

The Clash of Rights – Freedom of Thought, Conscience & Religion

On 4th September 2012, the **European Court of Human Rights** will hear **two UK cases** relating to freedom of religion and protection of conscience (McFarlane and Ladele). The Court only hears a handful of Article 9 cases and the outcome will have significant implications for religious freedom across Europe. The cases will be heard alongside two others from the UK that relate to the manifestation of faith through the wearing of a Christian symbol (Chaplin and Eweida).

Case Summary



Gary McFarlane, an experienced relationships counsellor, indicated during a training course that, on account of his Christian faith, he might have a conscientious objection to providing sex therapy to a same-sex couple, if the situation ever arose. As a result he was dismissed for gross misconduct for discrimination on the grounds of sexual orientation, despite the fact that the issue involved a hypothetical scenario.



Lillian Ladele was employed as a civil marriage registrar in London. Following the introduction of legislation in the UK allowing civil partnerships between same-sex couples, Lillian sought, on account of her Christian faith, a conscientious exemption from presiding over such ceremonies but her request was denied.

Case Details

- In neither case was anyone actually denied a service to which they were entitled; neither was there any danger of a situation arising where they would be.
- In both cases, there was ample supply of other employees who were willing and able to provide the required service, without causing any undue logistical or financial burden to fall on the employer.
- The religious convictions and conscientious objections of Ms Ladele and Mr McFarlane could have been respected without unreasonable burden on their employers or any actual detriment to the service offered. They could have been accommodated and were prepared to be flexible.
- In neither case was it necessary to remove the individual concerned from their job in order for the organisation to achieve the public service that they either wished or were obliged to provide.
- This lack of necessity highlights the issue of the compulsion to adopt a certain viewpoint that stands in contrast to the principle of freedom of thought, conscience and religion.

The position of the UK Government

The UK Government is opposing both Gary McFarlane and Lillian Ladele and argues that Article 9 is not relevant in these cases, notwithstanding that Gary and Lillian's convictions arose from their Christian faith and their commitment to mainstream, historic Christian teaching. The UK Government has proposed a very narrow interpretation of Article 9 that significantly limits its protections.

The Government's official submission to the Court suggests that:

- (i) Gary and Lillian's position is not subject to Article 9 protection because their desire to allow their Christian convictions to guide their ethics and practice in the work place is not an aspect of manifesting religion or belief in worship, teaching, practice or observance.
- (ii) The restriction placed on any freedom of thought, conscience or religion by the employer's action is justified because it was necessary to protect the rights and freedoms of others. This is asserted in spite of the fact that Gary and Lillian could have been accommodated without any danger of anyone actually being denied service. Thus an organisation can insist that all individual employees adopt a particular viewpoint on sexual ethics and be prepared to act against their conscience, even where this is unnecessary to facilitate the organisation's efficient delivery of that service.
- (iii) There was no infringement of freedom of religion because even if the restrictions imposed by the employers were unnecessary, Gary and Lillian were free to resign and find employment elsewhere.

It is hard to see how this is consistent with freedom of thought, conscience and religion.

Background

- The European Convention on Human Rights values freedom of thought, conscience and religion highly and provides very strong protections. Such freedoms are subject only to specific, limited and necessary restrictions.
- Freedom of thought, conscience and religion is considered to be an important element of ensuring a healthy, democratic society. It provides protection for legitimate dissent and protection of minority viewpoints. More generally, religion provides a relativising authority that, alongside other civic institutions and principles, balances the power of the State and holds it to account.
- The protections are arguably most relevant, valuable and necessary where the beliefs and behaviour under scrutiny clash most acutely with the ruling orthodoxy. The existence of the protections is in the interests of all, even though at any particular point, they may only be immediately and actively relevant to a minority.
- The mark of a robust and tolerant society is that it can provide space for dissenting belief and behaviour, enforcing restrictions only where absolutely and demonstrably necessary and in line only with the categories previously specified (in this case by international treaty).

European Convention on Human Rights – Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Case Observations

- It is disingenuous to argue that the desire to bring religious or convictions to bear on work-place responsibilities is not covered by the extensive provisions of Article 9. To do so implies that individuals with religious convictions should 'leave their faith at the door' and that their convictions only have a place in private life and thought. This not only reveals a fundamental misunderstanding of the nature of religious belief but appears to conflict with the thrust of Article 9 that explicitly underlines the freedom to private and public manifestation.
- It was unnecessary to compel the individuals concerned to choose between their employment and their Christian convictions, given that they could have been easily accommodated without detriment to the service being offered (since others were willing and able to meet any demand for the service).
- In refusing to accommodate, the organisation created a requirement on employees to adopt a particular viewpoint or ideology (in this case on matters of sexual ethics). This compulsion is not consistent with freedom of thought, conscience or religion and represents a 'thought' or 'conscientious' bar to office. It is both unnecessary and unfairly affects those of certain convictions, including but not limited to Christians.
- It is invalid to argue that 'freedom of thought, conscience and religion' is secured in such circumstances by the ability of the employees to resign and seek alternative employment. Such an approach belittles the significant costs and risks associated with losing employment. It also forces the individual to bear these unnecessarily since if accommodation had been pursued there would be negligible cost to either the individual or the organisation.

Conclusions

- The outcome of these cases is likely to have significant repercussions for freedom of thought, conscience and religion across Europe. In its submissions to the Court, the UK government justifies the erection of a conscientious bar to office that would disqualify many people from public and community service and of significantly devaluing 'freedom of thought, conscience and religion' by effectively privatising the protections of Article 9 and holding that they have no bearing on involvement in mainstream public life.
- This will have considerable implications not only for Christians but also for many others with viewpoints and convictions that conflict at points with the reigning cultural orthodoxy.

Appendix 1:

The Government's Submission to the European Court of Human Rights

14 October 2011

In its submission to the Court, the UK Government suggests that:

(i) A desire to act in line with Christian convictions is not relevant to the practice of the Christian religion:

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

Paragraph 3, Page 2

"Neither Mr McFarlane nor Ms Ladele can justify a refusal to provide services to homosexual couples on the basis of their beliefs, however sincerely held. Both applicants may have been inspired or motivated by their religious beliefs. As with the pharmacists in *Pichon*, however, neither could be said to be practising their religion in a generally recognised form and neither case therefore falls within Article 9."

Paragraph 8, Page 4

(ii) Freedom to resign and seek alternative employment secures freedom of religion:

"As in the other cases, the applicants were also free to resign if they considered that the requirements of their employment were incompatible with their religious beliefs. It is that ability to resign and seek employment elsewhere that, as the Commission held in *X and Konttinen*, guarantees freedom of religion."

Paragraph 13, Page 9

"The state has no positive obligation to intervene where the individual in question is free to resign and seek employment elsewhere and can practise their religion entirely unfettered outside their employment. That is sufficient to guarantee their Article 9 rights in domestic law."

Paragraph 17, Page 11

(iii) Employers are entitled to insist that existing employees are prepared to offer services that conflict with their conscience even where the employer could deliver an efficient service and meet its obligations without such imposition:

"If there was interference with the applicants' Article 9 rights, it is permissible if "necessary in a democratic society" in order to protect "the rights and freedoms of others". There can be little doubt that promoting equality and tackling discrimination on grounds of sexual orientation is a legitimate aim pursuant to Article 9(2)."

Paragraph 19, Page 12

"Ms Ladele and Mr McFarlane were entitled to practise their religion in any way they chose outside their employment and were free to resign if they found the requirements of their work incompatible with their religious beliefs. Their employers were entitled to insist they provided services equally to all. That was not only because permitting discrimination could affect the employers' customers and would undermine their commitment to equal treatment. It could also affect other employees, and it is notable that it was homosexual fellow employees who raised concerns with Islington about Ms Ladele's refusal to register civil partnerships."

Paragraph 29, Page 16