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Strasbourg, Conscience and Religious Belief

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This issue of Ethics in Brief assesses the meaning and possible impact of the recent decision by the European Court of Human Rights in four well-publicised freedom of religion cases arising in the UK. While the decision demonstrates the limitations of the European Convention on Human Rights in protecting religious freedom, it does contain grounds for cautious encouragement. The article also addresses some of the general issues raised by the decision.

Introduction

One can identify several strands in the relationship between law and religion. There may be a constitutional aspect, such as the separation of church and state or the establishment of a state church. There may be questions concerning the extent to which arguments based on religious premises should occupy a place in public affairs, and thus influence the laws that are enacted. There will be choices to make about the legal status of religious organizations, such as whether they should enjoy charitable status. There will certainly be choices to make concerning the extent to which the law protects freedom of religion. It was the last of these aspects—the legal protection afforded to freedom of religion—that was considered by the European Court of Human Rights in the recent case of *Eweida and others v The United Kingdom*.[1]

The *Eweida* case

The European Court of Human Rights (the 'Court') dealt with four conjoined applications against the United Kingdom. The facts were summarised as follows.

> The applicants complained that domestic law failed adequately to protect their right to manifest their religion. Ms Eweida [an airline employee] and Ms Chaplin [a nurse] complain specifically about restrictions placed by their employers on their wearing of a cross visibly around their necks. Ms Ladele [a registrar of births, deaths and marriages] and Mr McFarlane [a relationship counsellor] complained specifically about sanctions taken against them by their employers as a result of their concerns about performing services which they considered to condone homosexual union.[2]

The Court was asked to consider whether the UK, as a contracting state to the European Convention on Human Rights, had been in breach of its treaty obligations by failing to respect the applicants' rights in relation to Articles 9 (freedom of thought, conscience and religion) and 14 (prohibition on discrimination). The main focus of the Court's decision was the interpretation and application of Article 9:

> (1) 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.
>
> (2) 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, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Where Article 9 rights are in question, there are three questions to consider. (1) Is Article 9 engaged? That is, do the facts fit within the protection afforded by Article 9? As the text of Article 9 makes clear, the holding of

religious belief is protected absolutely, while actions flowing from those beliefs are given qualified protection. Moreover, past cases have distinguished actions manifested by belief (which are protected) from those merely motivated or inspired by beliefs (not protected). (2) If Article 9 is engaged, has there been an interference with that right? (3) Is any such interference justified in accordance with Article 9(2)? The four applications in *Eweida* turned on whether interference with the applicants' Article 9 rights had been justified. Ms Eweida's application was successful by a majority of 5:2 on the basis that the domestic courts had not struck a fair balance. The other three applications failed on the basis that a fair balance had been struck: in Ms Chaplin's case because of health and safety considerations; in Ms Ladele's case because of the need to secure the rights of others; in Mr McFarlane's case on account of what he had voluntarily assumed and his employer's pursuit of a non-discrimination policy. The Chaplin and McFarlane decisions were unanimous; the Ladele decision was reached by a majority of 5:2.

Three brief legal conclusions from the Court's judgment can be noted here. First, the wearing or display of religious symbols, even where not a mandatory requirement of a particular religion, can still amount to the manifestation of religious beliefs for the purposes of Article 9.[3] The same applies for those who act according to orthodox Christian beliefs (and by implication other religious faiths) about marriage and sexual ethics.[4] Actions such as those will engage Article 9 rights. Second, the decision confirms an important shift where Article 9 is invoked in relation to freedom of religion in the workplace. Historically the general position had been that the voluntary acceptance of a contract of employment meant that there could be no interference with Article 9 rights in regard to what was required by that employment.[5] It is now more likely the courts will go on to consider whether interference with an Article 9 right can be justified; that is, it will have to be shown that any such interference is in furtherance of a legitimate aim and the means adopted are proportionate. Third, given that the justification of any such interference with an Article 9 right involves a balancing exercise, the decision gives some indication of how courts and tribunals will be likely to conduct that balancing exercise in the future. Having said that, one should exercise care in articulating the precise legal effect of the decision. The reason the Chaplin, Ladele and McFarlane applications failed was the Court's conclusion that the UK had acted within the 'margin of appreciation' afforded to contracting states; in effect, the UK had acted within the range of choices that are compatible with Convention rights.

Within the 'margin of appreciation'

In attempting to understand the reach of a decision such as *Eweida*, it is important to distinguish different kinds of questions. What Article 9 requires of contracting states—the issue for the Court in *Eweida*—is certainly one question. What a contracting state should do as a matter of principle within its margin of appreciation is another. Whether the prudent employer should offer some accommodation or adjustment not strictly required by the letter of the law is yet another.[6] What the Court's decision does not say is that the state, in the laws it enacts and in the policies it pursues, may never provide the kind of legal protection claimed in the Chaplin, Ladele and McFarlane disputes. Nor does the decision necessarily prevent an employer from making the kinds of adjustments and compromises that may have avoided or ameliorated these disputes. Within the margin of appreciation such choices will be open to contracting states and employers, subject to any competing rights under the Convention and relevant domestic legal provisions. Of course, for a range of reasons one cannot expect the legal protection of freedom of religion and conscience to be absolute, especially within the employment context. In the law and in the conduct of particular employment relationships there will always be compromises to be reached and balances to be struck. Moreover, given the impossibility or impracticality of codifying a resolution to every possible dispute ex ante, the law may afford courts and tribunals considerable discretion in deciding what is reasonable, proportionate, fair, or however else that discretion is expressed. For the legislator creating statutes, the judge exercising some legal discretion or the employer considering some requested accommodation, the following question presents itself: in seeking to balance competing interests in the context of freedom of conscience and religion, what in principle is at stake?

Religious belief, conscience and moral motivation

The majority of the seven judges in *Eweida* regarded the four applications as raising more or less the same legal issue: the scope of religious freedom under the Convention.[7] The two judges who dissented with regard to the Ladele application considered her case, however, to be 'not so much one of freedom of religious belief as one of freedom of conscience'.[8]

They suggested that the majority's judgment had failed to mark a distinction between these two freedoms. They regarded that distinction as important for a couple of reasons: the differential treatment of the two freedoms within Article 9; and a conceptual distinction between conscience and religion, and their prescriptions. There may well be good reason to distinguish between freedom of religion and freedom of conscience in the law and also in principle. And one can expect that legal practitioners in future cases will attempt to exploit such a distinction where Article 9 rights are in question. Nevertheless, a plausible understanding of practical rationality and moral motivation in the life of the individual (with or without religious beliefs) will resist an uncoupling of matters of conscience from matters of belief.

For what is conscience but an awareness and understanding of the moral quality of my acts and my judgments about those acts? And what ultimately informs those judgments but my 'worldview', for want of a better word—my understanding about the way the world is? The point holds for religious believer, agnostic and atheist alike: the way I act, the choices I make, the projects I pursue, the commitments I embrace, and so forth, will be shaped by what I believe I have reason to do (and not to do), and by my understanding of what makes my life and that of others go well. Unless I am to surrender to an irrational inconsistency, my reasons for action will be, in one way or another, a function of what I believe to be the case and what I believe is of fundamental value.

Legal reasoning and legal decisions should reflect and respond to reality. In doing so, the law's method is as follows: 'defining terms, and specifying rules, with sufficient and necessarily artificial clarity and definiteness to establish the "bright lines" which make so many real-life legal questions *easy questions*.'[9] Yet, for that very reason we should not allow law and legal decisions to exhaust our thinking about the issues surrounding freedom of religion and conscience. In dealing with these freedoms a difficulty lies in the adoption of artificially restricted understandings of what it means to 'worship' and to 'practise' or 'observe' one's religion. In the context of Christianity—the faith of all four applicants in *Eweida*—that can be problematic, for two related reasons. The first is that Christian ethics is by no means reducible to a set of law-like prescriptions such as the Ten Commandments. Those kinds of scriptural injunctions certainly provide authoritative and decisive pronouncements on conduct required or to be avoided. Yet behind the injunction—even where it is a negative injunction—there is always a positive theological principle, some reflection of what it means to be a human person in God's world. Second, to worship and to practise one's religion is no sense limited to Sunday morning services, singing hymns, etc. Rather, the Bible envisages the Christian's whole life as an ongoing act of worship; to practise one's religion is to live and to choose moment by moment in response to God's grace.[10] With that in mind, the Court's conclusion that the actions of all four applicants in *Eweida* engaged their Article 9 rights is a welcome one.

In a statement made in support of Mr McFarlane's case when it was before the Court of Appeal, former Archbishop of Canterbury Lord Carey mooted the possibility of specially constituted courts to hear religious freedom claims; the suggestion was rejected.[11] One can understand Lord Carey's concern in making that proposal: namely, to ensure a fair hearing of the issues in relevant cases. With respect, however, I do not think that the answer is to park freedom of religion and conscience in a niche within the legal system. Certainly, what is needed, both within and beyond the law, is a better appreciation of moral motivation in the lives of those who profess religious belief, as well as a richer understanding of freedom of conscience and freedom of religion as fundamental political values. Such an understanding will acknowledge that religious belief is not primarily a problem to be solved or something to be contained or domesticated. On the contrary, it is a fact of life in the sense that human beings always have been, and always will be, concerned with ultimate questions about their origin and existence and whether there is any transcendental reality beyond the material. What is the practise of religion, then, but the alignment of oneself with the best answers that can be found to those kinds of questions? It goes without saying that to protect freedom of religion and conscience is not equivalent to a legal endorsement of any beliefs so protected. Nor is it equivalent to a claim that beliefs protected by law comprise part of the law.

Conclusion

Christianity takes a high view of the rule of law; in the ordinary course of things, the conscientious law-breaker is the exception rather than the norm.[12] It also takes a high view of tolerance and forbearance

towards others, both within and outside of the Christian community. Yet, the challenge is this: in seeking to respect an institution such as law and in extending an attitude of tolerance and forbearance, the Christian believer is called to be 'morally and spiritually distinct' but not 'socially segregated'.[13] In the context with which we have been concerned here, he asks that the margin of appreciation afforded to contracting states in relation to Article 9 does not become an excuse for his marginalization (whether de jure or de facto) vis-à-vis worthwhile opportunities in the workplace. True, the law may not prevent him from singing hymns with other believers. Following Ms Eweida's success at the European Court of Human Rights in Strasbourg, it will not prevent the reasonable display of some appropriate religious symbol. Nevertheless, if there is to be freedom of religion in any real sense, there must be genuine freedom of conscience. The reason? There is a connection between belief (what we believe, as well as the reasons we have for those beliefs) and our reasons for action (what there is reason to do and not to do). And as one writer suggests, it is from a grasp of 'the nature and value of conscience, that an understanding of the value of religious liberty will arise'.[14]

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1. [2013] ECHR 37.
2. ibid, § 3.
3. ibid, §§ 89, 97.
4. ibid, §§ 103, 108.
5. ibid, § 83.
6. In the context with which we are concerned, reference is sometimes made to the idea of 'reasonable accommodation'. It means the offer of special provisions by an employer to meet some particular requirement of an employee arising, for example, from disability (e.g. by providing wheelchair access) or religious belief (e.g. by providing a prayer room for Muslims). Reasonable accommodation as a legal concept is currently recognised in English and European Union law with respect to disability, but not religion and belief. Nor is it formally acknowledged in the jurisprudence relating to the European Convention on Human Rights. For a discussion of reasonable accommodation as a legal concept, see the article by Bribosia et al. in the further reading items.
7. ibid, §§ 79–88.
8. ibid, joint partly dissenting opinion of Judges Vučinić and de Gaetano, § 2.
9. John Finnis, 'Natural Law and Legal Reasoning' in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992), 142.
10. E.g. Romans 12:1–2.
11. *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.
12. Mark 12: 13–17; Romans 13: 1–7.
13. John Stott, *Issues Facing Christians Today* 2nd ed. (Marshall Pickering, 1990), 66.
14. Christopher Tollefsen, 'Conscience, Religion and the State' (2009) 54 *Am J Juris* 93, 93.

For further reading:

- Emmanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, 'Reasonable Accommodation for Religious Minorities: A Promising Concept for European Anti-discrimination Law?' (2010) 17 *Maastricht Journal of European and Comparative Law* 137-161 (available at http://ssrn.com/abstract=1781182).
- Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, 2001).
- Christopher Tollefsen, 'Conscience, Religion and the State' (2009) 54 *The American Journal of Jurisprudence* 93–115.
- Religion Law Blog: http://religionlaw.blogspot.co.uk/

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