IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application Numbers 48420/10 and 59842/10

(1) NADIA EWEIDA
(2) SHIRLEY CHAPLIN

v

UNITED KINGDOM

RESPONDENT'S OBSERVATIONS

Foreign & Commonwealth Office
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LONDON SW1A 2AH

14 October 2011

Introduction

1. The Government are requested to make observations on the following questions:

    1. In each case did the restriction on visibly wearing a cross or Crucifix at work amount to an interference with the applicant's right to manifest her religion or belief, as protected by Article 9 of the Convention?

    2. In the event that there was such an interference: (a) in the first applicant's case, was there a breach of the State's positive obligation to protect the applicant's rights under Article 9? (b) in the second applicant's case, was the interference "necessary in a democratic society"?

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

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. Additionally, for the reasons set out below at paragraphs 43-49, Mrs Chaplin failed to exhaust domestic remedies as required by Article 35(1). Alternatively, if either or both claims are found to be admissible, they should be dismissed on their merits as they do not disclose a breach of any Convention rights.

Question 1: In each case did the restriction on visibly wearing a cross or Crucifix at work amount to an interference with the applicant's right to manifest her religion or belief, as protected by Article 9 of the Convention?

3. The Government submit that (a) the applicants' wearing of a visible cross or Crucifix was not a manifestation of their religion or belief within the meaning of Article 9, and (b), in any event, the restriction on the applicants' wearing of a visible cross or Crucifix was not an "interference" with their rights protected by Article 9.

(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 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.

7. These cases can be contrasted with those concerning acts intimately related to religious beliefs and which do constitute "practice" of a religion or belief in a generally recognised form so as to fall within Article 9. Thus in *Sahin v Turkey* (2007) 44 EHRR 5 the Grand Chamber endorsed the findings of the Chamber that the practice of wearing a headscarf by a Muslim woman could be assumed to fall within Article 9. The Grand Chamber accepted at §78 that the applicant was "obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith".

8. The distinction between acts motivated by religion or belief falling outside Article 9 and protected religious practice has also been drawn by the UK's domestic courts, applying the Convention jurisprudence. In *R (Playfoot) v Governing Body of Millais School* [2007] EWHC 1698 the court considered whether the wearing of a "purity ring"

by a Christian girl at school to show her commitment to sexual abstinence prior to marriage was a manifestation of her religion or belief. The court noted the Strasbourg jurisprudence and the requirement that if a belief takes the form of a "perceived obligation to act in a specific way, then, in principle doing that act pursuant to that belief is itself a manifestation of that belief in practice" (see *Playfoot* §21). However the act must, as the court held, be "'intimately linked" to the belief (ibid). The court concluded that the wearing of the purity ring was not "intimately linked" to the belief in chastity before marriage and that the claimant was "under no obligation, by reason of her belief, to wear the ring." The court held, therefore, that Article 9 was not engaged (§23-24).

9. In these proceedings Ms Eweida submits that any sincere expression of religious belief or any act sincerely motivated by such a belief is protected by Article 9, and that the courts should not question the extent to which the act in question is required by the individual's faith (see Statement of Alleged Violations of the Convention §§19, 24-25, 30-31). That is not the approach taken in the Strasbourg jurisprudence. As indicated above, the Court has repeatedly held that not every act or practice that is motivated or inspired by a sincere religious or other belief falls within Article 9. It is necessary that the act should constitute a practice which is intimately linked to the religious belief and which follows a generally recognised form. This does not mean that everyone who professes the religion must agree that a particular practice is obligatory (see, for example, the wearing of the headscarf by some but not all Muslim women), but it must be established that in performing the act in question the individual is doing something which is a generally recognised form of religious practice.

Application of law to present cases

10. The Employment Tribunal recorded that "it was common ground that [Ms Eweida] wished to wear the cross visibly as a matter of personal expression of faith, and not in response to a scriptural command" (§5.8). The Court of Appeal noted: "on the evidential basis now adopted on [Ms Eweida's] behalf, [she had] an entirely personal objection [to British Airways' ("BA") uniform policy] neither arising from any doctrine of her faith nor interfering with her observance of it, and never raised by any other employee" (§34). Similarly Mrs Chaplin regarded the Crucifix she wore as "a personal statement of faith" (see Application to ECHR §6). In neither case is there any

suggestion that the wearing of a visible cross or Crucifix was a generally recognised form of practising the Christian faith, still less one that is regarded (including by the applicants themselves) as a requirement of the faith. The applicants' desire to wear a visible cross or Crucifix may have been inspired or motivated by a sincere religious commitment. It was not, however, a recognised religious practice or requirement of the Christian faith. It therefore does not fall within the scope of Article 9.

11. This does not mean that an individual who seeks to express their beliefs or to communicate their commitment to their faith is not protected by the Convention at all. The protection comes in principle, however, from Article 10 and not Article 9. It is Article 10 that is intended to protect expressions or statements about individuals' beliefs. Thus, for example, in the case of *Arrowsmith*, while the Commission held that the arrest of the applicant for handing out leaflets about military service in Northern Ireland did not engage Article 9, it fell squarely within Article 10. The present cases are similarly concerned with expression and not religious practice. Both applicants were permitted to wear a cross or Crucifix at work provided it was under their clothing and were offered alternative work in which they could wear a visible cross/Crucifix. Both wished, however, to be able to communicate their membership of the Christian faith to others through the wearing of a cross/Crucifix which would be visible at all times in whatever work they did. Employees who wish to communicate their beliefs about matters of religion in this way may fall within Article 10(1) and an employer who wishes to limit their expression may be required to justify doing so pursuant to Article 10(2). Such individuals are not, however, "practising" their religion simply because their acts of expression are motivated by it, and their case does not fall to be determined under Article 9.

(b) Was there an interference?

12. If, contrary to the above, the applicants' wearing of a visible cross or Crucifix was a "practice" of their religion so as to fall within Article 9, there was no interference with their rights under that provision.

Legal framework

13. 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 does not accommodate a religious practice, 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" which makes clear that in such cases there will be no interference with Article 9 (§24).

14. 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 teaching 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, at p 108: "by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs."

(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).

15. 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).

16. It is suggested by Ms Eweida that the approach of the European Court and Commission to these issues has "not always been consistent" and she refers to the decisions of the *Jewish Liturgical Association* and *Begum* (see Statement of Alleged Violations of the Convention §40-41). It is notable, however, that the applicant has not cited any authorities that she regards as inconsistent with one another. Contrary to her submission, and as Lord Bingham observed in the *Begum* case, the Strasbourg authorities are, in fact, "coherent and remarkably consistent". This is borne out by the summary of the case law set out above.

17. 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

18. The applicants' claims are significantly weaker than those set out above at paragraphs 14-15 in which there was held to be no interference with Article 9. In cases such as *Ahmad*, *Konttinen* and *Stedman* the applicants were faced with the choice of acting contrary to what they considered to be a requirement of their religion or be dismissed from their employment. In *Begum* the claimant was required to attend a different school if she wished to wear the jilbab. In the present cases even if, contrary to the above, the wearing of a visible cross or Crucifix was protected by Article 9(1), it is accepted by both applicants that it was not a requirement of their religion but arose from a personal choice. No pressure was placed on either applicant to change their religious views and both were told that they could wear the cross or Crucifix provided that it was covered when dealing with customers or patients (as, indeed, Ms Eweida had done from 1999-2006). Furthermore, not only were both applicants free to resign and to find alternative work in which they would be permitted to wear a visible cross or Crucifix, but both applicants were offered the opportunity to do so with the same employer for the same pay in different positions. In those circumstances, if there was no interference in cases such as *Ahmad*, *Konttinen*, *Stedman* or *Begum*, the same must be true, *a fortiori*, in the present cases.

Question 2(a) In the event that there was an interference in the first applicant's case, was there a breach of the State's positive obligation to protect the applicant's rights under Article 9?

19. Ms Eweida was employed by a private company. She can only rely on Article 9 of the Convention if the state had a positive obligation to ensure that a private employer permitted her to wear a visible cross at work. She argues that Article 9 imposes such a positive obligation (Statement of Alleged Violations of the Convention §37-38).

20. 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.

21. *Otto-Preminger v Austria* [1994] EHRR 34 is the sole case the applicant relies upon to assert a positive duty pursuant to Article 9. It is not, however, an Article 9 case. 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).

22. 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 applicants by third parties prevented them practising their religion freely. That is nothing like the present case. Ms Eweida 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 hers. It cannot be said that the refusal of BA to permit the applicant to wear a visible cross when she checked in customers over a period of a few months (while it considered her request to change the uniform policy) prevented the applicant exercising her freedom to hold religious beliefs or practising her religion to such an extent that the state had a positive obligation to intervene. 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 limitation on their rights and freedoms. The same is true of a person who chooses to work for a private employer with a uniform code which may not permit them to fully express their religious beliefs or other convictions through dress. The state has no positive obligation to intervene to prevent the employer applying their uniform policy. Where the individual in question is free to resign and seek employment elsewhere or practise their religion unfettered outside their employment, that is sufficient to guarantee their Article 9 rights in domestic law.

23. Even if that is wrong, and the state does have some positive obligation in relation to dress codes applied 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 is any positive obligation on the UK to protect Ms Eweida's Article 9 rights from interference by BA, putting in place the 2003 Regulations (and now the Equality Act 2010) satisfies that obligation.

24. Furthermore, even if BA had been part of the state rather than a private employer, there would still have been no breach of Article 9 as any interference with Ms Eweida's rights would be justified under Article 9(2). Ms Eweida issued proceedings pursuant to the 2003 Regulations. Her claim was dismissed by the Employment Tribunal and her appeals to the Employment Appeal Tribunal and Court of Appeal were unsuccessful. The Court of Appeal considered whether, even if BA's uniform policy placed Christians at a particular disadvantage, the policy was a proportionate means of achieving a legitimate aim. It concluded at §§30-39 that it was. The chronology and the Court of Appeal's reasoning is as follows:

    (i) The Court of Appeal concluded that the aim of an airline in having a uniform code for its check-in staff was a legitimate one (§31). That is obviously correct. BA was entitled to conclude that the wearing of a uniform played an

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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 required 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.

important role in maintaining a professional image and strengthening recognition of the company brand and it had a contractual right to insist its employees wore a uniform. It was a matter for BA that its particular choice of uniform included a blouse for women to be worn with a cravat and without visible necklaces.

(ii) The Court of Appeal also noted that the rule that, as part of the uniform, visible items round the neck were not permitted had caused no known problem for Christians, including, apparently, for seven years for Ms Eweida herself. The uniform was worn by approximately 30,000 staff who had contact with the public. As the Court noted, Ms Eweida accepted that her objection to BA's dress code was "entirely personal" and did not arise "from any doctrine of her faith nor interfering with her observance of it" (§34).

(iii) The Court noted that Ms Eweida raised an objection to the uniform code in 2006 "not by seeking a revision of the code but by reporting to work [twice] in breach of it" (§34). She then lodged a formal grievance in June 2006. Without waiting for the grievance to be resolved, she again breached the code and on this occasion, 20 September 2006, was sent home (ibid).

(iv) On previous occasions when employees had raised concerns about the uniform code on religious grounds, BA viewed the matter "through the perspective of diversity, and sought to accommodate staff diversity where appropriate" (§35). Other than Ms Eweida, every other individual who had requested accommodation of their religious circumstances had observed the existing policy until a change was authorised (ibid).

(v) While the matter was being resolved, Ms Eweida was offered work by BA on the same pay but involving no public contact and at which she could wear a visible cross. She refused and chose instead to stay at home and claim her pay as compensation (§33).

(vi) In November 2006 BA announced a review of its policy on the wearing of visible religious symbols and consulted with staff members and trade union representatives.

(vii) On 19 January 2007 BA announced a new policy. With effect from 1 February 2007, BA permitted the visible wearing of religious and charity symbols where authorised. Certain symbols, such as the cross and the star of David, were given immediate authorisation.

25. As the Court of Appeal observed, it is difficult to see how a previously unobjectionable uniform policy could become disproportionate as soon as the applicant raised a complaint about it (§37). Once the applicant raised the issue, it was then conscientiously addressed and the policy changed within a few months. The Court of Appeal concluded that both during the years that the policy operated without objection and while it was being reconsidered following Ms Eweida's complaint, the uniform policy constituted a proportionate means of achieving a legitimate aim pursuant to the 2003 Regulations. That was plainly a conclusion that the Court of Appeal was entitled to reach, and it is notable that in her application to this Court, Ms Eweida does not take issue with the Court of Appeal's reasoning or, it seems, with its conclusion in relation to justification.

26. The Court of Appeal's conclusion applies in substance equally to Article 9. Pursuant to Article 9(2) the right to freedom of religion may be limited if necessary to protect the rights of others. That includes the contractual right of an employer to require its employees who deal with the public to wear a prescribed uniform. Where a complaint is made on religious grounds about a uniform policy previously found to be unobjectionable, the employer is entitled to take some time to consider the objection. When the employer does so conscientiously and agrees to change the uniform policy, and when he offers the affected employee alternative work in the interim, the employer has acted entirely appropriately. Even if Article 9 is engaged, any interference with Ms Eweida's rights was therefore justified and proportionate, and there was no breach in those circumstances.

Question 2(b): In the event that there was an interference in the second applicant's case, was the interference "necessary in a democratic society"?

27. The Court has noted in a number of cases concerning the wearing of religious symbols in public institutions that it is for national authorities to strike a balance between the

rights of an individual who wishes to display the symbol, and the authorities' assessment of the rights and freedoms of others, the protection of public order and health (see, for example, *Sahin* §109-110, *Dogru v France* (2009) 49 EHRR 8 §71). These are issues on which different opinions can legitimately be held in various members of the Council of Europe and within each democratic society, and it is therefore appropriate to accord national authorities a wide margin of appreciation.

28. The purpose of the Royal Devon & Exeter NHS Foundation Trust's ("the Trust") uniform policy in prohibiting the wearing of necklaces was "to reduce the risk of injury when handling patients" (Employment Tribunal decision §12). The Trust's concern was that a visible chain might be seized and pulled by a "disturbed patient" (ibid §18). All nurses who were engaged in direct patient care either of a clinical or personal nature were thus prohibited from wearing a visible necklace as well as other jewellery (ibid §22). The Tribunal accepted that by far the most important aim of the uniform policy was the health and safety of staff and patients (ibid §29). It concluded that that was a legitimate aim, and, by a majority, that it was pursued in a proportionate manner. The Tribunal also noted that the Trust offered to re-deploy Mrs Chaplin to non-clinical duties on the same pay (§22) and that it made other suggestions to enable her to wear the Crucifix, such as attaching it to her identity badge (§21) or wearing a necklace under her clothes in a way that could not be grabbed by patients (§20).

29. Mrs Chaplin in her application to the Court does not suggest that the Trust's aims of reducing risks to health and safety were not legitimate. Nor does she appear to suggest that its policy was disproportionate. Under those circumstances it is hard to see on what basis she contends that Article 9 was breached. Mrs Chaplin does assert that if "Sikh and Muslim medical personnel are permitted to breach infection control for religious reasons (wearing of the *Hijab*, *Sikh Kara bracelet*, or Islamic modesty rules), there is a requirement of weighty reasons for the banning of Mrs Chaplin from wearing a small Crucifix" (applicant's submissions §40). That submission is wrong on the facts. Sikh nurses were not permitted by the Trust to wear the Kara bracelet or the Kirpan (Employment Tribunal §15 and §26). The Trust also did not permit Muslim staff to wear clothing that it regarded as a risk to health and safety. It prevented the wearing of a flowing Hijab (ibid §16) and permitted only the wearing of "close fitting sports Hijab akin to a Balaclava helmet and with no loose ends" (ibid). It is simply incorrect to

suggest that those of other religions were "permitted to breach infection control for religious reasons." The Trust refused to permit any medical staff to wear jewellery or clothing considered to be a risk to the health and safety of patients and staff. That included instances where the jewellery or clothing had religious significance. It is well within the margin of appreciation for a state medical authority to apply such a rule as a proportionate means to pursue the legitimate aim of securing staff and patient safety.

Question 3: Was there a breach of Article 14 taken together with Article 9 in either case?

Positive obligations in Ms Eweida's case

30. In Ms Eweida's case the arguments about positive obligations in relation to Article 9, set out at paragraphs 19-26, apply equally to her 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 Ms Eweida to wear a visible cross at work in breach of her employer's uniform policy. Alternatively, if the UK did have any positive obligations in this area, they were satisfied by the enacting of the 2003 Regulations.

Discrimination

31. The complaint pursuant to Article 14 taken with Article 9 appears to be that BA and the Trust's uniform codes were indirectly discriminatory. The applicants' claim that the policy should have been disapplied in their cases because the necklaces they wished to wear had religious significance. 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). The argument is that because of their religion, the applicants were in a different situation from other employees who wished to wear jewellery, and they should have been accorded different treatment as far as the application of their employers' uniform policy was concerned.

32. The applicants' claim of discrimination is manifestly ill-founded for three reasons: (i) they cannot show that because they are Christians they were in a different position with

regard to prohibitions on visible necklaces as compared to others so as to place them at some particular disadvantage, (ii) where a uniform policy does not interfere with the right to manifest religion or belief, it is very difficult to see how it could constitute indirect discrimination on grounds of religion, (iii) in any event, the uniform policy as applied to the applicants had a reasonable and objective justification.

33. Firstly, as to the applicants being in a different position to others vis-a-vis uniform policies because they were Christians, the Court of Appeal in Ms Eweida's case and the Employment Tribunal in Mrs Chaplin's case concluded that both applicants had failed to show their employers' uniform policy placed Christians at a particular disadvantage. They could only show that the policy affected them as individuals. It was noted by the Court of Appeal that of the 30,000 employees at BA, none other than Ms Eweida complained that, as Christians, they felt disadvantaged by the uniform policy.

34. In their Applications to this Court, the applicants argue that Article 9 protects matters of individual conscience and can apply to "a solitary individual". They argue that Article 9 does not require proof of general disadvantage among a particular group (see Ms Eweida's Statement of Alleged Violations of the Convention §25-36 and Mrs Chaplin's submissions §30). This is then used by the applicants to assert that there has been a breach of Article 14. That is to confuse the right to freedom of thought, conscience and religion protected by Article 9 with protection from discrimination pursuant to Article 14. It is, indeed, the case that all individuals are entitled to freedom of thought, conscience and religion regardless of whether their beliefs are shared by others. Discrimination, however, by its nature requires showing that an individual is treated less favourably or is placed by some policy or practice at a particular disadvantage because of some characteristic that does not relate simply to their own individual choice, conduct or behaviour. Discrimination requires disadvantage attributable not to individuals' personal actions but to their status (their sex, race, religion etc). As the Court has stressed, "Article 14 does not prohibit all difference in treatment but only those differences based on an identifiable, objective or personal characteristic or 'status' by which persons or groups of persons are distinguishable from one another" (*Clift v United Kingdom* (App No 7205/07, 13 July 2010). Where there is no evidence that others of the same sex, race, religion etc as the applicant were or would be placed at a particular disadvantage because of a policy or practice, there is no

"discrimination". If it is the individual conduct of the applicant or some personal choice that places them at a disadvantage, that is not discrimination on the grounds of some "characteristic" or "status" and they do not come within Article 14. There was no evidence in these cases before the domestic tribunals and courts that BA or the Trust's uniform policies disadvantaged Christians and therefore there was no discrimination on grounds of religion.

35. Secondly, for the reasons set out above, there was no interference with the applicants' right to manifest their religion or belief pursuant to Article 9. That is so, in particular, because employees who face work requirements incompatible with their faith, and have the option of resigning and seeking alternative employment, cannot claim for a breach of Article 9. 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 facts 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.

36. The Government accepts that it is possible to conceive of such cases. An example of such a case would be, as the Grand Chamber suggested in *Sahin*, if the banning of the Islamic headscarf had been specifically "directed against the applicant's religious affiliation" (§165). The Grand Chamber held that *Sahin* was not such a case, and that the same reasons which led to the conclusion that there was no violation of Article 9 "incontestably also apply to the complaint under Article 14" (ibid). In relation to the present cases, there might be discrimination in beach of Article 14 if, for example, Jewish employees were permitted to wear a visible star of David (which is not a requirement of the religion), but the applicants were not permitted to wear a visible cross/Crucifix because of some particular animus felt by their employers towards Christians. Their claim might then fall within Article 14 notwithstanding that there was

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 (or insofar as such claims are made, they are unsustainable on the facts). The applicants' complaint is the opposite, namely that they should have been treated differently to other employees. They claim that the requirements of the uniform policy should have been waived/disapplied in their cases to accommodate their religious beliefs.

37. 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,[2] and if BA and the Trust's uniform codes did not interfere with the applicants' freedom to manifest their Christian religion or beliefs, it is very hard to see how the uniform codes 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.

38. Thirdly, even if there was a disadvantage to which the applicants, as Christians, were subject because of their employer's uniform policy, it had an objective and reasonable

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2 The applicants rely on *Thlimmenos v Greece* (2001) 31 EHRR 14. 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. In *Thlimmenos* the conviction for refusing to serve in the Army was a clear interference with the applicant's 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)). *Thlimmenos* was not, therefore, a case in which there was found to be no interference with Article 9 and yet there was discrimination on grounds of religion under Article 14.

justification. Accordingly, it was proportionate and there was no unlawful discrimination under Article 14.

39. In Mrs Chaplin's case pursuant to the uniform policy she is seeking to challenge no nurse was permitted to wear a necklace or any jewellery other than a plain smooth ring and discreet earrings when engaged in clinical or personal care. The applicant's argument is that that placed at a disadvantage those who wished to wear jewellery for religious reasons (eg the wearing of the Kara bracelet by Sikhs or Mrs Chaplin wearing a visible Crucifix). The Trust's policy was applied to members of all religions and irrespective of whether the jewellery in question was regarded as a religious requirement, or, as in Mrs Chaplin's case, a personal choice. As indicated above at paragraph 28, the purpose of the policy was to protect the health and safety of staff and patients and was a proportionate means of achieving that end. That is self-evidently an objective and reasonable justification for any disadvantage suffered by those who wished to express their religious commitment through the wearing of particular articles. That is so, in particular, in Mrs Chaplin's case where any disadvantage she suffered was relatively minor, in that there was no religious requirement for her to wear a visible Crucifix and she was offered non-clinical work on the same pay. There was therefore no breach of Article 14.

40. In Ms Eweida's case the impugned policy was that no necklaces or other departures from BA's uniform policy were permitted for staff with contact with members of the public. As indicated above at paragraph 24, Ms Eweida made no objection to the policy for seven years. Once she raised an objection, BA considered it conscientiously and a few months later changed the policy. It offered her in the interim alternative work on the same pay in which she could wear a visible cross. The Court of Appeal concluded that even if BA's uniform policy temporarily placed Ms Eweida at a disadvantage in her expression of her religious commitment, in all of the circumstances of the case, BA's approach to the matter was a proportionate means of pursuing a legitimate aim. That conclusion was correctly reached and does not appear to be impugned by Ms Eweida in these proceedings. That also means that the claim of a breach of Article 14 is ill-founded.

41. Ms Eweida argues that BA's uniform policy discriminated against her as compared to adherents of other faiths because exceptions had previously been made for employees

for whom the wearing of an item was regarded as a religious requirement (such as Sikh employees who were permitted to wear the Kara bracelet or a turban, or Muslim employees permitted to wear a Hijab). She argues that that placed Christian employees at a disadvantage because there was no religious requirement to wear an article which would identify them as Christians (Statement of Alleged Violations of the Convention §21).

42. This argument is misconceived:

(i) Insofar as Ms Eweida complains that she was prevented from identifying herself as a Christian, there is no factual basis to the claim. There is no suggestion that Ms Eweida was prevented by BA from expressing her Christian faith in other ways or by informing colleagues about her beliefs.

(ii) The evidence indicates that BA did not, in fact, treat members of different religions differently when they sought exceptions in the uniform policy. When any employee asked for an amendment of the uniform code on religious grounds it was considered by BA "through the perspective of diversity and [BA] sought to accommodate staff diversity where appropriate" (Court of Appeal judgment §35). When Ms Eweida raised the issue in relation to the wearing of a visible cross, the BA procedures were "properly followed" (ibid §36) and her complaint "conscientiously considered" (ibid §33). Within a few months BA amended its uniform code to permit the wearing of visible crosses. There is no evidence that Ms Eweida was treated any differently from other employees of different religions who had previously raised concerns about the uniform code on religious grounds.

(iii) There would, in any event, be an obvious objective and reasonable justification for an employer, when considering making exceptions to its uniform code, to treat differently items that are regarded as religiously mandated from those that are personal preferences. The justification for permitting religiously required items to be worn is not to enable some employees but not others to openly express the fact that they are members of their religion. It is to enable employees to comply with what are understood to be requirements of the religion. An employer is entitled to treat expressions or acts that are motivated

by religious beliefs, but not religious requirements, differently from obligatory religious practices. Indeed, as indicated above at paragraphs 4-9, that is a distinction which is drawn in the Court's jurisprudence, and is objective and justifiable.

Failure by Mrs Chaplin to exhaust domestic remedies

43. Mrs Chaplin brought proceedings before the Employment Tribunal alleging religious discrimination in breach of the 2003 Regulations. Her claim was dismissed on 6 April 2010. Mrs Chaplin had a right to appeal to the Employment Appeal Tribunal. She states in her letter to the Court of 23 September 2010 that she did not exercise that right because:

> "[the] judgment of the Court of Appeal in *Eweida v British Airways* [of 12 February 2010] held that there was no individual right to manifest religious faith under Article 9 of the Convention. National discrimination laws only protect *group discrimination*. Mrs Chaplin falls within this interpretation and has no individual right to manifest her rights under Article 9."

In her Application at §13 Mrs Chaplin makes further submissions about the decision of the Court of Appeal in *Eweida*, and then states that in the light of *Eweida* she had "no prospect of success" (§15) and therefore that her failure to appeal to the Employment Appeal Tribunal should not render her application inadmissible by reason of a failure to exhaust domestic remedies as required by Article 35 of the Convention (§16).

44. Mrs Chaplin's submissions on exhaustion of domestic remedies should be rejected for the following reasons.

45. Firstly, she fundamentally misrepresents the decision of the Court of Appeal in *Eweida*. Mrs Chaplin states at §13 of her Application that the court held that pursuant to Article 9 "there is no individual right to manifest religious practice" (referring to Court of Appeal judgment §9) and that the court held that "Article 9 adds little or nothing to the corpus of human rights protection. This is the position of a number of recent decisions by the higher courts" (referring to Court of Appeal judgment §21). The Court of Appeal held nothing of the sort whether in the paragraphs referred to or otherwise. Ms Eweida did not bring a claim for breach of Article 9. No doubt that was because her employer was a private company and therefore was not bound by the Human Rights Act 1998 to

comply with the Convention. Ms Eweida brought her claim for religious discrimination pursuant to the 2003 Regulations which apply both to public and private employers. Her case in the Court of Appeal turned on an interpretation of the wording of regulation 3(1)(b) of the 2003 Regulations and whether it required an applicant in an indirect religious discrimination claim to show that others of the same religion were disadvantaged by the provision, criterion or practice under challenge. The only reference made to Article 9 by the Court of Appeal was at §21-23 of its judgment. It stated that Article 9 did not advance Ms Eweida's case on the correct interpretation of the 2003 Regulations. The Court of Appeal in *Eweida* nowhere concluded that Article 9 did not protect "individual rights to manifest religious faith", still less that Article 9 adds little or nothing to the corpus of human rights protection.

46. Unlike Ms Eweida, Mrs Chaplin's employer was a public authority and pursuant to the Human Rights Act 1998 s 6(1) it was unlawful for it to act incompatibly with her Article 9 rights. The Court of Appeal in *Eweida* made no decision on the application or otherwise of Article 9 or as to its correct interpretation and there was nothing in the *Eweida* decision which precluded Mrs Chaplin pursuing in domestic proceedings the arguments as to the applicability of Article 9 which she now raises before this Court. As stated above at paragraph 23, the Government submits that if there is a positive obligation to protect Article 9 rights from interference by a private employer, the 2003 Regulations provide that protection. If that is wrong, however, and Article 9 rights are not fully protected in the UK by the 2003 Regulations, employees of public authorities have a remedy under the Human Rights Act 1998. That remedy was not pursued by Mrs Chaplin.

47. Secondly, as indicated above at paragraphs 29 and 39, Mrs Chaplin seeks to assert that she was a victim of discrimination pursuant to Articles 9 and 14 because she was treated differently from Sikh and Muslim medical personnel. Members of other religions, she claims, were permitted to breach infection control through dress worn for religious reasons. The Employment Tribunal concluded that that was not the case on the evidence before it. Mrs Chaplin nonetheless asserts again before this Court that there was such direct discrimination. If there was evidence before the Employment Tribunal that Christians were treated less favourably than Sikhs or Muslims or members of others religions in this way, and that evidence was ignored by the Tribunal,

Mrs Chaplin could have appealed to the Employment Appeal Tribunal.[3] She chose not to do so for reasons which have not been explained and which have nothing to do with the Court of Appeal decision in *Eweida*. She should not now be permitted to raise before this Court the same allegations of discrimination which she did not pursue on appeal in domestic proceedings.

48. Thirdly, even in terms of her religious discrimination claim, the decision in *Eweida* did not preclude Mrs Chaplin proceeding. Mrs Chaplin in her Application §15 states that, following the decision of the Court of Appeal in *Eweida*, in order to succeed under the 2003 Regulations she would have had to find a second person who would "have the same conviction as [her] and be prepared to lose employment in identical or near identical circumstances," and on that basis she had "no prospect of success". That is not what the Court of Appeal in *Eweida* determined. It left open what an applicant in an indirect religious discrimination claim needed to prove, suggesting that it might suffice that the applicant could show that "there were in society others who shared the material religion or belief and so would suffer a disadvantage were they to be ... employees [of the same employer]" (Court of Appeal judgement §18). While the Government does not concede that that is a correct interpretation of the 2003 Regulations, it was certainly open to Mrs Chaplin to argue in domestic proceedings that that would suffice and to appeal against the narrower interpretation given by the Employment Tribunal of the 2003 Regulations in her case (see decision of Employment Tribunal §28 in which the Tribunal concluded that Mrs Chaplin needed to show that someone other than herself was, in fact, placed at a disadvantage by the uniform policy).[4]

49. For these reasons, it is submitted that Mrs Chaplin failed to exhaust all domestic remedies and she has therefore not complied with the admissibility requirements set out in Article 35(1).

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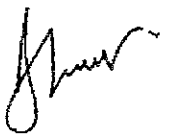
3 It is said in Mrs Chaplin's application at §14 that "in the United Kingdom, one is only able to appeal from an Employment Tribunal to the Employment Appeal Tribunal on a point of law and not on factual findings." It is true that a party to Employment Tribunal proceedings cannot appeal simply because they disagree with the factual findings of the Tribunal. An appeal can, however, be brought if there was no evidence to support a particular finding of fact or if the Tribunal ignored relevant evidence.

4 Mrs Chaplin did present evidence of another nurse who was asked by the Trust to remove her cross and chain (see Employment Tribunal §15). If that evidence was improperly ignored by the Employment Tribunal, it was open to Mrs Chaplin to appeal against its decision.

CONCLUSION

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



Ahila Sornarajah

Agent for the Government of the United Kingdom

14 October 2011