IN THE EUROPEAN COURT OF HUMAN RIGHTS

Fourth Section

F-67075 Strasbourg Cedex

France

Application No. 59842/10

Date of Introduction: 23 September 2010

SHIRLEY CHAPLIN

- v -

UNITED KINGDOM

Additional Documentary Material

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Paul Diamond
PO Box 1205 Shelford
Cambridge CB22 5WG
United Kingdom
Tel. +44 (0) 7979 837714

SUMMARY OF THE FACTS

1. Ms. Shirley Chaplin was an employee of the Royal Devon and Exeter NHS Foundation Trust, where she was employed as a nurse from 16 April 1989 to July 2010. As a nurse she wore a Crucifix visibly around her neck for some 30 years. It always had a deep religious significance to her.

2. In June 2009, the applicant's employer requested verbally that Ms. Chaplin remove her "necklace". After she declined to do so, Ms. Chaplin was re-deployed in November 2009 in a non-nursing temporary position that ceased to exist in July 2010.

3. According to the Uniform Policy of the employer (cited in the application), Ms. Chaplin sought to have approval for wearing a religious symbol. However, the employer decided that the Crucifix was not a "mandatory" religious symbol, thus denying her request. Her request has been denied in a situation, in which Sikh and Muslim medical persons were granted approval for wearing their religious symbols.

CURRENT LEGAL DEVELOPMENTS

4. The purpose of this brief is to highlight positive developments in jurisprudence with regard to the issues of freedom of thought, conscience and religion; rights of conscience and reasonable accommodation. The scope of the brief is to deal with developments at the European level and at the domestic level in the United Kingdom.

I. Freedom of Thought, Conscience and Religion

5. As evidenced by the Written Observations of the United Kingdom in its reply to the application, the respondent Government sought to diminish the fundamental nature of freedom of thought, conscience and religion to a much more narrow freedom of worship or protection of merely private inner manifestations of faith. The Written Observations could be summarized with one phrase: "freedom of religion and conscience do not extend to the workplace and if an employee cannot as a matter of conscience fulfill their job criteria they are free to find alternative employment where the conscience question is not an issue."

6. The European Court of Human Rights ("the Court") has elevated the rights guaranteed by Article 9 to being one of the cornerstones of a democratic society.[1] The Court has held that religious freedom is one of the vital elements that go to make up the identity of believers and their conception of life.[2] Article 9 has taken the position of a substantive right under the European Convention.[3]

7. In this respect, the most significant legal happening in recent months has been the legal opinion of the Advocate General of the CJEU in *Federal Republic of Germany v. Y* and *Federal Republic of Germany v. Z*.[4] While the Advocate General's opinion is not yet binding on the CJEU and while CJEU judgments are not binding on the ECHR, the opinion should nonetheless hold strong persuasive weight in defining the substance of religious liberty and rights of conscience. The premise of the Advocate General's opinion is that external manifestation of one's religious faith is a key component of freedom of thought, conscience and religion. Therefore, in the context of European Communities asylum law, a state cannot expect an asylum seeker to "hide" his faith if returned to his country of origin.

8. The case before he *Bundesverwaltungsgericht* (Supreme Administrative Court) involves two Pakistani nationals – both of whom are active members of the Ahmadiyya community in Pakistan. The activities of the Ahmadiyya community are severely restricted in Pakistan. In particular, Y and Z were not allowed to profess their faith publicly without those practices being considered blasphemous.[5] As such, Y and Z sought asylum in Germany.

9. The *Bundesverwaltungsgericht* essentially asked the CJEU three questions: *First*, to what extent is an infringement of freedom of religion, and in particular the right of the individual to live his faith openly and fully, likely to be an "act of persecution" within the meaning of Article 9(1)(a) of the Directive? *Secondly*, should the concept of an act of persecution be restricted to infringements affecting only what is referred to as a "core area" of freedom of religion? *Thirdly*, is a refugee's fear of persecution well-founded within the meaning of

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[1] ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.
[2] ECHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A, No. 295-A: JDI, 1995, p. 772.
[3] *Kokkinakis op.cit.*, ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 788; *Otto-Preminger-Institut, op. cit.*; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749.
[4] Case C-71/11 and Case C-99/11.
[5] Advocate General's Opinion at § 2.

Article 2(c) of the Directive where the refugee intends, on his return to his country of origin, to perform religious acts which will expose him to danger to his life, his freedom or his integrity or rather is it reasonable to expect that person to give up the practice of such acts?[6]

10. The Advocate General proposed that the Court should reply to the questions submitted by the *Bundesverwaltungsgericht* as follows:

    10.1 *First,* Article 9(1)(a) of Directive 2004/83/EC must be interpreted as meaning that a severe violation of freedom of religion, regardless of which component of that freedom is targeted by the violation, is likely to amount to an "act of persecution" where the asylum-seeker, by exercising that freedom or infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude, or of being prosecuted or imprisoned arbitrarily. Under Article 3 of Directive 2004/83, the Member States remain free to adopt or maintain more favourable standards provided, however, that they are compatible with the Directive.

    10.2 *Secondly,* Article 2(c) of Directive 2004/83 must be interpreted as meaning that there is a well-founded fear of persecution where the asylum-seeker intends, once back in his country of origin, to pursue religious activities which expose him to a risk of persecution. In this context, and in order to ensure observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, the authority responsible for examining the application for asylum cannot reasonably expect the asylum seeker to forego these activities, and specifically to forego manifesting his faith.[7]

11. Most central to this opinion and its applicability to present case are the implications of the interpretation of freedom of religion to national authorities. The Advocate General

[6] *Id.*, at §§3-5.
[7] *Id.*, at § 107.

resolutely held that it is not possible for national authorities to identify "core areas" of a person's particular religious belief.[8] The Advocate General noted the significant risk of arbitrariness if authorities were given the responsibility of defining "core areas" of religion, stating that "there will be as many views as there are individuals".[9]

12. In several recent cases, national courts have strayed beyond their mandate and started to speculate as to what may be a "core area" of religion. However, it is not for judges to judge doctrine. Notably, several cases before the courts of the United Kingdom have erred in this respect. For example, in *Ladele v. The London Borough of Islington*,[10] one of four companion cases being heard together by the Court along with the current case, Lord Neuberger held that: "Ms Ladele's objection [to performing same-sex civil partnerships] was based on her view of marriage, **which was not a core part of her religion…**"[11]

13. Likewise, in the UK, the courts engaged in dangerous discussions regarding the importance of wearing the cross for Christians, versus the wearing of items of religious significance by members of other religions. Indeed, in the present case, the Tribunal took it upon itself to proclaim, based on no evidence, that "the wearing of the Hijab is a cultural rather than a religious requirement"[12] and in the case of *Nadia Eweida*, also before this esteemed Court, the Court of Appeal held that the visible wearing of a cross was "[no] more than a personal preference" on the part of the Claimant.[13] Thus, it was reasoned that because the wearing of the cross was a matter of individual choice, the Claimants deserved less protection under the law.

14. The Advocate General's opinion clearly affirmed that freedom of religion cannot be limited to the private sphere. The Advocate General stated that if the so-called "core area" of religious belief comprised only of "private conscience", it would render any protections for "the external manifestation of that freedom" effectively "meaningless".[14] He further held that "…there is nothing in the case-law of the Court or, specifically, of the European Court

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[8] *Id.*, at § 39.
[9] *Id.*, at § 41.
[10] [2009] EWCA Civ 1357.
[11] *Id.*, at § 52. Emphasis added.
[12] *Chaplin* at § 16.
[13] *Eweida* at § 37.
[14] Advocate General opinion at § 46.

of Human Rights, to support the proposition that the 'core area' of freedom of religion must be limited to private conscience and the freedom to manifest one's religion in private or within the circle of those who share the faith, thus excluding the public manifestation of religion."[15]

15. The Advocate General pointed to the judgment of *Metropolitan Church of Bessarabia and Others v Moldova*[16] to support this position, and stated that "bearing witness in words and deeds is bound up with the existence of religious convictions".[17] Moreover, the Advocate General stated that "[t]he manifestation of religion is inseparable from faith and is an essential component of freedom of religion, whether it be practiced in public or in private." He pointed to the jurisprudence of the European Commission of Human Rights,[18] where it was held that the term "in private or in public" in the legislation "means nothing other than allowing the faithful to manifest their faith in one form or the other, and should not be interpreted as being mutually exclusive or as leaving a choice to the public authorities."[19] Such an interpretation of the relationship between belief and manifestation is certainly to be welcomed. Clearly belief and manifestation cannot be easily separated, and whether in "private" or in "public", freedom of religion enjoys strong protections.

II. Developments in the United Kingdom

16. No domestic precedent or case has arisen since the filing of our Reply to Written Observations. It is noteworthy however, that Prime Minister David Cameron during a Parliamentary Question period in July addressed the *Eweida* case, stating that the right to wear religious symbols to work is a vital freedom and that he would ensure that the law was changed in order to support this freedom.[20]

17. Moreover, the government-funded Equality and Human Rights Commission (EHRC) publically proclaimed that, if allowed to intervene in the four collective cases before the

[15] *Id.,* at § 49.
[16] Judgment of 13 December 2001, ECHR *Reports* 2001-XII.
[17] *Id.,* at § 114
[18] ECHR, *X v. United Kingdom,* judgment of 12 March 1981, D.R. , 22, p. 39, § 5.
[19] Advocate General opinion at § 50.
[20] Rosa Prince, David Cameron: I will change the law to allow crosses at work, in *The Telegraph* (11 July 2012).

ECHR, it would support the legal doctrine of reasonable accommodations[21] as proposed in our Written Observations and in the interventions of several third parties. The EHRC stated that: "if given leave to intervene, the Commission will argue that the way existing human rights and equality law has been interpreted by judges is insufficient to protect freedom of religion or belief. It will say that the courts have set the bar too high for someone to prove that they have been discriminated against because of their religion or belief; and that it is possible to accommodate expression of religion alongside the rights of people who are not religious and the needs of businesses."[22]

18. Further, as referred to in the submissions, in the context of the NHS, policies accommodating religious apparel have been introduced and balanced with health care requirements[23].

CONCLUDING REMARKS

19. The jurisprudence of the Court makes it crystal clear that Article 9 protects not only the sphere of personal beliefs, the *forum internum*, but it also protects the *forum externum*, on the basis that "bearing witness in words and deeds is bound up with the existence of religious convictions."[24]

20. The Court has held that guaranteeing freedom of thought, conscience and religion assumes State neutrality. Therefore, where necessity and proportionality are lacking, a State must seek to **accommodate** religious beliefs no matter how irksome it finds them. <u>This notion stems from the reluctance of European civilization – born of decency, forbearance, and tolerance – to compel our fellow citizens to humiliate themselves by betraying their own consciences.</u>

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[21] http://www.equalityhumanrights.com/news/2011/july/commission-proposes-reasonable-accommodation-for-religion-or-belief-is-needed/.

[22] *Id.*

[23] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114754.pdf (p 6) and http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114755.pdf (pp 6 - 9)

[24] *Kokkinakis op.cit.*, ECHR, 23 June 1993, § 31.