IN THE EUROPEAN COURT OF HUMAN RIGHTS

F-67075 Strasbourg Cedex

France

Application No. 59842/10

Date of Introduction: 23rd September 2010

Shirley CHAPLIN

-v-

UNITED KINGDOM

Full SUBMISSION

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Brief SUMMARY

Introduction:

1. This application is made on behalf of Mrs. Shirley Chaplin, of *Hillbrook, Kenn, Exeter, Devon, EX6 7UH.* Mrs. Chaplin is represented by Mr. Paul Diamond, barrister and assisted by Ms. Elizabeth Blaxall.

2. The manifestation of religious rights in the United Kingdom has reached a critical level due to national applications of Article 9 of the European Convention on Human Rights ("the ECHR") that have emptied it of any substantive content. It is believed that another Cross case has been submitted to the European Court of Human Rights (*Eweida v United Kingdom*) and it may be sensible to join these cases.

3. Mrs. Chaplin was an employee of the Royal Devon and Exeter NHS Foundation Trust (a National Health (State) hospital); she was employed there from 16th April 1989 to July 2010. She has been a qualified nurse since 1981 and has an exceptional employment history. She worked as a Ward Sister since 4th February 2001, with responsibility for infection control. In November 2009, she was redeployed in a temporary non-nursing position.

4. Mrs. Chaplin wears a Crucifix visibly around her neck as a symbol of her Christian faith. It has a deep religious significance to her and she has always worn the Cross as a nurse (some 30 years without difficulty or adverse comment) since her confirmation in 1971.

5. Mrs. Chaplin is a practising Christian. Mrs. Chaplin gave evidence before the national court (an Employment Tribunal) stating:-

> *"I have been a nurse for roughly thirty years and throughout that time I have worn my Crucifix. The Crucifix is an expression of my faith and my belief in the Lord Jesus Christ; I cannot remove my Crucifix without violating my faith. The wearing of the Cross is an important expression of my faith as I believe God is calling me to do so as a Christian.*
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> *Christians are called by the Bible and God to tell others about their faith and the wearing of a Cross is a visible means of manifesting that calling. Also, by wearing the Cross visibly, I believe it creates more personal accountability in my Christian lifestyle. In other words, if others know I am a Christian because they see the Cross on my necklace, I tend to focus more on my actions and words to keep them as consistent as possible with the requirements of my Christian faith. If I were forced to not wear the Cross, my accountability to Christian living while at work may be compromised and my actions may suffer."*

6. In June 2009, the employer requested verbally that Mrs. Chaplin remove her 'necklace'. Mrs. Chaplin declined as she regarded her Crucifix to be a personal statement of faith; she was distressed that her Crucifix was described as a 'necklace' and 'jewellery'. The primary issue appeared to be whether the Crucifix was visible or not. In November 2009, Mrs. Chaplin was re-deployed in a non nursing temporary position that ceased to exist in July 2010.

7. The hospital has a *Uniform Policy* (the "Policy"), of which paragraph 5.1.11 states:

> *"Any member of staff who wishes to wear particular types of clothes or jewellery for religious or cultural reasons must raise this with their line manager who will not unreasonably withhold approval."*

8. Mrs. Chaplin sought to avail herself of paragraph 5.1.11 of the Policy. This was refused as the employer held that the Crucifix was not a mandatory religious symbol. The employer stated in evidence at the Employment Tribunal that the wearing of the *hijab* was permitted under Policy 5.1.11 as a mandatory cultural symbol worn by all Islamic women. This statement is unsustainable[1].

9. On 12th April 2010, following national consultation, the hospital allowed staff with religious convictions about dress to opt out of strict dress codes which would have required them to have bare arms below the elbow. This benefited Sikh and Muslim medical persons[2]. In short, health and safety concerns (infection) can be compromised to accommodate the employee's religious practice.

Why European Court supervision of the United Kingdom is urgently required in the field of Religious Rights under Article 9 ECHR:

The Exhaustion of Domestic Remedies:

10. Protection of religious rights in the United Kingdom have reached a critical level and protection levels have fallen below that which is necessary for a civilised State. During the Pope's visit to the United Kingdom in September 2010, he warned against a*ggressive forms of secularism* in the light of a series of anti-Christian cases before the courts of the United Kingdom.

11. On 1st December 2010, Lord Carey, the former Anglican Archbishop of Canterbury launched the '*Not Ashamed'* campaign to speak out again the marginalisation of Christianity in the United Kingdom. Prior to the hearing of the case of Mrs. Chaplin, Lord Carey and six other senior Bishops wrote to the national press about Christian persecution in the United Kingdom[3]. This case caused national disquiet.

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[1] It is unsustainable to argue that the *Hijab* is a mandatory item of clothing when Islamic States have proscribed the wearing of it.

[2] http://www.dailymail.co.uk/news/article-1265136/NHS-relax-superbug-safeguards-Muslim-staff--just-days-Christian-nurse-banned-wearing-crucifix-health-safety-reasons.html

[3] http://www.telegraph.co.uk/news/newstopics/religion/7531293/Senior-bishops-call-for-end-to-persecution-of-Christians-in-Britain.html; and the letter: http://www.telegraph.co.uk/comment/letters/7528487/The-religious-rights-of-Christians-are-treated-with-disrespect.html

12. The Claim by Mrs. Chaplin ('ET1') was filed in November 2009 and on 12th February 2010, the Court of Appeal gave judgment in the case of *Eweida v British Airways,* on the right of a Christian employee to wear a Cross. At the date of this decision, Mrs. Chaplin's case was already set down for hearing on 29th March 2010, but the decision of *Eweida* is binding on all lower and equal Courts and Tribunals. Subsequently, the Supreme Court declined the appeal from the Court of Appeal in *Eweida* and under the current position of national Court precedent in the United Kingdom there is no need to exhaust domestic remedies within Article 35 of the Convention.

13. In *Eweida*[4], the Court of Appeal held:-

> *[9] There is no individual right to manifest religious practice. Evidence is required that other religious adherents are required to wear a Cross/Crucifix around the neck on a chain, that such wearing was to be visible and the 'particular' disadvantage was the willingness to lose employment (to establish that 'others' accord the same importance to the wearing of a Cross/Crucifix) as the complainant before the court;*
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> *[15] Solitary disadvantage is not enough;*
>
> *[21] Article 9 adds little or nothing to the corpus of human right protection. This is the position of a number of recent decisions by the higher courts;*
>
> *[34][37] Court requires evidence of religious practice and mandatory nature of the wearing of the Cross/Crucifix. Personal manifestations are called a 'personal objection';*

14. In the decision of *Chaplin*, the Employment Tribunal followed *Eweida* and made a number of factual findings. However, 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. In *Chaplin,* any appeal on both law (*Eweida*) and facts cannot succeed:-

> [8] The Employment Tribunal makes reference to *Ewedia;*
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> [9] A Witness (Mr. Amos) in favour of Mrs. Chaplin failed to attend court and sought to retract his Statement. The Employment Tribunal decided to disregard his Statement, despite what would normally raise concerns of employer pressures;
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> [16] Evidence from Mrs. Babcock asserted differential treatment between Christians and Muslims; namely that a Muslim doctor was permitted to wear a flowing *Hijab* with a brooch (jewellery that was purportedly banned). Employers denied this and did not call the doctor in question. The Employment Tribunal found in favour of the employer;
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> [19] The employer accepted that a magnetic clasp to secure the necklace around Mrs Chaplin's neck would ameliorate health and safety concerns but still accepted remote

[4] [2010] IRLR 322

> theoretical concerns of injury (by scratching) with no evidence of any previous injury, or of a risk assessment[5];
>
> [23] The Employment Tribunal accepted the employer's position that all staff complied with the Policy despite the fact that evidence was given that items of jewellery were seen on staff, as the 'sightings' were not in the clinical setting and clinical duties were not being undertaken;
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> [27] The Employment Tribunal followed *Eweida* that for indirect discrimination to exist there must be more than one person affected by the policy banning Crucifixes (issue of meaning of '*Group'* remains uncertain) and, further, any other person must have an identical religious view to Mrs. Chaplin and be prepared to lose employment over the wearing of a Crucifix around the neck to fulfil the definition of '*particular*' disadvantage. A solitary individual does not suffice;
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> [29] The dissenting panel member held that there should have been a risk assessment, and greater attention should have been given to clause 5.1.11 of the Policy. However, both these issues fail to address the legal need for multiple victims, or the adverse findings of fact.

15. Article 35 of the ECHR requires that remedies available must be '*effective'*; the remedy must be available and sufficient[6]. However, *Eweida* has decided that there must be '*group'* disadvantage; the meaning is unclear but a solitary applicant is insufficient for protection in national law. Further, the second (or 'group') person must have the same conviction as the applicant and be prepared to lose employment in identical or near identical circumstances to the complainant. In the light of the decision of the Court of Appeal in *Eweida*, there is no prospect of success in the current case.

16. Article 35 should be applied with '*some degree of flexibility and without excessive formalism'*[7]*;* and the United Kingdom government will not be able to establish that a solitary believer has secured protection since the decision of the Court of Appeal in *Eweida.*

Article 9 of the ECHR:

17. Courts in the United Kingdom have held that Article 9 grants little or few rights; and Article 9 rights are clearly not as important as *privacy* rights (sexual or lifestyle choices) or freedom of speech.

18. For example in *Eweida,* this point is made clearly; the Court of Appeal relies on *Kalac v Turkey*[8]*,* which is a case involving the Islamic fundamentalism of a Judge going to the heart of

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[5] I described this in Court as to the risk of opening a window on a hot summer date with the risk that a bee might enter and sting a patient. The solution was to close all windows at all times.

[6] *Pine Valley Developments v Ireland* 61 DR 206

[7] *Guzzardi v Italy* (1981) 3 EHRR 333 at paragraph [72]

[8] (1997) 27 EHRR 522

a Contracting State's (Turkey's) ability to adhere to the Convention, as analogous to the wearing of a Cross in conformity with the cultural traditions of the United Kingdom. However, *Kalac* says no more than Article 9 is a qualified right and the Court simply refused to analyze Article 9.

19. The Court goes further in *Eweida* [para 23], by implying that the very attendance at a school (*R(SB) v Governors of Denbigh High School*) or of accepting employment implies a voluntarily waving of one's Convention Rights to religious freedom. No other Convention Rights would be treated so dismissively. In paragraph [40] in *Eweida,* the Court of Appeal notes that opposition to religious manifestation in the workplace may justify a '*blanket ban'* on the manifestation of Article 9 Rights.

20. The Court must be suspicious of any 'purported' waiver of Convention Rights[9]. Further, the approach outlined above has given discretion to the employer as to which religious manifestation he may decide is suitable for endorsement and recognition. In other contexts, the opposition to fundamental rights by an employee who may have a homophobic or racist objection would not be accorded such deference.

21. In *Barankevich v Russia*[10], the Court simply did not accept assertions on public safety and order and required substantive evidence of this factor. In *Vogt v Germany* [11], Convention Rights were applicable to the employment context and a *proportionality* requirement had to be fulfilled.

22. A *waiver* of Convention Rights in the employment context depends on the free choice of the employee to accept a contract of employment that restricts his religious manifestation. A freedom *to leave* current employment cannot be equated to a freedom to *accept* employment. On this approach, the *Stedman v United Kingdom* [12] analysis, no conditions ever imposed by an employer could ever be contrary to rights[13]. If the *Stedman* decision is premised on freedom of contract, then the employer cannot vary the bargain. This is true for Mrs. Stedman as it is for Mrs. Chaplin.

23. The correct characterization of the case is one involving a *clash of right*s; the freedom of the employer to offer work on terms and the rights of an employee to have free exercise of his faith. Those rights are not *balanced* when the employer can unilaterally change the terms of employment in a manner that prevents the employee's previous exercise of religion on threat

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[9] Deweer v Belgium (1980)

[10] Appl. No. 10519/03 of 26th July 2007

[11] (1996) 21 EHRR 205

[12] (1997) Commission decision.CD168 23 EHRR

[13] Can an employer have working practices or working and non working hours, in which no Orthodox Jew, Christian or Muslim could work without violation of their religious faith?

of dismissal. An employee cannot lose their Convention Rights upon entering employment; in which the majority of one's time is spent at.

24. Religious freedom has been recognised in Western counties since the Treaty of Westphalia in 1648 and continuing: in the UN Declaration 1948, European Convention on Human Rights and Fundamental Freedoms 1950 (including other regional treaties), Covenant on Civil and Political Rights 1966 and the UN Declaration on the Elimination of all forms of Discrimination based on Religion 1981.

25. The United Nations Human Rights Committee General Comment No. 22 (1993) has recognized that: "*The concept of worship extends to [.] the display of symbols*" and "*The observance and practice of religion or belief may include not only ceremonial acts but also such customs as [.] the wearing of distinctive clothing or head coverings [.].*" Paragraph 4.

26. In addition, Principle 16 of the Concluding Document of the 1989 Vienna Meeting of Representatives of the Participating States of the CSCE Conference: "*In order to ensure the freedom of the individual to profess and practice religion or belief, the participating State will, inter alia , [...] (16.9) respect the right of individual believers and communities of believers to acquire, possess, and use sacred books, religious publications in the language of their choice and other articles and materials related to the practice of religion or belief*; ". The impetus of these international measures is to ensure that the religious adherent can live in society with the least violation to their religious conscience.

27. Article 9 rights are very important and religious activity is generally one of self denial and service, which the State should recognize are a public virtue and not in terms of discrimination. Articles 8 and 10 ECHR deal with a specific aspect of the human existence; whilst Article 9 is comprehensive to a person's life. Religious rights are clearly primary rights; religion directs every aspect of an individual's life. It is a comprehensive code of conduct of relationship between man and God. Spiritual sanction is more severe than secular sanction relating as it does to the after-life.

28. Of course, this does not mean that anyone can do anything they want in the name of religion and Article 9; it simply means that similarly with other Convention Rights the limitation contained in Article 9(2) must be rigorously examined and strictly construed.

29. It is submitted that in both *Chaplin* and in *Eweida* Article 9 provides the necessary answer. A wide and sensible meaning needs to be given to religious manifestation within the second sentence of Article 9(1); thereafter it falls on the State to justify the restriction within Article 9(2).

30. A solitary individual can partake of the protection of Article 9, as there is no such limiting provision. The Court should not require evidence of religious practice or whether it is

mandatory or whether others have the same religious conviction.[14] In both cases, it is submitted that there would be difficultly in justification, especially in the light of Article 14 where other religious practices by other religious groups are recognised. It is religious animus for an employer not to make '*reasonable accommodation* ' for a religious employee; even if the employer is not motivated by hostility to religion *per se*, but is driven by economic concerns.

31. The Court of the United Kingdom does not, as such, adequately protect religious freedom within Article 9. When UK Courts consider religious freedom issues the focus is on discrimination law which is distinct from legislation dealing with religious freedom. First, as discussed, discrimination law applies to groups and not to individuals (or those with unusual beliefs). Secondly, if everyone is treated the same or equally badly there is, *prima facie,* no discrimination. This interpretation gives the discretion to the employer to promote or suppress those religions he approves or disapproves of. Religious adherents want to manifest their faith and discrimination and the discrimination/equality analysis currently being used by the Courts does not address this specific behavioural issue of religious practice. In short, religious accommodation may entail a degree of beneficial treatment by, in this case, the employer, however the Courts seem unwilling to come to this conclusion, or are prevented from so doing because of the context in which they are directed to consider the issues before them.

32. In the US Supreme Court of *Thomas v Review Board of Indiana Employment Security Division*[15], *First Amendment* protection was granted to a religious adherent, despite the fact that his religious views were distinct from the religious group/work colleague that adhered to the same religious community. Mr. Thomas was a pacifist and did not wish to build tanks but he sought unemployment benefits. Although he had acted inconsistently (previously he had been employed in military work) and fellow adherents were not pacifist, the Supreme Court held that views can be imprecisely articulated, not in conformity with the religious community, and can be solitary.

33. US courts recognise the wearing of a Cross as Constitutionally protected necessitating interim protection of such rights; any limitation on Constitutional Rights is subject to strict scrutiny analysis: *Nicol v Arin Intermediate Unit 28* [16]. This case was about a public school teacher wearing a Cross.

34. The case of *Dogru v France*[17] is distinct (as is *Leyla Sahin v Turkey* [18]). These cases are distinct as they relate to Islam, (which this application does not wish to address in any detail).

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[14] Metropolitan Church of Bessarabia and others v Moldova (1999) at paragraph [117] - [119]

[15] 450 US 707 (1981)

[16] District Court, Western Pennsylvania (June 25th 2003)

[17] Appl. 27058/05 of 4th December 2008

[18] Grand Chamber 2005- XI

Paragraph [21] of *Dogru* notes the specific issues with Islam resulting in opposition to the values of the Republic. Subsequently, France passed *Loi No. 2004 - 228* on the prohibition of religious symbols in schools. The French Parliament has recently legislated against certain forms of Islamic clothing in public. Further, this case (*Dogru*) is limited to the 'duty of *assiduity'* in physical education classes.

35. Religious rights need to be interpreted in their cultural context in which the wearing of a Cross in the United Kingdom conforms to national socio cultural norms. Ironically, in the United Kingdom, it is the Christian symbol that is proscribed and it is the Islamic and Sikh symbols that are permitted (in both *Chaplin* and *Eweida*). The Cross as representative of Judeo Christian values in European culture is a controversial matter: *Lautsi v Italy* [19].

36. In *Kokkinakis v Greece* (1993) 17 EHRR 397 it was said (at paragraph 31) that:

> *"Freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life ... the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions".*

37. These words either have substance or are simply a sop to European public opinion.

38. In *Thlimmenos v Greece*[20] the Court analysed a neutral and general rule that individuals with criminal convictions were unable to join a profession. The European Court held i) a uniform rule does undermine Article 9 Rights where the motivation for breaching the rule was religious; ii) a right exists to be treated differently and a *pure conduct approach* (without assessing motivation) was inadequate. The Court expressly held: -

> "*The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective reasonable justification* ***fail to treat differently persons whose situations are significantly different****". (paragraph 44).*

39. It was decided in *Thlimmenos* that the Greek court had undermined Thlimmenos's freedom of religion and impacted on his career. Accordingly to the Court's case law, a difference in treatment is discriminatory for the purposes of Article 14 if it has no '*objective and reasonable justification'* and there is not a *'reasonable relationship of proportionality between the means employed and the aim sought to be realised'* [21].

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[19] Judgment of Grand Chamber awaited

[20] (2001) 31 EHRR 411

[21] *Johnson v Ireland* (1987) 9 EHRR 203, *Frette v France* (2004) 38 EHRR 438

Conclusion:

40. If Sikh and Muslim medical personnel are permitted to breach infection controls for religious reasons (wearing of the *Hijab*, the *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 that she has worn for 30 years without incident.

41. In conclusion, it is submitted that there has been a violation of Article 9 simpliciter, or Article 9 with Article 14 of the ECHR.

Paul Diamond, barrister

Cambridge, 8th December 2010.