

Application nos. 48420/10 and 59842/10
Eweida and Chaplin v the United Kingdom

Application nos. 51671/10 and 36516/10
Ladele and McFarlane v the United Kingdom

**SUBMISSIONS ON BEHALF OF
THE NATIONAL SECULAR SOCIETY**

Introduction

1. These submissions are made on behalf of the National Secular Society ('the NSS'), with leave of the Vice-President of the Section.¹
2. The NSS is a not-for-profit non-governmental organisation founded in 1866, funded by its members and 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 status at the United Nations.
3. Neither the NSS nor secularism in general is opposed to freedom of religious thought, conscience and belief. The NSS works together with religious organisations on matters of common cause. It does not seek to interfere with believers following their faith in any way that does not impinge adversely and disproportionately on the rights of others. Secularism is not a religious viewpoint itself but a set of beliefs about how the relationships between religion, law, politics and the state should be structured to achieve fairness and mutual respect in a diverse and plural society. It should not be equated with intolerance towards religion: it takes no issue with religious belief, religious worship in its proper place, or people choosing to govern their private lives by reference to their religious (or philosophical) beliefs. All Contracting States are secular in the sense of maintaining a degree of separation between law, politics and religion while a number of States, such as France and Turkey, whose populations have strong religious traditions have officially secular identities. The Grand Chamber has held secularism to be consistent with the values underpinning the Convention.²

¹ Under Rule 44 §3 of the Rules of the Court. Letter dated 5 August 2011 from Mr TL Early, Section Registrar, to the NSS.

² *Şahin v Turkey* [GC], no. 44774/98, §114, ECHR 2005-XI.

The UK equality scheme

4. Equal treatment without discrimination is a recognised common-law principle.³ As a matter of statute law, for almost fifty years, successive UK governments and parliaments have developed a wide-ranging and robust legislative scheme to promote equality of opportunity and treatment on merit and to provide effective legal redress for the civil wrong of unlawful discrimination. The current legislation, largely contained in the Equality Act 2010, is more comprehensive in scope and remedies than any elsewhere in Europe or the common-law world. It reflects and goes beyond the minimum protections laid down by the European Union.⁴ By section 3 of the Human Rights Act 1998, UK courts must, so far as possible, read and give effect to the scheme, like all primary and subordinate legislation, in a way compatible with Convention rights, including the rights protected by Articles 9 and 14 of the Convention. The fundamental principles of domestic law, and the rationale behind the relevant concepts, were summarised by Baroness Hale in her leading speech in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, in a passage cited by the Court in *DH and Others v Czech Republic*.⁵
5. Religious discrimination (direct and indirect) was made unlawful in Great Britain⁶ in the Equality Act 2006, and religion and belief (or lack of belief) are included among the characteristics protected against direct or indirect discrimination by the Equality Act 2010. Under the scheme ‘religion or belief’ is defined as any religious or philosophical belief, and a reference to belief includes a reference to a lack of belief.⁷ The Explanatory Notes that accompany the Equality Act 2010 state (§51) that this is ‘a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9.’
6. The statutory instruments at issue in these cases are the Employment Equality (Religion or Belief) Regulations 2003 (the ‘2003 Regulations’) and the Equality Act (Sexual Orientation) Regulations 2007 (the ‘2007 Regulations’). The 2003 Regulations prohibited direct and indirect discrimination on grounds of religion or belief in employment. They implemented in part a European directive establishing a general framework for equal treatment in employment.⁸ The 2007 Regulations prohibited direct and indirect discrimination on grounds of sexual orientation in fields including the provision of goods and services, education, and the exercise of public functions.

³ *Arthur JS Hall and Co v Simons* [2002] AC 615 (HL), at 618, *per* Lord Hoffmann.

⁴ For example, discrimination, in the provision of goods and services, on grounds of age, religion/belief, sexual orientation and disability, is now prohibited under UK law. In 2009 the EU Parliament adopted the Commission’s proposal to create equivalent protection at EU level. Such legislation is still being negotiated. The European Court of Justice has recognised the general principle of equality as a fundamental principle of Community law: see e.g. case C-152/81, *Ferrario v Commission* [1983] ECR 2357, at 2367.

⁵ [2004] UKHL 55, [2005] 2 AC 1, at paragraphs 73-75, cited in *DH and ors v Czech Republic* [GC], no. 57325/00, §106, ECHR 2007-....

⁶ It was already unlawful in Northern Ireland.

⁷ 2003 Regulations, reg 2.1; Equality Act 2010 s.10.

⁸ Council Directive 2000/78/EC of 27 November 2000, [2000] OJ L 303/16.

7. Both sets of Regulations have since been brought together in the Equality Act 2010, which harmonized and strengthened the legislative scheme. The Act prohibits direct and indirect discrimination, harassment and victimisation because of one or more of the characteristics it protects: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Such discrimination is prohibited (*inter alia*) in the provision of goods and services to the public, the exercise of public functions, the disposal and management of premises, employment and education. The provisions brought into force require that certain public bodies, when carrying out their functions, have due regard to the need to eliminate unlawful discrimination, harassment or victimisation; to advance equality of opportunity; and to foster good relations.
8. As with other characteristics, the prohibition of discrimination because of religion or belief is subject to exceptions. Some of these exceptions make particular accommodation for religious people and faith organisations: for example, charities may make acceptance of a religion or belief a condition of membership;⁹ faith schools may give preference to members of their own religion in their admissions criteria;¹⁰ and in some cases religious employers may discriminate on grounds not only of religion but also sex, marital status and sexual orientation.¹¹ On the other hand, the content of school curricula is protected, so that for example teaching evolution would not be religious discrimination against a pupil who believed in creationism.¹²

Balancing freedom of conscience and other rights

9. These exceptions, implemented in detailed and nuanced statutory provisions, exemplify how carefully and sensitively the UK scheme balances competing rights, and in particular how it balances the protection of freedom of thought, conscience and religion, with its broad prohibition against discrimination.
10. The scheme distinguishes between the separate concepts of ‘direct’ and ‘indirect’ discrimination. Direct discrimination arises where, because of a protected characteristic, A treats B less favourably than A treats or would treat others, and direct discrimination is unlawful without the need for a discriminatory motive or intent. It is sufficient for the complainant to show that he or she would have been treated in the same way as a relevant comparator, but for the complainant’s protected characteristic.¹³ Indirect discrimination occurs where a provision, criterion, or practice puts persons sharing a protected characteristic at a particular disadvantage when compared with persons who do not share it, and which cannot be shown to be a proportionate means of achieving a legitimate aim.

⁹ Equality Act 2010 s.193.

¹⁰ Equality Act 2010 sch 9 para 5.

¹¹ Equality Act 2010 sch 9 para 2.

¹² Equality Act 2010 s.89(2).

¹³ *Birmingham City Council v Equal Opportunities Commission* [1989] AC 1155 (HL); *James v Eastleigh Borough Council* [1990] 2 AC 751 (HL).

11. Direct discrimination cannot be justified as lawful except where it comes within carefully tailored exceptions (for example, in employment where there is a genuine occupational requirement for a person of a particular characteristic). Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

Parliamentary debate and scrutiny

12. The scope of such exemptions is the result of extensive public and Parliamentary debate. For example, during the passage of the Equality Bill 2010, the following amendments were proposed with cases of the kind now before the Court in mind:
13. An exception to the prohibition on non-discrimination in the provision of goods and services where complying would require a person to act inconsistently with his genuine conscientious objection;¹⁴ and
14. A requirement that service providers make reasonable adjustments to ensure that, so far as possible, no employee is required to be complicit with an action or circumstance to which he has a genuine conscientious objection on the basis of his beliefs regarding sexual orientation.¹⁵
15. The Minister in charge of the Bill, Baroness Thornton, explained, in opposing the first proposed amendment, that:

‘We are talking here about everyday activities – such as shopping, going to the bank, eating in a restaurant, seeking assistance from the police, applying for planning permission or visiting a health clinic – which could for some people be made extremely difficult and unpleasant by discrimination. People are entitled to expect fair and unbiased treatment from commercial and publicly funded organisations, regardless of their protected characteristics ...

‘The Government are determined to tackle discrimination or disadvantage because of any protected characteristic and there is no hierarchy of rights. We believe the Bill strikes a balance between potentially conflicting rights, for example by providing some specific exceptions for religious bodies on grounds of their doctrine. While the Equality Bill maintains everyone’s right to express in a legitimate manner both religious and non-religious beliefs, it is only right that people employed by commercial and publicly funded organisations are not allowed to discriminate on any grounds, no matter what their private belief.’¹⁶

16. Baroness Royall of Blaisdon, the Minister for Equality, spoke for the Government in opposition to the second proposed amendment, as follows:

¹⁴ HL Deb 13 January 2010, vol. 716, col 591.

¹⁵ HL Deb 2 March 2010, vol. 717, col 1356.

¹⁶ HL Deb 13 January 2010, vol. 716, cols 596–7.

‘This is not about creating a hierarchy of rights. The Equality Bill has to strike a fair balance ... We would never allow a person to have a conscientious objection on the grounds of race or disability, so why is sexual orientation different?’¹⁷

17. After considerable debate these amendments were withdrawn. The Equality Act 2010 passed into law with cross-party support.
18. On 27 June 2011, the subsequent Coalition Government laid before the House of Lords for approval the Equality Act 2010 (Specific Duties) Regulations 2011, which impose specific duties on listed public authorities to enable them to carry out the public sector duty more effectively. Lord Waddington moved an amendment for the House to express regret (amongst other things) that the Regulations ‘seem likely to reinforce the failure of equality law to take proper account of freedom of religion and conscience.’¹⁸ The draft Regulations were debated on 6 September 2011, and the Minister, Baroness Verma, explained that Government’s view that the law does indeed take proper account of freedom of religion and conscience.¹⁹ The amendment was rejected by 258 votes to 126.²⁰
19. The legislative framework and the concepts upon which it is based have thus been carefully considered recently by successive Parliaments, and have the approval of successive Governments and the main political parties.

Compatibility with the Convention

20. In the NSS’s submission, the UK scheme is fully compatible with Article 9 of the Convention, as Article 9 has been consistently interpreted by the Court. Indeed, the scheme gives greater protection to religion than is required by Article 9 (or, in the NSS’s view, is appropriate or necessary).
21. Religion/belief is unique among the characteristics protected under the UK scheme and the Convention. 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.
22. In *Şahin v Turkey* (cited n.2, §115), the Court assumed that the applicant’s Article 9 rights had been interfered with, but found that the interference was outweighed by secular principles, in particular gender equality, which was ‘one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe’. The Court has explained that the same respect should be accorded to equality among

¹⁷ HL Deb 2 March 2010, vol. 717, cols 1369–70.

¹⁸ HL Deb 7 September 2011, vol. 730, col 125.

¹⁹ HL Deb 7 September 2011, vol. 730, cols 144–145. Lord Lester of Herne Hill QC took part in the debate and declared his professional interest as co-counsel for the NSS in the present matter.

²⁰ HL Deb 7 September 2011, vol. 730, col 149.

people of different sexual orientations, because ‘[j]ust like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.’²¹ Indeed, a contrary approach would conflict with Article 17 of the Convention, which implies that ‘no one should be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society.’²² Those values are guaranteed by the principle of secularism. The Grand Chamber has repeatedly held that conduct which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9.²³

Manifestations of beliefs protected under Article 9

23. The Court has consistently held that, but for very exceptional cases, the Convention right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.²⁴ It follows that it is not for Contracting States or their courts to determine the validity of an individual’s beliefs according to whether they conform to the official doctrine of the faith in question. Freedom of thought, conscience and belief is an individual right, and does not depend on membership of any group.
24. This principle need not, however, prevent the investigation of whether a professed faith is genuinely held, particularly where it is relied upon to claim a privilege.²⁵ Nor can it obviate the distinction between *manifestations* of a belief, which attract Article 9 protection, and acts merely motivated or inspired by a belief, which do not do so. As the Court’s Statement of Facts recognises, it is clear from the consistent jurisprudence of the Court that:

‘Article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.’²⁶
25. When interpreting domestic law compatibly with Convention rights in accordance with the Human Rights Act 1998, UK courts apply this distinction. Not every set of facts that, in UK law, discloses indirect discrimination because of religion or belief, will necessarily involve a ‘manifestation’ in Article 9 terms.
26. It is doubtful whether refusal to carry out a professional duty, or provide a service, can constitute a ‘manifestation’. Article 9 was not engaged when a judge was disciplined for

²¹ *Karner v Austria*, no. 40016/98, §37, ECHR 2003-IX.

²² *Zdanoka v Latvia* [GC], no. 58278/00, §99, ECHR 2006-IV.

²³ *Refah Partisi (the Welfare Party) and Others v Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §93, ECHR 2003-II; *Şahin v Turkey* (cited n.2), §114.

²⁴ *Hasan and Chaush v Bulgaria* [GC], no. 30985/96, §78, ECHR 2000-XI; *Jehovah’s Witnesses of Moscow v Russia* (2011) 53 EHRR 4, §141.

²⁵ *Kosteski v former Yugoslav Republic of Macedonia*, no. 55170/00, §39, 13 April 2006.

²⁶ *Kalaç v Turkey*, 1 July 1997, § 27, *Reports of Judgments and Decisions* 1997-IV.

conscientious non-observance of his duties.²⁷ In *Pichon and Sajous v France*, two chemists were convicted for refusing, on religious grounds, to sell contraceptive pills.²⁸ They argued that the refusal was a manifestation of their freedom of religion. The Court held otherwise, stating as a matter of principle that:

‘Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance ... [it] does not always guarantee the right to behave in public in a manner governed by that belief. The word “practice” used in Article 9 §1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief.’

27. It is a question of fact and context whether the wearing of a particular item (and/or the insistence that the item be visible) amounts to a manifestation protected by Article 9. When determining whether the facts of a case disclose a manifestation protected by Article 9, what matters is not whether a given belief is legitimate, but whether the wearing of a particular item, on the basis of the applicant’s own account of his or her belief, amounts to a manifestation – that is, whether it is the result of a command of conscience rather than a mere desire to express oneself.²⁹ Where a domestic court has made such a finding of fact, the Court requires cogent elements to depart from it.³⁰
28. The distinction between manifestation and motivation applies equally to non-religious beliefs.³¹ In the NSS’s submission, to protect Article 9 as a ‘precious asset for atheists, agnostics, sceptics and the unconcerned’,³² it is important (as UK equality law recognises) that the distinction is not applied so as to create a hierarchy of rights by giving greater protection to religious forms of conscience to forms of conscience that are not religious in nature. Acts, including the refusal to provide a service and the wearing or display of particular costume or symbols, should not more readily be held to constitute a manifestation when believed to follow from religious doctrine than when they result from philosophical conviction or rational analysis.³³ As the Grand Chamber held in *Lautsi v Italy*, Article 9 ‘imposes on Contracting States a “duty of neutrality and impartiality” ... Their role is to help maintain public order, religious harmony and tolerance in a democratic society.’³⁴ Any other approach would both be contrary to Article 9 and, in

²⁷ *Cserjés v Hungary* (dec.), no 45599/99, §1, 5 April 2001.

²⁸ *Pichon and Sajous v France* (dec.), Reports of Judgments and Decisions 2001-X p 371.

²⁹ Though the latter might well be protected as part of the exercise of the right to freedom of expression under Article 10 of the Convention.

³⁰ *Giuliani and Gaggio v Italy* [GC], no. 23458/02, §180, 16 February 2011.

³¹ *Arrowsmith v UK*, no. 7050/75, Commission decision of 16 May 1977, §71, Decisions and Reports 8, p. 123.

³² *Kokkinakis v Greece*, 25 May 1993, §31, Series A no. 260-A.

³³ For example, a refusal to employ mothers of young children that is based on a non-religious belief in traditional gender roles should receive no more or less protection than a similar refusal based on a religious commitment to such gender roles.

³⁴ *Lautsi v Italy* [GC], 30814/06, §60, 18 March 2011.

according less favourable treatment to individuals because of their lack of religious belief, amount to a violation of Article 14.

Employment and public services

Interference

29. Strasbourg jurisprudence has consistently recognised that where public servants have obligations to their employers inconsistent with their religions or beliefs, the requirement to respect such obligations does not give rise to an interference with Article 9.³⁵ In the discretionary field of employment, freedom to resign is the ultimate guarantee of freedom of conscience.³⁶ This distinguishes it from contexts involving the exercise of fundamental political rights such as holding parliamentary office,³⁷ in which obligations inconsistent with religion or belief are more likely to constitute an interference with Article 9 rights.
30. UK domestic courts have relied on the consistent jurisprudence of Strasbourg in defining their approach in this area. In *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, §23, Lord Bingham carefully considered ten decisions of the Court and Commission and concluded:

‘The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.’

31. This reasoning applies *a fortiori* in the context of private employment.³⁸ While Article 9 may impose some positive obligations upon Contracting States,³⁹ Convention jurisprudence discloses no positive obligations that would require States to protect employees against such requirements by private employers, and, in the NSS’s respectful submission, the Court should be slow to introduce them.

³⁵ *X v UK*, no. 8160/78, Commission decision of 12 March 1981, Decisions and Reports 22, p. 27; *Konttinen v Finland*, no 24949/94, Commission (plenary) decision of 3 December 1996, Decisions and Reports 87-A, p. 68; *Kalaç v Turkey*, no. 20704/92, 1 July 1997, §31, *Reports of Judgments and Decisions* 1997-IV. *Dahlab v Switzerland* (dec.), no. 42393/98, ECHR 2001-V does not contravene with this principle: the Court held if there was an interference – which it did not decide – it was justified. *Thlimmenos v Greece* [GC], no. 34369/97, ECHR 2000-IV concerned exclusion from a profession; the applicant had not refused to comply with his employment obligations.

³⁶ *X v UK* (cited n.35), §15; *Konttinen v Finland* (cited n.35).

³⁷ *Buscarini v San Marino*, no. 24645/94, §34, ECHR 1999-I.

³⁸ *Stedman v UK*, no. 29107/95, Commission decision of 9 April 1997, Decisions and Reports 89, p. 104.

³⁹ *Dubowska and Skup v Poland*, nos. 33490/96 and 34055/96, Commission decision of 18 April 1997.

Justification

32. Where an interference does arise, the question of whether it is justified should take the employment context into account.
33. 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 Convention, requires particularly weighty reasons to justify – such as on grounds of gender, race or sexual orientation – such a requirement will always be a proportionate means of protecting the rights and freedoms of others so as to justify a potential interference with Article 9 rights. Nor should these core Convention values be weakened by the argument that in some cases the service could be provided by other employees so as to permit discrimination on conscientious grounds. 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 he or she can obtain access the relevant service elsewhere. 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.
34. Where a public office-holder discharges public functions in providing services or facilities to the public, the Convention as well as domestic written and unwritten law requires the office-holder to perform those 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 14.⁴⁰ Whether or not Article 14 places positive obligations on Contracting States to ensure that similar requirements are imposed on private employees, such requirements are in the NSS's submission clearly justified under the Convention whether resulting from domestic law or the employer's discretion.
35. The wearing and display of particular symbols and dress also give rise to particular issues. As the Court recognized in *Dahlab* (cited n.35), 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.
36. Different people may be offended or even threatened by different symbols and dress. While some offence must be tolerated in a democratic society, such concerns can in the NSS's submission justify restrictions in the workplace in the interests of health and safety and for the protection the rights and interests of fellow employees, users of public

⁴⁰ 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. The NSS submits that a European consensus is emerging on non-discrimination in the provision of goods and services: see n.4.

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 and commercial rights.⁴¹ It follows from the Court's consistent jurisprudence that to the extent an employer's limits on the display of symbols of religion and belief in the workplace may interfere with Article 9, they can be justified in order, to protect the employer's own reputation and the rights and freedoms of its customers and employees, and their human dignity.

37. Where an employer allows the display of such symbols it will almost invariably be on a qualified basis, so as to exclude symbols found grossly offensive by co-workers or clients. In such cases it is important to respect the heavy burden the exercise of such inevitably discriminatory discretion will impose. Identifying those symbols and beliefs that are or are not offensive is a fraught task that threatens to entangle either the state or employers in the assessment of the legitimacy and validity of various beliefs. The Court should be slow to find a violation where a given policy was conscientiously applied, particularly when the extent and duration of any interference was limited, and/or alternative or interim arrangements were proposed. A discriminatory measure is not shown to be disproportionate merely because it is later altered to remove the different treatment.⁴²

Margin of appreciation

38. In striking the difficult balance between religious rights, public safety, public order, health or morals, and the rights and freedoms of others, and in assessing related issues under Article 14, it is clear that Contracting States have a considerable margin of appreciation in accordance with the principle of subsidiarity. The principles of equality before the law, pluralism and neutrality, unite the Contracting States; but while some States implement those principles by requiring judges and advocates to refrain from displaying religious symbols in court, others, such as the United Kingdom, permit Sikh advocates to wear turbans and Muslim women advocates to wear the *hijab* in court instead of wigs, to promote equality and diversity. The principle of subsidiarity permits such differences of approach.
39. A State's margin of appreciation should be accorded particular respect where all three branches of its government have carefully and recently considered, and given full weight to, the relevant Convention rights and obligations and the Court's jurisprudence.

LORD LESTER OF HERNE HILL Q.C.
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14 September 2011

⁴¹ *Van der Heijden v the Netherlands*, no. 11002/84, Commission decision of 8 March 03 1985, Decisions and Reports 41, p. 268.

⁴² *Abdulaziz, Cabales and Balkandali v UK* (Plenary), nos. 9214/80, 9473/81 and 9474/81, 28 May 1985, §88, Series A no. 94.