Check against delivery

Suppose that a woman who wishes for religious reasons to wear the *burka*, the most complete form of covering with only a slit for the eyes, also wishes to drive her car in Helsinki. There is plainly an issue of safety: if a driver's view of other traffic is restricted, she and other drivers may be put in danger.

That is a relatively unusual case, for the exercise of freedom of religion seldom affects the rights of others in such a clear way. Article 9 of the European Convention on Human Rights protects both individual and collective rights. Article 9(1) provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, *either alone or in community* with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Most of the cases which have come before the Court have in fact concerned individual rights but the rights of churches have been the subject of a number of cases in which the State has denied recognition to a church or, where a church has divided for some reason, to one of the separated parts: for example, *Metropolitan Church of Bessarabia v Moldova* and *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Innocent) v Bulgaria*.

Article 9(2) provides the limitations on the freedom enjoyed by individuals:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety [*and that might well provide an answer to the driving example I gave*], for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Cases before the Court are always against the State, and not against other individuals. So the issue is often whether the State did enough to protect the freedom of religion, and the case-law allows every State a certain 'margin of appreciation'; it may take into account local circumstances to some extent. Quite when the Court will apply the 'margin of appreciation' is difficult to predict. Its existence enables the Court to defer to strongly-held views of the respondent State, which is politically convenient but does produce a certain incoherence in the Court's decisions.

I contrast two well-known cases to illustrate that.

In *Leyla Şahin v Turkey*, decided by the Grand Chamber in 2007, the applicant was a woman medical student, had worn the Islamic headscarf throughout the first 4½ years of her university studies. Then the university vice-chancellor, acting under legal powers, issued a circular saying that female students who wore a headscarf or male students with beards were not to be admitted to lectures or examinations. Miss Şahin considered that wearing the headscarf was her religious duty and she was excluded from lectures and examinations. The Court repeated what had been said in earlier cases, that the freedom of thought, conscience and religion is one of the foundations of a democratic society. Yet the court rejected Miss Şahin's application, on the 'margin of appreciation' ground. The Turkish Constitution describes Turkey as 'a democratic, secular and social State'. Given that, it was 'understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious dress,

including, as in the present case, the Islamic headscarf, to be worn'. Wearing a headscarf might have some kind of proselytising effect.

That can be contrasted with *Lautsi v Italy*, concerning the display of the crucifix, required by law, in Italian schoolrooms. A parent objected to the display of a Christian symbol and argued that it offended her right and that of her children *not* to believe and was contrary to the neutral position a State should take in matters of religion. In contrast to the *Şahin* case, here the State was anxious to *allow* a religious practice and not suppress it; and the freedom of religion asserted was the freedom of non-believers and not that of someone following what she saw as a religious duty. It is well established that the freedom to believe and the freedom not to believe (negative freedom) are both protected by article 9. At the first hearing, the applicant succeeded but that was reversed by the Grand Chamber.

The Grand Chamber accepted that the State conferring on the country's majority religion preponderant visibility in the school environment but nonetheless refused to declare the Italian State in breach of article 9. The main reason was the 'margin of appreciation' allowed to a State in matters so tied up with its history and culture.

What about the 'proselytising' effect of the headscarf in the *Şahin* case? The Grand Chamber in *Lautsi* explained that the crucifix was a 'passive symbol' and so had no such effect. I think that is nonsensical. A crucifix is directly concerned with the central facts of Christ's passion, a much clearer sign of Christian teaching than a headscarf could ever be.

Another element in the *Şahin* case is the emphasis on the secular nature of the State, enshrined in the Constitution of Turkey. That led in effect to the 'margin of appreciation' supporting the suppression of the religious symbol of the headscarf. But a secular principle is also part of Italian constitutional law, but that fact was conveniently ignored in the *Lautsi* case.

Two other arguments have been used to deny individuals their freedom of religion. The first is that a particular practice is not required by, or is not an essential part of the practice of, a religion, in our case of Christian practice. If that argument is accepted, there is no right vested in the applicant which needs protection.

The Convention speaks of 'freedom … to manifest [one's] religion or belief, in worship, teaching, practice and observance'. And does raise the question as to what are the public practices that are 'manifestations' of religion or belief. What 'practices' are essential elements of Christianity? It is a theological or ecclesiological question, but I am not sure there is a very clear answer. So it is not surprising that the Court usually tries to avoid the issue.

The second argument is essentially one of waiver, that the applicant has voluntarily put him- or herself into a situation in which certain restrictions on the freedom to manifest his or her religion apply and has so waived the right he or she would otherwise enjoy. There have been many decisions on this basis. A Finnish example is the early case of *Kontinnen v Finland* (where an employee on the state railways had become a member of the Seventh-day Adventist Church and objected to working on Saturdays), the Commission held that the applicant, as a civil servant of the State Railways, had a duty to accept certain obligations towards his employer, including the obligation to observe the rules governing his working hours. It took the view that he was not dismissed because of his religious convictions *per se* but for having refused to respect his working hours.

But we now have an important group of cases decided by the Court in January of this year, and generally known, from the name of the first applicant, as *Eweida v United Kingdom.* I summarise the facts as briefly as I can:

Ms Eweida, a Coptic Christian, worked in the check-in staff of British Airways, a private company. Although Sikhs were allowed to wear turbans and bracelets with their uniform, and Muslim women the headscarf, 'jewellery', including in her case a small cross worn around the neck, was forbidden. She was suspended from work. Although British Airways did later amend their rules in the face of considerable press criticism, the English courts found that she had no remedy.

Ms Chaplin also wished to wear her cross as a necklace; she worked as a nurse in a State hospital. Necklaces were forbidden under the hospital rules to avoid any risk of injury to patients.

Ms Ladele was a registrar of marriages, an officer of the local authority. She believed that same-sex unions were contrary to the law of God but was required to conduct same-sex 'civil partnership' ceremonies, or (by way of compromise) administrative work and simple registration of civil partnerships as opposed to ceremonies. She declined and was faced with possible dismissal.

Mr McFarlane's case also concerned same-sex relationships. He was employed by Relate, a private counselling organisation. He was dismissed because he had failed to give an assurance that he would provide counselling to those in a same-sex relationship.

It will be seen that two of the applicants were employed by State and two by private bodies; in the second type of case the issue is whether the State failed to take appropriate steps to prevent the private employer from infringing the applicants' Convention rights.

The UK Government relied on both the arguments that we have identified. First, that behaviour which was motivated or inspired by religion or belief, but which was not an act of 'practice of a religion in a generally recognised form', was not protected by article 9. The visible wearing of a cross was not a generally recognised form of practising the Christian faith, still less one that was regarded as a mandatory requirement. Similarly, Mr McFarlane's objection to providing psycho-sexual therapy to same-sex couples could not be described as the practice of religion in a generally recognised form.

In the alternative, the Government argued that even if the visible wearing of the cross, or the refusal to offer specific services to homosexual couples, were a manifestation of belief and thus a right protected by article 9, there had been no interference with this right in respect of any of the applicants. Each of the present applicants had been free to seek employment elsewhere; and Ms Eweida and Ms Chaplin had both been offered other posts by their current employers at the same rate of pay which involved no restriction on their freedom visibly to wear a cross. This issue attracted particular attention from the various persons and groups allowed to intervene: the Christian groups held that it was quite wrong for an employee to be forced to make the invidious choice between his or her job and faith. The National Secular Society, unsurprisingly, took a different approach, emphasising that the 'freedom to resign is the ultimate guarantee of freedom of conscience'.

The Court held in favour of Ms Eweida (the check-in lady) by 5 votes to 2; against Ms Chaplin (the nurse) unanimously; against Ms Ladele (the marriage registrar) by 5 votes to 2; and against Mr McFarlane (the counsellor) unanimously. I think it is possible to argue that Ms Eweida's wearing of the cross interfered with no-one else's rights, and that in all the other cases there was some interference with those rights, even if it were only in the case of the nurse, Ms Chaplin, a possible risk to patients. But more important than the actual decisions on the facts, where the 'margin of appreciation' was a factor of importance, are the clarifications of the law made by the Court.

On the issue of what is a manifestation of a religion, the judgment says this:

> ‘In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question’.

So in future the question will be whether there is a sufficiently close and direct nexus between the act and the underlying belief; and the Court, especially in one of the dissenting judgments, recognises that this is an easier test for Christians, whose religion is less prescriptive than some others in terms of what should or should not be done in manifestation of it.

On the relevance of the possibility of resignation, the Court made a definite break with the past:

> It is true, as the Government point out ..., that there is case-law of the Court and Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9(1) …. However, the Court has not applied a similar approach in respect of employment sanctions imposed on individuals as a result of the exercise by them of other rights protected by the Convention, for example the right to respect for private life under Article 8; the right to freedom of expression under Article 10; or the negative right, not to join a trade union, under Article 11. Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

So in future, the fact that the individual seeks exemption from a general rule applying in his or her place of employment is no longer necessarily fatal to his or her case. It has to be ‘weighed in the overall balance’ and we may expect the case-law of the Court to develop so as to spell out quite how that balancing exercise will work. It is, for example, clearly the case that in harsh economic times, the chance of changing one’s job may be illusory; there may be no other jobs to go to, and the Court will have to take note of that reality.

Overall, *Eweida* is a decision of real importance which offers better protection to the freedom of religion.

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