

Protecting the 'rights of others' in the UK: Religious expression, reasonable accommodation and the real meaning of non-discrimination

Over the years, states have been developing and implementing legislation with the aim of protecting individuals against discrimination, *inter alia*, on the grounds of sexual orientation and gender identity. Recent developments have led to an expansion of the concept of 'family' to include same-sex couples and single parents and the progressive adjustment of the law with a view to extend parenthood rights to less "traditional' family forms. In terms of access to parenthood, objections of conscience may arise in relation to facilitating adoption by same-sex couples or single parent adoption, whereby religious objectors may feel that their professional duties are in direct conflict with the tenets of their religion. Conscientious objections have traditionally been expressed by persons whose beliefs are at odds with laws compelling them to carry out certain functions, such as facilitating adoptions in same-sex families or registering and officiating civil unions. The progressive legal recognition of alternative family unions and parenthood rights to non-traditional family forms on the one hand, and the manifestation of religious beliefs outside an individual's *forum internum*¹ on the other, can be described as an 'explosive mix' of conflicting rights and freedoms. In addition to national courts in the Council of Europe's member states, the European Court of Human Rights has been exploring the scope and limits of the right of conscientious objection as a particular aspect of the right to freedom of thought, conscience and religion. In the European context, the European Court of Human Rights has demonstrated through its jurisprudence that although a 'human right' to conscientious objection exists, this is not absolute, but subject to permissible limitations as found in Article 9(2) ECHR² including the protection of the rights and freedoms of others.

¹ The term 'forum internum' is used to place objections of conscience within an internal and private sphere of the individual against which no State interference is justified. The term 'forum externum' is used to denote the external manifestation of a religion or a belief that is subject to certain permissible limitations. See P. M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005).

² In *Bayatyan v Armenia* [2011], the Court confirmed that a genuine conscientious objection to military service can sufficiently attract the protections of Article 9, whereas in *Erweida v UK* [2013] the failure to allow exemptions from officiating or registering civil partnerships and another for providing counselling to same-sex couples were held by the European Court to pursue a legitimate aim to protect the rights and freedoms of others.

I INTRODUCTION

Objections to compulsions under the law

Objections to compulsions under the law can be legally recognised and protected, to some extent, through legislation. Refusals to certain compulsions under the law may have either a religious or ideological background and include objections to the obligation to swear a religious oath³, military service⁴, abortion⁵ or the teaching of religion in schools.⁶ Other objections relating to the provision of healthcare⁷ include objections to medically-assisted reproduction,⁸ euthanasia in countries where such a procedure is permitted by law,⁹ refusal to withdraw or withhold life-sustaining treatment,¹⁰ compulsory vaccination,¹¹ the provision of medically prescribed contraceptive products and/or emergency contraception,¹² the provision of fertility treatment,¹³ or even participation in Caesarean Delivery on Maternal Request.¹⁴

Conscientious objections in the context of medical healthcare and bioethics in the United Kingdom are protected, albeit not entirely, by law and may be defined as objections to a particular medical procedure due to moral, ethical or religious motives. In the United

³ *Buscarini and others v San Marino*, App no 24645/94, Reports 1999-I.

⁴ *Bayatyan v Armenia*, App no. 23459/03, judgment of 7 July 2011.

⁵ Shaw D., Abortion and Human Rights, *Clinical Obstetrics and Gynaecology* (2010), vol. 24(5), p 633

⁶ Braithwaite discusses denominational religion in the public educational system in the United Kingdom – Anglican, Non-Conformist and Catholic – and proposes a conscience clause for parents to decide whether to allow their children to receive religious instruction at school. See Braithwaite C., *Conscientious objection to various compulsions under British law* (William Sessions, 1995).

⁷ Wicclair M. R., *Conscientious Objection in Health Care: An ethical analysis* (Cambridge University Press, 2011), p. 31.

⁸ See Human Fertilisation and Embryology Act 1990 (as amended in 2008), section 38:

“Conscientious objection:

(1) No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so.

(2) In any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(3) In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in a particular activity governed by this Act shall be sufficient evidence of that fact for the purpose of discharging the burden of proof imposed by subsection (2) above.”

⁹ Wicclair M.R., *Conscientious Objection in Medicine, Bioethics* [2000] Vol 14(3), p 205.

¹⁰ BMA, Expressions of doctors’ beliefs, available at <<http://bma.org.uk/practical-support-at-work/ethics/expressions-of-doctors-beliefs>> [accessed 11-7-15]

¹¹ Braithwaite, op cit 6 p167.

¹² *Pichon and Sajous v France*, App no 49853/99, judgment of 2 October 2001.

¹³ Equality and Human Rights Commission, ‘Religion or belief, equality and human rights in England and Wales’, Research Report No 84, p 83, available at <http://www.equalityhumanrights.com/sites/default/files/documents/research/r84_final_opt.pdf> [accessed 2-7-15]

¹⁴ Gail A. Van Norman, *Clinical Ethics in Anesthesiology: A case-based textbook* (Cambridge, 2011), p.52

Kingdom, practitioners who have a conscientious objection to abortion can rely on section 4(2) of the British Abortion Act 1967, which, however, excludes refusal on grounds of conscience of 'treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman'. This right is therefore limited only to the active participation in an abortion where there is no emergency regarding the physical or mental health of a pregnant woman.¹⁵

A refusal to engage in practices that are contrary to a person's conscientious beliefs may arise with respect to several other medical procedures, including sterilisation, fertility treatment, pre-natal examinations and the prescription or dispensing of contraceptives as mentioned above. It may be argued that such objections are not, at least in principle, conflicting with equality legislation, if objections to perform certain duties are dismissed by the objector as a whole and not selectively. A serious conflict with equality legislation would arise if the medical practitioner expressed their objections to perform their functions, only against a particular social group. For example, as noted by Kennedy and Grubb, a problematic scenario arises when medical practitioners refuse artificial insemination to lesbian women based on their sexual orientation.¹⁶

In the aforementioned example, the law would be interpreted in a way that gives precedence to equality legislation.¹⁷ For instance, interpreting section 38 of the Human Fertilisation and Embryology Act 1990 (as amended by the Human Fertilisation and Embryology Act 2008) *in light* of the Equality Act, such an objection would not fall within the scope of 'participating in any activity governed by this Act [the Human Fertilisation and Embryology Act]',¹⁸ since the objection is, in principle, to refuse treatment to a specific class of persons; it is not a conscientious objection to a medical procedure *per se*. It is suggested therefore, that although a conscientious objection to a medical procedure may be recognised under legislation, it may not be permitted if it is discriminatory or contrary to the equality and diversity policies of organisations and employers.

¹⁵ *Doogan and another v Greater Glasgow and Clyde Health Board* [2012] CSOH 32, 29 February 2012, opinion of Lady Smith, paras 75-80, available at <<http://www.scotcourts.gov.uk/opinions/2012CSOH32.html>> [accessed 20-6-15]

¹⁶ Kennedy I. and Grubb A., *Medical law* (Butterworths Publishing, 2000), p 1282.

¹⁷ Equality Act 2010, Ch 15.

¹⁸ Human Fertilisation and Embryology Act 1990, section 38(1) 'No person who has a conscientious objection to participating in any activity governed by this Act shall be under any duty, however arising, to do so'.

It is therefore clear that each occurrence of a conscientious refusal to treat or serve others needs to be considered on its own facts, as competing interests between different parties may emerge. For example, in *Pichon and Sajous v France*, considered by the European Court of Human Rights in 2001, the owners of a pharmacy refused to sell contraceptives on a doctor's prescription to three women on religious grounds; the women later lodged a complaint against the owners of the pharmacy to the local police, where the owners were found guilty for refusing to sell the contraceptives and later ordered to pay damages to the complainants. After exhausting all their appeal rights, the pharmacy owners lodged a complaint to the European Court of Human Rights, arguing that their right to freedom of religion under Article 9 of the Convention had been ignored by the domestic courts. The Strasbourg Court, in dismissing their application, ruled that the applicants could not 'give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere'.¹⁹

It consequently emerges that an important consideration in relation to the expression of conscientious objections in medical healthcare is the balance and limits of religious and other manifestations and how these affect the rights and freedom of others, including reproductive rights which constitute a crucial aspect of the right to private and family life.²⁰

II THE IMPACT OF *EWEIDA V UK* ON CASES CONCERNING RELIGIOUS MANIFESTATIONS IN THE WORKPLACE

The standard test for establishing a genuine conscientious objection requires that the objection must be linked to a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 ECHR.²¹ Nevertheless, even if a genuine conscientious objection is recognised as being of sufficient cogency and importance, the refusal to accommodate such an objection does not necessarily give rise to a violation of Article 9 ECHR. The right to manifest a conscientious objection is subject to permissible limitations posed by Article 9(2) ECHR when measures taken to restrict an individual's freedom of thought, conscience and religion are prescribed by law and are necessary in a

¹⁹ *Pichon and Sajous v France* (2001), op cit 12.

²⁰ *Tysiac v Poland* (2007), app no 5410/03, 45 EHRR 42.

²¹ *Bayatyan v Armenia* [2011], op cit 4 para. 110.

democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In *Ladele v London Borough of Islington* [2009],²² the UK Court of Appeal found against the appellant, a former registrar that challenged her dismissal from employment that resulted from her non-involvement in the registration of civil partnerships for same sex couples. The appellant had refused to perform her duties towards same-sex couples on the basis of her religious beliefs.

Ms Ladele claimed that, in failing to treat her differently from staff that did not have a conscientious objection to registering civil partnerships, the local authority had discriminated against her on the basis of her religion.²³ She further argued that the local authority had discretion not to designate her as a registrar of civil partnerships but failed to exercise this discretion by accommodating her request to be exempted from her duties in relation to civil partnerships. The Court of Appeal concluded that there had been no unlawful religious discrimination by the local council against the appellant, despite the fact that the nature of her duties had been altered substantially since she was appointed as a registrar.

Ms Ladele's case was subsequently heard by the European Court of Human Rights in *Erweida v UK* in 2010, which considered four different claims from individuals who were dismissed from their employment because of their failure to comply with their employers' equality and diversity policies²⁴, insofar as those policies were at odds with their religious beliefs. In finding no violation of Ms Ladele's Convention rights, the Strasbourg court held that 'regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State'.²⁵ The court reiterated the principle previously expressed in *Shalk and Kopf v Austria*, that 'same-sex couples are in a relevantly

²² *Ladele v London Borough of Islington* [2009] EWCA Civ 1357

²³ On appeal, *Ladele v London Borough of Islington* [2008] UKEAT 045308 1912, judgment of 19 December 2008, para 51

²⁴ For example, in Ms Ladele's case, the London Borough of Islington was enforcing the "Dignity for All" Equality and Diversity policy, available at <[http://www.islington.gov.uk/publicrecords/library/Community-and-living/Information/Factsheets/2011-2012/\(2012-03-03\)-Dignity-For-All.pdf](http://www.islington.gov.uk/publicrecords/library/Community-and-living/Information/Factsheets/2011-2012/(2012-03-03)-Dignity-For-All.pdf)> [accessed 11-7-15]. In the case of another applicant, Mr McFarlane, his employer 'Relate' also had an Equal Opportunities Policy containing a positive duty to achieve equality; available at <http://www.relate.org.uk/files/relate/equal_opps_monitoring_and_health_declaration.doc> [accessed 11-7-15].

²⁵ *Erweida v UK* [2013] ECHR 37, para. 84

similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, although since practice in this regard is still evolving across Europe, the Contracting States enjoy a wide margin of appreciation as to the way in which this is achieved within the domestic legal order'.²⁶ This wide margin of appreciation meant that the United Kingdom could exercise its discretion to use all means it deemed appropriate to enforce its domestic equality laws requiring civil registrars to perform their duties both in relation to the registration of marriages and civil partnerships.

The principle on non-discrimination and its strong enforcement in domestic legislation played a crucial part in the outcome of this case. Employers often incorporate non-discrimination principles in the form of equality and diversity policies to ensure compliance with the law. As the European Court noted referring to Ms Ladele, 'the borough of Islington was not merely entitled, but obliged to require her to perform civil partnerships'.²⁷ The European Court placed emphasis on the obligatory, rather than the discretionary nature of performing duties prescribed by the employer. The case of *Erweida v UK* echoes the need for a careful balance between religious expressions and manifestations in the work place, and the need to enforce equality legislation by refusing to accommodate exemptions from professional duties when this would result to discrimination against others on any of the grounds protected under the Equality Act 2010, namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.²⁸ The Equality Act 2010 incorporated the Employment Equality Framework Directive 2000/78/EC which establishes, *inter alia*, a general framework for equal treatment in employment and an obligation to provide reasonable accommodation for people with disabilities.

Although *Erweida* confirms that conscientious objections of sufficient cogency and seriousness are capable of attracting the protection of the European Convention on Human Rights under Article 9, the jurisprudence of the European Court of Human Rights indicates that States are under no positive obligation to accommodate conscientious objections when these are conflicting with the overarching aims of equality legislation and employment policies. Furthermore, in light of Directive 2000/78/EC the meaning of 'reasonable

²⁶ *Ibid*, para 105

²⁷ *Ibid*, para 29

²⁸ Equality Act 2010, s 4.

accommodation' should be taken so as to facilitate the access of disabled persons to employment and to eliminate disadvantages against them.

The debate on accommodating religious beliefs has not led to any law or policy changes since *Eweida v UK*, whereas the decision has been reiterated in subsequent cases. Its implications are echoed in Lady Hale's *obiter dicta* in *Bull et al v Hall et al* where she stated:

'I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases. This is reinforced by the decision in *Eweida v United Kingdom* (2013) 57 EHRR 8, where the Strasbourg court abandoned its previous stance that there was no interference with an employee's right to manifest her religion if it could be avoided by changing jobs. Rather, that possibility was to be taken into account in the overall proportionality assessment, which must therefore consider the extent to which it is reasonable to expect the employer to accommodate the employee's right'.²⁹

It therefore remains as the employer's duty to accommodate their employees' conscientious objection; nevertheless, *Eweida* is already being used in adjudication in light of the ECHR's current approach in determining whether the employer's restrictions constituted proportionate means of pursuing a legitimate aim and whether the right balance had been struck. Describing it as a "distraction" in finding a violation of Article 9 in *Greater Glasgow Health Board v Doogan et al*, a UK Supreme Court decision concerning the refusal of two Christian nurses to be involved in abortion procedures, Lady Hale stated that

'Refusing for religious reasons to perform some of the duties of a job is likely (following the decision of the European Court of Human Rights in *Eweida v United Kingdom* ((2013) 57 EHRR 8) to be held to be a manifestation of a religious belief. There would remain difficult questions of whether the restrictions placed by the employers upon the exercise of that right were a proportionate means of pursuing a legitimate aim.'³⁰

²⁹ *Bull and another v Hall and another* [2013] UKSC 73, para 47.

³⁰ *Greater Glasgow Health Board v Doogan and another (Scotland)* [2014] UKSC 68.

Even though Lady Hale recognised that the reasonable accommodation of employee's religious beliefs depended on practicalities that could be resolved at tribunal level,³¹ the decision of the Supreme Court in *Doogan* reiterates the significance of *Erweida* and its impact in the workplace. *Erweida* has further been applied more recently and at first instance in *Lee v Ashers Baking Co Ltd*³², otherwise known as the "gay cake" case where a Belfast court found Ashers to have breached equality and non-discrimination laws by refusing service to a client because of their sexual orientation. The case went on appeal but it failed.³³ The court repeated that the bakers were not allowed to provide a service only to people who complied with their religious beliefs. This cements the courts' position that businesses in Northern Ireland are not exempted from equality legislation.

III ATTEMPTS FOR LEGISLATIVE REFORM TO ACCOMMODATE RELIGIOUS MANIFESTATIONS IN THE WORKPLACE

As indicated by the following examples, the legislature in the United Kingdom has so far declined to demonstrate a willingness to accommodate the full spectrum of religious manifestations in the work place, and, in particular, refusals to solemnise or register civil partnerships, same-sex marriages or facilitate same-sex parent adoptions.

In 2003, Baroness Blatch, during a debate on the Local Government Bill 2003, proposed a right to 'opt-out' for Christian social workers who refused to participate in adoptions by same-sex couples.³⁴ Lady O' Cathain went further to suggest an exception to participate in any placement under section 18 of the Adoption and Children Act 2002 (concerning placement for adoption by agencies) where a person had a conscientious objection based on their religion or belief.³⁵ Lady O' Cathain, in a House of Lords debate on Equality Bill in

³¹ *Ibid*, para 24 (Lady Hale): 'their employers should have made reasonable adjustments to the requirements of the job in order to cater for their religious beliefs. This will, to some extent at least, depend upon issues of practicability which are much better suited to resolution in the employment tribunal proceedings'.

³² *Lee v Ashers Baking Co Ltd* [2015] NICty 2 (19 May 2015)

³³ www.courtsni.gov.uk

³⁴ Official Report of the Grand Committee on the Local Government Bill, HL Deb 23 June 2003 vol 650 cc1-58GC, Para 39GC, available at <http://hansard.millbanksystems.com/grand_committee_report/2003/jun/23/official-report-of-the-grand-committee> [accessed 11-7-2015]

³⁵ Local Government Bill, moved Amendment No. 13, 10 September 2003 available at <<http://www.publicwhip.org.uk/division.php?date=2003-09-10&number=5&house=lords&display=allvotes>> [accessed 11-7-2015]

2005 suggested a prohibition that would allow exemptions from officiating or participating civil partnerships under the Civil Partnership Act 2004, and from arranging or participating in the registration of marriage involving a person that have legally changed their gender under the Gender Recognition Act 2004.³⁶ The government refused to implement the proposed amendment and it was subsequently withdrawn.

Two further amendments to the Equality Bill (now the Equality Act 2010) were proposed to the House of Lords in 2010. The amendments, proposed by Baroness Butler-Sloss, constitute some of the first attempts to incorporate ‘reasonable accommodation’ clauses in relation to those refusing to provide services to LGBT individuals. In a controversial motion, Baroness Butler-Sloss proposed the insertion into the Equality Bill of a right not to be ‘complicit with an action or circumstance’ which would be contrary to the beliefs of employees.³⁷ These amendments were also withdrawn.

Supported by Baroness Cumberlege, Lord Mackay and Baroness Williams, Baroness Butler-Sloss has proposed similar amendments to the Marriage (Same Sex Couples) Bill that was later passed into law in 2013. The suggested amendment was the following:

Page 2, line 7, at end insert—

(6) Any duty of a person employed as a registrar of marriages on the date this Act comes into force (“relevant registrar”) to solemnise marriages is not extended by this Act to marriages of same sex couples if the relevant registrar has a conscientious objection to doing so.

(7) Nothing in subsection (6) shall affect the duty of a relevant registrar to carry out any other duties and responsibilities of his employment.

(8) The conscientious objection, under subsection (6), must be based on a sincerely held religious or other belief concerning only the marriage of same sex couples and in

³⁶ House of Lords, Equality Bill [HL], Amendments to be moved in Committee, available at <<http://www.publications.parliament.uk/pa/ld200506/ldbills/002/amend/su002-ia.htm>> [accessed 11-7-2015]

³⁷ House of Lords, Equality Bill, available at <<http://www.publications.parliament.uk/pa/ld200910/ldbills/035/amend/ml035-ir.htm>> [accessed 11-7-2015]. Proposed text of clause 29: ‘A service-provider must make reasonable adjustments to ensure that, so far as is possible, no employee is required to be complicit with an action or circumstance to which the employee has a genuine conscientious objection on the basis of the employee's beliefs regarding sexual orientation.’

*any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.*³⁸

These proposals had the same fate as all other attempts to incorporate conscientious objection clauses into domestic legislation. None of these proposed amendments have been introduced into the Marriage (Same Sex Couples) Act 2013 that entered into force on 13 March 2014.³⁹

IV THE IMPACT OF EQUALITY LEGISLATION ON CATHOLIC ADOPTION AGENCIES

In light of the legislature's reluctance to incorporate conscientious objection clauses into legislation, a case that demonstrates the significance of equality legislation and the impact it had on Catholic adoption agencies with a charitable status is *Catholic Care v The Charity Commission for England and Wales* [2010].⁴⁰ In this case, the High Court considered two Charity Tribunal decisions that prevented the appellant, a Roman Catholic charity offering adoption services from selecting its charitable objects by amending its memorandum of association in order to prohibit adoption by same-sex couples. According to the High Court, this amounted to discrimination and did not fall within the exemption of Regulation 18 of the Equality Act (Sexual Orientation) Regulations 2007.⁴¹ Explaining the purpose of Regulation 18, Justice Briggs stated, *inter alia*, that:

*it was no part of the purpose of Regulation 18 to give carte blanche to publicly funded faith-based adoption agencies to continue to deny their services to same-sex couples, simply by changing their charitable instruments during the transitional period.*⁴²

³⁸ Marriage (Same-Sex Couples) Bill, Session 2013-14, available at <<http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0034/amend/ml034-ir.htm>> [accessed 11-7-2015]

³⁹ Marriage (Same Sex Couples) Act 2013, ch 30, available at <http://www.legislation.gov.uk/ukpga/2013/30/pdfs/ukpga_20130030_en.pdf> [accessed 20-6-15]

⁴⁰ *Catholic Care v The Charity Commission for England and Wales* [2010] EWHC 520 (Ch), available at <<http://www.bailii.org/ew/cases/EWHC/Ch/2010/520.html>> [accessed 20-6-15]

⁴¹ Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263. Regulation 18: 'Nothing in the Regulations will make it unlawful for a person to provide benefits only to persons of a particular sexual orientation, if (a) he acts in pursuance of a charitable instrument, and (b) the restriction of benefits to persons of that sexual orientation is imposed by reason of or on the grounds of the provisions of the charitable instrument.'

⁴² *Catholic Care v The Charity Commission for England and Wales* [2010], op cit 40 para 84.

In interpreting the meaning of Regulation 18, the Court concluded that,

*it is by implication limited to the provision of benefits on the basis of differential treatment which would be justified under Article 14, and in most cases (including the present) but not necessarily all, the regulatory powers of the Charity Commission would be sufficient to ensure that Regulation 18 conferred no exemption in relation to unjustified discrimination.*⁴³

In *Catholic Care v The Charity Commission for England and Wales*, the High Court ruled in unequivocal terms that charities will not be pardoned or given unrestricted power to act at their own discretion by relying on exemption clauses if they cannot demonstrate that their policies are proportionate to achieve a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to a protected characteristic. The same rationale could apply to section 193 of the Equality Act 2010 which provides for a charitable instrument exemption to provide benefits to beneficiaries sharing a protected characteristic. Allowing charities to provide the benefit of parenthood to heterosexual couples and openly discriminating against another group, would not only mean that exemptions are misapplied, but it would also result in a breach of Convention rights, such as Article 8 ECHR which protects the right to private and family life, and Article 14 ECHR which prohibits discrimination.

It is argued that since registrars are carrying out public duties, it is plausible to distinguish between objections of conscience and allow the existence of reasonable limitations to the exercise of religious manifestations in the workplace. Kenneth Norrie, for example, has argued that objections by health care professionals relating to abortion or other compulsions under the law is rather different since healthcare professionals are not carrying out public functions in the same way as public servants and there is therefore more leeway to accommodate religious manifestations for healthcare professionals if their actions do not constitute systemic discrimination. In England, a number of Catholic adoption agencies with charitable status faced closure since the Charity Commission found that policies of excluding non-traditional families are in breach of the Equality Act 2010 on the basis of discrimination on the ground of sexual orientation.⁴⁴ Catholic Care, a Roman Catholic

⁴³ *Ibid*, para 104

⁴⁴ *BBC News*, Catholic charity's appeal over gay adoption fails, available at <<http://www.bbc.co.uk/news/uk-11019895>> accessed on 26-1-17; Martin Beckford, 'Last Catholic adoption agency faces closure after Charity

charity lost an appeal in 2012 when it failed to demonstrate that it held compelling reasons justifying a change to its memorandum of association in order to exempt itself from the Equality Act 2010 and restrict adoption services to same-sex couples.⁴⁵

V 'REASONABLE ACCOMMODATION' AS A MEANS OF LEGITIMISING DISCRIMINATION

This paper adopts the definition of “reasonable accommodation” as this is found in the UN Convention on the Rights of Persons with Disabilities and in Article 5 of EU Directive 2000/78. According to the UN Convention on the Rights of Persons with Disabilities, ‘reasonable accommodation’ means ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. In the same light, according to Article 5 of Directive 2000/78,

in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

It is therefore clear that the notion of ‘reasonable accommodation’ was developed to give effect to the protection of disadvantaged minorities, and in light of the Directive, the provision of ‘reasonable accommodation’ is specific to the rights of disabled persons. One of the most recent attempts to modify the meaning of ‘reasonable accommodation’ and expand

Commission ruling’ (*The Telegraph*), 19 August 2010, available at <<http://www.telegraph.co.uk/news/religion/7952526/Last-Catholic-adoption-agency-faces-closure-after-Charity-Commission-ruling.html>> [accessed 18-7-15]

⁴⁵ *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*, appeal to the Upper Tribunal (Tax and Chancery) on appeal from the First-Tier Tribunal (General Regulatory Chamber) (Charity), ref no CA/2010/0007, available at <<https://www.judiciary.gov.uk/judgments/catholic-care-charity-commission-judgment-02112012/>> [accessed 26-1-17]

it to incorporate an exemption for employees exercising public functions was made by Lord Anderson of Swansea at the House of Lords during the Committee stage of the Marriage (Same Sex Couples) Bill. Lord Anderson proposed the insertion of clause permitting ‘reasonable accommodation’ for employers who express conscientious objections to performing their duties in a same-sex marriage:

Reasonable accommodation

(1) *An employer has a duty to take such steps as are reasonably practical to accommodate an employee who has a conscientious belief that marriage is the union of one man to one woman for life to the exclusion of all others.*

(2) *The duty in subsection (1) applies where an employee would otherwise be required to act in a way which is contrary to their conscientious belief about marriage.*

(3) *For the purposes of subsection (1), an employee is as defined in section 230 of the Employment Rights Act 1996 but does not include a registrar, a superintendent registrar, the Registrar General or any person holding or exercising judicial office.*

(4) *This section is without prejudice to any rights which an employer has under Schedule 9 to the Equality Act 2010.⁴⁶*

This proposed insertion was not included to the Marriage (Same Sex Couples) Act 2013.

In light of the arguments outlined above, reasonable accommodation in the workplace needs to be carefully balanced and adjusted to legally protected principles of equal treatment, since near-blanket recognition and accommodation of all religious manifestations without taking into account equality legislation could in certain cases amount to legitimising discrimination. Given the wide scope of “beliefs” falling within the right to freedom of thought, conscience and religion, accommodating manifestations that are directly discriminatory could potentially open the floodgates of litigation for other religious or non-religious objectors seeking the right to be exempted from their professional duties on the basis of their religious, moral or philosophical beliefs.

⁴⁶ Lords Hansard, Amendment 53, moved by Lord Anderson of Swansea, available at <<http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/130708-0003.htm>> [accessed 20-6-15]

VI CONCLUSION

Religious manifestations in the workplace have drawn considerable attention and debate over the years, particularly with the change of social perceptions and the gradual recognition of the rights of minorities. In cases of conscientious objections to medical procedures for children where the decision of the parents may have serious impact on the life of a child, it is acceptable for a court to give weight to the rights of the child over the right of their parents. For example, in cases where blood transfusion to a child is refused by the parents, a court may place the child in the care of a local council, or issue a court order in this regard, in order to allow the transfusion to preserve life. Therefore, domestic policies that may restrict religious manifestations, although they may seem punitive by the objector, can, in certain circumstances, be justified. As the recent jurisprudence on religious manifestation suggests, the nature of particular posts may become determinant factors in decisions involving conflict of rights in the field of employment. Public servants, Catholic adoption agencies and health care providers have so far been unsuccessful in their efforts to secure exemptions from their duties on the basis of their religious beliefs. Recent decisions such as those in *Bull v Hull* and *Lee v Ashers Baking Co Ltd* indicate that private businesses are also likely to be bound by equality legislation and its prevailing safeguards.

Balancing religious rights with the rights and freedoms of others has been proven a particularly challenging task for the legislature and the judiciary in the United Kingdom. The decisions and arguments outlined in this paper constitute evidence of the importance of safeguarding the right to equality and non-discrimination in the workplace. This view was highlighted by the Employment Appeal Tribunal in *Ladele* where it was held that the issue was not a matter of giving equal respect to the rights of the claimant and the rights of the LGBT community, but it was whether the means adopted by the local council to achieve this aim were proportionate and necessary in a democratic society. As indicated by the jurisprudence of domestic and international courts, the right of conscientious objection exists and is recognised where necessary; however it is not absolute. Any attempts to reasonably accommodate religious manifestations must, first and foremost, be balanced with the rights of others and must take into account the fundamental protections of non-discrimination and equality legislation.