their religious beliefs by resigning and attending a different institution or seeking different employment. For example, in *Kokkinakis v Greece* (1994) 17 EHRR 397 the Court found an interference with Article 9 where the applicant was prosecuted for proselytising, which was a recognised practice of the applicant's faith as a Jehovah's Witness. In *Sahin v Turkey* (2007) 44 EHRR 5 it was accepted that there was an interference with Article 9 where the applicant was prohibited from wearing an Islamic headscarf at university, and where, as Lord Hoffman noted in *Begum* §59, there was no other Turkish university which did not ban the headscarf. In *Ahmet Arslan v Turkey* (41135/98) Decision 23 February 2010, the Court found an interference with Article 9 where the applicants were convicted of breaching a law that prohibited the wearing of religious garments in public. The applicants were members of a religious group which considered it a requirement to dress in a particular manner held to be unlawful by the Turkish criminal courts. The Court emphasised that the case concerned punishment for the wearing of particular dress in public areas that were open to all, rather than the wearing of religious symbols in a specific establishment. The applicants in *Kokkinakis*, *Sahin* and *Arslan* had no choice of attending a different institution, obtaining work with a different employer or not going out in public in order to avoid a conflict with their religious beliefs. As a result, in their cases there was an interference with Article 9 rights.

Application of law to present cases

13. The present cases fall squarely within the line of authority dealing with applicants who find that their employment is incompatible with their religious beliefs. As with the pharmacists in *Pichon*, the clergyman in *X*, the employees in *Ahmad* and *Stedman* and the schoolgirl in *Begum*, the applicants were able to "manifest [their religious] beliefs in many ways outside the professional sphere" (*Pichon* p 4). As in the other cases, the applicants were also free to resign if they considered that the requirements of their employment were incompatible with their religious beliefs. It is that ability to resign and seek employment elsewhere that, as the Commission held in *X* and *Konttinen*, guarantees freedom of religion. The fact that the applicants found that there was a conflict between what they considered were the obligations of their religion and the requirements that their employers sought to impose upon them does not give rise to an interference with Article 9.

III Positive obligations in Mr McFarlane's case

14. Mr McFarlane was employed by a private organisation. He can only rely on Article 9 if the state had a positive obligation to ensure that he was not dismissed because of his refusal to counsel same-sex couples. This issue is not dealt with in Mr McFarlane's application. It is not clear on what basis, if any, he asserts that such a positive obligation was owed to him.

15. The possibility of positive obligations being imposed by Article 9 has been countenanced in only a few cases. Even in relation to Article 8, which the Court has on a number of occasions recognised may give rise to positive obligations, it has emphasised that such obligations are not imposed "each time an individual's everyday life is disrupted, but only in exceptional cases where the State's failure to adopt measures interferes with the individual's right to personal development and to his or her right to establish and maintain relations with the outside world" (*Sentges v Netherlands* (27677/02) Decision of 8 July 2003, emphasis added). Positive obligations are also more likely to be imposed where the applicant suffers directly from state inaction (for example the non-recognition of transsexual people, see *Goodwin v United Kingdom* (2002) 35 EHRR 18), and in Article 8 cases, positive obligations are rarely imposed

which would require states to take steps compelling private parties to act or abstain from acting in a particular manner.

16. The possibility of recognising positive obligations in relation to Article 9 was considered in passing in *Otto-Preminger v Austria* [1994] EHRR 34. The case concerned the seizure and forfeiture of a satirical film with a religious subject matter. The applicant, who wished to show the film, complained that the seizure breached his Article 10 right to freedom of expression. The Court held that the seizure of the film was justifiable and in that context referred, in passing, to Article 9 (§47). It noted that "in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them." *Gldani Congregation of Jehovah's Witnesses v Georgia* (2008) 46 EHRR 30 is an "extreme case" in which the Court held that a failure by the state to protect a religious group from non-state actors prevented the group being able to enjoy their right to freedom of religion. The applicants in *Gldani* were Jehovah's Witnesses attacked during a meeting of their congregation by a group of Orthodox believers, who confiscated and burned their bibles. The Jehovah's Witnesses were forced to watch as the Orthodox believers humiliated and beat a number of the Jehovah's Witnesses and shaved the head of one to the sound of prayers by way of religious punishment. The police did nothing to protect the Jehovah's Witnesses both during and following the attacks. The Court held that: "the applicants were ... confronted with total indifference and a failure to act on the part of the authorities, who, on account of the applicants' adherence to a religious community perceived as a threat to Christian orthodoxy, took no action in respect of their complaints" (§133). The Court found there to be a breach of Article 9: "through their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists ... tolerated the existence of the applicants' religious community and enabled them to exercise freely their rights to freedom of religion" (§134).

17. One can readily see why the failure by the authorities in *Gldani* to protect the applicants breached Article 9. The passive toleration by the state of the attacks on the Jehovah's Witnesses by third parties prevented them from practising their religion. That is nothing like the present case. Mr McFarlane has cited no case, and the Government are aware of none, in which a positive obligation has been recognised by the Court or Commission

in a case coming close to his. It cannot be said that Relate's termination of Mr McFarlane's employment prevented him from exercising his freedom to hold religious beliefs or practising his religion in any way he chose outside his employment. As the Court noted in *Kalac* §28, a person who chooses a military career accepts a system of military discipline that implies the possibility of placing limitations on their rights and freedoms. The same is true of a person who chooses to work for a private employer which may require him to provide services in a manner he considers incompatible with his religious beliefs or other convictions. The state has no positive obligation to intervene where the individual in question is free to resign and seek employment elsewhere and can practise their religion entirely unfettered outside their employment. That is sufficient to guarantee their Article 9 rights in domestic law.

18. Even if that is wrong, and the state does have some positive obligation in relation to the terms of employment imposed by private employers, that obligation was not breached by the UK. The UK had put in place the Employment Equality (Religion or Belief) Regulations 2003 ("the 2003 Regulations").[1] These applied at the material time, though they have now been replaced, with substantially similar provisions, by the Equality Act 2010. The 2003 Regulations, in regulation 6, rendered it unlawful to "discriminate" in employment. Regulation 3 defined "discrimination" to include direct religious discrimination (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 in question at a particular disadvantage and which the employer cannot show was a proportionate means of achieving a legitimate aim). Insofar as there was any positive obligation on the UK to protect Mr McFarlane's Article 9 rights from interference by Relate, putting in place the 2003 Regulations (and now the Equality Act 2010) satisfies that obligation.

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[1] The 2003 Regulations were promulgated to comply with the UK's obligations pursuant to the Council Directive 2000/78/EC of 27 November 2000 which established a general framework for equal treatment in employment. The Directive requires member states to put into effect measures to prohibit direct and indirect discrimination on grounds of religion or belief, as well as on grounds of disability, age and sexual orientation. At the time the 2003 Regulations were implemented, the relevant Minister made a declaration to Parliament pursuant to the Human Rights Act 1998 that the provisions of the Regulations were compatible with Convention rights.

IV In the event that there was an interference with the applicants' Article 9 rights, was the interference "necessary in a democratic society" in pursuit of a legitimate aim?

Legal framework

19. If there was interference with the applicants' Article 9 rights, it is permissible if "necessary in a democratic society" in order to protect "the rights and freedoms of others". There can be little doubt that promoting equality and tackling discrimination on grounds of sexual orientation is a legitimate aim pursuant to Article 9(2). The Court has held on a number of occasions that particularly convincing and weighty reasons are necessary to justify subjecting individuals to differences in treatment on the grounds of their sexual orientation (see, for example, *EB v France* (2008) 47 EHRR 21 §91 *Karner v Austria* (2003) 38 EHRR 24 §37, *JM v United Kingdom* (2011) 53 EHRR 6 §54).

20. As to proportionality, the Court has recognised that there is a difficult balance to be struck in democratic societies between individuals' rights to manifest their religious beliefs, and the rights of others who are affected by that manifestation. The Court has recognised that both permitting and restricting manifestations of religious belief communicates important values for a society and has a significant symbolic, as well as practical, impact. How the values are to be weighed against one another is a matter on which national authorities can legitimately take different positions and the Court has accordingly recognised that a particularly wide margin of appreciation applies in this area.

21. The leading authority is *Sahin v Turkey* (2007) 44 EHRR 5. The Grand Chamber considered a rule in Turkey banning the wearing of headscarves by students at university. The applicant was a 5th year medical student affected by the rule. The Grand Chamber accepted that the ban interfered with the applicant's right to manifest her religious beliefs. It noted at §78 that in wearing the headscarf the applicant was "obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith." There was, furthermore, no university in Turkey where she could have completed her medical studies in which the headscarf was not formally banned. The Grand Chamber held, nevertheless, that the ban on the headscarf was justified as being necessary to protect the rights and freedoms of others.

22. The Grand Chamber noted the role played by the state in democratic societies in balancing the interests and rights of different groups. It recognised at §106 that "in democratic societies, in which several religions co-exist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected." The Grand Chamber continued at §107: "the Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society... the role of the authorities ... is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other." The Grand Chamber stressed at §108 that "pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'" and that this requires "a balance ... which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position." The constant search for this balance "between the fundamental rights of each individual" constitutes the foundation of a "democratic society" (ibid).

23. The Grand Chamber in *Sahin* recognised that in cases concerning this balance "the role of the national decision-making body must be given special importance" (§109). The Grand Chamber continued (ibid):

> "This margin of appreciation goes hand in hand with a 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. In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society."

The importance of the margin of appreciation was also stressed by the Chamber which reached the same conclusion on Article 9, see *Sahin v Turkey* (2004) 41 EHRR 109 §100-101:

> "The court observes ... that the role of the Convention machinery is essentially subsidiary. As is well established by its case law, the national authorities are in principle better placed than an international court to evaluate

> local needs and conditions. It is for the national authorities to make the initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation ...
>
> In determining the scope of the margin of appreciation left to the States, regard must by had to the importance of the right guaranteed by the Convention, the nature of the restricted activities and the aim of the restrictions. Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance. In such cases, it is necessary to have regard to the fair balance that must be struck between the various interests at stake: the rights and freedoms of others, avoiding civil unrest, the demands of public order and pluralism."

24. In assessing the balance struck by Turkey, the Grand Chamber endorsed the approach of the Chamber which had concluded that the ban on the headscarf was legitimate and proportionate. The Chamber noted that gender equality is recognised by the Court as once of the key principles underlying the Convention (§115). Although it might be thought that permitting women to wear the headscarf at university would have little impact on others who chose not to do so, the Chamber recognised that such decisions have a symbolic impact and affect the perception and treatment of women generally (ibid). It found that the ban on the headscarf was intended to achieve the legitimate aim of promoting a pluralist and secular society in which women's rights were respected (ibid).

25. As to proportionality, the Grand Chamber noted that "the university authorities are in principle better placed than an international court to evaluate local needs and conditions," and that "Article 9 does not always guarantee the right to behave in a manner governed by religious belief and does not confer on people who do so the right to disregard rules that have proven to be justified" (§121). The Grand Chamber concluded "in the light of the foregoing and having regard to the contracting states' margin of appreciation in this sphere ... [the interference was] justified in principle and proportionate to the aim pursued" (§122).

26. A similar approach was taken in *Dogru v France* (2009) 49 EHRR 8 in which Muslim schoolgirls were permanently excluded from school for refusing on a number of occasions to remove their headscarves during physical education. The Court again stressed the "special importance" that must be given to a national decision-making body in cases involving manifestation of religious belief (§63 and 71-72). In *Dahlab v*

Switzerland App 42393/98 15/02/2001 a claim brought by a Muslim teacher who was not permitted to wear a headscarf while teaching was held to be manifestly ill-founded. The Court again stressed the margin of appreciation of national authorities and the "impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children."

Application of law to present cases

27. The present cases, like *Sahin* and the other cases discussed above, are concerned with the relationship between the state and religion when the state seeks to strike a fair balance between the rights and freedoms of different groups. On the one hand are the rights of those who believe, whether or not motivated by religion, that homosexual acts are sinful or otherwise unacceptable. On the other hand are the rights of homosexuals to equal treatment, and the principle that those who provide services to the public should not be permitted to discriminate on grounds of sexual orientation. How that balance is to be struck, and the circumstances in which private beliefs should be required to give way to wider public concerns, is a matter on which different opinions may be held in various members of the Council of Europe and within each democratic society.

28. It is accepted that Ms Ladele sincerely believes that civil partnerships are contrary to God's law and Mr McFarlane sincerely believes that homosexual activity is sinful and that he should do nothing which directly endorses it. It is also recognised that the London Borough of Islington ("Islington") and Relate are committed to the provision of services on a non-discriminatory basis and to ensuring that members of the public, regardless of their sexual orientation, are treated with dignity and have equal access to services. Islington's "Dignity for All" equality and diversity policy states that the council is committed to promoting "community cohesion and equality for all groups, but will especially target discrimination based on age, disability, gender, race, religion and sexuality." The policy also states that Islington will ensure that "customers receive fair and equal access to council services" and does not tolerate discrimination. Relate had an Equal Opportunities Policy which commits it to ensuring that no one, including staff and clients, was treated less favourably on grounds of sexual orientation.

29. The removal of discrimination on grounds of sexual orientation and, in particular, ensuring equal provision of services irrespective of sexual orientation, are plainly

legitimate aims for both a public authority and a relationship counselling service to pursue.[2] Requiring employees to perform their roles without discriminating on grounds of sexual orientation is a proportionate means of pursuing that legitimate aim. Islington and Relate were entitled to conclude that it would undermine their commitment to equality of access to services if they permitted employees, regardless of the sincerity of their religious beliefs, to refuse to provide services to individuals because of their sexual orientation. Ms Ladele and Mr McFarlane were entitled to practise their religion in any way they chose outside their employment and were free to resign if they found the requirements of their work incompatible with their religious beliefs. Their employers were entitled to insist they provided services equally to all. That was not only because permitting discrimination could affect the employers' customers and would undermine their commitment to equal treatment. It could also affect other employees, and it is notable that it was homosexual fellow employees who raised concerns with Islington about Ms Ladele's refusal to register civil partnerships.

30. It is submitted by Ms Ladele that any interference with her Article 9 rights was not proportionate as there were "less severe and intrusive means available to Islington" (Ms Ladele's Application §48(c)). Islington could, it is said, have arranged its services so that other registrars, without Ms Ladele's beliefs, would officiate in civil partnerships. It is also noted that other local authorities did not designate marriage registrars as civil partnerships registrars if they had religious objections (ibid §48(d)), and that in other contexts (such as abortion, human embryo research, advice on contraception, the wearing of motorcycle helmets by Sikhs) exceptions are made on grounds of religious or other belief (ibid §54 and see discussion of Council of Europe materials on conscientious objection to the performance of abortion at §43).

31. These submissions miss the point. They do not deal with the aim that Islington was pursuing. In requiring Ms Ladele to register civil partnerships, Islington was not simply ensuring that it had sufficient registrars available to cover the borough. It may be that by rearranging its services, Islington could have assigned same-sex couples to other

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[2] This is not, of course, to suggest that there are not other legitimate reasons that employers may have in other cases for requiring employees to provide all the services which the employer makes available to the public. Those reasons may also constitute an objective and reasonable basis for refusing to treat employees with particular religious beliefs differently from others. As indicated further below, however, the only aim at issue in this case is the non-discriminatory provision of services.

registrars or it could have decided not to designate Ms Ladele as a civil partnership registrar because of her views on homosexuality and required others to register civil partnerships. Similarly, Mr McFarlane could, perhaps, have been assigned only heterosexual couples to counsel. There may be cases in which ensuring that there are sufficient employees to provide services is the legitimate aim the employer is pursuing. Providing an efficient counselling and registrar service was not, however, the legitimate aim that was, and is, at issue in this case. Islington and Relate's aim, as found by the Employment Appeal Tribunal and the Court of Appeal, was to provide equal access to services irrespective of sexual orientation and to thereby communicate a clear commitment to non-discrimination. That is, in itself, a legitimate aim which was pursued in a proportionate manner, and it is irrelevant to that aim (and indeed would undermine its pursuit) that an efficient service might have been maintained while permitting employees to refuse to provide services to same-sex couples.

32. As to the circumstances referred to by Ms Ladele in which conscientious objection is permitted, these also do not assist her. A national authority may decide, as the UK has done, to make exceptional provisions for medical staff who do not wish to advise on contraceptive services or perform abortions, or it may decide not to require Sikhs to wear motorcycle helmets. Other national authorities may, entirely compatibly with the Convention, take different decisions on these issues. In *Pichon*, pharmacists were convicted of refusing to supply contraceptive notwithstanding that doing so was incompatible with their religious beliefs, and the Court declared their complaint of a breach of Article 9 inadmissible. The fact that France did not recognise conscientious objection in this area did not mean it was in breach of the Convention even if other countries took a different approach, and the fact that the UK has decided to recognise conscientious objection in some areas but not others does not establish that it is acting in a disproportionate manner. The UK is entitled to conclude that different issues arise where medical staff do not wish on religious grounds to perform an abortion (provided women seeking an abortion are properly referred to staff willing to do so), as compared to instances in which public servants or others do not wish on religious grounds to provide services to homosexuals. The UK is entitled to conclude, as reflected in the legislation considered below at paragraph 34 that (other than in limited prescribed circumstances) religious belief does not justify discriminating on grounds of sexual orientation.

33. It is also no answer that other local authorities had chosen to arrange their civil partnership services in a different manner from Islington. As the Court recognised in *Sahin*, in the determination of how best to strike the balance between the state and religious groups, different national authorities may legitimately reach differing conclusions. The same is true of the decision as to when individual religious beliefs should give way to the public interest of tackling discrimination on grounds of sexual orientation. Local decision-makers are best placed to balance the rights and interests of the different groups affected. While their assessment is subject to supervision by the Court, it is respectfully submitted that the Court should be slow to interfere with the decisions that national authorities take, and that is so notwithstanding that other authorities might reach a different decision.

34. It is particularly appropriate to defer to the assessment of national authorities where, as here, specific legislative consideration has been given to the balance that should be struck between the different competing interests. The following legislation applied at the material time in the UK (it has now been replaced by the Equality Act 2010 with essentially the same provisions):

    (i) The 2003 Regulations prohibited discrimination on grounds of religion and belief in employment. Insofar as the applicants complain that Islington/Relate should have altered their policies to accommodate their religious beliefs, and not required them (as it required all other employees) to offer services to members of the public irrespective of their sexual orientation, they were able to bring proceedings for indirect discrimination pursuant to regulation 3(1)(b). Even if the applicants were disadvantaged by Islington/Relate's policies, however, it would not be unlawful to apply the policies if they constituted "a proportionate means of achieving a legitimate aim" (regulation 3(b)(iii)).

    (ii) Legislation was also put in place to prohibit discrimination on grounds of sexual orientation: see the Equality Act (Sexual Orientation) Regulations 2007 SI 2007/1263 ("the 2007 Regulations"). Pursuant to regulation 4(1) of the 2007 Regulations, it was unlawful to "discriminate" on grounds of sexual orientation by refusing to provide facilities or services that were otherwise made available to the public. Pursuant to regulation 3(1) a person

"discriminates" against another by treating them on the grounds of their sexual orientation less favourably than others would be treated. Regulation 14 provided certain limited exceptions which applied to "organisations" the purpose of which is the practice or advancement of a religion or belief. Such organisations were permitted to discriminate on grounds of sexual orientation in restrictions on membership or in the provision of goods, facilities and services provided that the restrictions were necessary to comply with the organisation's doctrine or to avoid conflict with "strongly held religious convictions of a significant number of the religion's followers". Save pursuant to regulation 14, treating people less favourably on grounds of sexual orientation was prohibited. It could not be defended on the basis that it is a proportionate means of pursuing a legitimate end, nor on the basis that it was compelled by a religious belief.

35. According to the Court of Appeal, it may have been that if Islington had not designated Ms Ladele as a civil partnership registrar, as it did for all of its marriage registrars, she would not have been in breach of the 2007 Regulations as she would not have been authorised to perform civil partnerships (see Court of Appeal §74). The relevance of the 2007 Regulations, read in conjunction with the 2003 Regulations, however, is that it indicates the choice that the legislature has made as to the balance the UK wishes to strike. As the Court of Appeal concluded at §73:

> "however much sympathy one may have for someone such as Ms Ladele, who is faced with choosing between giving up a post she plainly appreciates or officiating at events which she considers to be contrary to her religious beliefs, the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions."

36. In the UK the 2003 Regulations and 2007 Regulations constitute a legislative decision seeking to strike a balance between the right to manifest religious beliefs and the rights of individuals not to be discriminated against on grounds of sexual orientation. Pursuant to the 2007 Regulations it was only permissible for a person offering services to the public to refuse to provide the service to those of a particular sexual orientation if the service was provided by a religious organisation and the other requirements of

regulation 14 were satisfied. In all other cases person A was not permitted to refuse to provide services to person B on grounds of sexual orientation. The 2003 Regulations protect individuals against discrimination on grounds of religion or belief. But they provide that it is permissible to apply a provision, criterion or practice which places those of a particular religion or belief at a particular disadvantage if doing so constitutes a proportionate means of achieving a legitimate aim. The decision of the legislature is thus that, other than in the very limited and clearly demarcated circumstances applicable to religious organisations, any person who chooses to provide goods and services to the public cannot refuse to provide those services on grounds of sexual orientation even if the person is motivated by sincerely held religious beliefs. Just as with the balance struck in the headscarf cases, that is a decision which the national legislature is entitled to take within its margin of appreciation under the Convention, and Islington and Relate are entitled to take the same view and to require their employees to offer services to all irrespective of sexual orientation.

V Was there a breach of Article 14 taken together with Article 9 in either case?

Positive obligations in Mr McFarlane's case

37. In Mr McFarlane's case the arguments about positive obligations in relation to Article 9, set out at paragraphs 14-18, apply equally to his claim that there has been a breach of Article 14 taken together with Article 9. For the reasons set out above, the UK had no positive obligations to ensure that a private employer permitted Mr McFarlane to refuse to counsel homosexual couples. Alternatively, if the UK did have any positive obligations in this area, they were satisfied by the enacting of the 2003 Regulations.

Discrimination

38. Ms Ladele suggests in her letter to the Court of 27 August 2010 that there has been a breach of Article 9, but without providing any detailed explanation. The complaint of a breach of Article 9, taken alone, does not appear at all in the detailed legal submissions that accompanied her application which focuses only upon Article 14 (read in conjunction with Article 9). That is no doubt because she seeks to avoid the consequence of the line of authority referred to above at paragraphs 10-11, which makes clear that there is no interference with the right to manifest religion or belief

where employees face work requirements incompatible with their faith and have the option of resigning and seeking alternative employment. Neither Ms Ladele nor Mr McFarlane deal with those cases or seek to distinguish them. Instead, they present their claims only as breaches of Article 14. That does not, however, enable the applicants to avoid the Court's clear and consistent authorities on what constitutes an interference with the right to manifest religion or belief in employment.

39. Unlike other forms of discrimination that fall within Article 14, in almost every case in which there is discrimination on grounds of religion there will be a breach of another substantive right, namely Article 9. The converse is also true. In almost every case where there is no interference with Article 9 rights, there will not be discrimination on grounds of religion under Article 14. It is true that an applicant does not need to establish a breach of a substantive right to fall within Article 14, provided the case falls within the ambit of another Convention rights. But it is likely to require exceptional circumstances for a policy of an employer to be found not to interfere with employees' rights to manifest their religion or belief pursuant to Article 9, and yet at the same time to fall within the ambit of Article 14 so as to constitute unjustified indirect discrimination on the grounds of the employees' religion.

40. The Government accepts that it is possible to conceive such cases. Suppose, for example, that an employee of some other religion who considered homosexual activity to be sinful was permitted not to counsel homosexual couples while Mr McFarlane was not so permitted because of some particular animus felt by his employers towards Christians. Mr McFarlane's claim would then fall within Article 14 notwithstanding that there might be no interference pursuant to Article 9. Neither applicant alleges such discrimination, however. They do not claim that they were treated less favourably than other employees because they were Christians or that members of other faiths were treated more favourably. The complaint is the opposite, namely that they should have been treated differently to other employees. They claim that the requirement that they provide services to same-sex couples should have been waived/disapplied in their cases to accommodate their religious beliefs. The claim is that "without an objective and reasonable justification [there was a failure] to treat differently persons whose situation are significantly different" (*Thlimmenos v Greece* (2001) 31 EHRR 15 §44).

41. The Government are aware of no case in which applicants have successfully established religious discrimination in breach of Article 14 where they could not show an interference with the right to manifest their religion within the meaning of Article 9. No such case is cited by the applicants, and if Islington and Relate's requirement that the applicants provide services to all irrespective of sexual orientation did not interfere with the applicants' freedom to manifest their Christian religion or beliefs, it is very hard to see how the requirement could then constitute unlawful discrimination against the applicants because they were Christians. The applicants' cases are indistinguishable from *X*, *Ahmad*, *Konttinen*, *Stedman* and *Pichon* which concerned employment requirements said to conflict with religious convictions. It cannot be correct that the applicants in those cases could have avoided the conclusion that there was no interference with their Article 9 rights, and thus no breach of the Convention, simply by framing their claims as discrimination on the grounds of religion contrary to Article 14. The same applies to the present cases.

42. Furthermore, if the Government are correct in the argument set out above that any interference with the applicants' right to manifest their religion or belief was justified within the meaning of Article 9(2), that is also the answer to their Article 14 claims. Where a policy which interferes with the right to manifest religious beliefs is found to be necessary and in pursuit of a legitimate aim pursuant to Article 9(2), that policy will also be justified for the purpose of Article 14. The failure to treat the applicants differently will already have been held to be proportionate and have an "objective and reasonable justification" and thus does not constitute unlawful discrimination under Article 14.

43. That was the approach taken in *Sahin* by the Grand Chamber. The Chamber concluded that Article 9 had not been breached because the ban on wearing the headscarf in educational institutions pursued a legitimate aim. It then dealt very briefly with the claim that there had been a breach of Article 14, noting at §165:

> "the regulations on the Islamic headscarf were not directed against the applicant's religious affiliation, but pursued, among other things, the legitimate aim of protecting order and the rights and freedoms of others and were manifestly intended to preserve the secular nature of educational institutions. Consequently, the reasons which led the Court to conclude that there had been no violation of Article 9 ... incontestably also apply to the

complaint under Article 14, taken individually or together with the aforementioned provision..."

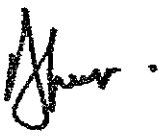
The same applies in the present case. The requirement that the applicants provide services to same-sex couples was not "directed against" their religious affiliation. It pursued a legitimate aim which, if justified for the purposes of Article 9(2), was also lawful for the purposes of Article 14.

44. The present cases are thus different from *Thlimmenos* on which the applicants rely. The applicant in *Thlimmenos* refused to perform compulsory military service in the Greek Army as it was incompatible with his beliefs as a Jehovah's Witness. He served two years in prison as a consequence. On his release he wished to train as a chartered accountant but was not permitted to do so pursuant to a blanket rule that barred all those with felony convictions from the profession. The Court held that such a blanket rule breached Article 14 read in conjunction with Article 9 as it made no distinction between those convicted exclusively because of their religious beliefs and other felons. This constituted a failure to treat differently persons whose situations are significantly different without objective and reasonable justification (§44). The Court at §47 noted that "unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession." The applicant had served a prison sentence for his refusal to serve in the Army and the Court concluded that further sanction and excluding him from the profession of chartered accountants was "disproportionate" and "did not pursue a legitimate aim" (ibid).

45. Mr Thlimmenos' conviction for refusing to serve in the Army was a clear interference with his Article 9 rights (though having found a breach of Article 14 the Court did not consider it necessary to determine whether Article 9 had been breached (§52-53)). In the present case, by contrast, there has been no interference with Article 9. Further, in the present cases not permitting the applicants to refuse to provide services to same-sex couples was a proportionate means of pursuing a legitimate end. In contrast, in *Thlimmenos* there was no justification for barring a person with a conviction showing no dishonesty or moral turpitude from being an accountant.

CONCLUSION

46. For these reasons, the Court is invited to declare these Applications inadmissible or to reject them on the merits.



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