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

Response of Shirley CHAPLIN

To the United Kingdom

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Response of Shirley CHAPLIN

Article 9 of the European Convention states:-

> *(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 in private, to manifest his religion or belief, in worship, teaching, practice or observance.*
>
> *(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Introduction: The Relevant Facts and Scope of the Case:

1. This Response of the United Kingdom Government fails to address a number of important issues:-
    - The United Kingdom Government primary position devoid Article 9 of all effective content;
    - The disjunction between national law on discrimination with the need for a 'comparator' and 'group' discrimination;
    - The meaning of manifestation of religious categories within Article 9;
    - The ability of secular employers and court to determine correct religious practice;
    - The current situation in the United Kingdom in which the wearing of a Cross does not engage Article 9 protection, the severity of sanction (end of employment in Mrs Chaplin's case[1] and the legal restriction in relation to Christian faith manifestations;

The Meaning of Religion or Belief:

2. Human Rights looks to the whole person; and provide the means to reconcile conflicts of interest with the emphasis on a framework that enables individuals to enjoy their fundamental rights. The need to accommodate religious diversity is historically and contextual shape; some European countries have welcomed their religious heritage; whilst others have adopted a more secular approach.

3. It is not for the secular authorities or entities to define manifestations of religious faith; the State cannot have a preferred faith or belief system which they choose to recognise or a correct interpretation of scriptural texts. State authorities are not competent to adjudge

[1] She was quietly made redundant after the case in or about July 2010.

religious faith *inter religion* (Jewish, Christian, or Muslim); nor by logical extrapolation *infra religion* (the correct Biblical interpretation).

4. In *Campbell and Cosans v United Kingdom*[2] the Court considered the wider phrase of '*religious and philosophical belief*' with the *First Protocol* and focused on Article 9 to determine that views '*that attain a certain level of cogency, seriously, cohesion and importance'* are protected (although in this case, the evidence appears little more that the fact that the parents were strongly opposed to corporal punishment). The Applicant's views were accorded status as 'philosophical convictions' because they related to 'a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporeal punishment and the exclusion of the distress which the risk of such punishment entails'[3]

5. In *Williamson v Secretary of State for Education and Employment*[4], the House of Lords endorsed the 'sincerity test' for *religious belief*; that it is not for secular authorities to assess religious belief and held that the Claimant's Article 9 Rights encompassed their belief to give corporal punishment. The test for national court is wider than issues intimately connected to belief and an Article 9(2) test is required.

6. The House of Lord held (at paragraph 22):-

> *22. It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in Syndicat Northcrest v Amselem(2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. As Iaccobucci J also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may*

[2] (1982) 2 EHRR
[3] (1982) 2 EHRR, paragraph 36
[4] [2005] 1 AC.

seem to some, however surprising. The European Court of Human Rights has rightly noted that 'in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed': Metropolitan Church of Bessarabia v Moldova (2002) 35 EHRR 306, 335, para 117. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.

7. The question for the National Court is whether the belief is worthy of respect in democratic society. However, the belief can be personal, inconsistent and changing, but the Court is entitled to adjudicate if they are sincere. However this decision on Article 9 has not been followed in relation to national anti – discrimination law.

8. The Court clearly must assess whether the belief is 'sincere' but the approach in *Valsamis v Greece*[5] is problematic and needs to be re-considered as it is difficult to understand the basis upon which a secular Court can determine a matter is not of religious importance, whether the adherent says it is.

9. Further an inquiry into *sincerity* must be sensitive and non-oppressive so as to dissuade reliance on Article 9. Mrs Chaplin had a severe and offensive inquiry into the wearing of her Cross which was disrespectfully considered as jewelry. It is self-evidence when a person where a religious symbol that this is bona fides of their faith, unless upon inquiry they assert that wear the item for reasons of fashion.

10. If '*freedom of religion ... excludes any discretion on the part of the State to determine whether religious beliefs or the <u>means used to express</u> such beliefs*'[6] are legitimate, by logical extrapolation, it is for the adherent and the State or Court to determine whether something is, for the adherent, a religious symbol.

The Manifestation of Religion or Belief:

11. The House of Lords premised their Judgment on the Canadian Supreme Court case of *League for Human Rights of B'Nai Brith Canada v Syndicat Northcrest et al*[7] where a

[5] Of 18th December 1996, Reports of Judgments and Decisions 1996 VI.
[6] *Moscow Branch of the Salvation Army v. Russia,* Application no. 72881/01, judgment of 5 October 2006
[7] 241 DLR (4th) (2004).

private landlord made a subjective assessment of religious faith was made[8] and the Court held[9]:-

> *Freedom of religion consists of freedom to undertake practices and harbour belief, having a nexus with religion, in which an individual demonstrates he or she sincerely believes ... irrespective of whether a particular practice is required by official religious dogma or is in conformity with the position of religious officials ... An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.*

12. The case of *League for Human Rights of B'Nai Brith Canada v Syndicat Northcrest et al*[10] was a *private party* dispute between landlord and tenant: *Ghaidan v Mendoza*[11], *X & Y v Netherlands*,[12] *Thomas v Review Board of the Indiana Employment Security Division*[13] and the European Court of Human Rights in *Metropolitan Church of Bessarabia v Moldova*[14].

13. Confusion additionally arises where the religious *rite* is analogous to a secular practice (such as marriage[15] to the wearing of a *Cross* being confused with jeweler). Lord Justice Rix discussed this in the case of *Williamson v Secretary of State for Education and Employment*[16]. He held:-

> *The deed does not have to express the belief in the form of proclaiming it. A Muslim or Jew who adheres to his religious dietary laws does not proclaim it (unless perchance there is any need for request or explanation): he does it. To all outward appearances he is like any other person eating a meal: but he is manifesting his religious belief and duty.*

14. The example here is eating a Hal'al or Kosher meal; to the 'non adherent', the individual is engaging in a generalised activity of simply eating, but to the adherent, he is manifesting his faith. The Court must inquire into the underlying motivation.

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[8] Paragraph [43] rejecting objective expert evidence to ascertain the 'rites' of religion.
[9] Paragraphs [46] – [48].
[10] 241 DLR (4th) (2004).
[11] [2004] AC. See also *Connolly v DPP* [2007] per Dyson LJ.
[12] (1985) 8 EHRR 235.
[13] 450 US 707 (1981). See *R v Chief Rabbi, ex parte Wachmann* [1992] 1 WLR, CA.
[14] Appl. 45701/99 of 13th December 2001. Paragraph 117.
[15] Both religious and non-religious individuals marry.
[16] [2003] QB 1300, CA. Paragraph 164.

The Remedies for Breach of Religious Rights and Freedoms:

15. In *Kokkinakis v Greece*[17] , the European Court of Human Rights held that:-

> *It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life ...*
>
> *Article 9...is one of the foundations of a "democratic society" within the meaning of the Convention...The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.* (paragraph 31).

16. It the light of this statement of principle, it cannot be correct that the "ultimate" guarantee of an employee's right to freedom of religion is self-abnegation.

17. Article 9 is the *lex specialis* and there is no reason to undervalue this Convention Right, but asserting that manifestation of religious apparel falls with the expressive principles of Article 10. Clearly if Article 9 protects only the *forum internum* it is meaningless because it would only protect '*brainwashing'* or improper inquiries into faith that would be equally protected by Article 3. If wearing a Cross (visibly around the neck on a chain) is not a recognized manifestation of Christian practice, there is little that is- it clearly is not jeweler.

18. A quality of the Convention in relation to Article 9 is the notion and principle of *respect* of the religious adherent. The term is not expressly used in Article 9, but in *Kokkinakis* the Court held that the State must *'ensure that everyone's beliefs are respected'*[18]. Whilst free societies have critiques of all ideologies, religious belief is to be accorded a degree of respect as illuminated in *Otto- Preminger v Austria*[19]; *Wingrove v United Kingdom*[20]

19. It is inaccurate to describe Strasbourg jurisprudence on Article 9 in the context of employment as determining that if a person can be dismissed, or lose their employment, there is no violation of the Right[21].

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[17] Decision of 25 May 1993.

[18] Paragraph 33.

[19]

[20] Report of Judgment and Decisions 1996- V.

[21] The following is taken from Lord Justice Rix analysis in *Copsey v WWB Minerals Ltd* [2005] IRLR 811

Ahmad v. United Kingdom

20. The earliest in a line of cases in which the Commission has considered article 9 in the context of employment appears to be *Ahmad v. United Kingdom*[22] . The applicant was a devout Muslim, who had been employed by the Inner London Education Authority (ILEA) since 1968 as a teacher. It was his duty to pray on Fridays and, subject to distance, to attend a mosque to do so. No problem arose until 1974 when he worked at schools which were near enough to a mosque to require his attendance. His absence from the schools, when he visited the local mosque, was longer than the time-table that he was working to permitted. ILEA informed him that if he continued to take time off on Friday afternoons, there would be no alternative but to vary his appointment from full-time to four-and-a-half days a week. The applicant said he preferred to resign. Later he applied to be re-engaged on the basis of a four-and-a-half day week, and ILEA refused to accept him. In July 1974 he complained to an Industrial Tribunal that his resignation constituted unfair dismissal. His complaint was dismissed on the basis that as a matter of contract he was bound to be in school on Friday afternoons and to work full-time. The Tribunal considered whether, despite his contract of employment, ILEA should have accommodated him and adjusted his time-table accordingly and found on balance that ILEA had not been unreasonable. Following that hearing, ILEA did agree to re-engage the applicant, as requested, on a four-and-a-half day week. Appeals to the EAT [1976] ICR 461 and to the court of appeal [1978] QB 36, [1977] ICR 490 resulted in the upholding of the Tribunal's decision (in the Court of Appeal by a majority, Scarman LJ dissenting).

21. Mr Ahmad complained to the Commission, invoking article 9. However, the Commission emphasised that he had already in 1968 of his own free will accepted teaching obligations under his contract with ILEA which proved incompatible with attendance at the mosque on Fridays (at para 9). In successive paragraphs the Commission continued to underline the importance and relevance of his contractual obligations, freely entered into. It observed that he had never informed ILEA at the time of contracting, or for another six years, of the need, or possible need, to absent himself to attend mosque. It said (at para 15) that –

[22] (1981) 4 EHRR 126.

> *"throughout his employment with the ILEA between 1968 and 1975, the applicant remained free to resign if and when he found that his teaching obligations conflicted with his religious duties. It notes that, in 1975, the applicant did in fact resign from his five-day employment and that he subsequently accepted four-and-a-half day employment enabling him to comply with his duties as a Muslim on Fridays."*

22. Nevertheless, the applicant, concerned at his lower pay and impaired pension rights, submitted that *"his case would have been better solved by a re-arrangement of the school time-table permitting his absence for about 45 minutes..."* (at para 16).

23. At this point, the Commission broadened the argument considerably. It noted that "*UK society was with its increasing Muslim community in a period of transition*": the applicant's case raised questions of general importance (para 17). The Commission took note of the UK's evidence and submissions concerning the requirements of the education system as a whole and the task of gradual adaptation to new developments in its society. It asked itself "whether the school authorities, in relying on the applicant's contract, arbitrarily disregarded his freedom of religion" (at para 19). It founded itself on the facts found in the domestic litigation, and concluded as follows:

> *"21. The Commission accordingly notes that the applicant, at his first school in Division 5, was allowed to be absent for a short period after the Friday mid-day break in order to attend prayers at the mosque, but that serious difficulties arose as a result of his unauthorised absence, for the same purpose, from the schools at which he was subsequently employed. The Commission further notes the applicant's various suggestions, as to how the school authorities could and should have solved his problem, and the Government's answers thereto.*
>
> *22. Having regard also to the requirements of the education system as described by the Government, the Commission does not find that in 1974/75 the ILEA – or, in their independent capacity, the schools of its Division at which he was employed – in their treatment of the applicant's case on the basis of his contract did not give due consideration to his freedom of religion.*
>
> *23. The Commission concludes that there has been no interference with the applicant's freedom of religion under Article 9(1) of the Convention."*

24. Finally, the Commission went on briefly to consider and dismiss a submission of discrimination contrary to article 14 taken in conjunction with article 9. It found that he was not treated less favourable than others placed in a comparable situation.

25. This is a nuanced judgment, containing a number of strands. One important strand, perhaps ultimately the most important, is the concept of contract, which reflects the

autonomy of the parties. Mr Ahmad had agreed to work full time without making any special arrangement for Friday afternoons. Such an arrangement could have been made, and ultimately, when the matter became important and the parties had had the opportunity to consider the issues, following the first Tribunal decision, was made. In those circumstances, it is not at all surprising that the Commission had concluded that there was no interference with Mr Ahmad's freedom of religion under article 9(1). He had wanted to be paid full time for less than full time work. But he was free to be employed on terms which reflected his religious needs.

26. A second strand considered Mr Ahmad's submission that a timetabling accommodation could have been found which allowed him an absence of 45 minutes. It is not clear whether the submission was that an accommodation could have been crafted which would have met both his need to absent himself for a certain period and his duty to provide full time work; or whether it would merely have solved his absence. On the latter hypothesis, it could have been answered by the answer already given to the effect that he was bound by the contract he had made. However, the Commission instead considered the submission in the round, and concluded, by reference to both the larger picture and the timetabling needs of the schools involved, that there had been no failure to "*give due consideration to his freedom of religion*".

27. This decision is an acceptance that any interference could be justified under article 9(2) (to which the Commission had referred implicitly or expressly at paragraph 3 – "the object of Article 9 is essentially that of protecting the individual against unjustified interference by the State" – and paragraphs 5 and 11). In the light of the facts found by the Industrial Tribunal at the very start of the litigation, viz that ILEA and the schools had not been unreasonable in their attempts to accommodate him, which the Commission took into account, their conclusion is understandable.

28. Accordingly, *Ahmed* is a decision about *'reasonable accommodation'*.

Konttinen v. Finland

29. In *Konttinen v. Finland*[23] the applicant had commenced employment with the state railways in 1986. In 1991 he had joined the Seventh-day Adventist Church and had thus become obliged and wished to observe the Sabbath on Saturdays, commencing at sunset on Friday. Under his contract of employment he worked Monday to Friday, in clerical duties. This presented no problem to him save for about five times in the winter, when sunset came

[23] (1996) 87 DR 68

early on a Friday. Having become a Seventh-day Adventist, he started to leave his work early on Fridays, giving his employers warning and offering to make up his missed hours by working longer in the summer, when sunset on Fridays fell later. He was dismissed.

30. The applicant submitted that his work could easily have been rescheduled (a minority of the Board of Civil Servants which had considered his claim had agreed). The respondent government, however, submitted that the State Railways had not arbitrarily disregarded his freedom of religion since their efforts to transfer him to another post had failed and changes to the shift schedule would have led to inconveniences for both the employer and his fellow-employees. He was cautioned that his continued absences would lead to his dismissal.

31. The Commission said (at 75/76):

> *"In these particular circumstances the Commission finds that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be considered protected by Article 9 para. 1. Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief.*
>
> *The Commission would add 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. In sum, there is no indication that the applicant's dismissal interfered with the exercise of his rights under Article 9 para. 1."*

The complaint was therefore found to be manifestly ill-founded.

32. The Commission in *Konttinen* did not cite *Ahmad v. United Kingdom*. It appears, however, that the Commission was prepared to deal with the matter solely on the basis that, having agreed to the terms of his employment, the applicant was not in a position to alter them unilaterally. It seems, therefore, that the Commission did not feel it necessary to adjudicate further, as it had done in *Ahmad*, concerning the parties' competing submissions regarding attempts to find an accommodation. It cannot be said that the applicant was not prevented from manifesting his religion by asking him to choose between his employment and his observance of the Sabbath.

Stedman v. United Kingdom

33. The other Commission decision concerning employment is *Stedman v. United Kingdom*[24]. This case was about access to a Court as jurisdiction was denied to those employees employed for less than 2 years. She was asked to agree to work on Sundays and had refused, and had therefore been dismissed. The Commission simply referred to *Konttinen* without notice or reference to counsel in the case[25].

34. Her original contract had not involved Sunday working. In its brief reasoning, the Commission merely referred to and applied its earlier reasoning and decision in Konttinen. It does not appear to have considered that its decision in Stedman involved an unreasoned extension of what I have taken to be the rationale of Konttinen, namely that an employee cannot complain of interference in his rights of religious freedom if he binds himself by his own contract in a way inconsistent with those rights. However, for the purpose of such a rationale, the facts of Stedman are critically different: she had not agreed, when first employed, to Sunday working; it was her employer who was now requiring her, against her.

35. This decision has been impacted by the decision of *Smith & Grady v United Kingdom*[26].

Kalac v Turkey:

36. The first issue to note is the position of the applicant. He was a Judge, a position in which there is a pressing State interest, *a fortiori* in a State that has formerly declared secularism as a tenet. The second focus of the case is the military context. The ECtHR held:-

> *[28] ... in choosing to pursue a military career Kalac was accepting of his own accord a system of military discipline [which meant accepting] limitations incapable of being imposed on civilians.*

37. Mr. Kalac joined the Air Force, *in the knowledge*, that military discipline would, by logic, place limitations on the practice of religion. The third feature is the avowed 'secularism' of the Turkish State, of which the Armed Forces are the custodians thereof. The Armed Forces, in such circumstances, represented a 'vocation' analogous to a religious employment.

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[24] (1997) 23 EHRR CD 168.
[25] Present Counsel was counsel in *Stedman*.
[26] (2000) 29 EHRR 493

38. The military has direct State interest to which considerable powers are given (security operations, maintenance of public order, the lawful taking of life). It is only natural that the symmetry of such 'privilege' is strict discipline. These factors came into harmony in Larissis v Greece[27], where the Court held that it was lawful to prevent the proselytizing of fellow servicemen (in hierarchical relationship and to maintain order in the services), but was unlawful in relation to the evangelisation of civilians. There is a distinct military/civilian divide. Kalac takes us no further, other than to illustrate the unique institution of the Armed Forces.

Smith & Grady v United Kingdom:

39. In *Smith & Grady v United Kingdom*[28], the Armed Forces (the employer) had to accommodate the *personality privacy* needs of the homosexual servicemen. The servicemen did not seek absence from work (such as a holy rest day), but sought to exercise a privacy right that the employer thought incompatible with the efficacy of his enterprise. In short, the *privacy* right would be vitiated if not accommodated to the employer's perceived detriment. It was simply an issue of importance; public perceptions with respect to homosexuality were not considered relevant in the current climate. Similar consideration could apply to Mrs Chaplin; if religious freedom is a fundamental right, it must be accommodated by an employer.

Thlimmenos v Greece:

40. In *Thlimmenos v Greece*[29], the European Court applied Article 14 to avoid discrimination on Article 9 for a Jehovah's Witness accountant who had broken a provision of the neutral criminal law. Although premised on discrimination, the real principle is that different cases required different considerations. The 'no criminal conviction' rule appears neutral but was excessively 'burdensome' to a Jehovah Witness adherent and the subsequent reformulation of the principles inherent in Article 14 enables the State to make the necessary '*accommodation*' of religious belief.

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[27] (1999) 27 EHRR 329.

[28] (2000) 29 EHRR 493

[29] (2001) 31 EHRR 15

41. *Thlimmenos* shows that a neutral application of the law (or a regulation or term of an employment contact) can mask a restriction on freedom of conscience / religion where the conviction/ loss of employment was/ is for an Article 9 reason. The Court analysis the underlying reason for the refusal to serve in the military (not the effect on others) and were deeply concerned at the severity of punishment for religious belief.

Applicability of Law to Mrs Chaplin:
The Scope of Article 9

42. In paragraphs 4 to 11 of the UK government submissions, it is argued that the wearing of a visible cross or Crucifix is not a manifestation of Ms. Chaplin's religion or belief within the meaning of Article 9 and therefore the applicant's claim is manifestly ill-founded and should be declared inadmissible. This interpretation of the *scope* of Article 9 is incorrect.

43. The visible wearing of the cross or Crucifix is clearly an aspect of the practice of the Christian religion "in a generally recognised form". The Rt Rev Dr Michael Nazir-Ali makes this point in paragraphs 8 to 14 of his Written Observations. Moreover, as argued, it is incorrect to distinguish between "requirements" of religion and non-requirements: with the result being that only religious "requirements" are seen to fall within the protection of Article 9. There are at least two problems with such an approach.

44. First, this places the threshold of what is protected by Article 9 too high. In other (non Article 9) discrimination cases, the UK courts have accepted a far lower threshold. For example, in *R (Watkins-Singh) v. Aberdare High School* [2008] EWHC 1865 (Admin), a Sikh Kara bracelet was considered to be of "*exceptional importance*" to the Sikh applicant and therefore worthy of protection (§ 39-40). And in *G v. St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin) a "cornrows" hairstyle was considered to be of "*particular importance*" to the applicant and therefore worthy of protection (§ 37). Conversely, in the case of *Chaplin* (§§ 16-17) there was much discussion about whether or not the wearing of the cross was a "requirement" of the Christian faith.

45. The Tribunal concluded that it was not a requirement, and this appeared to affect how much protection Nurse Chaplin could claim under the domestic legislation. Similarly, the UK government appears to place great importance on the fact that the wearing of the cross

is not a requirement of the Christian faith. It is important to note that the employer determined the merits or otherwise of religious manifestation and had determined that the *Hijab* was a mandatory cultural requirement (which is absurd in fact as well as law).

46. Regarding domestic cases under the Human Rights Act 1998, the UK Supreme Court has held that non-mandatory requirements fall within the scope of Article 9. For example, in ***R (Williamson)*** *v. Secretary of State for Education and* Skills [2005] UKHL 15, [2005] 2 AC 246 (§ 24), Lord Nicholls explained that when questions of manifestation arise under Article 9, a belief must satisfy some "modest, objective minimum requirements", which he outlined as being consistency with basic standards of human dignity as well as an adequate degree of seriousness, importance and coherence. However, Lord Nicholls stressed that "too much should not be demanded in this regard." Whether or not it was a mandatory requirement of Christians to use corporal punishment on their children did not form part of the Court's analysis.

47. Moreover, the European Court has held that practices that are not mandatory religious "requirements" can engage Article 9. For example:

- *In Case of the Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, judgment of 5 October 2006 (§ 92), members of the Salvation Army had a right to wear special uniforms and have ranks as a way of manifesting their religious faith even though no such requirement stemmed from Biblical precepts. Hence, it was sufficient to demonstrate that it was central to the individual faiths of the adherents of the Salvation Army.
- In *Jakobski v Poland* (2010) 30 BHRC 417 (§ 45) the refusal of a Buddhist prisoner's request for vegetarian food fell within the protection of Article 9 even though vegetarianism was not a mandatory requirement of Buddhism. The Court stated that Article 9 was engaged where the applicant's decision could be regarded as <u>motivated or inspired</u> by a religion and was not unreasonable.
- In *Bayatyan v Armenia,* Application no 23459/03, judgment of 7 July 2011 (§§ 110-111) the Grand Chamber held that opposition to military service was <u>motivated</u> by religious beliefs which were of a sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.

48. Secondly, stating that the manifestation must be a requirement of the religion has the effect of giving more protection to some religions than to others. Hence, because some religions contain many specific rules that must be strictly followed by the religion's followers and other religions (such as Christianity) do not, if the government's interpretation of Article 9 is correct, adherents of a religion with mandatory religious requirements will gain more protection under Article 9 than adherents of non-rule-based religions. Such an approach is self-evidently discriminatory and undesirable.

49. Therefore, whether or not a manifestation is a "requirement" of the religion in question should not form part of the Court's Article 9 analysis, or at least it should not be the conclusive test. Instead, as the Grand Chamber held in *Bayatyan v Armenia,* it should be enough for the adherent to show that the action was "motivated or inspired" by his beliefs.

Interference with Article 9

50. In paragraphs 12 to 18 of the UK government submissions, it is argued that the restriction on the wearing of a visible cross or Crucifix was not an interference with Ms. Chaplin's rights under Article 9. To substantiate this contention, the UK government cites a number of ECHR cases. However, the government makes no mention of any of the recent cases that have come before the Court in the past decade. In these latter cases it is clear that the Court has adopted a broader approach to interference. For example, in the last decade several cases involving religious dress or symbols have come before the Court, including: *El Morsli v. France* (Application No. 15585/06), 4 March 2008; *Dahlab v. Switzerland* (Application No. 42393/98) 15 February 2001; *Phull v. France* (dec.), no. 35753/03, ECHR 2005-I, 11 January 2005; *Sahin v. Turkey* (2007) 44 EHRR 5; *Mann Singh v. France* (Application No. 24479/07) 27 November 2008; *Dogru v. France* (Application no. 27058/05), 4 December 2008.

51. In all of these cases, involving different religions and a range of different factual circumstances, the Court has held that there was an interference with Article 9. However, rather than engaging with these latter authorities, the UK government has simply chosen to ignore them (with the exception of *Sahin v. Turkey*, which is given a brief mention).

52. Thus, the more recent approach of the European Court with regard to religious dress or symbols has been to proceed on the basis that there has been an interference with Article 9,

and consider other issues, such as whether or not the applicant has voluntarily accepted the restriction, under the proportionality test in Article 9 § 2.

Justification under Article 9 § 2

53. In paragraphs 27 to 29 of the UK government submissions, it is argued that the restriction on the wearing of a visible cross or Crucifix was necessary in a democratic society. The Court has held that for a restriction to be "necessary in a democratic society" it must be in pursuit of a "pressing social need" and must be proportionate to the aim pursued. The word "necessary" must be interpreted strictly and does not have the flexibility of expressions such as "useful", "reasonable" or "desirable" (*Handyside v. The United Kingdom* (1976) 1 EHRR 737, § 48.) Regarding the phrase "in a democratic society", the Court has consistently held that the key characteristics of such a society are "pluralism, tolerance and broadmindedness."

54. In determining whether a necessity within the meaning of Article 9 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with the rights protected by the Convention.

55. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 9 the decisions they took. However, this does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. Instead, the Court will look at the interference complained of in the light of the case as a whole and determine, after having established that the State pursued a "legitimate aim", whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient". In so doing, the Court has to be satisfied that the national authorities applied standards which were in conformity with the principles embodied in Article 9 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

56. An assessment of the facts makes it clear that the interference on the applicant's rights is no more justified under Article 9 § 2 than it was under the Employment Equality Regulations 2003 in the Employment Tribunal. Whilst the applicant's employer argued that the

restriction was for reasons of health and safety, no evidence was adduced to suggest how the wearing of the cross could breach health and safety. Furthermore, the main argument advanced by the employer was that a patient could pull on the cross and chain and cause damage (presumably to the applicant). However, when the applicant suggested that a chain with a magnetic clasp be worn to mitigate this risk, the employer refused to accept the compromise.

57. Moreover, the employer's own uniform policy (5.1.11) stated that: *"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."* However, the employer refused to follow its own policy and used the unsubstantiated claim of health and safety to justify an interference with the applicant's rights.

58. In *Aslef (Associated Society of Locomotive Engineers & Firemen v United Kingdom* (2007) 45 EHRR 34, the Trade Union expelled Mr Lee who was a member of an extreme right wing party. The Court considers the balance between the right of a private association to regulate its membership and the right of Mr Lee to trade union membership and freedom of expression. The defining issues were the lack of harm and of any identifiable hardship to Mr Lee as a consequence of his expulsion. If there had been a closed shop, and his employment was terminated, the result could have been different.

59. The Tribunal heard evidence of a, at least, one doctor who was allowed to wear *'a long flowing Hijab ... which was fixed in place with a brooch of some sort'* (paragraph 16). Further, as noted in the Application on 12th April 2010 (6 days after Judgment in this case), the Department of Health amended the rule of '*bare beneath the elbows'* and accepted a health risk for patients to accommodate Muslim and Sikh medical personnel. Of particular concern, is the fact that the hospital rely on their health and safety record (without examples) and of this policy (bare beneath the elbow); it is inconceivable that they were unaware of this policy as one of their witnesses was a leading authority in this field and they concealed this fact.

Discrimination under Article 14

60. For a violation of Article 14 to be established in conjunction with another substantive article, the facts in issue must be considered to fall within the "ambit" of that article. Clearly, the set of facts falls within the ambit of Article 9, which has been interpreted broadly by the Court. (For example, see *Thlimmenos v. Greece* App. no. 34369/97, 6 April 2000, §§ 42-43 and *Kosteski v. The Former Yugoslav Republic of Macedonia* App.no. 55170/00, 13 April 2006, § 45.)

61. The Court has stated that the right under Article 14 is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. Less favourable treatment based on the grounds of religion will rarely be capable of justification under Article 14 (*Hoffmann v. Austria,* App. no. 12875/87, (1993) 17 EHRR 293, § 36). Indeed, religion may even be considered to have joined a list of the most sensitive grounds, which, along with other characteristics such as race and sex, requires "very weighty reasons" for a difference of treatment to be justifiable. (For example, see the United Kingdom case of *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, per Lord Walker at § 58, quoting Jacobs and White, *European Law of Human Rights*, 3rd ed (2002), pp 355-6.)

62. The fact that the applicant was refused permission to wear a small cross whilst Muslim members of staff were permitted to wear the hijab is *prima facie* different treatment. Stating that one religious symbol was a mandatory requirement (§ 16 of the *Chaplin* judgment) whilst the cross is not (§ 17 of the *Chaplin* judgment), cannot be considered an objective and reasonable justification for a difference in treatment.

63. If burdens placed on adherents of some beliefs are greater than those placed on others, and there is no objective justification for the difference, then clearly there is discrimination in the enjoyment of the Right within Article 14.

64. In this case, Christians wishing to wear a Cross were placed at a disadvantage with Muslims (Hijab and clothing below the elbow) and Sikhs (clothing beneath the elbow). As indicated above, such a position will lead to religions with mandatory rules to be protected under the

Convention, and adherents of a religion that is "not under law but under grace" (Romans 6:14) will not be protected.

65. However, all religious apparel is non-mandatory to varying degrees; the determination by a secular employer (the Health Authority) of religious and cultural norms; and that the wearing of the Hijab is a mandatory cultural requirement for all Muslim women clearly shows the discrimination and arbitrary nature of the discrimination. It is self-evidence that the Hijab is a religious item and not cultural; further that not all Muslim women wear the Hijab[30].

66. The State is to be neutral and maintain a level playing field; and to create a climate of tolerance and mutual respect. The United Kingdom permits employers to act as religious authorities determining the right of individuals to wear religious symbols in arbitrary ways; further the National Courts have acted inconsistently to Christian beliefs: *R (Watkins-Singh) v. Aberdare High School* [2008] EWHC 1865 (Admin), a Sikh Kara bracelet was considered to be of "*exceptional importance*" to the Sikh applicant and therefore worthy of protection (§ 39-40). And in *G v. St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin) a "cornrows" hairstyle was culturally protected. Not all religious apparel is banned regardless of the bare assertions of health and safety.

67. The case of *Gldani Congregation of Jehovah Witnesses v Georgia*[31] is on point. The United Kingdom has mis-understood this case. Clearly it is an *'extreme'* case because of the levels of acquiesced violence, but the case is about *discriminatory behaviour by the State*. There was clearly a violation of Article 9, but the reasoning was the discriminatory treatment to the Jehovah witnesses as evidence by the tacit support of violence against them.

68. The Court held (in finding a violation of Article 14):-

> *140. ... in the instant case, the refusal by the police to intervene promptly at the scene of the incident in order to protect the applicants, and the children of some of their number, from acts of religiously-motivated violence, and the subsequent indifference shown towards the applicants by the relevant authorities, was to a large extent the*

[30] It is believed that Tunisia and Turkey have restriction on the wearing of the Hijab at State bodies.
[31] (2008) 46 EHRR 30. See paragraphs 140-141.

corollary of the applicants' religious convictions. The Government has not adduced any counter-arguments. In the Court's opinion, the comments and attitude of the State employees who were alerted about the attack or subsequently instructed to conduct the relevant investigation cannot be considered compatible with the principle of equality of every person before the law (see paragraphs 28 and 44 above). No justification for this discriminatory treatment in respect of the applicants has been put forward by the Government.

141. The Court considers that the negligent attitude towards extremely serious unlawful acts, shown by the police and the investigation authorities by the police on account of the applicants' faith, enabled Father Basil to continue to advocate hatred through the media and to pursue acts of religiously-motivated violence, accompanied by his supporters, while alleging that the latter enjoyed the unofficial support of the authorities

69. Furthermore, contrary to the UK government submissions (paragraph 39), the reasons of health and safety are not "self-evidently" objective and reasonable. Considering health and safety, or any justification, to be "self-evident" is simply unacceptable. In *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 the Court explained that "objective and reasonable justification" required the pursuit of a legitimate aim and a "reasonable relationship of proportionality between the means employed and the aim sought to be realized" (§ 10). In the case of Nurse Chaplin, whilst the aim sought to be realized may be clear (although unsubstantiated), the means employed to achieve this aim was not. No evidence was submitted as to how Nurse Chaplin's cross breached any health and safety provisions, and the main argument advanced by the employer—that the chain could be pulled and cause damage —was easily mitigated by the applicant's offer to use a magnetic clasp.

70. Moreover, there was no evidence that the wearing of the cross would cause a health and safety breach whilst the wearing of the hijab would not. Thus, even if the health and safety policy was justifiable, that does not make a difference in treatment justifiable.

71. This argument was unsustainable and illuminates the discretionary treatment. The fears of a possible scratch (which had not occurred in 38 years with Nurse Chaplin) is juxtaposed with the clear accommodation of other faiths (flowing headscarf's, brooches and clothing below elbow) despite the impact on health and safety. *In Case of the Moscow Branch of the Salvation Army v. Russia*, Application no. 72881/01, judgment of 5 October 2006, at paragraph 92 the Court held:-

It could not seriously be maintained that the applicant branch advocated a violent change in the State's constitutional foundations or thereby undermined the State's integrity or security. No evidence to that effect had been produced before the domestic authorities or by the Government in the Convention proceedings. It follows that the domestic findings on this point were devoid of factual basis.

72. This discrepancy of treatment between religions is all the more unjustifiable in circumstances where the Court has recognised issues as regards pluralism and respect between the sexes specifically with respect to Islam: *Leyla Sahin v Turkey*[32]*; Refah Partis (and others) v Turkey*[33].

Exhaustion of Domestic Remedies:

73. It is respectfully submitted that Mrs Chaplin has complied with Article 35 of the Convention. The Applicant need only make use of remedies that are '*effective*', '*sufficient*' and *'available'*[34]. The decision of *Ewedia*, which was decisive in the case of *Chaplin* (paragraph 8)meant there was not prospect of success and only time and monies would be expended before inevitable defeat.

74. The United Kingdom is unable to show any successful action with respect to a Cross in the English and Welsh courts; any purported remedy is illusionary and theoretical. Further the Court may note the *aggressive secularism* in the United Kingdom, with exceptions to select minority groups[35].

75. The Court has held that in order for a remedy to be considered available, it must be sufficiently certain, not just in theory but in practice as well.[1] The failure of having a certain remedy also will mean that there is a lack of requisite effectiveness.

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[32] {GC] see paragraph 116,
[33] [GC] paragraph 93.
[34] *Pine Valley Developments v Ireland (61 DR 206).*
[35] *Foka v Turkey Decision of 9th November 2006*
[1] *Van Droogenbroeck Case*, Judgment of 24 June 1982, Publ. E.C.H.R., Series A, Vol. 50, p. 30; *Case of De Jong, Baljet and van der Brink*, Judgment of 22 May 1984, Publ. E.C.H.R. Series A, vol. 77, p. 19; *Cullia Case,* Judgment of 22 February 1989, Publ. E.C.H.R. Series A, vol. 167, p. 16; *Case of Vernillo v. France*, Judgment of 20 February 1991, Publ. E.C.H.R., Series A, vol. 198, p. 12.

76. According to well-tried principles of ECHR case-law with respect to the exhaustion of local remedies and the requirement that they be effective; remedies which in the circumstances of the case appear to be ineffective need not be exhausted.[2] It has also been deemed by the European Human Rights Commission that the local remedies rule does not require resort to appeals that have no objective prospect of success[3]; and furthermore it has been held that a remedy which has no prospect of success does not constitute an effective remedy.[4]

77. The Human Rights Committee, like the Commission, has made it clear that domestic remedies need not be exhausted if, under the relevant domestic laws, the claim would inevitably be dismissed, or if established jurisprudence of the highest domestic tribunals precluded a positive result.[5] While remedies might have been available in Chaplin, the fact that another case on similar facts would have inevitably resulted in a loss rendered that remedy illusory and insufficient. Furthermore, as domestic remedies in Eweida were exhausted, and the applicants are bringing nearly identical claims on both the facts and merits, it would be redundant to appeal Chaplin where no objective possibility of success existed domestically and where the European Court's treatment of Eweida would ultimately be binding on Chaplin as well.

78. The Applicant wishes to place the case in context. The case of Mrs Chaplin attracted considerable national interest because of concern that the Cross was to become a proscribed religious symbol in the United Kingdom. Prior to the case, Lord Carey and six other senior Bishops wrote to the national press about Christian persecution in the United Kingdom[36] concerned at the requirement of the need for evidence that Christians wear Crosses. The trial was therefore in the public eye.

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[2] See e.g. Application No. 299/57, Yearbook 2, pp. 192-193 (inter-State); Application No. 434/58, Yearbook 2, p. 374; Application No. 788/60, Yearbook 4, p. 168 (inter-State; Application No. 712/60, Yearbook 4, p. 400; Application No. 5006/71, Collection 39, p. 93.

[3] See: e.g.: Communications Nos. 210/1986 and 225/1987, HRC1989 report, p. 228; Communication No. 220/1987, HRC 1990 Report, Vol. II, p. 122; Communication No. 222/1987, HRC 1990 Report, Vol. II, p. 130; Communication No. 306/1988, HRC 1990 Report, Vol. II, p. 182; Communication No. 356/1989, HRC 1993 Report, Vol. II, p. 87.

[4] See e.g.: Application No. 12097/86, D.R. 53, pp. 216-217; Application No. 12810/87, D.R. 59, p. 177; Application No. 14507/89, D.R. 65, p. 300; Application No. 13134/87, D.R. 67, p. 224; Application No. 16130/90, 12 H.R.L.J. (1991), p. 402; Communication No. 220/1987, H.R.C. 1990 Report, Vol. II, p. 122; Communication No. 222/1987, H.R.C. 1990 Report, Vol. II, p. 130; Communication No. 306/1988, H.R.C. 1990 Report, Vol. II, p. 182.

[5] Communication No. 327/1988, HRC 1991 Report, p. 265.

[36] 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

79. Mrs Chaplin was transferred to a non- clinical role on the same pay during the trial. However, after the case and upon the decision not to appeal, she lost her employment in July 2010; furthermore she had hoped to continue to use her skills as a Bank (reserve) nurse in retirement but this has been prevented. She has paid a very severe price for his faith and has lost her profession. The United Kingdom Government submissions are simply wrong on this.

80. Further, a witness, Mrs Babcock was witness in the case (who was repeatedly referred to as lacking the deeply held religious views of Mrs Chaplin as she removed her Cross upon management request (paragraph 15) gave evidence that another witness (Mr Amos) declined to attend due to fear of 'retribution' from his employer. The Tribunal disregarded his evidence (paragraph 10) as they are entitled to do so.

81. Further, at paragraph 23 of the Tribunal judgment, it was noted that a small number of nurses worn 'medi-alert chains' (due to their own medical conditions, a nurse can call for assistance if has a stroke for example). However, this was accepted to be a risk to patient care, but justified in the circumstances; the nurse was not moved to a non clinical position. Interestingly, in the US case of *Fraternal Order of Police v City of Newark*[37] , the Court considered the practice of exemptions for a secular purpose (health and safety) with a decision not extended such an exemption to a religious purpose (a beard which breached uniform policy). The US Court held that this medical exemption established that the policy was not 'compelling' and to refuse to extend to a religious purpose is an unlawful value judgment in violation of the *First Amendment*.

82. The decision in *Eweida* means, *inter alia*, that there is no personal right to manifest one's faith; the manifestation is determined in a discrimination context (not a religious freedom context) with the need to establish 'group' disadvantage.

83. The United Kingdom Courts do not apply Article 9 *in abstracto* and the Convention Rights are used in an interpretive manner by virtue of section 3 of the *Human Rights Act 1998.* The argument by the United Kingdom is unsustainable and would not be

[37] US Court of Appeal 3rd Circuit (1999) No. 97-5542. Decision of Alito J.

entertained in the light of enabling legislation in relation to EU Directive 78/2000. Furthermore, the Court requires the religious practice to be mandatory; the decision by Mrs Chaplin to wear her Cross was an expression of her faith without compulsion from religious authorities.

84. This is enough to show there is no available and effective remedy.

85. However, in order to assist the Court, the *Ewedia* judgment causes further difficulties. The simply test encompassed within Article 9 (of course, Article 9(2) may justify restriction of the Right on the context and facts of the individual case) are now lost in the Court of Appeal judgment of *Eweida*. The contour of the legal issues are:-

- a *group*, There is, in effect, no individual right to protection of religious freedom. What if you are a sole believer?
- *the size and nature of the group*. This is likely to require national evidence of the number of Christian wearing Crosses; or it could be a number of employees who feel so strongly about the Cross they are *all* prepared to lose their employment;
- *the nature of the disadvantage sustained by the group or individuals of the group;* whilst this is a legitimate inquiry, it is ill suited to religious adjudications as a religious violation is non remedial. What does it mean to be prevented from wearing a Cross or from eating Kosher food?
- *the nature of the expert evidence required*; It is likely that detail expert evidence will need to be given by either an Antropologist or Professor of Comparative Religion. It is likely to be so complex that it would be beyond an individual to produce and would have to be prepared by a Governmental agency;
- *the relevance of mandatory religious requirement,* Christianity does not have mandatory requirements; only beliefs and this cannot be satisfied.;
- *the evidence would need to determine whether the Cross should be worn visibly or around the neck or as an ear-ring*; the visibility of the Cross and its position on a chain around the neck was in issue.

86. It is humbly submitted that Mrs Chaplin's Article 9 and/or Article 14 Rights have been violated.