Eweida v United Kingdom

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I Introduction

In January 2013, the European Court of Human Rights released its decision in *Eweida v United Kingdom*.[1] The Court decided on applications in four freedom of religion cases, thus juxtaposing questions of religious clothing and its accommodation with more complex rights conflicts between religious beliefs and provision of services contrary to those beliefs. The Court ended the notion that the 'freedom to resign' resolves the former kind of case, although arguably it may still resolve the latter. Understanding why this is so, the progressive steps the Court has taken, and the questions it has failed to answer, requires some analysis. We commence with the facts, turn to the religious clothing context, then reflect more broadly on conflicts between freedom of religion and other rights, particularly in the context of comparative jurisprudence that the Court failed to examine.

II The Four Applications and the Court's Decision

All four applications concerned the freedom of religion of employees in the workplace. The first applicant, Ms Eweida, was a British Airways employee and practising Coptic Christian. In 2006, Ms Eweida began to wear a cross around her neck at work, violating British Airways' uniform policy. Her employer disciplined her, eventually sending her home without pay until she chose to comply with the uniform policy. British Airways then offered her an administrative position where she would not be required to wear a uniform. She refused this position. British Airways eventually adopted a new policy in February 2007 that allowed employees to wear authorised religious symbols at work.[2] Ms Eweida returned to work and lodged a complaint with the United Kingdom Employment Tribunal, claiming a breach of reg 3 of the domestic *Employment Equity Regulations 2003*.[3] This claim was dismissed by the Employment Tribunal,[4] the Employment Appeal Tribunal,[5] and the Court of Appeal.[6]

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1 (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) ('*Eweida*'). A request for referral of the case to the Grand Chamber was rejected: see Registrar of the European Court of Human Rights, 'Ten Requests for Referrals to the Grand Chamber Rejected' (Press Release, ECHR 161, 28 May 2013).

2 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [12]–[13].

3 *Employment Equality (Religion and Belief) Regulations 2003* (UK) SI 2003/1660; see *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [14].

4 *Eweida v British Airways Plc* [2006] *ET*/2702689/06 (15 December 2006); . *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [14].

The second applicant, Ms Chaplin, was a nurse and practising Christian. She also wore a cross around her neck while working. In 2007, the hospital where she was employed introduced new uniforms for nurses. As a result, Ms Chaplin's display of a cross around her neck became problematic. She was asked to remove it on health and safety grounds, and she refused.[7] Her employer suggested alternative ways in which she could display the cross at work, but these were rejected by Ms Chaplin.[8] She was ultimately moved to a non-nursing position in November of 2009, which ceased to exist in July of 2010.[9] She applied to the Employment Tribunal, alleging discrimination on religious grounds. This application was dismissed, and no application was made to the Employment Appeal Tribunal.[10]

The third applicant, Ms Ladele, was a practising Christian who was employed by the London Borough of Islington as a registrar of births, deaths, and marriages. She began her employment in 2002. In 2005, the *Civil Partnership Act 2004* (UK) c 33 came into force. Islington then designated all of its registrars as civil partnership registrars, meaning that they would be required to conduct same sex partnership ceremonies. Ms Ladele refused to conduct these ceremonies based on her religious beliefs.[11] After complaints from other registrars in her office, a formal disciplinary complaint was brought against Ms Ladele on the basis that she failed to comply with Islington's Code of Conduct.[12] She made a complaint to the Employment Tribunal, which found that she had been discriminated against on the basis of her religion.[13] The Employment Appeal Tribunal reversed this decision.[14] The Employment Appeal Tribunal's decision was upheld by the Court of Appeal.[15]

The fourth applicant, Mr McFarlane, was a practising Christian and a relationship counsellor at a private organisation, Relate Avon Limited ('Relate'). This organisation had a policy requiring its counsellors to provide services to both same-sex and opposite-sex couples without discrimination. Mr McFarlane worked at Relate from May 2003 until March 2008, but began to demonstrate unwillingness to conduct this counselling based on his religious beliefs in late 2007.[16] His employer commenced an investigation, and Mr McFarlane ultimately confirmed that he would counsel same-sex couples if asked.[17] After further investigation, his employer concluded that Mr McFarlane would not, in practice,

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5 *Eweida v British Airways Plc* [2008] UKEAT/0123/08/LA (20 November 2008); *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [15]

6 *Eweida v British Airways Plc* [2010] EWCA Civ 80 (12 February 2010); *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [16].

7 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [20].

8 Ibid.

9 Ibid.

10 *Chaplin v Royal Devon & Exeter NHS Foundation Trust* [2010] ET/1702886/09 (21 May 2010); *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [21]–[22].

11 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10, and 36516/10, 15 January 2013) [26].

12 Ibid.

13 *London Borough of Islington v Ladele* [2008] *ET*/2203694/2007 (3 July 2008); *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10, and 36516/10 15 January 2013) [27]–[28].

14 *London Borough of Islington v Ladele* [2008] UKEAT/0453/08 (19 December 2008).

15 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (15 December 2009).

16 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [33].

17 Ibid [34].

comply with the employer's policies regarding same-sex counselling. Mr McFarlane was dismissed from his position.[18] He applied to the Employment Tribunal, alleging wrongful dismissal. This claim was dismissed.[19] This decision was upheld by the Employment Appeal Tribunal.

The European Court of Human Rights was asked to consider whether United Kingdom law on freedom of religion, as applied in these cases, was sufficiently protective of the *European Convention on Human Rights*[20] art 9 right of freedom of religion. Of the four applications, the Court found a violation of the *Convention* only with respect to Ms Eweida's claim. It found that British Airways' limitation of her freedom of religion was not proportionate, as its justification for the limitation did not outweigh its significant interference with Ms Eweida's freedom of religion.[21] With respect to the second case, while the Court did accept that Ms Chaplin's employer had restricted her right to freedom of religion, the employer's justification of health and safety concerns was accepted and no violation of art 9 was found.[22] The third case involved Ms Ladele's claim under art 9 in conjunction with art 14's anti-discrimination provision, but found that her employer's legitimate interest in securing the rights of others — the equality rights of those seeking same-sex unions — was proportionate and no violation of arts 9 or 14 was found.[23] Similarly, in regards to the fourth case, while Mr McFarlane's employer's actions did interfere with his religious beliefs, the Court held that his employer's intention of providing a service without discrimination justified the interference, and no violation of arts 9 or 14 was found.[24]

III Reasonable Accommodation of Religious Practices in the Workplace

By finding that employer restrictions on the wearing of religious symbols in the workplace constitute a prima facie violation of art 9,[25] the Court has expanded the scope of the freedom of religion in European human rights jurisprudence. In previous cases on the issue of employer restrictions on the religious practices of employees, the Court had held that such restrictions do not violate art 9 because the employee is always free to resign.[26] This freedom of contract, in the words of the Court in *Konttinen*,[27] is the 'ultimate guarantee of [one's] right to freedom of religion'.[28] However, the Court has recently begun to recognise that freedom of contract may not be the preferred guarantor of *Convention*

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18 Ibid [37].

19 *McFarlane v Relate Avon Ltd*,[2009] *ET*/1401179/08 (5 January 2009); *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [38].

20 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*Convention*').

21 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [95].

22 Ibid [99]–[100].

23 Ibid [106].

24 Ibid [109]–[110].

25 Ibid [91], [97].

26 See, eg, *Ahmad v United Kingdom* (1981) 4 EHRR 126; *Konttinen v Finland* (1996) 87-A Eur Comm HR 68; *Stedman v The United Kingdom* (1997) 23 EHRR CD 168.

27 *Konttinen v Finland* (1996) 87-A Eur Comm HR 68.

28 Ibid 75.

rights,[29] given the social and economic costs associated with resignation from one's employment.

Eweida is a continuation of this approach. The Court held that the employee's freedom to resign is now only one factor to be considered in determining whether the restriction imposed was proportionate.[30] Freedom of religion in the workplace appears to be treated now as a clash of rights between the employer and employee, rather than as a zone free from the application of art 9 with protection only via the contractual freedom of both parties.[31] The strength of this approach is that art 9 is now treated similarly to arts 8, 10, and 11 of the *Convention* in the employment law context, avoiding the hierarchy of *Convention* rights that had implicitly been established by the Court's previous jurisprudence on this issue.[32]

The Court further expands the scope of art 9 in its decision regarding Ms Eweida, as it implicitly endorses a duty of reasonable accommodation for religious practices in the workplace. While this duty is not explicitly discussed in the case,[33] one could arguably identify such an implied duty in the Court's treatment of Ms Eweida's claim. The Court emphasised that the British Airways uniform code was easily amended and that other religious items were permitted to be worn by employees.[34] Both of these factors indicate that British Airways could have accommodated her religious expression with little hardship, and British Airways' interference with Ms Eweida's art 9 rights was thus not proportionate. The lack of accommodation was arguably the determinative factor in finding an art 9 violation.[35]

Despite finding no violation of art 9 on Ms Chaplin's claim, the Court still considered the attempts made by the hospital to accommodate her desire to wear a cross and similar accommodation that had been made for religious symbols worn by other employees.[36] It eventually found that the measures taken by the employer in restricting her art 9 rights were legitimate and proportionate.[37] Even if possible accommodation is considered only at the proportionality stage, however, the fact that it is a significant factor at all indicates that a duty of reasonable accommodation of religious practices in the workplace may be developing under the *Convention*'s guarantee of the freedom of religion.

IV Conflicts between Freedom of Religion and other Rights

On the one hand, the *Eweida* and *Chaplin* decisions seem to confirm an evolving principle that apparently neutral dress requirements must make room for religious accommodation

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29 Aileen McColgan, 'Religion and (In)equality in the European framework' in Lorenzo Zucca and Camil Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press, 2012) 215, 225; Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 *Oxford Journal of Law and Religion* 109, 123.

30 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [83], [109].

31 Leigh, above n 29, 124.

32 Ibid 122.

33 David McIlroy, 'A Marginal Victory for Freedom of Religion' (2013) 2 *Oxford Journal of Law and Religion* 210, 214.

34 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [94].

35 Ibid.

36 Ibid [98].

37 Ibid [99]–[100].

unless raising a legitimate concern such as safety, to which the courts may strongly defer.[38] On the other hand, the decisions regarding Ms Ladele and Mr McFarlane illustrate a potentially more complex clash of rights. Interestingly, despite purporting to address 'relevant comparative law', the Court did so with respect only to selected comparative law on religious clothing.[39]

In its decision, the Court did not refer to *R v NS*,[40] a leading Canadian judgment, in which the Supreme Court of Canada considered whether a Muslim woman had to remove her niqab when testifying so as to respect the fair trial rights of an individual accused of sexual assault. In this case, the Canadian Court enunciated a framework for analysing situations of conflicting rights.[41] This omission was perhaps understandable, as the case was released only three months before the European Court's judgment. However, the Court also omitted to refer to a leading Canadian appellate court judgment from 2011 regarding whether individual civil marriage commissioners might lawfully be permitted to decline to perform same-sex marriage ceremonies on the grounds of religion.[42] The omission is particularly striking, given its similar legal issues to the cases of *Ladele* and *McFarlane*. This Canadian case law provides an interesting contrast to *Eweida*.

In the *Marriage Commissioners Reference*, handed down in early 2011, the Saskatchewan Court of Appeal considered whether the Canadian province of Saskatchewan could enact a legislative exemption permitting civil marriage commissioners to decline to perform a same-sex marriage on religious grounds.[43] The symbolic effect of the same-sex couple facing a refusal, even where that couple was easily able to obtain marriage services from another commissioner, gave rise to an equality rights breach. On one reading, the Saskatchewan Court of Appeal held simply that the proposed law did not limit equality rights as minimally as possible in the context of the objective pursued. According to the Court, there would be less impairment of equality rights if the government instead operated a centralised system where couples did not approach particular commissioners but were simply assigned a commissioner, with a central authority then granting exemptions to commissioners without any couple ever facing a refusal. The claim that such a system was operating in Ontario appears to have been incorrectly put before the Court,[44] although that may not affect the reasoning. However, on another reading of the judgment, the Court independently held that there was a basic lack of proportionality between the exemption and the public interest in governmental services being available on a non-discriminatory basis.[45]

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38 See, eg, Janet Epp Buckingham, 'Oil and Vinegar: Resolving Conflicting Rights under the *Charter* and Ontario's *Human Rights Code*' in Shaheen Azmi, Lorne Foster and Lesley Jacobs (eds), *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Irwin Law and Ontario Human Rights Commission, 2012) 113, 126–31.

39 *Eweida* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) [47]–[49].

40 [2012] 3 SCR 726.

41 Ibid.

42 *Reference Re Marriage Commissioners Appointed Under the Marriage Act, 1995* (2011) 366 Sask R 48 ('*Marriage Commissioners Reference*').

43 Ibid.

44 Dwight Newman and Michelle Biddulph, 'The Judgments of the Saskatchewan Court of Appeal, 2011' (2012) 75 *Saskatchewan Law Review* 125, 154.

45 *Marriage Commissioners Reference* (2011) 366 Sask R 48 [90]–[100].

The *Marriage Commissioners Reference* case was framed in terms of a legislative exemption to protect freedom of religion, with an equality rights challenge against it and a justification of the law put in terms of protecting freedom of religion. It is interesting to consider whether, if the courts applied an equally stringent approach to rights limitation, a law lacking the same exemption would fail against a freedom of religion challenge, once equality rights were turned into a mere justificatory factor. The European Court, considering the *Ladele* appeal, stated that there is 'a wide margin of appreciation when it comes to striking a balance between competing Convention rights'.[46] This deferential approach upholds the law and thus avoids any risk of the paradoxical situation that could arise from a stringent approach if the courts were to strike down an exemption system as an equality rights violation and the lack of an exemption as a religious freedom violation. Insofar as the decision of the European Court assumes that there need not be accommodation provided to employees in this context, it implicitly relies upon the freedom of the employees to cease their employment. Insofar as the issue concerns whether that (non-)accommodation is a sufficiently proportionate way of approaching freedom of religion to allow for deference, the effect is implicitly to say that the courts have nothing to say about how different rights are reconciled, a conclusion that surely runs up against the noble aspirations implicit in any rights culture.[47]

The Supreme Court of Canada's majority approach to the question whether a sexual assault complainant's religious freedom to wear the niqab must yield to the fair trial rights of the accused during testimony takes a particular approach. It looks first to reconcile conflicting rights, alternatively to accommodate them, and in a last resort to balance them, all under judicial scrutiny rather than within the deferential margin of appreciation.[48] However, Canada has reasonably unified views on rights. There are additional reasons for a wider margin of appreciation in the context of a diverse set of states within the European Convention, each of which has given up some of its own sovereignty.[49] However, a purely deferential approach on rights conflicts actually risks leaving the challenging next wave of religious freedom cases simply beyond rights analysis.

V Conclusion

The *Eweida* decision of the European Court of Human Rights is a fascinating case in that its factual matrices locate several different problems within the same legal analysis. In the context of the more straightforward of the cases, the Court escapes old ideas about the freedom to resign and develops a place for accommodation of religion, albeit subject to strong deference to legislative choices on legitimate aims such as safety. This same deferential stance, when applied to more complex conflicts, avoids risks of legal paradox, but does so at the expense of leaving the field of these complex cases beyond legal rights analysis. This case stands as a significant international decision on freedom of religion on some points but also as one that marks further room for doctrinal development in future.

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46 Ibid [106].

47 See generally *Balancing Competing Human Rights Claims in a Diverse Society,* above n 38.

48 *R v NS* [2012] 3 SCR 726.

49 See generally Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012) 116–37.