challenging religious privilege

national secular society

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Submission to the Joint Committee on Human Rights

1. This submission is made by the National Secular Society (NSS). The NSS is a not-for-profit non-governmental organisation founded in 1866, funded by its members and by donations. It campaigns for a diverse society where all are free to practise their faith, change it, or to have a faith at all. It opposes the imposition of religious dogma (for example on contraception or homosexuality) on society at large; and campaigns against the entrenchment of religious privilege in law through, for example, blasphemy laws or permitting religious groups to discriminate in ways others cannot. Its honorary associates include writers, academics, and parliamentarians. It is on the advisory board of the European Parliament Platform for Secularism in Politics, and is being considered for NGO consultative status at the United Nations.

2. This submission is made in response to the Joint Committee on Human Rights (JCHR)'s call for evidence on Human Rights judgments in 2013[1]. We wish to submit evidence on the state's positive obligation to secure employees' right to manifest their religion or belief (*Eweida v UK*) and to protect employees against discrimination based on political affiliation or belief (*Redfearn v UK*).

Summary of position on *Eweida v UK*

3. In September 2011, we made an intervention, led by Lord Lester of Herne Hill, to the European Court of Human Rights (ECtHR) in the case of *Eweida and others v UK* to argue that Britain's equality laws should be upheld and not compromised by religious exemptions[2]. When making our submission, we supported the UK in the four cases contained in *Eweida v UK,* and argued that the cases of Eweida, Chaplin, Ladele and McFarlane, all relating to alleged religious discrimination in the workplace, had been correctly dismissed by the UK courts.

Ladele and McFarlane

4. We note that where a public office-holder discharges public functions in providing services or facilities to the public, the European Convention on Human Rights (ECHR) as well as UK domestic written and unwritten law requires the office-holder to perform those

[1] http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/human-rights-judgments-call-for-evidence1/
[2] http://www.secularism.org.uk/uploads/nss-intervention-to-european-court-of-human-rights.pdf

functions without discrimination. For example, discrimination in service provision between heterosexual and homosexual couples falls within the ambit of Article 8 so as to engage Article 14.[3]

5. Correspondingly, employers are entitled to require that those who voluntarily undertake to provide services to the public must do so in a non-discriminatory fashion, even if they believe it is morally wrong to do so. At least where the prohibition concerns discrimination of a type that, under the ECHR, requires particularly weighty reasons to justify – such as on grounds of gender, race or sexual orientation – such a requirement will almost invariably be a proportionate means of protecting the rights and freedoms of others so as to justify a potential interference with Article 9 rights.

6. These core values cannot be weakened by the sort of argument presented by McFarlane and Ladele, who argued that, provided that no individual was actually deprived of a service, it was disproportionate and discriminatory for employers to require employees to provide services on a non-discriminatory basis when doing so obliged such employees to go against their religious beliefs in relation to what they regarded as the sinfulness of homosexual conduct.

7. As we argued in our submission, the harm done by invidious and unfair discrimination goes far beyond the deprivation of a service. An individual's dignity, sense of worth and full membership of the community is significantly affected by acts of discrimination even if she or he can obtain access to the relevant service elsewhere. For example, one would not say that Rosa Parks would have suffered no significant harm if there had been available to her an alternative bus service in Montgomery, Alabama which did not impose discriminatory seating arrangements. Likewise, a registrar who refused to marry inter-racial couples on the grounds that she or he felt such marriages were sinful makes stark the issue of discrimination as wrong, independent of service availability.

8. The NSS supports the ECtHR's interpretation of the margin of appreciation in these cases to the effect that that in drawing up anti-discrimination norms, states should not be allowed to disregard this form of harm.

9. We argue that one cannot selectively grant religious individuals exemptions from anti-discrimination norms whilst at the same time denying them to those whose conscience claims arise from non-religious sources. This was backed-up by the ECtHR, which affirmed that states have wide discretion in reconciling rights to freedom of conscience and religion on the one hand and freedom from discrimination on the other. In doing so, it confirmed that states are entitled to take account of the moral significance of discrimination beyond deprivation of a good or service.

Eweida and Chaplin

10. With reference to Eweida and Chaplin, we argue that restrictions on symbols and dress in the workplace can be justified in the interests of health and safety and for the protection of the rights and interests of fellow employees, users of public services, and private customers. In the context of private employment, the rights and freedoms at stake are not only those of other employees and citizens, but the employer's reputation

[3] It is now established that same-sex relationships fall within the notion of "family life" in Article 8: *Schalk and Kopf v Austria*, no. 30141/04, §95, 24 June 2010.

and commercial rights.[4] To the extent an employer's limits on the display of symbols of religion and belief in the workplace may interfere with freedom of religion, they can be justified in order to protect the employer's own reputation and the rights, freedoms and human dignity of its customers and employees.

11. The wearing and display of particular symbols and dress also give rise to particular issues. As the ECtHR recognised in *Dahlab,*[5] the wearing of religious clothing or symbols may be proselytizing in intention and/or effect. The rights and freedoms of others may reasonably include protection from such proselytizing. Such protection can justify restrictions on dress by the state; even more readily will it justify giving private employers similar discretion.

12. Whilst much of the publicity over the four cases was dedicated to the ruling in Ms. Eweida's case, her win was based on rather narrow factual questions and was, we argue, significantly less important than the rejection of the claims of MacFarlane and, particularly, Ladele. The ECtHR's ruling on Eweida came in the light of various factors such as the lack of evidence of adverse impact on her employer's reputation, employees already being allowed to wear symbols of other religions, and the fact that the cross Ms. Eweida wished to wear was discreet. Notably, Ms. Eweida's employers had updated their policy to permit crosses. What the ECtHR's ruling did demonstrate however was that the right to resign, that had been previously viewed as a sufficient protection for religious freedom in the workplace, could no longer be seen as such.

Summary of position on *Redfearn v UK*

13. The outcome of *Redfearn v UK* revealed, in our view, a limitation to a UK citizen's freedom of belief and association. We agree with the ECtHR that the UK failed to secure to the applicant under domestic law his right to freedom of association; i.e. that the UK failed in its positive obligation to protect its citizen from dismissal by a private employer based on his political affiliation.

14. The question of whether Mr Redfearn's dismissal was against his Human Rights according to UK law was not tested given that, under UK employment law, workers do not have a right against unfair dismissal unless they have been in the same job for 12 (now 24) consecutive months (and Mr Redfearn was with his employer for only 6 months), and given that this was a dispute between private individuals, he could not directly invoke the Human Rights Act 1998 as the legal basis for an action against his employer.

15. The ECtHR examined Mr Redfearn's complaint under Article 11 of the ECHR, rather than under Article 9. This notwithstanding, throughout the judgment the Court referred disjunctively to Mr Redfearn's political 'opinion' or 'affiliation', and we argue that the judgment would have been the same whether Mr Redfearn was a *believer* in BNP policies (relevant for Article 9), or whether he was an *actual member* (relevant for Article 11).

16. Whilst the ECtHR considered whether Mr Redfearn's rights under Article 11 were properly balanced against concerns for the safety of his colleagues and the service users, it needs to be acknowledged that potential dangers to the service users and Mr

[4] *Van der Heijden v the Netherlands*, no. 11002/84, Commission decision of 8 March 03 1985, Decisions and Reports 41, p. 268.
[5] *Dahlab v Switzerland* (dec.), no. 42393/98, ECHR 2001-V

Redfearn's colleagues came not from Mr Redfearn's privately held political affiliation, but from potential response to it. It seems unjust to have discriminated against Mr Redfearn on the grounds of how others *may have responded to him*.

17. In its third-party intervention to the ECtHR against the Mr Redfearn, the Equality and Human Rights Commission (EHRC) argued that an employer could legitimately dismiss a BNP member on a number of grounds, including whether employing him undermines public trust and confidence or harms the employer's reputation. It also said that regardless of whether there had been any complaints about the standard of an employee's work, that employing known BNP members nevertheless impacts on the employer's provision of services.

18. We argue that these arguments made by the EHRC fail to give due weight relative to an individual's fundamental rights to assembly and belief. An employee cannot lawfully be dismissed, we contend, on the grounds that someone else refuses to be served by them (so long as the beliefs of the employee do not affect the manner of the work undertaken by that employee). Just as an employer would not be justified in dismissing a person of any extreme political persuasion, likewise it would not be justified to dismiss BNP members solely because ethnic minorities do not want to be served by them.

19. An analogous example, which helps to put more starkly the injustice of penalising one individual on the grounds of his democratically-held (and indeed, in this case, democratically-*supported*) belief, would be to imagine what choice would have made if he were a Muslim living in a "British nationalist" area. We should not seek to discriminate in order to deter potentially violent people. Instead, we should be seeking to punish the violent, not those who hold beliefs privately and who have not used them to incite. It is noteworthy that Mr Redfearn was a *democratically elected* councillor as a member of a legal political party; he was also a "first class" employee with a perfect record.

20. Not only were the specific beliefs he held private, and should not have been relevant to his employer's decision-making process, but the ECtHR rightly, in our view, recognised the importance of protecting political belief for the maintenance of democracy. Crucially, the court also rightly noted that "Article 11 is applicable not only to persons or associations whose views are favourably received or regarded as inoffensive or as a matter of indifference, but also those whose views offend, shock or disturb."[6] The UK should not allow people to be deprived of employment simply because they hold views the majority find abhorrent.

21. In any case, the crucial issue raised in *Redfearn v UK* was that it was beyond the scope of UK employment tribunals to make any pronouncement on whether such dismissals are proportionate to the legitimate aim of preventing a clear and present risk of racial violence.

22. Given the importance of protecting the right to private belief and the right of association, we argue that the ECtHR was correct in judging that the UK needs to take "reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation". And that, in the case of *Redfearn v UK*, there was a violation of Article 11 of the Convention.

Further Considerations

[6] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"fulltext":["redfearn"],"languageisocode":["ENG"],"itemid":["001-114240"]}, §56.

23. We would encourage the JCHR to consider three key elements that we feel have come out of these judgments when looked at together. The first is: how it understands political belief to differ from religious belief or philosophical 'belief' (as defined in equality law), and whether it thinks we can allow discrimination on the grounds of political belief, whilst prohibiting discrimination on the ground of *religious* belief and philosophical 'belief'.

24. We understand that for the purposes of non-discrimination, the UK Equality Act 2010, based on Article 9 of the ECHR, recognises that for religious beliefs to qualify as such, they "must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity."[7] A "philosophical belief" has to be a belief that is genuinely held; it must "be a belief and not an opinion or viewpoint based on the present state of information available; be a belief as to a weighty and substantial aspect of human life and behaviour; attain a certain level of cogency, seriousness, cohesion and importance" Notably, these beliefs must also be "worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others."[8]

25. We argue that political allegiance is often grounded in deeply held beliefs that are cogent, serious, cohesive and important, in the same sense that religion and philosophical beliefs are. Apart from a sensitivity to a history of persecutions of people of certain religions and non-religions, it is unclear how or why we should exclude a political belief or allegiance as something equally in need of protection if religious belief is understood to deserve such protection. Article 9 of the ECHR, not only protects the right to hold religious beliefs but also *any* other belief (whether philosophical or political or otherwise). Indeed, the ECtHR has accepted 'veganism' as a belief under Article 9 (and valid for grounds of conscientious objection).[9] Likewise, a UK Employment Appeals Tribunal has ruled that 'beliefs about climate change and the environment' constituted a philosophical belief, going beyond "mere opinion" and giving rise to a moral order similar to most religions.[10]

26. We argue therefore, that a state cannot legitimately prohibit discrimination on the grounds of *religious* belief but allow discrimination on the grounds of *political* beliefs. Notably, if Mr Redfearn had been dismissed because he held certain religious beliefs or was a member of a particular church, he *would* have been allowed able to challenge his dismissal under UK employment law.

27. Crucially, we argue, if states prohibit religious discrimination, as the UK does, then they must also prohibit discrimination on the basis of political opinion or association, as required by the ECHR. The differential treatment between religious beliefs and political opinion – or, in the case of Mr Redfearn - political association by the UK is arbitrary and goes against the very core of Article 9 of the ECHR, an issue that was noted by the ECtHR in its judgment.[11] Thus, contrary to what the European Court's dissenting judges (Sir Nicholas Bratza, Hirvela and Nicolaou) argued, the grounds upon which the UK can allow discrimination within employment are *not* within its margin of appreciation to determine.

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[7] http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/7
[8] Explanatory notes of the equality act 2010. See here: http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/7
[9] United Kingdom Application No.00018187/91 (1993)
[10] http://www.bailii.org/uk/cases/UKEAT/2009/0219_09_0311.html
[11] http://www.bailii.org/eu/cases/ECHR/2012/1878.html, §54 - §57

28. The second element to consider is the importance of taking responsibility for one's own beliefs and actions. The case of *Redfearn v UK* differs from the collection of cases under *Eweida v UK,* in so far as the complainant was not demanding special treatment or seeking to opt out of a particular role in his job. The role of choice here is key; whilst people should be protected to hold as private beliefs any beliefs they choose, they are not entitled to have special arrangements that undermine the health and safety of others or the rights of others on the grounds of those chosen beliefs. There is a duty to take responsibility for the beliefs we choose, and recognise that if a role in a job goes against those beliefs that job is unsuitable. Despite the ECtHR, in the case of Eweida finding against resignation as a form of protection of freedom of religion it is *worth reflecting on how far employers should go to protect characteristics that have been chosen, when the complainant is herself seeking to discriminate*. Again, it is worth noting that Mr Redfearn was not seeking exemption of any kind, or seeking to discriminate.

29. We do note that religion/belief is unique among the characteristics protected under the UK scheme and the Convention, and support the fact that it is the *only* such characteristic that can be interfered with by a requirement to respect the protection of other characteristics. In particular, manifestations of certain religions/beliefs may involve discrimination on grounds of gender, race, nationality and/or sexual orientation, which the Court has consistently held requires particularly weighty reasons to be justified. We would argue that its uniqueness in this legal sense reflects a recognition of the role of choice here, and that religion/belief differs from the characteristics protected under the UK Equality Act in so far as it brings with it other beliefs. Unchosen characteristics such as gender, race, or sexual orientation do not bring with them a set of beliefs since they are biologically determined. This vast difference should be recognised when looking at cases of discrimination.

30. The third, and final, issue we would like to emphasise for the JCHR's consideration is the importance of the public/private distinction when considering beliefs held and questions of discrimination in relation to this. It should be remembered that Mr Redfearn was being punished for his beliefs and activities *outside the workplace*. This, it is worth emphasising, is an entirely different matter from seeking to follow or display one's beliefs whilst working. As secularists, we encourage the recognition of the public/private divide, which gives people the right to act and think as they please in their own time. If the rights to privacy and freedom of belief mean anything, they mean that one has the right to hold whatever beliefs one wants in one's own time. This can be contrasted however, with employees who bring their beliefs so far into the workplace that they seek to discriminate against certain service-users upon the grounds of those beliefs.