Religious Freedom, Religious Discrimination and the Workplace

Second Edition

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Protection Against Religion and Belief Discrimination in the UK

The Employment Equality Directive[1] requires all Member States to protect against discrimination on grounds of religion and belief in employment, occupation and vocational training. In response, the Employment Equality (Religion or Belief) Regulations 2003 were introduced in Great Britain and came into force in December 2003, and have since been consolidated into the Equality Act 2010. Provisions protecting against discrimination on grounds of religion and political opinion were already in force in Northern Ireland,[2] and amending legislation was introduced there to ensure compliance with the Directive.[3] The aim of this chapter is to assess the extent to which the approach in the UK, based on the Employment Equality Directive, provides the level of protection for religious interests that was advocated in Chapter 3, and whether the difficult task of reconciling different interests has been appropriately achieved. The focus is on the Equality Act 2010 (the 'Equality Act'),[4] which does not apply in Northern Ireland.[5] However, the protection in Northern Ireland is very similar, and where differences occur these will be indicated.

[1] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 ('the Directive').

[2] Legislation to protect against discrimination on grounds of religion or belief was introduced in Northern Ireland in 1976 and is currently governed by the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO). The FETO requires registration of all employers with 10 or more employees, and requires all registered employers to monitor the composition of their workforce by persons belonging to either the Roman Catholic or Protestant communities and by sex. The Equality Commission for Northern Ireland has powers of enquiry and investigation, and powers to recommend or require employers to take affirmative action in a specified period. There are also extensive duties on public authorities to promote religious equality. See A McColgan, *Discrimination Law* (Oxford, Hart Publishing, 2005) 668–87.

[3] The Fair Employment and Treatment (Amendment) Regulations (NI) 2003 (SI 2003/520), which amended the definitions of harassment and indirect discrimination to bring them into line with the Directive.

[4] The Equality Act 2010 will be referred to as 'the Equality Act'. Where the Equality Act 2006 is referred to, the year will be included.

[5] Northern Ireland has long had protection against discrimination on grounds of religion, dating from the Government of Ireland Act 1920, through the Fair Employment Acts of 1976 and 1989 to the FETO 1998. Although this gives rise to extensive experience of dealing with religious discrimination, the historical and political context of the protection is peculiar to Northern Ireland, and so this experience is not always of direct relevance to the rest of the UK.

Prior to the implementation of the 2003 Regulations, and in the absence in Great Britain of any provisions relating directly to religious discrimination, the only protection available against discrimination on religious grounds was race discrimination. For some religious groups who share a common ethnicity, protection could be granted on grounds of ethnic origin rather than religion. Thus Sikhs and Jews have been defined as both ethnic or racial groups, and as religious groups.[6] This meant that they were already protected under the race provisions of the Race Relations Act 1976. In contrast, Muslims are not an ethnic group,[7] although, because in the UK the Muslim population is predominantly Asian, there have been findings in domestic law that discrimination against Muslims may amount to indirect race discrimination.[8] The clear lack of consistency between different religious groups was overcome with the introduction of protection against discrimination on grounds of religion in 2003.

The general protection against discrimination now contained in the Equality Act is examined below. The chapter starts with a discussion of the protection in general terms. It then turns to consider a number of specific situations, together with the case law, relating to religion and belief at work, such as dress codes, requests for time off for religious observance and requests to opt out of particular work tasks. The special position of schools is then considered, followed by a brief review of the residual employment protection available for those who fall outside the protection of the Equality Act.

I. Protection Under the Equality Act 2010

Definition of Religion and Belief

As discussed in Chapter 2 above, the Equality Act does not define 'religion and belief', although the phrase has been interpreted in the light of the jurisprudence of the ECtHR,[9] and working definitions can be seen to be emerging through the UK case law. The lack of a conclusive definition in the Equality Act reflects the absence of definition in the Directive, and provides the potential for inconsistent treatment of religious groups across Europe. The discussion of the case law in Chapter 2 concluded that the courts have struggled to achieve consistency in the definitions of religion and belief. For example, a belief system such as Scientology

[6] See *Mandla v Lee* [1983] 2 AC 548 and *Seide v Gillette* [1980] IRLR 427. In determining the meaning of 'ethnic group' in the UK, one of the factors considered was whether the group shared a religion.

[7] *Tariq v Young* Case 247738/88, *Equal Opportunities Review Discrimination Case Law Digest* 2.

[8] *JH Walker v Hussain* [1996] IRLR 11.

[9] For the approach under the ECHR see C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, OUP, 2001) Ch 4.

has been subject to inconsistent treatment within Europe;[10] and the UK courts have interpreted politically based beliefs, as well as beliefs relating to fox hunting, inconsistently.[11] A more positive view of this position is that the lack of formal definition provides flexibility to those interpreting the terms 'religion' and 'belief', and means that the courts will not be bound by definitions that could be under-inclusive, or could become outdated.

In the Northern Irish context, religion and politics are closely related, and it is clear that legal protection extends to cover political opinion. Even here, however, the boundaries may not be clear. In *Gill v Northern Ireland Council for Ethnic Minorities*,[12] the Northern Irish Court of Appeal rejected a claim that discrimination had occurred on grounds of political opinion where an individual had not been offered a job because of differences in approach to race relations. The claimant had advocated an anti-racist stance, whereas the local council (and the successful applicant) favoured a more 'culturally sensitive' approach. The Court defined political opinions as those concerning the government of the state or matters of public policy, rather than differing approaches to race relations.

Although the outer limits of the definition of 'belief' are not clear, the Equality Act clearly covers atheism and other non-religious viewpoints. References to religion or belief include reference to a lack of a religion or belief. This does more than provide that the Equality Act cover atheists. It would seem additionally to cover absence of a belief in a specific religion, so, for example, an employer who will only employ Christians discriminates against any applicant who is not a Christian.

Coverage of the Equality Act 2010

The Equality Act applies to all employers, religious or secular, and to the public as well as the private sector. It protects employees, and all those who contract personally to do work. It also applies to partnerships, barristers, office-holders, agency workers and other categories of worker not always protected by employment-related legislation.[13] Despite the wide range of workers and occupations covered by the Act, the Supreme Court has confirmed that two occupational groups remain outside its protection: volunteers and those engaged under a contract for the provision of services.

In *X v Mid Sussex Citizens Advice Bureau*,[14] a volunteer adviser with the Citizens Advice Bureau (CAB) was asked to stop attending as a volunteer. She claimed that the reason was connected to her disability. The Supreme Court had to determine

[10] For example, it is recognised in Italy (Country report Italy, European Equality Network 2014) but not in Germany (Federal Labour Court, *Bundesarbeitsgericht* 22 March 1995, *Neue Juristische Wochenschrift* 1996, 143, Country report Germany, European Equality Law Network, 2014).

[11] See discussion in Ch 2 at pp 26–29.

[12] *Gill v Northern Ireland Council for Ethnic Minorities* [2002] IRLR 74.

[13] See ss 39–60 for coverage of the Equality Act 2010.

[14] *X v Mid Sussex Citizens Advice Bureau (CAB)* [2012] UKSC 59.

whether her position as a volunteer was covered by the Equality Directive, and decided that it was not. The decision is particularly important in the religion and belief context, as many religion- and belief-based organisations will have significant numbers of voluntary workers: for example, churches, gurdwaras, temples and mosques will rely on large numbers of volunteers to run worship, youth groups, communal meals and food kitchens, religious education and study groups, and many other ancillary activities. Ethos-based charities also often have substantial volunteer programmes. If those who volunteer time had been covered by the provisions of the Equality Act, this would have great significance for organisations based on religion and belief. On the one hand, it is arguable that no reputable organisation should be worried by a requirement that it be governed by equality laws, as there is no reason not to ensure that its practices are non-discriminatory. On the other hand, the Court recognised that it is not necessary for all fields of activity with which people occupy themselves to be governed by provisions designed to protect equality in the field of employment. Moreover, although it was never argued that all volunteers should be covered by non-discrimination laws, an alternative ruling, perhaps allowing for a multi-factor test to be applied, would have led to significant uncertainty regarding the legal status of the large numbers who volunteer in religion- and belief-based work. However, while the decision was clear that volunteering in the CAB case was not an occupation for the purposes of the Equality Act, it did turn on particular facts. Where work is untaken on an unpaid basis, but with expenses paid, set hours of work and an obligation to undertake the work, it could be that the outcome would be different, particularly if there is an associated chance, in time, of paid employment.

Jivraj v Hashwani[15] concerned the application of equality law in the context of independent contractors, and in particular the use of religion as a criterion for the appointment of an arbitrator in a legal dispute. The arbitration clause in a legal agreement provided that any arbitrator appointed should be from the Ismaili community. When a dispute arose, Hashwani nominated an arbitrator who was not from the Ismaili community, and claimed that the requirement to be from that community contravened the law prohibiting religious discrimination in employment.[16] It was argued that the appointment of arbitrators is covered by equality laws because the arbitrators were persons contracted personally to carry out the work. However the Supreme Court held that arbitrators are self-employed, and so their selection, engagement or appointment is outside the scope of the non-discrimination laws. The Supreme Court focused on the fact that the equality provisions did not just cover those with a contract personally to do the work, but also applied to 'employment under' such a contract.[17] This meant that the term should

[15] *Jivraj v Hashwani* [2011] UKSC 40.

[16] The Employment Equality (Religion and Belief) Regulations 2003 (SI 2003/1660), now replaced by the Equality Act 2010.

[17] Employment Equality (Religion and Belief) Regulations 2003, reg 2, now replaced by the Equality Act 2010.

be interpreted in the light of the underlying understanding of the employment relationship. Given that the arbitrator was independent and not in a relationship of subordination to the user of the service, there was no employment relationship in the case. The majority of the Supreme Court also held that in any event, the religious requirement relating to the appointment of the arbitrator would have come within the exception to the non-discrimination principle, based on genuine occupational requirements, discussed below.

The case has been subject to significant debate.[18] On the one hand, by limiting the protection of discrimination law to those who are in a subordinate working relationship, the parameters of equality law are kept within the boundaries seemingly envisaged by the drafters of the EU non-discrimination law, where the concern is with employment-focused protection, in the context of employment, access to work, training, etc. On the other hand, the case, together with the case on volunteers, can create a significant lacuna in the law, with groups of the self-employed and volunteers vulnerable to discrimination. This is a particular concern given that any opaqueness in the law on employee status can be exploited by employers, who have at times chosen to define their relationship with those who perform work for them in ways that exclude employment protection.[19] It is also a concern given that voluntary work is often a route into paid employment. Whilst it is understandable that employment protection needs some limits and cannot apply outside the employment sphere, care needs to be taken that vulnerable groups are not left unprotected and unable to access the protection for religion and belief because they remain at the margins of the employment relationship.

As well as protecting areas of employment such as arrangements for interview, and terms and conditions of work, the Equality Act covers access to further and higher education.[20] It also covers the operation of qualifications bodies, which have power to confer professional or trade qualifications, and prohibits discrimination in decisions on the conferral of such qualifications.[21] Employment agencies are also covered,[22] as are trade organisations, with a prohibition on discrimination in the terms on which a person may be admitted to the organisation, or by refusing to accept, or deliberately not accepting, an application for membership. This reflects the fact that admission to a trade organisation may give access to markets for a business, or may give particular standing to a business, the denial of which could clearly cause some detriment to a religious person. However, it may be that the blanket restriction on discrimination by trade organisations will have

[18] For example, see C McCrudden, 'Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani*' (2012) 41(1) *ILJ* 30; and M Freedland and N Kountouris, 'Employment Equality and Personal Work Relations—A Critique of *Jivraj v Hashwani*' (2012) 41(1) *ILJ* 56.

[19] See A Bogg, 'Sham self-employment in the Court of Appeal' (2010) 126 *LQR* 166; A C L Davies, 'Sensible Thinking About Sham Transactions' (2009) 38 *ILJ* 318; see also discussion in Ch 3 at p 63.

[20] Equality Act 2010, ss 90–94.

[21] Equality Act 2010, s 53.

[22] Equality Act 2010, s 55.

significant consequences for religious groups.[23] A trade organisation is defined as an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.[24] The exact meaning of the wording is somewhat unclear, but it may cover organisations such as the Association of Christian Lawyers, and the Muslim Doctors and Dentists Association, which include a faith requirement for membership. Whether or not they are covered may depend on the extent to which such organisations provide economic benefits to members such as access to networks of clients, etc. The exception based on genuine occupational requirements does not apply to trade organisations. Therefore a trade organisation that discriminates in terms of membership on grounds of religion or belief will not be exempted on the basis that the discrimination is necessary to preserve the religious ethos of the organisation.

Direct Discrimination

Direct discrimination involves less favourable treatment because of religion or belief. Examples of the behaviour covered would be refusal to employ, train or promote staff on the basis of religion. Employment decisions based on stereotypical views of how those of a particular religion will behave would also be directly discriminatory.[25] As the Equality Act covers both religious employers and secular employers, the definition of direct discrimination will cover the religious employer who refuses to employ a person of a different religion or a person with no religion,[26] and the secular employer who refuses to employ religious people. Inconsistencies in the employment of religious staff will also be covered. For example, the employment of members of staff of one religion, coupled with a refusal to employ those of another, will amount to direct discrimination. Similarly, less favourable treatment, such as refusal of time off for religious observance for one religion whilst accommodating time off for others, would be directly discriminatory.[27]

Direct discrimination is defined as less favourable treatment 'because of' religion or belief:[28] it thus covers not only less favourable treatment because of a person's actual religion or belief, but also treatment based on the discriminator's perception of a person's religion, a perception that may, of course, be mistaken. It also covers discrimination based on another person's religion. Thus discrimination

[23] I am grateful to Peter Griffith for this point.

[24] Equality Act 2010, s 57(7).

[25] In *Mbuyi v Newpark Childcare* [2015] ET 3300656/2014, the claimant was successful in parts of her claim. The Employment Tribunal found that stereotypical assumptions had been made by the employer in the investigation of a dispute between Mbuyi and her colleague, which had little evidence to support them. This had been done because of her beliefs, and led to a finding that Mbuyi's treatment had been directly discriminatory: *Mbuyi* at paras 151–58.

[26] Although this may be covered by the 'occupational requirement' exception discussed below.

[27] *Holland v Angel Supermarket Ltd & Anor* [2013] ET 3301005/2013.

[28] Equality Act 2010, s 13.

based on an association with people of a particular religion (for example, discrimination against someone married to a member of a religious group) is covered, as is discrimination based on refusal to comply with a discriminatory instruction.[29]

The definition of direct discrimination does not provide any general exceptions or justifications. However, specific exceptions exist where, having regard to the nature or context of the work, being of a particular religion or belief is an occupational requirement and it is proportionate to apply that requirement in the particular case.[30] Thus requiring that a priest be Catholic, or that a teacher of Islam be Muslim, would not involve unlawful direct discrimination. Moreover, a slightly wider exception exists where the employer is a church or an organisation the ethos of which is based on religion or belief. The scope of these exceptions is discussed in more detail below.

Indirect Discrimination

Indirect discrimination is defined to cover the application of a provision, criterion or practice in relation to religion or belief, which applies to those who do not share the religion or belief but which puts or would put persons of the religion or belief in question at a particular disadvantage compared to others, and which cannot be shown to be a proportionate means of achieving a legitimate aim.[31] Indirect discrimination addresses the fact that discrimination is not always caused directly. Inherent in its meaning is the idea of disparate impact,[32] the idea that certain requirements will be harder for some to comply with than others. It reflects the fact that treating everyone the same may not achieve full equality but may instead create inequality, or at least allow inequality to remain, because of a failure to recognise the difficulties some groups may have in meeting what appear to be neutral requirements.[33]

The disadvantages suffered by religious staff may not be that employers refuse to employ or promote them directly because of their religion; instead, difficulty can arise because it is harder for religious staff to comply with some requirements imposed at work, even though those requirements are religiously neutral and applied to all staff. For example, an employer may not refuse to employ Christians, but a requirement to work on Sundays may make it harder for some Christians to take up the employment. Similarly, a uniform for female staff that consists of a skirt and short-sleeved top would not amount to a bar on the employment

[29] cf under the Race Relations Act 1976: *Showboat Entertainment Centre v Owens* [1984] 1 WLR 384.

[30] Equality Act 2010, Sch 9.

[31] Equality Act 2010, s 19. The wording of the Directive (Art 2(2)) is 'where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief … at a particular disadvantage compared with other persons' unless it can be justified.

[32] The concept of disparate impact discrimination was developed in the USA in *Griggs v Duke Power Company* 401 US 424 (1971).

[33] For an overview of the development of the concept of indirect discrimination, see S Fredman, *Discrimination Law*, 2nd edn (Oxford, OUP, 2011).

of Muslim women, but could act as a barrier to their entry into the particular employment. Protection from indirect discrimination is designed to address the neutral employment requirements which create particular difficulty for some staff. It reflects the fact that neutral rules which are generally applied can have a particularly detrimental impact on some religious groups. Clearly, such requirements are sometimes necessary, and so the concept of indirect discrimination includes an element of justification. A hospital will need to employ some staff to work on Sundays, for example, and so a requirement to work on Sundays will be capable of justification.

In order to establish indirect discrimination, an applicant must show that the neutral work requirement operates to the disadvantage of the particular religious group. The fact that an employee can, in fact, comply with a requirement will not prevent a claim being made;[34] the focus is on whether it is harder for the employee to comply in practice, and so the requirement puts the applicant at a disadvantage in comparison with others. Thus, Christian workers are clearly physically able to work on Sundays, but to do so may interfere with their religious observance. It is the practical difficulty in complying with a requirement to work on Sundays which would be the cause of discrimination, and any claim would not be blocked by the fact that compliance is physically possible.

Although cases cannot be ruled out by the physical possibility of compliance with a work requirement, applicants will need to show that they are put at a 'particular disadvantage' before indirect discrimination is made out. This wording is designed to overcome the difficulties caused by earlier definitions of indirect sex discrimination, which required proof that the proportion of women who could comply with a work-based requirement was 'considerably smaller' than the proportion of men who could comply. This caused uncertainty over what was meant by 'considerably' smaller, what evidence was needed to prove this, and who should comprise the comparator group with whom the applicant would be compared.[35] The wording in the Equality Act is designed to make it easier for applicants to prove indirect discrimination, requiring only that the applicant show that the requirement puts the religious person at a particular disadvantage compared to others. Exact statistical proof of the extent to which it is harder to comply is not needed, nor is there a need to find a comparator group which can be proven statistically to find it easier to comply with the requirement.

Despite the attempts to make the indirect discrimination provisions more user-friendly in the Equality Act, hurdles still remain for applicants attempting to bring

[34] Note that under earlier definitions of indirect discrimination contained in the Sex Discrimination Act 1975 and the Race Relations Act 1976, the applicant had to show that there was a requirement with which he or she could not comply. However, early case law decided that this covered requirements with which the applicant had difficulty complying, as well as requirements with which he or she could not comply at all: *Price v Civil Service Commission* [1978] ICR 27.

[35] These issues generated much case law with respect to sex discrimination; eg, see *Jones v University of Manchester* [1993] IRLR 218; *R v Secretary of State for Employment, ex parte Seymour Smith* [2000] IRLR 263 HL; *London Underground v Edwards (No 2)* [1998] IRLR 364, HL; and *Barry v Midland Bank* [1999] IRLR 581, HL.

claims of indirect discrimination. Although statistical analysis is not needed to prove the disparate impact of neutral requirements, nonetheless, applicants will still need to be able to show that the requirement causes them difficulty in comparison to others, and will need to be able to point to others in comparison with whom they are at a disadvantage.

A problem with regard to showing particular disadvantage can arise with respect to the use of indirect discrimination by those who have an individualised religious belief that is not shared by others. The wording of the Equality Act suggests that before indirect discrimination can be made out, the applicant must show that a neutral requirement is imposed that puts or would put persons of the same religion at a particular disadvantage. This suggests that there must be an element of group disadvantage suffered by the applicant, and such a reading accords with the traditional view of indirect discrimination as addressing group disadvantage. The wording is the same in relation to sex and race discrimination, where it rarely creates difficulties, as there will always be others in the same group as the applicant. However, in the context of religious discrimination, this restriction is of some significance. If an individual has a personal religious or philosophical belief that makes it difficult for her to comply with a particular work requirement, it can be difficult to come within the indirect discrimination protection unless she can point to others who are also disadvantaged.

This issue was raised in the domestic hearings in the cases in *Eweida v British Airways*.[36] Eweida was a member of the check-in staff for British Airways, who was refused permission to wear a cross over her uniform, as this was in breach of the airline's uniform policy. British Airways did allow Muslim women to wear the *hijab*, and Sikh men to wear turbans, on the basis that the items were required by the particular religions, and they could not be concealed under the uniform, whereas Eweida's cross could have been concealed and she did not believe that wearing the cross was a 'mandatory' requirement of her religion. Eweida's claim of indirect discrimination was unsuccessful, on the basis that the refusal to accommodate the request of a single believer was not covered by the indirect discrimination protection, as the Employment Equality (Religion and Belief) Regulations (and now the Equality Act) require a group disadvantage. The definition requires that a neutral requirement (here the requirement not to wear visible jewellery) be imposed that 'puts, or would put, *persons* of the same religion at a particular disadvantage'.[37] This suggested that more than one person must hold the belief. As Eweida was the only person identified in the case who held the particular belief, there could be no indirect discrimination. The result of this ruling is that individual believers who do not share their beliefs with others are not protected by the indirect discrimination provisions in the Equality Act.[38]

[36] *Eweida v British Airways* [2010] EWCA Civ 80. See the comment on the EAT decision in L Vickers, (2009) 11 (2) *Ecc LJ* 197.

[37] Emphasis added.

[38] This approach is confirmed in *Chatwal* v *Wandsworth Borough Council* [2011] UKEAT 0487-10-0607.

Ms Eweida was later successful in her claim under Article 9 ECHR,[39] and it is therefore arguable that the Equality Act should now be interpreted to comply with Article 9, so that its protection extends to those individuals who are disadvantaged on the basis of their own individual beliefs.[40] This can be done by a specific reading of section 19 of the Equality Act. The provision uses the plural term 'persons with whom B shares the characteristic' (here, religion or belief), but it prefaces this with the words 'it puts or would put' such persons at a disadvantage. The inclusion of the conditional 'would put' could mean 'would also put persons of the same view, were there to be any, at a disadvantage'. Understood this way, the indirect discrimination provisions can be extended to individuals in the absence of a group whose members hold the same religious or other belief, in accordance with the understanding of the requirements of Article 9, for which there is no need for group disadvantage.

Although this argument was put to the Court of Appeal in *Eweida*, it was not accepted, on the basis that 'the argument loads far too much on to the word "would"'.[41] Following the decision of the ECtHR upholding Eweida's appeal, however, the point was further discussed in *Mba v London Borough of Merton.*[42] The Court of Appeal in *Mba* recognised that the protection of freedom of religion under Article 9 ECHR does not require that the claimant first establish a group disadvantage. However, it held that this would not mean that the Directive or domestic law should be interpreted so as to enable indirect discrimination to apply to individual claimants:[43] it held that the Strasbourg decision did not affect the domestic jurisdiction. It thus seems that, after *Mba*, group disadvantage still needs to be shown for claims of indirect discrimination under the Equality Act. However, the point was not definitively dealt with in the case, as the question of group disadvantage had been conceded on the facts; moreover, as Lord Justice Vos confirmed, this issue was not fully argued.[44] The point therefore still seems to be left open, and it is arguable that despite the Court of Appeal's approach in *Eweida* and *Mba*, indirect discrimination should cover individual disadvantage, particularly given that the parent Directive 2000/78 is worded solely in the conditional.[45]

There are some clear advantages to the requirement for group disadvantage;[46] in particular, it would avert the danger that discrimination claims could be generated by a wide range of behaviours linked to individual beliefs.[47] However, there are clear disadvantages too, not least the fact that it leaves individual believers

[39] *Eweida v British Airways* [2013] ECHR 37, discussed in Ch 4 above.
[40] See G Pitt, 'Taking Religion Seriously' (2013) 42(4) *ILJ* 398.
[41] *Eweida v British Airways* [2010] EWCA Civ 80 [17].
[42] *Mba v London Borough of Merton* [2013] EWCA Civ 1562.
[43] *Ibid* [34]–[35].
[44] *Ibid* [41].
[45] See also N Bamforth, M Malik and C O'Cinneide (eds), *Discrimination Law, Theory and Context* (London, Sweet & Maxwell, 2008) 307–08.
[46] See, eg, R Allen and G Moon, 'Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and Their Implications' [2000] *EHRLR* 580, 601.
[47] *Eweida v British Airways* [2010] EWCA Civ 80 [18].

unprotected when it comes to manifesting their beliefs at work. Allowing individual indirect discrimination cases under the Equality Act would mean that the protection would accord with Article 9 ECHR and protect the manifestation of religion or belief by those who do not share their religion or beliefs with others, and who cannot make claims directly under the Human Rights Act 1998.[48] Moreover, allowing indirect discrimination to be used in individual belief cases would not mean that employers would need to anticipate and then meet every wish of employees with any belief, as indirect discrimination can be always justified where proportionate.

The issue of proportionality leads to a second question regarding group disadvantage that has been raised in the cases, relating to the size and make-up of any group with which a claimant should share the disadvantage. In *Eweida*, the Court of Appeal considered whether the group in question would need to comprise other co-workers, or just others with the same views in society at large. If the narrower view is taken, that the group must comprise other workers, then the lone believer would usually be left unprotected. However, if the broader understanding of the group is accepted, then the concern for the 'lone believer' may remain hypothetical, as other believers are likely to be identifiable somewhere, albeit not in the same workplace. In the event, the Court of Appeal left the question open, as no group, co-workers or otherwise, had been identified.[49] The issue was returned to in *Mba*, where the number of believers who would need to be identified as part of the group was discussed. The Court took the view that the size of the group would not determine whether there was a disadvantage; but that the number of people affected by practice or requirement would be relevant when deciding whether any potential indirect discrimination could be justified as a proportionate means to achieve a legitimate aim. So it may be more difficult for an employer to allow requests from many individuals, for example if large numbers of staff want time off work at the same time. This means, paradoxically, that it may be relatively easy to justify refusing to accommodate requests from large groups, and more difficult to justify refusals to accommodate requests by small groups of believers.[50] Yet it could equally be argued that more effort should be made by employers to remove obstacles to religious manifestation when large numbers are affected. Thus, although in *Mba* it was recognised that the size of the disadvantaged group may be relevant to the question of proportionality, it remains unclear exactly how this would affect the issue in any particular case.

Justification

Even if a work requirement does put a person at a disadvantage, there will only be unlawful indirect discrimination where the requirement cannot be justified.

[48] Although religion and belief are protected under Art 9 ECHR, individual employees in the private sector cannot make direct claims under the Human Rights Act 1998.

[49] *Eweida v British Airways* [2010] EWCA Civ 80 [18].

[50] *Mba v London Borough of Merton* [2013] EWCA Civ 1562 [36].

Once the employee has shown that a practice puts her at a disadvantage, then it is for the employer to show that the requirement is a proportionate means of achieving a legitimate aim. This means that appropriate and necessary requirements can be imposed, even though they may give rise to disadvantage to some groups. In effect, the test of justification enables any work requirements that will adversely affect the right to freedom of religion and belief to be subject to review in the light of the factual and contextual factors discussed in Chapter 3 above.

The case of *Azmi v Kirklees Metropolitan Borough Council*[51] can usefully illustrate how a restriction on religious practice can be justified as a proportionate means to achieve a legitimate aim. Here, a classroom assistant wanted to wear a face veil (*niqab*) when she was in the classroom with a male teacher, helping children for whom English is a second language. The EAT held that the treatment was indirectly discriminatory, as the requirement to have her face showing put her, as a Muslim, at a disadvantage. However, the court held that the indirect discrimination was justified: the restriction on wearing the *niqab* was proportionate given the need to uphold the interests of the children in having the best possible education; and for this they needed to be able to see the assistant's face.[52] In reaching the conclusion that the restriction on her religious practice was justified, the court noted that the school had thoroughly investigated before deciding that the restriction was necessary. For example, it undertook a review of Azmi's teaching to see if the quality of teaching was reduced when Azmi wore the face covering, and came to the conclusion that it was; it had also investigated whether it was possible to rearrange her timetable to enable her to assist only in classes with a female teacher, and found that it was not. In relation to the question of justification, Azmi argued that insufficient effort had been made to try to accommodate her religious requirements; for example, the school could have trialled and assessed alternative ways to improve her communication and performance when wearing the *niqab*. The court, while agreeing that the standard of review needed to be stringent, accepted that the school's actions were proportionate: it had investigated whether it could accommodate Azmi's requirement to wear the *niqab* and concluded that it could not.[53] The fact that Azmi could identify alternative accommodations that she would have preferred did not change matters.

Thus, the religion and belief provisions of the Equality Act have the potential to be interpreted to give appropriate protection against religious discrimination, and to provide proper protection for freedom of religion. The extent to which it does so will depend on the extent to which courts and tribunals are able to take into account the factors discussed in Chapter 3 above when assessing whether any religious requirements imposed at work are proportionate.

In particular, there is scope for the standard of justification to be developed to reflect interests other than the pure economic interests of the employer.

[51] *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154.
[52] *Ibid*, para 74.
[53] ET decision, ET Case no 1801450/06 para 22; Cited by the EAT *ibid*, para 67.

For example, it is arguable that at times indirect discrimination may be justifiable because of the need to protect the interests of other staff. In particular, the negative aspect of freedom of religion may be important, allowing practices that aim to provide a 'religion-free' environment to be justified. For example, if a workplace operates in an area where there is religious tension between different groups, it may be justifiable to require a secular workplace, even though this causes disadvantage to religious interests. Or an employer may wish to project a secular image to the public. Although there may be some economic reasons for this, it may also be motivated by the employer's own views, or the views of the majority of staff. If the rights of all parties are to be respected, it may be that the indirectly discriminatory effect of such a policy can be justified, as serving the legitimate aim of upholding the 'rights of others', even in the absence of a business or economic case. Conversely, the adverse effect of a requirement to work in an overtly religious atmosphere which may be experienced as a disadvantage by an atheist working for a religious employer may be justified as necessary to uphold the religious freedom of the employer.

The extent to which tribunals and courts interpret the Equality Act 2010 to balance the interests of religious freedom as well as equality appropriately, may be tempered by the need for consistency as between different grounds of discrimination, as discussed in Chapter 4 above. With regard to sex discrimination, the standard of justification is very high: any requirement must have a legitimate aim, the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.[54] Economic cost or customer preference will not usually justify indirect sex discrimination; and if less discriminatory means to achieve a legitimate aim can be identified, the indirect discrimination will not be justified. However, as can be seen from the indirect discrimination in cases involving religion, discussed elsewhere in this chapter, courts have not subjected potential discriminatory requirements to a particularly strict level of scrutiny. Thus, the fact that Azmi was able to identify alternative measures to accommodate her religious requirements did not mean that the restriction on religious dress was unjustified. Similarly, in *Ladele*, discussed below, the fact that an alternative accommodation could be identified, and had been implemented by similar employers, again did not mean that the employee's treatment was unjustified. This more moderate standard of justification review should allow the contextual issues identified in Chapter 3 to be taken into account in assessing proportionality. This allows issues such as whether the employer is a monopoly employer, whether the employer operates in the public or private sector, the socio-economic context in which the discrimination has occurred, as well as the interest of colleagues or service users to freedom from religion to be taken into account.

[54] *Bilka-Kaufhaus v Weber von Hartz* [1986] ECR 1607.