

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application No: 36516/10**

**BETWEEN:**

***Gary McFARLANE***

***Applicant***

***-and-***

***UNITED KINGDOM***

***Respondent***

---

***WRITTEN SUBMISSIONS***  
***of Rt. Rev and Rt. Hon The LORD CAREY (Intervener)***

---

***Introduction:***

1. I was Archbishop of Canterbury from 1991- 2002. I was the 103<sup>rd</sup> Archbishop of Canterbury and I was responsible for the spiritual welfare of 70 million Anglicans in the worldwide communion. I was created Lord Carey of Clifton upon retirement.
2. The case of Mr. McFarlane raises profound issues on the question of human rights and religious freedom: and whether religious freedom is protected in the States of the Council of Europe; or whether a new secular and sectarian agenda is to dominate.
3. The Convention presupposes existing national arrangements concerning religion and the law and contains no preference for any particular model of Church-State relationship. I make this comment because I am limiting this submission to the defence of the Christian faith. Currently, the Christian faith is being singled out for detriment; and as a Christian leader I defend the Christian faith solely.
4. I believe that it is important that the European Court recognizes the role of Christian values in society: *Lautsi v Italy*<sup>1</sup>. I make no submission in relation to new religious practices in Europe, which have values which are compatible and values that are non-compatible with European values. These need to be addressed by National law-makers and on a case by case basis.

***The Importance of Religion:***

5. Article 9 is a primary right; in that it is a *lex specialis* where religious freedom is recognized in all international treaties; the *United Nations Declaration on Human Rights*

---

<sup>1</sup> 30814/06 of 18<sup>th</sup> March 2011.

*1948, the European Convention on Human Rights and Fundamental Freedoms 1950, the International Covenant on Civil and Political Rights 1966, and the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.*

6. It is to be noted that rights of *lifestyle* have been developed by Court decisions from concepts of *'privacy'*. Both rights are important, but there is no reason a free society cannot respect both set of rights. Where there is a *clash of rights*, a balance is required.
7. 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; denial of the fundamentals of one's faith is not a realistic option and such a burden should not be placed upon a religious adherent. Judeo Christian beliefs are part of an individual's worldview; they are fundamentally tied to moral and ethical values, including moral and ethical values on sexual conduct.
8. Religious organizations perform the role of an intermediary institution between the individual and state. They are integrative and community building. The autonomy of religious organizations and of religions (in a general sense) is vital; they represent alternative values, they are counter-cultural and prevent State hegemony.
9. I am increasing concerned that the State and the Courts are entering into religious and theological matters by making judgments on what constitutes 'acceptable' and 'unacceptable' matters of doctrine and ethics. This approach is both fallacious and simplistic. Under 'acceptable' Christianity, there is a tendency to group into 'harmless' practices such as compassion, Sabbath attendance, diet, wearing a cross, as manifestations which do not harm anyone and are no more than matters of private religious practice. Accordingly, the State can permit these manifestations of such forms of religion that it finds conducive.
10. Under the category of 'unacceptable' Christianity come Biblical ethical values on sexual conduct, family life, beliefs in the sanctity of life. These

---

<sup>2</sup> Proclaimed by General Assembly resolution 36/55 of 25<sup>th</sup> November 1981.

manifestations of belief give rise to substantive issues of dispute. Increasing attempts are made to repress such values.

*Legal Considerations: and the inadequacies of anti-discrimination laws:*

11. An artificial conflict has been created between the expression of religious belief (in particular, Christian belief) and Equality law. I call it 'artificial' as the Judeo Christian tradition is one of the primary sources of human rights; in the United Kingdom, the Christian faith is firmly enmeshed in the constitutional structure. From the Puritan revolution, the force of Christianity has been a moderating and tolerant force represented in democratic institutions, the rule of law and characterized by the established Church<sup>3</sup>. Christianity is part of the value system. Religions (as far as the Judeo-Christian tradition) represent 'civic virtues' and 'public morality'; aspects of character that should be encouraged<sup>4</sup>.
12. Article 9 should be treated in like fashion to the rights of Articles 8 (family and privacy), 10 (expression) and 11 (association); a broad based approach to the rights contained in Article 9(1) and, thereafter, the onus on the State to justify their restriction under Article 9(2). The approach is one of a generous application towards religious manifestation. The public dimension/ interest of privacy, freedom of expression and association is often recognized<sup>5</sup> and should be recognized with regard to religious rights.
13. The well-known case of *Kokkinakis v Greece* (1993) expressed Article 9 in fulsome terms, but the principles of this decision need to be realized by means of substantive judgments. One of the most important of Convention Rights has become one of its most meaningless and weakest; this position needs to be re-considered.

---

<sup>3</sup> An established Church and religious tradition is not contrary to the Convention: Kokkinakis is a case in point and the Greek Orthodox Church.

<sup>4</sup> Judicial Notice should be taken that National Socialism and Marxist- Leninism were products of secular humanist thought and not Judeo- Christian thought patterns.

<sup>5</sup> Freedom of association is part of pluralism indispensable for democracy: Freedom and Democracy Party v Turkey (1999).

14. Equality law has six prohibited grounds of discrimination: age, disability, race, religion, sex (including transgender status) and sexual orientation. All are of equal weight and standing and there is no hierarchy of rights between religious manifestation and sexual orientation.
15. However, the Courts of the United Kingdom have consistently applied Equality law to discriminate against Christians. The process of formal legal analysis in the United Kingdom is whether a person who is *not* a Christian would be permitted to act in such a manner; and if the answer is that they would not be permitted to act in such a manner there is no discrimination.
16. So if a bigot, or a prejudiced individual would object to homosexual conduct and would be dismissed from employment, there is no discrimination against religious belief (according to British courts) if a Christian is dismissed. Thus, religious standards on sexual ethics and conduct (which have a different motivation) are comparable with those of a bigot and the Courts treats Christians in the same way. This very analysis and approach by the British Courts begs serious questions on their understanding and approach towards religious belief.
17. The description of religious faith in relation to sexual ethics is crude; and illuminates a lack of sensitivity to religious belief. The Christian message of 'love' does not demean or disparage any individual (regardless of sexual orientation); the desire of the Christian is to limit self-destructive conduct by those of any sexual orientation and ensure the eternal future of an individual with the Lord. In my view, the highest development of human spirituality is acceptance of Christ as Saviour and adherence to Christian values.
18. The correct approach is one of '*reasonable accommodation*' of the practice and manifestation of religion; this should be by means of Article 9 and not by the use of Equality/ discrimination laws (although the principle of '*reasonable accommodation*' does apply to disabled persons for the simple reason that it would be counter-productive to compare them with able bodied persons).

19. Religious belief cannot be compared with non-religious belief, or other forms of religious belief, but must be analysed on its own value system. It matters not to the religious adherent whether all faiths are treated (equally) miserably, or whether a non-religious adherent would be denied similar accommodation. A Muslim may wish to eat *Halal* food and it is irrelevant whether other faiths are denied concessions; a Jewish adherent wishes to observe the Sabbath and it is irrelevant whether non-Jews would also be denied the concession to not to work on a Saturday.

20. In principle Article 9 should enable individuals to live in conformity with their religious values with the least obstruction and hindrance. This does not mean that religious belief trumps other rights, but it must be restricted according to settled principles and the test of *proportionality*.

***The Persecution of Christians in the United Kingdom:***

21. It is, of course, but a short step from the dismissal of a sincere Christian from employment to a 'religious bar' to any employment by Christians. If Christian views on sexual ethics can be effectively described as '*discriminatory*' in outcome, such views cannot be '*worthy of respect in a democratic society*'. An employer could dismiss a Christian, refuse to employ a Christian and actively undermine Christian beliefs. I believe that further Judicial decisions are likely to end up at this point and this is why I believe it is necessary to intervene now.

22. In a country where Christians can be sacked for manifesting their faith, are vilified by State bodies<sup>6</sup>, are in fear of reprisal or even arrest for expressing their views on sexual ethics, something is very wrong. It affects the moral and ethical compass of the United Kingdom. Christians are excluded from many sectors of employment simply because of their beliefs; beliefs which are not contrary to the public good; Article 17 of the Convention has no direct applicability. These decisions and attitudes are not within the '*margin of appreciation*' of the State; and this approach needs correction by the European Court<sup>7</sup>.

---

<sup>6</sup> In a case of *R(Johns) v Derby City Council* [2011], the Equality and Human Rights Commission argued that Christian sexual ethics were akin to an '*infection*' to which the State had a duty to protect vulnerable children from becoming '*infected*' with.

<sup>7</sup> Decisions on religious freedom from States such as Turkey may not be reliably applied directly to the United Kingdom. The religious traditions, democratic evolution and pressing concerns are different.

23. The National Court should do the domestic balance, but where there is no satisfactory balance by the National Court, there must be European supervision. Would the European Court fail to give a remedy in circumstances where someone was refused employment, or was dismissed solely from employment because they were Jewish, or a Jehovah Witness; the national laws and domestic legislation must be applied in conformity with the norms of the European Convention<sup>8</sup>?
24. The Court has long recognized the applicability of the Convention to the employment context: *Rommelfanger v Germany*, (doctor wrote letter supporting abortion whilst working at Catholic hospital) *Vogt v Germany* (State employed teacher active in Communist party), *Fuentes Bobo v Spain* (employee criticizes employer publicly). Conscientious objection applies in the employment context in numerous fashions: Sabbath rights, abortion, euthanasia, ethical issues, use of certain phrases, gambling, etc.
25. There is now developing in the United Kingdom a form of secular conformity of belief and conduct, in which religiously (Christian) motivated conduct, is to be banned from the public forum.
26. In case after case, the Courts have found against the Christian faith, by strict application of national Equality/ anti- discrimination law; and by voiding Article 9 of any substantive effect:-
- Christians have been denied the right to wear Crosses, where other faiths are permitted to wear religious apparel; the Courts have required evidence, the establishment of ‘group discrimination’; whether a sizable number of employees at the same establishment are all willing to lose their employment for a Cross<sup>9</sup>;
  - Numerous dismissals for any expression of disapproval of homosexuality from a Christian position, or even suspected disapproval of homosexuality;
  - Christian medical personal are disciplined for praying with patients<sup>10</sup> or even discussing religion<sup>11</sup>;

---

<sup>8</sup> *Smith & Grady v United Kingdom* (1999); *Cox v Turkey*

<sup>9</sup> *Eweida and Chaplin* cases.

<sup>10</sup> <http://www.telegraph.co.uk/health/healthnews/4409168/Nurse-suspended-for-offering-to-pray-for-patients-recovery.html>

<sup>11</sup> <http://www.telegraph.co.uk/news/religion/8528088/GP-rapped-for-talking-about-God-with-patient.html>

- Church singing on a Sunday morning has been classified as noise pollution<sup>12</sup>;
- Christian Unions suspended from Student Unions at universities<sup>13</sup> as it is discriminatory to have a requirement of being a Christian to be a member or lead a Christian organisation;
- Christian schoolgirls are banned from wearing purity rings, but other faiths permitted to manifest modesty<sup>14</sup>;
- Christian views on the upbringing of children (two parents of different sex) have not been recognized as either a religious or a philosophical conviction<sup>15</sup>, but philosophical views on global warming<sup>16</sup>, the BBC as a public broadcaster<sup>17</sup> and anti-fox hunting<sup>18</sup> have been recognised as worthy of legal protection;
- Christian families can be deemed unsuitable to foster (or adopt) children because of their views on sexual ethics<sup>19</sup>;
- A Christian is disciplined by a private employer for supporting the institution of marriage<sup>20</sup> as this discriminates against people living together;
- A teacher is disciplined after expressing concern at the promotion of the homosexual lifestyle to children<sup>21</sup>;
- The closure of all Catholic adoption agencies for refusal to place children in same sex unions (despite the rising number of children who now cannot be adopted)<sup>22</sup>;
- The right to damages against a Bishop of the Church of England who declined to appoint a homosexual youth worker<sup>23</sup>;
- An employee faces dismissal for manifesting a palm Cross<sup>24</sup> in his van;

<sup>12</sup> <http://news.bbc.co.uk/1/hi/england/london/8316287.stm>

<sup>13</sup> <http://www.guardian.co.uk/education/2006/jan/25/highereducation.students> ;  
<http://news.bbc.co.uk/1/hi/6232869.stm>

<sup>14</sup> <http://www.telegraph.co.uk/news/uknews/1549965/Schoolgirl-goes-to-court-over-chastity-ring.html>

<sup>15</sup> <http://www.timesonline.co.uk/tol/news/uk/article2719462.ece>

<sup>16</sup> <http://www.personneltoday.com/articles/2009/05/27/50855/tribunal-accepts-environmentalism-as-a-belief-case-of-the-week-nicholson-v-grainger.html>

<sup>17</sup> <http://www.dailymail.co.uk/news/article-1384968/Believing-BBCs-ethos-equivalent-faith-job-tribunal-rules.html>

<sup>18</sup> <http://www.personneltoday.com/articles/2011/05/03/57605/legal-opinion-protection-of-philosophical-belief-under-discrimination-law.html>

<sup>19</sup> <http://www.bbc.co.uk/news/uk-england-derbyshire-11666594>

<sup>20</sup> <http://www.telegraph.co.uk/news/religion/5140133/Charity-worker-suspended-over-religious-debate-with-work-colleague.html>

<sup>21</sup> <http://www.christiantoday.com/article/christian.teacher.suspended.for.opposing.progav.training/23180.htm>

<sup>22</sup> <http://www.telegraph.co.uk/news/religion/7952526/Last-Catholic-adoption-agency-faces-closure-after-Charity-Commission-ruling.html>

<sup>23</sup> <http://news.bbc.co.uk/1/hi/wales/6904057.stm>

<sup>24</sup> <http://www.dailymail.co.uk/news/article-1377684/Electrician-Colin-Atkinson-faces-sack-Christian-cross-van-dashboard.html>

- The Court has recognized the right to wear Afro hairstyles (cornrow<sup>25</sup>), a hijab<sup>26</sup> and the rights of Sikhs<sup>27</sup>;
- It is now Christians who are persecuted; often sought out and framed by homosexual activists. Christians are driven underground<sup>28</sup>.

27. I could go on. Further, I believe that other faiths should be accommodated. However, there appears to be a clear animus to the Christian faith and to Judeo Christian values. It is difficult to understand why this is taking place; but clearly the courts of the United Kingdom require guidance.

28. I have called for specialist Courts (similar to family or commercial courts) to adjudicate on religious disputes as there appears to be a lack of understanding and sensitivity to these issues. This submission was ridiculed by the National Courts and I was portrayed as having asked for special courts for Christians (which I was clearly not arguing).

***The need for 'religious accommodation':***

29. I see no reason why religious belief should not be considered an important human right worthy of protection. The United States has strong *First Amendment* protection of religious rights without any noticeable defect.

30. The test of '*reasonable accommodation*' requires an accommodation of religious practice; such as the permission for wearing a turban as opposed to a helmet whilst riding a motorbike. Clearly in cases involving (so called) '*Good Christianity*' where there is no *clash of rights*, there should in principle be *reasonable accommodation* of religious manifestations. The question is one of practicality.

31. However, where there is a clash of rights (such as refusing to participate in the abortion process, or assist in euthanasia, or assist in unethical sexual conduct), there is a need for a more nuanced approach. I make the following submissions.

32. First, there should be a principle of '*mutuality of respect*'. By this I mean, that that both parties (for example, the Christian who is compromised and the homosexual) should respect the other's rights. Whilst there is a duty not to discriminate in the provision of services, the Court should require that where alternative service provision exists there is no denial of services. So if there is another employee, or organization, or individual who will provide the service, the Courts (or employer) must ensure that service provision comes from this alternative source and introduce procedures to make this an effective right. Secondly, Article 9 (religion) is a primary right) and this should not be assessed against principles of Discrimination (Article 14). Religion need not justify itself against a political criteria. Finally, in circumstances in which there was a direct clash of rights (such

---

<sup>25</sup> <http://www.bbc.co.uk/news/uk-england-london-13803106>

<sup>26</sup> <http://www.dailymail.co.uk/femail/article-1027300/How-I-nearly-lost-business-refusing-hire-Muslim-hair-stylist-wouldnt-hair.html>

<sup>27</sup> <http://www.telegraph.co.uk/news/religion/2469905/Sikh-teenagers-bangle-discrimination-win-will-impact-rules-on-uniforms.html>; <http://www.telegraph.co.uk/news/religion/7186319/Sikh-schoolchildren-should-be-allowed-ceremonial-daggers-says-Britains-first-Asian-judge.html>; <http://www.guardian.co.uk/politics/2009/oct/02/sikh-police-turban-tribunal>

<sup>28</sup> <http://www.telegraph.co.uk/news/uknews/8261705/The-therapist-who-claims-she-can-help-gay-men-go-straight.html>

as the only available abortion was from a religious person who objected to abortion), I believe it would be morally wrong for a civilized society to require somebody to act against their conscience (such as participate in what is perceived to be ‘murder’). Coercion of people to fulfill a political ideology those people do not believe in is the antithesis of freedom.

33. Of particular concern is that the domestic courts are refusing to balance rights by finding that non-discrimination policies trump all religious rights; or by accepting the unsubstantiated or weak evidence that a reasonable accommodation (or filter) cannot be made<sup>29</sup>. If the Convention requires a ‘*balance of rights*’ where a Church representative is engaged in adultery, *a fortiori* this requirement should apply to a private secular employer who is simply providing a non-statutory service: *Schuth v Germany*<sup>30</sup>.
34. This failure to *balance rights* is a process of decision by the Courts and not Parliament; the *Employment Equality (Religion or Belief) Regulations 2003* were specifically introduced to protect rights of religion in the workplace; the *Equality Act* protects against discrimination on grounds of religion and sexual orientation. It is the decision of the Courts and not of Parliament to decline to balance rights. Furthermore, the Strasbourg institutions remain the final bodies with oversight for the protection of fundamental rights in the United Kingdom.
35. The requirement that an employee should be subjected to intrusive and intimate enquiry by an employer about their religious faith and attitudes to theoretical events is a clear breach of *Article 9 First Sentence* as well as the ‘*psychological integrity*’ of an individual’s private life within *Article 8*<sup>31</sup>. There is no freedom of religion in the United Kingdom if an individual must publicly denounce tenets of faith as a condition of employment; this is a totalitarian position (*a fortiori* if the individual does not himself know his spiritual position).
36. Most of the cases, in my submission, do not involve discrimination on grounds of sexual orientation *per se*. For example, if a lawyer (who happens to be a homosexual or a woman) wishes to have his business card printed by a printer, it would be wholly improper to deny him the service. If, however, the same lawyer wishes to print posters advocated an orgy, the refusal is not because the individual is a homosexual, but because of the ideology promoted which violates the dignity of the Christian. Equality and anti-discrimination laws are simply depressing ethical behavior and believes they do not like.
37. EC *Directive 2000/78* protects conscientious objection based both on religion and ideology. The issue of conscientious objection can be linked to that of *reasonable accommodation* in the religious domain. This *cross over* was achieved by the Canadian Supreme Court in the decision of *Ontario Human Rights Commission v Simpson -Sears*<sup>32</sup> where the law was framed in terms of discrimination, but the Court applied a test of reasonable accommodation (following the framework established by the US Supreme Court).

---

<sup>29</sup> See *Bayatyan v Armenia* of 7<sup>th</sup> July 2011 at paragraphs 124-126. And UN Human Rights Committee *Republic of Korea Nos. 1321 and 1322/2004*.

<sup>30</sup> Application No. 1620/2003 of 23<sup>rd</sup> September 2010.

<sup>31</sup> *Gillan & Quinton v United Kingdom* (2010) 50 EHRR; *Smith Grady v United Kingdom* (1999)

<sup>32</sup> [1985] 2 SCR 536. The Courts of the UK have refused to consider the applicability of the concept of reasonable accommodation. The one exception was Lord Justice Rix in *Copsey v WWB Minerals* [2005] IRLR 811.

***Conclusion:***

38. It is my view that the case of *McFarlane v United Kingdom* will have profound implications for Europe; namely whether the Contracting States of the Council of Europe are to be free and respect traditional human rights; or whether another ‘*experimentation*’ in human rights will take place on the European continent. Such ‘*experiments*’ have had an unsatisfactory outcome; in particular the undermining/ privatisation of Christian values have been a component of totalitarian States in Europe in the recent past.
39. The secular human rights agenda has gone too far; and the Convention is losing legitimacy in many Contracting states. Many noble words such as ‘*human rights*’ are seen as little more than a political agenda. The *human rights agenda* is now seen as an anti -moral agenda; the Court must restore its prestige by recognition of traditional religious values.
40. Christians have values of morality, honesty and generosity that the State should promote, not discourage. The law recognizes minimum standards, and it is now accepted that the State should not advance a particular concept of morality but should not disable noble values. The secular cannot lay claim to the whole of the society (the *king’s writ does not run*) if we are to remain a few society; religious exemption would avoid these types of conflicts and avoid secular entanglement with religious belief.

Lord Carey  
House of Lords  
London.