IN THE EUROPEAN COURT OF HUMAN RIGHTS

F-67075 Strasbourg Cedex

France

Application No. 59842/10

Date of Introduction: 23rd September 2010

Date of Judgment of Fourth Section: 15th January 2013

Shirley CHAPLIN

-v-

UNITED KINGDOM

Request for Referral to Grand Chamber

Article 43 of the European Convention

Rule 73 of the Rules of Procedure

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Request for Referral to Grand Chamber

Introduction:

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

2. On 12th April 2011, the application of Ms Chaplin was joined to that of Ms Eweida (as well as to Ms Ladele and Mr McFarlane). On 15th January 2013, the Fourth Section of the European Court of Human Rights gave judgment in this case.

3. These cases arose because the National Courts held that:-

> *... Article 9 was inapplicable since the restriction on wearing a Cross visibly at work did not constitute an interference with the manifestation of religious belief:* paragraph [56] and [92] of the Judgment.

4. The Fourth Section held that this decision by the National Court was erroneous and that the wearing of the Cross was a manifestation of faith: paragraphs [89] and [97].

5. Ms Eweida prevailed after a proportionality analysis: paragraphs [94]-[95]; Ms Chaplin did not succeed because the Fourth Section held at paragraph [99]:-

> *The hospital managers were better placed to make decisions about clinical safety than a Court, particularly an international court which has heard no direct evidence.*

6. Whilst this position is understandable, this judgment devoid of the normal intensity of review will only enable further violations of Article 9 to occur in the United Kingdom. The case of *Chaplin* raises serious questions affecting the interpretation or application of the Convention or the Protocols thereto, and a serious issue of general importance, which warrants consideration by the *Grand Chamber*. This case raises the following issues:-

   i. Factual elements of the case;
   ii. Procedural Justice as a counterweight to the margin of appreciation;
   iii. The meaning of 'necessary in a democratic society' and the strict requirement of a proportionality review.

i. Factual Elements of Case:

7. In paragraph [62] of the Judgment, it was noted that HM Government had submitted that:-

> *Restrictions were also placed on the wearing of religious items by non - Christians on health and safety grounds: for example, Sikh nurses were not allowed to wear the Kara bracelet or the Kirpan sword, and Muslim nurses had to wear closely fitted, rather than a flowing hijab.*

8. As a statement of principle, this is not correct. Many health authorities have varying rules on the wearing of religious apparel.

9. On or about 9th April 2010, the Department of Health modified health and safety requirements to accommodate minority faiths[1]. The new policy permits Sikhs and Muslims to avoid the '*bare beneath the elbow'* rule by the use of 'over-sleeves' (which are paid for by public monies and have an increased risk of infection). Further, this new policy permits the wearing of the kara bracelet. This new policy was based on the advice of Islamic scholars and the *Muslim Spiritual Care Provision* in the *National Health Service*. The threshold of risk was lowered by the national authorities to accommodate religious practices.

10. The Judgment of the Exeter Employment Tribunal in *Chaplin v Royal Devon & Exeter NHS Foundation Trust* was on 6th April 2010[2]; the new policy was introduced within a week. It is inconceivable that the authorities were unaware of this change of policy and kept this information from Ms Chaplin and her legal representative. Furthermore, the enforcement of this policy was used in evidence[3] as for the impartial need to remove Ms Chaplin's Cross.

11. It is important to note that no evidence was presented to the Tribunal (or any forum, including the Fourth Section) of any injury caused by the wearing of the Cross; at all, in the entire history of the NHS. The 'risk' is purely theoretical. There was an evidential deficit that the Fourth Section failed to consider; as well as an incorrect factual basis.

12. Thus, the hospital authorities refused to apply their own policy on the wearing of religious and cultural clothes or jewellery (see paragraph [19] of *Eweida*) on an unsubstantiated ground of health and safety; and because the wearing of the Cross was not mandatory and the wearing of the *Hijab* was a mandatory cultural norm[4].

13. The only evidence before the national Employment Tribunal was that of a doctor who wore a flowing Hijab fastened by a broach (jewellery). The authorities could have called this Muslim doctor and declined to do so. The other facet was a witness in favour of Ms Chaplin who changed his evidence during the trial; and in normal circumstances this would have caused a judicial investigation[5]. A retraction of evidence in which a previous Statement may have been potential given in perjury would have resulted in the need to call the person, Mr Afos. The Employment Tribunal ignored this fact. Counsel believes that Mr Afos is a worker from the Philippines whose residency status in the United Kingdom is dependent on continued employment by the hospital authorities.

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[1] 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.

[2] Written judgment was sent on 21st April 2010.

[3] Paragraph 16 of Exeter Employment Tribunal Judgment.

[4] This is abused as the *Hijab* is not mandatory; further it is prohibited in public service in Turkey. See paragraphs [16] and [17] of Exeter Employment Tribunal judgment.

[5] Paragraph [10] of Exeter Employment Tribunal Judgment.

ii. Procedural Justice:

14. The Fourth Section failed to analysis the balance in the *Chaplin* case as they did in the *Eweida* case; the reasoning of the *Fourth Section* in *Chaplin* is that there should be judicial deference to the decisions of hospital managers about clinical safety. It appears this deference should be both by National Courts as well as international courts. With the greatest respect to the Fourth Section, this analysis is inadequate and will cause further problems on the interpretation of the Convention. Procedural justice is a component part of the Convention: *Buckley v United Kingdom.*[6]

15. In both cases (Eweida and Chaplin) the employer (absurdly) set himself up as a religious authority with the capacity to determine which religions to privilege and which faiths to disadvantage. In both cases, it was the wearing of the Christian Cross that was disadvantaged and the evidence shows that other faiths were privileged. These decisions are made by public bodies or large private enterprises under Governmental pressures to pursue 'diversity policies'. The policies of both bodies were self-evidently absurd, but upheld in both instances by the National Courts. This is why further guidance is required by the Court.

16. Paragraph [10] describes the *British Airways* policy; and paragraph [19], the *Royal Devon and Exeter Hospital* Trust policy. The employment and personnel officers in both companies determined that the *Hijab* was a mandatory faith symbol (religious by *British Airways;* cultural by *Royal Devon*) and the Cross was not. These findings are unsustainable[7]. Further, in *British Airways,* the less discreet the religious apparel was, the more likely it was to be permitted; and in *Chaplin* there is an unreviewable discretion as to which religions to privilege by the management under the pretextual use of 'health and safety'.

17. The Court has not accepted the *ipse dixit* of the executive as a ground for the breach of a Convention Right; even in matter of religious discrimination engaging issues of national security. In *Tinnelly & Sons & Others v United Kingdom*[8] the Secretary of State issued a 'Section 42 Certificate' on national security during the '*troubles'* in Northern Ireland; this was issued in response to the applicant's claim that a contract had not been awarded on the grounds of the perceived religious beliefs or political opinions of his employees. The Court held that an individual should be accorded '*procedural justice'* (paragraph [78]) and found a disproportionate breach of Article 6(1) because the National Court was unable to review the case. The judicial procedures should have been modified to accommodate security concerns.

18. The Fourth Section considered relevant comparative law on the wearing of religious symbols. In paragraphs [48] and [49] the Fourth Section considered this principle of '*reasonable accommodation'* as given effect by the Courts of the United States and Canada. Towards the end of paragraph [49], consideration is given to the decision of the Canadian Supreme Court in *Multani v Commission scolaire Marguerite-Bourgeoys*[9]; whilst the Fourth

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[6] (1997) 23 EHRR 101 at paragraph [76].
[7] Both Turkey and Tunisia (prior to the revolution) have prohibitions on the wearing of the *Hijab.*
[8] (1998) 27 EHRR 249
[9] (2006) 1 SCR 256

Section is correct to note that this case is authority for the '*sincerity test*', it deserves further consideration as the approach to evidential submissions by respondents.

19. The Courts of the United States and Canada apply the principle of '*reasonable accommodation*'. It is the duty (and onus) on the employer to adjust, adapt or modify the workplace to accommodate religious rights. The onus on the employer must be exercised '*seriously', 'conscientiously' and 'genuinely': see BC v BCGSEU [1999] 3 SCR, 3, 868; [2000] 1 SCR 665.* As employers generally do not wish to '*reasonably accommodate'* the religious manifestation of their employees (or may be hostile to such religious manifestations), National Courts in North America need to be vigilant.[10]

20. *Multani* was about the desire of a Sikh school boy to wear the Kirpan knife[11]; this breached school rules and involved the risk of a 'weapon'[12] entering school premises. The school authorities gave evidence on the self-evident element of risk. The risk from a Kirpan is greater than a Cross (in the sense that the risk in one is self-evident and not self-evident in the other). According to the Fourth Section, it is not for a court to analyze this assessment by those with greater involvement in schools or hospitals.

21. The Canadian Supreme Court did not follow this route. It found that i) if '*reasonable accommodation'* is possible, the *proportionality test* requires this accommodation[13]; reasonable safety and not absolute safety is the correct analysis. It is impossible to stop '*scissors, pencils and baseball bats*' in schools[14] and there is always a risk of injury; that there was no evidence of any injury of violence from Sikhs with Kirpan knifes in schools[15]; and it was disrespectful to Sikhs and sends out an incorrect message of their value of their religious belief[16]. Accordingly the decision of the school was set aside.

22. This structured analysis ought to be applied to Ms Chaplin; to ban the wearing of a Cross for the theoretical risk of injury by coming into contract (for which there is no evidence) is equivalent to the closing of all windows during a hot summer because of risk of a bee sting.

23. In *Elsholz v Germany*[17], a father sought access to his son in a family law dispute. The Court held that in paragraph [48]:-

> *determining whether the impugned measure was 'necessary in democratic society'* the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient for the purposes of paragraph (2) of Article 8 of the Convention.

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[10] See for example, EEOC v. Arlington Transit Mix, Inc., 957 F.2d 219, 222 (6th Cir. 1991); Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607 (9th Cir. 2004); Pyro Mining, 827 F.2d at 1086; Haring, 471 F. Supp. at 1182.
[11] It is understood that this was permitted by British Airways at an airport.
[12] The descriptor of 'weapon' to a Kirpan knife is similar to the 'disrespect' of calling the Cross a piece of jewellery as Ms Chaplin suffered.
[13] Paragraph [52]- [53] of *Multani* judgment.
[14] Paragraph [58] of *Multani* judgment.
[15] Paragraph [59]- 60] of *Multani* judgment.
[16] Paragraph [71] of *Multani* judgment
[17] (2002) 34 EHRR 58

24. In answer to the question about whether the grounds of the national authorities were '*relevant and sufficient*', there was a requirement for expert evidence in the form of an independent psychological Report; the failure to require this amounted to a breach of both Articles 8 and 6.

25. Clearly, in *Chaplin*, the National Courts should be required to demand an independent Risk Assessment Report; *a fortiori,* where the reasoning of a Respondent is suspect and the reasons given by the hospital authorities for the purposes of Article 9(2) are not *'relevant and sufficient'*.

26. In *Turek v Slovakia*[18]*,* Mr Turek sought to sue the Slovak Intelligence Services for his listing as a former Communist collaborator and a negative 'security clearance'. Article 8 included procedural safeguards and this engaged both Articles 8 and 6 (although the purposes of the Articles are distinct). The Court considered its role to ensure the observance of the undertakings in the Convention under Article 19 of the Convention (paragraph [114]); it noted that whilst it is not a Court of Appeal the Court must consider if the National Court considered the evidence in a manner compatible with the objectives of the Convention. On the facts of this case, Article 8 included procedural protection of access to security documents.

27. These cases show that Article 8 has procedural safeguards (such as independent evidence) and a Claimant must be able to see the evidence against him in order to effectively challenge it. Where the evidence is merely an assertion of a 'risk to health and safety' (a 'risk' first attached to Ms Chaplin herself and as the case developed moved to patients); in circumstances where there is *prima facie* evidence of arbitrary application (other faiths permitted religious apparel), there is a breach of Articles 6, 9 and 14.

28. It must be remembered that Ms Chaplin has worked as nurse since 1981 wearing her Cross without incident. The risk inherent in the permitting of the wearing of a Hijab or Kara bracelet means that that the standard is '*reasonable'* not '*absolute'* safety. Further, if items such as fob watches, medi alerts[19] and lanyards are permitted, a similar systemized exemption should be extended in cases of religious hardship[20] to the wearing of Ms Chaplin's Cross.

29. In *Lombardi Vallauri v Italy*[21], a Catholic professor's tenure was terminated by reason of going against '*Catholic doctrine'*. He had no means of challenging this; it was a mere assertion by the authorities; and a breach of Article 10 was found.

30. In *Schuth v Germany*[22], an organist was dismissed from the Church for establishing an extra-marital relationship and this damaged the position of the Catholic Church. The Court criticized the German National Courts for appearing *'to have followed the opinion of the ecclesiastical employer without making any further enquires'*: paragraph [68]. The assertion by an employer as to his reasons for an act nevertheless still required structural

[18] (2007) 44 EHRR 43
[19] Paragraph [23] of Exeter Employment Tribunal judgment
[20] *Fraternal Order of Police v City of Newark* 170 F 3rd 359.
[21] Appl. No. 39128/05
[22] (2011) 52 EHRR 32.

analysis of the necessity of the measure by the National Court, or whether the reasoning of the employer was pretextual. A breach of Article 8 was found because the National Court did not fully consider the issues in dispute and thereafter balance them.

iii. Proportionality:

31. Thirdly, the Fourth Section incorrectly applied the test of '*necessary in a democratic society'* in relation to Ms Chaplin: paragraph [99]. In cases where a wide '*margin of appreciation'* is established, the procedural safeguards become overriding. The Court should require National Courts to conduct an intense proportionality review in cases where there is a violation of a Convention Right. This is particularly important at this juncture in the history of the Court.

32. The *draft Agreement on Accession of the European Union to the European Convention on Human Rights* was announced on 5th April 2013. The European Union is developing a fundamental rights approach to their case law under the *Charter of Fundamental Rights of the European Union*[23], the development of the principle of *Citizenship of the Union* based on Article 20 *Treaty on the Functioning of the European Union* and the creation of the *Fundamental Rights Agency*[24]. Both the Court in Strasbourg and Luxembourg work in harmony for the protection and promotion of human rights: *Bosphorus Hava Yollari v Ireland*[25].

33. The rights of Ms Chaplin arise from Directive 2000/78 as transposed by the *Employment Equality (Religion or Belief) Regulations 2003*: see paragraph [43] in *Chaplin v United Kingdom*.

34. The *Luxembourg* test on proportionality; suitability, necessity and fair balance are strictly construed[26] by National Courts as they affect an EU freedom. The Court should not offer any less protection and should consider the evidence as to both suitability and necessity. The Fourth Section has not done this.

Conclusion:

35. The following conclusion is made with hesitation and regret, but these matters must be brought to the attention of the Court.

36. Dissenting Judges Vucinic and Gaetano made a very powerful dissent criticizing (albeit in relation to Ms Ladele) the '*blinkered political correctness … (which clearly favoured 'gay rights' over fundamental human rights)* and '*the doctrinaire line, the road of obsessive political correctness'*. Regrettably, these are current factors in the United Kingdom and explain some of the decisions coming before the Court.

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[23] [2007] OJ 303/1
[24] *Regulation 168/2007.*
[25] (2006) 42 EHRR 1
[26] The German concept: *Kreutzberg* (14th June 1882).

37. First, the use of discrimination law as a means of effecting Article 9 rights should be criticized. In the *Chaplin* case, instead of the National Court analysing the need and proportionality for restrictions on the manifestation of the Rights contained within Article 9(1), it became a complex argument of i) direct discrimination, namely was the '*process of dialogue'* discriminatory as between Christians and Muslims (of which Ms Chaplin clearly couldn't produce any evidence) and of ii) indirect discrimination.

38. In relation to *indirect* discrimination, the argument was equally complex and the courts needed to consider:- is the religious symbol mandatory, 'group discrimination', Ms Chaplin had no group as Ms Babcock was pressurized to remove her Cross, the need for evidence on the wearing of the Cross (but not on its purported danger). The Grand Chamber should note the very arguments of the Government of the United Kingdom in the Fourth Section in which it was submitted that the '*visible wearing of the Cross was a [not] generally recognized form of practicing the Christian faith';* an argument that had prevailed in the United Kingdom courts.

39. The United Kingdom has an overall good record on human rights; in recent years this has come into sharp contrast due a number of decisions made against Christians. The cases attract considerable media attention and ridicule of the judiciary and these cases have resulted in hostility to the human rights agenda (which is seen as political). Leading figures have spoken out on this, including the former Archbishop of Canterbury and other Bishops. The National Court of the United Kingdom requires a degree of correction from this Court.

40. However, the Courts in the United Kingdom have recognized the Hijab, burka, Kara bracelet and the cornrow haircut for Afro Caribbean school boys. Christian views on the upbringing of children by two parents have not been recognized as a religious view at all; whilst views on global warming, fox hunting, and even the BBC as a public broadcaster have been recognized.

41. The Equality and Human Rights Commission has submitted to a British Court that it is the duty of the State to protect vulnerable children from becoming '*infected'* with Judeo Christian values on sexual morality without any comment from senior members of the Judiciary. The EHRC was arguing that a Christian family was unsuitable to foster children because their Christian values did not endorse homosexuality.[27]

42. Christian Unions have been suspended from Universities for membership requirements of being a Christian prior to joining,[28] Christian schoolgirls have been forbidden from wearing chastity rings whilst other faith groups are permitted to protect their modesty.[29] Christian views on pre-marital sex have been the subject of legal actions. Christian preachers have been arrested and prosecuted for preaching 'offensive' sermons from the Bible.[30] Christian service providers such as guest houses have been successfully sued for seeking to uphold a

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[27] *R (Johns) v. Derby City Council* [2011] EWHC 375 (Admin).
[28] http://news.bbc.co.uk/2/hi/6232869.stm.
[29] http://news.bbc.co.uk/2/hi/6900512.stm.
[30] http://www.bbc.co.uk/news/uk-england-somerset-16984133.

Christian ethos within their business.[31] Catholic adoption agencies have been closed by the government.[32] Christian charities have had funding removed because of the Christian nature of the charity.[33] And access to venues and services is now being denied to Christian groups because the Christian content of the meetings is considered 'offensive'.[34]

43. On a wider European level, it is noteworthy that both the European Parliament and the OSCE have already officially recognized the phenomenon of intolerance and discrimination against Christians and have held numerous workshops on the subject to stem the tide of aggressive secularism.

44. It is therefore submitted that the Convention rights of Ms Chaplin have been violated by the United Kingdom. The Grand Chamber of this Court is respectfully requested to accept this appeal application, particularly with reference to the factual elements of the case; the procedural injustice and the meaning of 'necessary in a democratic society' and the strict requirement of a proportionality review.

[31] *Bull and Bull v. Hall and Preddy and Hall* [2012] EWCA Civ 83; *Black and Morgan v Wilkinson*, Claim, no. 0UD02282, 18 October 2012.
[32] 'Adoption agencies shut under 'equality' laws', *The Christian Institute,* April 2009.
[33] 'Care home suffers under 'equality' laws: How traditional Christian beliefs cost an elderly care home a £13,000 grant,' *The Christian Institute,* May 2009.
[34] http://www.telegraph.co.uk/news/uknews/law-and-order/9260335/Storm-as-Law-Society-bans-conference-debating-gay-marriage.html.