Shirley Chaplin

Gary McFarlane

-v-

United Kingdom

Oral Submission

The cases of *Shirley Chaplin* and *Gary McFarlane* are not complex but they raise very serious issues for the United Kingdom and the Member States of the *Council of Europe*. The issues before this esteemed Court today can be summarised in three main points.

First, this Court must determine to what extent freedom of thought, conscience and religion must be protected and guaranteed not just for the four applicants here today but to Europeans as a whole. The effect of the respondents' position is essentially to limit Article 9 to a mere freedom to worship in private or in a church setting.

This leads to the *second* issue before this Court which is for it to find a workable 'bright line test' by which to determine, in the work place context, to what extent freedom of thought, conscience and religion may be limited by the scope of the test - "necessary in a democratic society". In this regard, the doctrine of 'reasonable accommodation' has shown itself to be the most workable standard to protect both the employer and employee in guaranteeing Article 9 rights.

Thirdly, in my respectful submission this Court is called upon to determine the extent to which conscience is to be protected under Article 9. Freedom of thought, religion and conscience are inextricably linked. As submitted in the pleading, this court in *Bayatyan v Armenia* has, for

instance, indicated that the protection of conscience can be extended beyond merely the right to be exempt from military conscription.

Regrettably, the Courts of the United Kingdom have not adopted a simple, straight forward, principled approach to Article 9 so as to enable the religious adherent to live his life with the least infringement on his religious beliefs.

The Courts of the United Kingdom appear instead to have created insurmountable hurdles to ensuring that freedom. National courts have ruled on whether the religious 'manifestation' is a mandatory requirement of faith; whether religious apparel is a scriptural requirement; whether the Claimant is part of a 'group' that is discriminated against (as a sole adherent is unprotected by indirect discrimination law). The exact meaning and size of this 'group' is unknown.

Shirley Chaplin:

Let us begin with the case of Shirley Chaplin. Mrs Chaplin has worn a cross on a chain around her neck since her confirmation in 1971 and considers this to be a manifestation of her faith. She has worked as a nurse for approximately 30 years with a faultless employment record and has never stopped wearing her cross. In those 30 years her wearing of a cross has never injured a single patient.

The hospital uniform policy stated that: "Any member of staff who wishes to wear particular types of clothes or jewellery for religious or cultural reasons must raise this with their line manager who will not unreasonably withhold approval." For 30 years there was no issue. There is no issue for Muslim dress. Why now an issue for Christians?

As the case developed the hospital began to argue health and safety issues; that the cross and chain might cause injury if an elderly patient pulled on it. To alleviate such concerns, Mrs Chaplin suggested that a magnetic clasp could be fitted to the chain which would allow it to break

easily when pulled, thus solving the problem. However, the hospital rejected this as a solution and suggested that the Cross could scratch a patient.

No evidence has ever been submitted to support the claim that the cross posed a health and safety risk. What is equally clear is that the refusal to make an allowance for her to wear the cross even after any legitimate safety issue was alleviated, breached the 'necessity standard' used by this Court in analysing where a violation of Article 9 has occurred.

Freedom of thought, conscience and religion is a fundamental right both under European and British law. Christians enjoy the same rights to adorn themselves with the religious symbols or clothing of their choosing as does any other religion or as those who do not adhere to a specific religion.

The failure to provide even the most simple of accommodations for the right of an employee to wear a cross, particularly where other religions have been accommodated and where necessity is lacking, is a clear breach of the Convention. Furthermore, any difference in treatment on the basis of religion will require very weighty reasons to be justified under Article 14. Those reasons do not exist in this case.

Further, a week after the Judgment in this case, the Department of Heath announced a modification of the health and safety rules in relation to covering below the elbow to accommodate nurses of the Islamic and Sikh faiths. It is inconceivable that the hospital was not aware of this development to modify health and safety rules to accommodate religious practice.

As soon as the media interest in the case ended, Mrs Chaplin lost the clerical employment given to her in order to try and 'accommodate' her. Shirley now has no employment; Shirley is suffering economically, feels humiliated and disrespected: and the National Health Service has lost a good nurse who is willing to work. Moreover there is no legitimate reason to discriminate in this way against Christians.

Mrs Chaplin who sits next to me now wants to say:-

The Tribunal left me shattered. My world was turned upside down. My pay band immediately dropped. The knowledge that the role I had enjoyed for the majority of my adult life was no longer open to me. They also implied that I was a danger to patients because of my failure to remove my Cross. I can't put into words how that made me feel. My whole nursing career was based on this one moment, not on over 30 years of caring and devotion. My finances are now limited so I do not have the lifestyle that I anticipated.

Gary McFarlane:

Let's now move to the case of Mr McFarlane. Since 2003, Gary McFarlane worked as a counsellor for a national organisation which provides a confidential sex therapy and relationship counselling service.

Finding employment is now very difficult for Mr McFarlane and he is unable to register with any reputable professional body because he was dismissed for gross misconduct for discrimination on the grounds of sexual orientation – something which sadly labels him as homophobic. Nothing could be further from the truth.

Mr McFarlane's hurt is all the greater because he had always acted professionally. He has, please note never, refused to counsel a same sex couple (he counselled two such couples) and believes that Christianity and non-discrimination principles are fully compatible.

His trouble arose when, on a training course, he decided not to watch a film called '*Brokeback Mountain'* (a film about a homosexual relationship) because he was tired. Suspicions arose among his co-workers because he was known as a Christian. He was required to state his position in the counselling of same sex couples in "Psycho-Sexual Therapy". He had expressed, in confidence to his supervisor, some private anxieties. His supervising therapist breached professional rules (with impunity) to reveal these 'private' anxieties.

Mr McFarlane did not know himself what he would do if required to give directive sexual therapy to a same sex couple; he had a similar problem with 'couple counselling' and same sex relationships and had resolved this satisfactorily to all parties.

He was required to state his position on giving sex therapy to same sex couples without having worked through what he believed; and to prospectively deny his own beliefs as a condition of employment. It is important to note there was no refusal to see a client; in fact, there was no client. He was prevented from continuing solely with 'couple counselling' in which there had been no discrimination issues.

His *inner forum* within the First Sentence of Article 9 was violated. This line of inquiry is wholly intrusive and disapproved of in *Smith & Grady v United Kingdom*. '*Moral integrity'* is a component part of Article 8[1].

Mr McFarlane worked for a private employer; he did not provide any statutory service and his employer simply introduced a non-discrimination policy and was both judge and jury in its application. Mr McFarlane has no idea what he could have said that would have convinced his employer to behave differently.

The implications drawn from these two cases go far beyond the two individuals. In the United Kingdom, religious people who have followed their convictions in the workplace in the face of overly vague non-discrimination laws have been sacked, demoted or disciplined. Among them have been doctors, magistrates, teachers, foster parents, therapists and many others. In my respectful submission, the situation for religious liberty in the United Kingdom is now critical.

The Importance of Article 9 Rights:

[1] *Schuth v Germany of* September 23rd of 2010 at paragraph [53]

The doctrine of reasonable accommodation is plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others. If an employee risks losing his or her job because of their religious faith, then the sincerity of their belief is unquestionable, but this would be too high a threshold.

In all four of these cases, the sincerely held rights of conscience of the applicants could have easily been accommodated. In the particular cases of my clients, Mrs Chaplin's cross clearly posed no danger to anyone and no legitimate aim was served by banning her from wearing it. The question also arises why exceptions were made for the Hijab and not for the cross.

The same is true in the case of Mr McFarlane. His dismissal for posing a hypothetical question about a sincerely held religious belief, again a belief protected by Articles 8 and 9, was not necessary in a democratic society and nor was it proportionate to the aim of preventing discrimination.

Had Mr McFarlane simply been allowed to refer patients to other counsellors where his conscience could not allow him to act, or, had he been allowed to work through the prospective issues he might have had, the clients would have received their counselling and Mr McFarlane's sincerely held beliefs would have been respected. The referral of clients by counsellor occurs in many situations from a lack experience or of a self-awareness which impacts their professionalism to simply moving residence.

All the applicants wanted to do was follow their faith quietly and neither imposed their views or faith on any third party.

There has been an interference with the manifestation of the religious beliefs of Mrs Chaplin and Mr McFarlane. Article 8 Rights (privacy) and Article 10 Rights (expression) have been applied in the employment context and so should Article 9 Rights. Article 9 Rights need to be fully recognised and protected with or without an Article 14 analysis.

As reflected in our most recent filing, we find the very timely opinion of the Advocate General in the Court of Justice of the European Union's case *Y and Z v.* Germany most instructive as to the importance of the outward manifestation of religious belief. The Advocate General stated that if the so-called "core area" of religious belief comprised only of "private conscience", it would render any protections for "the external manifestation of that freedom" effectively "meaningless".[2]

The real issue is that where Article 9 is engaged in an employment context, the national Courts must correctly balance the 'clash of rights' between an employer and employee in accordance with the fundamental rights and guarantees of the Convention. There should be of a strict form of scrutiny and the concept of 'reasonable accommodation' is a practicable working model. This process can take place under Article 9, or Article 14 (in conjunction with Article 9) or under Article 6.

The State is under a positive obligation to protect Article 9 Rights; the United Kingdom has done this by means of anti- discrimination legislation. Whilst Article 9 is essentially aimed at protecting persons from arbitrary state interference there are positive obligations on the State to effect protection for the manifestation of religious belief. This extends to an obligation to exercise domestic legislation in conformity with the Convention. There is no lack of consensus between the Member States of the Council of Europe on the importance of Article 9.

The problem is the perceived animus to the Christian faith by the Court of the United Kingdom. Religious faith should never be so treated, described or disparaged by a State. The Christian faith is 'worthy of respect' in democratic society.

[2] Case C-71/11 and Case C-99/11, Advocate General opinion at § 46.

It is submitted that there was a breach of Article 14, in conjunction with Article 9 in both the Chaplin and McFarlane cases because the principles of *Thlimmenos v Greece* were either not applied or were dismissed by the national courts.

Moving onto the issue of conscience, the Grand Chamber of this Court, in the *Case of Bayatyan v. Armenia*, clearly held that not only does a right to conscientious objection exist under Article 9 of the Convention, but that it must be extended beyond the right to object to military conscription. The majority in that judgment held that 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. At no other time in history has political correctness been so prevalent in the legal culture. Tolerance in the context of "sexual orientation" and so-called diversity policies has led to traditional and fundamental human rights being subverted to prevailing civil privileges.

In my respectful submission this Court is the 'conscience of Europe' and it has the opportunity to effectively recognise and accommodate religious freedom in Europe.

Paul Diamond.