FOURTH SECTION OF THE

EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NOS. 48420/10 and 59842/10

Nadia Eweida and Shirley Chaplin

Applicants

v.

The United Kingdom

Respondent

WRITTEN OBSERVATIONS OF THIRD PARTY INTERVENERS:

- **Dr. Jan Carnogurksy and The Alliance Defense Fund**

filed on
14 September 2011

Written Submissions on Behalf of Jan Carnogursky and the Alliance Defense Fund (Interveners)

Introduction

1. The intervening parties to this brief, Jan Carnogursky and the Alliance Defense Fund [ADF], are dedicated to the protection of freedom of thought, conscience and religion in both its private and public manifestations. This brief addresses this Court's governing jurisprudence as it should apply to freedom of conscience and freedom from discrimination, particularly in light of the joining of these two cases by the Fourth Section of the Court. By direction of the Court, this brief does not address the specific facts of this case or its applicants.

Article 9: Freedom of Thought, Conscience and Religion

2. Freedom of thought, conscience and religion is a fundamental right protected by several seminal international human rights treaties.[1] The European Court of Human Rights ("the Court") has elevated the rights guaranteed by Article 9 to being one of the cornerstones of a democratic society.[2] Article 9 has taken the position of a substantive right under the European Convention.[3] The United Nations Human Rights Committee has stated that freedom of thought, conscience and religion is a "profound" and "far reaching" right of a "fundamental character"; one which state parties may not suspend or derogate from even in times of public emergency pursuant to Article 4.2 of the ICCPR.[4]

3. This Court has noted that "religious communities…abide by rules which are often seen by followers as being of divine origin."[5] Thus, Article 9 of the Convention stands alone in that it is the only fundamental right which recognizes the relationship between the individual and the transcendent. It therefore protects the most profound and deeply held conscience and faith-based beliefs. In *Metropolitan Church of Bessarabia and Others v. Moldova*, it was held that: "a State's duty of neutrality and impartiality, as defined in its case-law, is incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and requires that conflicting groups tolerate each other…"[6] This idea of state neutrality and allowance for Article 9 religious freedoms is echoed by the Court in *Serif v. Greece*, where it was stated that: "freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[7]

---

[1] *See e.g.*: Universal Declaration of Human Rights (1948), article 18; European Convention on Human Rights (1950), article 9; International Covenant on Civil and Political Rights (1966), article 18; American Convention on Human rights (1969), article 12; African Charter on Human and Peoples' Rights (1981) article 8.
[2] ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.
[3] *Kokkinakis op.cit.*, ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 788; *Otto-Preminger-Institut, op. cit.*; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749.
[4] HRC, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion* (1993) [1], available at http://www2.ohchr.org/english/bodies/hrc/comments.htm.
[5] ECHR, 26 October 2000, *Hasan & Chaush v. Bulgaria* (Appl. No. 30985/96), § 62.
[6] ECHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Appl. no. 45701/99., § 123.
[7] ECHR, *Serif v. Greece*, application no. 38178/97, judgment of 14 December 1999, § 49.

4. In addition to being a fundamental right, Article 9 is also a multi-dimensional right. Thus: "Freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9, would be likely to remain a dead letter."[8] Hence, as well as protecting the sphere of personal beliefs, the *forum internum*, Article 9 also protects the *forum externum*, on the basis that "bearing witness in words and deeds is bound up with the existence of religious convictions."[9] Precisely stated, Article 9 envisions protection for public manifestations of religious faith, which would undoubtedly include the context of employment.

Interference

5. This Court has consistently determined that wearing religious dress or displaying religious symbols is a manifestation of one's religion or belief and is thus protected by Article 9 § 1.[10] It therefore follows that in a number of different factual scenarios presented before the Court, it has been held that a restriction on religious symbols or dress does constitute an interference with Article 9. Scenarios have included Muslim women who have refused to remove their veil, *inter alia*, during a security check;[11] during the course of employment;[12] as a student at university[13] or at school,[14] and Sikh men who have refused to remove their turban for a security check[15] or in order to be photographed for a driving licence.[16] For example, in *Sahin v. Turkey*[17] the Grand Chamber held that a restriction on the right to wear the Islamic headscarf in universities constituted an interference with Article 9:

> The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.

6. Likewise, in *Dogru v. France*[18] the Court reiterated that, according to its case-law, wearing the headscarf may be regarded as "motivated or inspired by a religion or religious belief". It held that "in the present case the ban on wearing the headscarf during physical education and sports classes and the expulsion of the applicant from the school on grounds of her refusal to

[8] ECHR, judgment of 25 May 1993, *Kokkinakis v. Greece* (Publications ECHR, Series A vol. 260-A), § 31. Dr. R. A. Lawson, *Opinion at the Request of the Council of Europe: Concerning the Confessions Act*, May 2003 (unpublished).
[9] *Id.*
[10] See R. Sandberg and M. Hill, 'Is nothing sacred? Clashing symbols in a secular world', *Public Law,* Aut, 488-506 § 494.
[11] *El Morsli v. France* (Application No. 15585/06), 4 March 2008
[12] *Dahlab v. Switzerland* (Application No. 42393/98) 15 February 2001.
[13] *Sahin v. Turkey* (2007) 44 EHRR 5.
[14] *Dogru v. France* (Application no. 27058/05), 4 December 2008.
[15] *Phull v. France* [2005] ECtHR (Application No. 35753/03)
[16] *Mann Singh v. France* (Application No. 24479/07) 27 November 2008
[17] (2007) 44 EHRR 5 § 78.
[18] (Application no. 27058/05), 4 December 2008, § 47-8.

remove it constitute a "restriction" on the exercise by the applicant of her right to freedom of religion." As the Court went on to point out in *Dogru*, "such interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 9."[19] Hence, the interference must be justified in order to be lawful.

Justification

7. As to whether an interference with the right to manifest a religious belief is justified, the Court has held that the interference must: (i) be prescribed by law; (ii) be in pursuit of a legitimate aim; and (iii) be necessary in a democratic society. Interference with the enjoyment of Article 9 rights will not be considered prescribed by law if it is arbitrary and based on legal provisions which allowed an unfettered discretion to a supervising government actor.[20] Restrictions on religious freedom must be foreseeable and proportionate to the legitimate aim being sought. Once exemptions or reasonable accommodations are made for other religions with regard to a policy purporting to protect the health and safety of others, then they must also be forthcoming for Christians who seek to wear a small cross.

8. For the general public, a law must be accessible and foreseeable in its effects. One of the roles of the judges of this Court is therefore to assess the "quality"[21] of a law, ensuring that the law has the requisite precision in defining the conditions and forms of any limitations on basic safeguards. The precision and forseeability requirement is necessary in order to avoid both arbitrariness[22] and an unfettered discretion by the authorities to act as they wish. The legislation in question must therefore be easy to access, as well as clear and precise in order that the public may govern their actions accordingly. It is only thus, when these four elements of precision, access, clarity and forseeability are met that the law will be deemed to meet the criteria of prescription by law.[23] Legal provisions which are permissive towards certain religious clothing but then forbid others clearly lacks the requisite requirements of forseeability and provides the arbiters of such provisions unlawful amounts of discretion in making decisions about uniform policies.

9. The Court notes that under Articles 9 § 2 of the Convention exceptions to freedom of religion and association must be narrowly interpreted, such that their enumeration is strictly exhaustive and their definition is necessarily restrictive.[24] Article 9 § 2 limits the legitimate aims pursued by the State in interference of Article 9 rights to public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[25] Pursuant to the protections afforded by the Convention, even where interference with freedom of thought, conscience and religion does pursue a legitimate aim, where application of the interference is discriminatory in nature, then a violation of the Convention occurs.

---

[19] *Id.*
[20] *Cf.* ECHR, *Hasan and Chaush v. Bulgaria, op. cit.*, § 86.
[21] *Case of Sunday Times v. United Kingdom*, *op. cit.*, § 49 *et seq*.
[22] ECHR, 24 March 1988, *Olsson v. Sweden*, series A., No. 130 § 61f. See also: ECHR, 22 September 1994, *Hentrich v. France*, series A, No. 296-A, § 42.
[23] ECHR, 26 April 1991, *Ezelin v. France*, series A, No. 152, § 56.
[24] See: *mutatis mutandis*, ECHR, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV, § 38.
[25] Notably, when the Convention was being written, the final draft of Article 9(2) was the narrowest of the proposed articles and Article 9 is the least qualified of the qualified rights. See C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, Oxford University Press, 2001, p. 137.

10. The final criterion that must be met for government interference into Convention protections to be legitimate is that the interference in question must be necessary in a democratic society. The European institutions have stated that the typical features of a democratic society are pluralism, tolerance and broadmindedness.[26] For such an interference to be necessary in a democratic society it must meet a pressing social need whilst at the same time remaining proportionate to the legitimate aim pursued.[27] Any interference must correspond to a "pressing social need"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable".[28] The list of restrictions of freedom of religion, as contained in Articles 9 of the Convention, is exhaustive and they are to be construed strictly, within a limited margin of appreciation allowed for the State and only convincing and compelling reasons can justify restrictions on that freedom.[29]

11. In the specific case of freedom of religion, the Court's task in order to determine the margin of appreciation in each case is to take into account what is at stake, namely the need to maintain true religious pluralism, which is inherent in the concept of a democratic society.[30] The restrictions imposed on freedom to manifest all of the rights inherent in freedom of religion call for very strict scrutiny by the Court.[31] In the exercise of its supervisory function the Court must consider the basis of the interference complained of with regard to the case as a whole.[32]

12. Therefore, even where an interference is prescribed by law and pursues a legitimate aim, if the interference in question is not necessary in a democratic society then it is in violation of the Convention. As to what "necessary in a democratic society" actually means with regard to freedom of religion, the Court has held that in a democratic society in which several religions co-exist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure everyone's beliefs are respected.[33] However, the State has a duty to remain neutral and impartial, since what is at stake is the preservation of pluralism and the proper functioning of democracy, which must resolve a country's problems through dialogue, not interference, even when these views are irksome[34]; the role of the authorities is not to remove the cause of tension by eliminating pluralism but to ensure that competing groups tolerate each other.[35]

13. In previous cases before the European Court involving the Muslim headscarf, it has been held that an interference with the right to wear the headscarf has been justified on the basis of

[26] ECHR, 30 September 1976, *Handyside v. the United Kingdom*, Series A, No. 24, § 49 *et seq*.
[27] ECHR, *Case of the Sunday Times v. United Kingdom*, app. no. 6538/74, at § 63 *et seq*. (Eur. Ct. H.R. Apr. 26, 1979).
[28] ECHR, *Case of Svyato-Mykhaylivska Parafiya v. Ukraine*, application no. 77703/01, judgment of 14 June 2007, § 116.
[29] ECHR, *Wingrove v. the United Kingdom*, judgment of 25 November 1996, Reports of Judgments and Decisions 1996-V, p. 1956, § 53.
[30] ECHR, 25 May 1993, *Kokkinakis v. Greece*, *op. cit*., § 31; 13 December 2001, *Metropolitan Church of Besarabia and Others v. Moldova*, *op. cit.*, § 119.
[31] ECHR, 26 September 1996, *Manoussakis v. Greece*, *op. cit.*, § 44.
[32] ECHR, *Kokkinakis v. Greece*., *op. cit.*, § 47.
[33] ECHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, *op. cit.*, § 115. *Cf., Kokkinakis* judgment, *op. cit.*, § 33.
[34] ECHR, 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, Reports 1998-I, p. 25, § 57.
[35] *Metropolitan of Bessarabia and Others v. Moldova*, *op. cit.*, § 116; See also: ECHR, 14 December 1999, *Serif v. Greece*, Reports 1999-IX, § 53.

protecting public order and protecting the rights and freedoms of others.[36] For example, in the case of *Dahlab v. Switzerland*,[37] the Court held that a ban on a Muslim school teacher from wearing a headscarf at school was justified in order to protect the rights and freedoms of the pupils. The Court noted that the applicant's headscarf was a "powerful external symbol" and that the pupils were very young. Thus, it held that, "the wearing of a headscarf might have some kind of proselytising effect" on the impressionable young children. The Court further observed that the Muslim headscarf appeared to be "imposed on women by a precept which is laid down in the Koran", something which the Court found "hard to square with the principle of gender equality." Therefore the Court concluded that it was "difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."

14. This approach was endorsed by the Grand Chamber in *Sahin*, where the Court emphasised that the ban on headscarves met a pressing social need by seeking to achieve the aim of secularism and gender equality. The Court noted that gender equality is "recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe",[38] whilst the notion of secularism was held to be "consistent with the values underpinning the Convention" and the Court accepted that "upholding that principle may be regarded as necessary for the protection of the democratic system in Turkey."[39]

15. With regard to the Christian cross, it must first be noted that there is no conflict with the principle of gender equality. Although the Court has noted that the Muslim headscarf "appears to be imposed on women by a precept which is laid down in the Koran",[40] the Christian cross is clearly not imposed on women. Hence, insofar as the Muslim headscarf conflicts with the principle of gender equality because it is *imposed*, wearing the Christian cross is, on the contrary, not hard to square with the principle of gender equality. Secondly, a ban on the Christian cross should not be justified on the basis that it may have "some kind of proselytising effect" on the impressionable. The Grand Chamber noted in *Lautsi and others v. Italy*[41] that crucifixes on classroom walls were not "powerful external symbols" within the meaning of the decision in *Dahlab*.[42] It should therefore follow that if large crucifixes, displayed on a daily basis to non-believing children, were not considered to have a significant impact on those who viewed them, and were seen as "passive" rather than "powerful", a cross worn around the neck should be treated similarly when considering the rights and freedoms of others. Thirdly, within the specific context of the United Kingdom, a ban on the cross cannot be justified on the grounds of "secularism". Clearly, the situation in Turkey is different to that of the United Kingdom. In the United Kingdom, the principle of secularism is not recognized and, on the contrary, there is still an established church in England and Scotland.[43] Hence, the justifications used to restrict the wearing of the Muslim headscarf in

[36] *Sahin v. Turkey* (2007) 44 EHRR 5 § 99.
[37] (Application No. 42393/98) 15 February 2001.
[38] *Sahin v. Turkey* (2007) 44 EHRR 5 at § 111.
[39] *Id.*
[40] *Dahlab v. Switzerland* (Application No. 42393/98) 15 February 2001
[41] (Application no. 30814/06) 18 March 2011
[42] *Id.*, at § 73.
[43] For a detailed description of the relationship between the Church and the State in the UK, see F. Cranmer, '*Notes on Church and State in the European Economic Area*', 2011, at § 41. Available at: http://www.law.cf.ac.uk/clr/networks/Frank%20Cranmer_%20Church%20&%20State%20in%20W%20Europe.pdf

cases such as *Dahlab* and *Sahin* were fact specific and should not be transferred to the wearing of the Christian cross.

Article 9 and 14: Censorship of Religious Symbols

16. States may not discriminate against Christians from wearing a cross or crucifix as a manifestation of their faith. Nor may a State operate distinctions between one religion and another with regard to allowing or disallowing the wearing of religious objects. The United Nations Generally Assembly, in its *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, held that "discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights…"[44] The Declaration also called on States to respect the rights of religious adherents to use and manifest objects related to their religious faith.[45] Restrictions on the adornment of religious clothing or symbols may not be imposed for discriminatory purposes or be applied in a discriminatory manner. In a later Resolution on the Elimination of all forms of religious intolerance, adopted by the General Assembly in 1993, the UN reaffirmed that States must "ensure that their constitutional and legal systems provide full guarantees of freedom of thought, conscience, religion and belief..."[46]

17. Moreover, the United Nations Human Rights Committee has held that that it is a violation of a State's obligations to the ICCPR to ban the wearing of a religious symbol.[47] In *Raihon Hudoyberganova v. Uzbekistan*, the defendant State failed to properly justify any legitimate aim in calling for the ban on religious clothing. Furthermore, the Human Rights Committee held that the ban was not necessary under the limiting articles provided for in Article 18(3) of the Covenant.

18. Turning to Article 14 of the European Convention, although it does not forbid every difference in treatment in the exercise of the rights and freedoms recognized by the Convention,[48] a difference in treatment based on the ground of religion will rarely be capable of justification.[49] Indeed, religion may even be considered to have joined a list of the most sensitive grounds, which, along with other characteristics such as race and sex, requires "very weighty reasons"[50] for a difference of treatment to be justifiable.[51]

19. Under the United Kingdom's equalities legislation, discrimination on the basis of religion or belief can either be direct or indirect. Direct discrimination occurs when, because of a

[44] Proclaimed by General Assembly resolution 36/55 of 25 November 1981, Article 3.
[45] *Id.*, Article 6(c).
[46] A/RES/48/128, 20 December 1993, [2].
[47] *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/ C/82/D/931/2000 (2004).
[48] *Kafkaris v. Cyprus*, App. no. 21906/04, 12 February 2008 § 160.
[49] See, for example, *Hoffmann v. Austria*, App. no. 12875/87, (1993) 17 EHRR 293, § 36.
[50] See *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, 501, § 78; *Schmidt v Germany* (1994) 18 EHRR 513, 527, § 24; *Van Raalte v Netherlands* (1997) 24 EHRR 503, 518-519, § 39.
[51] For example, see the United Kingdom case of *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, per Lord Walker at para 58, quoting Jacobs and White, *European Law of Human Rights*, 3rd ed (2002), pp 355-6 and *Hoffmann v Austria* (1994) 17 EHRR 293, § 36.

religion or belief, an employer treats an employee less favourably than he treats or would treat others. Indirect discrimination occurs when an apparently neutral, provision, criterion or practice puts people with a religion or belief at a disadvantage compared with others who do not share that belief, and the employer applying the provision, criterion or practice cannot prove that it was a proportionate means of achieving a legitimate aim.

20. Clearly under the United Kingdom legislation, it is a *prima facie* case of direct discrimination to allow members of other faiths to wear their religious clothing and symbols but to prohibit Christians from wearing a small cross or crucifix. Furthermore, even where a legitimate aim regarding a restriction is in place, such as for protection of public health and safety, the discriminatory application of this regulation would also constitute a violation of both the United Kingdom legislation and Article 14 of the Convention. Even blanket policies disallowing the wearing of jewelry would be violative of Convention rights where necessity was lacking and where a reasonable accommodation could easily be made to affirm the religious belief or custom of wearing a small cross. In a case where a policy does pursue a legitimate aim, such as the protection of public safety, but where reasonable accommodations are nonetheless made for some religions and not others, the Convention's prohibition of discrimination is again violated. Once a state decides to support or accommodate certain religious groups, it must do so in a non-discriminatory way.[52]

21. The Court cannot operate distinctions between religions based on whether or not the manifestation of the religious belief was a mandatory requirement. If such an approach were adopted by the Court, it would be easy for an adherent of a religion that has many obligatory rules, regulations and duties to show a manifestation of his belief, whereas an adherent of a religion that is not rule-based will have less protection under the Convention, as his actions will not be based on strictly imposed duties. Precisely stated, the state cannot therefore differentiate between the theological requirement of one religion to wear certain clothing and the sincerely held belief of a Christian that it is their religious calling to wear a small cross as a symbol of their faith.[53] Instead, the Court should adopt the approach taken in *Case of the Moscow Branch of the Salvation Army v. Moscow*, where members of the Salvation Army had a right to wear special uniforms and have ranks as a way of manifesting their religious faith[54] even though no such requirement stemmed from Biblical precepts: it was sufficient to demonstrate that it was central to the individual faiths of the adherents of the Salvation Army. For the same reasons, the wearing of a cross cannot be censored as a manifestation of one's religious faith. The disparate treatment of employees of different religious faiths in the allowance of the wearing of religious symbols not only *prima facie* a case of direct discrimination under the European Convention, but is also violative of British domestic law[55] and European law[56].

22. It is equally important to recognize that the restriction of religious liberties such as the right to wear a cross cannot be limited simply because it may offend a small minority of people. In this sense, Article 9 must be taken in conjunction with the Article 10 protection of freedom of

[52] *See*: Article 14 ECHR; ECHR, 28 May 1985, *Abdulaziz a.o. v. the UK* (Series A vol. 94), § 82; ECHR, 19 December 1994, *VDSÖ & Gubi v. Austria* (Series A vol. 302), § 37
[53] *Cf.* ECHR, *Hasan and Chaush v. Bulgaria, op. cit.*, § 78.
[54] ECHR, *Case of the Moscow Branch of the Salvation Army v. Russia*, application no. 72881/01, judgment of 5 October, 2006, § 92.
[55] The Equality Act 2010.
[56] Employment Directive 2000/78/EC, 07 November 2000.

expression. As the Court has repeatedly held, "freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfillment."[57] The Court has also held on numerous occasions that freedom of expression constitutes one of the essential foundations of a democratic society.[58] This freedom of expression protects not only: "the information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society."[59]

23. The recent judgment of the United States Supreme Court in *Salazar v. Buono*[60] is instructive as to the secular value of religious symbols in the public square. Justice Kennedy, writing for the majority, made it clear that the application of the doctrine of "separation of church and state" requires accommodation rather than a strict ban on religious symbols of faith.[61]

Article 34: Victim Status

24. Article 34 of the Convention requires that all applicants claim to be the victim of a violation of the rights guaranteed by the Convention.[62] The definition of victim is fluid and the discretion of defining victims is left to this Court.[63] An applicant can prove that he has victim status regardless of whether the applicant prevailed in the highest court of the domestic legal system.[64] For example, in the *Case of Tsirlis and Kouloumpas v. Greece*, the ECHR decided the case despite the fact that the applicants were acquitted by the Greek domestic courts. The applicants were ministers with the Jehovah's Witnesses who were imprisoned for more than a year on charges of insubordination because they refused to join the military. The Military Appeals Court, which is the highest military court in Greece, acquitted Tsirlis because it concluded that "'there was no act' of insubordination."[65] At the domestic level, the Greek Military Appeals Court had refused to award compensation for the detainment of the applicants and made the following statement when rendering the verdict: "The State is under no obligation to compensate the applicant for his detention between 6 March 1990 and 30 May 1991, because his detention was due to his own gross negligence."[66] The ECHR did not comment on the fact that the applicants prevailed in the Greek court system while at the same time finding a violation of the Convention for having failed to compensate the victims for the damage caused them as a result of the detention. Precisely

[57] *Lingens v. Austria*, 1986; *Sener v. Turkey*, 2000; *Thoma v. Luxembourg*, 2001; *Maronek v. Slovakia*, 2001; *Dichand and Others v. Austria*, 2002, etc.
[58] See e.g.: *Handyside v. The United Kingdom*, 1976.
[59] *Handyside v. the United Kingdom*, 1976; *Sunday Times v. the 1United Kingdom*, 1979; *Lingens v. Austria*, 1986; *Oberschlick v. Austria*, 1991; *Thorgeir Thorgeirson v. Iceland*, 1992; *Jersild v. Denmark*, 1994; *Goodwin v. the United Kingdom*, 1996; *De Haes and Gijsels v. Belgium*, 1997; *Dalban v. Romania*,1999; *Arslan v. Turkey*, 1999; *Thoma v. Luxembourg*, 2001; *Jerusalem v. Austria*, 2001; *Maronek v. Slovakia*, 2001; *Dichand and Others v. Austria*, 2002.
[60] *Salazar v. Buono*, 559 U.S._____ (2010).), No. 08-472, *available at* http://www.law.cornell.edu/supct/html/08-472.ZS.html.
[61] *See e.g.*: *Id.*
[62] *European Convention on Human Rights*, art. 34.
[63] ECHR, *Klass and Others v. Germany*, judgment of 6 September 1978, §§ 31-32.
[64] *See e.g., Case of Biserica Adevarat Ortodoxa din Moldova v. Moldova*, app. no. 952/03, § 29 (Eur. Ct. H.R. Feb. 27, 2007) (holding in favor of the religious association based on the failure of the Government to enforce fully a court judgment in the association's favor); Case of Church of Scientology Moscow v. Russia, app. no. 18147/02 (Eur. Ct. H.R. Apr. 5, 2007).
[65] *Case of Tsirlis and Kouloumpas v. Greece*, no. 54/1996/673/859-860, at § 24 (Eur. Ct. H.R. Apr. 25, 1997).
[66] *Id.*

stated, that even where a policy has been changed to remedy discriminatory behavior, an applicant still carries "victim status" with them so long as the domestic judgment or change in policy did not properly compensate the applicant for the hardships suffered as a result of the interference with their right to religious belief.

Comparative Jurisprudence: Title VII of the Civil Rights Act of 1964 [United States][67]

25. The urgency arising in the United Kingdom regarding religious freedoms cases involving rights of Christian employees is quickly becoming endemic throughout Europe. It is instructive for the Court to view the existing anti-discrimination legislation in the United States to examine how other jurisdictions have successfully dealt with these issues. While Title VII of the Civil Rights Act of 1964 does have some parallels with the United Kingdom's Employment Equality Regulations 2003 [Religion or Belief], it is nonetheless far better developed with regard to guidance in reasonable accommodations of sincerely held religious beliefs.

26. As the Third Circuit has held: "[Title VII] plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions, where such relief will not unduly burden others. ...This is...part of our "happy tradition" of avoiding unnecessary clashes with the dictates of conscience."[68] Among other protections, Title VII prohibits employers from treating applicants or employees differently because of their religious beliefs;[69] and denying a reasonable accommodation of an employee's sincerely held religious belief.

27. Religion is liberally protected under Title VII and includes "all aspects of religious observance and practice, as well as belief."[70] With regard to sincerity, a plaintiff is not held "to a standard of conduct which would have discounted his beliefs based on the slightest perceived flaw in the consistency of his religious practice."[71] If the employee risks losing his job because of his religious faith, then the sincerity of his belief is practically unquestionable. As one court observed, sincerity of religious belief can scarcely be doubted when the "[p]etitioner is willing to jeopardize [his] job in support of that belief."[72] Importantly, the EEOC defines religious practices as including "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional views…The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee."[73] Therefore, regardless of whether the wearing of a small cross is a theological requirement or a personally and sincerely held belief, it should be accommodated if no undue burden is borne by the employer. Clearly in instances where

---

[67] As amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. §§ 2000e et seq.).
[68] *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3rd Cir. 1986).
[69] *See e.g.*: *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 281-82 (3d Cir. 2001). S*ee also*: *Delegne v. Kinney Sys., Inc.*, 2004 WL 1281071 (D. Mass. June 10, 2004) (Ethiopian Christian parking garage cashier could proceed to trial on religious harassment and discrimination where he was not allowed to bring a Bible to work, pray, or display religious items).
[70] 42 U.S.C. 2000e(j).
[71] *EEOC v. University of Detroit*, 701 F. Supp. 1326, 1331 (E.D. Mich. 1988), *rev'd on other grounds* 904 F.2d 331 (6th Cir. 1990). *See also EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (request of vacation to observe Yom Kippur by Jewish employee was sincere, even though she had not asked for vacation in the previous eight years).
[72] *McGinnis v. United States Postal Service*, 512 F. Supp. 517, 520 (N.D. Cal. 1980).
[73] *Guidelines On Discrimination Because of Religion,* 29 C.F.R. § 1605.1 *("*Guidelines*")*.

other religions are having their beliefs accommodated under identical circumstances, then the burden on the employer is not undue.

28. An employee who has shown themself to have a sincerely held religious belief must be reasonably accommodated by the employer unless such accommodation would result in undue hardship to the employer.[74] Reasonable accommodation is a fluid and liberal term which must be determined on a case-by-case basis.[75] Broadly, an employer is required to accommodate an employee's religious belief or custom unless such accommodation will actually interfere with the operations of the employer. Again, where accommodations are made for other religions under identical circumstances, the employer cannot argue that accommodations would interfere with the operations of the employer. An employer violates Title VII if it fails to even attempt an accommodation.[76]

29. Almost universally, employers are required to accommodate religious beliefs requiring employees to dress or groom in a certain manner, unless the prohibiting rule is justified by a business necessity. The EEOC ruled, for example, that a nurse whose Christian faith required her to wear a scarf was unlawfully discharged for refusing to come to work without the scarf.[77]Under Title VII law, the employer has the burden of proving undue hardship.[78] Evidence of undue hardship must be more than mere speculation.[79] The concept of reasonable accommodations for religious belief in employment provides the optimal balance of proportionality and respect for "necessity in a democratic society" under Convention analysis.

Conclusion

30. Freedom of thought, conscience and religion is a fundamental right both under European and British law. Christians enjoy the same rights to adorn themselves with the religious symbols or clothing of their choosing as does any other religion or as those who do not adhere to a specific religion. Freedom of religion means not only the right to manifest one's faith in private, but also in community with others and in public. Any interfere with this freedom must pursue a legitimate aim and be necessary in a democratic society. The failure to provide even the most simple of accommodations for the right of an employee to wear a cross, particularly where other religions have been accommodated and where necessity is lacking, is a clear breach of the Convention. Furthermore, any difference in treatment on the basis of religion will require very weighty reasons to be justified under Article 14. In the case of health and safety, where necessity is lacking with regard to interference with the right to manifest religious symbols, employers are required to accommodate a request to wear the religious symbol when the safety concern has been alleviated. Finally, it is important to emphasize that a positive change in policy accommodating religious clothing does not automatically cure victim status where a previous violation has not been properly remedied.

---

[74] *Trans World Airlines*, 432 U.S. at 73-74; *EEOC v. READS, Inc.*, 759 F. Supp. 1150,1155 (E.D. Pa. 1991).
[75] *Religious Discrimination*, 22 A.L.R. Fed. at 604; *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976) *cert. denied*, 433 U.S. 909 (1977).
[76] *EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991).
[77] EEOC Dec. 6180 (1970). *See also EEOC* Dec. 6283 (1971) (employer could not fire employee for wearing traditional Islam garb because there was no evidence that requiring employees to wear traditional office attire was necessary to the safe and efficient operation of the business). The same can reciprocally be stated about a small cross or crucifix.
[78] *See e.g.*: *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004).
[79] *Pyro Mining*, 827 F.2d at 1086; *Haring*, 471 F. Supp. at 1182 (''undue hardship' must mean *present* undue hardship, as distinguished from anticipated or multiplied hardship." (emphasis in original)).