

Neutral Citation Number: [2021] EWCA Civ 255

Case No: A2/2019/1712

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Choudhury P, Mrs K Bilgan and Mr M Worthington

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE PETER JACKSON
and
LADY JUSTICE SIMLER

- -

RICHARD PAGE	**Appellant**
v	
NHS TRUST DEVELOPMENT AUTHORITY	**Respondent**

- -

Mr Paul Diamond (instructed by **Andrew Storch Solicitors**) for the **Appellant**
Ms Betsan Criddle (instructed by **Hempsons**) for the **Respondent**

Hearing dates: 3rd and 4th November 2020

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. This is one of two appeals to this Court based on the same sequence of events and with the same Appellant, Mr Richard Page. I will refer to the case in which it arises as "the NHS case" and to the case giving rise to the other appeal as "the magistracy case". The appeals were heard consecutively in the same hearing, but we are giving separate judgments in each. In both appeals the Appellant was represented by Mr Paul Diamond of counsel. The Respondent in this appeal was represented by Ms Betsan Criddle of counsel.

2. The Appellant's claim arises out of disciplinary action taken against him as a Non-Executive Director of the Kent and Medway NHS and Social Care Partnership Trust ("the Trust"), which is responsible for the delivery of mental health services in Kent. The action followed media interviews, including two on national television, in which he expressed views, rooted in his Christian faith, about adoption by same-sex couples.

3. The impugned decisions were taken not by the Trust itself but by the Respondent, a body called the NHS Trust Development Authority ("the Authority") which is responsible for the appointment and tenure of NHS Trust Non-Executive Directors. The Authority is part of a group of NHS entities operating under the name "NHS Improvement" ("NHSI"). The Authority's Termination of Appointments Panel ("the TAP") made findings which would normally have led to the termination of the Appellant's appointment as a Director. In fact, by the time that it made its decision his current term had expired, but the practical effect of its findings was to prevent him from applying to serve a further term or serving as a Non-Executive Director of a different Trust. That being so, sacrificing strict accuracy for the sake of convenience, I will refer to it as "the termination decision".

4. On 17 November 2016 the Appellant commenced proceedings against the Authority on the basis that the termination decision, and the suspension and investigation which led to it, constituted unlawful discrimination and harassment by reference to his religion or belief, and also victimisation, contrary to Part 5 of the Equality Act 2010.[1]

5. The Appellant's claim was heard by an Employment Tribunal sitting at London South, comprising Employment Judge Bryant, Ms H Bharadia and Mr J Gautrey, over four days in August 2017. He was represented by a Mr Pavel Stroilov (who was not a practising lawyer). The Authority was represented by Mr David Massarella of counsel. By a Judgment and Reasons sent to the parties on 18 October 2017 the claim was dismissed in its entirety.

6. The Appellant appealed to the Employment Appeal Tribunal, where the appeal proceeded only as regards the discrimination and victimisation claims. It was heard on 22 January 2019 by a constitution consisting of Choudhury P, Ms K Bilgan and Mr M Worthington. The Appellant was represented by Mr Diamond; the Respondent was

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[1] Initially the Secretary of State for Health was also a respondent, but the proceedings against him were subsequently withdrawn.

represented, as in the ET, by Mr Massarella. By a judgment handed down on 19 June the appeal was dismissed.

7. The Appellant was also for many years a magistrate. He was removed from that role for publicly expressing similar views to those which led to the termination decision in the present case. He brought proceedings against the Lord Chancellor and the Lord Chief Justice arising out of his removal: that is the "magistracy case" to which I have referred above. His claim was dismissed by a (different) Employment Tribunal. His appeal to the EAT was heard by the same constitution as the appeal in this case, though on a different occasion, and its judgment was handed down on the same day.

8. The Appellant's application for permission to appeal against the decision of the EAT was supported by grounds and a skeleton argument settled by Mr Diamond. When I gave permission I was critical of some aspects of the skeleton argument, and I asked that the version filed following the grant of permission be more closely cross-referred both to the pleaded grounds and to the paragraphs in the Reasons of the ET and the judgment of the EAT that were said to be wrong in law. A replacement skeleton argument was in due course filed. It was signed by the Appellant's solicitors, but Mr Diamond told us that it was in fact settled by him. No doubt in response to my request, it was very different in both form and substance from the earlier skeleton argument and avowedly did not follow the structure of the grounds of appeal. Mr Diamond's oral submissions were fairly short, and, if I may say so, not always clearly focused on the legal issues, and when in doubt I have treated the replacement skeleton argument as the authoritative statement of the Appellant's case on the appeal.

THE FACTS

9. At para. 11.1 of its Reasons the ET found as follows:

> "The Claimant is a devout Christian. He also firmly believes that it is always in the best interests of every child to be brought up by a mother and a father. He therefore believes, as he accepted in evidence, that it is not in the best interests of any child to be adopted by anyone other than a mother and a father. He said that it is 'not normal' to be adopted by a single parent or same sex couple."

10. The Appellant had a successful career in finance for many years, latterly in senior roles in the NHS. He was appointed a Non-Executive Director of the Trust in June 2012. The appointment was for a four-year term. The Chair of the Trust at that time was Mr Andrew Ling. The ET found that the Appellant took a "hands on" approach to his role and had a high profile within the Trust.

11. The Appellant was also a magistrate, sitting on the Central Kent bench, where he was a member of the family panel. In December 2014, following a formal disciplinary process, he was reprimanded by the Lord Chief Justice as a result of an incident in which he declined to agree to the adoption of a child by a same-sex couple. The details are immaterial for the purpose of this appeal, though they can be found in our judgment in the magistracy case. The reprimand was reported in the press, and it is clear that the Appellant had spoken to reporters about it and expressed his views about same-sex adoption.

12. The Appellant did not inform the Trust or the Authority about the disciplinary action taken against him by the Lord Chief Justice or about his contacts with the press. However, they came to Mr Ling's attention, and he arranged to have a meeting with the Appellant on 22 January 2015 to discuss the matter. The day before the meeting the Appellant participated in a live radio phone-in on the same subject on Radio Kent. Again, he did not inform the Trust beforehand. At para. 11.18 of its Reasons the ET found that at the meeting:

> "… The Claimant confirmed that he had given an interview to the Mail on Sunday and had taken part in a radio phone-in the day before the meeting. Mr Ling asked the Claimant to consider whether readers of the newspaper and/or listeners to the radio phone-in might make a connection between the views he was expressing about same sex couples and his role with the Trust. The Claimant said that he had not thought about that. Mr Ling asked him why he had not alerted the Trust to the impending media coverage. He again said that he had not thought about it. Mr Ling told the Claimant that it was important that he alert him if there was going to be any further media coverage."

13. On 3 February 2015 the Trust received a complaint from the Chair of its LGBT Staff Network, referring to the views expressed by the Appellant in the media. The complaint described them as "highly offensive to same sex parents" and said that it would be "highly damaging if the LGBT community, and society in general, were to see [the Trust] as harbouring this type of opinion without action". Mr Ling then arranged to meet the Appellant again, together with the Trust's Chief Executive, on 11 February 2015. At the meeting the Appellant confirmed his view that children need a mother and a father and that he stood by that view. He was asked to give an assurance that he would not express his views in a public forum but he would not do so. He did, however, accept that he should have told the Trust about his contact with the media.

14. In a letter following the meeting Mr Ling reiterated that the Appellant's public expression of his views in the media could undermine confidence that he would exercise his judgment in a way that was not affected by those personal views. In a reply dated 12 March 2015 the Appellant said that he was sorry that there had been an impact on the Trust. He apologised for any problems that he might have caused and confirmed that his actions, discussions and decisions within the Trust would continue to conform strictly with the Trust's policies and procedures and with the standards for NHS Boards.

15. As between the Trust and the Appellant the matter rested there for the remainder of 2015. However, the ET noted, at para. 11.23 of its Reasons, that:

> "Unbeknownst to the Trust or [the Authority], the Appellant continued to engage with the media. On 12 March 2015, the same day as the Appellant's letter as mentioned above, he appeared live on BBC Breakfast News and, as the tribunal understands it, made much the same comments as he had in previous press and media appearances. The Appellant did not inform the Trust about this appearance and they did not find out until much later."

16. Although the Trust did not learn about the Appellant's appearance on BBC Breakfast News, the Central Kent bench became aware of it, and it led to further disciplinary

action by the Judicial Conduct Investigations Office. He was eventually removed from the magistracy with effect from March 2016.

17. The Trust first learned of the Appellant's removal as a magistrate on 10 March 2016. Mr Ling and the Appellant arranged to speak the following week. In the meantime, without prior notice to the Trust, the Appellant gave a number of other media interviews. In particular, on 14 March 2016, he appeared live on television, on both the ITV News and *Good Morning Britain*. At para. 11.29 of its Reasons the ET said:

> "The tribunal has seen, and taken into account, a transcript of the entire interview by Susanna Reid and Piers Morgan on *Good Morning Britain*. The interview began with discussion of the Appellant's dismissal from the magistracy but then moved onto wider issues. At no point did the Appellant decline to answer any of the questions put to him. Key passages include these:
>
> PM: You talk[ed] about natural earlier. Do you think being gay is unnatural?
>
> RP: It is not what is best for a child.
>
> PM: That wasn't the question I asked you. Do you think being gay is unnatural
>
> RP: Being homosexual … err … in scripture it doesn't say that being homosexual is good or bad …
>
> PM: What is your belief
>
> RP: What is wrong is homosexual activity
>
> PM: Really[?]
>
> RP: Yes. As sex outside marriage is not right
>
> …
>
> PM: You don't agree with same sex marriage
>
> RP: I do not agree with same sex marriage
>
> PM: You don't agree with same sex adoption
>
> RP: I do not see that could ever be the best for the child … that is my responsibility
>
> …"

(We were in fact supplied during the hearing, at our request, with a full transcript of the hearing; but it was not submitted that it put any different complexion on the extracts quoted by the Tribunal.)

18. In those exchanges the Appellant expresses three distinct views, albeit closely related – that "homosexual activity" (which I take to refer to sexual acts) is wrong, like all sexual acts outside marriage; that he does not agree with same-sex marriage; and that same-sex adoption can never be best for the child. Where I need to refer to these compendiously I will refer to them as his "views about homosexuality", though of course I do not mean to suggest that they represent the totality of his views. I should make clear that I accept that such views cannot be crudely equated with hostility to (still less hatred of) gay people; but that distinction is often not properly understood. In his submissions before us Mr Diamond said that the Appellant had given those answers "under pressure in a live interview". It was, however, evidently the ET's view that he could have declined to answer and confined himself to addressing the topic of his removal as a magistrate and the issue of same-sex adoption. (I would add that Mr Diamond's statement might appear to involve a tacit acceptance that the Appellant's opinions on the wider questions of "homosexual activity" and same-sex marriage would have been better left unexpressed; also that it is partly because of the pressures of dealing with a live interview and an unsympathetic interviewer that the Appellant would have been well advised to discuss possible media interviews with the Trust beforehand.)

19. The Appellant's interview on *Good Morning Britain* is the only one of his contacts with the media at this time about which the ET gives any detail. No doubt in his other interviews he expressed the same opinion about same-sex adoption; he may or may not have expressed his other views about homosexuality. The case has proceeded before us on the basis that, in so far as the Authority reached its decision because of the Appellant's public expression of his views, what he said in the passage quoted by the ET represents the substance of the views in question, and for convenience I will sometimes refer simply to this interview.

20. Mr Ling met the Appellant on 15 March 2016. He had by then heard about the television interviews and watched them on catch-up. The Appellant was told that his term would not be renewed when it expired in June that year. He was told that he could resign voluntarily or the matter would have to be reported to the Authority with a request that he be suspended pending investigation.

21. The Appellant did not resign and was therefore suspended. At para. 11.33 of its Reasons the ET says:

> "Mr Ling wrote the same day to [the Authority] asking for authority to suspend the Appellant; authority to suspend Non-Executive Directors rests with [the Authority] rather than the Trust or its Chair. Mr Ling's letter raised a number of concerns, including the impact of the Appellant's actions on staff, on patients and on the reputation of the Trust. He said that it was a concern that the media attention the Appellant appeared to have sought would mean that a large number of patients would be aware of his views and would have less confidence that the Trust would treat them fairly. He also raised the fact that the Appellant had not kept him informed of the disciplinary process leading to his removal from the magistracy or of his continued engagement with the media, even though he had been told in 2015 to do so. After this Mr Ling had no further relevant dealings with the Appellant."

22. By letter dated 21 March 2016 the Chair of the Authority's Appointments Committee, Dame Christine Beasley, wrote to the Appellant expressing the concerns which Mr Ling had raised and confirming that he was suspended with immediate effect pending further investigation. At para. 11.35 of its Reasons the ET found:

> "The reasons for the Respondent's decision to suspend the Claimant were his engagement with the media, with the likely consequent impact on staff and patients, and the Claimant's failure to keep the Trust informed of the Judicial Conduct Investigation Office's disciplinary processes or of recent television interviews in spite of specific requests that he do so."

23. The Authority referred the matter to the TAP. The Authority's Head of Non-Executive Development, Ms Janice Scanlan, prepared a report on the Appellant's conduct. The Appellant appeared before the Panel on 2 August 2016. The meeting was chaired by Ms Caroline Thomson, who was a Non-Executive Director of NHSI and Chair of its Appointments and Remuneration Committee. The ET found that the Appellant was given every opportunity to respond to the concerns raised in whatever way he saw fit.

24. On 19 August 2016 Ms Thomson wrote to the Appellant as follows:

> "The panel was unanimous in its view that it was not in the interests of the health service for you to serve as a non-executive director in the NHS. It felt that your public response to the decision of the Lord Chancellor and Lord Chief Justice to remove you from the magistracy, the events following that decision and your position in relation to these matters was likely to have had a negative impact on the confidence of staff, patients and the public in you as a local NHS leader. The panel also agreed that the adverse impact on your credibility would continue into the future.
>
> In reaching this conclusion, the panel was concerned that when questioned on these issues, you failed to:
>
> a) accept that statements made in public, even when made as a private citizen, might have an impact on your credibility as a non-executive director in the NHS;
>
> b) accept that you had any personal responsibility for ensuring that when stating your views in public they were not open to misinterpretation by others; and
>
> c) demonstrate any remorse for your actions or insight into the impact they might have on the confidence of patients and staff.
>
> The panel therefore determined that your behaviours were not compatible with the standards expected of a non-executive director of an NHS board.
>
> Had you still been in post as a non-executive director of Kent and Medway NHS and Social Care Partnership NHS Trust, this letter would

> have formed the basis of the recommendation to the board of NHS Improvement (NHSI) that your appointment be terminated as being not in the interests of the health service for you to continue to hold that office. If the recommendation had been accepted you would also be automatically disqualified for any further appointment for a period of at least two years. The panel further agreed that a disqualification period of two years would have been appropriate.
>
> As you are no longer a non-executive director, however, NHSI is not in a position to terminate your tenure of office. So while the panel considers that it would not have been in the interests of the health service for you to serve as a non-executive director of a NHS trust, it has been determined that NHSI will not take any further action on this matter at this stage. Should you apply to serve as a non-executive director in the NHS in the future though, you should then be aware that the Board of NHSI will be asked to consider the panel's view about your suitability for appointment, the result of which is likely to be taken into consideration as part of any selection process.
>
> …
>
> I appreciate that the last six months or so have been quite a challenge for you. Your co-operation with the panel and the open and candid way in which you responded to its enquiries was very much appreciated."

25. At para. 11.42 of its Reasons the ET summarises the terms of that letter. Both Ms Scanlan and Ms Thomson, who was by then Deputy Chair of the Authority, gave evidence before the Tribunal. Based on that evidence, it says, at para. 11.43:

> "Of particular importance to the TAP in reaching its decision was the Claimant's apparent inability or unwillingness to distinguish between his personal views and what it was appropriate, given his role as a Non-Executive Director with a high profile in the Trust, to say to the press and other media. Further, the TAP concluded that although the Claimant had denied courting publicity, he had actively engaged with the media and had accepted a number of invitations to appear on local radio and national television. This was compounded by the fact that Mr Ling had told the Claimant in 2015 to keep him informed of any impending publicity which he had failed to do. The TAP concluded that the Claimant was likely to engage actively with the media in future if the opportunity arose; the Claimant confirmed to the tribunal that he continued and still continues to be willing to talk to anyone from the media if asked and this was demonstrated during the course of the tribunal hearing by a number of appearances on television news programmes."

THE RELEVANT PROVISIONS OF THE 2010 ACT

26. Section 4 of the 2010 Act sets out a list of "protected characteristics". They include "religion or belief". Section 10 contains further provisions about that characteristic,

but I need only note that subsection (2) provides that "[b]elief means any religious or philosophical belief".

27. The Appellant's claim is, as I have said, brought under Part 5 of the Act which proscribes both discrimination and victimisation in the field of work. Section 50 renders various different kinds of discrimination and victimisation unlawful as regards appointment to public office or detriments suffered by persons holding such an office. There is no issue before us that if the procedures culminating in the TAP's letter of 19 August 2016 constituted discrimination or victimisation that would fall within the terms of section 50, and I need not set out its detailed provisions.

28. The provisions defining discrimination, both direct and indirect, and victimisation, are in Part 2 of the Act. I take them in turn.

29. Section 13 is headed "Direct discrimination". The only relevant subsection for our purposes is (1), which reads:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in *R (E) v Governing Body of the JFS* ("the *Jewish Free School* case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes referred to as what "motivates" the putative discriminator they do not include their "motive", which it has been clear since *James v Eastleigh Borough Council* [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.

30. Section 19 is headed "Indirect discrimination". Subsections (1) and (2) read:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Subsection (3) lists the relevant protected characteristics: they include religion or belief. I will adopt the usual shorthands of "PCP" for the phrase "provision, criterion or practice" in subsection (2) and "justification" for the requirement that a PCP must be a proportionate means of achieving a legitimate aim.

31. Section 23 (1) provides:

"On a comparison of cases for the purposes of section 13, … or 19 there must be no material difference between the circumstances relating to each case."

32. Section 27 defines victimisation as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) …".

(2) Each of the following is a protected act—

(a)-(c) …

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3)-(5) …"

THE APPELLANT'S CLAIMS

33. The nature of the Appellant's complaint, as definitively established at a prior preliminary hearing, is set out at paras. 2 and 3 of the ET's Reasons, as follows:

"2. This is a claim of unlawful religion or belief discrimination, harassment and victimisation. The Claimant relies on three alleged detriments:

2.1 His suspension as a Non-Executive Director of the Kent and Medway NHS and Social Care Partnership NHS Trust ('the Trust') on 21 March 2016 which continued until the expiration of his fixed term appointment on 12 June 2016;

> 2.2 An investigation initiated by the Respondent on 21 March 2016 which lasted until 2 August 2016;
>
> 2.3 The decision of a Termination of Appointments Panel ('TAP'); the TAP hearing took place on 2 August 2016 and its decision was communicated to him by letter dated 19 August 2016.
>
> 3. The Claimant makes the following claims: he says that each of the above detriments:
>
> 3.1 was an act of direct discrimination because of his religion and/or belief; for this purpose he relies on his Christianity and also his belief that it is always in the best interests of a child to be brought up by a mother and a father;
>
> 3.2 amounted to indirect discrimination; the detail of this aspect of his claim will be discussed further below;
>
> 3.3 amounted to harassment because it was unwanted conduct related to his religion or belief that had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him;
>
> 3.4 was an act of victimisation because of a series of protected acts as set out at paragraphs 17-28 of his ET1."

I will give the "detail" of the indirect discrimination claim, as referred to at 3.2, at para. 81 below; and I identify the pleaded protected acts referred to at 3.4 at para. 92. The harassment claim is no longer live.

34. It should be noted that at 3.1 the Appellant relies on two ways of formulating the relevant "religion or belief". First, he relies straightforwardly on his religion, identified simply as Christianity. Secondly, and much more specifically, he relies on his belief that it is always in the best interests of a child to be brought up by a mother and a father: I will refer to that – rather clumsily, I fear – as "the traditional family belief". The ET found at para. 48 of the Reasons that that was a belief which "falls within the definition of philosophical belief for the purposes of [section10]": I am not clear whether that had in fact been disputed, but it was not in any event challenged by the Authority before us (or in the EAT). I should note, however, that at para. 16 of the Reasons, where the Tribunal is summarising the Appellant's (i.e. Mr Stroilov's) submissions, it says:

> "The Claimant relies on his Christianity as his religion and also on what he describes as the narrower belief that it is in the best interests of a child to have a mother and a father. He says that these two ways of putting his case were 'complementary rather than advanced as alternatives'."

It is fair to say that before us also Mr Diamond did not always observe the distinction between the wider and the narrower formulations and sometimes spoke as if the discrimination with which the case was concerned was simply against Christians, or in any event against Christians with traditional beliefs.

35. It should also be noted that the acts complained of do not consist simply of the termination decision (2.3) but cover also the Appellant's prior suspension (2.1) and investigation (2.2). I will for convenience refer to those acts compendiously as "disciplinary action", although that is not the terminology that the Authority itself uses.

THE APPEAL

36. The way that the issues have developed in this case does not lend itself to a conventional approach in which I summarise the reasoning of the ET (and the EAT so far as necessary) and then proceed to set out and consider the grounds of appeal. I propose instead to take the principal sections of the Tribunal's Reasons in turn and consider Mr Diamond's challenges to them as advanced (primarily) in the skeleton argument.

ARTICLES 9 AND 10 OF THE CONVENTION

37. The Tribunal begins its discussion of the issues, at paras. 49-62, by considering articles 9 and 10 of the Convention. It had no jurisdiction to entertain any claim for a breach of the Appellant's Convention rights as such: see *Mba v London Borough of Merton* [2013] EWCA Civ 1562, [2014] ICR 357, in particular *per* Elias LJ at para. 35. However, by virtue of sections 3 and 6 of the 1998 Act it was obliged to determine his claims under the 2010 Act compatibly, so far as possible, with his Convention rights. In his skeleton argument Mr Diamond submits that for that reason in every case of religion or belief discrimination a tribunal should start by deciding whether there has been a breach of the claimant's relevant Convention rights, which can then inform its analysis of the claim under the 2010 Act. For myself, I do not think that there needs to be any such rule. It is, ultimately, the Act from which the claimant's rights must derive, and there can be nothing wrong in a tribunal taking that as the primary basis of its analysis. But of course if there is reason to believe that a particular approach or outcome may involve a breach of the claimant's Convention rights that question must be fully considered.

38. It is convenient to mention at this point that Mr Diamond also placed reliance on articles 10 and 11 of the EU Charter of Fundamental Rights, which correspond to articles 9 and 10 of the Convention; but he did not submit that they add anything for our purposes to the provisions of the Convention, and I do not believe that they do – see *Achbita v G4S Secure Solutions NV* C-157/17, [2018] ICR 102, at para. 27 of the judgment of the Grand Chamber of the CJEU.

39. To anticipate, the essential question in this case, so far as concerns the Appellant's Convention rights, is whether the Authority's response to his expression of his views about homosexuality can be justified. Since that issue is essentially the same in the case of both article 9 and article 10 it is tempting to take the two articles together and proceed straight to the justification issue, particularly since there are issues in relation to the engagement of article 9 which would not arise if the interference were in fact justified. However, I think the better course is to follow the shape of the Tribunal's Reasons and take the two articles separately.

ARTICLE 9

40. Article 9 is titled "Freedom of thought, conscience and religion". It reads:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

41. There is good deal of case-law, both domestically and in Strasbourg, about the effect of article 9. For present purposes I need refer only to the decision of the European Court of Human Rights in *Eweida v United Kingdom* 48420/10, [2013] IRLR 231. At para. 80 of its judgment the Court points out that paragraph 1 provides for the protection of religious belief in two ways – that is, it protects not only the right to hold (or change) such a belief but also the right to manifest it (in public as well as in private). As it also points out, the right to manifest a religious belief is qualified to the extent specified in paragraph 2. I shall return to another aspect of the judgment in *Eweida* later.

42. At paras. 52-53 the Tribunal identifies the distinction between the two kinds of right accorded by article 9[2]. It holds at para. 52 that since the action taken against the Appellant was not based on his beliefs as such but on his public expression of them any breach of his article 9 rights must relate to the (qualified) right to manifest his beliefs. That is plainly right, and although it seems that Mr Stroilov may have sought to argue otherwise Mr Diamond did not.

43. The Tribunal addresses the question whether there had been any breach of the Appellant's right to manifest his religious beliefs at paras. 54-59 of the Reasons. It concludes:

(a) that that right was not "engaged" on the facts of the case (para. 55); and

(b) that, even it was, it was not breached because "any limitation placed on [his] Article 9 rights was necessary and proportionate in the circumstances" (para. 58) – or, for short, that it was justified.

I take those two points in turn.

(a) Was article 9 "engaged"?

44. The terminology of "engagement" can mean different things in different contexts. Here, it is clear that what the Tribunal was referring to was the point made by the ECtHR at para. 82 of its judgment in *Eweida*. This reads (omitting the numerous references to the case-law):

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[2] The Tribunal describes the absolute right to hold a religion or belief as being accorded by paragraph 1 and the qualified right to manifest it as being accorded by paragraph 2. That is not strictly accurate, since both derive from paragraph 1, but nothing turns on the point.

> "Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a 'manifestation' of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 §1 … . In order to count as a 'manifestation' within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question … ."

45. The Tribunal, adopting the language of that discussion, held that there was on the facts of the present case "no sufficiently close and direct nexus between the act and the underlying belief". It gave its reasons at para. 55, as follows:

> "Here, the act or acts resulting in the Respondent taking action were not the Claimant holding or expressing his views as such, but the Claimant accepting invitations to appear, and then appearing, in the press and on national television, compounded by the fact that he did so without informing the Trust when he had been expressly told to do so. Expressing his views in that context was not something that the tribunal finds was intimately linked to his religion or his beliefs."

46. The first sentence could perhaps be read as meaning that the Authority was only concerned about the fact of the Appellant making statements to the media (and without informing the Trust first), rather than with what he actually said. But it is clear from the second sentence that that is not what the Tribunal meant. Rather, its point is that the Authority was not responding to the fact that the Appellant held the views that he did about homosexuality but to the fact that he had expressed those views in the media.

47. In the second sentence the Tribunal finds that the Appellant's expression of those views in public "was not … intimately linked to his religion or his beliefs". That phrase derives from the passage from *Eweida* which I have quoted, and the Tribunal was evidently seeking to make the kind of determination which the ECtHR there says is required of whether, based on the facts of the particular case, there was a "sufficiently close and direct nexus between the act and the underlying belief".

48. In so far as that finding relates to the Appellant's religion, I can see no error of law in it. Although it will have been apparent from the interview that his views about homosexuality derived from his Christian faith, it is clear from the passage which I have quoted from *Eweida* that a causative link of that kind is not necessarily enough. The primary focus of what the Appellant is saying is his belief about the importance of a child having a mother and a father. The fact that that belief is rooted in his religious faith is part of the context, but the interview cannot be characterised as a "direct expression" of the Appellant's Christianity. The closeness and directness of the

relevant nexus was a matter for the assessment of the Tribunal, and it was in my view open to it to reach the conclusion that it did. I note that in *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127, which involved a student who had been disciplined for expressing views about homosexuality derived from his Christian belief, this Court endorsed the finding of the Judge that article 9 was not engaged: see para. 61 of its judgment.

49. At para. 23 of his skeleton argument Mr Diamond challenges the Tribunal's reasoning on this aspect on the basis that it had "focused … on the Authority's reasons … [rather than] on the Appellant's rights": he submits that the Authority's reasons for disciplining him only became relevant at the stage of justification. He refers to the decisions of this Court in *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, [2005] ICR 1789, and of the ECtHR in *Eweida* and in *Thlimmenos v Greece* (2001) EHRR 15. I do not accept that the Tribunal fell into any such error. Mr Diamond's reference to "the Authority's reasons" confuses two different stages of the exercise. The first question for the Tribunal was what conduct on the Appellant's part caused the Authority to discipline him: that necessarily involved, in one sense, a consideration of its reasons. The answer is straightforward: it was responding to the Appellant's having expressed his views about homosexuality in the media (compounded by his having done so without giving the Trust prior notice). The next question is whether his expression of those views constituted a manifestation of his religious belief in the sense explained in *Eweida*. I agree that in answering *that* question it is not relevant to consider the Authority's thinking. But the Tribunal did not do so. What it did was to evaluate the nexus between the expression of the Appellant's views about homosexuality and his Christian belief, which is precisely the exercise required by *Eweida*. As for the authorities referred to, the skeleton argument does not attempt to explain their relevance. However, it appears from para. 31 (b)-(d) of Choudhury P's judgment that in the EAT Mr Diamond invoked them on the basis that they were examples of article 9 having been found to have been engaged. Since the facts in question were not materially similar, as Choudhury P shows at paras. 37-40, they do not advance the argument.

50. At para. 22 of the skeleton argument (read with para. 24) Mr Diamond advances a different, and potentially better, argument. He contends that, even if article 9 was not engaged as regards his religion, it was engaged as regards what I have called "the traditional family belief", which is identified in the agreed issues as being a distinct belief (see para. 34 above). He points out that it is not in dispute that that is a "philosophical belief" for the purpose of section 10; and he refers to the decision of the EAT in *Harron v Chief Constable of Dorset Police* [2016] UKEAT 0234/15, [2016] IRLR 481, in which Langstaff P held (see paras. 32-33) that in determining whether a belief qualified for protection there was no material difference between article 9 and the domestic legislation. If that is treated as the relevant belief, i.e. rather than Christianity, there could be no question that the Appellant was "manifesting" it: it was the whole focus of the media interviews that he gave. Accordingly in this regard at least article 9 was necessarily engaged.

51. That argument seems to me to have some force, though there may be subtleties that require to be explored. However, I am far from sure that it is open to the Appellant on this appeal. It is not clear to me that the traditional family belief was relied on in the ET as a separate alternative in the context of whether article 9 was engaged: see para.

34 above. The Appellant's grounds of appeal to the EAT did not complain that the ET had erred in focusing only on his Christianity, and Mr Diamond does not appear to have advanced that argument in his submissions. Nor is there any sign of the point in the grounds of appeal to this Court or the skeleton argument filed in support of the application for permission. It appears for the first, and only, time in the skeleton argument. Notwithstanding all that, if the point were determinative of the appeal it might be necessary for the Court to consider it, however unsatisfactory the manner in which it emerged. However, we need not do so because, as will appear, I believe that even if article 9 is engaged the appeal against the Tribunal's conclusion on justification must be rejected.

(b) Justification

52. There was no issue before us as to the test for establishing justification under paragraph 2 of article 9, and the equivalent paragraph in article 10. The language there used requires an assessment of proportionality, as classically expounded in the decision of the Supreme Court in *Bank Mellat v Her Majesty's Treasury (no. 2)* [2013] UKSC 39, [2014] 1 AC 700, (see para. 20 of the judgment of Lord Neuberger). It is a sufficient summary for present purposes to say that that involves balancing the interference with the fundamental right in question against the legitimate interests recognised by paragraph 2 of both articles.

53. The Tribunal's conclusion on justification appears at para. 57 of the Reasons, which reads as follows:

> "… [I]f, contrary to the above finding, Article 9(2) was engaged then the tribunal would have found, as the ECtHR did in *Chaplin*, *Ladele* and *McFarlane* (the other three cases decided with *Eweida*), that [the Appellant's] actions fell within the qualifications to Article 9(2) and there was therefore no breach of his ECHR rights. In the tribunal's judgment, the Claimant's actions were clearly in conflict with the protection of health, which is the Trust's and the Respondent's principal function, and with the protection of the rights of others (two of the qualifications in Article 9(2)). The Trust is subject to the Public Sector Equality Duty under EqA, s149 which includes a duty to advance equality of opportunity and to foster good relations between persons who share and those who do not share a protected characteristic. The Claimant accepts that there were, and had been, specific issues with LGBT members of the community suffering disproportionately from mental health problems and also difficulty persuading them to engage with the Trust's services. There had also been a specific complaint from within the Trust's organisation concerning the Claimant's actions. There is clear evidence that there was a specific and genuine concern on the part of the Trust and the Respondent as to the impact of the Claimant's actions on the Trust's ability to serve the entire community in its catchment area. Given the Claimant's high profile role within the Trust, the tribunal finds that this concern was justified. The Claimant himself confirmed in evidence that although he did not think about the effect of his public statements on others, even after Mr Ling had raised it with him in early 2015, he accepted that those reading, listening to or watching his interviews might have made a connection with his role

> with the Trust and/or in the NHS in a wider sense and that could be damaging for the Trust or the wider NHS."

It expressed its conclusion, at para. 58, as being that the limitation on the Appellant's article 9 rights was "necessary and proportionate in the circumstances".

54. The primary element in that justification is what the Tribunal found to be a genuine and reasonable[3] concern that the expression by the Appellant in the national media of his views about homosexuality risked impairing the willingness of gay people with mental health difficulties to engage with its services. In that connection I should quote the findings of fact made at paras. 11.6-7 of the Reasons, which read:

> "11.6 Both parties accepted in evidence that lesbian, gay, bisexual and transgender ('LGBT') members of the community suffer disproportionately from mental health problems. Both parties also accept that there have been significant difficulties with a lack of willingness on the part of LGBT members of the community to engage with mental health services such as those provided by the Trust.
>
> 11.7 The Trust (and the Respondent) see it as vital that its staff and Board should not do or say anything that could be perceived as giving rise to a risk of losing the confidence of trust of any section of the community it serves, including those, such as LGBT individuals, where there has been historic distrust and difficulty with engagement. The Claimant accepted that it was vital that LGBT members of the community should feel welcome in the Trust and should be encouraged to access its services if they need them."

55. That being so, it is important to make clear from the start that, as Mr Diamond expressly acknowledged, there is no challenge in this Court to the factual basis of the justification found by the Tribunal; nor was there any such challenge in the EAT. It follows that it is accepted that the Tribunal was entitled on the evidence before it to find that the concerns felt by the Trust and the Authority about the impact of the Appellant's public statements on the Trust's ability to engage with gay service-users were reasonable. In principle it might have been arguable that on the evidence the risk of such an impact was unreal, and that it was accordingly not open to the Tribunal to place the weight on it that it did. However, such an argument would have required us (and the EAT) to consider the evidence on which the Tribunal relied, and since there was no such challenge that evidence was not before us.

56. In his skeleton argument Mr Diamond begins (at para. 28) by submitting that para. 57 of the Reasons is inadequately analysed and reasoned. I do not accept that. It is in my view adequately clear what the Tribunal is saying, and why. The only criticism that could be advanced is that it does not expressly acknowledge the importance of the Appellant's right, albeit qualified, to express his beliefs. Kerr J noted this omission on the sift, when he allowed the appeal to proceed in the EAT, and I agree that it would have been better if this point had been explicitly made. However, it is clear that the

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[3] The Tribunal does not use the word "reasonable", but it clear from the passage as a whole that that was its view.

Tribunal, which had been referred to the leading authorities, understood the nature of the exercise required.

57. Mr Diamond's real case is not that the Tribunal's analysis is inadequate but that it reached a conclusion that was not open to it in law. He goes on to develop that argument in the following paragraphs. His essential argument is that the Tribunal set the threshold for justification under article 9 (2) too low. He emphasises that the test is one of "necessity", and says at para. 31:

> "It is by no means self-evident that reassuring LGBT patients and public that none of the Trust's 15 directors hold a sceptical opinion on same-sex adoptions is necessary in a democratic society to the extent that this justifies a form of censorship of a public debate on that issue."

He goes on to cite a number of well-known authorities which emphasise the importance of upholding the freedom to express opinions which may be offensive or upsetting to many people, referring in particular to the judgment of the ECtHR in *Handyside v United Kingdom*, 5493/72, [1976] ECHR 5. He submits, at para. 32:

> "A justification on the substantive ground that the speech offends and or disturbs any sector of the population, such as LGBT members of the public, is contrary to that principle."

In support of that contention he referred us to two decisions in which the courts in this country have criticised action taken against individuals who have expressed on social media views about homosexuality similar to those expressed by the Appellant in the present case, namely *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2013] IRLR 86, and *Ngole* (to which I have already referred). He also referred us to other authorities concerned more generally with freedom of religious belief and freedom of speech, in particular *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin), *Vajnai v Hungary* 33629/06 and the decisions of the CJEU in *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* C-414/16, [2018] IRLR 762, and *IR v JQ* C-68/17, [2019] ICR 417.

58. Although article 9 (2) does indeed use the term "necessary" that language has, as Lord Bingham says at para. 23 of his speech in *R v Shayler*, [2002] UKHL 11, [2003] AC 247, been "strongly interpreted". The essential task of the Tribunal in the circumstances of this case was to balance the infringement of the Appellant's right to express in public beliefs that were evidently important to him against the importance to the Trust of mitigating or avoiding the risk of damage to its work from his remaining in post, as identified at paras. 53-55 above. This Court should only interfere with the way in which it struck that balance if we are satisfied that it was wrong.

59. The extent to which it is legitimate to expect a person holding a senior role in a public body to refrain from expressing views which may upset a section of the public is a delicate question which can only be decided by reference to the facts of each particular case. It is right to acknowledge that the Appellant had a particular interest in expressing publicly his views about same-sex adoption in the context of his removal as a magistrate, which was a legitimate matter of public debate: his media appearances were not in that sense gratuitous. It is also right to acknowledge that he expressed his views in temperate terms. This is not therefore a case in which it is obvious from the start that

the proportionality balance comes down in the Authority's favour. However, there are three reasons in particular why I believe that the Tribunal was entitled to reach the conclusion that it did.

60. First, the Appellant's expressed views about homosexuality went beyond what Mr Diamond somewhat blandly characterises at para. 31 of the skeleton argument as "a sceptical opinion on same-sex adoptions". As noted at para. 18 above, they included opinions also on same-sex marriage and "homosexual activity" and were accordingly the more likely to cause offence or invite misinterpretation. I do not say that that is by itself sufficient to justify the Trust or the Authority objecting to his expressing them in public: after all, they reflect the traditional teaching of Christianity and indeed other religions. But it is important to identify from the start what the views were.

61. Secondly, this was not, as para. 32 of the skeleton argument characterises it, a case where the justification advanced is merely that some or many members of the public, or members of the Trust's staff, both gay and straight, might find the Appellant's views about homosexuality offensive or disturbing; nor is it based on some generalised perceived reputational damage to the Trust. On the contrary, it is based specifically on the risk that the fact that a member of its board held the views that the Appellant did about homosexuality might deter mentally ill gay people in the Trust's catchment area from engaging with its services. That risk relates directly to the ability of the Trust to perform its core healthcare functions. As I have said, it is not part of the Appellant's case that that risk was unreal. Mr Diamond's submissions fail to engage with this aspect.

62. Third, the Appellant's conduct made it in practice impossible to try to find a way forward that might have respected both parties' interests. One approach that might have been considered would have been for the Trust and the Authority to accept the legitimacy of the Appellant expressing his views about same-sex adoption, but for him to acknowledge the sensitivities and the consequent potential for damage of the kind noted above, and to engage with the Trust about how to best to address those sensitivities. But it is clear from the history that neither the Trust nor the Authority could have any confidence that the Appellant would reliably co-operate in that way. He had been spoken to in 2015 following his previous media appearances and the complaint from the LGBT Staff Network. (It is important to note that no action had been taken against him at that stage: this is not a case where the Trust or the Authority indulged in any knee-jerk response.) On that occasion he said that he had simply not thought about the impact of the public expression of his opinions on how members of the public might view the Trust, and he declined to undertake not to give more media interviews. He did accept that he should have informed the Trust before doing so, and yet in March 2016 he resumed engagement with the media, again without any prior notice to the Trust.[4] The Appellant's failure to acknowledge that there was any problem is the essential point made by the TAP in the second paragraph of the termination letter, and his willingness to continue to engage with the media without any reference to the Trust of which he was a Director is the subject of the Tribunal's findings at para. 11.43.

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[4] Mr Diamond says in his skeleton argument that the Appellant explained in cross-examination that he had forgotten that he should have told the Trust first. There is no finding to that effect; but, even if it were the case, such an explanation would hardly reassure the Authority that he was aware of the problems that he could cause the Trust and of the need for caution.

I regard this as a further important reason affecting the proportionality of the Authority's conduct.

63. I do not need to say much about the authorities on which Mr Diamond relied. There is no issue about the general principles, but their application in particular cases is necessarily fact-specific. Mr Diamond suggested that the facts in *Smith* and *Ngole* were so close to those of the present case that they should be treated as determinative of how the proportionality balance should be struck.[5] I do not agree. In both cases the claimant – in *Smith* an employee of a Housing Trust (not at board level) and in *Ngole* a social work student – had expressed their views about homosexuality on social media. There was no reason to suppose that their expression of those views in that way would have any impact on how the public might engage with the relevant services: that point is made very clearly in para. 135 of the judgment in *Ngole*.

ARTICLE 10

64. I need not set out the full terms of article 10. Paragraph 1 confers the right to freedom of expression and paragraph 2 identifies the extent to which it may be limited, in broadly similar terms to paragraph 2 of article 9. Ms Criddle submits that it has no relevance in the present case because the 2010 Act does not protect freedom of expression. I am not sure that that the position is as straightforward as that, but for reasons that will appear I need not resolve the point.

65. At para. 60 of its Reasons the Tribunal noted that although Mr Stroilov had referred to article 10 he had in his submissions only advanced a developed argument by reference to article 9. It said at para. 61 that it had nevertheless considered whether article 10 added anything of substance to the Appellant's case, but its conclusion, at para. 62, was:

> "Doing the best it can to analyse the Claimant's case, the tribunal cannot see, and the Claimant has not suggested, what Article 10 adds to his argument under Article 9. The Claimant has referred the tribunal to *Fuentes Bobo*, a judgment of the ECtHR on a complaint of breach of Article 10 rights, but he has not sought to argue how, if at all, this adds to his arguments under Article 9."

The position appears to have been very similar in the EAT. Mr Diamond apparently mentioned article 10 in his skeleton argument, but Choudhury P says at para. 42:

> "As this was not a matter developed below, and as nothing of substance was said about it before us, we do not consider it necessary to deal with the Article 10 point in any detail. Suffice it to say that we do not see any basis on which the Claimant's position under Article 10 could be any more favourable to him than that under Article 9."

66. In his skeleton argument Mr Diamond claims that these paragraphs implicitly criticise him and Mr Stroilov for not developing a separate argument under article 10 and contends that in a case of this kind the two articles can be treated together. I do not think that any such criticism was intended. Both the ET and the EAT are in fact making

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5 In fact the issue in *Smith* turned on the employer's contractual right of dismissal. But Mr Diamond submitted that the Court's decision tracked the position under the Convention.

the same point as Mr Diamond, namely that there is in the present case no real distinction between the issues raised under article 9 and article 10, at least as regards justification. Since I would uphold the Tribunal's conclusion about justification in the context of article 9 there is nothing more that I need say about article 10.

CONCLUSION

67. For those reasons I believe that the Tribunal was entitled to find that the Authority did not infringe the Appellant's Convention rights. It might be thought to follow that it cannot have discriminated against him on the grounds of his religion or belief, since the relevant protections under the Convention and the 2010 Act must be intended to be co-extensive. In my view that is indeed the case, but that does not absolve me from considering the issues through the lens of the 2010 Act, which must be the formal basis of the Appellant's claim.

DIRECT DISCRIMINATION

68. I start with a point which is central to the analysis on this issue. In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it: see para. 29 above. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself.

69. The distinction is apparent from three decisions in cases where an employee was disciplined for inappropriate Christian proselytisation at work – *Chondol v Liverpool City Council* [2009] UKEAT 0298/08, *Grace v Places for Children* [2013] UKEAT 0217/13 and *Wasteney v East London NHS Foundation Trust* [2016] UKEAT 0157/15, [2016] ICR 643. In essence, the reasoning in all three cases is that the reason why the employer disciplined the claimant was not that they held or expressed their Christian beliefs but that they had manifested them inappropriately. In *Wasteney* HH Judge Eady QC referred to the distinction as being between the manifestation of the religion or belief and the "inappropriate manner" of its manifestation: see para. 55 of her judgment. That is an acceptable shorthand, as long as it is understood that the word "manner" is not limited to things like intemperate or offensive language.[6]

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[6] See also *McFarlane v Relate Avon Ltd* [2009] UKEAT 0106/09, [2010] ICR 507, in which I made a similar distinction at para. 18 of my judgment, which was cited with approval by the Divisional Court (Munby LJ and Beatson J) in *R (Johns) v Derby City Council* [2011] EWHC 375 (Admin) (see para. 81). *McFarlane* was one of the three cases heard with *Eweida* in the ECtHR.

70. The Tribunal addresses the Appellant's direct discrimination claim at paras. 69-73 of its Reasons. Those paragraphs read, so far as material:

> "69. The Claimant says that the Respondent's actions in suspending him in March 2016 and subsequent events up to and including the TAP decision were acts of direct discrimination. He says that they were because of religion or belief. …
>
> 70. Contrary to the Claimant's submissions, the tribunal has already found that the Respondent's actions were not because of the Claimant's religion or because he held or expressed his views as such, but were because he accepted invitations to appear in the press and on national television without informing the Trust and when he had been expressly told to inform them.
>
> 71. The Respondent does not accept the Claimant's contention that the Claimant's religion and/or views cannot validly be distinguished from the manner in which he expressed them. The Claimant says that this is a false distinction but it is one that has been made in a consistent line of previous cases and upheld as valid on appeal: see, for example, *Chondol*, *Wasteney* and *Trayhorn*[7].
>
> 72. Nor is the Claimant assisted by arguments under the ECHR. The tribunal has already found above that Article 9 was not engaged in this case and, even if it was, it was not breached. …
>
> 73. Having found that the reason for the treatment of the Claimant was not his religion or belief, it is not necessary for the tribunal to consider further the dispute between the parties as to the correct construction of a hypothetical comparator. The 'reason why' approach (which the Claimant accepted in submissions was appropriate in this case) provides the answer to the direct discrimination claim."

71. That reasoning needs clarification in one respect. At para. 70 the Tribunal refers to what it has "already found" the Authority's reasons for taking action against the Appellant to have been. It summarises them as being that the Appellant

> "… accepted invitations to appear in the press and on national television without informing the Trust and when he had been expressly told to inform them".

Something has gone wrong with the drafting here. On the Tribunal's previous findings the Authority's reasons went beyond the mere fact that the Appellant had "accepted invitations to appear" in the media interviews, and without telling the Trust first, and extended to his expression in those interviews of his views about homosexuality. That is quite clear from para. 57 of the Reasons: it is only because of his expression of those views that his appearance in the media was liable to cause the real damage to the Trust's

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[7] In *Trayhorn v Secretary of State for Justice* [2018] UKEAT 304/16, [2018] IRLR 502, there was no live issue about direct discrimination, and I am not sure that it was relevant to refer to it in this context.

work with gay people there referred to. Choudhury P makes the same point at para. 33 of the judgment of the EAT, as indeed does Mr Diamond in his skeleton argument.

72. Once that point has been clarified, the Tribunal's reasoning is clear. Para. 71 applies the distinction which I have discussed at paras. 68-69 above. The Authority took disciplinary action against the Appellant not because he was a Christian or because he held the traditional family belief but because he expressed the latter belief (and his other views about homosexuality) in the national media in circumstances which, on the Tribunal's findings, justified the action taken.

73. At para. 55 of his skeleton argument Mr Diamond submits that the correct analysis of that finding in law is that the only "reason" for the action taken against the Appellant was "[his] very public expression of his protected belief", and that "the concerns about a possible misinterpretation, and the potential impact on [the] LGBT community" were no more than "motives": he is thus invoking the distinction which I mention at para. 29 above. That characterisation of the Authority's reason does not essentially differ from mine, but it does not follow that the other considerations are irrelevant. Their importance is that, if they are sufficiently cogent, they may demonstrate that the Authority's objection to the Appellant's public expression of the belief is a different reason from an objection to his holding the belief, as explained at para. 68 above. That is a quite different distinction from the reason/motive distinction that was applied in *James v Eastleigh*.

74. So far as I am aware the distinction applied by the Tribunal has not been endorsed in this Court, but it is in my view plainly correct. It conforms to the orthodox analysis deriving from *Nagarajan*: in such a case the "mental processes" which cause the respondent to act do not involve the belief but only its objectionable manifestation. An analogous distinction can be found in other areas of employment law – see paras. 19-21 of my judgment in *Morris v Metrolink RATP DEV Ltd* [2018] EWCA Civ 1358, [2019] ICR 90. Also, and importantly, although it gets there by a different route (because the provisions in question are drafted in very different ways), the recognition of that distinction in the application of section 13 achieves substantially the same result as the distinction in article 9 of the Convention between the absolute right to hold a religious or other belief and the qualified right to manifest it. It is obviously highly desirable that the domestic and Convention jurisprudence should correspond.

75. However, Mr Diamond in his skeleton argument advances a number of arguments intended to demonstrate that the distinction applied by the Tribunal either is wrong in principle or at least requires qualification. I take them in turn.

76. First, at para. 60 he submits that *Chondol* and *Wasteney* are wrongly decided if and to the extent that they warrant an infringement of Convention rights. But the distinction which they apply plainly does not do so: it is, as I say above, to substantially the same effect as the distinction embodied in article 9 between the absolute right to hold a protected belief and the qualified right to manifest it.

77. Second, he refers at para. 61 to the principle (established in *Nagarajan*) that an act will be caught by section 13 even if the protected characteristic has only a "significant influence" on the putative discriminator's reason for doing it. He says that, even if on the Tribunal's findings the Authority had regard to other considerations, the beliefs which the Appellant was expressing must have formed at least a part of its reasons. But

the whole point of the distinction is that, where it applies, the underlying belief is not part of the reason for the act complained of.

78. Third, at para. 62 he submits that the Authority's reason for acting was indissociable from the Appellant's religion or belief, in the sense in which that term was used in *Preddy v Bull* [2013] UKSC 73, [2013] 1 WLR 3741: he referred also to the decision of the EAT in *Amnesty International v Ahmed* [2009] UKEAT 0447/08, [2009] ICR 1450. But the issue here is quite different from the issue in those cases. There is no difficulty in dissociating, in a proper case, an objection to a belief from an objection to the way in which that belief is manifested. Ms Criddle referred us to para. 25 of the judgment of Lady Hale in *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2020] AC 413, which emphasises the limited and specific role of the concept of indissociability.

79. Fourth, at para. 63 he criticises the Tribunal for declining, as it does at para. 73 of the Reasons, to "construct a hypothetical comparator", as, he says, it was required to do by the decision of this Court in *Aylott v Stockton-on-Tees Borough Council* [2010] EWCA Civ 910, [2010] ICR 1278. He says that if it had done so, applying section 23 of the Act, it would have appreciated that the correct comparison was with a Director who had given a media interview but who had not expressed the Appellant's views about homosexuality. There is nothing in this point. It is trite law that it is not necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of: see the very well-known passage at paras. 8-13 of the speech of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337. *Aylott* says nothing to the contrary. In any event, even if the Tribunal had undertaken the exercise the correct comparator would not have been as Mr Diamond proposes, because his formulation leaves out a material circumstance, namely that the expression of the views in question by a Director of the Trust was liable to have a serious impact on the Trust's relationship with an important group of service-users, and that he or she had shown themselves wholly insensitive to the difficulties caused. In such a case the Trust would obviously have acted in the same way, even if the views expressed were not the product of any religious or other protected belief. (It may not be a very likely hypothesis that a Director of the Trust would have expressed himself as the Appellant did unless he had held the same beliefs; but it is precisely because the exercise of constructing a hypothetical comparator is frequently so artificial that Lord Nicholls said what he did in *Shamoon*.)

80. For those reasons I see no error of law in the Tribunal's decision on direct discrimination. I have not thought it necessary to refer to the reasoning of the EAT on this aspect. It does not appear that Mr Diamond put his case there in quite the same way as he has before us, but to the extent that he did so the EAT's reasons for rejecting it are essentially the same as mine.

INDIRECT DISCRIMINATION

81. The Appellant's case in the ET was that one or more of the following three PCPs had been applied to him, namely that:

> "(1) in assessing suitability of a Non-Executive Director for the office, the Respondent considers that expressing a critical view of same

> sex adoptions has a negative impact on the confidence of staff, patients and the public in a Non-Executive Director of an NHS Trust;
>
> (2) in assessing suitability of a Non-Executive Director for the office, the Respondent gives a high priority to securing the confidence and/or approval of the so-called 'LGBT community';
>
> (3) in assessing suitability of a Non-Executive Director for the office, the Respondent gives greater weight to the actual or perceived views of the so-called 'LGBT community' than to the views of Christians and others who adhere to the traditional sexual morality."

It was his case, in accordance with section 19 (2) (b) of the Act, that those PCPs put Christians at a disadvantage when compared with non-Christians[8]; and, in accordance with section 19 (2) (c), that it put him at that disadvantage.

82. The Tribunal's reasoning in rejecting the claim of indirect discrimination can be summarised at follows:

(1) It did not accept that the first and third formulations constituted PCPs within the meaning of section 19, though the first could perhaps be reformulated so as to do so: see paras. 75-77.

(2) As regards the second PCP (and the other two, subject to the previous point), there was insufficient evidence that it put Christians at a "group disadvantage" – that is, a disadvantage falling within section 19 (2) (b): see para. 79.

(3) As an answer to (2), Mr Stroilov had advanced an argument that "where article 9 is engaged there is no requirement to establish group disadvantage". The Tribunal rejected that argument primarily on the basis of the decision of this Court in *Mba* (to which I have referred in a different context at para. 37 above): see paras. 80-81.

(4) Even if it was wrong on the previous two points, the PCP was justified, for the reasons given in relation to article 9: see para. 81.

83. At para. 44 of his judgment in the EAT Choudhury P says that Mr Diamond's submissions on indirect discrimination

> "… focused on the Tribunal's conclusion that there was no group disadvantage shown in this case. He submits that where Article 9 is engaged, there is no requirement to establish group disadvantage, or that if there is such a requirement it is not an onerous one."

The submissions which he goes on to summarise are directed to showing that *Mba* supports the proposition that there is no requirement to establish group disadvantage in

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[8] So far as appears from the Reasons, for the purpose of the indirect discrimination claim the Appellant appears to have relied only on his belief as a Christian rather than on the traditional family belief: see in particular para. 19.

an article 9 case, rather than, as the ET had held, being inconsistent with it. The EAT upheld the ET's understanding of *Mba*: see paras. 47-48 of the judgment. It went on at para. 49 to hold that the ET had been entitled to find that there was insufficient evidence that the PCPs relied on led to any group disadvantage.

84. For reasons which will appear, I do not believe that it is necessary to consider *Mba* in any detail, but I should briefly summarise how the issue in that case arose and what the Court decided. The claimant was employed by the local authority as a care assistant. The council required her to work on Sundays, which was contrary to her belief as a Christian. She was disciplined for not being prepared to do so. She complained of indirect discrimination. One of the issues was whether she had proved that a requirement to work on a Sunday put Christians at a particular disadvantage within the meaning of (what is now) section 19 (2) (c). It was contended on her behalf that article 9 did not require a claimant to prove group disadvantage. The majority (Elias and Vos LJJ) accepted that that was so, but they did not accept that it followed that the statutory definition of indirect discrimination could be read down so as to remove that disadvantage. It was that reasoning which the ET and the EAT followed in the present case.

85. The Appellant's pleaded ground of appeal as regards indirect discrimination (ground 6) reads:

> "[The EAT] misinterpreted and/or misapplied the decision of *Mba v Merton LBC:*
>
> a. The Tribunal failed to apply and distinguish the twin approaches of a quantitative and qualitative proportionality test explained in *Mba*.
>
> b. The EAT failed to apply the requirement of *Group Discrimination* correctly; depending on whether the quantitative and qualitative proportionality test is to be used;
>
> c. The EAT erred in using the national law requirement of group discrimination as a barrier to frustrate the protection of fundamental rights."

I am not sure that I understand head (a), but nothing turns on that for present purposes. What matters is that the ground is wholly concerned with the effect of *Mba*, and thus with what I have called element (3) in the ET's reasoning.

86. In his skeleton argument Mr Diamond abandoned his case about the effect of *Mba*. Para. 91 reads:

> "The submission that the test of group disadvantage does not apply *at all* where Convention rights are involved is no longer pursued in this appeal. However, the alternative submission that the evidential hurdle is low, and has been overcome in this case, has not been dealt with adequately."

In other words, he abandons the challenge to element (3) in the reasoning of the ET but seeks to challenge element (2). He goes on at para. 92 to refer to two pieces of evidence

which are said to show that "[the Appellant's] beliefs were shared by many Christians" and which he says that the ET had failed to address. The first piece of evidence consists of the text of a petition, apparently promoted by a body called Christian Concern and said to have been signed by over 5,000 people, which protests against a reprimand which the Appellant had received from the Lord Chief Justice for refusing to agree to the adoption of a child by a same-sex couple: details of the reprimand can be found in my judgment in the magistracy appeal. The second consists of an article by Bishop Nazir-Ali claiming that action of the kind taken by the Lord Chief Justice against the Appellant prevented Christians from manifesting their belief in the public sphere. Both are in extremely general terms and say nothing specific about the Christian attitude to homosexuality or about the particular issue of same-sex adoption. Neither appears to have been relied on before the ET. At para. 19 of its Reasons it says:

> "When asked during oral submissions what evidence was relied on to support the Claimant's case on group disadvantage, the reply from the Claimant's representative (which the tribunal presumes was on the basis of instructions from the Claimant) was that the group disadvantage hurdle is easy to overcome, especially in an Article 9 case, that 'the bible says that homosexuality is an abomination', that the tribunal should assume that a significant number of Christians would hold the same view and that group disadvantage should therefore be assumed."

87. In her skeleton argument Ms Criddle took the preliminary point that the argument which Mr Diamond now wished to advance did not form part of his pleaded grounds. But she nevertheless went on to respond to the substance of the argument by making five points, which I can summarise as follows:

(1) Mr Diamond's submission was only said to apply in cases where article 9 was engaged. That was not the case here.

(2) There was no authority for the proposition that group disadvantage was easier to establish in article 9 cases.

(3) The PCP relied on did not correspond to the definition of the disadvantaged group, being those who share the view that homosexuality is an abomination (the reference clearly being to the case as recorded at para. 19 of the ET's Reasons).

(4) The PCP relied on did not place the Appellant at a disadvantage because the belief on which he relied was not a Christian belief in the sinfulness of homosexuality but his belief that it was in the best interests of a child to be brought up by a mother and a father.

(5) There was no appeal against the decision of the ET on justification – what I have called "element (4)" – and that, even if there had been, the same features which supported its conclusion on justification under article 9 applied equally to the indirect discrimination claim.

88. When it came to his oral submissions, Mr Diamond's position was, I have to say, rather unsatisfactory. He said that his concession about *Mba* "may have been unnecessary", but he did not seek to resile from it. He did not seek to develop the submission about the height of the evidential bar and whether it had been crossed by the evidence adduced

in this case, saying that the real points in the appeal were about direct discrimination and victimisation; but he said that he was not abandoning the challenge to the decision on indirect discrimination. He did not address any of the arguments in Ms Criddle's skeleton argument.

89. In this unsatisfactory state of affairs, and where Mr Diamond was so frank about the limited importance which he attached to this aspect of the appeal, I prefer to decide it on the most economical basis available. One option would be simply to say that the argument now relied on by Mr Diamond is not open to him on the grounds for which he was given permission; but that might be too formalistic. Instead, I accept Ms Criddle's point (5). As she says, the Appellant has not challenged the ET's conclusion on justification (indeed he did not do so in the EAT either); and that is not a purely formal matter since, however the PCP may be formulated, I find it hard to see how the ET's conclusion on justification in relation to article 9 would not read over to the indirect discrimination claim.

90. Some or all of Ms Criddle's other points may also be good, but I am reluctant to address them in circumstances where we heard no real argument. One point of some general significance on which we did hear brief oral submissions from both her and (in reply) Mr Diamond was the type of evidence that should be required to establish group disadvantage in a case of this kind. For myself, I would regard the approaches taken to this issue by the Appellant both in the ET and in Mr Diamond's skeleton argument as unsatisfactory. It was obviously not good enough simply to make an unreferenced assertion that "the Bible says that homosexuality is an abomination" (not least, though not only, because that is not the position taken by the Appellant himself on *Good Morning Britain*); and the two documents referred to by Mr Diamond simply do not address the issue. I rather baulk at the idea that elaborate evidence should be required to establish that more Christians than non-Christians hold the beliefs which the Appellant expressed in his interview, but I do not believe that it could be left altogether to judicial notice. However, I do not feel in a position to express any firm view on this issue and it is unnecessary to do so.

91. For those reasons I would dismiss the appeal against the Tribunal's dismissal of the indirect discrimination claim.

VICTIMISATION

92. The protected acts on which the Appellant relies are his statements in the media interviews that the action taken against him by the Lord Chancellor and the Lord Chief Justice (for short, "the judicial authorities"), and more particularly his removal as a magistrate, constituted unlawful discrimination. Although no such statement is made in the passage quoted by the Tribunal from the *Good Morning Britain* interview, there is no dispute that he made such statements: his removal was of course the reason why the media were interested in the first place.

93. However the Tribunal held that the action taken against him by the Authority was not because he had made those statements. At para. 84 of the Reasons it says:

> "The question is, then, whether the actions taken by the Respondent were because the Claimant had done one or more protected acts. In so far as the Claimant contends that it is not possible to distinguish

> between what he said in various press interviews and the manner in which he said it, the tribunal has already rejected that contention. Further, the tribunal has already made specific findings as to the reasons for the Respondent's actions, and the protected acts played no part in those reasons."

94. The essential point is that made in the last sentence. The Tribunal had indeed made findings of fact as to the reasons for the disciplinary action taken against the Appellant, namely that he had, without prior notice to the Trust, given media interviews in which he expressed views about same-sex adoption and homosexuality more generally which were liable to impact on the Trust's ability to engage with gay service-users, and that he showed no insight into why that was problematic. Those reasons have nothing to do with what he had said about having been discriminated against as a magistrate. That is a finding of fact, which cannot be challenged unless it can be shown not to have been open to the Tribunal on the evidence. Mr Diamond made no such submission. In any event it is hardly a surprising finding: it is difficult to see why an NHS authority would have been motivated to take action against the Appellant by the fact that he was complaining that he had been discriminated against by the judicial authorities.

95. The only live claim in the magistracy appeal was for victimisation, and Mr Diamond addressed the Court on the relevant principles in that context. He said that he did not wish to make any further oral submissions in this appeal. Accordingly we can only proceed by reference to the pleaded grounds and his skeleton argument.

96. Ground 7 of the grounds of appeal pleads that the EAT

> "… misapplied the law on victimisation:
>
> a. It was sufficient for the Applicant to believe that his disciplining by the Lord Chancellor was a discriminatory act and was unjustified. It was the attempts by the Applicant to articulate his position in good faith that result in the dismissal by a third party (the *Respondent*). The analysis of the *ET* is lacking in this unusual scenario.
>
> b. The Appellant's public expression of his protected beliefs is not *properly severable* from the protected act of alleging discrimination on the grounds of those beliefs. The Tribunal misapplied *Martin v Devonshire Solicitors*."

Head (a) is not developed in the skeleton argument at all. Head (b) is fairly briefly developed at paras. 78-81.

97. In so far as I can understand the argument at (a), it is obviously wrong. No doubt the Appellant did believe that his disciplining by the judicial authorities was discriminatory, but the issue in a victimisation context is whether his expressing that belief caused the alleged victimiser to do the act complained of.

98. As to (b), this is, I think, also the point which the Tribunal was intending to address in the second sentence of para. 84. I address the effect of the decision of the EAT in *Martin v Devonshires Solicitors* [2010] UKEAT 0086/10, [2011] ICR 352, in my

judgment in the magistracy appeal (see paras. 54-57), and I need not repeat that here. In my view this is not a case of the *Martin* kind at all. It is true that the Appellant's statements about homosexuality and about his treatment by the judicial authorities were made in the course of the same interview, but they remain quite separate statements and there is no conceptual difficulty about a finding that the Authority was motivated by the one but not the other. The exercise required in a "*Martin* case" is less straightforward, because in such a case the respondent is indeed, in one sense, caused to act by the complaint of discrimination, and the issue is whether it is nevertheless legitimate to treat some separable feature of the complaint – such as the way in which it was advanced – as their true reason. No such issue arises here. The Authority's case is not that it was influenced by the manner in which the Appellant had complained of discrimination by the judicial authorities but not by the fact of the complaint itself: rather, it was, and the Tribunal found, that it was not influenced by that complaint at all. Paras. 78-81 of the skeleton argument contend that the Tribunal is here "salami slicing" the Authority's reasons and attempting "to separate media publicity from the contents of the Appellant's allegations to which it was given [*sic*]"; but that is not a correct characterisation of its reasoning.

CONCLUSION AND OVERVIEW

99. I would dismiss this appeal, and I understand that My Lord and My Lady agree. However, I think I should briefly put to one side the specific legal issues which I have had to consider (which I have to say have been made to seem rather more complicated than they are by the way in which the Appellant's case has been put) and say something about the wider implications of our decision.

100. At some points in his submissions Mr Diamond appeared to be suggesting that if the decisions of the ET and the EAT stood it would become impossible, or in any event difficult, for Christians (and members of other faiths) holding traditional views about sexual identity and sexual morality to hold any kind of public office. That is obviously wrong. The issue raised by this case is not about what beliefs such a person holds but about the limits on their public expression.

101. Mr Diamond would say that even if that is the issue the implications for Christians remain serious: they should not be expected to remain silent about their beliefs simply because they may be unpopular with, or even offensive to, others – in particular, in this context, gay people – and therefore potentially embarrassing to the institution for which they work. That is true up to a point, and the Courts have shown themselves astute to protect the freedom of Christians to manifest their beliefs in relation to matters of traditional Christian teaching about these matters. I have already referred to the decisions in *Smith v Trafford Housing Trust* and *R (Ngole) v University of Sheffield* on which Mr Diamond relies. But I say "up to a point" because the freedom to express religious or any other beliefs cannot be unlimited. In particular, so far as the present case is concerned, there are circumstances in which it is right to expect Christians (and others) who work for an institution, especially if they hold a high-profile position, to accept some limitations on how they express in public their beliefs on matters of particular sensitivity. Whether such limitations are justified in a particular case can only be judged by a careful assessment of all the circumstances of the case, so as to strike a fair balance between the rights of the individual and the legitimate interests of the institution for which they work. As I acknowledge at para. 59 above, striking the balance in this case is not entirely straightforward; but I have concluded that, in

particular for the reasons given at paras. 60-62 above, the Employment Tribunal was entitled to conclude that the Authority did not act unlawfully in taking the action that it did against the Appellant. This is a decision on the facts of a particular case, and wider conclusions should not be drawn from it.

Peter Jackson LJ:

102. I agree.

Simler LJ:

103. I also agree.