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EQUALITY ACT 2010

A proposed amendment in respect of its treatment of religion

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About the author

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FOREWORD

"Everyone has the right to freedom of thought, conscience and religion …" begins Article 9 of European Convention on Human Rights. The conscience element in that right has been recognised by the laws of our country on various occasions over the years: the right to conscientious objection to military service and the conscience clause in the Abortion Act 1967 are well-known examples.

But in some situations which have come before the courts in more recent years individuals have failed to find protection for their religious or conscientious positions. One such individual was Lillian Ladele who was employed by the London Borough of Islington as a registrar of births, deaths and marriages. That authority's proclaimed policy was this:

> "The council will promote community cohesion and equality for all groups but will especially target discrimination based on age, disability, gender, race, religion or sexuality."

When the civil partnerships were introduced Ms Ladele, a Christian, felt a conscientious objection to officiating at ceremonies for them. Some local authorities chose not to designate all their registrars as civil partnership registrars, and Islington, which had a team of registrars, could have found a pragmatic solution by doing this. But two homosexual fellow employees complained that accommodating Ms Ladele's position made them feel victimised. The Council then dismissed Ms Ladele. She won a case of religious discrimination at an Employment Tribunal, but this decision was overturned on appeal.

At the European Court of Human Rights the majority decision was again against her. But in a powerful dissent Judges Vucinic and De Gaetano wrote:

> "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 art.9(2) apply to prescriptions of conscience, cannot be deemed necessary in a democratic society …."

Whether our law at present has struck the correct balance between religious rights and other modern considerations is a matter of debate. In a lecture in 2017 Baroness Hale said:

> "if the law is going to protect freedom of religion and belief it … has to work out how far it should go in making special provisions or exceptions for particular beliefs, how far it should require the providers of employments, goods and services to accommodate them, and how far it should allow for a "conscience clause", either to the providers, as argued by the hotel keepers in *Bull v Hall*, or to employees, as suggested by the dissenting minority in *Ladele*. I am not sure that our law has yet found a reasonable accommodation of all these different strands."

This is the debate to which the author of this paper contributes. Dr James Gould is an academic lawyer. His detailed knowledge of equality law is abundantly demonstrated by this learned paper. He proposes the amendment of the Equality Act 2010 by the insertion of a conscience clause, modelled on that in the Abortion Act 1967.

I commend this paper as a thoughtful and informed contribution to an important discussion.

Sir Bob Neill MP
Chair of the Executive Committee, Society of Conservative Lawyers

INTRODUCTION

This paper will analyse the Equality Act 2010 (EA 2010) and consider its approach to religion. This will provide proposals for an amendment to the Equality Act 2010 in respect of its treatment of religion, and particularly, religious liberty.

Law is becoming increasingly important in the 'public life of developed liberal democracies such as the United Kingdom'.[1] This is not particularly surprising. However, equality law is gradually becoming more prominent in public life. The Master of the Rolls considers equality to be 'one of the core values of liberal Western democracy'[2] and a specialist in the interaction between law and religion, Professor Russell Sandberg, has termed the EA 2010 to be one of the 'most important statutes' in domestic law.[3] Equality and diversity are arguably becoming two of the most favoured jurisprudential concepts of public discourse. As such, the importance of equality in law should not be underestimated.

Equality and religion are very closely linked. For instance, in light of the EA 2010 (and the discrimination law contained within it), Christopher McCrudden identifies that arguments concerning the place of religion in the public or private spheres are now 'frequently reframed in practice as issues of "discrimination" and "equality"'.[4] This shows connection between equality and religion. It also provides for dialogue between equality law and religion in the role exercised by the courts. Religious issues are now debated through the medium of equality law and this allows for discussion about equality law and religion.

This paper will be in two parts. First, this paper will outline the applicable equality law and the tensions that have arisen. Second, the analysis will then turn to the dispute surrounding available protection for religious freedom and draw upon leading equality law cases to substantiate a potential amendment.

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[1] J Rivers, 'Good News for Law?' (2014) 19(5) KLICE Ethics in Brief 1.

[2] T Etherton, 'Religion, the Rule of Law and Discrimination' (2014) 16 (3) Ecc. L.J. 265, 269.

[3] R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 128.

[4] C McCrudden, *Litigating Religions: An Essay on Human Rights, Courts and Belief* (Oxford University Press, 2018) 73.

AN INTRODUCTION TO THE TENSIONS FACING EQUALITY LAW

Claimants alleging religious discrimination have often lost their case in equality law litigation. For instance, the vast majority of the cases brought with reference to the religion clauses of the European Convention on Human Rights 1950 (ECHR) have failed in English domestic courts.[5] It is not that there is not respect for religion,[6] but that when balanced against other competing rights and considerations it tends to lose out. It is submitted that the problem with proportionality analysis involving equality law, is that religious freedom loses out within indirect discrimination law. Religious freedom further loses out in adjudication concerning the protected characteristics listed in the EA 2010. This section will develop that equality law provides insufficient weight to religious freedom.

A number of legal claims have been brought by employees who have been required to perform new legal obligations which they have been unwilling to comply with because of a conflict with their religious beliefs.[7] It can be identified in that when religious claimants attempt to defend their rights, they lose in litigation.[8] As such, it has been suggested that overall Article 9 rights (respect for freedom of thought, conscience and religion) are becoming 'insufficiently and erratically protected in the courts'.[9] The problem is that this suppresses the ability to exercise religious liberty. It can be submitted therefore that more weight is required to be given to protect religious liberty under equality law.

Equality law has developed in line with religious liberty. Religious freedom is protected, for instance, by freedom to change belief being secured by Article 9 ECHR (there is no restriction upon changing a belief),[10] and also in the EA 2010, religion or belief sitting alongside eight other 'protected characteristics' under s.4 of the EA 2010. Religion being designated as a protected characteristic is designed to protect and prevent against religious discrimination.

The Human Rights Act 1998 (HRA) has been termed a 'watershed' moment by providing the domestic courts with the opportunity to directly enforce ECHR rights.[11] The HRA has also ushered in a new rights driven culture, promoting religious freedom and the right to, and respect for, a private life as protected universal human rights.[12] As part of this evolving legal culture, however, it is now considered the norm to speak about the balancing of these rights. This is in an attempt to resolve inevitable tensions between them. For instance, a proportionality test is applied under Article 9(2) of the ECHR, by which the manifestation of Article 9 rights is permitted to be infringed. Infringement may take place if the action is justified as a proportionate means of achieving a legitimate aim.[13]

It has been suggested by Russell Sandberg that domestic courts can create tensions by underplaying the importance attached to preventing religious discrimination in equality law.[14]

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[5] J Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 320. See also C Cross, J Dingemans, H Masood and C Yeginsu, *The Protections for Religious Rights: Law and Practice* (Oxford University Press, 2013) 292.

[6] For instance, the right to freedom of religion is secured by Article 9 of the ECHR.

[7] For example, see: *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880; and *Eweida v United Kingdom* (2013) 57 EHRR 8. These cases will be introduced and analysed later in this paper.

[8] J Rivers, 'The Secularisation of the British Constitution' (2012) 14(3) Ecc. L.J. 371, 380.

[9] A Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (2013) 2 (1) *OJLR* 50, 51.

[10] D Hoffman and J Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (3rd edn, Pearson, 2010) 278.

[11] R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 36.

[12] For instance see: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *Kokkinakis v Greece* (1993) 17 EHRR 397; *Gillan and Quinton v The United Kingdom* [2010] ECHR 28; *Eweida v United Kingdom* (2013) 57 EHRR 8.

[13] M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell, 2011) 313.

[14] R Sandberg, *Religion, Law and Society* (Cambridge

For example, Article 9 rights can frequently be contested and so this can lead to legal uncertainty for these rights.[15] Equality law is now starting to take over from the HRA as the greater cause of increased litigation – disputes are more frequently being brought by litigants as anti-discrimination and not liberty claims.[16] Moreover, it was earlier suggested that religious freedom often loses out when balanced against other competing rights and considerations in indirect discrimination law. This may be why overall there is insufficient protection for religious rights under equality law.[17] As such, it can be identified that the problem with proportionality analysis concerning religion is that individual religious freedom can be infringed upon. Such a process occurs in the balancing of human rights in what has become a conflicted rights discourse. Limitation can be imposed upon religious rights if there is satisfactory justification.[18] Such a restriction impacts religious freedom, which loses out in adjudication concerning the protected characteristics in the EA 2010.

Passing of the Equality Act 2010

What is the relevant equality law that has led to these problems? The source of these tensions can be attributed to the creation of new obligations within the workplace. An interesting and important development within discrimination law is that, in compliance with EU Council Directive 2000/78/EC, a large body of equality law was implemented. For instance, firstly, employment discrimination on the grounds of sexual orientation and religion or belief was prohibited, with the implementation of Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660 and the Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661. Following this, secondly, discrimination was prohibited in relation to goods and services in the Equality Act 2006 (Part 2) and the Equality Act (Sexual Orientation) regulations 2003 SI 2003/1661. Evidently the aim of these provisions centred upon reducing discrimination within the workplace. However, this extensive anti-discrimination law, now to be found in the EA 2010, has arguably caused a problem and exacerbated tensions in relation to religious freedom.

The EA 2010 was passed by Parliament on the 8th April 2010 and is a harmonising measure that acted to consolidate the regulations referred to above. It also consolidated, inter alia, the Disability Discrimination Act 1995 and the concepts of both direct[19] and indirect discrimination.[20] The idea was brought by the Labour administration led by Gordon Brown and the Equality Bill was presented by Harriet Harman.[21] The EA 2010 was carried through in the dying days of the Labour government only rather narrowly receiving Royal Assent due to the general election on the 6th May 2010. As such, the EA 2010 was brought through at great speed.[22] This speed is reflected in the drafting of the EA 2010 and may give rise to the subsequent litigation which has taken place surrounding the EA 2010.

The Public Sector Equality Duty

The EA 2010 has been interpreted in different ways. The equality duty has been criticised for 'merely harmonis[ing] and marginally extend[ing] previous duties.'[23] Julian Rivers (a Professor of Jurisprudence) goes further in his criticism and has suggested that one problem with equality law is that it reverses a traditional understanding of law

University Press, 2014) 203.

[15] L Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc. L.J. 280, 298.

[16] J Rivers, 'The Secularisation of the British Constitution' (2012) 14(3) Ecc. L.J. 371, 382.

[17] A Donald, 'Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for optimism' (2013) 2 (1) OJLR 50, 51.

[18] M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell, 2011) 313.

[19] S.13 Equality Act 2010.

[20] S.19 Equality Act 2010.

[21] B Hepple, 'The New Single Equality Act in Britain' (*Equal Rights Trust*, 10 August 2010) www.equalrightstrust.org/ertdocumentbank/bob%20hepple.pdf accessed 27 April 2020.

[22] 'Coalition to stick with Labour's Equality Act' (3 July 2010) www.bbc.co.uk/news/10496993 accessed 27 April 2020.

[23] B Burton, 'Neoliberalism and the Equality Act 2010: A Missed Opportunity for Gender Justice' (2014) 43(2) ILJ 122, 134.

within a democratic state by 'justifying new restrictions on the civil liberties of individuals and groups who adopt a different ethical foundation.'[24] Equality law may restrict the civil liberties of those with a different ethical foundation, particularly those with a concern for religion and belief, and prescribes views upon equality to justify a defined foundation.

It is debatable, however, that prescribing views upon equality was exactly the intention behind the equality provisions. One of the key influences behind the EA 2010, Professor Sir Bob Hepple,[25] has noted in *Equality: The New Legal Framework* that equality law 'is important because it seeks to use law as a means of changing entrenched attitudes, behaviour and institutions in order to secure the fundamental human right to equality.'[26] Professor John Finnis supports this by noting that the indirect strategy of anti-discrimination law and its 'capacious notions of equality have changed the law and social policy of millennia in a very few decades'.[27] It is significant that, even at the outset, the EA 2010 was intended to be persuasive in its impact.

This prescriptive nature is the inherent nature of the Public Sector Equality Duty. A Public Sector Equality Duty is imposed via the EA 2010 upon public sector authorities to 'reduce the inequalities of outcome which result from socio-economic disadvantage' – s.1(1) of the EA 2010. The Public Sector Equality Duty in s.149 EA 2010 has been identified as one of the prime ways in which the EA 2010 aims to buttress the law to support progress on equality.[28] Further the statutory duties to advance equality found in ss. 149-157 EA 2010 focus upon both 'public authorities' (s.149(1)), and individuals who exercise 'public functions' (s.149(2)). S.149(1) Equality Act 2010 states:

> '(1) A public authority must, in the exercise of its functions, have due regard to the need to —
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

The statutory duties brought about by ss.149-157 of the EA 2010 provide for outcomes to support equality. This is prescriptive to the extent that it narrows the options and opportunities for difference. As such, the duty imposed by equality law is a negative one.[29] In other words, the duty has a negative impact for debate about equality, and this enables opportunity to prescribe preferred conceptions of equality.

The equality duty has also been criticised by Rivers for placing an 'unavoidable' temptation to place one's preferred conception of equality under the radar of rational justification. In other words, equality becomes 'a mask for a substantive conception of the good which informs the distinctions and values at play.'[30] Such law serves as a tool to incorporate personal values within society. Further, this danger is particularly the case for equality on grounds of religion and belief.[31] Rivers has written that the drive towards equality is not only a denial of reality but represents an illiberal attempt to define people's faith for them, rather than allowing freedom of conscience.[32] Equality is here treated as a universal, univocal 'good' prone to abuse as a negative and prescriptive ideal/duty that can be manipulated. It can be manipulated as

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[24] J Rivers, 'Good News for Law?' (2014) 19(5) KLICE Ethics in Brief 1, 2.

[25] A member of the Commission for Racial Equality and drafter of the EA 2010.

[26] B Hepple, *Equality: The New Legal Framework* (Hart, 2011) vii.

[27] J Finnis, 'Equality and Differences' (2011) 56 Am. J. Juris 17, 42.

[28] See S Fredman, 'The Public Sector Equality Duty' (2011) 40(4) ILJ 405.

[29] J Rivers, 'Promoting Religious Equality' (2012) 1 Ox. J Law Religion 2, 386.

[30] Ibid, 396.

[31] Ibid 398.

[32] R McCrea, 'Book Review: J Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010)' (2011) 74(4) MLR 631, 632.

law governs notions of the common good.

A more positive reading is taken by Hepple who notes that the Public Sector Equality Duty marks a transition from the focus not to discriminate to positive duties to advance equality[33] through structural change.[34] The practical impact of this extension finds expression in s.149(3) of the EA 2010, which provides that equality of opportunity involves having 'due regard' to: minimising disadvantages based upon protected characteristics;[35] meeting the needs of those who share a relevant protected characteristic;[36] and encouraging participation.[37] This pragmatically advances equality but does not actively achieve equality.

Founder of the Oxford Human Rights Hub, Professor Sandra Fredman has noted that the substantive conception of equality advanced by the Public Sector Equality Duty is prescriptively worded to 'have due regard',[38] not to take steps to achieve equality. This equality duty is an admirable stance that requires public bodies to have due regard for the need to eradicate discrimination, including indirect discrimination. Yet the duty to have 'due regard' may not achieve equality when interacting with religion. For instance, to have 'due regard'[39] has been criticised for its potential impact upon religious discrimination. Rivers, for example, has identified the equality duty and equality law more generally to be a form of manipulation when viewed through this process of having 'due regard'. Indeed, the process of having 'due regard' is one that Rivers fears will make public authorities deliver prescribed conceptions of equality, and one which requires public authorities in a liberal-democratic state to pretend, even if they do not believe, that equality on grounds of religion or belief should be promoted equally within public discourse.[40] Rivers suggest that public authorities should not be forming a view on such matters as they 'should be particularly cautious in their implementation of such duties where they touch on matters of legitimate public debate.'[41] Caution is welcomed. The difficulty in the suggestion made by Rivers, however, is that the problem can be identified in the implementation of such procedures, not the individual authorities themselves – it is quite correct that public authorities should consider and impact matters of public debate.

A subtle shift has also been observed by Sandra Fredman from claims being initiated by individual victims to proactive models 'plac[ing] responsibility on public bodies, employers and others who are in a position to bring about change.'[42] This identifies a transfer in that larger bodies act on the individual's behalf to bring about the expansive aims set out in the equality duty. This criticism is developed by Rivers who argues that the root of the problem with expansive conceptions of equality is that the new positive duty for equality requires having regard to how a policy or decision might impact a large group defined by reference to their protected characteristic.[43] A tendency identified here is to reinforce patterns of understanding/norms/belief by rooting them in 'supposedly personal characteristics, beyond rational challenge'.[44] Individual equality is extended to an extensive group setting, all of whom share a protected characteristic. Such a temptation 'is fundamentally illiberal in ethos and tendency.'[45] This may prescribe preferred conceptions of equality impacting religious freedom under the banner of equality law. In essence, equality law is prescribing normative behaviour and belief for the individual.

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[33] B Hepple, *Equality: The New Legal Framework* (Hart, 2011) 1.

[34] S Fredman, *Discrimination Law* (2nd edn, Oxford University Press, 2011) 279.

[35] Equality Act 2010 s.149(3)(a).

[36] Equality Act 2010 s.149(3)(b).

[37] Equality Act 2010 s.149(3)(c).

[38] S Fredman, 'The Public Sector Equality Duty' (2011) 40(4) ILJ 405.

[39] As outlined above.

[40] J Rivers, 'Promoting Religious Equality' (2012) 1 Ox. J Law Religion 2, 401.

[41] Ibid.

[42] S Fredman, 'The Public Sector Equality Duty' (2011) 40(4) ILJ 405, 408.

[43] Ibid 398.

[44] Ibid.

[45] Ibid.

There are also problems with the remedy available under the equality duty. For instance, the implementation of the Public Sector Equality Duty by the EA 2010 has set down statutory duties. As there is no private sector duty to advance equality within the EA 2010,[46] it has been argued by Hepple that the equality duty does not give rise to any enforceable private law rights; rather, judicial review provides the only route for enforceability.[47] The Public Sector Equality duty is limited to being only enforceable against public bodies as a public law action. As such, Hepple observes that most claims so far have been brought by non-governmental organisations or individuals.[48] It follows that because there is no cause of action in private law, it is not possible for an individual to claim damages for breach of statutory duty. Rather, the only legal remedy available is an application for judicial review on the basis that an authority had failed to perform its duty.[49] This limitation upon the remedies available to claimants presents further problems with the Public Sector Equality Duty.

[46] B Hepple, *Equality: The New Legal Framework* (Hart, 2011) 179.

[47] Ibid 140.

[48] Ibid 142.

[49] Ibid.

THE DISPUTE SURROUNDING AVAILABLE PROTECTIONS

The problem with English equality law as it pertains to religion has been disputed. For example, human rights advocate Lucy Vickers suggests that there is definite 'protection available under Article 9'[50] for religion and belief – highlighting a strong mantle of protection. Christopher McCrudden, Professor of Human Rights and Equality Law, takes a similar stance by arguing that within a proportionality analysis, 'the European Court of Human Rights seems to give particular weight to the importance of the religious beliefs in relation to competing Convention provisions.'[51] McCrudden is suggesting that religion or belief is given adequate protection. If viewed as the only responses, then the equality law in respect of its treatment of religion does not seem to be problematic.

Yet commentators have equally identified a problem facing freedom of religion. It has been argued that the obligations on employers not to discriminate on grounds of sexual orientation have 'trumped the rights of the employee not to be discriminated against on grounds of religion or belief'.[52] An employment law expert, Professor Gwyneth Pitt, argues that listing religion or belief as a protected characteristic in the EA 2010 has made it impossible for courts to avoid religious liberty litigation.[53] These examples highlight the extent to which religious rights are being infringed. Hepple has suggested that this may be because the harmonisation of equality law within the area of religion and belief has progressed too far[54] and consequently equality law tends to challenge Article 9 rights. An example can be seen in the way that equality law has been connected to religion and belief which leads to the legal obligations presented in equality arguments being much more precise.[55] This results in religious equality law preventing claimants from effectively being able to rely upon Article 9 of the ECHR. As such, clearly the views presented on the problems facing religious equality law are contradictory. This highlights that significant problems and unresolvable tensions have been created within the legal framework.[56] The aim of this this paper is to present a constructive resolution.

Eweida v The United Kingdom

This paper will illustrate the problems that can arise for religious freedom in light of equality law by drawing upon a number of legal claims that have been brought by employees who have been forced to carry out obligations from new law protecting rights. To address the problems and tensions that can arise for religious freedom due to equality law, the relevant litigation arising from the EA 2010 needs to be presented.

The leading equality law case concerning freedom of religion is *Eweida v The United Kingdom*.[57] Ms Nadia Eweida, a British Airways employee, advanced a claim of discrimination based on a breach of her right to manifest her religion by wearing a cross within the workplace, contrary to Article 9 of the Convention. In other words, Ms Eweida claimed that equality law did not protect her right to exercise religious liberty.

The European Court of Human Rights (ECtHR) found that Ms Eweida, had a right to manifest her

[50] L Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc. L.J. 280, 297.

[51] C McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 Ecc. L.J. 26, 36.

[52] R Sandberg, 'The Right to Discriminate' (2011) 13(2) Ecc. L.J. 157, 172. See further, R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) 214.

[53] G Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (2011) 40 ILJ 4, 384.

[54] B Hepple, *Equality: The New Legal Framework* (Hart, 2011) 177.

[55] J Rivers, 'Promoting Religious Equality' (2012) 1 Ox. J Law Religion 2, 399.

[56] P Edge and L Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law relating to Religion and Belief' Equality and Human Rights Commission (Manchester, September 2015) www.equalityhumanrights.com/sites/default/files/publication_pdf/RR97_Review%20of%20equality%20and%20human%20rights%20law%20relating%20to%20religion%20or%20belief.pdf (accessed 5th December 2015), 40.

[57] *Eweida v United Kingdom* (2013) 57 EHRR 8.

religion in the workplace:[58] by denying Ms Eweida her right to wear a cross, domestic law did not strike the right balance between the protection of Ms Eweida's right to manifest her religion and the rights of others.[59] This identifies that the ECtHR had to weigh the restriction of Ms Eweida's religious rights. The restriction of these rights was weighed against the UK government's competing submission that, by restricting her right to wear a cross, British Airways were correctly justifying a legitimate aim. This aim was namely enforcing a corporate professional image.[60] In the alternative, it was argued that, even if wearing a cross was motivated by religion or belief, it was not a generally recognised act of religious observance and so fell outside the protection of Article 9.[61]

Recognising Ms Eweida's Article 9 rights, the ECtHR held that the UK had not put in place 'legislation adequate to enable those in the position of the applicant to protect their rights.'[62] In other words, domestic law did not provide adequate protection of Ms Eweida's religious freedom. However, this case benefits from deeper analysis. The headline judgment is not really reflective of the wider case. In this case there were four conjoined applicants. Only one applicant won her claim, that applicant being Ms Eweida. It was held by the ECtHR that Ms Eweida's Article 9 right to wear a cross upon her work uniform was not adequately protected by either (a) her employer or (b) English equality law.[63]

Eweida is to be considered an important decision because it was the first adverse determination for the United Kingdom government regarding Article 9.[64] As such, a right is established to manifest religion in the workplace.[65] The structure of Article 9 provides that freedom of thought, conscience and religion is a general freedom not subject to limitation. There is, in other words, no restriction upon holding a belief. It has been shown above that the right is limited, however, when the belief is manifested in accordance with Article 9(2). This distinction is upheld by scholars Hoffmann and Rowe because, while it would be wrong in principle for the state to legislate how people should think, it may be entitled for equality law to regulate how individuals should act, where such action may result in harm to others.[66] This right is a contested one because Ms Eweida's manifestation of belief was held not to be limited.[67] Despite the arguments brought by British Airways to the contrary, Ms Eweida established her protected right to wear a cross in the workplace.

As was earlier noted, within Eweida,[68] the other three conjoined applicants lost their claims before the ECtHR. To understand why they lost, the next section will provide context by analysing the earlier domestic law hearings. The applicants will be divided into two categories: first, provision of services and the impact this has upon hierarchies; and second, wearing of religious symbols.

The applicants within Eweida v The United Kingdom

Beginning with the provision of services, two of these applications concerned legal claims brought by employees forced to carry out obligations from new equality law protecting rights. First, the Court of Appeal decision in *McFarlane v Relate Avon*[69] involved a Christian counsellor dismissed for

[58] *Eweida* has clarified the meaning of 'manifestation of belief': conduct is not restricted to acts of worship or devotion but needs to have a sufficiently close and direct nexus between the practice and underlying belief. However, a religious practice does not need to be prescribed by the religion in question – ibid [82]. Here conduct is tied closely to belief.

[59] Ibid [79].

[60] Ibid [61], [94].

[61] Ibid [58].

[62] Ibid [66].

[63] Ibid [79].

[64] M Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (2013) 15(2) Ecc. L.J. 191, 193.

[65] D McIlroy, 'A Marginal Victory for Freedom of Religion' (2013) 2 Ox. J Law Religion 1 211.

[66] D Hoffman and J Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (3rd edn, Pearson, 2010) 277–279.

[67] *Eweida v United Kingdom* (2013) 57 EHRR 8 [95].

[68] Ibid.

[69] *McFarlane v Relate Avon Limited* [2010] IRLR 872.

refusing to counsel a homosexual couple, and second, *Islington Borough Council v Ladele (Liberty Intervention)*[70] concerned a registrar threatened with dismissal because she refused on conscience grounds to perform civil partnership ceremonies, which would, in her opinion, contradict her religious belief. The Court of Appeal, in both cases, held that claims of direct discrimination on grounds of religion failed because the employee was not treated by the employer unfavourably on grounds of religion. Similarly claims of indirect discrimination failed on the basis that any disadvantage was justified. For, in the case of *Ladele*,[71] the effect of implementing the policy on the claimant, Ms Ladele, was held to not impinge on her religious belief as she was still able to hold those beliefs. As such, the policy pursued by the employer was a legitimate aim.[72] Here Sandberg suggests that the EA 2010 consolidated the substantive law[73] concerning both religious discrimination and the exceptions that exist for religious groups in the area of indirect discrimination.[74] This arguably justifies the alleged infringement of rights. It pays little attention to religious rights.[75] The consequences for Ms Ladele were, for instance, serious: even though the job requirement was introduced by the employer at a later date and stage in her employment, Ms Ladele still lost her job given her beliefs because of her inability to carry out what was seen to be part of her job.[76] The severity of losing employment was considered to be a justified restriction upon the right to religious freedom.

It is argued that legislative developments culminating in the EA 2010 have brought about a significant shift from 'non-discrimination to anti-discrimination',[77] whereby a shift from passive tolerance to the active promotion of religious freedom (Article 9 of the ECHR) and sexual orientation anti-discrimination (Article 14 of the ECHR) as positive legal rights has now occurred.[78] By way of impact religious freedom and sexual orientation are more frequently defended by claimants within litigation. As such, most relevant claims are taken under the protected characteristic of religion and belief within equality law.[79] It is evident that this presents freedom of religion under equality law as an enforceable, contested right.

Rights being infringed via indirect discrimination appears to be justified by the ECtHR in *Eweida*.[80] Mr McFarlane's and Ms Ladele's religious beliefs were held to be the direct motivation for their objection to performing work tasks. This was held to be sufficient to engage Article 9 in *Eweida*.[81] It was argued by the United Kingdom that the right to manifest religious beliefs and the rights of individuals not to be discriminated against on grounds of sexual orientation were matters failing within the margin of appreciation.[82] This margin of appreciation was given to the jurisdiction of national authorities to derogate from their obligations under Article 9 ECHR.

Mr McFarlane's contrasting submission highlighted the need to maintain religious pluralism when determining the margin of appreciation given to the state.[83] This call for pluralism highlights that a claim for tolerance within society of a diversity of cultural or ethnic groups and the beliefs they express

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[70] *Islington Borough Council v Ladele (Liberty Intervention*) [2010] 1 WLR 955.

[71] Ibid.

[72] *Eweida v United Kingdom* (2013) 57 EHRR 8 [105].

[73] Such as the Employment Equality (Religion or Belief) Regulations 2003.

[74] R Sandberg, 'The Right to Discriminate' (2011) 13(2) Ecc. L.J. 157, 159.

[75] R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) 203.

[76] *Eweida v United Kingdom* (2013) 57 EHRR 8 [106].

[77] R Sandberg, 'The Right to Discriminate' (2011) Ecc. L.J. 13(2) 157, 180.

[78] R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 81.

[79] M Gibson, 'The God 'Dilution'? Religion, Discrimination and the case for Reasonable Accommodation' (2013) 72(3) CLJ 578, 590.

[80] *Eweida v United Kingdom* (2013) 57 EHRR 8.

[81] Ibid [103, 108] (Fourth Section).

[82] Ibid [63].

[83] Ibid [73].

regarding religion.[84] However, the ECtHR held in *Eweida*[85] that for both Ms Ladele and Mr McFarlane, equality legislation led to the justification of *prima facie* discriminatory acts requiring the identification of a legitimate aim and a reasonable relationship of proportionality between the aim and discriminatory effect within the state's margin of appreciation.[86] As such, the legitimate aim ignored the religious difference in favour of a conception of proportionality. A conflict between laws protecting religious freedom and those prohibiting discrimination is highlighted.[87]

Have laws protecting equality law constrained religious freedom? The appellate courts have encountered significant difficulty addressing this issue. Case law and legislation are conflicting here. Religious discrimination legislation and equality legislation are perceived to be acutely irreconcilable by both claimants and academics. For instance, the 2015 Equality and Human Rights Commission Report – *Review of Equality and Human Rights Law Relating to Religion and Belief* – noted the difficulties and tensions created within the legal framework by equality law addressing freedom of religion.[88] Arguably this is because future courts are likely to follow the Court of Appeal decisions in *McFarlane*[89] and *Ladele*.[90] This follows because the later decision in *Eweida*[91] still held that religious freedoms were categorised as choices by the employees.[92] In other words, individual choices were weighed against the deprivation of services and, in the end, did not win.[93]

Hierarchy arising from the protected characteristics

It was earlier stated that in the EA 2010 religion and belief sits alongside eight other 'protected characteristics'. This is important because there are concerns that religion or belief is different from the other characteristics and so should be protected differently. Sedley LJ held in *Eweida v British Airways PLC*[94] that while all the other protected characteristics apart from religion or belief 'are objective characteristics of individuals; religion and belief alone are matters of choice.'[95] This is an interesting comment. Are the courts actively treating religion and belief differently?

Fears of a hierarchy within equality law can be contrasted with the assessment made by Munby LJ in R *(Eunice Johns and Owen Johns) v Derby City Council and Equality and Human Rights Commission*.[96] According to Munby: '[t]he starting point of the common law is thus respect for an individual's religious principles coupled with an essentially neutral view of religious beliefs and benevolent tolerance of cultural and religious diversity.'[97]

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[84] D Hoffman and J Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (3rd edn, Pearson, 2010) 277–278. This call for pluralism was similarly supported by the ECtHR finding for Ms Eweida's religious freedom, whereby it was noted: 'On one side of the scales was Ms Eweida's desire to manifest her religious belief… [which] is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity;' by doing so this emphasises the connection between religious pluralism and religious freedom – *Eweida v United Kingdom* (2013) 57 EHRR 8 [94]. See further *Hasan and Chaush v Bulgaria* (2002) 34(6) EHRR 1339 [62].

[85] Ibid.

[86] J Rivers, 'The Presumption of Proportionality' (2014) 77(3) MLR 409, 422 – see section 149(1) of the Equality Act 2010.

[87] R Sandberg, 'The right to discriminate' (2011) Ecc. L.J. 157.

[88] P Edge and L Vickers, 'Equality and Human Rights Commission Report 97 – Review of Equality and Human Rights Law relating to Religion and Belief' Equality and Human Rights Commission (Manchester, September 2015) www.equalityhumanrights.com/sites/default/files/publication_pdf/RR97_Review%20of%20equality%20and%20human%20rights%20law%20relating%20to%20religion%20or%20belief.pdf (accessed 5th December 2015), 40.

[89] *McFarlane v Relate Avon Limited* [2010] IRLR 872.

[90] *Islington Borough Council v Ladele (Liberty Intervention)* [2010] 1 WLR 955.

[91] *Eweida v United Kingdom* (2013) 57 EHRR 8.

[92] See further R McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) MLR 277, 279.

[93] *Eweida v United Kingdom* (2013) 57 EHRR 8. Partly dissenting judgment at [6]. See also *Bull v Hall* [2013] UKSC 73.

[94] *Eweida v British Airways PLC* [2010] EWCA Civ 80.

[95] Ibid [40].

[96] *R (Eunice Johns and Owen Johns) v Derby City Council and Equality and Human Rights Commission* [2011] EWHC 375 [41].

[97] Ibid [41]. See also J Munby, 'Law, Morality and Religion in the Family Courts' (2014) 16 Ecc. L.J. 131, 137.

In contrast, Gwyneth Pitt identifies a hierarchy arising within the protected characteristics. Pitt does so by arguing that the impact of the Court of Appeal decision in *Eweida v British Airways*[98] is 'effectively to introduce a hierarchy of protection in relation to different beliefs.'[99] Lucy Vickers makes a bolder assertion and notes that the inevitability of a 'hierarchy of protection' being created in the implementation of the EA 2010, with religion and belief being treated differently from equality on other grounds.[100] Logically, this would result in two contrasting possibilities: 1) a danger of levelling down of protection for the other grounds; or 2) the creation of a hierarchy of protection as between grounds of discrimination.[101] This highlights a failure by EA 2010 to clearly define the relations between the protected characteristics.

The creation of a hierarchy, with religion towards the higher echelons of such a hierarchy, can be dismissed following the trend set by case law. The earlier assertion that *Eweida* was the first adverse determination for the United Kingdom regarding Article 9 supports such a finding.[102] Religious equality law failed to protect Ms Eweida's right to manifest her religion and belief. Matthew Gibson writing in the Cambridge Law Journal has also identified that English law concerning religious discrimination in the workplace has shown that the 'courts often marginalise religion in the face of other legitimate aims'.[103] This dismisses any idea of a hierarchy with religion and belief at the higher end, or anywhere near top.

Wearing of religious symbols

This paper now moves, secondly, to the protection of religious symbols. The issue of crosses is a recurring one in equality law: the remaining two conjoined applicants in *Eweida v United Kingdom*,[104] Ms Chaplin and Ms Eweida, both brought claims regarding wearing the Christian cross at work. In the earlier case of *Chaplin v Royal Devon & Exeter NHS Foundation Trust*[105] Ms Chaplin's claim failed, following precedent set in *Eweida v British Airways PLC*.[106] The domestic courts dismissed Ms Eweida's claim that her employers (British Airways) had discriminated against her on the ground of her religious belief, within the meaning of regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003/1. It was held that the provision, criterion or practice that jewellery or religious items should be concealed was applicable to all employees regardless of their faith, and did not put Christians as a group at a 'particular disadvantage when compared with others persons' as required by regulation 3(1)(b). The Court of Appeal's judgment further held that Article 9 was inapplicable since the restriction on wearing a cross visibly at work did not constitute an interference with the manifestation of belief.[107] Yet, even if it did, the court considered this limitation to be proportionate.[108] Consequently both Ms Eweida and Ms Chaplin complained that domestic law failed adequately to protect their right to manifest their religion, contrary to Article 9 of the

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[98] *Eweida v British Airways* [2010] IRLR 322 (CA).

[99] Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (n 14) 398.

[100] L Vickers, 'Promoting equality or fostering resentment? The public sector equality duty and religion and belief' (2011) 31 LS 135, 158.

[101] L Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?' (2010) 12 Ecc. L.J. 280, 301.

[102] M Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (2013) 15(2) Ecc. L.J. 191, 193. To support this trend, see further: *Bull v Hall* [2013] UKSC 73; *Mba v Mayor* [2013] EWCA Civ 1562; *Black & Anor v Wilkinson* [2013] EWCA Civ 820, and *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

[103] M Gibson, 'The God 'Dilution'? Religion, Discrimination and the case for Reasonable Accommodation' (2013) 72(3) CLJ 578, 616.

[104] *Eweida v United Kingdom* (2013) 57 EHRR 8. But not, it seems, in the ECtHR: the case of *Eweida v United Kingdom* was the first time that the ECtHR addressed the question of applicants wearing crosses – P Smith 'Book Review: E Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* by Erica Howard (Routledge, 2011)' (2014) Ecc. L.J. 226, 227.

[105] *Chaplin v Royal Devon & Exeter NHS Foundation Trust* (2011) 13 Ecc. L.J. 242.

[106] *Eweida v British Airways PLC* [2010] EWCA Civ 80.

[107] Ibid [22] (Sedley LJ).

[108] *Eweida v British Airways PLC* [2010] EWCA Civ 80 [38].

Convention, taken alone or in conjunction with Article 14.

The judgement concerning religious symbols was a particularly anticipated and intriguing decision. As noted, within *Eweida*,[109] the ECtHR found that Ms Eweida had a right to manifest her religion in the workplace. By a 5–2 majority the ECtHR found that the domestic courts had given too much weight to BA's wish to protect its corporate image.[110] On the other hand, manifestation of religion may be limited because the ECtHR found otherwise for Ms Chaplin. It was held that the refusal by the health authority to allow Ms Chaplin to remain in post while wearing her cross was found to be an interference with her freedom to manifest her religion.[111] However, the health and safety concerns of the employer (preventing infection on a hospital ward) amounted to a legitimate aim and a proportionate restriction on Ms Chaplin's freedom to manifest her religious belief within the margin of appreciation given to the state.[112] In sum, analysis points to manifestation being limited for both proportionate reasons and justified as part of a legitimate aim.[113] This further reaffirms the finding that decisions are being made through jurisprudential balancing of a conflicting rights discourse. It is these conflicting jurisprudential approaches which provide the basis for proposals to amend the EA 2010. After considering the leading equality law case impacting religion, this paper now turns to consider more recent appellate cases.

Greater Glasgow Health Board v Doogan

Freedom of religious conscience was consid*ered by the Supreme Court in Greater Glasgow Health Board v Doogan*.[114] This case highlights an instance where equality law interacts with freedom of religion. Both Miss Doogan and Mrs Wood were practising Roman Catholics and they worked at South General Hospital in Glasgow as Labour Ward Co-ordinators. They objected to having any involvement in the process of abortion. Despite this case originating in Scotland, the relevant legislation is the same in Scotland as in England and Wales.[115] As such, this makes the judgment insightful as an indication of the scope of the Abortion Act 1967 and the EA 2010 in England as well.

Section 4 of Abortion Act 1967 was considered. This was because the Supreme Court examined the right to conscientious objection to abortion. Section 4 contains a 'conscience clause' for conscientious objectors. The conscience clause in s.4(1) was identified as key to determining the scope of the right of conscientious objection,[116] in particular the phrase 'to participate in', which protects an individual from participating in an abortion. As such, the question put to the court was one of pure statutory construction.[117]

In *Doogan*, Lady Hale ascribed a narrow meaning for the purposes of conscientious objection. For example, it was held that participation 'means taking part in a "hands-on" capacity.'[118] Lady Hale interpreted the intention of Parliament to authorise the whole course of treatment in a narrow way. This interpretation excluded from the conscience clause ancillary, administrative and supervisory tasks.

The whole course of treatment was interpreted to include work activity not included in the narrow conscience clause.[119] As such, the nurses' complete job description was not covered by the protection offered by conscience clause. The nurses were required to perform services that infringed their religious conscience, but which were not covered by the statutory conscience clause.

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[109] *Eweida v United Kingdom* (2013) 57 EHRR 8.

[110] Ibid [112]–[114].

[111] Ibid [97].

[112] Ibid [99].

[113] Ibid [100].

[114] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

[115] S.217 Equality Act 2010.

[116] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [10]–[11] per Lady Hale.

[117] Ibid.

[118] Ibid [37–38] per Lady Hale.

[119] Ibid [39]–[40] per Lady Hale. See further B Hale, 'Secular Judges and Christian Law' (2015) 17(2) Ecc. L.J. 170, 177.

Freedom of thought, conscience and religion in relation to equality law was raised in the judgment.[120] By deciding that the case concerned solely statutory construction, Lady Hale considered important arguments that involve freedom of religion and equality law.[121] It was held that argument made under the EA 2010 involving discrimination in this case should be made under a different forum. *Doogan* was held to resolve issues involving statutory interpretation; *Doogan* was held not the correct setting to resolve matters of indirect discrimination under the EA 2010.

Finding against the protection offered by the 'conscience clause' under the Abortion Act 1967 is a controversial step. The case can be read in two ways. First, it may be viewed as a narrow victory for freedom of religious conscience. Such a level of respect is welcome in hospitals. As the advocate Alasdair Henderson points out this is for the sake of women undergoing an abortion procedure, because they may rather not be treated by someone who strongly disagrees with what is happening.[122]

On the other hand, constitutional lawyer Richard Ekins has written than this case 'undercut the provision that Parliament made to protect conscience.'[123] The missed opportunity here to protect manifestation of religion highlights a limitation placed upon freedom of religious conscience. Freedom of religion here interacted with equality law and consequently the 'conscience clause' for conscientious objectors was not upheld. Does this require further protection for religious conscience? Does this require further protection for 'conscience clauses'?

[120] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68 [24] (Lady Hale).

[121] Ibid [22] (Lady Hale).

[122] A Henderson, 'Conscientious objection to abortion: Catholic Midwives lose in the Supreme Court' https://ukhumanrightsblog.com/2014/12/28/conscientious-objection-to-abortion-catholic-midwives-lose-in-supreme-court/ 18 September 2018.

[123] R Ekins, 'Abortion, Conscience and Interpretation – Case Comment: Greater Glasgow Health Board v Doogan [2014] UKSC 68' (2016) 132 LQR 6, 11.

Lee v Ashers Baking Company Ltd

An important recent example mixing equality legislation with human rights principles can be seen in *Lee v Ashers Baking Company Ltd*.[124] The Supreme Court here considered the right of a bakery and its owners to freedom of religion and freedom of expression under Articles 9 and 10 ECHR.[125] In Northern Ireland, Ashers Baking Company Ltd refused to supply a cake iced with the message 'support gay marriage'. The cake was ordered by Mr Lee and this service was denied to him. Mr Lee was informed by the bakers that his order could not be fulfilled and Mr Lee was given an apology and full refund.[126] The given reason for the refusal was that the message was not endorsed by the bakery owners.[127] The Supreme Court had to consider whether this was unlawful associative direct discrimination.[128]

In her judgment, Lady Hale recognised that there were very important questions raised by this appeal which were 'undoubtedly of general public importance, not only in Northern Ireland but also in the rest of the United Kingdom.'[129] The Court of Appeal had found that the refusal to bake the cake was direct discrimination on grounds of sexual orientation, contrary to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. The provision of services here raises issues at the heart of equality law.[130]

[124] *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

[125] Ibid [1] (Lady Hale).

[126] Ibid [12] (Lady Hale).

[127] Ibid [1] (Lady Hale).

[128] Ibid.

[129] Ibid [7].

[130] See further cases relating to the provision of services – *Islington v Ladele* [2008] UKEAT 0453_08_1912; Ladele v London Borough of Islington [2009] EWCA Civ 1357; Lautsi v Italy (2010) 50 E.H.R.R. 42; McFarlane v Relate Avon Limited [2010] EWCA Civ 880; Eweida v British Airways PLC [2010] EWCA Civ 80; Black & Anor v Wilkinson [2013] EWCA Civ 820; Mba v Mayor [2013] EWCA Civ 1562; Eweida v United Kingdom (2013) 57 EHRR 8; Bull v Hall [2013] UKSC 73; R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages [2013] UKSC 77.

The requirement for a Christian bakery to provide a message set against their protected religious conscience shows how arguments made in the name of equality apply. For instance, Mr Lee was financially supported by the Equality Commission for Northern Ireland. The litigation was brought on the basis that there was an infringement to Mr Lee's individual equality and dignity.[131]

Finding for the bakery in an unanimous decision, Lady Hale held that the bakery would be entitled to refuse to do whatever the message conveyed by the icing on the cake.[132] It did not matter whether the message was support for a political party or support for a particular religious denomination, in Lady Hale's view the bakery would be permitted not to provide such a service.[133] Lady Hale is clear that the 'objection was to the message and not to any particular person or persons.'[134] As such, a bakery would be entitled to refuse to provide a variety of messages.

In considering the alternative outcome: had the judgment not found for freedom of thought, conscience and religion, Lady Hale concedes that this would oblige the bakery, 'to supply a cake iced with a message with which they profoundly disagreed.'[135] Indeed, no obligation was imposed to provide a service with a message that conflicted with the baker's beliefs. This is because obliging a person to manifest a belief which they do not hold is a limitation on Article 9(1) rights to freedom of thought, conscience and religion.[136] Lady Hale made clear under Article 9 that '[o]ne is free both to believe and not to believe.'[137] By upholding freedom of thought, conscience and religion, here the level of freedom put forward may give more credit and substance to freedom of thought, conscience and religion. This level of freedom strengthens individual (and collective) conscience against challenges made by equality legislation by not requiring individuals to act against protected conscience. Equality legislation did not here require individuals to provide services that require them to act against their legally protected conscience. To do so would be very chilling.

Article 9 requires the courts to pay 'respect to individual's…religious principles'[138] and so finding for the appellants under Article 9 the judgment develops the law surrounding freedom of thought, conscience and religion. The case has ramifications for freedom of religion. Although *Ashers* does not insert a conscience clause into equalities legislation,[139] it does strengthen arguments made for freedom of religion and by doing so is strengthens the right to freedom of thought, conscience and religion.

Ashers shows the way forward for the EA 2010. Although this case did not go as far as inserting a conscience clause (for religion) into equalities legislation it is not very difficult to imagine a situation where this needs to happen. An example in the Ashers judgment suggests: 'Christian printing business being required to print leaflets promoting an atheist message'.[140] A conscience clause inserted into equalities legislation would prevent future litigation of this sort. The tensions surrounding equality law and religious freedom have been identified. This helps to demonstrate the need for an amendment to the EA 2010 in respect of its treatment of religion.

There is growing support to introduce a conscience clause to benefit religion.[141] There have been suggestions for an approach to a conscience

[131] *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [35].

[132] Ibid [55] per Lady Hale.

[133] Ibid.

[134] Ibid [34] per Lady Hale.

[135] Ibid [55].

[136] *Buscarini v San Marino (1999) 30 EHRR 208; Commodore of the Royal Bahamas Defence Force v Laramore* [2017] 1 WLR 2752. See M Pearson, 'Article 9 at a Crossroads: Interference Before and After Eweida' (2013) HRLR 1, 22.

[137] *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [49] (Lady Hale).

[138] J Munby, 'Law, Morality and Religion in the Family Courts' (2014) Ecc. L.J. 131, 137.

[139] Such as that discussed earlier for conscientious objectors under the Abortion Act 1967.

[140] *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [47].

[141] See: N Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) Ox. J Law Religion 5(3) 385; S Smet, 'The Pragmatic Case for Legal Tolerance' (2019) Oxford J Legal Studies 39(2) 344, I Leigh, 'The Courts and Conscience Claims' in J Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart, 2019) ch 6.

clause in the form of 'reasonable accommodation'.[142] This is a method to allow space for conflicting views, particularly those held by religious individuals. The suggested conscience clause could itself be a form of reasonable accommodation. A process of legal tolerance[143] allows for the marginalised, protected views held by religious individuals that conflict with equality law to be accommodated. This process enables the courts to adjudicate the boundaries set by any conscience clause, keeping said conscience clause under control.

A proposal for an amendment to equalities legislation can be found in the current conscience clause in s.4(1) of the Abortion Act 1967. In particular, the wording 'to participate in any treatment authorised by this Act to which he has a conscientious objection … the burden of proof of conscientious objection shall rest on the person claiming to rely on it.' This provides a basis that can be transferred to the EA 2010. A section could be inserted into the EA 2010 stating:

> 'to participate in any service provision authorised by this Act to which he has a conscientious objection … the burden of proof of conscientious objection shall rest on the person claiming to rely on it.'

This has two benefits: first, the clause impacts service provision – this has been shown to be the area attracting most litigation[144] and the proposed clause allows the anti-discrimination legislation found in the EA 2010 to still operate in this contested area, subject to an individual proving a valid exemption. Second, the burden of proof remains upon those seeking to rely upon the conscience clause. In litigation this may often be the defendant and so this provides a barrier to frivolous claims. It follows calls from Lady Hale for the law to develop more protection for individuals who would find providing services contrary to the pursuance of their own conscience and manifestation of religious freedom.[145]

The impact of such a proposal would provide claims of religious freedom sufficient weight.[146] In effect this would prevent the proposed situation arising in *Ashers* from being widened: where an individual is required to provide any form of service against their conscience. Further protected is provided for freedom of conscience. This would help equality law to strike the correct balance between protecting religious freedom and the rights of others.[147]

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[142] For instance: M Gibson, 'The God 'Dilution'? Religion, Discrimination and the case for Reasonable Accommodation' (2013) 72(3) CLJ 578, 591; K Alidadi, *Religion, Equity and Employment in Europe: The Case for Reasonable Accommodation* (Hart, 2019).

[143] See S Smet, 'The Pragmatic Case for Legal Tolerance' (2019) Oxford J Legal Studies 39(2) 344, 349.

[144] See *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *Lautsi v Italy* (2010) 50 E.H.R.R. 42; *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880; *Mba v Mayor* [2013] EWCA Civ 1562; *Black & Anor v Wilkinson* [2013] EWCA Civ 820; *Eweida v United Kingdom* (2013) 57 EHRR 8; *Bull v Hall* [2013] UKSC 73; *Glasgow Health Board v Doogan* [2014] UKSC 68; *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77; *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 [35].

[145] B Hale, 'Freedom of Religion and Belief' (Annual Human Rights Lecture for the Law Society of Ireland, 13 June 2014) www.supremecourt.uk/docs/speech-140613.pdf (accessed 25 September 2017).

[146] J Rivers, 'The Secularisation of the British Constitution' (2012) 14(3) Ecc. L.J. 371, 399.

[147] *Eweida v United Kingdom* (2013) 57 EHRR 8 [114].

CONCLUSION

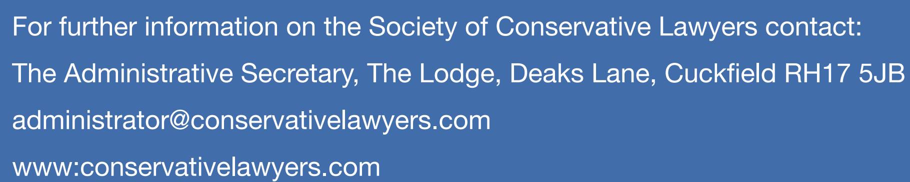
Equality law has been shown to frequently interact with religion. The tensions impacting religious freedom have been demonstrated through considering the marginal victory for freedom of religion in *Eweida v The United Kingdom*;[148] statutory interpretation involving the Abortion Act 1967 in *Greater Glasgow Health Board v Doogan* [2014] UKSC 68;[149] and the opportunity presented for a conscience clause in *Lee v Ashers Baking Company Ltd*.[150] All these cases demonstrated the dispute surrounding available protection under the EA 2010. As such, these cases have demonstrated the need for amendment to the EA 2010.

A conscience clause provides an amendment to the EA 2010. This conscience clause follows the spirit of the conscience clause found in the Abortion Act 1967. Such an amendment improves the EA 2010 by providing a way to maintain protection for religion and resolve disputes generated by equality law legislation.

[148] Ibid.

[149] *Greater Glasgow Health Board v Doogan* [2014] UKSC 68.

[150] *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.



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