

Consultation response summary - Legal intervention on religion or belief rights: seeking your views

The Commission (EHRC) carried out an informal public consultation exercise that invited stakeholders to provide their thoughts on the Commission's intended positions in four cases at the European Court of Human Rights (ECtHR), and separately the use of the reasonable accommodations concept.

The consultation exercise took place between 16 August and 5 September 2011. The reason for the short consultation period was that the Court only gave the Commission a few weeks in which to prepare our submissions.

The consultation set out the following intended positions and asking the following questions:

- The EHRC proposes to intervene in Eweida and Chaplin on the basis that the courts may not have given sufficient weight to article 9(2) of the European Convention on Human Rights (ECHR).
- The EHRC proposes to intervene in Ladele and McFarlane on the basis that the domestic courts came to the right conclusions.

- Q1 Please let us know if you think the UK tribunals and courts applied the correct principles to the cases of Eweida and Chaplin to ensure that freedom of religion and belief was properly respected as set out in articles 9 and 14 of the ECHR?
- Q2 Please let us know if you think the UK courts and tribunals applied the justification test correctly in the cases of Ladele and McFarlane?
- Q3 Do you think some concept akin to reasonable accommodations for individuals wishing to manifest their religions or beliefs in the workplace should be incorporated into the approach to human rights in the UK?

This paper provides a summary of consultation responses received by 5 September 2011. In the three-week period during which the consultation exercise took place we received nearly 500 responses from a range of stakeholders, including religious organisations, LGB and T (lesbian, gay, bisexual and transgender) organisations, employers, trades unions,

academics, individuals and others. We received a diverse range of views from organisations within and across these communities.

The summary below uses descriptions and phrases from the various responses and hence does not represent the Commission's endorsement or support for specific wording.

Q1. Please let us know if you think the UK tribunals and courts applied the correct principles to the cases of Eweida and Chaplin to ensure that freedom of religion and belief was properly respected as set out in articles 9 and 14 of the ECHR?

Although few responses dealt directly with the question posed in the consultation exercise in relation to the first question, most respondents did indicate support for the view that the decisions in the cases of Eweida and Chaplin were wrong in terms of the question.

Most religious stakeholders indicated that they accepted that wearing a visible crucifix was not a religious obligation for Christians as a whole, but were still alarmed that limits on wearing the crucifix were being set under what they perceived as a secular agenda. They pointed to the what they say was unfairness of granting accommodations to Muslims and Sikhs, in terms of religious symbols, but not to Christians, even though allowing employees to wear a visible crucifix generally caused no harm to others.

Many religious stakeholders indicated that Eweida and Chaplin were not as important to them as the cases of Ladele and McFarlane.

The minority view, that the correct principles had been applied and the correct conclusions were reached in the cases of Eweida and Chaplin, represented a wider range of stakeholders including business representatives, trades unions, many LGB and T stakeholders, and some religion or belief stakeholders.

Business representatives were all very concerned about the Commission's proposed interventions potentially creating greater regulatory burdens. One stakeholder thought the cases had been correctly decided on the relevant principles based on the evidence presented. Most trades unions agreed with the view that the cases had been correctly decided.

Stakeholders across different communities thought Eweida and Chaplin were wrongly decided. They felt that the cases should have been properly analysed to answer the question of whether the employers' actions in each case were objectively justifiable.

Q2. Please let us know if you think the UK courts and tribunals applied the justification test correctly in the cases of Ladele and McFarlane?

In respect of the cases of Ladele and McFarlane, the majority of responses expressed the view that the justification test had been applied incorrectly, and that the courts had come to the wrong conclusions. They strongly opposed the Commission's proposed intervention position in these two cases.

For most religious individuals and organisations who responded to the consultation exercise, the cases of Ladele and McFarlane concerned the principle of conscientious religious objection to same-sex relationships that should have resulted in exemptions being granted to both employees.

Many thought the situation of Ladele and McFarlane analogous with the right that medical staff have to be exempted from duties concerning abortion.

Religious stakeholders generally thought that, in the case of Ladele, it was possible for her employer not to designate her for civil partnership duties. The employer would thereby accommodate her request without limiting or adversely affecting the civil partnership services provided to same-sex couples. They felt that the rights of same-sex couples were not in conflict with Ladele's requested accommodation. Their perception was that Ladele had paid an unnecessarily high price – losing her job – to uphold the notional rights of others, which created a hierarchy of legal rights, where sexual orientation rights 'trump' religious rights.

Responses received from a wide number of business representatives, trades unions, LGB and T stakeholders, and some religion or belief stakeholders supported the reasoning of, and conclusions reached by, the appeal courts in these cases.

Business representatives all thought the lines had been drawn clearly and fairly by the courts in these two cases, and any blurring of boundaries as a result of the further litigation would cause greater uncertainty, conflict and business burdens.

Trades unions and LGB and T stakeholders were very concerned that any other conclusion by the courts in these cases might provide legal legitimacy for homophobic views, and this could inevitably undermine the rights of LGB and T people. Some LGB and T stakeholders

highlighted what they perceived as a growing campaign by Christians to seek the right to discriminate against LGB and T communities under the guise of seeking religious equality and human rights. They also asked the Commission to note that Ladele and McFarlane were selective in asking for accommodations based on religious views concerning sexual orientation, but did not in respect of divorcees.

Some legal observers noted in their consultation responses that although the conclusions of the courts may have been correct, the reasoning – particularly the proportionality analysis – was defective. On the question of justification in these two cases the courts were felt to be too focused on the employee and the employer promoting the legitimate aim of equality, and not sufficiently focused on other possibly less discriminatory options available to the employer.

Q3. Do you think some concept akin to reasonable accommodations for individuals wishing to manifest their religions or beliefs in the workplace should be incorporated into the approach to human rights in the UK?

Some respondents thought the reasonable accommodation concept was required now; they asked the Commission to argue for the concept of reasonable accommodations in the current cases. Other respondents considered that it could be a useful concept if the criteria and limits were clearly explained to enable greater understanding of the benefits/drawbacks of the changes and consequences resulting from it. Most religious stakeholders either wanted the introduction of the concept now or for further investigation of this idea.

Business representatives, trades unions, LGB and T stakeholders and some religion or belief stakeholders were strongly opposed to extending the concept of reasonable accommodations to religion and belief cases.

The former thought the government's reasons for rejecting this concept beyond disability were still valid. The limits of this concept were unclear, so it was perceived as being likely to cause greater burden to businesses, increase complexity, confusion and conflict. Trades unions and LGB and T stakeholders were concerned this concept could act as a vehicle for religious people to discriminate and thereby threaten to diminish the rights of LGB and T people. These groups felt that religious accommodation was different to adjustments needed by disabled people and that preferential treatment should not be given to religious views through such a concept. This view was shared by some lawyers and academics.

Other lawyers and academic observers thought there was some advantage to this concept if the UK courts and tribunals continued to fail to carry out the required proportionality exercise in cases concerning religious rights under equality and human rights law. The Equality Commission for Northern Ireland indicated in its response to the Commission's consultation exercise that it is recommending the introduction of an 'anticipatory duty' to make reasonable accommodations across all equality law protected characteristics.