

The Legal, Research and Policy Work of the Equality and Human Rights Commission on Religion or Belief

David Perfect

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Introduction

This paper explores the legal, research and policy work on religion or belief that has been carried out by the Equality and Human Rights Commission (EHRC) since its establishment in 2007.

EHRC structure and responsibilities

The EHRC is a non-departmental public body which was established in October 2007. Its sponsor body is the Government Equalities Office. It has a statutory role for seven equality strands (age, disability, ethnicity/race, gender, religion or belief, sexual orientation and transgender) and two other protected characteristics (pregnancy and maternity; and marriage and civil partnership) and has been a National Human Rights Institution since 2011. The EHRC, which replaced three previous bodies, the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission, is a GB-wide body with offices in Glasgow and Cardiff. Its current Chair is Baroness Onora O'Neill and there are currently eleven other Commissioners; its core functions include legal, policy, research and communications work. A small number of policy, legal and research staff specialise on religion or belief issues.

Key legislation: equality law

Equality law on religion or belief is relatively new, when compared with the legislation on race, gender or disability. The initial legislation consisted of the Employment Equality (Religion or Belief) Regulations of 2003, which were followed by the Equality Act 2006. Both pieces of legislation were replaced by the Equality Act 2010; this brought earlier legislation together and added the Public Sector Equality Duty (PSED) for the first time.

'Religion or belief' is defined in the Act very broadly to include any religion; any religious or philosophical belief; a lack of religion; and a lack of belief. There are also important religion or belief exceptions in the Act relating to employment and service delivery. Under the PSED, public bodies are required to give 'due regard' to eliminate discrimination, advance equality and foster good relations.

Key legislation: human rights law

Since the Human Rights Act 1998, which came into force in October 2000, a right to freedom of thought, conscience and religion has existed in UK law. There are two aspects to this right. Under Article 9 (1), there is an *absolute* right of belief and also an absolute right to change religion. There is also a *qualified* right in terms of the manifestation of religion or belief in worship, teaching, practice and observance. Under Article 9 (2), the freedom to manifest a religion or belief is subject to 'necessary' limitations. These limitations are prescribed by law and must be clear, accessible and non-retrospective; the circumstances and consequences of the limitations must be foreseen; and they must be 'in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedom of others'. As discussed below, the key legal decision with regard to the manifestation of religion or belief has been the judgment of the European Court of Human Rights (ECtHR) in the *Eweida et al* case.

EHRC legal interventions and guidance

EHRC legal interventions on religion or belief have been concerned with both equality and human rights law. Under Section 28 of the Equality Act 2006, the EHRC can assist an individual who is, or may become, a party to legal proceedings involving equality legislation. It can provide legal advice, legal representation (either 'in-house' by Legal Directorate staff or by external lawyers funded by the EHRC), facilitate the settlement of disputes or provide any other form of assistance. Under Section 30 of the Equality Act 2006, the EHRC may apply to become a party to legal proceedings involving equality or human rights issues; this is typically to advise a court on matters within its expertise, either to intervene or to apply for a judicial review. The EHRC's remit in this respect covers domestic courts, the ECtHR and the European Court of Justice.

There have been relatively few EHRC interventions in religion or belief cases and most of these concern either the balancing of competing rights of religion or belief and sexual orientation or the manifestation of religion or belief. Decisions to intervene (or not) are based on considerations within our strategic litigation policy (which is published on our website). The EHRC may choose to intervene because particular cases advance the objectives of our Strategic Plan and Business Plan. It may also do so because the issue at stake has the potential to help prevent breaches of equality or human rights law by setting a precedent or by

raising public interest in the issue raised. Other relevant considerations include whether the legal case has a good prospect of success; cases are not usually supported where the prospects of success are assessed at less than 50 per cent.

EHRC interventions: balancing competing rights

The EHRC has intervened in a number of cases involving the balancing of the competing rights of an individual or group and the rights of others. In *Hall and Preddy v Bull and Bull*, the EHRC funded and led the discrimination claim in 2011 which was taken by Martyn Hall and Steve Preddy, who were civil partners, at the Bristol County Court against Peter and Hazelmary Bull, the owners of a small hotel in Cornwall. Hall and Preddy had booked a double room at the hotel in 2008, but when they arrived, the Bulls refused to allow them to use it. The EHRC also funded Hall and Preddy's defence, when the Bulls appealed at the Court of Appeal in 2012 and again at the Supreme Court in 2013. The Supreme Court unanimously upheld the original County Court ruling (although the judges differed over whether there had been direct or indirect discrimination).

The EHRC's direct support for the applicants in *Hall and Preddy* was unusual; a more typical intervention was that in *Johns v Derby City Council*. Owen and Eunice Johns, who were members of a Pentecostal Church and had previously been foster carers, applied to become short-term foster carers in Derby in January 2007. The Johns held negative views about same-sex relationships which were not in line with the National Standards for Fostering Services. The EHRC presented evidence about the impact that views which were opposed to, or disapproving of, same-sex relationships and lifestyles might have on the development and wellbeing of children and young people, including gay and lesbian children and young people. The High Court, which found for Derby City Council, accepted a number of the EHRC's submissions in its 2011 judgment.

In similar vein, the EHRC also intervened in *Catholic Care (Diocese of Leeds) v the Charity Commission for England and Wales*. Catholic Care, a Leeds-based adoption agency, had sought to amend its charitable objects to permit it to restrict its services to mixed-sex couples, arguing that otherwise it would be forced to close. The EHRC argued before the High Court in 2010 that as the Charity Commission was a public authority, it was subject to the Human Rights Act and so Catholic Care had to abide by the Act, a view accepted by the Court of Appeal in 2011. Catholic Care lost the case and an appeal to the Upper Tribunal in 2012 was also unsuccessful.

The EHRC's role in *Ladele v London Borough of Islington* and *McFarlane v Relate Avon* was rather different. Lillian Ladele, who was a member of an Evangelical Anglican Church in South London, was employed as a registrar of births, deaths and marriages by Islington Council. After the 2004 Civil Partnerships Act had given same-sex couples rights and responsibilities comparable to civil marriage, Ladele refused to conduct civil partnerships and was disciplined and threatened with dismissal. The domestic courts reached opposite conclusions with higher courts overturning the decision of the Employment Tribunal which had found for Ladele. Gary McFarlane, a Pentecostal Christian, provided relationship counselling services on behalf of Relate Avon. Believing that homosexuality was sinful, McFarlane refused to provide psychosexual therapy to same-sex couples contrary to his employer's non-discrimination policy, a view supported by the domestic courts. Although the EHRC had not been involved in either case in the domestic courts, it was granted permission to intervene after both were brought before the ECtHR. In September 2011, following an informal consultation of stakeholders, the EHRC published its views on the cases concluding that the domestic courts had reached the correct conclusions. This decision was supported by the ECtHR in its January 2013 judgment.

EHRC interventions: manifestation of belief

The EHRC has also intervened in a number of cases related to the manifestation of belief, including *R (Ghai) v Newcastle City Council*, *R (E) v Governing Body of JFS* and *O'Donoghue and Others v United Kingdom*.

Davender Ghai was a Hindu who wanted to be cremated using an open-air funeral pyre and asked Newcastle City Council in 2006 to dedicate land to construct such pyres. This was opposed by Newcastle which cited the Cremation Act 1902 and Cremation Regulations 2008. The EHRC argued that to deny Ghai an open-air funeral pyre would breach his rights to a private and family life and the Court of Appeal found in 2010 that Ghai's wishes could be accommodated without infringing existing legislation. The EHRC's intervention thus helped Ghai win his case.

JFS, an Orthodox Jewish school in North London, had an admissions policy that gave preference when places were oversubscribed to applicants recognised as Jewish by the Office of the Chief Rabbi (OCR) on basis of matrilineal descent. When a case was brought by a convert to Judaism who attended a non-Orthodox synagogue which was not recognised by the OCR, the EHRC argued that the school's use of an ethnic-based test in selecting students did not comply with the

Race Relations Act. The majority in the Supreme Court found in 2009 that there had been direct discrimination by JFS.

Sinead O'Donoghue wished to marry her Nigerian partner, Osita Chris Iwu, in Derry. However, Home Office rules required immigrants without a settled status to pay large fees for permission to marry anywhere except in the Anglican Church. When the case was brought to the ECtHR in 2010, the EHRC criticised the rule arguing that it violated freedom of religion; the ECtHR agreed, O'Donoghue was awarded substantial damages and the scheme was later abolished.

As in *Ladele* and *McFarlane*, the EHRC did not intervene in the domestic courts in either *Eweida v British Airways* or *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust*, but did so at the ECtHR.

A Coptic Christian, Nadia Eweida, was a check-in clerk who worked for British Airways (BA) at Heathrow Airport. A new uniform code introduced in 2004 required all jewellery (unless considered mandatory to a religion, like the Sikh *kara*) to be concealed by the uniform. Eweida was sent home from work on unpaid leave in September 2006 for wearing a small silver cross visible to customers. Following widespread external criticism, BA altered its dress code to allow staff to display a faith or charity symbol while wearing the uniform; Eweida returned to work, but was not compensated for lost earnings. Eweida's subsequent claim for damages was dismissed by the domestic courts. In a broadly similar, but not identical, case, Shirley Chaplin, a member of the Free Church of England, was a nurse employed by Royal Devon and Exeter NHS Foundation Trust. She had worn a crucifix on a chain over her uniform for many years. When asked by the Trust to remove it as it contravened a new policy minimising the risk of jewellery, Chaplin refused; she also rejected a compromise that she could wear the crucifix under a high-necked T-shirt. The Employment Tribunal found against her.

When the cases were referred to the ECtHR, the EHRC was granted permission to intervene and once again following an informal consultation of stakeholders, it published its views on the cases in September 2011. This time the EHRC view was that domestic courts might not have given sufficient weight to the claimants' right to manifest their religion or belief. In January 2013, the ECtHR ruled in a majority decision that Eweida's Article 9 right to manifest her belief had unjustifiably been breached. Domestic courts had given too much weight to the employer's legitimate need to project a corporate image and not enough to the employee's

right to wear a visible cross, which did not adversely affect that corporate image. Chaplin's claim was rejected.

EHRC guidance post-Eweida

In the light of the judgment in *Eweida et al*, the EHRC published two guidance documents in February 2013. The first examined the key legal implications of the judgment. The guidance concluded that: it was now easier to manifest a belief in the workplace; employers can no longer require employees to resign as a last alternative if their requests are turned down; the courts can no longer consider what elements are mandatory to a religion or a belief; and that in future the courts will pay more attention to deciding whether restricting religious rights is justified. The second guidance document examined what kind of religion or belief requests an employer might receive and outlined steps on how to deal with them and ensure that their approach was justified. It also considered whether employees have a right to promote their religion or belief at work and whether they can refrain from their agreed work duties.

EHRC research on religion or belief

As part of our remit to collect and monitor evidence, the EHRC has commissioned and published specialist research on religion or belief issues.

A 2009 report by Linda Woodhead with Rebecca Catto of Lancaster University, *'Religion or Belief': Identifying Issues and Priorities*, set out possible priority areas for future EHRC work following three expert seminars with selected academics and stakeholders.

Religious discrimination, one of the issues discussed in the Lancaster University research, was examined more fully in 2011 by Paul Weller of the University of Derby. This report, *Religious Discrimination in Britain: A Review of Research Evidence, 2000-10*, explored various approaches to defining religious discrimination; considered whether religious discrimination had increased or decreased over the first decade of the twentieth century; and explored the contested concept of Islamophobia as a frame of reference for discrimination against Muslims.

Also in 2011, Woodhead assessed recent research carried out for the ESRC/AHRC Religion and Society Programme and by members of the EHRC's Religion or Belief

Network across six broad themes in *Recent Research on Religion, Discrimination and Good Relations*.

In 2012, the EHRC published a major new research report by Alice Donald with Karen Bennett and Philip Leach of London Metropolitan University, *Religion or Belief, Equality and Human Rights in England and Wales*. Based on 67 interviews with a wide range of stakeholders, roundtable discussion events with practitioners and two surveys, the report explored such issues as the law on equality, human rights and religion or belief; responses to the law; and the implementation of equality and human rights in the workplace and in service delivery.

A key finding was that while on some issues there was broad consensus (or at least the possibility of consensus) across a range of perspectives, on other issues no such consensus existed.

There was broad agreement that: religion or belief groups are legitimate interest groups, but should not have a privileged role; reasonable accommodation for religion or belief is beneficial, but there should be limits as to what is allowed; excessive litigation in this area is damaging and the law has a limited capacity to effect change; principles, or 'rules of thumb', are required to pre-empt or resolve disputes in the workplace and the community; practice-based guidance is required for religion or belief issues in the workplace to be handled effectively; and, finally, that there is a need for clear ground-rules for debate in this area, as much previous public discussion on religion or belief has been intemperate.

In contrast, there was a lack of consensus on whether: conscientious objection opt-outs beyond those that already exist in medical contexts (for example over abortion) are desirable or not; a hierarchy of equality strands exists or indeed should exist and whether (if it does) sexual orientation 'trumps' religion; Christians are 'marginalised' in public life; religion or belief is essentially different from other equality strands; and whether the exceptions in the Equality Act 2010 concerning religion or belief are too narrow or too broad.

As well as these externally commissioned research reports, in an EHRC Briefing Paper, *Religion or Belief*, I published an analysis in 2011 of available statistical data on religion or belief topics from a variety of national sources. The issues covered included religious affiliation; religious practice and attendance; discrimination and prejudice on grounds of religion or belief; belief in God; and gender and church leadership positions.

Apart from specialist reports on religion or belief, the EHRC has published other research which examines religion or belief alongside other equality strands. For example, in a 2009 study, *Integration in the Workplace: Emerging Employment Practice on Age, Sexual Orientation and Religion or Belief*, Sue Bond and others of Edinburgh Napier University examined recruitment, promotion and advancement at work for these three strands. This research, which was based on eight 'good practice' case studies in England, Scotland and Wales, found that good practice in the workplace was less well developed on religion or belief than for gender, age and disability.

All this research evidence has been widely disseminated both through the EHRC's Research Database and its separate Religion or Belief Network (the latter has nearly 700 members).

Goldsmiths' dialogue events

In October 2012, the EHRC commissioned the Religious Literacy Leadership Programme at Goldsmiths, University of London, working in partnership with the Coexist Foundation, to explore a number of key religion or belief themes.

Goldsmiths convened four half-day dialogue events in London in February and March 2013 on the themes of religion and belief in the public sphere; the media and religion or belief; religious diversity in the workplace and service delivery; and balancing competing interests. The events were attended by invited participants from religion or belief organisations (including secular and humanist bodies), employer organisations and trade unions, advice and equality bodies and government officials.

A final event in April 2013 summarised the earlier findings and suggested possible actions for three separate groups: employers and trade unions; religion or belief and civic society organisations; and the EHRC and the government. Although there was no overall consensus on important religion or belief issues, some of the key findings included that: the contemporary religion or belief landscape is complex, diverse and diffuse; Christianity is part of our shared intellectual tradition whatever our own stance; the media do not show the range of views across the religious field and can polarise public views on different religions; the differences between the absolute right to hold a religion or belief and the qualified right to manifest it are unclear; tolerance and mutual respect in discussing issues relating to the protection of religion and belief is required; and

guidance, materials and opportunities for discussion are helpful to build competence and confidence in this area. Some of these findings clearly echoed those previously outlined in the London Metropolitan University research.

A short report of all five events and other project material has been published by Goldsmiths. Subsequently, the EHRC devised a short survey which was administered to all participants at any of the events and to others to help EHRC decide its future work priorities. The findings from the dialogue events have also been publicised through the EHRC's Religion or Belief Network.

EHRC religion or belief strategy

In October 2013, the EHRC published *Shared Understandings: a New EHRC Strategy to Strengthen Understanding of Religion or Belief in Public Life*. This drew on our prior research evidence, notably that by London Metropolitan University, the Goldsmiths' dialogue events, and the views of stakeholders, as expressed in both the earlier research and the dialogue events, about what role the EHRC should play in this area.

The three key elements of the strategy are: to improve understanding and practice by employers and service providers; to create a more balanced and reasonable public dialogue on religion or belief issues; and to assess the effectiveness of the current legislative framework on religion or belief, equality and human rights.

A three-year programme of work has been established to implement the strategy. Between August and October 2014, NatCen Social Research conducted a call for evidence on the EHRC's behalf which sought to gather positive and negative experiences of religion or belief in the workplace and service delivery by employees, employers, service users, service providers, organisations and the legal and advice community. In part thanks to a range of external individuals and organisations which publicised the call for evidence on our behalf, it achieved nearly 2,500 responses. The subsequent report, *Religion or Belief in the Workplace and Service Delivery* by Martin Mitchell and Kelsey Beninger, with Alice Donald and Erica Howard, was published in March 2015.

In addition, a team from Oxford Brookes University led by Lucy Vickers and Peter Edge is currently carrying out a review of the interpretation and effectiveness of the legislative framework; their report will be published in summer 2015. NatCen is also building on the findings of the call for evidence by preparing guidance,

supported by good practice, on a number of key religion or belief topics which affect the workplace and service delivery. This work will be completed and published by early 2016.

Finally, in 2014, the EHRC set up a high-level group to discuss religious literacy in different contexts at a series of meetings. Thus far these still ongoing meetings have covered the law, the City, school education, higher education and the media.

In late 2015, the EHRC will publish a report on the adequacy of the laws protecting religion or belief. This will draw on the findings from the call for evidence and its ongoing work and will also take account of the views of stakeholder organisations.

David Perfect is a Research Manager at the Equality and Human Rights Commission and a Visiting Research Associate at the University of Chester. Most of his current work focuses on religion or belief issues.
david.perfect@equalityhumanrights.com