Decision in Eweida, Ladele etc appeal

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For those following Law & Religion issues, the European Court of Human Rights has just handed down its decision in four conjoined appeals from the UK involving the rights of Christians to free exercise of religion- the Eweida, Chaplin, Ladele and Macfarlane cases. (A more detailed background on the earlier decisions can be found in a paper I gave in 2011 here: [http://works.bepress.com/neil_foster/46/](http://works.bepress.com/neil_foster/46/). The new appeal decision, *Eweida and others v United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10; decision 15 Jan 2013) can be found at this link: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881). The short story of the result: not as bad as I feared, though not what I think they should have found. Ms Eweida, who was told by British Airways she could not wear a cross at work, was successful here (overturning a finding of the English Court of Appeal.) Ms Chaplin, Mr Macfarlane and Ms Ladele lost, as they had in the English courts.

*The good news:* the decision in favour of Ms Eweida correctly recognised that she had indeed been subjected to a detriment that amounted to an interference with her freedom of religion (see [91]). In effect a blanket policy of "no jewellery" impacted harshly on believers who saw it as important to testify to their faith in this way (and by contrast did not have such an impact on those whose religion could be manifested in other way, such as a hijab or a turban, which were allowed). The court also recognised that a balancing process was needed, to determine whether the legitimate interests of the employer outweighed the interest of the believer in manifesting their religion. On balance the majority concluded that the English court had weighed the claimed interest of the airline (in projecting a "corporate image") too heavily, and that Ms Eweida’s freedom of religion should have been given more weight.

See para [94]:

> On one side of the scales was Ms Eweida’s desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer’s wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.

Another important "plus" arising from the decision (indeed, I think probably the most important part long-term) is the recognition, contrary to some previous suggestions by the ECHR, that where freedom of religion is an issue it is not
sufficient to just say, "well, the person can always quit their job"! See the comment at the end of para [83]:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

This is a good development in ECHR thinking, and hopefully may have a flow-on effect in domestic UK law and in other areas like Australia where we are still to see a lot of these cases.

**The bad news:** I think Ms Ladele should have won her case, and unfortunately she did not. If you have only now come across the case please read my earlier note to get the facts. She declined to register same sex partnerships, but when she took the job there was no such thing. Her polite refusal to do these registrations had zero impact on members of the public, as there were plenty of other available registrars. But in effect the majority buy the "politically correct" view that the Council were entitled to sack her simply because she took a stand on the issue and some homosexual employees were offended. There is an excellent dissenting judgment by 2 members of the court that is very blunt on these issues. At para [5] of their judgment Judges Vučinić and De Gaetano say:

>a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights) eventually led to her dismissal.

They go on later at [7]:

Instead of practising the tolerance and the “dignity for all” it preached, the Borough of Islington pursued the doctrinaire line, the road of obsessive political correctness. It effectively sought to force the applicant to act against her conscience or face the extreme penalty of dismissal – something which, even assuming that the limitations of Article 9 § 2 apply to prescriptions of conscience, cannot be deemed necessary in a democratic society. Ms Ladele did not fail 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, but only on its extent. She never attempted to impose her beliefs on others, nor was she in any way engaged, openly or surreptitiously, in subverting the rights of others.

Very good! Sadly, not the majority opinion, but hopefully still material that can be used in the future and in other jurisdictions to put this decision in proper context.

A brief comment about the other two decisions. The claims by Ms Chaplin and Mr Macfarlane were rejected and, I think, on balance rightly so. Ms Chaplin was a nurse who wanted to wear a cross on a chain. The hospital had good health and safety reasons why this was not a good idea, and even went to the extent of agreeing to let her wear a cross-shaped brooch instead- I think they had done enough to take her rights into account. Mr Macfarlane was a sex counsellor who
knew the organisation he was joining catered for same-sex couples, when he joined. On balance I think the organisation was justified in saying he could not expect to work for them and decline to counsel homosexual couples. There were also issues in the case about whether he had made promises which he was not keeping.

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