

Religious clothing and symbols at work

The jurisprudence of the Court of Justice and the European Court of Human Rights

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**1/ Right to wear religious clothing and symbols
and protection of freedom of religion**

2/ Wearing religious signs at work

3/ Wearing religious signs in public services

1/ Right to wear religious clothing and symbols and protection of freedom of religion

- Scope of protection of freedom of religion
- Manifestation of religious belief

Scope of protection of freedom of religion

Article 9 § 1 ECHR : “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”

=> The wearing of clothing or symbols motivated by the faith of the persons concerned or by the will to bear witness to that faith, constitutes a manifestation of religious belief, in the form of “worship,” “practice” or “observance”: behaviour protected by Article 9 § 1

ECHR, *Eweida and others v. the United Kingdom* (2013), req. 48420/10, 59842/10, 51671/10 and 36516/10, § 80

European law protects the right to have a religion and to manifest it in public: *forum internum* and *forum externum*

CJEU, *Achbita*, C-157/15 and *Bougnoui*, C-188/15 (2017) resp. § 28 and §30

Manifestation of religious belief

“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”

ECHR, *Eweida and others v. the United Kingdom*, § 82

The fact that it is a minority practice is without effect on its legal characterisation

ECHR, *S.A.S. v. France* [CG] (2014) § 56

2/ Wearing of religious signs at work

- Protection on the basis of freedom of religion
- Protection on the basis of prohibition of discrimination based on religion

Protection of freedom of religion

ECHR, Eweida and others v. the United Kingdom (2013)

Article 9 ECHR – Freedom of thought, conscience and religion

“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.”

ECHR, Eweida and others v. the United Kingdom (2013)

The facts

Temporary dismissal of an employee, a check-in employee of British Airways, for having refused to conceal her Christian cross, whereas certain symbols of other religions (the turban or the hijab) were authorized.

Decision

Violation of Article 9 ECHR

Grounds

A private commercial company may legitimately impose a dress code on its employees in order to protect a certain commercial image.

The application of this code may at times entail restrictions on wearing religious symbols.

A balance has to be struck between the legitimate interests of the employer with the right of the person concerned to manifest her religion.

ECHR, *Eweida and others v. the United Kingdom*
(2013)

2nd instance
The facts

Mrs Chaplin, a nurse in a public hospital, has to remove her cross pendant for safety reasons

Decision

No violation of Article 9 ECHR

Grounds

Recognition of the importance for the person concerned to have the possibility to manifest her religion by the visible wearing of the cross,

But: greater importance of health and safety in a hospital service

Wide margin of discretion of the internal authorities

The hospital officials are better placed to take decisions concerning safety in their institution than the court and, *a fortiori*, an international court.

Conclusions on the ECHR jurisprudence (*Eweida*)

- Religious freedom may allow the claim to wear religious clothing and symbols at work

Not sufficiently protected by the possibility of finding another job compatible with the employee's religious belief

- Possible justifications of restrictions
 - commercial image of the company
 - protection of the health and safety of third parties

Discrimination based on religion

CJEU, *Achbita and Bougnaoui* (2017)

Directive 2000/78/EC

Article 1: “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief ... ”

Article 2 (1) : “For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.”

The (separate) facts

Achbita

A receptionist in a company that provides services relating to security. Dismissed when she decided to wear an Islamic headscarf, 3 years after she was hired, in spite of her employer’s objections, based on the latter’s policy of neutrality (prohibition of all visible signs of political, philosophical, or religious convictions)

Bougnaoui

A salaried employee having worked as a research engineering in a company for a year while wearing an Islamic headscarf. She was dismissed because she refused to remove her headscarf as demanded by a customer

Does the obligation not to wear religious clothing constitute discrimination based on religion?

➤ *Direct discrimination?*

➤ *Indirect discrimination?*

➤ *Narrow concept of direct discrimination*

- Cf. the question asked by the French Court of Cassation and its rewording by the CJEU (*Bougnaoui*)
 - The fact that the measure is inexorably linked to the prohibited criterion not taken into account.
(cf. e.g. *Dekker*, C-177/88, 1990 ; *Maruko*, C-267/06, 2008)
 - Choice of the reference employee (*Achbita*)
- Intentional nature of the discrimination not taken into account
(Comp. CJEU, *CHEZ*, C-83/14, 2015)

➤ *Indirect discrimination subject to rigorous conditions*

“If it is established... that the apparently neutral obligation it encompasses **results, in fact**, in persons adhering to a particular religion or belief being put at a particular disadvantage.” (Achbita, § 34)

Cf. Directive 2000/78, article 2(2) b)

“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice **would put** persons having a particular religion or belief at a particular disadvantage”

Justifications

- *Genuine requirements (Directive 2000/78/EC, Article 4(1))*
- *Policy of neutrality*
- *Proportionality (appropriate, necessary and balanced character between conflicting interests)*

➤ *Genuine and determining occupational requirement*

- Is a national law required?
- Wearing of the Islamic headscarf = a “characteristic linked to religion?”
- Prohibition of wearing of the headscarf = “occupational” requirement” ?

The notion of a “genuine and determining occupational requirement” refers to **a requirement that is objectively dictated by the nature of the occupational activities concerned**

It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer

(Bougnaoui, § 40)

➤ *Justification based on a policy of neutrality*

“The desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.”

... An employer’s wish to project an image of neutrality towards customers relates to the ***freedom to conduct a business that is recognised in Article 16 of the Charter*** and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.”

(Achbita, § 37-38)

EU law distinguishes certain organizations “whose ethos is based on religion or belief”

“ In the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.”

“This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.”

Directive 2000/78/EC, article 4(2)

Are companies that pursue a neutrality objective companies **“whose ethos is based on religion or belief?”**

New categories of organizations

“Neutral” companies / opting to pursue a policy of neutrality

➤ *Proportionality (appropriate character)*

The fact of prohibiting employees to wear visible signs of political, philosophical or religious beliefs is apt to ensure a proper application of a policy of neutrality

“provided that that policy is genuinely pursued in a consistent and systematic manner”

=

“a **general and undifferentiated policy** of prohibiting the visible wearing of signs of political, philosophical or religious beliefs”

“in respect of **members of its staff who come into contact with its customers.**”

(*Achbita*, § 40-41)

➤ *Proportionality (necessity)*

- The prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only workers who interact with customers.

(*Achbita*, § 42)

- *Reasonable accommodation requirement?*

The employer has to propose a position that does not involve visual contact with customers, rather than proceed to dismissal if that does not entail “an additional burden”
“taking into account the inherent constraints to which the undertaking is subject”

(*Achbita*, § 43)

➤ *Proportionality (balance between conflicting interests)*

Aren't the inconveniences caused by the practice at issue inordinate by comparison with the objectives and doesn't this practice entail excessive infringement on the legitimate interests of the persons concerned?

(Cf. CJEU, *CHEZ*, C-83/14 (2015) § 123)

The latter element of proportionality is not mentioned in the *Achbita* judgement...

**Conclusions on the CJEU
jurisprudence (*Achbita* and
Bougnaoui)**

- The emergence of case law that makes it possible to reconcile non-discrimination based on religion and the freedom of companies to be a "neutral" organization
- Narrow conceptualization of discrimination based on religion
Regression?

3/ Wearing of religious signs in public services

- Restrictions based on the principle of secularism / neutrality of the State
- Absence of discrimination (based on sex or sex and religion)

ECHR, *Dahlab v. Switzerland* (dec.) req. 42393/98 (2001)

The facts

A public primary school teacher in charge of very young children (aged four to eight) may not wear an Islamic headscarf when carrying out her teaching activity.

Decision

No violation of Article 9 ECHR, no violation of Article 14 (discrimination based on sex)

Grounds

The State may subject the members of the civil service, on account of their status, to an obligation of discretion in the public manifestation of their religious beliefs, but persons working in the civil service are protected by Article 9 ECHR.

The nature of the occupation of primary school teacher (who holds school authority and represents the State before students, and the possible proselytizing effect that the wearing of religious clothing and symbols may have for them) is taken into account

The age of the children is an important factor to take into consideration: very young children do ask many questions while they can be influenced more easily than other pupils who are older.

Wearing of the Islamic headscarf: "a strong visible sign" that is difficult to reconcile with the message of tolerance, respect for others, equality of the sexes, and non-discrimination which all teachers have to convey to their pupils in a democracy

ECHR, *Kurtulmuş v. Turkey* (dec.) req. 65500/01, (2006)

Facts

Disciplinary sanction on a professor in a public university in Turkey for having worn an Islamic headscarf while carrying out her teaching activity, contrary to the dress code regulations for civil servants

Decision

No violation of Article 9 ECHR, no violation of Article 14 ECHR (discrimination based on religion and sex)

Grounds

- A democratic State is entitled to require its civil servants to be true to the constitutional principles on which it relies.

The principle of secularism is one of the founding principles of the Turkish state.

A representative of the State who has freely accessed the status of civil servant must abide by the rules which require her to be discrete in the public expression of her religious beliefs.

- Similar rules exist concerning men to ensure discretion in expressing their religious beliefs.

ECHR, *Ebrahimian v. France*, req. 64846/11 (2015)

The facts

Non-renewal of the employment contract of a Muslim woman employed as a social worker in the psychiatric service of a French public hospital following her refusal, after warning, to remove her headscarf

Decision

No violation of Article 9 ECHR

Grounds

The will of the State to guarantee ***strict religious neutrality*** in order to preserve the rights and interests of users of public services, especially in the event that the latter are vulnerable, is a legitimate aim to protect “the rights and freedoms of others” (article 9§2)

Preservation of ***respect for the religious beliefs and spiritual orientation of users*** who have to benefit from equal treatment without distinction of religion

Whereas the constitutional order of the State subordinates the relations of the State with denomination **under the principle of secularism-neutrality**, it is possible to give more weight to this principle and to the interest of the State than to the interest of the civil servant not to limit the expression of her religious beliefs.

No obligation to adapt the requirement of neutrality to the concrete tasks carried out.

The hospital authorities examined carefully the employee’s refusal to comply with the decision which required her to remove her headscarf.

The employee had the opportunity to contest the sanction before the national court and to assert her right to freedom of religion effectively.