*IN THE EUROPEAN COURT OF HUMAN RIGHTS*

*F-67075 Strasbourg Cedex*

*France*

*Application No. 36516/10*

*Date of Judgment of 4th Section: 15th January 2013:*

*Gary McFARLANE*

*-v-*

*UNITED KINGDOM*

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*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 Mr Gary McFarlane, of *Flat 5, Knightstone Court, Gordon Road, Whitehall, Bristol BS5 7EE.* Mr McFarlane is represented by Paul Diamond, barrister and Andrews Law Solicitors.

2. Mr McFarlane was an employee of Relate; he was employed from 2003 – 2008 as a counsellor. Relate is well known in the United Kingdom and provides relationship counselling services for couples.

3. Mr McFarlane is a practicing Christian. As a condition of his employment, he was required to 'state' that he would counsel same sex couples in directive sexual therapy, regardless of any violation of his religious conscience. He was unable to give such an assurance as he was uncertain of his own views about a theoretical scenario. Mr McFarlane had never refused to counsel a same sex couple; in 'couple counselling' he had previously counselled two same sex couples. In short, the employer required Mr McFarlane to act contrary to his religious faith or be dismissed; he was singled out by reason of his religious faith.

4. On 18th March 2008, he was dismissed summarily for gross misconduct. This is the most severe sanction by an employer and is normally reserved for acts of moral turpitude such as theft, lying or violence.

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

6. The case of *McFarlane* 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:-

    - *The decision of the Fourth Section is very worrying and opens the door to totalitarianism in the European Area;*
    - *Mr McFarlane was dismissed from employment for holding private views supporting traditional marriage; his Christian views on traditional marriage paralleling Article 12 were repugnant to his employer;*
    - *Procedural Justice as a counterweight to the margin of appreciation;*
    - *The meaning of 'necessary in a democratic society' and the need for the principle of 'reasonable accommodation' to be established.*

### *The Judgment of the Fourth Section:*

7. The Judgment of the *Fourth Section* fails to critically review the findings of the National Courts by its overly generous use of the doctrine of *'margin of appreciation'* and does not determine whether the dismissal of a person for their religious viewpoint in circumstances where such a person could be *'reasonably accommodated'* would be the more appropriate

test to determine whether an interference was '*necessary in democratic society'* and thus, *proportionate*. In the specific case of freedom of religion, the Court's task in order to determine the margin of appreciation in each case is to take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society.[1] The restrictions imposed on freedom to manifest all of the rights inherent in freedom of religion call for very strict scrutiny by the Court.[2] In the exercise of its supervisory function the Court must consider the basis of the interference complained of with regard to the case as a whole.[3] By providing an erroneously large margin of appreciation to the United Kingdom in its balancing test, the Fourth Section erred in not applying the proper standard of review which should have been strict scrutiny.

8. Furthermore, according to this Court's own well established case law regarding Article 6, the Convention requires that judgments be duly reasoned. Precisely stated judgments should address all key legal arguments central to the case at hand.[4] The applicant, as well as several third parties, made substantive arguments concerning the definition of "necessary in a democratic society" and "proportionality" as best being served by the doctrine of reasonable accommodation rather than a balancing test. The Court failed to properly assess these arguments despite legal precedent from the Court suggesting that it would utilize such a standard in future Article 9 cases.[5]

9. In paragraph [109], the *Fourth Section* holds that in assessing whether a '*fair balance'* was struck:-

> *However, for the Court, the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination...*
>
> *In all the circumstances, the Court does not consider that the margin of appreciation was exceeded in the present case.*

10. In paragraph [38] the *Fourth Section* describes the findings of the *Employment Tribunal* as:-

> *Relate's commitment to providing non-discriminatory services was fundamental to its work and it is was entitled to require an unequivocal assurance from Mr McFarlane that he would provide the full range of counselling services to the full range of clients without reservation.*

11. In paragraph [39], the *Fourth Section* notes the views of *Relate* as found in national proceedings:-

> *It noted Relate's argument that the compromise proposed by Mr McFarlane would be unacceptable as a matter of principle because it ran "entirely contrary*

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[1] ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658; 13 December 2001, Metropolitan Church of Bessarabia and others v. Moldova (2002) 35 EHRR 306, § 119.
[2] ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV, § 44: AFDI, 1996, p. 749.
[3] ECHR, *Kokkinakis v. Greece.*, *op. cit.*, § 47.
[4] *See e.g.*: ECHR, 09 December 1994, *Ruiz Torija v. Spain* , Series A, No. 303-A; ECHR, 9 December 1994, *Hiro Balani v. Spain*, Series A, No. 303-B.
[5] *See e.g.*: ECHR, *Jakóbski v. Poland*, no. 18429/06, 7 December 2010.

*to the ethos of the organization to accept a situation in which a counsellor could decline to deal with a client because of their conduct"... Relate was entitled to refuse to accommodate views which contradicted its fundamental declared principles.*

12. The *Fourth Section* noted the findings of the National Court, namely that the dismissal of Mr McFarlane was *'on principle'* and not on whether he could be accommodated (which he clearly could). In short, his Christian views on traditional marriage within Article 12 were repugnant to his employer.

13. Further, the *Fourth Section* reviewed the findings of fact by the national Courts. In paragraph [34], the facts record that there was a finding of a 'perception' that Mr McFarlane was unwilling to work on sexual issues with same sex couples, resulting in a letter from his fellow co-counsellors dated 5th December 2007: paragraph [35].

14. The *Fourth Section* did not record the position of Mr McFarlane. The attitude of an employee (Mr McFarlane) in this sensitive situation was confidential and normally would have been unknown to co-workers. This was the result of an atmosphere of vilification of Christians in which the views of Mr McFarlane were purposely leaked by his employer and he was described as a 'homophobe'; which ironically was a position that directly discriminated against Mr. McFarlane contrary to Relate's declared principles.

15. In paragraph [34] the *Fourth Section* notes a concern at an inability to filter clients by the employer. However, Relate is a body for the maintenance of relationship between couples; thus individuals present as 'couples' (not threesomes or families) and it is self-evident whether they are a same sex couple or not. Clearly couples go through a process of allocation and they are sent to the most suitable counsellor.

16. Referrals regularly take place in counselling if a specific need arises requiring a more specialized approach, or the counsellor becomes ill or moves away. It would be bizarre to want counsellors to counsel in circumstances in which they would feel unable to support (same sex, a certain type of abuse, or other personal reasons); if for no other reason, the counsellor would be unlikely to do a good job.

17. Previously, Mr McFarlane had been uncertain how he would cope with 'couple counselling' same sex couples due to his Christian faith, but when the situation arose he was able to resolve it with the assistance of his Supervisor: paragraph [33]. In 2007, he commenced Relate's post graduate diploma in psycho-sexual therapy: he did not know his views: '*his views on providing psycho-sexual therapy to same sex couples were still evolving*': paragraph [35] and he hoped to resolve this again with his Supervisor if the situation arose.

*The Dissenting Judgments of Judges Vucinic and De Gaetano:*

18. Dissenting Judges Vucinic and De 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'*. Dissenting Judges Vucinic and De Gaetano are clearly aware of the real issues at stake in the cases of *Ladele* and *McFarlane*.

19. However, they appear to have less sympathy for Mr McFarlane. Their departure between the *third and fourth applicants* appears to be that Ms Ladele commenced her work at a time when civil partnerships was not thought of; whilst Mr McFarlane *'must have known that he might be called upon to counsel same sex couples...he effectively signed off or waived his right to invoke conscientious objection when he voluntarily signed up for the job'*.

20. First, it is submitted that a contract of employment is not decisive as recognized by the *Fourth Section's* judgment in paragraph [109]; what if someone commences employment at a certain date and, some years later converts to Christianity or another religion, it is submitted that the individual would still have the protection of the Convention (albeit, this would be a matter for the *proportionality* balance).

21. Secondly, the *waiver of a Convention* right is problematic and should only be accepted in the most exceptional circumstances. In the employment circumstance where livelihood is at stake and there exists an unequal relationship between employer and employee, this must only be permissible where there exists an equality of 'bargaining power' and where the 'waiver' is unequivocal: *Deweer v Belgium*[6]; *Hakansson & Sturessson v Sweden*[7]

22. Thirdly, the concept that future employment may require doing an act contrary to your conscience and that such a possibility exists means forfeiture of one's Convention Rights is misconceived. A person may choose to qualify as a lawyer or doctor; they may intend to practice law and medicine in a non-controversial field. However, a situation may arise in which the practitioner wishes to exercise his rights of conscientious objection (a same sex couple wishes to buy a home; or the doctor may be asked to participate in medical research which would be morally abhorrent to that individual). On this analysis, a person could not accept most employments and professions; even a judicial appointment, if a need arose to recuse oneself from a conflict of interest. In this case Mr McFarlane did not consider the scenario likely to occur and, if it did, he was uncertain of his reaction. The disciplinary process brought against him by his employer was wholly theoretical. Furthermore, to ostensibly ban anyone with a morally based conscientious objection to any theoretical task within an employment setting from entering that profession would likewise deny clients with similar worldviews from having their service provided by someone who better understands and empathizes with their needs. The importance of this, particularly in the counselling profession, cannot be understated. Should all Christian couples seeking counselling, for example, be denied a right to have a Christian counsellor who holds their views in order to safeguard political correctness?

23. Fourthly, the case of McFarlane is more important than that of Ms Ladele. The preservation of a contractual analysis would leave all future marriage registrars unprotected because they would now know about same sex marriage. The case of Mr McFarlane directly raises the question of conscience and 'thought crime' and gives the Grand Chamber an opportunity to judge on principle how Article 9 Rights should be applied in the workplace.

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[6] (1973) 2 EHRR 439

[7] (1991) 13 EHRR 1 at paragraph [67].

24. Finally, dissenting Judges Vucinic and Gaetano address the issue of conscience as a distinct issue from religious manifestation. This will be addressed later in the submission.

*The Breach of a Fundamental Right:*

25. There has been a breach of the fundamental Rights of Mr McFarlane. He was dismissed for his 'thoughts' and 'religious beliefs' on a wholly theoretical basis. There is a direct violation of his *inner forum* and his privacy and identity rights within the *first sentence of Article 9.*

26. The persuasive factor for the *Fourth Section* at paragraph [109] was the fact that the employer intended to provide a service without discrimination. This premise is erroneous; there was no case of a failure in service provision, there was no individual denied service provision and nor would there be a case of any denial of service provision (as a same sex couple would be allocated a suitable counsellor). There is no 'victim' other than Mr McFarlane.

27. Relate themselves accepted this. Mr McFarlane was dismissed on '*principle'* and they would not compromise or accommodate Mr McFarlane; his secular employer simply would not employ a person who was not sympathetic to homosexual unions. This is not the province of an employer who is only concerned with job performance.

28. The views of Mr McFarlane that were so repugnant to his employer were the traditional Christian beliefs that marriage is between a man and a woman as defined in Article 12 of the Convention. Is the believing in Convention Rights unacceptable? Is the believing in the very laws of the United Kingdom defining marriage at the time of Mr. McFarlane's employment unacceptable?

29. The worse putative outcome for the employer would have been if Mr McFarlane had been unable to resolve his conflict with his faith; only then could an issue have arisen. Even in this circumstance, Mr McFarlane could have been accommodated to a small degree by an allocation of same sex couples wanting directive psycho-sexual therapy to a more suitable counsellor. He would be able to discharge probably in excess of 99% of his functions and with a reallocated case load, be able to work to maximum capacity.

30. The need for a non-discriminatory service provision does not require that every employee should provide the service (regardless of privacy or other rights); only that the service should be provided to those seeking the service. There may be a heightened requirement in the case of a Statutory right, or a public service, but none of these factors were present in this case.

31. The counselling process was divided into i) couple counselling and ii) directive psycho-sexual counselling in which the counsellor assists in sexual technique and pleasure. Mr McFarlane had practiced since 2003 with 'couple counselling' and had counselled two same sex couples during this period.

32. On 18th March 2008, he was dismissed summarily for gross misconduct. This is the most severe sanction by an employer and is normally reserved for acts of moral turpitude such as theft, lying or violence.

33. The fact that he was dismissed in this fashion and not permitted to return to 'couple counselling' which he had discharged satisfactorily for some 5 years (and simply be prevented from providing directive psycho-sexual counselling) was because he was dismissed for holding religious views whether they were acted on or not. He was dismissed on *'principle'* for holding (or potentially holding) to Christian views on marriage. The Fourth Section of this esteemed Court therefore erred by incorrectly balancing a direct violation of Mr McFarlane's right to religious freedom under Article 9 and a theoretical act of discrimination for a theoretical victim. Under this Court's own jurisprudence, no application to the Court for non-discrimination because of Mr McFarlane's conscientious objection could have been filed under Article 34 because no actual victim existed.[8] Therefore the balance used by the Court its analysis was wholly erroneous.

34. The (unnecessary) loss of employment has had a number of consequences for Mr McFarlane; and some of these aspects were caused or intensified by his dismissal. He has lost employment, income, his home and his marriage. His faith has remained strong and he has now remarried but is still unable to fully pursue his counselling profession as professional bodies refuse to accept him. He must clear his name in the European Court.

*The Misapplication of the 'margin of appreciation':*

35. The *Fourth Section* has misapplied the margin of appreciation. The *Fourth Section* found that this serious violation of fundamental Rights is permissible because of the combination of the desire to deliver a non-discriminatory service (which is fallacious as outlined above) and because these are sensitive issues between competing Convention Rights they should fall within the '*margin of appreciation*': paragraphs [106] *Ladele*, [109] *McFarlane.*

36. However, (i) this is not a case of competing Convention Rights, (ii) nor is it an area for the application of the *margin of appreciation* as the European area has a common code in this field and (iii) it involves an unrestrained Convention violation of a personal nature. All these propositions are related.

37. This is not an area of competing Convention Rights. It is not a sensitive area in which the Contracting States have distinct national values. The *Fourth Section* gave the example of the use of embryos: *Evans v United Kingdom*[9]. Other controversial areas are *inter alia* same sex marriage, euthanasia and the "right to die" and national security.

38. This case is not about the rights of same sex couples or sexual orientation, it is about the violation of fundamental Rights of Christians using the 'ruse' of service delivery (in both the cases of *Ladele* and *McFarlane*, there was no impact on service delivery). The United Kingdom can accommodate both non-discrimination and Article 9 rights by the principle of *reasonable accommodation.*

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[8] *See, e.g., Lindsay and Others v. UK*, app. no. 31699/96 (Eur. Ct. H.R. Jan. 17, 1997).
[9] GC Appl No. 6339/05 at paragraph [77], ECHR 2007-1.

39. Thus the competing Convention Rights (if there is a conflict, and this is not accepted) is between the Convention Right in Article 9 *and* the non-Convention Right to deliver a non-discriminatory service (which was not affected). Thus, even on this 'test', Mr McFarlane should prevail.

40. In *Chassagnou v France*[10], the Court held at paragraph [113] that where there is a balance between a Convention Right enunciated (Mr McFarlane's Article 9 Rights) and a non-enunciated Right (all persons must be non-discriminatory in service provision), only '*indisputable imperatives'* can justify inference with a Convention Right. Clearly there are no such imperatives in this case.

41. This is not a case in which the Contracting States do not have a common code. This case is not about the merits or demerits of same sex unions; it is about whether individuals who have Christian beliefs should be protected by the Convention. There is no Contracting State which does not believe this and as the practice of the Christian faith by Mr McFarlane has no detrimental impact on any third party, his Article 9 rights should be protected.

42. As dissenting Judges Vucinic and De Gaetano reasoned, the United Kingdom is in serious violation of the Convention by the creation of an area within the Contracting States in which the Christian faith has been singled out for special animosity. Mr McFarlane calls on the Grand Chamber and other Contracting States to vindicate his Convention Rights.

43. Finally, the Court has not applied the doctrine of the *margin of appreciation* where there are blatant, serious and unreasonable violations of the Convention; this is *prima facie* the case were the violation effects a core component of an individual's identity such as religious belief or sexual orientation: *Dudgeon v United Kingdom*[11], *Smith & Grady v United Kingdom*.

44. In *Pla v Andorra*[12], a case on inheritance by an adopted child, the Court held:-

> *59. Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention (see Larkos v. Cyprus [GC], no. 29515/95, §§ 30-31, ECHR 1999-I).*
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> *61. The Court reiterates that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised"*

[10](1999) 29 EHRR 615 at paragraph [113].
[11](1992) 4 EHRR 149 at paragraphs [60] – [61]
[12]*Pla v Andorra* [2004] VIII at paragraph [46] and [59]

*(see, inter alia, Fretté v. France, no. 36515/97, § 34, ECHR 2002-I). In the present case, the Court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, where a child is adopted (under the full adoption procedure, moreover), the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his or her family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.*

*Furthermore, there is nothing to suggest that reasons of public policy required the degree of protection afforded by the Andorran appellate court to the appellants to prevail over that afforded to the first applicant.*

45. In *Vojnity v Hungary*[13], the Court held at paragraph [36] that '*very weighty reasons'* are required to justify a difference of treatment of rights protected by Article 9.

46. In *Redfearn v United Kingdom*[14], the Court required the United Kingdom to introduce employment legislation to protect Article 11 Rights, even where the issue was sensitive, because of the importance of the Right.

***Other International Treaties and Considerations:***

47. 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*[15], 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*[16]. Both the Court in Strasbourg and Luxembourg work in harmony for the protection and promotion of human rights: *Bosporus Hava Yollari v Ireland*[17].

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

49. The *Luxembourg* test on proportionality; suitability, necessity and fair balance are strictly construed[18] 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.

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[13] Appl. No. 29617/07 of 12th February 2013.
[14] Appl. No. 47335/06 of 6th November 2012
[15] [2007] OJ 303/1
[16] *Regulation 168/2007.*
[17] (2006) 42 EHRR 1
[18] The German concept: *Kreutzberg* (14th June 1882).

*50.* Further, EU law does not have a *margin of appreciation*. In *Konstantinidis v Stadt Altensteig-Standesamt*[19] Advocate General Jacobs held that Community law could not prevent violations of fundamental rights under the principle of *'civic Europeus sum';* and specifically gave the example of a non-discriminatory law based on Shari'a that prevented free movement because of religious violations to the rights of EU citizens. This example was followed by Advocate General Sharpston in *Zambrano v ONEM*[20] at paragraph [84] of her Opinion. The Court of Justice is aware that the non-protection of rights of religion (and protection from religious acts) are contrary to EU fundamental Rights law.

51. In *Sidabras and Dziautas v Lithuania*[21], the Court held that the ban on a whole class of persons (former KGB agents) was disproportionate under Articles 8 and 14.

52. Wide ranging provisions that affect a class of persons (in this case, Christians) would also bring into place Article 1(2)[22] of the *European Social Charter 1961* (of which the United Kingdom is a signatory). ESC 1961 is a binding international treaty to which the Contracting States must give immediate effect.

*The Principle of 'reasonable accommodation':*

53. Mr McFarlane could have been easily accommodated; Mr McFarlane sustained ideological sanction because of his religious views without any proportionality. The problematic scenario was hypothetical and he could have continued in employment until the issue arose and was a problem. The views of Mr McFarlane would have been considered 'moral' in the United Kingdom some 15 years ago and would have been respected by the national Courts.

54. 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*[23]; whilst the *Fourth Section* is correct to that this case is authority for the '*sincerity test'*, it deserves further consideration as the approach to evidential submissions by respondents.

55. *Multani* was about the desire of a Sikh school boy to wear the Kirpan knife and the issue arose as to whether this could be accommodated by the school. The Canadian Supreme Court held: i) if '*reasonable accommodation'* is possible, the *proportionality test* requires this accommodation[24]; reasonable safety and not absolute safety is the correct analysis. It is impossible to stop '*scissors, pencils and baseball bats*' in schools[25] and there is always a risk of injury; that there was no evidence of any injury of violence from Sikhs with Kirpan knifes

[19] [1993] 3 CMLR 401.
[20] [2011] 2 CMLR 46
[21] Appl. No. 55480/00 of 27th July 2004.
[22] Conclusions 2006, Lithuania, p. 488; Conclusions 2006, Statement of Interpretation on Article 1§2, pp. 11-12.
[23] (2006) 1 SCR 256
[24] Paragraph [52]- [53] of *Multani* judgment.
[25] Paragraph [58] of *Multani* judgment.

in schools[26]; and it was disrespectful to Sikhs and sends out an incorrect message of their value of their religious belief[27]. Accordingly the decision of the School was set aside.

56. In particular, the Supreme Court of Canada held:-

> *52: In considering this aspect of the proportionality analysis, Lemeilin J expressed the view that 'the duty to accommodate this student is a corollary of the minimal impairment test'. In other words, she could not conceive of the possibility of a justification being sufficient for the purpose of section 1 [of the Charter] if reasonable accommodation is possible...*
>
> *53: In my view, this correspondence between legal principles is logical...*

57. The principle of *reasonable accommodation* offers a working model of how to address Article 9 Rights in the workplace. If Mr McFarlane can be accommodated, why should he not be?

58. It is ironic that a secular private employer such as Relate should dismiss a Christian on '*principle*'. The Court would not accept such an approach from an ideological employer such as the Church (or a political party).

59. In *Schuth v Germany*[28], an organist was dismissed from the Church for establishing extra-marital relations and this damaged the position of the Catholic Church. The Court criticized the German national Courts for having '*... appeared 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 require structural analysis of the necessity of the measure by the national Court, or whether the reasoning of the employer is pretextual. A breach of Article 8 was found because the National Court did not fully consider the issues in dispute and thereafter balance them.

60. 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' 'genuinely': see BC v BCGSEU [1999] 3 SCR, 3, 868; [2000] 1 SCR 665.* If employers 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 would be vigilant in protecting the employee's religious manifestion.[29]

61. Title VII of the Civil Rights Act prohibits employers from treating applicants or employees differently because of their religious beliefs;[30] and denying a reasonable accommodation of

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[26]Paragraph [59]- [60] of *Multani* judgment.
[27] Paragraph [71] of *Multani* judgment
[28](2011) 52 EHRR 32.
[29] *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991).
[30]*See e.g.*: *Abramson v. William Paterson Coll. of N.J.,* 260 F.3d 265, 281-82 (3d Cir. 2001). S*ee also*: *Delegne v. Kinney Sys., Inc.*, 2004 WL 1281071 (D. Mass. June 10, 2004) (Ethiopian Christian parking garage cashier could proceed to trial on religious harassment and discrimination where he was not allowed to bring a Bible to work, pray, or display religious items).

an employee's sincerely held religious belief. Religion is liberally protected under Title VII and includes "all aspects of religious observance and practice, as well as belief."[31] With regard to sincerity, a plaintiff is not held "to a standard of conduct which would have discounted his beliefs based on the slightest perceived flaw in the consistency of his religious practice."[32] If the employee risks losing his job because of his religious faith, then the sincerity of his belief is practically unquestionable. As one court observed, sincerity of religious belief can scarcely be doubted when the "[p]etitioner is willing to jeopardize [his] job in support of that belief."[33]

62. Employers must also accommodate religious beliefs concerning opposition to homosexual behavior. A company, for example, violates Title VII by refusing to accommodate an employee's refusal on religious grounds to sign a diversity policy requiring him to value homosexual co-workers.[34]

63. Of course, one must be sensible and the principle of *'reasonable accommodation'* is flexible. For example, a Muslim adherent is employed in a large supermarket, but does not want to handle alcohol or pork; clearly this could be accommodated as there are numerous other functions the employee could be allocated to. Conversely, if such an individual seeks employment at a 'butcher', accommodation may not be possible.

64. In the Judgment of Lord Justice Rix in the case of *Copsey v WWB Minerals Ltd*[35], the principle of 'reasonable accommodation' found support in the National Courts. In *Alexandridis v Greece*[36], the Court found a violation of Article 9 in the obligation to say the Oath for becoming a lawyer in the Orthodox tradition violated his freedom not to manifest his beliefs.

65. The primary difference between the concept of '*reasonable accommodation'* and the Convention test of *proportionality* is that it provides a clear rule of practice, with the onus on the employer to accommodate (as he possesses greater knowledge of the workings of the undertaking).

### *Conscience and Religious Manifestation:*

66. Rights of conscience are recognized both internationally and in domestic legal systems around the globe. In the UK, for example, conscientious objection from military service has long since been recognized – the UK being the first State to legislate for recognition of conscientious objection, simultaneously with full-time conscription.[37] Numerous other exemptions from domestic law exist in order to protect the conscience of the individual:[38] Sikhs, for example, may conscientiously object to wearing a safety hat on a construction

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[31] 42 U.S.C. 2000e(j).
[32] *EEOC v. University of Detroit*, 701 F. Supp. 1326, 1331 (E.D. Mich. 1988), *rev'd on other grounds* 904 F.2d 331 (6th Cir. 1990). *See also EEOC v. Ilona of Hungary, Inc.,* 108 F.3d 1569 (7th Cir. 1997) (request of vacation to observe Yom Kippur by Jewish employee was sincere, even though she had not asked for vacation in the previous eight years).
[33] *McGinnis v. United States Postal Service*, 512 F. Supp. 517, 520 (N.D. Cal. 1980).
[34] *Buonanno v. AT&T Broadband, LLC*, 313 F. Supp. 2d 1069 (D. Colo. 2004).
[35] [2005] IRLR 811, CA.
[36] Application No. 19516/06
[37] Conscientious objection to military service was first formally recognized in Britain by the Militia Act 1757 and then again in the Military Service Act 1916, Section 2(1)(d).
[38] See R. Sandberg and N. Doe, 'Religious exemptions in discrimination law', *C.L.J.* 2007, 66(2), 302-312.

site[39] or a safety helmet when riding a motor cycle,[40] Jews and Muslims benefit from special rules relating to animal slaughter methods[41], shop workers may object to working on a Sunday[42] and, central to the issues raised in this memorandum, section 4 of the Abortion Act 1967 provides a conscientious objection to participation in abortion procedures.[43]

67. In the landmark case of *Bayatyan v. Armenia*,[44] the Grand Chamber for the first time expressly upheld the right to conscientious objection. The Court held:-

> *124. The Court cannot overlook the fact that, in the present case, the applicant, as a member of Jehovah's Witnesses, sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions. (...) Thus, the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service. In the Court's opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant. It therefore considers that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that there existed viable and effective alternatives capable of accommodating the competing interests, as demonstrated by the experience of the overwhelming majority of the European states.*
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> *126. The Court further reiterates that pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (...) Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.*[45]

68. Similarly, the Parliamentary Assembly of the Council of Europe supports the right to conscientious objection,[46] as does the Committee of Ministers.[47] Notably, the support of the

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[39] Employment Act 1989, s.11
[40] Road Traffic Act 1988, s.16
[41] Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 1995/731, sch. 12.
[42] Sunday Trading Act 1994, s. 4.
[43] See also Human Fertilisation and Embryology Act 1990, section 38.
[44] (2012) 54 E.H.R.R. 15.
[45] *Id.*, at § 126.
[46] See Resolution 337(1967), Recommendation 478(1967), Recommendation 816(1977), Recommendation 1518(2001) and Recommendation 1742(2006).

Parliamentary Assembly for conscientious objection is not limited to military service, but also applies to abortion procedures. In 2010, the Parliamentary Assembly passed Resolution 1763 (2010) on "the right to conscientious objection in lawful medical care".

69. Every civilized society respects a right to conscience; namely that an individual should not be coerced to complete an act that they object to at the level of *'irreconcilable differences'.* A neutral State should endorse *freedom of conscience as a principle* with Article 9(1); the liberal State does not advance a morality, but should not handicap those persons with a traditional morality. The '*right to be wrong'* is the *'inconvenience'* of pluralism.

70. By failing to extend rights of conscience in the instant case, the Court has sharply departed from its ruling in *Bayatyan* and has threatened to make Article 9 a dead letter. In light of both the fact that the Grand Chamber in *Bayatyan* was clear in declaring that an explicit right to conscience exists (and extends beyond exemption from military service) taken in conjunction with the intent of the Parliamentary Assembly of the Council of Europe to protect rights of conscience, it is clear that the lower chamber failed to properly assess Mr McFarlane's claim in light of the prevailing consensus in favour of conscience.

71. Without a clear ruling by the Grand Chamber of whether rights of conscience exist in the workplace or not, Contracting Parties will be left in legal uncertainty and the fundamental rights of European citizens to manifest their faith will be left to the absolute discretion of judges throughout Europe. Examples pervade. In January 2013, the Federation of Catholic Family Associations (FAFCE) brought a collective complaint against Sweden before the European Committee of Social Rights for its under regulated provisions pertaining to conscientious objection from performing abortions.[48] In the Netherlands, Mrs. Eringa-Boomgaardt, a Dutch civil servant, was fired from her position for refusing to perform same-sex "marriage" ceremonies in her home city of Leeuwarden because of her Christian convictions. While she won her case before the Dutch Human Rights Commission, the Netherlands thereafter tightened their laws on eligibility for reasonable accommodation.[49] In France, Ranjit Singh, a Sikh, was told by the French authorities to remove his turban for an identity photograph. He argued that the removal of his turban could be viewed as a rejection of his faith and an identity photograph showing him bareheaded would produce feelings of shame and degradation every time it was viewed. All of his social benefits were then discontinued following his refusal to remove his turban. The U.N. Human Rights Committee found a violation of the International Covenant on Civil and Political Rights in September 2011 evidencing that his right of conscience should have been respected.[50]

72. With some legislatures trying to actively eliminate rights of conscience[51], it is clear that the appeal of Mr McFarlane serves a much greater general importance than the plight of just a

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[47] See Recommendation R(87)8 and Recommendation CM/Rec(2010)4

[48] Yet to be communicated by the European Committee of Social Rights. Filed in January 2013. *Cf. http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp.*

[49] See Opinion No 2008-40, available in Dutch on the website of the CGB (http://www.cgb.nl).

[50] < http://www.ccprcentre.org/doc/OP1/Decisions/102/1876%202009%20France_en.pdf>

[51] Denmark, for example, has recently passed a bill that legalizes same-sex "marriage". However, it has also been widely reported that the new law will force churches to conduct the ceremonies, and that churches will not be able

single man. By placing rights of conscience and manifestation of religious belief in such a wide margin of appreciation, the *Fourth Section* gave a license to Contracting Parties to act with impunity in denying the Article 9 rights of Christians throughout Europe. If this question is not brought up by the Grand Chamber, fundamental rights and freedoms could be set back for Christians in Europe for decades to come.

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73. Mr McFarlane humbly craves that his request to the Grand Chamber is granted.

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to opt out. The Christian Democratic Party, which is no longer in parliament, announced that it will initiate a class action lawsuit against the new law. < http://www.christianpost.com/news/denmark-passes-bill-allowing-same-sex-weddings-at-church-76327/>. Furthermore, Norway's health ministry recently confirmed that all doctors must be prepared to refer patients to abortion clinics even if abortion runs counter to their own beliefs. The secretary of state at the health ministry, Robin Kåss, stated that: "Doctors have to be ready to do their duty" and "If you're a pacifist, you can't work as a police officer. If you refuse to perform a blood transfusion, you can't be a surgeon. If you deny a patient contraception or a referral for an abortion, you can't be a general physician." < http://www.thelocal.no/page/view/doctors-cant-opt-out-of-abortion-duties>.