

FOURTH SECTION OF THE  
EUROPEAN COURT OF HUMAN RIGHTS  
APPLICATION NOS. 51671/10 and 36516/10

**Lillian LADELE and Gary MCFARLANE**

Applicants

v.

**The United Kingdom**

Respondent

**WRITTEN OBSERVATIONS  
OF THIRD PARTY INTERVENERS:**

- **Dr. Jan CARNOGURSKY and The Alliance Defense Fund**

**filed on  
14 September 2011**

## **Introduction**

1. The intervening parties to this brief, Jan CARNOGURKSY along with the Alliance Defense Fund (“ADF”), are dedicated to the protection of freedom of thought, conscience and religion in both its private and public manifestations. This brief addresses this Court’s governing jurisprudence as it should apply to freedom of conscience, particularly in light of the joining of these two landmark cases by the Fourth Section of the Court. By direction of the Court, this brief does not address the specific facts of these cases or the applicants.

## **Article 9: Freedom of Thought, Conscience and Religion**

2. The European Court of Human Rights (“the Court”) has elevated the rights guaranteed by Article 9 to being one of the cornerstones of a democratic society.<sup>1</sup> The Court has held that religious freedom is one of the vital elements that go to make up the identity of believers and their conception of life.<sup>2</sup> Article 9 has taken the position of a substantive right under the European Convention.<sup>3</sup>
3. The freedom to choose one’s faith and live it out is an inviolable freedom protected under the European Convention. Discriminatory treatment of a religion for historic, ethnic or content based reasons, which has the effect of diminishing this freedom, violates the European Convention. In addition, the Court has held that guaranteeing freedom of thought, conscience and religion assumes State neutrality. Therefore, where necessity and proportionality are lacking: a State must seek to accommodate religious beliefs no matter how irksome it finds them; furthermore, government actors cannot discriminate against or punish a Christian merely for seeking to adhere to his religious beliefs that homosexual behavior is immoral; nor can a government actor require a Christian employee to choose between his job or participating in an employment activity which offends his conscience.
4. Respect for a plurality of beliefs and convictions are a basic obligation of the State. Individuals must be able to freely choose, and States must allow individuals to freely adopt, their religious and moral convictions and religious membership. Article 9 enshrines the dictum that the right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.<sup>4</sup>
5. Freedom of thought, conscience and religion is not *only* a cornerstone of a democratic or progressive society, but the choice between liberty and tyranny. Liberty cannot exist when individuals’ consciences are held captive—when belief and expression are stifled by invasive State action, or when authorities distinguish individuals based on their opinions and beliefs. This is not why governments exist. As one time-tested view states, governments derive “their just powers from the consent of the governed” and are instituted to secure person’s “unalienable rights,” not to

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<sup>1</sup> ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.

<sup>2</sup> ECHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A, No. 295-A: JDI, 1995, p. 772.

<sup>3</sup> *Kokkinakis op.cit.*, ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 788; *Otto-Preminger-Institut, op. cit.*; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749.

<sup>4</sup> *Manoussakis and Others v. Greece, op. cit.*, § 47.

redefine or curtail their rights. By favoring some beliefs and practices over others, States contravene the principles of democracy so ably defended throughout Europe's recent history.<sup>5</sup>

### **Conscientious Objection**

6. Although the text of the European Convention does not refer to conscientious objection *per se*, there is clearly an increasing recognition of the right being developed by the Court.<sup>6</sup> In addition to holding that where Member States recognize conscientious objection, they must do so in a non-discriminatory manner,<sup>7</sup> the Court has more recently upheld the right to conscientious objection even when the State in question did not itself recognize the right. The Grand Chamber held that: "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9."<sup>8</sup> Paramount to the applicability of the right of conscientious objection, even outside of the scope of military service, the Grand Chamber held:

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 (see *Leyla Şahin*, cited above, § 108). 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.<sup>9</sup>

7. Paragraphs 118-120 and 126 of the Grand Chamber's judgment focus on the fundamental nature of freedom of thought, conscience and religion. While the Court held that one means of expressing the guaranteed right of conscience is through exemption from military service, the judgment by no means limited the expression of conscientious objection *only* to military service.

8. There can be little doubt where the Convention's guarantees fall. It affirms "the right to freedom of thought, conscience and religion," including the right to publically manifest one's religion or belief in teaching, practice, worship and observance.<sup>10</sup> Yet even without the clear guidance of the Convention, jurisprudential concerns should restrict the continued erosion of Article 9 rights when they come into conflict with "sexual orientation" challenges. Courts have few, if any, principled means to determine what is truly discriminatory to an individual or group's interests when

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<sup>5</sup> Cf., "Report of the Committee of Ministers," in *Theory and Practice of the European Convention on Human Rights*, Van Dijk and Van Hoof, Kluwer, 1990, 413.

<sup>6</sup> See I Leigh, 'New trends in religious liberty and the European Court of Human Rights', *Ecc.L.J.*, 2010, 12(3), 266-279.

<sup>7</sup> *Thlimmenos v. Greece* (Application No. 34369/97) 6 April 2000.

<sup>8</sup> ECHR, *Case of Bayatyan v. Armenia*, application no. 23459/03, judgment of 07 July 2011 [Grand Chamber]. § 110.

<sup>9</sup> *Id.*, § 126.

<sup>10</sup> Cf., Universal Declaration of Human Rights (1948), article 18; European Convention on Human Rights (1950), article 9; International Covenant on Civil and Political Rights (1966), article 18; American Convention on Human rights (1969), article 12; African Charter on Human and Peoples' Rights (1981) article 8. See J Rivers, "The Law of Organized Religions", *Oxford University Press*, 2010, p.35.

competing interests are at play. The neutrality of courts is compromised when judges decide between rival claims of morality, when they stifle a person's conscience merely because it goes against a certain interest group.

### **Interference with the Right of Conscience**

9. Religious liberty has not come quickly or easily to the United Kingdom ("UK"). As was recently pointed out in the House of Lords: "We fought over the centuries for freedom of religion. We did not have it in the 17th Century; it was not until the 1820s that we got Catholic emancipation and it was not until well into the 19th Century that we got religious freedom."<sup>11</sup> And similarly, it has been noted that: "The right of religious people to associate with others of similar belief without legal penalties was established in Britain and in most of Europe only after centuries of struggle against persecution and intolerance."<sup>12</sup> Historically, therefore, the right to religious liberty is something that has been fought for and won and should not be easily lost. Moreover, as the House of Lords has recently stated in the case of *Williamson*: "[Religious] freedom is not confined to freedom to hold a religious belief. It includes the right to express and practise one's beliefs. Without this, freedom of religion would be emasculated. Invariably religious faiths call for more than belief."<sup>13</sup>
10. This Court too has echoed this position stating: "The Court recalls that freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."<sup>14</sup> However, despite the lofty protections afforded to religious liberty by the Convention, the UK has shown over and over again that it will disregard the right to freedom of thought, conscience and religion every time it comes into conflict with the protection of "sexual orientation" privileges.
11. Recently, a husband and wife were successfully sued for not allowing a same-sex couple to share the same bed in their private guest house despite their clear notice to all guests (regardless of "sexual orientation") that because of their Christian convictions they would only provide a double bed to married couples.<sup>15</sup> In a similar vein, faith-based (and in particular Catholic) adoption agencies who wish to maintain their Christian ethos have been forced to either secularize themselves or remove their services completely, because of their refusal to facilitate adoptions to same-sex couples based on Scriptural proscriptions of homosexual behavior. Stunningly, despite being recognized as some of the best adoption agencies in the country,<sup>16</sup> of the 14 faith-based adoption agencies working throughout the UK, only two have been able to function while maintaining their religious ethos. More than half have been forced to abandon

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<sup>11</sup> Lord Lyell, House of Lords, *Hansard*, Col. 660-1, 9 November 2005.

<sup>12</sup> I Leigh, 'European Threat to Religious Freedom, a response to the EU's proposed Employment Directive', *The Christian Institute*, June 2000, p.4.

<sup>13</sup> *R v Secretary of State for Education and Employment ex p Williamson* [2005] UKHL 15, § 16, per Lord Nicholls.

<sup>14</sup> See e.g.: ECHR, *Serif v. Greece*, application no. 38178/97, judgment of 14 December 1999, § 49.

<sup>15</sup> *Hall and Preddy v Bull and Bull*, (Case No. 9BS02095), 18 January 2011.

<sup>16</sup> Many of the children helped were considered "hard-to-place" (see *BBC News*, 25 January 2007) and furthermore, the breakdown rate was just 3.6% - one of the lowest of all the agencies.

their Christian identity,<sup>17</sup> and the others are either fighting to maintain their ethos judicially or have removed their services.

12. The cases clearly establish a pattern whereby Christians are marginalized and discriminated against when their genuinely held religious convictions clash with progressively enacted privileges for those who practise homosexual behavior—under the false guise of laws supporting “tolerance”. The cases further highlight that fundamental rights are being trumped by newly formulated privileges despite the black letter of international treaty law.
13. Clearly, freedom of thought, conscience and religion emptied of a right of conscience is no longer the fundamental right that is guaranteed protection by the Convention. It becomes the far more limiting freedom of *worship*, which protects only private manifestations of faith. Precisely stated, religious faith is allowed so long as its manifestation does not touch any other boundaries of civil society. This is not what the Convention envisioned, nor what it protects. However, this is how the UK courts are interpreting the right. For example, when the Charity Tribunal found against the last remaining Catholic adoption agency in England, it stated that “religious conviction in the sphere of personal belief is protected in both domestic and European equality law, so that acts of devotion, worship, and prayer (including ceremonies) are exempt from equality obligations”<sup>18</sup> but held that there is an “essential distinction” between private acts of worship and the provision of a public service.<sup>19</sup>
14. Even though the UK government has repeatedly said that there is no hierarchy of rights, even though the source of protection in UK discrimination law is the same for both religious belief and sexual orientation, and even though all of the major international human rights documents refer to the importance of protecting religious belief but do not mention sexual orientation – it is now clear that where the freedom of religion and freedom of conscience meets with the principle of “non-discrimination” within the context of “sexual orientation”, it is the religious believers who lose out.<sup>20</sup> This failure to protect religious liberty is in fact becoming endemic across Europe.

### **Justification for Interference**

15. Under the Convention, for an interference with the right of thought, conscience and religion to be lawful, it must meet three criteria: (1) the interference in question must be prescribed by law; (2) it must pursue a legitimate aim; and (3) it must be necessary in a democratic society. In order to be prescribed by law, provisions of the domestic law must be precise enough and reasonably foreseeable enough to foresee the consequences which one’s actions may entail. The law should also provide adequate safeguards against arbitrary interference with respective substantive

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<sup>17</sup> The following adoption agencies have been forced to cut ties with the church and change their name and ethos: Catholic Children’s Society, Nottingham; St Francis Children’s Society, Northampton; The Catholic Children’s Society; St David’s Children Society, Wales; Catholic Caring Services, Lancaster; St Andrew’s Children’s Society, Scotland. *See: Adoption Agencies Shut under “Equality” Laws*, The Christian Institute, April 2009.

<sup>18</sup> *Catholic Care v. The Charity Commission for England and Wales*, CA/2010/0007, 26 April 2011 § 60.

<sup>19</sup> *C.f. Ladele v. London Borough of Islington* [2009] EWCA Civ 1357 per Sedley LJ at § 51.

<sup>20</sup> *See Reaney v Hereford*, (Case No. 1602844/2006), 17 July 2007; *Haye v London Borough of Lewisham*, (Case Number: 2301852/2009), 16 June 2010; *Matthews v Northamptonshire County Council* (Case No. 1901629/2009), 26 November 2010; *Hall and Preddy v Bull and Bull*, (Case No. 9BS02095), 18 January 2011; *R (Johns) v Derby City Council* [2011] EWHC 375 (Admin); *Catholic Care v The Charity Commission* (CA/2010/0007), 26 April 2011.

rights.<sup>21</sup> It is only thus, when the four elements of precision, access, clarity and foreseeability are met that the law will be deemed to meet the criteria of prescription by law.<sup>22</sup>

16. As the above enumerated cases establish, current legislation in the UK pertaining to freedom from discrimination based on religion or belief is increasingly coming into conflict with “anti-discrimination” regulations protecting “sexual orientation”. One key area of confusion is that the law does not make the vital distinction between same-sex *attraction* and homosexual *behavior*.<sup>23</sup> Hence, Christians are often accused of discriminating against people with same-sex attractions, when in reality the Christian is simply refusing to condone or further homosexual behavior – something that is contrary to his genuinely held religious convictions. The wisdom of this distinction was proposed to the European Commission when drafting the Employment Directive (which set the legal basis from which the UK legislated its equalities legislation in the context of employment). In that proposal to the Commission it was stated that: “With regard to sexual orientation, a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behavior, which is not.”<sup>24</sup> Had this key distinction been properly codified in either the Directive or the Employment Equality Regulations, it is very likely that the current clash of rights and subjugation of religion or belief would have been entirely avoided.<sup>25</sup>
17. However, under the current statutory scheme, the only way in which Christians with sincerely held religious beliefs regarding homosexual behavior or sexual activity outside of marriage can protect themselves from having to condone or assist in the furtherance of that which offends their conscience, is to avoid any employment possibility where their beliefs might be compromised. This is the direct result of a lack of precision and clarity in the drafting of the laws on “sexual orientation” making it impossible for many Christians to manifest the tenets of their faith in public – either at work or in the provision of services.
18. Second, in order for an interference with religious liberty and conscience not to be violative of the Convention, it must pursue a legitimate aim. The Court notes that under Articles 9 § 2 of the Convention, exceptions to freedom of religion and association must be narrowly interpreted, such that their enumeration is strictly exhaustive and their definition is necessarily restrictive.<sup>26</sup> Article 9 § 2 limits the legitimate aims pursued by the State in interference of Article 9 rights to public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>27</sup> Pursuant to the protections afforded by the Convention, even where

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<sup>21</sup> ECHR, *Huvig v. France*, Judgment of 24 April 1990, Series A no. 176-B § 27; *Kruslin v. France*, Judgment of 24 April 1990, Series A no. 176-A § 36.

<sup>22</sup> ECHR, 26 April 1991, *Ezelin v. France*, series A, No. 152, § 56.

<sup>23</sup> For example, when discussing the Employment Equality Regulations in the judicial review case of *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] WL 741919, Richards J stated that: “The protection against discrimination on grounds of sexual orientation relates as much to the manifestation of that orientation in the form of sexual behaviour as it does to sexuality as such.” §119.

<sup>24</sup> Commission of the European Communities, Brussels, 25.11.1999, COM(1999) 565 final, 1999/0225 (CNS), p.8.

<sup>25</sup> Lord Mackay of Clashfern made a similar observation in the House of Lords during the passing of the Equality Act 2010. See House of Lords, *Hansard*, 13 Jan 2010, Col. 591.

<sup>26</sup> See: *mutatis mutandis*, ECHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, § 38.

<sup>27</sup> Notably, when the Convention was being written, the final draft of Article 9(2) was the narrowest of the proposed articles and Article 9 is the least qualified of the qualified rights. See C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, Oxford University Press, 2001, p. 137.

interference with freedom of thought, conscience and religion does pursue a legitimate aim, where application of the interference is discriminatory in nature, then a violation of the Convention occurs. Where a clash of rights exist, and “sexual orientation” is protected above freedom of thought, conscience and religion as has been consistently occurring in UK court’s, then discrimination is clearly evident.

19. Finally, any interference with the right to thought, conscience and religion must be necessary in a democratic society. The European institutions have stated that the typical features of a democratic society are pluralism, tolerance and broadmindedness.<sup>28</sup> Pluralism and tolerance dictate that the law cannot only protect the toleration of the sexual attractions of others: true pluralism must also protect the religious and moral views towards those differences in sexual attraction.<sup>29</sup>
20. For such an interference to be necessary in a democratic society it must meet a pressing social need whilst at the same time remaining proportionate to the legitimate aim pursued.<sup>30</sup> The Court defines proportionality as being the achievement of a fair balance between various conflicting interests.<sup>31</sup> Hence, where tension between competing groups arises, “the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”<sup>32</sup> Any interference with freedom of thought, conscience and religion must be based on just reasons which are both relevant and sufficient.<sup>33</sup> This need must of course be concrete.<sup>34</sup> The failure to even attempt to accommodate sincerely held religious beliefs in the work place clearly runs afoul of the necessity requirement of the Convention.
21. 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.<sup>35</sup> The restrictions imposed on freedom to manifest all of the rights inherent in freedom of religion call for very strict scrutiny by the Court.<sup>36</sup> 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.<sup>37</sup>
22. The recent proliferation of cases in the UK where freedom of religion or belief have been subordinated under the precept of “anti-discrimination” based on “sexual orientation” almost universally highlight the failure of the UK to analyze the necessity of rejecting the applicant’s

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<sup>28</sup> ECHR, 30 September 1976, *Handyside v. the UK*, Series A, No. 24, § 49 *et seq.*

<sup>29</sup> L Vickers, *Freedom of religion and the workplace: the draft Employment Equality (Religion or Belief) Regulations 2003*, I.L.J. 2003, 32(1), 23-36, p.35.

<sup>30</sup> ECHR, *Case of the Sunday Times v. UK*, app. no. 6538/74, at § 63 *et seq.* (Eur. Ct. H.R. Apr. 26, 1979).

<sup>31</sup> ECHR, 7 December 1976, *Handyside v. the UK*, Series A No. 24, § 49; ECHR, 22 October 1981, *Dudgeon v. the UK*, Series A No. 45, § 60.

<sup>32</sup> *Metropolitan Church of Bessarabia and others v. Moldova* (Application No. 45701/99) 13 December 2001, § 116; *Serif v. Greece*, no. 38178/97, ECHR 1999-IX, § 53. Emphasis added.

<sup>33</sup> ECHR, 22 October 1981, *Dudgeon v. the UK*, Series A No. 45, § 51ff.

<sup>34</sup> *See: Article 9 of the European Convention of Human Rights: Freedom of Thought, Conscience and Religion*, Human Rights Files, No. 20, Council of Europe Publishing, 2005. p. 47.

<sup>35</sup> ECHR, 25 May 1993, *Kokkinakis v. Greece*, *op. cit.*, § 31; 13 December 2001, *Metropolitan Church of Besarabia and Others v. Moldova*, *op. cit.*, § 119.

<sup>36</sup> ECHR, 26 September 1996, *Manoussakis v. Greece*, *op. cit.*, § 44.

<sup>37</sup> ECHR, *Kokkinakis v. Greece*, *op. cit.*, § 47.

sincerely held religious convictions. Where undue hardship is not borne by the employer in the accommodation of a religious belief, it is paramount that the fundamental right of religion and belief be protected. No necessity exists in having to choose one's job over their sincerely held religious beliefs. There is further no proportionality in protecting "sexual orientation" where daily business operations would not be affected in the least by the accommodation of a Christian employee who requested to refrain from participating in tasks which would offend his conscience.

23. This Court also recalls that the "notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development."<sup>38</sup> Where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation allowed to the State will normally be restricted.<sup>39</sup> Article 9 recognizes the importance of an individual's relationship with the transcendent. This relationship is often profound and provides the basis upon which people of faith live their lives. In circumstances where this relationship and the moral values stemming from this relationship are affected in the workplace, it is clear that the margin of appreciation provided to States must be *de minimus*.
24. It follows from the principle of non-discrimination that "[t]he right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."<sup>40</sup> The Court also argues that "[f]acts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention."<sup>41</sup>
25. The respective regulations on "Religion and Belief" and "Sexual Orientation" prescribe equal protection from discrimination for people of the Christian faith as they do for people based on their "sexual orientation". However, the application of the legislation has been used as a sword against religious believers and not a shield. The laws themselves indirectly discriminate against Christian moral beliefs. By protecting "sexual orientation", Christians are discriminated against in that they are forbidden to treat homosexual behavior or even the issue of sexual activity outside of marriage as a moral issue. Thus: "If the power of the State is invoked on one side of this argument so that religious groups are prevented (by non-discrimination laws) from treating homosexuality as a moral issue they will have been denied their religious liberty."<sup>42</sup>

#### **Article 14: Prohibition of Discrimination**

26. Whilst Article 14 does not provide a free-standing right against discrimination, it does provide the right not to be discriminated against in respect of the other rights laid down in the Convention, and there is no need for a violation of another Convention right for the Court to find

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<sup>38</sup> *Pretty v. UK*, Application no. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002, available at: <http://www.unhcr.org/refworld/docid/4daee1682.html> [accessed 19 August 2011], § 61.

<sup>39</sup> ECHR, *Evans v. the UK* [GC], [2006] All ER (D) 82 (Mar), §77.

<sup>40</sup> ECHR, 26 September 1996, *Manoussakis v. Greece* (RJD 1996, p. 1346), § 47.

<sup>41</sup> ECHR, 26 October 2000, *Hasan & Chaush v. Bulgaria*, Appl. No. 30985/96, § 78.

<sup>42</sup> R. Adhar and I. Leigh, *Religious Freedom in the Liberal State*, (Oxford University Press: 2005) p.317.

a breach of Article 14.<sup>43</sup> For a violation of Article 14 to be established in conjunction with another substantive article, the facts in issue must be considered to fall within the “ambit” of that article. The set of facts that are deemed to fall within the ambit of Article 9 have been interpreted broadly by the Court.<sup>44</sup>

27. The general situation under Article 14 is that an applicant must demonstrate that there has been a difference in treatment on the basis of one of the protected grounds within the meaning of Article 14 (such as religion). However, to fall within the scope of Article 14 there does not necessarily have to be a difference in treatment. In *Thlimmenos v. Greece*<sup>45</sup> the Court held that it is possible for Article 14 to be breached, not only when persons in analogous positions are treated differently without justification, but also when “States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”<sup>46</sup>
28. In the case of *Thlimmenos*, the applicant was convicted for conscientiously objecting to military service and the conviction then prevented him from becoming a chartered accountant. The Commission’s decision, affirmed by the Court, was that “there was no objective and reasonable justification for the failure of the drafters of the rules governing access to the profession of chartered accountants to treat differently persons convicted for refusing to serve in the armed forces on religious grounds from persons convicted of other serious crimes.”<sup>47</sup> Accordingly, the Court held that Greece had enacted legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. Greece did so “by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.”<sup>48</sup> Similarly, where members of society who genuinely hold religious convictions with regards to sexual ethics are not treated accordingly, and face a significant penalty as a result, there will be a violation of Article 14.
29. This is because discrimination that is contrary to Article 14 must be a proportionate response to a legitimate aim. In determining proportionality the effect on the individual must be considered.

### **Comparative Jurisprudence: Title VII of the Civil Rights Act of 1964 [United States]**<sup>49</sup>

30. The urgency arising in the UK regarding religious freedoms cases involving rights of Christian employees is quickly becoming endemic throughout Europe. Respect for rights of conscience have also become part of mainstream debate throughout the Council of Europe, as evidenced by the Parliamentary Assembly’s recent resolution supporting a right to conscientious objection.<sup>50</sup> The Resolution recognized among Member States “the need to affirm the right of conscientious

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<sup>43</sup> See *Belgian Linguistics Case*, App. no. 1474/62, (1968) 1 EHRR 252 Part I(B), § 9.

<sup>44</sup> For example, see *Thlimmenos v. Greece* (Application no. 34369/97) 6 April 2000, § 42-43 and *Kosteski v. The Former Yugoslav Republic of Macedonia* App.no. 55170/00, 13 April 2006, §45.

<sup>45</sup> (Application no. 34369/97) 6 April 2000.

<sup>46</sup> *Id.*, at § 44. The reasoning has been upheld in other ECtHR decisions, such as *Sampanis v. Greece* (Application no. 32526/05) 5 June 2008.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, at § 48.

<sup>49</sup> As amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. §§ 2000e et seq.).

<sup>50</sup> Parliamentary Assembly of the Council of Europe, ‘*the right to conscientious objection in lawful medical care*’ (Resolution 1763 (2010), 7 October 2010).

objection”. Regarding the medical field, it went further, holding that no person should be coerced, held liable or discriminated against for refusing to perform, accommodate or assist in work related to the ending of human life where that person had moral objections to the procedures.<sup>51</sup> The same principle must be naturally extended to include prohibitions on discrimination, punishment or coercion in performing any task within the spectrum of employment to which the affected individual holds a sincerely held religious or moral belief to the contrary.

31. Whilst this is not to say that it must be a universal model, it may be informative for the Court to consider the existing anti-discrimination legislation in the United States to examine how other jurisdictions have addressed these issues. While Title VII of the Civil Rights Act of 1964 does have some parallels with the UK’s Employment Equality (Religion or Belief) Regulations 2003, it has nonetheless developed with regard to guidance in reasonable accommodations of sincerely held religious beliefs.
32. Title VII prohibits employers from treating applicants or employees differently because of their religious beliefs;<sup>52</sup> and denying a reasonable accommodation of 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.”<sup>53</sup> 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.”<sup>54</sup> 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.”<sup>55</sup>
33. Importantly, the EEOC defines religious practices as including “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional views.... The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee.”<sup>56</sup>
34. Employers must also accommodate religious beliefs concerning opposition to homosexual behavior. Reasonable accommodation is a fluid and liberal term which must be determined on a case-by-case basis.<sup>57</sup> Broadly, an employer is required to accommodate an employee’s religious belief or custom unless such accommodation will actually interfere with the operations of the

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<sup>51</sup> *Id.*, § 1.

<sup>52</sup> See e.g.: *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281-82 (3d Cir. 2001). See 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).

<sup>53</sup> 42 U.S.C. 2000e(j).

<sup>54</sup> *EEOC v. University of Detroit*, 701 F. Supp. 1326, 1331 (E.D. Mich. 1988), *rev’d on other grounds* 904 F.2d 331 (6<sup>th</sup> Cir. 1990). See also *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7<sup>th</sup> 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).

<sup>55</sup> *McGinnis v. United States Postal Service*, 512 F. Supp. 517, 520 (N.D. Cal. 1980).

<sup>56</sup> *Guidelines On Discrimination Because of Religion*, 29 C.F.R. § 1605.1 (“Guidelines”).

<sup>57</sup> *Religious Discrimination*, 22 A.L.R. Fed. at 604; *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10<sup>th</sup> Cir. 1976) *cert. denied*, 433 U.S. 909 (1977).

employer. An employer violates Title VII if it fails to even attempt an accommodation.<sup>58</sup> Under Title VII law, the employer has the burden of proving undue hardship.<sup>59</sup> Evidence of undue hardship must be more than mere speculation.<sup>60</sup>

35. The concept of reasonable accommodations for religious belief in employment provides the optimal balance of proportionality and respect for “necessity in a democratic society” under Convention analysis. The UK already recognizes a similar concept in its disability law with reasonable adjustment.<sup>61</sup> The reality remains that in most, if not all, of the cases that have come before courts in the UK where “sexual orientation” has come into conflict with a sincerely held religious belief, the accommodation of that belief would have caused no undue hardship whatsoever. Nonetheless UK courts have consistently interfered with the Article 9 rights of Christians disproportionately to the legitimate aim being sought, and in a manner which lack necessity within a democratic society.

### **Conclusion**

36. The third party interveners to this submission hereby reiterate that this Court’s governing jurisprudence dictates that the highest scrutiny must be given to State interference with freedom of thought, conscience and religion. Article 14 must be applied so as to prevent discrimination where, regarding the impact upon the individual, it is not proportionate with regard to any legitimate aim, and Article 9 must be read in conjunction with this. Article 9 emptied of a right to conscience with respect to employment is an unlawful limitation of freedom of thought, conscience and religion. Precisely because limitations of Article 9 rights must be proportionate to a legitimate aim and necessary in a democratic society, reasonable accommodations for sincerely held religious beliefs are clearly mandated by the protections afforded by the Convention. With the Grand Chamber’s recent recognition of a Convention right to conscientious objection for sincerely held religious beliefs taken in conjunction with the Parliamentary Assembly of the Council of Europe’s resolution on rights of conscience, it is clear that reasonable accommodations must be afforded to religious beliefs where no undue hardship is faced by employers in the daily operations of a business. It is equally clear from the case-law of this court, because of the fundamental and profound nature of the rights at the centre of disputes involving protection of conscience in the work place, that the margin of appreciation afforded to Member States by the Court should be *de minimus*.

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<sup>58</sup> *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6<sup>th</sup> Cir. 1991).

<sup>59</sup> See e.g.: *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9<sup>th</sup> Cir. 2004).

<sup>60</sup> *Pyro Mining*, 827 F.2d at 1086; *Haring*, 471 F. Supp. at 1182 (“undue hardship” must mean *present* undue hardship, as distinguished from anticipated or multiplied hardship.” (emphasis in original)).

<sup>61</sup> S.20-21, Equality Act 2010.