- TRANSLATION FROM THE ORIGINAL IN FRENCH -

OBSERVATIONS RELATING TO THIRD PARTY INTERVENTION

submitted to the Fourth Section of the
European Court of Human Rights

in the case of

Lillian LADELE and Gary McFARLANE vs. The UNITED KINGDOM

(Petitions n^{os} 51671/10 and 36516/10)

by Dr Grégor Puppinck, Director of the ECLJ

Strasbourg, 15th September 2011

1. The ECLJ is convinced that the recognition of the existence of specific moral issues, with regard to which the free conscience of citizens should be respected, can only be beneficial to democratic, pluralist and tolerant States and strengthen the cohesion of society.

Taking into account the small numbers of conscientious objectors and homosexual couples, there should be no practical difficulties in respecting their respective rights. Under no circumstances should this lead to a loss of employment.

Much evidence shows that believers, frequently Christian, are genuinely stigmatised[1] because of their moral convictions, to the point where they are prevented, *de facto*, from holding certain jobs. This has aroused concerns among some OSCE bodies, especially the ODHIR[2] and the Parliamentary Assembly[3] about the growing discrimination faced by Christians in Europe. The cases submitted to you are, in this respect, crucial.

I. APPLICABLE PRINCIPLES

A. With respect to society

2. According to convention and the jurisprudence of the Court, a "democratic society" is characterised by a plurality of ideas and beliefs, tolerance of all religions and strands of opinion and by debate on the diverse concepts of life and the world within a framework governed by the neutrality of state-controlled authorities.

There can be no democracy without pluralism[4]. The State is its ultimate guarantor[5]. One of the main characteristics of democracy resides in the chance it offers for resolving the problems a country faces through dialogue and without recourse to violence, even when these are challenging. The role of the authorities is not to suppress the cause of the tensions by eliminating pluralism, but to ensure that opposing groups tolerate each other[6].

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[1] *mutatis mutandis Grzelak v. Poland*, n° 7710/02, act of 15th June 2010, § 95, 97 and 99;

[2] E.g.: see: Report of OSCE/ODIHR Roundtable "Intolerance and Discrimination against Christians: Focusing on Exclusion, Marginalization and Denial of Rights", Vienna, 4 March 2009 - http://www.osce.org/odihr/40543; OSCE meeting on prevention of hate crimes against Christians, 12th September 2011.

[3] OSCE-PA, *Resolution on Combating Intolerance and Discrimination against Christians in the OSCE Area*, 6-10th July 2011.

http://www.oscepa.org/images/stories/documents/activities/1.Annual%20Session/2011_Belgrade/BelgradeDeclaration FINALEnglish.pdf

[4] *Unified Communist Party of Turkey v. Turkey*, n° 133/1996/752/951, act of 30th January 1998, § 43;

[5] *Informationsverein Lentia and others v. Austria*, act of 24th November 1993, series A n° 276, § 38;

[6] *Unified Communist Party of Turkey v. Turkey, aforementioned,* § 57 and *Serif v. Greece*, n° 38178/97, § 53, CEDH 1999-IX;

Pluralism, tolerance and open-mindedness are features of a "democratic society". Although the interests of the individual must sometimes be subordinate to those of a group, democracy does not come down to the continual supremacy of the opinion of a majority, but demands a balance that assures the individuals in a minority fair treatment and avoids any abuse of a dominant position[7]. Pluralism and democracy must also be based on dialogue and a spirit of compromise, which necessarily involves various concessions on the part of individuals or groups of individuals and which are justified by the end of safeguarding and promoting the ideals and values of a democratic society[8]. If the "rights and freedoms of others" feature among those guaranteed by the Convention or its Protocols, it must be allowed that the requirement to protect them could force States to restrict other rights or freedoms equally accepted by the Convention: it is precisely this continual search for a balance between the fundamental rights of everyone that constitutes the basis of a "democratic society"[9].

However, the State can legitimately exclude from the protection of the Convention, practices that aim to destroy the rights and freedoms guaranteed in the Convention.[10] The fact that a practice is inspired by a religion does not immediately confer upon it the protection of the Convention[11].

B. With respect to employees

Employees are subject to contractual obligations and a duty of loyalty to their employer, but do not lose the right to enjoy freedom of conscience and religion.

1. Freedom of conscience and religion

3. Freedom of thought, conscience and religion represents one of the foundations of a democratic society in the sense of the Convention. In its religious dimension, this freedom features among the most essential elements in the identity of believers and their notion of life, but it is also a valuable thing for atheists, agnostics, sceptics or those who are indifferent. It is an essential part of pluralism – hard won over the centuries – which cannot be dissociated from such a society. In particular, this freedom involves that of belonging to a religion, or not, and that of choosing to practise it or not[12]. This freedom has a positive aspect: the freedom to act according to one's conscience and or one's religion; it also has a negative aspect: the freedom not to act against one's conscience and/or religion.

In this case it is worth differentiating between freedom of conscience and freedom of religion, because, just as there is a difference in nature between conscience and religion, there is also a difference between the prescriptions of conscience and religious prescriptions.

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[7] *mutatis mutandis*, *Young, James and Webster v. United-Kingdom*, act of 13th August 1981, series A n° 44, p. 25, § 63, and *Chassagnou and others v. France* [GC], nos 25088/94, 28331/95 and 28443/95, § 112, CEDH 1999-III;

[8] *mutatis mutandis*, *Unified Communist Party of Turkey and others, aforementioned,* § 45, *Refah Partisi (Prosperity Party) and others*, § 99 and *mutatis mutandis Petersen v. Germany* (dec.), no 39793/98, CEDH 2001-XII;

[9] *Chassnagnou and others v. France*, § 113;

[10] *Kalifatstaat v. Germany*, decision of 11th December 2006, petition n°13828/04. This case concerned the banning of an association in favour of establishing a caliphate and the establishment of a worldwide state based on Sharia Law*; Kuhnen v. Germany*, n° 12194/86, decision of the Commission of 12th May 1988;

[11] *mutatis mutandis Unified Communist Party of Turkey and others v. Turkey,* aforementioned, § 100;

[12] *Kokkinakis v. Greece*, act of 25th May 1993, series A n° 260-A, p. 17, § 3, and *Buscarini and others v. Saint-Marin* [GC], n° 24645/94, § 34, CEDH 1999-I;

a) Freedom of conscience (art. 9 § 1)

4. Freedom of conscience, *stricto sensu*, is guaranteed in article 9 § 1; it concerns the right of every man to apply conscience to decisions on what he should or should not do, on good or bad. Conscience, which is part of one's deepest feelings, is wholly protected by the Convention, without exemption.

5. Thus, any employee has the right to hold beliefs and to apply conscience to decisions made concerning the expectations of his employer. Disciplinary action may not be taken against him for these. In a hierarchical relationship, the duty of obedience does not overrule the subordinate's freedom of conscience. Furthermore, it is established in law that the subordinate has an obligation that is not just moral, but legal, to exercise his conscience with respect to the orders he may receive. It is well known that he does not have the right to obey blindly: he must object conscientiously to unfair orders. The European Court recognised this recently in the case *Polednova vs. The Czech Republic*[13], in which it found that it "could no longer accept the argument of the claimant that she was only obeying the orders of her superiors" as "the person concerned must have been aware of the fact that the questions of guilt and punishment had been decided by the political authorities well before the trial and that the fundamental principals of justice were being completely flouted." Similarly, in the case *K.-H. W. vs. Germany*[14], the Court upheld the conviction of a soldier for carrying out unjust orders. The soldier "should have known, as an ordinary citizen, that firing on unarmed people who were simply seeking to leave their country, failed to recognise their fundamental and human rights" (§ 104).

In these two decisions, the Court applied the fourth "Nuremburg principle" according to which: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." This "moral choice" is exercised by conscience: this is freedom of conscience. Like the Nazi doctors at Nuremberg, *Polednova* and *K.-H. W.* were both convicted for having obeyed a superior rather than their conscience. These are genuine situations where conscientious objection comes into play. In such situations, conscientious objection is not only a right, but a duty. But *Polednova* and *K.-H. W.* were convicted now for not having objected at the time; they would probably have been convicted at the time if they had objected. Freedom of conscience has sometimes been paid for in heroism. It is in order to avoid that obeying one's conscience must still require payment in heroism that the law now guarantees freedom of conscience.

6. Apart from these cases in which the Court confirms the existence of a genuine *duty* of objection, the Court has also increasingly recognised a *right* to conscientious objection enabling objectors to follow their conscience without losing their life, their liberty or their livelihood. It has done this recently on the issues of military service and abortion and possibly others.

- *Concerning military service,* in the recent case *Bayatyan vs. Armenia*[15] the Grand Chamber established that opposition to military service constitutes a belief that is sufficiently strong, serious,

[13] *Polednova v. Czech Republic*, 21st June 2011, petition n° 2615/10. Case concerning the conviction of a woman for having acted as prosecutor at a mock trial that lead to the death sentence for four opponents of the Communist regime.

[14] *K.-H. W. v. Germany* (n° 37201/97, [GC], 22nd March 2001). The *K.-H. W.* case concerned an East German soldier who was ordered to fire upon a fugitive at the border.

[15] GC, 7th July 2011, *Bayatyan v. Armenia*, n° 23459/03, § 126.

consistent and important that the guarantees contained in article 9 can be invoked. To this end, the Court upheld that this opposition is motivated by a grave and insurmountable conflict of conscience, based on sincere and deeply held beliefs. The Court found that this was a violation of article 9, emphasising that there were effective solutions available that would reconcile the competing interests before the Court. Essentially, the Court found clearly that respect for the "demands of conscience" of a minority is "likely to ensure cohesive and stable pluralism and promote religious harmony and tolerance in society."[16]

The Court recognises this right within many National laws and international institutions, including the Parliamentary Assembly of the Council of Europe (PACE), which affirmed that "the right to conscientious objection is a fundamental component of the law on freedom of thought, conscience and religion upheld in the Universal Declaration of Human Rights and the European Convention on Human Rights"[17].

- *Concerning abortion*, in the case *R. R. vs. Poland*, the Court also upheld the rights of healthcare workers to freedom of conscience in a professional context, finding that the State must structure the healthcare system in such a way that the genuine exercise of freedom of conscience of certain staff does not prevent patients from accessing the services in question.[18]

The Court explicitly recognises this right within many National laws and international institutions, including the PACE, which affirmed in its resolution relating to the "right to conscientious objection within the framework of legal medical care" that "no hospital, establishment or person may be subjected to pressure, be held responsible or suffer discrimination of any kind for refusing to carry out, accommodate or assist an abortion, an induced miscarriage or an act of euthanasia, or to submit to such procedures, nor for refusing to carry out any intervention aiming to cause the death of a fœtus or human embryo, for whatever reason"[19].

7. Concerning military service and abortion, it is not sufficient for the State to invoke the existence of competing rights and interests to avoid taking positive measures guaranteeing respect for the freedom of conscience of conscientious objectors. In this sense, the State has a positive obligation; it is the State's duty to find appropriate solutions to reconcile the competing interests before it. In a pluralist society, this is what enables the demands of individual conscience to be articulated alongside collective interests. There is no reason not to apply this rule to various other questions in society where morality is objectively disputed.

8. Conscientious objection is the usual way of defending freedom of conscience. Once a genuine case of conscientious objection is established, the State is obliged to allow it and to respect

[16] "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." (§126)

[17] APCE, Recommendation 1518 (2001) of 1st March 2002 on "Exercising the right to conscientious objection to military service in Member States of the Council of Europe", § 8.

[18] 26 May 2011, *R.R. v. Poland*, n° 27617/04: "For the Court, States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation." § 206.

[19] APCE, Resolution 1763 (2010) of 7th October 2010 on "The right to conscientious objection within the framework of legal medical care."

freedom of conscience. Naturally, not any objection can be considered a conscientious objection. It is possible to draw a distinction between conscientious objections and religious objections, according to whether these are based on prescriptions of conscience or religion.

Differentiating "conscientious objection" from "religious objection":

9. A distinction must be drawn between "conscientious objection" and "religious objection" in order properly to understand that conscientious objection does not necessarily involve religion. It would be a fundamental error to judge that conscientious objection is a religious phenomenon; the Court would waste analytical tools and would be less able to distinguish a matter pertaining to conscience from one pertaining to religion.

- Conscientious objection, *stricto sensu*, is motivated by a prescription of conscience, by the "*dictamen rationis*", not by a religious or subjective prescription. To demonstrate this, one simply has to note that one cannot deduce from the subject of a conscientious objection (such as abortion, euthanasia or military service) the religion of the objector. There is no essential and sufficient link between the objection and the religion. The objection is based in reason. It is objective and not subjective; therefore it is not likely to be opposed to secularism. Unlike the human conscience, secularism makes no judgement about the rights and wrongs of sexual practices, abortion, euthanasia or military service.

- The same is not the case for objections that are actually religious objections: these do not obey prescriptions of conscience, but religious prescriptions. These are objections from which the religion of the objector can be deduced: there is a direct, essential and sufficient link between the religion of the objector and the nature of the objection; for example: not eating meat on a Friday, not handling pork, not working on Friday, Saturday or Sunday, not receiving blood transfusions, not showing one's face and others. Some religions have a large number of concrete prescriptions, governing many aspects of everyday life. Such objections, where they are not "reasonable" (in other words rational) and obey prescriptions of a (demonstrably) religious nature, come under the auspices of the protection of religious freedom, and consequently may be subject to certain limitations, on a case by case basis, with respect to the demands of life in society.

- Lastly, some prescriptions are both religious and rational. These include – taking some of the Ten Commandments (the Decalogue) as an example - not killing, not stealing, not bearing false witness, and not committing adultery or impure acts. Generally speaking, these are negative prescriptions: thou shalt not. It is the negative nature of these prescriptions which makes them especially likely to involve conscientious objection: refusal to do something. As a moral base for human action, and furthermore broadly translated into human rights, these prescriptions are in some ways a legitimate basis for conscientious objection.

10. It is, incidentally, useful to emphasise that it is quite right that freedom and conscientious objection fall under article 9 and not article 8 of the Convention. Indeed, while article 8 protects a person's right to autonomy, in other words the right of a person to set norms for themselves (auto-nomos), article 9 deals with heteronomy (hetero-nomos), in other words the ability of a person to perceive external norms and submit to them. This heteronomy can be moral in nature (and benefit from freedom of conscience), or religious, (and benefit from freedom of religion). Whilst autonomy aims to achieve personal free will, conscientious objection cases have in common that they are not motivated "by personal interests in accepted personal standards"[20]. They always

[20] GC, 7th July 2011, *Bayatyan v. Armenia*, no 23459/03, § 124.

include an element of sacrifice to which the objector consents through obedience to his conscience or religion. Conscientious objection cannot be motivated by fantasy or personal interest. This characteristic heteronomy is one of the criteria enabling conscientious objection cases to be recognised. The Court used it in the *Bayatyan* case.

b) Freedom to express one's religion and conscience (Art. 9 § 2)

11. Although freedom of conscience and religion concerns first and foremost the *internal conscience*, it also involves expressing that religion alone and in private or collectively in public and among those with whom one shares a faith. There are two sides to the freedom to express one's religion and conscience, one positive and the other negative. The positive aspect means not being prevented from acting according to one's conscience or religion; this is a positive expression that falls within the framework of article 9§2. The other – negative - aspect consists of not being forced to act against one's conscience; strictly speaking it is not a matter of external expression, but of preserving the internal conscience, which can be confused with issues associated with freedom and conscientious objection.

- *Freedom to positively express one's religion or beliefs*:

12. This *positive* freedom deals with the ability to translate one's religion or beliefs into an external act. Article 9 lists the various forms of expression: worship, teaching, practice and observance of rites. These expressions are subject to the constraints and limitations inherent in every positive freedom[21]. Furthermore, article 9 "does not protect every act [or positive expression] that is motivated or inspired by a religion or belief"[22]. It does not always guarantee the right to be able to act in a manner dictated by a belief and it does not confer upon individuals acting in this way the right to evade rules proven to be justified[23]. This applies for instance to assisted suicide[24], religious marriage under the age of consent[25] or the distribution of pamphlets[26]. The freedom to positively express one's religion is also subject to the general stipulations of Article 17[27] relating to the forbidding of any abuse of the right[28].

- *Freedom to negatively express one's religion or beliefs*:

13. The freedom to express one's religion and conscience also has a negative dimension; it is not limited to the freedom "not to subscribe to a religion or not to practise it"[29]. Most frequently, this negative freedom is perceived as applying to "atheists, agnostics, sceptics or those who are

[21] Public safety, the protection of order, public health or morals, or the protection of the rights and freedoms of others.

[22] *Cha'are Shalom Ve Tsedek v. France* [GC], no 27417/95, § 73; *Hassan and Tchaouch v. Bulgaria* [GC], n° 30985/96, § 60; *Kalaç v. Turkey* of 1st July 1997, *Collection* 1997-IV, p. 1209, § 27; *Metropolitan Church of Bessarabia and Others v. Moldova*, n° 45701/99, § 117;

[23] Leyla Şahin, § 121;

[24] *Pretty v. UK*, n° 2346/02, act of 29th April 2002.

[25] *Khan v. UK*, n° 11579/85, decision of the Commission of 7th July 1986.

[26] *Arrowsmith v. UK*, n° 7050/75, report of the Commission of 12th October 1978; *Van Den Dungen v. Netherlands*, n° 22838/93, decision of the Commission of 22nd February 1995.

[27] Art. 17 "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

[28] *Refah Partisi (Prosperity Party) and others v. Turkey* on 13th February 2003, [GC], *aforementioned*.

[29] *Kokkinakis v. Greece* of 25th May 1993, series A n° 260-A, p. 17, § 31, and *Buscarini and others v. San Marino* [GC], n° 24645/94, § 34, CEDH 1999-I. *Refah Partisi (Prosperity Party) and others v. Turkey, aforementioned*, § 90.

indifferent"; actually it is the freedom of minorities in the face of dominant social customs and in the face of power. This negative freedom might involve the refusal to participate in a catechism class, just as it might pertain to a refusal to attend a political or moral indoctrination class. Similarly, it is used today by some to avoid swearing a religious oath, just as it was during the French Revolution by the Clergy refusing, often at the cost of their lives, to swear an oath to the civil constitution of the clergy. It was also used by Thomas More and many others.

14. In fact, the "freedom to negatively express one's religion or beliefs" falls fully within the problems surrounding freedom and conscientious objection. The distinction between religious and conscientious motives still applies. This negative freedom must enjoy even stronger protection, as it does not aim to preserve the *expression* of beliefs or religion, but the ability of people to hold a moral or religious belief. It is not the expression of the freedom that is being aimed at, but the freedom itself. This explains why, for example, article 9 does not necessarily guarantee the freedom to wear the veil[30], but it does guarantee the negative freedom not to be forced to wear it. Put another way, the violation of positive freedom only affects the external *expression* of the belief: the *external conscience*; whereas the violation of negative freedom directly affects the belief itself: the *internal conscience*. This is why it is more serious to force someone to act against their conscience than to prevent them from acting according to it.

15. Interference in a positive expression can always be limited: wearing of the veil can thus be prohibited in certain places, at certain times, etc. This is not the case for negative expression: any restriction, even over a limited time, destroys it completely. Forcing someone to wear a veil at certain times or in certain places can never be in proportion, forcing a doctor to carry out abortions only at certain times does not reduce the violation of his conscience, similarly, granting Mrs Ladele a temporary exemption does not reduce the violation of her freedom of conscience.

Finally, as the Court noted in the *Bayatyan* case, in the matter of conscientious objection, the State has to demonstrate that it is tolerant, for fear of imposing a "moral order". All the State really has to do is to tolerate "abstentions", which poses far fewer difficulties than tolerating external expression.

2. Obligations to employers

16. An employee has duties to his employer and to his customers or users. These are for the most part governed by contractual obligations, to which a general duty of loyalty can be added.

For the employee, this general duty of loyalty consists of a duty to refrain from acting against the interests of his employer, throughout the entire duration of his contract of employment. It includes an obligation of discretion. The member of staff's duty of loyalty does not involve him renouncing the guarantee of these rights. Thus, a member of staff is not generally obliged to inform his employer about an event in his private life that could have repercussions on his work life.

The extent of this duty of loyalty may vary according to the nature of the job, but it is not at the discretion of the employer. We will see more detail about this in the following section concerning the employer's point of view.

[30] According to the Court, in a democratic society, the State can limit the freedom to express one's religion, for example the wearing of the Islamic headscarf, if the exercise of this freedom damages the aim of protecting the rights and freedoms of others, public safety and public order (*Dahlab v. Switzerland* (Dec.), n° 42393/98, CEDH 2001-V).

C. With respect to employers.

Nobody would contest the right of an employer to preserve the interests of his business and the proper carrying out of his tasks, and to require his employees - to this end - to fulfil their contractual obligations and demonstrate a loyal attitude. The professional field is not, however, a rights-free zone.

1. The respect of employees' freedom of conscience and religion

17. The employer has the obligation to respect the freedom of conscience and religion of his employees and not to practise discrimination in this respect. The employee's internal conscience enjoys full protection: the employer cannot discriminate against, or penalise, an employee solely for his beliefs or religion. Nor can he force them to change their beliefs or religion.

Conversely, with respect to external conscience, the employer is not obliged to accept all external expressions of employees' religion or beliefs where these are likely to disrupt the smooth running of the business. Thus, the obligation imposed on a teacher to observe working hours that he claims do not fit in with his times of prayer, may still comply with freedom of religion[31]. The same applies to the obligation on a motorcyclist to wear a helmet which, he claims conflicts with his religious observances[32]. In this case religious freedom can be sufficiently preserved by choosing to change jobs.

18. It is slightly different if the employer is a religious community; these enjoy the principle of institutional and doctrinal autonomy, which protects them from undue interference by virtue of article 9 combined with article 11. The significance of the obligation to loyalty is greater in the case of an employer whose ethical code is based on religion or beliefs[33]. Such an obligation can extend to behaviour outside the professional sphere. Religious organisations are not obliged to respect the religious freedom of their employees, whether they are secular or religious; this freedom is exercised at the point where they either accept or refuse the position or by choosing to leave the Church. The same is not true of non-religious employers who may not require their employees to share their religion or beliefs.[34]

2. Other specific obligations: the duty of discretion and ethical charters

a) The duty of discretion

19. The State can impose behavioural obligations on its public officers, both within and outside the administrative domain[35]. This obligation to loyalty has been upheld by jurisprudence before the

[31] *X v. United Kingdom*, n° 8160/78, decision of the Commission of 12th March 1981, Decisions and reports (DR) 22, p. 27.

[32] *X v. UK*, n° 7992/77, decision of the Commission of 12th July 1978, DR 14, p. 234.

[33] See above-mentioned directive 78/2000/CE, *Schüth*, § 40, or *Obst* above-mentioned, § 27, *Lombardi Vallauri v. Italy*, n° 39128/05, § 41, *Rommelfanger v. Germany*, n° 12242/86, dec. 6th September 1989.

[34] *X. v. Denmark*, n° 7374/76, decision of the Commission of 8th March 1976;

[35] Pascal Montfort, "The European Convention on Human Rights, religious acts and public office" *JCP Administration and local authorities* n° 12, 21st March 2005, 1144.

Court since 1986 through the *Glasenapp* and *Kosiek*[36] rulings and confirmed by the *Vogt*[37] judgement. In the *Kalac* v. *Turkey* case, the Court considered the retirement from office of a military magistrate for fundamentalist opinions considered illegal in accordance with article 9 of the Convention[38]. The same applied to the dismissal of a judge for statements of a religious nature made in the performance of his duties[39].

Civil servants also enjoy religious freedom: although because of their status it seems legitimate for the State to impose on them a requirement for discretion in the public expression of their beliefs, they are still individuals, who are entitled to the protection of the Convention on this basis. Equally for private employers it can be legitimate for them to impose a duty on their employees of discretion in the external expression of their beliefs or religion. This duty of discretion covers the freedom of positive expression: what the employee can say, do or wear while at work. In any event the duty of discretion does not legitimise any attack on the very heart of the freedom: the *internal conscience*. To repeat: the internal conscience is violated when one is *forced to act against* one's conscience, and not when one is prevented from acting according to one's conscience. This means that the duty of discretion does not pose an obstacle to the right to conscientious objection.

b) Ethical charters

20. In recent years, businesses and institutions have developed the practice of drawing up ethical charters, codes of conduct, and other professional ethics codes. These documents impose standards of behaviour on employees on top of their general and contractual obligations. These charters cannot contain stipulations contrary to public order nor excessive burdens. The legality of such stipulations must be examined case by case.

21. The question arises in particular of their legal validity. Charters most frequently result from a unilateral decision by employers. If the charter brings in new rights in favour of employees, it constitutes obligations on the employer. Conversely, if the charter is a source of obligations for employees, its legal nature and correlatively how legally binding it is, is open to interrogation.[40] In any event, their binding force is subject to their acceptance by the employees, except where the stipulations "relate to the contractual obligations to loyalty and good faith [which] are, independently of their inclusion in any internal code of conduct, expected of employees; if their breach is such that it entails a penalty, it is due to the employee's failure in his obligation to loyalty enshrined in the contract of employment.[41]

In any event, the general obligation to loyalty and good faith cannot be the source of new obligations imposed unilaterally by the employer, so that any new obligation relating to behaviour requires the consent of the employee before it can become binding.

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[36] *Glasenapp v. Germany*, Act of 28th August 1986, series A n° 104; *Kosiek v. Germany*, Act of 28th August 1986, series A n° 105.

[37] *Vogt v. Germany*, n° 17851/91, act of 26th September 1995, series A n° 323.

[38] *Kalaç v. Turkey*, n°20704/92, act of 1st July 1997, Rec. CEDH, 1997, IV.

[39] *Pitkevitch v. Russia*, n° 47936/99, act of 8th February 2001.

[40] Part of the doctrine assimilates it into the internal code of conduct; however the absence of a specific penalty where there is a failure in these behavioural standards should exclude them from the field of a code of conduct and into the realm of the employer's disciplinary powers.

[41] Véronique Cohen-Donsimoni, Internal Codes of Conduct and other Business Management Standards, JurisClasseur Travail Traité, Fasc. 1-40, § 160

22. Furthermore these charters are distinct from internal codes of conduct in that they put the power to impose penalties entirely at the discretion of the employer. The employer's power to penalise is such that it exposes employees to the possibility of "institutional or management creep"[42], making the role of justice crucial in regulating the *legality* of the behavioural obligation imposed, as well as the *fairness* of the penalty imposed with respect to all the circumstances of the case.

II. APPLICATION OF THE PRINCIPLES TO THE CASE IN HAND

A. The rejection of homosexual practices is derived from freedom of conscience and religion

23. The rejection of homosexual practices is derived from freedom of conscience and religion. Even though one may not agree with the rejection of homosexuality, it is indisputable that it is based on both a religious prescription and a prescription of conscience. It is not essential to be religious to disapprove of homosexual practices. The religion of a person cannot be deduced from the fact of his objection to homosexuality. The rejection of homosexual practices and same-sex partnerships results from a moral judgement of conscience, usually based on an observation of natural reality, which is independent of religions.

24. The former Commission, followed by the Court, upheld that homosexuality poses a question of a moral nature. For a long time they upheld that the penalisation of homosexuality on the grounds of health and morality was in accordance with the Convention[43]. They continue to uphold the distinction between homosexual and heterosexual as legitimate, in particular with regard to recognition of a private or family life[44] or to the right to marriage as guaranteed in article 12 of the Convention[45]. It is true that the jurisprudence of the Court is changing rapidly on this point, but one can nevertheless not consider the moral distinction made by the applicants between homosexual and heterosexual relationships to be contrary to the Convention or its values, in the absence which the jurisprudence of the Commission and the Court would also be contrary to the Convention.

In the *Bayatyan* case, the Court specified that the applicability to an objection of article 9 must be clear-cut with respect to the circumstances appropriate to each case.[46] In this case there is no doubt: homosexuality objectively poses a problem of a moral or religious nature. The conducting of civil partnerships or provision of advice on the sexuality of homosexual couples requires

[42] A. Barège and B. Bossu, note sous Cass. soc., 28th May 2008: JCP S 2008, 1506.

[43] See for example, among others, decisions of the Commission n°s 104/55 of 17th December 1955, 167/56 of 28th September 1956, 530/59 of 4th January 1960, or n°7215/75 of 7th July 1977.

[44] *S v. UK*, n° 11716/85, decision of the Commission of 14th May 1986, *Kerkhoven and Hinke*, n° 15666/89, decision of the Commission of 19th May 1992, X, Y and Z v. UK, n° 75/1995/581/667, decision of the Commission of 20th March 1997; *Mata Estevez v. Spain*, n° 5651/00, decision of 10th May 2001, *Manec v. France*, n° 66686/09, decision of 21st September 2010.

[45] *Margarita Šijakova and others v. "Former Yugoslav Republic of Macedonia"*, no 67914/01, decision of 6th March 2003.

[46] *Mutatis mutandis Bayatyan v. Armenia*, [GC], n°23459/03, act of 7th July 2011, § 110.

concrete action on the part of the applicants[47]. These acts engage the conscience of those that perform them[48] and are furthermore likely to go against their religious beliefs[49].

B. The case of Mr McFarlane

25. Mr *McFarlane's* case is simple to resolve. The choice to question the morality of homosexuality and to form beliefs on this basis is protected by article 9 § 1. Nobody can be punished simply for holding opinions or beliefs.
Mr McFarlane never refused to offer advice to homosexual couples on issues of sexuality, and has already advised two lesbian couples. The conclusion cannot be drawn from his letter of 2nd January 2008 that he would refuse to do so in the future: he had merely shared with his superiors the questions he had asked himself, his *internal conscience*, following rumours concerning the issue. Mr McFarlane did not *express* his beliefs, he did not translate his beliefs into action, he simply talked about them. He could not be criticized for any concrete act of rejection or discrimination. Yet it was solely on the basis of the employer's doubts concerning the applicant's beliefs that the employer took the decision to impose upon the employee the harshest penalty available: dismissal. Not only is this penalty disproportionate, but it lacks a legal foundation because although a charter may impose behavioural obligations, it can neither impose a way of thinking nor be imposed on employees' consciences.
There is cause to find that a violation of article 9§ 1 has occurred.

C. The case of Mrs Ladele[50]

26. Mrs Ladele worked for The London Borough of Islington from 1992, well before the *Civil Partnership Act* (5th December 2005), and before unilateral publication of the "*Dignity For All*" document by Islington, on a date that cannot be specified. Her employment contract, in accordance with the *Registration Services Act 1953,* did not cover conducting civil partnerships. Islington decided to assign the conducting of civil partnerships to all its births, marriages and deaths registrars, not from the time that the *Civil Partnership Act* came into force, because the law had avoided generalising such an obligation, but following a complaint submitted by two homosexual officers who could not tolerate Mrs Ladele's situation. The decision to assign the conducting of *civil partnerships* to all registrars, considered in isolation or in relation to the adoption of the *Dignity For All* document, had the effect of creating – unilaterally - new obligations for the applicant.

As a result, an issue arises over the legality of the interference, since *Islington* unilaterally imposed a new obligation on the applicant, without being forced to by law.

27. Because conscientious objection brings into play the *internal conscience,* it follows that, where a genuine case of conscientious objection is observed, the State has a **positive obligation** to take

[47] *By contrast Skugar and others v. Russia*, n° 400010/04, decision of 3rd December 2009.

[48] *By contrast* v. *v. UK*, n° 10358/83, decision of the Commission of 15th December 1983; *Bouessel du Bourg v. France*, n° 20747/92, decision of the Commission of 18th February 1993.

[49] *By contrast Valsamis v. Greece*, n° 21787/93, act of 18th December 1996, § 37.

[50] Much of what will be set forth in the case of Mrs Ladele is also broadly applicable to the case of Mr McFarlane, which explains why this is sometimes referred to.

reasonable and appropriate measures (especially with respect to procedures) to protect the rights of the applicants drawn from paragraph 1 of article 9. It should be remembered that the role of the authorities is not to suppress the cause of tensions by eliminating pluralism, but to ensure that opposing groups tolerate each other[51]. In this sense it is in the field of positive obligations that the Court ruled in the cases of *R. R.* and *Bayatyan*. The existence of a positive obligation does not make a negative obligation disappear, but it obliges the State to take measures, especially of a procedural nature, to prevent such violations and so that groups can co-exist through tolerance.

28. In this case, the internal procedures were demonstrably insufficient. No procedure was established to enable the applicant's freedom of conscience to be considered and to resolve the disagreement between the two opposing parties[52]. Internal tribunals took no account of the rights of the applicants guaranteed by the Convention. Yet the Convention does not aim to guarantee theoretical or illusory rights, but concrete, actual rights[53]**.**

29. If the case is viewed from the perspective of the State's **negative obligations**, (interference by a public authority must be justified with respect to paragraph 2 due to dismissal for reasons of conscience or religion), then careful consideration must be given to the fair balance to be maintained between the competing interests of the individual and society as a whole. In our opinion, the leeway enjoyed by the State in this matter must be extremely limited, as it is interference in the *negative* expression of conscience and religion. In our view, **compelling grounds** are required to justify interference in negative freedom, in other words forcing someone to act against their conscience.

30. It thus falls to the Court to decide if the measures taken against the applicants were justified in principle and were necessary and proportionate[54]. In exercising its power to control, the Court must consider the disputed interference on the basis of the entire case[55]. Specifically, in order to establish if such a justification exists and whether such a balance has been struck, the following factors must be taken into account:
a. It was not only not legally mandatory, but not even necessary, with respect to the requirements of service, to oblige the applicant to conduct civil partnership ceremonies.
b. The applicant has not failed in her duty of discretion: she did not publicly express her beliefs to service users. Her beliefs had no impact on the content of her job, simply on its extent. Her situation is thus very different from Islamist soldiers or magistrates who might have actively *acted* against the interests of the State.[56] There is no such aspect to this case. The applicants have never tried to persuade others of their notion of life or impose it upon them.[57] Mrs Ladele was not at risk of acting; on the contrary, she wished to abstain from acting.

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[51] *Unified Communist Party of Turkey and others v. Turkey, above-mentioned,* § 57 and *Serif v. Greece*, n° 38178/97, § 53, CEDH 1999-IX.

[52] *Mutatis mutandis Tysiac v. Poland*, n°5410/03, act of 24th September 2007, §§ 121 and 129.

[53] *Artico v. Italy*, act of 13th May 1980, series A n° 37, p. 16, § 33.

[54] *Mutatis mutandis Larissis and others v. Greece*, nos 23372/94, 26377/94 and 26378/94, act of 24th February 1998, § 46.

[55] *Metropolitan Church of Bessarabia and Others v. Moldova*, n° 45701/99, §§ 119, CEDH 2001-XII

[56] *Kalaç v. Turkey*, n°20704/92, act of 1st July 1997, § 28, *Tepeli and others v. Turkey*, n° 31876/96, decision of 11th September 2001; *Kurtulmus v. Turkey*, n° 65500/01, decision of 24th January 2006; *Vogt v. Germany*, n° 17851/91, act of 26th September 1995, §§ 57 and following and *Schuth v. Germany*, n° 1620/03, act of 23rd September 2010, § 71.

[57] *By contrast Refah Partisi (Prosperity Party) and others, above-mentioned, § 94.*

c. The applicants were not engaged in activities that aimed to destroy the rights or freedoms upheld in the Convention.
d. Furthermore, the two applicants, both belonging to the Christian and black minorities, should not themselves be discriminated against due to their faith. Yet no account has been taken of this nor any mention made in the arguments advanced in internal tribunals, despite the fact that the individual rights of the applicants were in opposition to a collective right[58].
e. The applicants were loyal to their employers: they consistently sought dialogue with *Islington* or *Relate* in order to find a compromise based on tolerance. Their requests remained unanswered. *Islington* even showed a lack of loyalty by communicating confidential information concerning the applicant to two homosexual colleagues who lodged the complaint.
f. Other local authorities had allowed for the possibility of not assigning the conduct of the ceremonies in question to objectors. The applicant herself enjoyed such an arrangement for a certain period on an informal basis, by coming to an agreement with her colleagues.
g. No method was sought by *Islington* or *Relate* to enable the applicants to exercise their right to freedom of conscience and religion[59].
h. Their objection is limited to participation in one specific act, and is not general.
i. The applicants never at any time sought to cause offence to any homosexual person.
j. *Islington* and *Relate* had sufficient staff available to provide the services concerned without affecting their continuity of service. As well as being unnecessary, it is disproportionate to require all civil servants to perform this role. None of the applicants' colleagues complained about excessive workload resulting from their refusal.
k. The only motive that led *Islington* to end the arrangement and impose the performance of civil partnership ceremonies was the complaint lodged by two homosexual colleagues: it was not a service-requirement based motive.
l. Taking into account the small number of conscientious objectors and homosexual couples, there should be no practical difficulties in respecting their respective rights; in any event, this should not lead to a loss of employment.
m. The penalty applied to the applicants was the harshest possible; it is disproportionate and has placed an extreme burden upon them, given:

- the issues for which they are being criticized, to whit abstaining from performing acts against their conscience;
- their good faith and attitude, always ready to engage in dialogue to find a compromise;
- the consequences of dismissal: feeling of injustice, financial loss, mental and psychological trauma,
- difficulty in finding a new job having served for fifteen and five years respectively, and taking account of their age (sixty-one and sixty respectively)[60].
- the small additional workload caused by their refusal[61], a load they have never refused to make up elsewhere.

31. In conclusion, the applicants' rights to enjoy freedom of conscience and religion, and their right not to be discriminated against for their beliefs have clearly not been taken into account. The internal tribunals at no time either took into account or weighed up these rights. These factors were

[58] *Mutatis mutandis Schuth v. Germany*, *above-mentioned,* §§ 67 and 69.

[59] *By contrast X. v. UK*, n° 5947/72, decision of the Commission of 5th march 1976.

[60] *Mutatis mutandis Schuth v. Germany*, n° 1620/03, act of 23rd September 2010, § 73.

[61] In 2008, 7,169 civil partnerships (fewer than 5% of the workload) and 156,290 marriages, in 2009, 6,281 civil partnerships[61] and 0.9% of the homosexual population and 0.5% of the bisexual population.

not considered at all. They merely noted that the disputed measures were in pursuance of a legitimate goal. Yet, if the Convention does not aim to guarantee theoretical or illusory rights, but concrete, actual rights[62], then the rights of the applicants can only be actual if they are taken into account by the tribunals when considering a proportionate response.

Taking into account the State's obligation to ensure the pluralism, tolerance and open-mindedness that underpin the Convention, and with respect to the presented facts, the State's attitude cannot be justified by the protection of the rights of others, it cannot be considered necessary in a democratic society and as representing a fair balance between the various interests at stake.

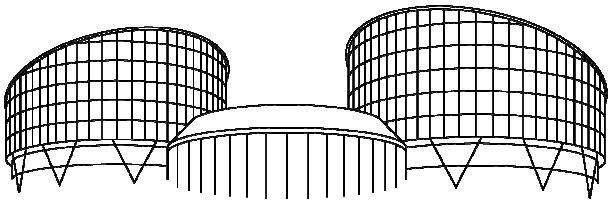
The absence of a procedure enabling the conflict to be resolved and freedom of conscience to be preserved, as well as the sanctions taken against the applicants have placed a disproportionate and excessive burden upon them, incompatible with freedom of religion and conscience, and the ban on discrimination.

Ultimately, the State has a positive obligation to be tolerant.

* * *

[62] *Artico v. Italy*, act of 13th May 1980, series A no 37, p. 16, § 33.

ANNEXE
STATEMENT OF FACTS FROM THE ECHR



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

Application nos. 51671/10 and 36516/10
by Lillian LADELE and Gary MCFARLANE
against the United Kingdom
lodged on 27 August 2010 and 24 June 2010

STATEMENT OF FACTS

THE FACTS

The first applicant, Ms Lillian Ladele, is a British national who was born in 1960 and lives in London. She is represented before the Court by Mr M. Jones of Ormerods, a firm of solicitors practising in Croydon, Surrey. The second applicant, Mr Gary McFarlane, is a British national who was born in 1961 and lives in Bristol. He is represented before the Court by Mr P. Diamond, a barrister practising in Cambridge.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The first applicant

a. The first applicant's refusal to conduct civil partnership ceremonies

The first applicant is a Christian. She holds the view that marriage is the union of one man and one woman for life, and sincerely believes that same sex civil partnerships, which she describes as "marriage in all but name", are contrary to God's law.

The first applicant was employed by the London Borough of Islington ("Islington") (a local public authority) from 1992 until 2009. In 2002, she became a Registrar of Births, Deaths and Marriages. Her job involved registering births and deaths, and conducting civil marriage ceremonies and registering such marriages.

Islington had a "Dignity for All" equality and diversity policy, which stated *inter alia*:

> "Islington is proud of its diversity and the council will challenge discrimination in all its forms. 'Dignity for all' should be the experience of Islington staff, residents and service users, regardless of the age, gender, disability, faith, race, sexuality, nationality, income or health status. ...
>
> The council will promote community cohesion and equality for all groups but will especially target discrimination based on age, disability, gender, race, religion and sexuality. ...
>
> In general, Islington will:
>
> (a) Promote community cohesion by promoting shared community values and understanding, underpinned by equality, respect and dignity for all. ...
>
> It is the council's policy that everyone should be treated fairly and without discrimination. Islington aims to ensure that:
>
> - Staff experience fairness and equity of treatment in the workplace
> - Customers receive fair and equal access to council services
> - Staff and customers are treated with dignity and respect
>
> The council will actively remove discriminatory barriers that can prevent people from obtaining the employment opportunities and services to which they are entitled. The council will not tolerate processes, attitudes and behaviour that amount to discrimination, including harassment, victimisation and bullying through prejudice, ignorance, thoughtlessness and stereotyping. ...
>
> All employees are expected to promote these values at all times and to work within the policy. Employees found to be in breach of this policy may face disciplinary action."

The Civil Partnership Act 2004 came into force in the United Kingdom on 5 December 2005. The Act provides for the legal registration of civil partnerships between two people of the same sex, and accords to them rights and obligations equivalent to those of a married couple. A civil partnership is formed by the signing of a registration document in the presence of a Registrar and witnesses.

The first applicant has a sincerely held religious objection to conducting civil partnerships. She is unable to reconcile her Christian beliefs with taking a direct and active part in enabling same sex unions to be given formal legal recognition equivalent to marriage. In her evidence to the Employment Tribunal, she stated: "I feel unable to directly facilitate the formation of a union that I sincerely believe is contrary to God's law".

In December 2005 Islington decided to designate all its existing Registrars of Births, Deaths and Marriages as Civil Partnership Registrars. It was not required to do so; the legislation simply required it to ensure that there was a sufficient number of Civil Partnership Registrars for the area to carry out that function. Some other United Kingdom local authorities took a different approach, and allowed Registrars with a sincerely held religious objection to the formation of civil partnerships to opt out of designation as Civil Partnership Registrars.

Initially, the first applicant was permitted to make informal arrangements with Registrar colleagues to swap work so that she was not required to conduct civil partnership ceremonies. In March 2006, however, two homosexual Registrars complained about the first applicant's refusal to carry out such duties. Islington immediately requested that the first applicant agree to a variation of her contractual terms to include all civil partnership duties, in return for which it would offer her a temporary exemption from conducting civil partnership ceremonies. The first applicant refused to agree, and requested that Islington make arrangements to accommodate her beliefs. Islington failed to respond to that request and in May 2007 it commenced disciplinary proceedings against the first

applicant on the ground that she "had refus[ed] to carry out work in relation to the civil partnership service solely on the grounds of [the] sexual orientation of the customers of that service". The outcome of those proceedings was that the first applicant was deemed to be in breach of Islington's "Dignity for All" policy and was required to include civil partnerships ceremonies as part of her duties, failing which her employment might be terminated. The first applicant then brought a claim against Islington in the Employment Tribunal.

b. The domestic proceedings

The first applicant lodged a claim with the Employment Tribunal in London. On 3 July 2008, the Tribunal upheld the complaints of direct and indirect religious discrimination, and harassment, holding that Islington had "placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community than it placed on the rights of [the first applicant] as one holding an orthodox Christian belief".

Islington appealed to the Employment Appeal Tribunal, which on 19 December 2008 reversed the decision of the Employment Tribunal. It held that Islington's treatment of the first applicant was a proportionate means of achieving a legitimate aim. At paragraph 111-112 of that judgment, the President of the Employment Appeal Tribunal stated:

> "Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate – and in truth it was bound to be – then in our view it must follow that the council were entitled to require all registrars to perform the full range of services. They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff and the wider community. It would necessarily undermine the council's clear commitment to that objective if it were to connive in allowing the claimant to manifest her belief by refusing to do civil partnership duties.
>
> ... the issue is not, as the Tribunal found, a matter of giving equal respect to the religious rights of the claimant and the rights of the gay community. It is whether, given the legitimate aim, the means adopted by the council to achieve that aim were proportional."

The Employment Appeal Tribunal noted, as an aside, that Islington might lawfully have chosen not to designate as Civil Partnership Registrars those Registrars who had strong religious objections to carrying out such duties. It could then have required all of its Civil Partnership Registrars to carry out civil partnership duties, and avoid acting in a discriminatory manner in the provision of the civil partnership service. However, Islington was entitled to choose not to act in this way.

The decision of the Employment Appeal Tribunal was appealed to the Court of Appeal, which on 15 December 2009 upheld the Employment Appeal Tribunal's conclusions. It stated, at paragraph 52:

> "...the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished."

It concluded (at paragraph 55) that Article 9 of the Convention and the relevant Strasbourg jurisprudence supported the view that the first applicant's desire to have her religious views

respected should not be allowed "...to override Islington's concern to ensure that all its registrars manifest equal respect for the homosexual community as for the heterosexual community."

It further noted that from the time when the Equality Act (Sexual Orientation) Regulations 2007 ("the 2007 Regulations": see below) came into force, once the first applicant was designated a Civil Partnership Registrar, Islington was not merely entitled, but obliged, to require her to perform civil partnerships.

The first applicant's application for leave to appeal to the Supreme Court was refused on 4 March 2010.

2. The second applicant

a. The applicant's refusal to give an unequivocal commitment to counsel same-sex couples

The second applicant is a practising Christian, and was formerly an elder of a large multicultural church in Bristol. He holds a deep and genuine belief that the Bible states that homosexual activity is sinful and that he should do nothing which directly endorses such activity.

Relate Avon Limited ("Relate") is part of the Relate Federation, a national organisation which provides a confidential sex therapy and relationship counselling service. Relate and its counsellors are members of the British Association for Sexual and Relationship Therapy (BASRT). That Association has a Code of Ethics and Principles of Good Practice which Relate and its counsellors abide by. Paragraphs 18 and 19 of the Code provide as follows:

> "**Recognising the right to self-determination, for example**:
>
> 18. Respecting the autonomy and ultimate right to self-determination of clients and of others with whom clients may be involved. It is not appropriate for the therapist to impose a particular set of standards, values or ideals upon clients. The therapist must recognise and work in ways that respect the value and dignity of clients (and colleagues) with due regard to issues such as religion, race, gender, age, beliefs, sexual orientation and disability.
>
> **Awareness of one's own prejudices, for example**:
>
> 19. The therapist must be aware of his or her own prejudices and avoid discrimination, for example on grounds of religion, race, gender, age, beliefs, sexual orientation, disability. The therapist has a responsibility to be aware of his or her own issues of prejudice and stereotyping and particularly to consider ways in which this may be affecting the therapeutic relationship."

Relate also has an Equal Opportunities Policy which emphasises a positive duty to achieve equality. Part of it reads:

> "Relate Avon is committed to ensuring that no person – trustees, staff, volunteers, counsellors and clients, receives less favourable treatment on the basis of personal or group characteristics, such as race, colour, age, culture, medical condition, sexual orientation, marital status, disability [or] socio-economic grouping. Relate Avon is not only committed to the letter of the law, but also to a positive policy that will achieve the objective of insuring equality of opportunity for all those who work at he Centre (whatever their capacity), and all our clients."

The second applicant worked for Relate as a Counsellor from May 2003 until March 2008. He signed up to the organisation's Equal Opportunities Policy. He obtained a Certificate in Marital and Couple Counselling in August 2005, and completed Relate's Post Graduate Diploma in Couple Therapy in March 2008. The main object of such counselling is to improve relationships between a client couple, which might have deteriorated for a variety of reasons, sexual or otherwise.

The second applicant initially had some concerns about providing counselling services to same-sex couples, but following discussions with his supervisor, he accepted that simply counselling a homosexual couple did not involve endorsement of such a relationship and he was therefore prepared to continue. He subsequently provided counselling services to two lesbian couples without any problems, although in neither case did any purely sexual issues arise.

In 2007 the second applicant commenced Relate's Post Graduate Diploma in Psycho Sexual Therapy ("PST"). PST is intended to deal particularly with problems such as sexual dysfunction and aims to improve a couple's sexual activity in an attempt to improve the relationship overall. By late autumn of 2007 there was a perception within Relate that the second applicant was unwilling to work on sexual issues with homosexual couples.

In response to concerns raised by the second applicant's superiors, Relate's General Manager, a Mr Bennett, met with the second applicant on 22 October 2007. The second applicant confirmed he had difficulty in dealing with same-sex sexual practices and fulfilling his duty to follow the teaching of the Bible. Mr Bennett expressed concern that it would not be possible to filter potential PST clients so that the second applicant would not have to deal with lesbian, gay or bisexual couples.

On 5 December 2007 Mr Bennett received a letter from other therapists expressing concerns that an un-named counsellor was unwilling, on religious grounds, to work with gay, lesbian and bi-sexual clients. The authors were concerned that such a view would discriminate against some members of the community, contrary to Relate's expressed values, and they suggested that the matter be dealt with through training and supervision.

On 12 December 2007 Mr Bennett wrote to the second applicant stating that he understood that the second applicant had refused to work with same sex couples on certain issues, and that he feared that this was discriminatory and contrary to Relate's Equal Opportunities Policies. He asked for written confirmation by 19 December 2007 that the second applicant would continue to counsel same sex couples in relationship counselling and PST; failing which he threatened disciplinary action and removal from the PST course. On 2 January 2008 the second applicant responded by confirming that he had no reservations about counselling same sex couples and had not asked not to work with them. With regard to PST work, he said that his views were still evolving and were not yet clarified as the situation had not arisen.

Mr Bennett took that as a refusal by the second applicant to confirm that he would carry out PST work with same-sex couples and he therefore suspended him pending a disciplinary investigation. At an investigatory meeting on 7 January 2008 the second applicant acknowledged that there was conflict between his religious beliefs and PST work with same-sex couples, but said that if he was asked to do such work, then he would do so and if any problems arose then he would speak to his supervisor. Mr Bennett took that as an undertaking to comply with Relate's policies, and therefore halted the disciplinary investigation.

Following a subsequent telephone conversation between the second applicant and his supervisor, his supervisor contacted Mr Bennett to express deep concerns about the second applicant as a counsellor – she felt that he was either confused over the issue of same-sex PST or was being dishonest about the issue. When these concerns were put to him, the second applicant stated that his views had not changed since their earlier discussion and that any issue would be addressed as it arose. The second applicant was called to a further disciplinary meeting on 17 March 2008, at which he was asked whether he had changed his mind, but he simply replied that he had nothing further to add to what he had said on 7 January 2008.

On 18 March 2008 Mr Bennett dismissed the second applicant summarily for gross misconduct, on the basis of his finding that the second applicant had said on 7 January 2008 that he would comply with Relate's policies and provide sexual counselling to same-sex couples without any intention of doing so. He could therefore not be trusted to perform his role in compliance with the Equal Opportunities Policies. An appeal meeting took place on 28 April. The appeal was rejected on the basis that Mr Bennett's lack of trust in the second applicant to comply with the relevant policies was justified in light of the evidence presented.

b. The domestic proceedings

The second applicant lodged a claim with the Employment Tribunal in Bristol, claiming, *inter alia,* direct and indirect discrimination, unfair dismissal, and wrongful dismissal. The Tribunal pronounced its judgment on 5 January 2009.

In the course of final submissions, Counsel for the respondent conceded that there had been a wrongful dismissal and a subsequent application to withdraw that concession was refused.

With regard to the claim of direct discrimination under Regulation 3(1)(a) of the 2003 Regulations (see below), the Tribunal concluded that the second applicant was not treated as he was because of his faith, but because it was believed that he would not comply with the policies which reflected the organisation's ethos.

With regard to the claim of indirect discrimination under Regulation 3(1)(b), the Tribunal accepted that the provision, criterion or practice which Relate applied equally to persons not of the same religion or belief was the requirement that counsellors comply with the organisation's Equal Opportunities Policies as they applied in particular to both homosexual and heterosexual clients. Such a requirement would indeed put persons of the same religion as the second applicant at a disadvantage when compared with other persons who did not hold such beliefs as a part of their religious faith. The Tribunal accepted that the aim of the requirement was the provision of a full range of counselling services to all sections of the community regardless of sexual orientation, which it concluded was a legitimate aim.

It then considered whether dismissing the second applicant was a proportionate means of achieving that aim. It found that Relate's commitment to providing non-discriminatory services was fundamental to its work. Relate was entitled to require from the second applicant an unequivocal assurance that he would provide the full range of counselling services to the full range of clients without reservation, and he failed to give such an assurance. Filtration of clients, although it might work to a limited extent, would not protect clients from potential rejection by the second applicant, however tactfully he might deal with the issue. The second applicant's dismissal was therefore a proportionate means of achieving a legitimate aim and the discrimination claim failed.

With regard to the unfair dismissal claim, the Tribunal concluded that Relate had genuinely and reasonably lost confidence in the second applicant to the extent that it could not be sure that, if presented with same-sex sexual issues in the course of counselling a same-sex couple, the second applicant would provide without restraint or reservation the counselling which the couple required because of the constraints imposed on him by his genuinely held religious beliefs. Since that was something which the organisation legitimately concluded could not be tolerated, it constituted a "substantial reason of a kind such as to justify dismissal" (in accordance with section 98(1)(b) of the Employment Rights Act 1996: see below). It followed that dismissal for that reason was fair and the claim failed.

The second applicant appealed to the Employment Appeal Tribunal against the Tribunal's findings in relation to direct and indirect discrimination and unfair dismissal. On 30 November 2009 the Employment Appeal Tribunal held that the Tribunal had been correct to dismiss those claims. It rejected the second applicant's argument that it was not legitimate to distinguish between objecting to a religious belief and objecting to a particular act manifesting that belief, and held that such an approach was compatible with Article 9 of the Convention. It noted Relate's arguments that the compromise proposed by the second applicant would be unacceptable as a matter of principle because it ran "entirely contrary to the ethos of the organisation to accept a situation in which a counsellor could decline to deal with particular clients because he disapproved of their conduct", and that it was not practicable to operate a system under which a counsellor could withdraw from counselling same-sex couples if circumstances arose where he believed that he would be endorsing sexual activity on their part.

Reference was made to the Employment Appeal Tribunal judgment in the first applicant's case. The Employment Appeal Tribunal noted that the facts in that case were very similar to those of the present case, and considered that the reasoning at paragraph 111 of that judgment (see above) applied directly to the present case; there was no material distinction between the position of a local authority and a private organisation such as Relate. Following that reasoning, it concluded that Relate was entitled to refuse to accommodate views which contradicted its fundamental declared principles. In such circumstances, arguments concerning the practicability of accommodating the applicant's views were "out of place". The Employment Appeal Tribunal concluded, at paragraph 30, that:

> "...it must be justifiable for a body in the position of Relate to require its employees to adhere to the same principles which it regards as fundamental to its own ethos and pledges to maintain towards the public, all the more so where observation of those principles is required of it by law. If it judges that to compromise those principles in its own internal arrangement would be inconsistent with its external stance, that judgment must be respected."

On the claim of unfair dismissal, the Employment Appeal Tribunal considered that the reason for the second applicant's dismissal should properly have been characterised as being his "conduct" rather than "some other substantial reason" (in terms of section 98 Employment Rights Act), but upheld the Tribunal's dismissal of the claim.

The second applicant applied to the Court of Appeal for permission to appeal the decision of the Employment Appeal Tribunal. On 20 January 2010, the Court of Appeal refused the application on the basis that there was no realistic prospect of the appeal succeeding in the light of the Court of Appeal judgment of December 2009 in *Ladele*. Following the refusal by the Supreme Court to allow leave to appeal in *Ladele*, the second applicant renewed his application for permission to appeal the decision of the Employment Appeal Tribunal. After a hearing, that application was again refused on 29 April 2010, on the basis that, as the present case could not sensibly be distinguished from *Ladele*, the second applicant's argument could not succeed. At paragraph 25 of his decision, Lord Justice Laws concluded:

> "There is no more room here than there was there for any marginal balancing exercise in the name of proportionality. To give effect to the applicant's position would necessarily undermine Relate's proper and legitimate policy."

B. Relevant domestic law and practice

1. The Employment Equality (Religion or Belief) Regulations 2003

Regulation 3(1) of the 2003 Regulations defines direct and indirect discrimination on grounds of religion or belief:

> "3. (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if –
>
> (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but –
>
> (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,
>
> (ii) which puts B at that disadvantage,
>
> (iii) which A cannot show to be a proportionate means of achieving a legitimate aim."

Under section 2(1), "religion or belief" means any religion, religious belief, or similar philosophical belief.

Regulation 6(2) makes it unlawful for an employer to discriminate against a person on grounds of religion or belief:

"(a) in the terms of employment which he affords him;

...(d) by dismissing him, or subjecting him to any other detriment."

2. Employment Rights Act 1996

The 1996 Act provides, as relevant:

"98. (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

...(b) relates to the conduct of the employee"

3. The Equality Act (Sexual Orientation) Regulations 2007

Regulation 3 of the 2007 Regulations defines discrimination on the grounds of sexual orientation as follows:

"3(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if, on grounds of the sexual orientation of B..., A treats B less favourably than he treats or would treat others (in cases where there are no material differences in the circumstances)...

(3) For the purposes of these Regulations, a person ('A') discriminates against another ('B') if A applies to B a provision, criterion or practice-

(a) which he applies or would apply equally to persons not of B's sexual orientation,

(b) which puts persons of B's sexual orientation at a disadvantage when compared to some or all others (where there are no material differences in the relevant circumstances),

(c) which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation (where there are no material differences in the relevant circumstances), and

(d) which A cannot reasonably justify by reference to matters other than B's sexual orientation."

Regulation 8(1) states that it is "unlawful for a public authority exercising a function to do any act which constitutes discrimination". "Public authority" is defined in Regulation 8(2) as including "any person who has functions of a public nature...".

Regulation 14 contains limited exceptions for organisations the purpose of which is the practice or advancement of a religion or belief.

COMPLAINTS

The first and second applicants complain that domestic law failed adequately to protect their right to manifest their religion, contrary to Article 9 of the Convention, taken alone and in conjunction with Article 14.

The first applicant complains that domestic law failed to afford her an effective remedy for a violation of the Convention, contrary to Article 13.

The second applicant complains that domestic law failed adequately to protect his right to a fair trial, contrary to Article 6 of the Convention. He also complains that domestic law failed adequately to protect his right to respect for private life, contrary to Article 8 of the Convention.

QUESTION TO THE PARTIES

In respect of either applicant, has there been a breach of Article 9, taken alone or in conjunction with Article 14?