

## Chapter 16

### **A Uniform Approach to Religious Discrimination?**

#### **The Position of Teachers and Other School Staff in the UK**

*Russell Sandberg*

On 1 October 2010, the majority of the provisions of the *Equality Act 2010* came into force. This was greeted with mass hysteria in the newspapers. The *Daily Mail* splashed with the questionable assertion that the Act meant the end of office jokes whilst the *Daily Telegraph* ran a column declaring the Act to be the ‘worst law in English history’. The Act draws together, and further strengthens, nine separate pieces of anti-discrimination legislation including the law designed to protect against discrimination on the grounds of religion or belief. It also outlines a number of exceptions afforded to religious groups (Sandberg 2011). Provisions previously found in the *Employment Equality (Religion or Belief) Regulations 2003* and Part 2 of the *Equality Act 2006* can now be found in the *Equality Act 2010*. These provisions have led to numerous cases and tribunal decisions, particularly in employment law. Moreover, the hyperbole in the press reaction of October 2010 suggests that further litigation is inevitable. These, still rather new, rights are not generally well understood.

The first decade of the twenty-first century witnessed numerous social and political developments surrounding the place of religion in the public sphere. The shadow of the terrorist attacks in New York on 11 September 2001 and in London on 7 July 2007 loomed large in debates concerning the extent to which religious difference should be accommodated. These concerns led to a plethora of new laws concerning religion in the United Kingdom. The *Human Rights Act 1998* (‘HRA’) encouraged discussion of religious freedom as a human right, religious discrimination became prohibited for the first time and the *Racial and Religious Hatred Act 2006* criminalised the stirring up religious hatred (Sandberg 2011:

chapters 5–7). These legal changes transformed the legal framework concerning religion. There is now more ‘religion law’ – national and international law affecting religion – than ever before (Sandberg 2008: 336–40, Sandberg 2011). There now exists a new legal framework concerning religion. The novelty of these legal provisions and the general hullabaloo concerning religion in the public sphere are the main reasons for the plethora of cases concerning religious dress and symbols which have taken place in recent years in Britain and across the globe and the amount of column inches they have consumed in the media. This chapter seeks to explore the case law that has developed in relation to the position of teachers and other school staff in the United Kingdom.

The chapter is divided into two parts. The first part will seek to provide the sociological and legal context in which the case law is to be found, exploring the main social changes concerning religion and introducing the legal responses which have been made. The second part explains the current law protecting the religious freedom of staff in schools in more depth. It will elucidate the protection under education law for those who are employed in different types of school as well as the application of general pieces of religion law found in human rights and discrimination law statutes. Focusing particularly upon the effect of discrimination law provisions now found in the *Equality Act 2010*, this part will explore the findings and effect of four significant cases: the Employment Tribunal (‘ET’) decisions in *Noah v Sarah Desrosiers (t/a Wedge)*<sup>1</sup> and *Chaplin v Royal Devon & Exeter NHS Foundation Trust*,<sup>2</sup> the Employment Appeal Tribunal (‘EAT’) decision in *Azmi v Kirklees Metropolitan Council*<sup>3</sup> and the Court of Appeal decision in *Eweida v British Airways*.<sup>4</sup> The conclusion will then seek to draw together these findings, not only concerning the extent to which the

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<sup>1</sup> [2008] ET Case Number: 2201867/07 (29 May 2008).

<sup>2</sup> [2010] ET Case Number: 17288862009 (6 April 2010).

<sup>3</sup> [2006] ET Case Number: 1801450/06 (6 October 2006); [2007] UKEAT 0009 07 30003 (30 March 2007).

<sup>4</sup> [2010] EWCA Civ 80.

wearing of religious dress and symbols by school staff is accommodated under English law but also in relation to what this suggests about the sociological place of religion in the public sphere.

### **Rewriting the Narrative**

Until fairly recently, there was a cosy consensus surrounding the place of religion in the public sphere. It was widely considered that the effect of the Enlightenment was the triumph of reason over religion. The question that interested the founding fathers of sociology (Marx, Durkheim and Weber) was that of how modern society would manage without religion (Robertson 1969: 12, Wilson 1966: 14, Wilson 1982: 12). Although it was recognised that the Judeo-Christian tradition had been a crucial element in the historical evolution of Europe as a whole, shaping its laws and social institutions, in modern Britain religion was said to have lost its social significance. As Steve Bruce (1996: 230) has written: ‘individualism threatened the communal basis of religious belief and behaviour, while rationality removed many of the purposes of religion and rendered away many of its beliefs implausible.’ Religious activity was seen to have retreated to the private sphere and to have become akin to any other leisure activity.

This assumption found expression in English law. The dogmatic and often violent religious intolerance and discrimination which followed the break with Rome in the 1530s gradually gave way to limited and piecemeal toleration of religions other than the established Church of England. Important legal milestones include the *Toleration Act 1689*, the *Roman Catholic Relief Act 1791* and the *Unitarians Relief Act 1813* (Sandberg 2011: chapter 2, Rivers 2010: chapter 1, Gunn 2005). The role of the law became minimal; as Hoffmann J commented in 1993: ‘the attitude of the English legislator to racing is much more akin to his attitude to religion ... it is something to be encouraged but not the business of government.’<sup>5</sup>

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<sup>5</sup> *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1WLR 909 at 932.

Similarly, judges professed themselves to be agnostic in matters of religion,<sup>6</sup> showed deference towards religious beliefs<sup>7</sup> and spoke of a ‘well recognised divide between Church and State’.<sup>8</sup> Over the years, although English law extended the accommodation of religious scruples and much was achieved by *ad hoc* and piecemeal measures (Menski 2008, Hill 2001, Sandberg 2011), the regulation of religion was characterised by a lightness of touch. This is shown, for example, by the fact that (unlike in many European countries) English law lacked detailed and compulsory registration schemes for religious groups (Friedner 2007).

That is not to say, however, that this secularisation thesis<sup>9</sup> boasted universal support. Reflections of a Christian heritage can still be found in English law. The legacy of the ecclesiastical courts upon the substantive laws and procedures of modern English law suggests that clerical fingerprints faded rather than disappeared; for example, in relation to marriage law.<sup>10</sup> As Bradney (2000: 89) has noted, although it is often said that there has been a trend towards ‘a separation of Church and State, religion and law ...’, allowing a multi religious country to maintain social stability. Detailed enquiry suggests that this separation is in fact far from complete’. Notably certain incidents of establishment continue in relation to the Church of England, for example, the right to rites of passage in the parish church that continue to belong to parishioners (Sandberg 2011, Hill 2007). The sociological evidence also points to a complex picture: statistics show that although there has been a steady decline

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<sup>6</sup> See *Re Watson* [1973] 1 WLR 1472: ‘the court does not prefer one religion to another and it does not prefer one sect to another’.

<sup>7</sup> *Gilmour v Coats* [1949] AC 426: ‘No temporal court of law can determine the truth of any religious belief: it is not competent to investigate any such matter and it ought not to attempt to do so’.

<sup>8</sup> *R v Chief Rabbi, ex parte Wachmann* [1992] 1 WLR 1036, 1043.

<sup>9</sup> The phrase ‘to secularise’ originates from the dissolution of the monasteries by Henry VIII in the 1530s (Herbert 2003: 29, Beckford 2003: 33).

<sup>10</sup> For example, section 22 of the *Matrimonial Causes Act 1857* provided that the courts of the State should continue to apply the same principles as the ecclesiastical courts had done.

in the membership of most Christian churches,<sup>11</sup> religious belief is not declining as fast as religious practice.<sup>12</sup>

Moreover, in the twenty-first century a vast number of changes have challenged the narrative that religion has disappeared from the public sphere. Sociologists of religion are producing new accounts that seek to move beyond the secularisation thesis. These take into account three changes that have occurred in the last decade: 1) a changing moral framework; 2) the rise of consumerism; and 3) immigration. First, as Fevre (2000: 9) has chronicled, Western society is characterised by confusion as to what to do for the best and an inability to rely on morality as a means of dispelling doubts and resolving dilemmas. It now takes ‘an extraordinary effort’ to hold onto the moral certainties which once were ‘as easily grasped as the art of taking breath’; a ‘positive act of submission’ is now required where previously a ‘superhuman exertion’ was needed to escape from such constraints. Secondly, the rise of the consumer society (as described, for instance, by Bauman 2002) has led to religion becoming a consumer choice. Some sociologists of religion have said that the prevalent form of religiosity is the ‘pick-and-mix’ variety (Bruce 1996: 233) and have spoken of the existence of a ‘free market in religion’ (Beckford and Richardson 2007: 411). Thirdly, as Davie (2006) has noted, new forms of religion are coming from outside Europe largely as a result of immigration. The second wave of immigration in the 1990s ushered in a growth of religious pluralism in general and Islam in particular, challenging ‘widely held assumptions about the place of religion in European societies’ (2006: 33) – chiefly the notion that religion is a private affair.

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<sup>11</sup> For instance, Davie (1994: 46) says that the Anglicans have lost almost half a million members between 1972 and 1992.

<sup>12</sup> Most famously in the 2001 census, over 70 per cent of Britons aligned themselves to Christianity. However, these figures are controversial (see Day: 2006).

These sociological changes have affected the law. Recent years has seen an increase in interest in religion on the part of the State and a widening and deepening of regulation on religion. This trend may be referred to as the ‘juridification of religion’.<sup>13</sup> The language of religious rights is becoming common place and a plethora of laws concerning religion have been enacted, interpreted and administered in England and Wales. Collectively, these may be considered to represent a considerable shift towards prescriptive regulation and the active promotion of religious liberty as a right (Hill and Sandberg 2007, Doe and Sandberg 2010, Sandberg 2011). The shift can be seen in the way in which English law deals with religious dress and symbols. Traditionally, the wearing of religious dress and symbols (like much of religious behaviour) was lightly regulated by the law. English law only provided specific statutory exceptions designed to lift particular legal restrictions. This was most notable in relation to the Sikh turban (Poulter 1998). Sikhs alone were exempt from the requirement to wear a safety hat on a construction site<sup>14</sup> and were among those exempted from the law relating to the wearing of protective headgear for motor cyclists.<sup>15</sup> Such provisions clearly owed more to the tradition of religious tolerance than to any notion of religious liberty as a widespread positive right (Vickers 2006: 598).<sup>16</sup>

However, from the mid-twentieth century onwards the light touch became firmer as a result of developments in human rights and discrimination law. Articles of the European Convention on Human Rights (‘ECHR’), including the freedom of religion provisions of Article 9, became important. Although domestic courts lacked the ‘jurisdiction directly to

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<sup>13</sup> See Sandberg 2011: chapter 10, which applies the notion of juridification (as developed by Teubner 1987, Blicher and Molander 2008) in relation to religion law.

<sup>14</sup> *Employment Act 1989*, s.11.

<sup>15</sup> Now found in s.16 of the *Road Traffic Act 1988*.

<sup>16</sup> This is illustrated by the fact that Sikhs injured as a result of wearing a turban instead of a safety hat are denied certain forms of legal redress: see *Employment Act 1989*, s.11.

enforce the rights and freedoms under the Convention',<sup>17</sup> Convention Articles became regarded as an aid to interpretation by domestic courts and individual petition to the European Court of Human Rights ('ECtHR') in Strasbourg became permitted after 1966. Moreover, important developments occurred in relation to discrimination law. The *Race Relations Act 1976* forbade direct or indirect discrimination on the grounds of colour, race, nationality or ethnic origins and this was interpreted to include members of certain religious groups such as Sikhs<sup>18</sup> and Jews.<sup>19</sup> Although Muslims,<sup>20</sup> Rastafarians<sup>21</sup> and all other religious groups were outside the scope of the protection, the *Race Relations Act 1976* began a trend whereby ethnic (and therefore some religious) practices were not merely tolerated but were legally protected. These developments represented a partial shift from the passive tolerance offered by common law to a more prescriptive regulatory regime.

The laws of the twenty-first century have accelerated this trend, providing explicit positive protection on grounds of religion and belief. Firstly, by virtue of the *Human Rights Act 1998* (in force from October 2000), which made Article 9 of the ECHR directly justiciable in domestic courts, it is now unlawful for public authorities to act in a way which is incompatible with a Convention right<sup>22</sup> and courts are required to interpret United Kingdom legislation so far as is possible in a manner compatible with the rights outlined in

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<sup>17</sup> *Waddington v Miah (Otherwise Ullah)* [1974] 2 All ER 377.

<sup>18</sup> *Mandla v Dowell Lee* [1983] 2 AC 548 compare this with the decision in the Court of Appeal which had considered them a religious group and thus outside the scope of the legislation: *Mandla v Dowell Lee* [1983] QB 1.

<sup>19</sup> *Seide v Gillette Industries Limited* [1980] IRLR 427.

<sup>20</sup> Muslims do not constitute an ethnic group because their descent cannot be traced to a common geographical origin; the spread of Islam is the spread of that faith rather than those who share it (Edge 2002, 252).

<sup>21</sup> *Crown Suppliers (PSA) Limited v Dawkins* [1993] ICR 517.

<sup>22</sup> s.6(1).

the ECHR,<sup>23</sup> and in so doing they must ‘take into account’<sup>24</sup> – though not necessarily ‘follow’<sup>25</sup> – the decisions of the ECtHR. Secondly, pursuant to *EU Directive 2000/78/EC*, regulations were enacted in 2003 to extend discrimination law to explicitly cover religion and belief. The *Employment Equality (Religion or Belief) Regulations 2003* prohibited direct discrimination, indirect discrimination, victimisation and harassment on grounds of religion or belief in relation to employment and vocational training (including higher education) whilst Part 2 of the *Equality Act 2006* prohibited direct and indirect discrimination and victimisation (but not harassment) in relation to the provision of goods and services and the exercise of public functions (including schools). The *Equality Act 2010* consolidates these pieces of legislation, replacing the substantive law found in earlier legislation without making any general changes.

The HRA and the new law prohibiting discrimination on grounds of religion or belief may be understood as the two pillars of twenty-first century religion law (Sandberg 2011: chapter 6). These are the key legal changes that have led to the juridification of religion in England and Wales. These new provisions protecting religion as a right have led to a significant amount of litigation and many cases have been concerned with the wearing of religious dress and symbols. The remainder of this chapter will explore the current law on religious dress and symbols, focussing upon the position of employees within schools. To what extent does English law now protect the wearing of religious dress and symbols by

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<sup>23</sup> s.3(1). In the event of there being an irreconcilable inconsistency, the domestic legislation prevails subject to a ‘fast-track’ system of executive action to bring English law into line with the Convention. See s.4 (declaration of incompatibility) and s.10 (remedial action).

<sup>24</sup> s.2(1).

<sup>25</sup> Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*[2001] UKHL 23, para. 26 has suggested that courts should only feel under an obligation to follow Strasbourg case law where there is a ‘clear and constant jurisprudence’.

teachers and other staff? And what does this suggest about the place of religion in the public sphere?

### **The Legal Framework**

Three different areas of English law are relevant to this question.<sup>26</sup> First, there are particular provisions protecting teachers which are found in education law. Second, the HRA provides general human right guarantees which protect people against interferences by public authorities such as schools and Local Education Authorities ('LEAs'). Third, there are legal provisions, now found in the *Equality Act 2010*, which protect employees from discrimination by employers. This section examines these different areas in turn.

#### *Education Law*

There are two important distinctions in education law. The first is between maintained schools and independent schools. The second is between schools which have a religious character and those which do not. These distinctions can be summarised as follows (Sandberg and Buchanan this book: chapter 5, Sandberg 2011). Maintained schools are those which are funded and run by the State: as a general rule, they are maintained by LEAs, follow the National Curriculum and are subject to inspection by the Office for Standards in Education, Children's Services and Skills ('Ofsted') in England and Estyn in Wales. Independent schools, by contrast, are funded by fees paid by parents and investments: they are largely free to run their own affairs, including setting their own curricula and admission policies.<sup>27</sup>

However, not all maintained schools are completely funded by the State. Maintained schools are organised into five statutory categories: 1) community schools; 2) foundation schools; 3) voluntary schools (which include voluntary aided and voluntary controlled

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<sup>26</sup> For an argument that these laws are best understood as being part of something called 'religion law', see Sandberg 2011.

<sup>27</sup> They do, however, need to be registered with the Department for Children, Schools and Families and are subject to inspection either by Ofsted or by an inspectorate approved by the Secretary of State.

schools); 4) community special schools; and 5) foundation special schools.<sup>28</sup> The main differences between these categories are control and financing. Community and voluntary controlled schools are run by the LEA, which employs staff and sets admission criteria. By contrast, foundation and voluntary aided schools are established by voluntary bodies (largely churches and other religious communities) and are run by their own governing body. Where a voluntary body has established a school, it will appoint 'foundation governors' whose duty is to preserve and develop the religious character of the school and to ensure that it is conducted in accordance with its trust deed.

Foundation, voluntary and independent schools can be designated as having a religious character. Such schools are designated by the Secretary of State as schools having a religious character where he is satisfied that the school was established by a religious body or for religious purposes.<sup>29</sup> The protection of the religious freedom of teaching staff differs in schools which have a religious character. Moreover, the protection also varies depending on the type of school which has a religious character. For present purposes, a distinction can be made between teachers at the following types of school:

Foundation or voluntary schools which do not have a religious character,

Foundation or voluntary controlled schools which do have a religious character,

Voluntary aided schools which do have a religious character,

Independent schools which do not have a religious character,

Independent schools which do have a religious character.

The general, default, rule is that teachers cannot be required to give religious education or attend religious worship and cannot be refused promotion or paid less because of their 'religious opinions'.<sup>30</sup> This rule applies to all teachers who work in foundation or

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<sup>28</sup> *School Standards and Framework Act 1998*, s.20(1).

<sup>29</sup> *Ibidem*, s.69(3), 124B.

<sup>30</sup> *Ibidem*, s.59.

voluntary schools which do not have a religious character. In schools that do have a religious character, this rule applies to all teachers except 'reserved teachers'. The exception for 'reserved' teachers allows the school to discriminate according to the religious opinions of teachers in order to safeguard the religious character of the school. The number of 'reserved teachers' depends on what type of school the school with a religious character is (Sandberg 2011, Vickers 2009).

In foundation or voluntary controlled schools which have a religious character, only a certain number of staff can be designated as being 'reserved teachers'. These are selected for their fitness and competence to give the required religious education and are specifically appointed to do so. Reserved teachers can be appointed provided that there are more than two teachers in the school and provided that the number of such 'reserved' teachers must not exceed one-fifth of the total number of teachers including the head teacher.<sup>31</sup> Where the head teacher is not to be a reserved teacher, 'regard may be had to that person's ability and fitness to preserve and develop the religious character of the school'.<sup>32</sup>

In the case of 'reserved' teachers, preference may be given in connection with the appointment, remuneration or promotion of teachers at the school to persons whose religious opinions are in accordance with that of the school, who attend religious worship in accordance with those tenets and who give, or are willing to give, religious education at the school in accordance with those tenets.<sup>33</sup> Regard may be had, in connection with the termination of the employment or engagement of any reserved teacher at the school, to any conduct on his part which is incompatible with the precepts or with the upholding of the tenets, of the specified religion or religious denomination.<sup>34</sup> All of the other non reserved

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<sup>31</sup> *Ibidem*, s.58(2)–(3).

<sup>32</sup> *Ibidem*, s.60(4).

<sup>33</sup> *Ibidem*, ss.60(3), (5)(a).

<sup>34</sup> *Ibidem*, ss.60(3), (5)(b).

teachers are governed by the general rule that applies to schools which do not have a religious character.<sup>35</sup>

In voluntary aided schools with a religious character, all teachers may be ‘reserved’ teachers. The general rule does not apply. Instead, the rules which apply to reserved teachers apply across the board.<sup>36</sup> The religious opinions of staff can be taken into account in relation to appointment, remuneration, promotion or termination of their employment. Therefore, in relation to teachers employed at maintained schools who wish to manifest their religion at work through the wearing of religious dress and symbols it may be said that those who work in a school without a religious character are protected by the provision that the school cannot discriminate against their religious opinions by paying them less, refusing to promote or requiring them to take part in religious education and worship. The same is true of teachers employed in foundation or voluntary controlled schools which have a religious character, provided that they are not ‘reserved’ teachers. ‘Reserved’ teachers in foundation or voluntary controlled schools which have a religious character and all teachers in voluntary aided schools with a religious character can be discriminated against if their religious opinions are different to those which are in accordance with that of the school. A teacher in a Catholic voluntary controlled school could be disadvantaged if he or she were to convert to Islam, for example. Such a teacher would not benefit from the general rule. However, it must be remembered that ‘reserved’ teachers who share the religious opinions of the school are likely to be advantaged.

In relation to independent schools, the general rule protecting the religious opinions of staff does not apply. However, independent schools can be designated as having a religious character.<sup>37</sup> Where this occurs, the independent school can treat all teachers as ‘reserved’

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<sup>35</sup> *Ibidem*, s.60(2).

<sup>36</sup> *Ibidem*, s.60(5).

<sup>37</sup> *Ibidem*, s.124B.

teachers. Independent schools designated as having a religious character may give preference in connection with the appointment, remuneration or promotion of teachers at the school to persons whose religious opinions are in accordance with that of the school, who attend religious worship in accordance with those tenets, and who give or are willing to give, religious education at the school in accordance with those tenets. Regard may be had, in connection with the termination of the employment or engagement of any teacher at the school, to any conduct on his or her part which is incompatible with the precepts, or with the upholding of the tenets, of the specified religion or religious denomination.<sup>38</sup>

There are a number of other pieces of education law affecting the religious freedom of staff (Sandberg and Buchanan this book: chapter 5, Sandberg 2011: chapter 8). In particular, it may be noted that there are a number of education related exceptions to the general law prohibiting discrimination on grounds of religion or belief. Legal prohibitions on religious discrimination do not apply to the school curriculum, to acts of worship and to schools which have a religious character.<sup>39</sup> The general picture appears to be that some of the usual safeguards protecting religious freedom do not apply in schools which have a religious character, allowing for discrimination against some staff who do not share the religious character of the school.

Overall, however, it may be doubted what effect these general education law provisions would have upon the wearing of religious dress and symbols by school staff. In the cases to date, these legal provisions have not been cited – largely because the protection provided by human rights and discrimination law go beyond the protection provided by the general rule that teachers cannot be disadvantaged by dint of their religious opinions. Having said that, the different provisions applying to ‘reserved’ teachers shows how the level of

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<sup>38</sup> *Ibidem*, s.124A.

<sup>39</sup> *Equality Act 2010*, Part 2 of Schedule 11. Note also the exceptions for LEAs now found in Part 2 of Schedule 3 of the Act.

protection differs according to the type of school. This perhaps is to be expected. If a teacher chooses to work within a school with a religious character, then surely it is fair for them to expect that manifesting a different religious character might be more difficult.<sup>40</sup>

The remainder of this chapter focuses entirely upon the position of teachers and other staff who work at a school without a religious character who wish to wear religious dress or symbols at work. First, since teachers at maintained school work for a public authority, it will look at whether they could argue that restrictions on dress or symbols infringe their right to manifest their religion under Article 9 ECHR. Second, the chapter will look at whether teachers could argue that the restriction constitutes discrimination on grounds of religion or belief under the *Equality Act 2010*.

### *Human Rights Law*

Although the HRA incorporated Article 9 into English law, the Act has not led to any great increase in the protection of religious employees who seek to wear religious dress and symbols. The Strasbourg jurisprudence has made it clear that Article 9 has little application in the employment sphere due to the ‘specific situation’ rule (Sandberg 2011: chapter 5). This states that where a claimant voluntarily submits to a system of rules (typically by signing a contract of employment) they cannot subsequently claim that the terms of those rules breach their right to religious freedom.<sup>41</sup> Although the Court of Appeal in *Copsey v WBB Devon*

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<sup>40</sup> This is consistent with the ‘specific situation’ rule applied by Strasbourg. The ‘specific situation’ rule is discussed further below. However, it is of note that whilst courts have prevented believers from bringing faith into secular situations on the grounds that the believer has voluntarily entered the secular environment, they have never developed this to cover the converse situation where a non-believer voluntarily submits to a religious situation. The religious situation rule would say a non-believer enters a place of worship, a faith school or a religious bookstore, then surely their voluntary submission should be an answer to any claim that the religious setting breaches their Article 9 rights. For further discussion of this see Sandberg 2010, Sandberg 2011: chapter 10.

<sup>41</sup> See, *Ahmad v United Kingdom* (1981) 4 EHRR 126; *Stedman v United Kingdom* (1997) 23 EHRR CD 168.

*Clays Ltd*<sup>42</sup> was highly critical of this rule,<sup>43</sup> it was of little doubt that it meant that where an employee agrees to a contract of employment which restricts their religious freedom in some way they cannot subsequently claim that this restriction interferes with their Article 9 right.<sup>44</sup> It is clear, therefore, that if a teacher's contract of employment includes a dress policy then once they sign that contract they cannot subsequently claim that the dress policy infringes their religious freedom.

It may be observed that this is quite unlikely to occur. Although teachers may be required not to dress in an offensive way, there will rarely be detailed regulations concerning their dress. However, this does not mean that the 'specific situation' rule will not apply. Domestic judgments have gone further than the ECtHR and have applied the 'specific situation rule' generally to any situation where the claimant retains the choice to manifest their religion elsewhere. The ECtHR has applied the 'specific situation' rule only where someone has voluntarily submitted to a system of rules, such as in relation to a person who voluntarily submits to military service,<sup>45</sup> a person who voluntarily enters into a contract of employment,<sup>46</sup> those who voluntarily enrol at a university,<sup>47</sup> and prisoners (who have broken the social contract).<sup>48</sup> However, with the exception of one decision which has not been subsequently followed,<sup>49</sup> Strasbourg has not cast this specific situation rule as being of

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<sup>42</sup> [2005] EWCA Civ 932.

<sup>43</sup> Mummery LJ stated that the rule amounted to 'repeated assertions unsupported by the evidence or reasoning that would normally accompany a judicial ruling' which 'are difficult to square with the supposed fundamental character of the rights' and noted that Strasbourg cases alleging breaches of other Articles and recent domestic cases on Article 9 had not followed it: see para. 236.

<sup>44</sup> Rix LJ, however, contended that the 'specific situation' rule did not extend to the situation where an *employer* subsequently ought to vary the terms of the employee's contract of employment: para. 65.

<sup>45</sup> *Kalaç v Turkey* (1997) 27 EHRR 552.

<sup>46</sup> *Stedman v United Kingdom* (1997) 5 EHRLR 544; *Ahmad v United Kingdom* (1981) 4 EHRR 126.

<sup>47</sup> *Karaduman v Turkey* (1993) 74 DR 93.

<sup>48</sup> *X v United Kingdom* (1974) 1 D& R at 41–2.

<sup>49</sup> *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France* (2000) 9 BHRC 27.

general application. However, the courts of the United Kingdom have done just that. This is shown by the case law that has developed in relation to the wearing of religious dress and symbols by pupils (Hill this book: chapter 15).

The effect of the expansion of the ‘specific situation’ rule by English courts, notably in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*,<sup>50</sup> is that Article 9 claims are unlikely to succeed (Sandberg 2011: chapter 5). Unlike Strasbourg, English courts focus more upon the question of whether there has been interference with the Article 9(1) right rather than the question of whether that interference can be justified by the limitations provided by Article 9(2) (Hill: this book, chapter 15). This means, as illustrated in *R (on the Application of Playfoot (A Child)) v Millais School Governing Body*,<sup>51</sup> that decisions can be reached without looking at the merits of the case. In *Playfoot*, the High Court also restrictively applied the manifestation / motivation requirement,<sup>52</sup> holding that a practice was not ‘intimately linked’ to the belief because the claimant was under no obligation, by reason of her faith. This is problematic, in that it requires courts to decide upon questions of religious doctrine and would seem to privilege mainstream religious groups and beliefs. Splinter groups and individuals within religious groups who form different beliefs would lack protection. The decision in *Playfoot* seems to be based on a misunderstanding of Lord Nicholls’ speech in *Williamson*;<sup>53</sup> whilst it is true that Lord Nicholls did say that where a belief is obligatory then it is likely to be ‘intimately

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<sup>50</sup> [2006] UKHL 15.

<sup>51</sup> [2007] EWHC Admin 1698.

<sup>52</sup> This rule, as developed by Strasbourg, requires that the claimant’s actions manifest their religion or belief as opposed to being merely motivated by it. See for example *Arrwosmith v United Kingdom* (1981) 3 EHRR 218.

<sup>53</sup> *R. Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15.

linked’,<sup>54</sup> he also said that it is not the case that a belief will not be ‘intimately linked’ unless it is obligatory.<sup>55</sup>

The decisions in *Begum* and *Playfoot* have therefore introduced misinterpretations of the Article 9 jurisprudence which have severely restricted the chances of litigants bringing successful Article 9 claims. This is underlined by the only successful case brought by a pupil concerning religious dress (*R (on the application of Watkins-Singh) v The Governing Body of Aberdare Girls’ High School*)<sup>56</sup> which succeeded because it was argued under discrimination laws rather than under the HRA (Sandberg 2011: chapter 5). That decision underlines the extent to which Article 9 is now moribund, particularly in claims concerning religious dress and symbols and especially in the employment sphere. This would suggest that school employees are best advised to rely upon discrimination law rather than human rights provisions.

#### *Discrimination Law*

There have been a number of religious dress and symbol cases brought by employees under religious discrimination laws. Some of these cases have been successful whilst others have been unsuccessful.<sup>57</sup> All of the successful cases have been cases of indirect discrimination rather than direct discrimination. Indirect discrimination occurs where A applies a provision, criterion or practice (a PCP) against B which is discriminatory in relation to B’s religion or belief. A PCP is discriminatory where it is: 1) applied equally to persons who do not share

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<sup>54</sup> *Ibidem*, para. 32: ‘If, as here, the belief takes the form of a perceived obligation to act in a specific way, then, in principle, doing that act pursuant to that belief is itself a manifestation of that belief in practice. In such cases the act is “intimately linked” to the belief, in the Strasbourg phraseology.’

<sup>55</sup> *Ibidem*, para. 33: ‘This is not to say that a perceived obligation is a prerequisite to manifestation of a belief in practice. It is not: ... I am concerned only to identify what, in principle, is sufficient to constitute manifestation in a case where the belief is one of perceived obligation.’

<sup>56</sup> [2008] EWHC (Admin) 1865.

<sup>57</sup> For a detailed discussion of the case law see Sandberg 2011: chapter 6, Vickers 2010.

B's religion or belief;<sup>58</sup> 2) puts persons of B's religion or belief at a particular disadvantage compared with others; 3) actually puts B at that disadvantage; and 4) A cannot show it to be a proportionate means of achieving a legitimate aim.<sup>59</sup>

Unlike direct discrimination, indirect discrimination can be justified, for example, by security or health and safety concerns. Its operation is therefore similar to the analysis of the right to manifest under Article 9. The analysis by the court or tribunal is often twofold. First, the court determines whether there is interference with the right. In discrimination law, this is often expressed as asking whether there is a 'disadvantage' but it is effectively the same question. Second, if there has been interference (or 'disadvantage') attention is then given to the question of justification: can the interference be justified?

There have been four significant indirect discrimination cases concerning religious dress and symbols worn by employees:<sup>60</sup> 1) the ET decision in *Noah v Sarah Desrosiers (t/a Wedge)*<sup>61</sup> in which the religious dress claim succeeded; 2) the EAT decision in *Azmi v Kirklees Metropolitan Council*<sup>62</sup> in which the religious dress claim lost because although there was a disadvantage, the indirect discrimination was justified; 3) the Court of Appeal decision in *Eweida v British Airways*<sup>63</sup> in which the religious dress claim lost because there was no disadvantage; and 4) the ET decision in *Chaplin v Royal Devon & Exeter NHS Foundation Trust*,<sup>64</sup> which followed *Eweida* and dismissed the religious dress claim because

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<sup>58</sup> Indirect discrimination also occurs where a PCP would create discrimination if it were applied. Indirect discrimination would therefore protect a claimant who did not apply for a job, knowing that a discriminatory PCP was to be applied.

<sup>59</sup> *Equality Act 2010* s.19(2). This mirrors the previous law: *Employment Equality (Religion or Belief) Regulations 2003* reg 3(1)(b); *Equality Act 2006*, s.45(2).

<sup>60</sup> See also the decision in *Harris v NKL Automotive Ltd & Anor* [2007] UKEAT/0134/07/DM; 2007 WL 2817981 (3 October 2007).

<sup>61</sup> [2008] ET Case Number: 2201867/07 (29 May 2008).

<sup>62</sup> [2006] ET Case Number: 1801450/06 (6 October 2006); [2007] UKEAT 0009 07 30003 (30 March 2007).

<sup>63</sup> [2010] EWCA Civ 80.

<sup>64</sup> [2010] ET Case Number: 17288862009 (6 April 2010).

there was no disadvantage. Although the decision in *Azmi* was the only case to involve an employee at a school (it involved a teaching assistant), all of these cases would be relevant to such employees. The question is what distinguishes the successful claim in *Noah* from the three other claims which were unsuccessful.

In short, the difference between *Noah* and *Azmi* was the question of whether the discrimination was justified. In *Noah*, the claimant, Mrs Noah, applied for a job as an assistant stylist at the respondent's hairdressing salon. When Noah attended the interview wearing a headscarf, the interview was terminated on the basis that the hair salon was known for 'ultra modern' hair styles which staff were supposed to display to clients. No other person was ultimately appointed to the job. The Tribunal held Noah had suffered a disadvantage even though no assistant stylist was ever appointed.<sup>65</sup> Moreover, this indirect discrimination was not justified. Although it was reasonable for the respondent to take the view that the issue posed a significant risk to her business, too much weight was accorded to that concern. By contrast, in *Azmi*, the tribunals concluded that the indirect discrimination had been justified. The claim was brought by a teaching assistant who had been suspended for insisting on wearing a full face veil when male members of staff were present, contrary to a school instruction not to wear the full face veil when teaching children. As in *Noah*, the tribunals accepted that this ban constituted a disadvantage.<sup>66</sup> However, both the ET and the EAT held that the indirect discrimination was justified. It could be justified as a proportionate means of achieving the legitimate aim of children being taught properly. The young children needed to see the facial expressions of their teaching assistant. This distinction between *Noah* and *Azmi* seems fair. Focusing upon the question of justification allows the tribunals to examine

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<sup>65</sup> The salon had applied provision, criterion or practice (PCP), that an employee would be required to display her hair at work for at least some of the time, this put persons of the same religion as the claimant at a particular disadvantage and disadvantaged the claimant.

<sup>66</sup> The 'no face veil when teaching rule' put Muslims at a disadvantage and actually put Azmi at a disadvantage.

carefully the facts of the case in order to arrive at a nuanced decision, reflecting the context in which the claimant operated. Noah could still have done her job properly whilst wearing the headscarf; Azmi could not.

The decision in *Eweida*, however, is more difficult to comprehend. It appears that the difference between *Noah* and *Eweida* is the question of how widely worn the religious symbol is and whether it is seen as being a requirement of a faith. The case concerned a member of check-in staff who wore a silver cross in breach of the airline's then uniform policy which prohibited visible religious symbols unless their wearing was mandatory. The Court of Appeal held that there was no indirect discrimination: the uniform policy did not put Christians at a particular disadvantage. There was no evidence that practising Christians considered the visible display of the cross to be a requirement of the Christian faith and no evidence that the provision created a barrier to Christians employed at the airline. There was no indication that the original Directive intended that solitary disadvantage should be sufficient. It was noted that Eweida herself described it as a personal choice rather than as a religious requirement.

The claim therefore failed on grounds of interference (or disadvantage) rather than justification. Sedley LJ held that if it had been held that there was indirect discrimination then the claim would nevertheless have been defeated on justification. This decision may appear to be unnecessary in that the claim could have been dismissed on grounds of justification instead. Indeed, it may be argued that the claim *should* have been dismissed on grounds of justification instead. There is a long established principle in English law that the courts do not and should not readily engage in questions of doctrine (Cranmer this book: chapter 14). This principle is most fully elucidated in the High Court decision in *HH Sant Baba Jeet Singh Maharaj v Eastern Media Group Ltd*<sup>67</sup> in which Eady J held that 'that the courts will not

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<sup>67</sup> [2010] EWHC (QB) 1294.

attempt to rule upon doctrinal issues or intervene in the regulation or governance of religious groups'.<sup>68</sup> Although exceptionally the courts will need to examine questions of doctrine to resolve disputes about property or money,<sup>69</sup> they are generally very reluctant to become involved in adjudicating internal disputes within religious groups. In the House of Lords decision in *Williamson*, Lord Nicholls of Birkenhead stressed that:

It is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. *Freedom of religion protects the subjective belief of an individual*.<sup>70</sup>

Yet, in *Eweida* (as in *Playfoot*) the courts overruled the subjective beliefs of the claimant and sought to judge the validity of the claim by reference to the doctrines of the group. This means that beliefs outside the mainstream are less well protected than those within.

*Eweida* was followed by the ET decision in *Chaplin v Royal Devon & Exeter NHS Foundation Trust*,<sup>71</sup> which concerned a nurse who wished to wear a crucifix around her neck. Despite evidence that another nurse had been asked to remove her cross and chain,<sup>72</sup> the ET held that this other nurse had not been put at a particular disadvantage since her religious views were not so strong as to lead her to refuse to comply with the policy.<sup>73</sup> This meant that

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<sup>68</sup> *Ibidem*, para. 5.

<sup>69</sup> *Forbes v Eden* (1867) LR 1 Sc & Div 568. See also *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904] AC 515. See Sandberg 2011: chapter 4.

<sup>70</sup> *R. v Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15, para. 22 (emphasis added).

<sup>71</sup> [2010] ET Case Number: 17288862009 (6 April 2010).

<sup>72</sup> *Ibidem*, para. 15.

<sup>73</sup> It was held that in order for there to be a 'particular disadvantage', the disadvantage needed to be 'noteworthy, peculiar or singular': *ibidem*, para. 27.

the uniform policy did not ‘place “persons” at a particular advantage’.<sup>74</sup> *Chaplin* entrenches the Court of Appeal’s decision in *Eweida*. On the face of it, Chaplin was disadvantaged and, unlike in *Eweida*, there was clear evidence that she was not alone. Ignoring the other nurse on the basis that her religious objection was not strong enough jars. Even if it is accepted that the courts are entitled to conclude that a ban on wearing a cross would not disadvantage Christians as a whole, these cases suggest that beliefs held by a few individuals (including beliefs held by a minority of believers within a larger religious group) are not protected. This contradicts the general position of religion law – as shown by the text of Article 9 – which protect both religious individuals and religious groups.

This is not to say, however, that these claims should have succeeded. The argument is simply that they should have been decided on grounds of justification. *Eweida* and *Chaplin* could have both easily been decided on grounds of justification. And this would have led to nuanced decisions taking into account the demands of the specific jobs and the cultures of the particular workplaces. The approach of *Noah* and *Azmi*, which focused on justification rather than disadvantage, is to be applauded. Courts and tribunals should distinguish successful and non successful claims largely by addressing the question of whether the employer’s actions were a proportionate means of achieving a legitimate aim. This will allow courts and tribunals to reach nuanced, situation specific conclusions – leading to different results in the differing contexts of the education and retail sectors. Ironically, the unsuccessful claimants in *Eweida* and *Chaplin* arguably suffered more than the successful claimant in *Noah*. It seems ludicrous to say that not being offered a job that never actually existed does constitute a disadvantage but being made to comply with a uniform policy which prohibited visible religious symbols unless their wearing was mandatory or a tidy hair rule does not constitute a disadvantage.

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<sup>74</sup> *Ibidem*, paras 27–8. This was the decision of the majority. Mr Parkhouse, by contrast, held that both nurses had been placed at a disadvantage but that this was justified. This seems to be a preferable conclusion.

## Conclusions

The conclusion seems to be that the success of any litigation by school teachers and other staff who wish to wear religious symbols or dress at work is uncertain. The type of school at which the litigant works may well be a factor, though the general law protecting teachers' rights to have 'religious opinions' is unlikely to be significant. Whilst Article 9 now provides a much fuller right to religious freedom, the cases of *Begum* and *Playfoot* suggest that a claim brought under Article 9 is unlikely to be successful. Litigants are best advised to argue instead that restrictions against them constitute indirect discrimination on grounds of religion. The decisions in *Noah* and *Azmi* indicate that any indirect discrimination claim will hinge upon whether the discrimination was justified. However, problematically, the decisions in *Eweida* and *Chaplin* further suggest that claims will only succeed if the litigant is able to point to a significant number of believers who wear the dress or symbol out of religious obligation. The judges have restricted the scope of the new law failing to protect claims which fall outside a conservative view of religion. Those who can manifest their religion elsewhere have been excluded and so have those whose beliefs are not, in the eyes of the court, required or obligatory to the religion in question or those whose beliefs are not shared by the mainstream of the religion.

The developing case law on religious dress and symbols also reveals much about the general debate concerning the place of religion in the public sphere. The new legal framework concerning religion cannot be understood in isolation from the profound social and political unease concerning the place of religion. The changes in the way in which English law interacts with religion do not point towards a separation of State and religion. Rather, the need to accommodate religious pluralism has led to greater regulation. Although it may be argued that the extension and expansion of protection towards religion is actually evidence of secularisation in that the State is forced to protect religion as a minority interest,

it is surely a an oversimplification to say that Britain in the twenty-first century is a secular society. The legal changes of recent years reflect a complicated and conflicted move towards a multifaith society where the State seeks to facilitate (and regulate) a religious free market by increasing the quantity and reach of regulation. As the ECtHR has frequently pointed out, the State's role is to facilitate religious freedom. The State is required to be 'the neutral and impartial organiser of the exercise of various religions, faiths and beliefs' striving to 'ensure mutual tolerance between opposing groups'.<sup>75</sup> The case law to date on the wearing of religious dress and symbols suggests that domestic courts are not comfortable with playing this role.

There seems to be two related reasons for this hesitation. The first reason is the novelty not only of the provisions but also of the approach of the new legal framework. The new active promotion of religious freedom as an individual right marks a sharp shift in the attitude towards and the regulation of religion in England and Wales. The judiciary are struggling to find a vocabulary to articulate a consistent and predictable jurisprudence (Hill and Sandberg 2007: 505, Doe and Sandberg 2010, Sandberg 2011: chapter 10). The new laws are expressed in rather abstract ways which make new demands of the judiciary. This is particularly true of the question of justification which requires judges and tribunal chairs to effectively undertake sociological evaluations. Whilst the question of interference is a legal test which can be reduced to a technical analysis of whether the facts fit the language of the provisions, the question of justification is a sociological test which requires reference to social reality. It is not surprising that those schooled in technical legal arguments are keen to avoid determining sociological questions of justification.

The second reason for the unease is the continuing pervasiveness of the notion that the social decline of religion and its retreat from the public sphere was inevitable. The

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<sup>75</sup> *Refah Partisi v Turkey* (2003) 37 EHRR 1, para. 91.

secularisation thesis remains deeply ingrained. Judges and tribunal chairs seem to be operating under the presumption that religion does not affect all aspects of a believer's life. However, as discussed above, it seems clear that the secularisation thesis no longer holds sway.<sup>76</sup> It has been challenged and affected by commercialism, changing morals, immigration, international terrorism and numerous other factors. Notions of religion as a private matter and as something that is always good are equally outmoded. The changing social and legal landscape requires a new approach. New legal and sociological tools are needed to understand the immense (and interconnected) legal and sociological changes that have occurred in relation to religion over the last decade in light of one another (Doe 2004, Bradney 1998, Bradney 2001, Sandberg and Catto 2010).

It is clear that the hyperbole in the press which greeted the *Equality Act 2010* was misplaced because the likely impact of the Act has been overplayed. In respect of religious matters, bringing a successful claim is far from easy. The most significant effect of the new laws protecting religion has been an increase in litigation rather than an increase in the protection of religion. Most claims have been unsuccessful. One reason for that increase in (ultimately unsuccessful) litigation is the low level of knowledge concerning the law (Bradney 2010). And that low level of knowledge is perpetuated by the confusion spread by the newspapers. Ironically, if the *Equality Act 2010* is the 'worst law in English history' then the newspapers are partly to blame.

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<sup>76</sup> It is important, however, not to simply swap the secularisation thesis with talk of religious resurgence. The fuller picture is more complicated than that. The holding and practicing of certain religious beliefs and practices are clearly declining.

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