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THE GOD "DILUTION"? RELIGION, DISCRIMINATION AND THE CASE FOR REASONABLE ACCOMMODATION

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ABSTRACT. *Anti-discrimination complaints by religious employees have constructed seemingly intractable conflicts. The United Kingdom courts have resolved these disputes by diluting individual religious liberty, particularly when determining questions of disadvantage and proportionality under indirect discrimination. This article explores an alternative UK anti-discrimination claim route for religious employees, namely an employer duty of reasonable accommodation. A comparative analysis outlines the corresponding Canadian duty. This model is applied to UK employment cases featuring indirect religious discrimination, specifically those claims which formed the recent applications in* Eweida and Others v UK. *It is suggested that adoption of the Canadian model be considered: its nuanced approach to proportionality is particularly instructive. Whilst such a UK duty could prove controversial, it would cohere with both normative theory in law and religion and conceptual understanding of anti-discrimination law. Moreover, reasonable accommodation's individualised focus should be acclaimed; it need not compromise collective notions of religious liberty.*

KEYWORDS: *Religion; discrimination; employment; sexual orientation; United Kingdom; exceptions; reasonable accommodation.*

I. INTRODUCTION

This article explores the level of protection that religious employees[1] receive in United Kingdom (UK)[2] anti-discrimination law, specifically

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[1] Employment remains the main United Kingdom (UK) anti-discrimination context in which most religious conflicts have been fought. The possibility of reasonable accommodation for religious individuals in other contexts, such as goods and services provision, entails a separate interrogation of both comparative reasonable accommodation and the relevant UK case law. Accordingly, attention is restricted to employment. This focus is also explained at the start of Part III.

[2] Attention is concentrated on the *UK* sphere. Others have recently investigated the introduction of a reasonable accommodation requirement for religion in the *European* context. For example,

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indirect discrimination. In Part II, attention focusses on the UK courts' analysis of related indirect discrimination claims, in particular their assessments of disadvantage and proportionality. It is argued, respectively, that these assessments preclude both an individualised approach to religious discrimination and, ultimately, the pursuit of maximum protection. This is problematic because affirmation of individual human dignity (which links with ideas of equality and autonomy) has emerged as a distinct imperative across normative dialogue in law and religion scholarship.[3] Moreover, doctrinal scope remains for enhanced realisation of the individual human dignity principle: arguably, the courts could facilitate greater accommodation of religious employees, albeit proportionately balanced so as to not challenge an employer's legitimate aim.

Accordingly, Part II establishes a case for change. It frames the courts' adjudication of indirect religious discrimination claims (through consideration of the disadvantage and proportionality tests) as precipitating a 'dilution' of individual religious freedoms. This dilution exists against a backdrop of putative protection designed to reinforce such freedoms.[4] Part III suggests that these issues can be better addressed by an employer duty of reasonable accommodation. This is discussed as an alternative claim route for religious employees in UK anti-discrimination law. Reasonable accommodation is suited to such a task as it attempts to adjust workplace rules on an individual basis in order to mitigate the continuing operation of those rules. The influential and prominent Canadian model of reasonable accommodation is outlined before being systematically applied in Part IV to UK case law concerning indirect religious discrimination in the workplace. Part V suggests that this exercise highlights how the more considered proportionality assessment in Canadian reasonable accommodation would have required domestic judges to pursue a more rigorous mode of accommodation. This factor, along with awareness of individual disadvantage, could add value to the adjudication of religious employee claims in the UK. More generally, Part V also scrutinises the broader implications of introducing an employer duty of reasonable accommodation for religion to the UK. These implications raise challenging issues for a variety of affected stakeholders across the wider equality landscape. Part VI offers some concluding thoughts on how

see K. Alidadi, "Reasonable Accommodations for Religion and Belief: adding value to art. 9 ECHR and the EU's anti-discrimination approach in employment?" (2012) 37 E.L.Rev 693 and E. Howard, "Reasonable Accommodation of Religion and Other Discrimination Grounds in EU Law" (2013) 38 E.L.Rev 360.

[3] For present purposes, calls to "law and religion" scholarship are references to research concerning the effects of "'external', temporal laws affecting religious individuals and groups. This consists of laws made by the state, international bodies and sub-State institutions": R. Sandberg, *Law and Religion* (Cambridge 2011), 6. Sandberg defines this as "religion law": p. 117.

[4] This dilution claim is explored more fully in Part IIC.

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to view the case for reasonable accommodation of religious employees in the UK.

This investigation is particularly timely given publication in January 2013 of the European Court of Human Rights (ECtHR) judgment in *Eweida and Others v UK* (*Eweida and Others*).[5] Indeed, it is these conjoined applications which form the basis of the reasonable accommodation analysis in Parts IV and V. The research provides a unique opportunity both to enhance domestic understanding of reasonable accommodation in employment and to fundamentally re-evaluate the religious employee accommodation debate in the UK. Existing literature already establishes that human dignity presents a persuasive justification for legal protection of individual religious adherents.[6] Moreover, scholars regularly critique the courts' treatment of such adherents in UK indirect discrimination law,[7] these analyses addressing issues of proportionality and group protection versus individual protection in the employment sphere. Meanwhile, other commentators have highlighted the role of reasonable accommodation for religious employees in other jurisdictions and how the doctrine is conceptually situated in anti-discrimination law.[8]

This article aims to fill a gap in the field by applying a model of reasonable accommodation in the UK employment context to reveal how a more pragmatic approach to accommodation may afford increased manoeuvrability in the proportionality balance. This novel exercise demonstrates how operation of reasonable accommodation could, perhaps controversially, change practices in the UK workplace. It also outlines the broader consequences which may obtain from adoption of the doctrine; particularly in connecting a human dignity standard with the focus on individual disadvantage and a likely increase in religious accommodation. The article defends the stridently individualised focus of reasonable accommodation. Legal disputes in employment necessarily operate at the individual level. Such a focus can be reconciled with not only collective religious liberty perspectives but also the roles of human dignity and equality as conceptual cornerstones of anti-discrimination law. Additionally, introduction of reasonable accommodation chimes with recent institutional and stakeholder enthusiasm[9] for a policy of sensible religious accommodation in the workplace.

[5] *(Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10)* (2013) 57 E.H.R.R. 8.
[6] See Part IIB.
[7] See Parts IIA and C. See also, generally, Parts IV and V.
[8] See Part III.
[9] For examples, see the discussion in Part VI.

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II. Religion and Anti-discrimination Law in the UK

A. Protection

The UK's[10] *Equality Act 2010* (*EqA 2010*) prohibits discrimination[11] against a range of specific "protected characteristics". "Religion or belief" is included as a protected characteristic.[12] Whilst the *EqA 2010*'s Explanatory Notes make it clear that the law will treat as a "religion" those faiths which have a "clear structure and belief system"[13] (applicable also to denominations within a religion), "belief" is defined widely to include any "philosophical belief". This envisages a belief genuinely held that is not an opinion or viewpoint based on the present state of information available, that is to a weighty and substantial aspect of human life and behaviour, that attains a certain level of cogency, seriousness, cohesion and importance, that is worthy of respect in a democratic society, that is compatible with human dignity and that does not conflict with the fundamental right of others.[14] The Explanatory Notes confirm that non-religious beliefs (such as humanism and atheism) may count as philosophical beliefs.[15] To this extent, protection against religion or belief discrimination is symmetrical. "Philosophical belief" has also been found to include environmental beliefs,[16] a belief in public service broadcasting's capacity to promote cultural interchange and social cohesion,[17] a belief that foxhunting is wrong[18] and a belief in spiritualism, life after death and psychic powers.[19] It has been found not to include political beliefs,[20] conspiracy theories[21] or the belief in wearing a poppy to show respect to servicemen.[22]

Discrimination on grounds of religion or belief can be either direct (s. 13) or indirect (s. 19). Direct discrimination occurs where A treats B less favourably than A treats or would treat others because

[10] Discussion will focus on anti-discrimination law in Great Britain due to its wider area of application. Indeed, in relation to Northern Ireland, Vickers notes that, "the historical and political context of the [anti-discrimination] protection is peculiar to Northern Ireland, and so this experience is not always of direct relevance to the rest of the UK": L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford 2008), 121, note 4.

[11] Associated forms of discrimination, such as victimisation and harassment, will not be discussed. They are not germane to the proceeding analysis.

[12] S. 4.

[13] See p. 12.

[14] Ibid.

[15] Ibid. Some cases have raised issues concerning individual *atheist* believers. See, for example, *R (on the application of the National Secular Society) v Bideford Town Council* (*Bideford*) [2012] EWHC 175 (Admin), and an unsuccessful indirect discrimination claim by an atheist town councillor who objected to the saying of prayers at town council meetings.

[16] *Grainger plc v Nicholson* [2010] IRLR 4 (*Grainger*).

[17] *Maistry v British Broadcasting Corporation* [2011] EqLR 549.

[18] *Hashman v Milton Park (Dorset) Ltd* [2011] EqLR 426.

[19] *Greater Manchester Police Authority v Power* [2009] EAT 0434/09/DA.

[20] *Kelly v Unison* [2009] ET 2203854/08.

[21] *Farrell v South Yorkshire Police Authority* [2011] EqLR 934.

[22] *Lisk v Shield Guardian Co Ltd* [2011] EqLR 1290.

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of B's religion or belief. Such discrimination cannot be justified – there is no defence in the *EqA 2010*. Indirect discrimination takes place where A applies a provision, criterion or practice (PCP) to B which discriminates against B's religion or belief. A PCP is discriminatory where: i) it applies to persons with whom B does not share a religion or belief; ii) it puts, or would put, persons with whom B shares a religion or belief at a particular disadvantage when compared with others; iii) it puts, or would put, B at that disadvantage; and iv) A cannot show it to be a proportionate means of achieving a legitimate aim. A critical difference between direct and indirect discrimination is that the latter can be justified even if a disadvantage can be shown: the original legitimate aim behind the PCP must be proportionate in achieving its objective. The prohibition on religion or belief discrimination operates in, amongst other areas, employment (s. 39).

Direct and indirect discrimination are both claimed at the individual level. However, in relation to the indirect discrimination, the need for a comparator in establishing a disadvantage is observed as making "it easier to accommodate [religion or belief] claims based on collective practice than those based on individual conscience".[23] Collective practice is also protected elsewhere. For example, recent decades have witnessed the creation of religious exceptions[24] in UK anti-discrimination law. Exceptions exist to the prohibitions on both sex and sexual orientation discrimination where employment in a post is for the purposes of an organised religion.[25] An exception also exists to the prohibition on religious discrimination where employment in a post is for employers with an ethos based on religion or belief.[26] These exceptions clearly enhance religious liberty at the institutional level. Religions as collectives may benefit from them so as to run their internal affairs as they like. Esau claims this entails "giving to them a zone of liberty to at least hire their own members and enforce their own lifestyle norms that are otherwise discriminatory'".[27] Consequently, Rivers affirms that the exceptions assist "in preserving the *group's* right

[23] J. Rivers, "The Secularisation of the British Constitution" (2012) 14 Ecc. L.J. 371, 390. The consequences of requiring such a comparator are discussed below: see Parts IIC1 and IIIA.

[24] The label "exception" is used (as opposed to "exemption" or "opt-out") as the *EqA 2010* adopts this term. Indeed, Sandberg states that he "follows the practice of the Equality Act 2010 which refers to 'exceptions'": "The Right to Discriminate" (2011) 13 Ecc. L.J. 157, 159, note 11. Separate philosophical debates exist concerning the differences between "exceptions" and "exemptions". For example, see Y. Nehushtan, "Religious Conscientious Exemptions" (2011) 30 Law and Phil. 143, 145, R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford 2005), 309, A. Esau, "'Islands of Exclusivity': religious organizations and employment discrimination" (2000) 33 U.B.C. Law Rev. 719, 750–751 and W. Twining and D. Miers, *How To Do Things With Rules* (London 1999), 135–136.

[25] *EqA 2010*, Schedule 9, para. 2.

[26] Ibid., para. 3.

[27] Esau, see note 24 above, p. 827.

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to maintain its identify".[28] As Sandberg notes, they address "the extent to which religious *groups* are expected to live up to secular standards".[29] Such dispensation does not apply to individuals of conviction seeking a personal "exception".

B. Justification for Protection

The range of religion or belief protection in UK anti-discrimination law is supported by numerous justifications.[30] Across law and religion scholarship, the concept of human dignity has emerged as a popular paradigm in normative discourse. Whilst recognition of human dignity is perhaps most closely associated with protecting human rights, including freedom of religion,[31] it is increasingly viewed as an appropriate reason for protecting religion or belief in anti-discrimination law. Vickers, for example, remarks that "[f]ull and meaningful enjoyment of autonomy, equality and dignity … requires protection for *both* freedom from religious discrimination and freedom of religion".[32] Moon also notes the increasing dignity discourse present in anti-discrimination law.[33]

The notion of human dignity is apt to promote legal protection of religion or belief at either the collective or individual levels. Khaitan, for example, submits that dignity "is seen sometimes as an individualistic ideal and at other times as a communitarian one".[34] Likewise, Leigh also discusses dignity in the context of both individuals and groups.[35] However, many commentators have consistently affirmed dignity's role at the level of purely *individual* religion or belief. This relationship assumes, first, that religion or belief intrinsically forms part of both the essence and nature of being human (an ontological claim) and, secondly, that it is appropriate, if not necessary, to legitimise this on the basis of individual autonomy. The idea rests on the inherent value of human worth itself. Exploring these claims, Vickers argues – respectively – that religion or belief is "closely related to an

[28] J. Rivers, *The Law of Organised Religions: between establishment and secularism* (Oxford 2010), 322 (emphasis added).
[29] Sandberg, see note 3 above, p. 200 (emphasis added).
[30] Extensive treatment of these highly contested justifications is beyond the scope of this article. Rather, the objective is to highlight a particularly prevailing justification supporting legal protection of religion. This will provide a firmer basis on which to argue later for a UK employer duty of reasonable accommodation for religious employees.
[31] For example, see T. Lindholm, "Philosophical and Religious Justifications of Freedom of Religion or Belief" in T. Lindholm, W.C. Durham and B. Tahzib-Lie (eds.) *Facilitating Freedom Of Religion Or Belief: a deskbook* (Leiden 2004), 47.
[32] See note 10 above, p. 43 (emphasis added).
[33] G. Moon, "Dignity Discourse in Discrimination Law: a better route to equality?" (2006) 6 E.H.R.L.R. 610, 625–626.
[34] T. Khaitan, "Dignity as an Expressive Norm: neither vacuous nor a panacea" (2012) 32 O.J.L.S.1, 14.
[35] I. Leigh, "Balancing Religious Autonomy and Other Human Rights under the European Convention" (2012) 1 Oxford Journal of Law and Religion 109, 111.

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individual's concept of identity and self-respect"[36] and that it is "protected because it is a key aspect of personality and autonomy, based on personal choices about conceptions of the good".[37] Beyond this, discussion also exists as to how human dignity should shape the normative debate on the *limits* of legal protection of religion or belief. This is particularly the case in relation to "belief" which is defined more broadly than "religion" to include explicit reference to, amongst other factors, human dignity.[38] Evidently, reliance on dignity should not mean that all beliefs stemming from individual "conscience" are protectable. Vickers highlights that it is only those matters:

> which feed into an individual's ability to make sense of the world, and through which they develop a sense of the good, that require protection. Thus a person's interest in being allowed to participate in, for example, country dancing because of its importance to them as a form of artistic expression will not require the same level of protection as a belief relating to the existence of a supreme being.[39]

This idea is further echoed in the *EqA 2010*,[40] showing that even if dignity is a contested concept it is still influential in the legal domain as an indicator of protection limits.

Equality and autonomy also feature inherently in the framework of human dignity, this "situat[ing] [human dignity] as part of a *broader* moral and political philosophy".[41] Moreover, "[e]ven if there is no agreement as to which is the foundational concept, they are deeply interlinked, and there is agreement that a commitment to providing protection for human rights can be based on the concepts of equality, dignity and autonomy".[42] In relation to religion or belief, equality establishes that individual interests should be treated equally to other interests (formal equality), but also that sometimes religion or belief interests should be treated differently from other interests precisely because religion or belief is different (substantive equality).[43] Regarding the latter, the link between human dignity and equality particularly affords accommodation of personalised difference.[44] This links dignity

[36] L. Vickers, "Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief" (2011) 31 Leg.Stud. 135, 138.
[37] Ibid.
[38] The definitions of "religion" and "belief" are contained in the *EqA 2010*: Explanatory Notes and are outlined above (see notes 13 and 14 above, respectively). The definition of "belief" contained in these explanatory notes (including the reference to human dignity) is that employed by Burton J. in *Grainger* at para. [24].
[39] See note 10 above, p. 40.
[40] As an example, the *EqA 2010*: Explanatory Notes advise that "adherence to a particular football team" would not satisfy the definition of 'belief': p. 12.
[41] C. Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford 2001), 32 (emphasis added).
[42] See note 10 above, p. 38.
[43] The formal/substantive equality dichotomy is revisited below: see Part IIIA.
[44] Vickers, see note 36 above, pp. 148–149.

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yet again with recognition of individual conviction and identity. Of course, the justification of human dignity (along with autonomy and equality) does not automatically presume that religion or belief will transcend other interests. This can lead to problems, not least where two parties on either side of a clash may claim their dignity is impugned. In relation to religion, Vickers notes that human dignity "merely … demonstrate[s] that religious interests are valid interests that need consideration alongside other interests that flow equally from a concern for human dignity and equality".[45] On this balance, McCrudden signals that, "many recent legislative interventions adopt ideas of proportionality when rights of interests conflict".[46] Proportionality is revisited in detail below from Part III onwards.

C. Protection Diluted?

It could be contended that religion or belief thus enjoys appropriate, and indeed sufficient, legal recognition in employment at the UK anti-discrimination level. However, this belies a notable challenge. A rapidly expanding corpus of UK equality jurisprudence has seemingly diluted the protection of religion or belief interests at work where individual divergence from a norm is required. Within religion or belief, this dilution has mainly arisen in unsuccessful indirect discrimination claims. In turn, those claims have predominantly concerned religious[47] interests across employment. Many of these are Employment Tribunal (ET) decisions although, for present purposes, the dilution of protection can be outlined by reference to decisions adjudicated in the Employment Appeal Tribunal (EAT) or above.[48]

In employment, unsuccessful UK cases have generally featured three types of claim. The first involves a clash between an employee's religion and the extent to which that employee can fulfil their duties according to their beliefs about sexual orientation, such cases including *McClintock*,[49] *Ladele*[50] and *McFarlane*.[51] The second type concerns the employee's wish to modify personal appearance in accordance with their religion or belief. These cases include *Azmi*,[52] *Harris*,[53]

[45] See note 10 above, p. 40.
[46] C. McCrudden, "Religion, Human Rights and Equality in the Public Sphere" (2011) 13 Ecc. L.J. 26, 37.
[47] Occasionally, cases have raised issues of protection for non-religious beliefs. For example, see those cases referred to above at notes 15–19.
[48] The exception is *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009 which is included for discussion as the claimant's case was joined with the appellant's claim in *Eweida v British Airways PLC* [2010] EWCA Civ 80 in an application to the ECtHR: *Eweida and Others* (2013) 57 E.H.R.R. 8.
[49] *McClintock v Department of Constitutional Affairs* [2008] I.R.L.R. 29.
[50] *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.
[51] *McFarlane v Relate Avon Ltd.* [2010] EWCA Civ B1.
[52] *Azmi v Kirklees Metropolitan Council* [2007] I.R.L.R. 484.
[53] *Harris v NKL Automative Ltd.* [2007] UKEAT 0134_07_0310.

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Eweida[54] and *Chaplin*.[55] The third type of claim relates to the conflict between an employee's obligation to attend religious observance ceremonies and their scheduled work duties. To date, *Cherfi* [56] is the only relevant appellate UK anti-discrimination judgment.

1. Common issues across employment

The employment judgments have restricted individual religious liberty in various ways. In *Eweida* the claimant failed in an indirect discrimination claim against her employer's refusal to allow her to wear a crucifix above her uniform. This was due to the fact that, prior to assessing disadvantage on the individual claimant, indirect discrimination requires that a provision "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".[57] It was held that, as she was the *only* employee who had complained of the prohibition, there was no evidence that any *other* persons had been placed at a disadvantage.[58] As there was no identified group disadvantage there was no need to look at proportionality. The same conclusion as to lack of group disadvantage was found in *Chaplin*, citing the reasoning in *Eweida*.[59] These cases raise uncertainty over individual religious liberty under indirect discrimination, particularly where there may only be one affected employee in circumstances where indirect discrimination is the sole claim option.[60] It has been said that in such cases the courts, "underestimated the importance of individual religious convictions".[61] Notwithstanding such comparator-based challenges, some have argued that it is possible – however strained – to interpret the use of the conditional "would apply; would put" as affording individual disadvantage where other (hypothetical) persons of the same view, were there to be any, would also be disadvantaged.[62] Unfortunately for those who are unable to establish group disadvantage, this argument has not found support from the domestic

[54] *Eweida v British Airways PLC* [2010] EWCA Civ 80.
[55] *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009.
[56] *Cherfi v G4S Security Services* [2011] Eq. L.R. 825.
[57] S. 19, *EqA 2010*.
[58] Per Elias J. in the EAT ([2009] IRLR 78) at para. [31] and per Sedley L.J. in the CA at para. [28].
[59] At para. [28] of the judgment.
[60] This is notwithstanding the ET decision in *Noah v Desrosiers t/a Wedge* (*Noah*) [2008] ET 2201867/07 where a hair salon terminated a Muslim woman's interview for the position of assistant stylist on the basis that the interviewee wore a headscarf which concealed her own haircut. The salon was known for very modern hair styles and viewed it as legitimate that staff display their own hair cut to clients. The Muslim applicant successfully claimed indirect discrimination on grounds of religion or belief. Whilst evidence of group disadvantage was not explored, such disadvantage was conceded by the respondents: per Judge Auerbach at para. [132].
[61] N. Hatzis, "Personal Religious Belief in the Workplace: how not to define indirect discrimination" (2011) 74 M.L.R. 287, 292.
[62] L. Vickers, "Religious Discrimination in the Workplace: an emerging hierarchy?" (2010) 12 Ecc. L.J. 280, 288–289.

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judiciary.[63] Of course, indirect discrimination exists to distribute equality of opportunity across communities; indeed, the courts' interpretation of disadvantage supports this.[64] However, *Eweida* and *Chaplin* highlight situations where an individual may seek to protect their religious interests in isolation. Whether this should be possible in the workplace, and if so how far, remains a live issue.[65]

Even where group disadvantage is demonstrated, there remains the matter of justification via a proportionality analysis. Aside from *Eweida* and *Chaplin*, proportionality otherwise thwarted all the employment claims outlined above. An example of this is the "specific situation" rule which has developed in Article 9 *ECHR* (freedom of religion) jurisprudence. Accordingly, where a religious individual voluntarily submits to an arrangement (such a contract of employment) which places them in a specific situation (the employment itself), the possibility of that individual simply leaving the arrangement (for example, to take up an alternative job elsewhere) may be relevant to determining whether interference with religious freedom under Article 9(1) can be justified as proportionate under Article 9(2).[66] As such, "[t]his voluntary submission creates a 'specific situation' which limits the claimant's right".[67] The specific situation rule is now viewed as influencing domestic judges' analyses of proportionality in workplace indirect discrimination claims: here, the balance often favours the employer. Sandberg duly concludes that, "[t]he jurisprudence in these two areas is no longer separated".[68] Indeed, commentators have claimed this rule operated in, amongst other cases, *Azmi*[69] and both *Ladele* and *McFarlane*.[70] The decision in *Azmi*, aside from the specific situation rule, further acts as an example of the courts employer-friendly approach towards proportionality. For example, Vickers notes that whilst it was possible to identify alternative accommodations which may have favoured the claimant, the court took the view that, "the employer is under no obligation to offer the employee the least disadvantageous accommodation available".[71] In side-lining the alternative solutions in favour of its own more restrictive proposal, the employer had not acted disproportionately. Whilst an employer's autonomy in

[63] For example, see comments by Sedley L.J. in *Eweida* at paras. [16]–[17].
[64] Hatzis, see note 61 above, pp. 303–305.
[65] These questions are considered further below. See Parts IIIA and VB.
[66] In *Eweida and Others* (2013) 57 E.H.R.R. 8 the ECtHR declared that this rule should be considered under Article 9(2) rather than prejudicing assessment of prima facie interference under Article 9(1): at para. [83].
[67] R. Sandberg, "Laws and Religion: unravelling *McFarlane v Relate Avon Limited*" (2010) 12 Ecc. L.J. 361, 365, note 28.
[68] See note 3 above, p. 117.
[69] M. Hill and R. Sandberg, "Is Nothing Sacred? Clashing Symbols in a Secular World" [2007] P.L. 488, 503–504.
[70] See note 67 above, p. 365.
[71] See note 62 above, p. 288.

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regulating their workplace is surely important in any employee accommodation relationship, it may be asked whether the current balance provides as sufficiently constructive a forum for accommodation dialogue as might be possible?[72]

In employment it is increasingly suggested that religion or belief comes below other characteristics in the protection "hierarchy". The debate about whether it is legitimate to discern such a hierarchy as a result of the proportionality balance has been controversial. Frequently, religion or belief appears to have been subordinated to sexual orientation with some arguing that any hierarchy is a straightforward by-product of anti-discrimination law juridification. Rivers contends that, "courts have shown [a] … bifurcation between an essentialising view of sexuality and a choice-model of religion that has rendered irrelevant the concerns of those with tender consciences about complicity in behaviour they consider immoral".[73] As the law views religion or belief as "chosen"[74] it may be wondered whether it can ever be placed above other protected characteristics in situations of clash?

The identification of a hierarchy of protection has become notorious in employment. It has been remarked that, "both the EAT in *McFarlane* and the Court of Appeal [(CA)] in *Ladele* failed 'to conduct the balancing exercise' between the two competing claims of religious discrimination and sexual orientation discrimination".[75] This has led to Sandberg drawing the conclusion that where religion and sexual orientation clash in the workplace, "[t]here seems to be no [legal] recognition that equality policy protects discrimination on grounds of religion as well as on grounds of sexual orientation".[76] In the sphere of employment this means that the option of last resort – the right to resign – is frequently the only realistic option. The apparent creation of such a hierarchy should be concerning from an equality perspective, as recognised by Malik who states that, "where there is a religion and sexuality conflict, it is important to take an approach that does not create a hierarchy between rights or equality grounds".[77] Nevertheless, the creation of any hierarchy between religion or belief and sexual orientation is not problematic for all: there are those who suggest,

[72] This is addressed, generally, in Parts IV and V.

[73] See note 23 above, p. 390.

[74] See the comments of Sedley L.J. in *Eweida* that whilst all the protected characteristics are "objective characteristics of individuals; religion and belief are matters of choice alone" (para. [40]). For similar remarks, see Lord Hope in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 at [11] and, in relation to children's capacity to be religious, Holman J. in both *An NHS Trust v MB* [2006] EWHC 507 (Fam) at [50] and *The NHS Trust v A* [2007] EWHC 1696 (Fam) at [41].

[75] See note 67 above, pp. 363–364.

[76] Sandberg, see note 24 above, p. 172.

[77] M. Malik, "Religious Freedom, Free Speech and Equality: conflict or cohesion?" (2011) 17 Res Publica 21, 38.

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for a variety of reasons, that conflict is inevitable.[78] However, the fact that the courts offer no detailed explanatory rationale for the existence of any such hierarchy is unsatisfactory. Whilst one interest may inevitably trump another in the proportionality balance, it will be argued[79] that reasonable accommodation provides a more transparent framework than indirect discrimination in which to understand when and why such subordination occurs.

III. The role of reasonable accommodation

Trends clearly exist which may be interpreted as a dilution of protection for religious interests under UK indirect discrimination. These trends coalesce around proportionality; however, sometimes they also relate to determination of disadvantage. Whilst religious believers cannot expect *carte blanche* dispensation, the judgments pose on-going concerns about the level of protection such individuals receive in UK anti-discrimination law.

A possible solution to this dilution is the introduction of a doctrine of reasonable accommodation to the UK.[80] Indeed, reasonable accommodation joins with direct and indirect discrimination in forming a standard part of anti-discrimination law, either as a free-standing claim option or as part of the existing indirect discrimination framework. The doctrine itself has been described as a specific response, in the form of an individual exception, to an indirect discrimination.[81] Consolidating this idea, it has been reasoned that, "where the controversial measure seems the best way to achieve a certain legitimate objective, the adjustment of that measure by means of an exception may be the only way to eliminate the discriminatory character without compromising the measure's purpose".[82] Interpreting the function of reasonable accommodation, Moon has commented that "the requirement of accommodation may rest on the view that there is something special or significant about religious beliefs that they are deeply rooted".[83] Such a concept has the potential to better address *individual* religious

[78] For example, see Vickers, note 62 above (pp. 301–303), and A. McColgan, "Class Wars? Religion and (In)equality in the Workplace" (2009) 38 Industrial Law Journal 1, 21–29.

[79] For example, see discussion of the Canadian model in Part IIIB1 and its application to *Ladele* in Part IVB.

[80] Conversely, Howard (see note 2 above) has claimed that these trends do not establish a need to introduce reasonable accommodation of religion or belief in discrimination law. She interprets the tests of group disadvantage and justification under indirect discrimination as affording sufficient consideration of attempts made at accommodation: pp. 365–370.

[81] E. Bribosia, J. Ringelheim and I. Rorive, "Reasonable Accommodation for Religious Minorities: a promising concept for European antidiscrimination law?" (2010) 17 Maastricht Journal of European and Comparative Law 137, 139. This idea is discussed more below in Parts IIIA and B.

[82] Ibid.

[83] R. Moon, "Introduction: law and religious pluralism in Canada" in R. Moon (ed.), *Law and Religious Pluralism in Canada* (Vancouver 2008), p. 8. This links with the discussion in Part IIB.

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interests in anti-discrimination law, in particular via a more sophisticated reconciling of competing positions.

The remainder of this article shall explore some of the issues surrounding adoption of a UK reasonable accommodation model for religion or belief in the workplace. The doctrine will be situated conceptually in existing anti-discrimination law, before a comparative model from Canada is outlined and applied to UK case law on indirect religious discrimination. For reasons of space, application of this model is limited to *Ladele*:[84] the intricate and challenging facts of this case best expose the proportionality analysis in the Canadian system.

Ladele also remains topical and relevant. The claimant, along with those in *McFarlane*, *Eweida* and *Chaplin*, recently applied to the ECtHR.[85] Eweida, Chaplin and McFarlane all invoked Article 9 separately and in conjunction with Article 14 *ECHR* (prohibition on discrimination);[86] Ladele only invoked Article 9 in conjunction with Article 14. Eweida successfully argued that the interference with her freedom of religion under Article 9(1) had been disproportionate under Article 9(2).[87] Interference with Chaplin, Ladele and McFarlane's freedom of religion was found to be proportionate under Article 9(2).[88] These four applications together represent the two most litigated areas of clash in employment, specifically religious conscience regarding sexual orientation and problems with employers' uniform policies.[89] They also relate to key issues identified in the jurisprudence.[90] Whilst the instant analysis centres on *Ladele*, the possibility of reasonable accommodation in *McFarlane*, *Eweida* and *Chaplin* is also briefly discussed at the end of this article.[91] Discussion duly concentrates on accommodation of individuals with a religious belief, although it is envisaged that any reasonable accommodation model would apply symmetrically across religion or belief.

Attention focusses on UK adoption of a reasonable accommodation duty in employment. Religious grievances in the workplace constitute the majority of relevant UK anti-discrimination claims. In any event, reasonable accommodation models are less established in other contexts: for example, the doctrine is very under-developed

[84] See below, Part IV.
[85] *Eweida and Others* (2013) 57 E.H.R.R. 8.
[86] As Eweida and McFarlane were employed by private companies their complaints did not directly relate to actions by the UK. In relation to their applications, the court therefore proceeded to examine whether in all the circumstances the UK authorities had complied with their positive obligation under Article 9: see paras. [91] and [109], respectively.
[87] See paras. [91]–[95].
[88] See paras. [98]–[100], [105]–[106] and [109], respectively.
[89] See Part IIC.
[90] See Part IIC1.
[91] See Part VC.

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in Canadian goods and services provision.[92] The Canadian model has been selected as it constitutes one of the most identifiable and classic models of reasonable accommodation of religion. Scholarly research regularly references this example,[93] whilst it has also been cited with approval in the domestic courts.[94] According to Vickers, the Canadian experience is instructive, "as it may provide guidance on how to tackle the difficult questions of principle that are common to both the UK and Canada".[95] The doctrine has played a similarly significant role in religious discrimination in the United States (USA). Indeed, "[t]he term 'reasonable accommodation' was born in the [USA] and was first used in connection with a duty to accommodate the religious beliefs of employees'"[96] However, in contrast to Canada, "the interpretation of the duty to accommodate [in the USA] has been somewhat restrictive, leaving employers with a most slender of duties to accommodate".[97] This comment on the USA model's narrow approach to accommodation alludes to a contrast in the tests used by the Canadian and USA reasonable accommodation doctrines to determine the threshold of accommodation. These tests are explored in more detail below.[98] It is submitted that application of the USA system to UK case law would add little to attempts at finding flexibility for religious employee accommodation.

A. Reasonable Accommodation and UK Anti-Discrimination Law

Introduction of a UK employer reasonable accommodation duty (for religion or belief) connects with the conceptual framework of anti-discrimination law. Indeed, reasonable accommodation is a species of anti-discrimination law. There are sound bases for protecting discrimination against individuals, central amongst these being the concept of equality, already noted as a principle (intertwined with human dignity and autonomy) upon which legal protection of religion can be based. In critiquing formal equality, Connolly notes that "in cases involving religion, claimants will often be seeking *different* rather than equal treatment".[99] Different treatment lies behind the operation

[92] Whilst reasonable accommodation does apply in Canadian goods and services provision (per McLachlin J. in *British Columbia (Superintendant of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 at [20] and [23]–[45]), there is a lack of related jurisprudence.

[93] For example, see Bribosia et al, note 81 above (pp. 144–150), Vickers, note 10 above (pp. 180–206), E. Howard, *Law and the Wearing of Religious Symbols: European bans on the wearing of religious symbols in education* (Abingdon 2012) (pp. 129–134) and Alidadi, note 2 above (p. 694).

[94] For example, see discussion by Rix L.J. of the Canadian system in *Copsey v WWB Devon Clays Ltd.* [2005] EWCA Civ 932 at [67]–[69].

[95] See note 10 above, p. 190.

[96] A. Lawson, *Disability and Equality Law in Britain: the role of reasonable adjustment* (Oxford 2008), 5.

[97] See note 10 above, p. 186.

[98] See Part IIIB1.

[99] M. Connolly, *Discrimination Law*, 2nd ed. (London 2011), 6 (original emphasis).

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of indirect discrimination; the same is true for reasonable accommodation. However, this is more subtle in relation to the latter. Whilst indirect discrimination uses differentiation in determining an outcome (as based on a comparator test), reasonable accommodation has no such comparator test. It focusses solely on any *omission* to provide a reasonable accommodation in the first place. Consequently, any resulting equality of opportunity is reached in contrasting ways: "reasonable accommodation discrimination typically emerges in response to the failure to make an adaptation to ensure equal opportunities and commonly does not follow from differentiation on a forbidden or seemingly neutral ground".[100]

Differentiation shifts the debate towards substantive equality. This conveys the idea that, "equality does not need to include the 'same' treatment, but may instead involve different groups being able to pursue their version of the good life".[101] This underscores indirect discrimination which "is more concerned with the *effects* of any behaviour, rather than the nature of the behaviour itself".[102] Indeed, such effects "must be concerned with both individuals and groups".[103] Reasonable accommodation clearly concerns itself with individual detrimental impact. However, it sidelines the group to which the individual belongs, meaning that it does not seek to ensure equality of opportunity for all – only the individual seeking accommodation. This affirms the view that it is "generally framed in terms of an individual right".[104] Accordingly, "it allows for an individualised approach to providing protection",[105] which might better target the protection gaps already identified in *Eweida* and *Chaplin* (subject to assessment of proportionality). Alidadi observes that it is "[a] more direct and positive way of addressing [indirect discrimination]".[106] Reasonable accommodation has also been seen as a way of enhancing individual human dignity. Moon argues that reasonable accommodation "underpins dignity, and in so doing it implies a need to be ready to adapt to the diverse situations of people from different backgrounds".[107]

Consequently, it is possible to arrive at a coherent conceptual understanding of reasonable accommodation. It provides individualised protection benefits which find a basis in (substantive)

[100] L. Waddington and A. Hendriks, "The Expanding Concept of Employment Discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination" (2002) 18 International Journal of Comparative Labour Law and Industrial Relations 403, 426.
[101] See note 10 above, p. 76.
[102] See note 99 above, p. 155.
[103] K. Swinton, "Accommodating Equality in the Unionized Workplace" (1995) 33 Osgoode Hall L.J. 703, 707.
[104] See note 100 above, p. 414.
[105] See note 10 above, p. 223.
[106] See note 2 above, p. 699.
[107] See note 33 above, p. 647.

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equality. Moreover, its relationship with human dignity provides an important normative link with legal protection of religion or belief.[108] A key difference with reasonable accommodation is that "disadvantage is not necessarily experienced by all or most members of a particular group, but is … experienced on the individual level, depending on both individual and environmental factors".[109] Of course, the emphasis is ultimately on proportionality to undertake the work in determining whether an individual should be accommodated.

B. Models of Reasonable Accommodation

The concept of making reasonable accommodation is not entirely foreign to UK anti-discrimination law. From its inception in 1995, legislation dealing with *disability*[110] discrimination has contained a duty to provide "reasonable adjustments".[111] This is the only protected characteristic to which reasonable adjustments is applied at the UK level, save for limited examples concerning pregnancy and maternity.[112] Following on from the *Disability Discrimination Act 1995* (*DDA*), the most relevant claim routes now constitute discrimination "arising from disability" and the duty to make reasonable adjustments, both found in the *EqA 2010*.[113] Reasonable adjustments might offer a useful comparison with reasonable accommodation of religion. However, aspects of disability discrimination mark it out as different from other protected characteristics. The reasonable adjustments duty is asymmetrical:[114] favourable treatment afforded to a disabled employee cannot be used as the basis for a claim by a disgruntled able-bodied employee. In contrast, religious discrimination is symmetrical: it protects both religion and belief and a lack of religion and belief. This recognises that disability is different from other protected characteristics. Whilst the reasonable adjustments model could be applied to religion, the focus here is on comparison with models of *religious* reasonable accommodation.

[108] See discussion above, Part IIB.
[109] See note 100 above, p. 427.
[110] For background commentary on the domestic system, see Lawson, note 96 above, pp. 5–13.
[111] The idea is the same regardless of the difference in terminology: D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford 2007), 696. Directive 2000/78/EC (employment equality), 27 November 2000, [2000] OJ L303/16, uses the phrase 'reasonable accommodation': Article 5.
[112] See, for example, the *Management of Health and Safety at Work Regulations 1999* SI 1999/3242: risk assessment for new or expectant mothers regarding health and safety (Regulation 16(1)) and, if health and safety risks cannot be avoided, having working conditions or hours of work changed (Regulation 16(2)). See also the *Employment Rights Act 1996* allowing employees time off work to receive ante-natal care (s. 55(1)).
[113] See ss. 15 and 20–22, respectively. The *DDA* provided for 'disability related discrimination': s. 3A(1)(a).The *EqA 2010*'s reasonable adjustment duty applies across employment and goods and services: s. 20.
[114] *Archibald v Fife Council* [2004] UKHL 32.

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1. Canada

In Canada, reasonable accommodation operates across anti-discrimination law[115] (as opposed to human rights law[116]). Within anti-discrimination, Schneiderman notes that it is "an idea familiar … in the context of employment".[117] Beaman similarly affirms this: "[r]easonable accommodation arose in … employment law as a way to articulate the necessary standard to be used by employers in dealing with requests for exemption from particular work requirements".[118]

Prima facie discrimination on a protected ground, including religion, must exist. There should be an identified religious belief, it must be sincere and it must be the basis for the claim.[119] There is no distinction between direct and indirect discrimination in Canada: a single unified test now exists. A common law duty of employer reasonable accommodation is built into this test. The employer must show: (i) it adopted the (discriminatory) standard for a purpose rationally connected to the performance of the job; (ii) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and, (iii) the standard is reasonably necessary to the accomplishment of that purpose. To show this, it must be demonstrated that it is impossible to accommodate the individual employees sharing the characteristic of the claimant without imposing undue hardship on the employer.[120] The approach in step (iii) reflects group *or* individual disadvantage.[121]

Once discrimination is found, reasonable accommodation asks whether employee accommodation would impose "undue hardship" on the employer. This test emerged at common law in *Ontario Human Rights Commission (O'Malley) v Simpson Sears* (*O'Malley*).[122] Before undue hardship can be explored it is necessary to determine the factors an employer may cite in relation to which an accommodation might cause such hardship. In *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* (*Alberta*)[123] the court set out "a non-exhaustive list

[115] The more familiar label 'anti-discrimination law' is used here even though in Canada both anti-discrimination and reasonable accommodation are referred to under the broader label of 'equality law'.

[116] Recently, it was said that reasonable accommodation does not operate outside the anti-discrimination context: per McLachlin C.J. in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567 at [68] and [69].

[117] D. Schneiderman, "Associational Rights, Religion and the *Charter*" in Moon (ed.), *Law and Religious Pluralism in Canada*, p. 67.

[118] L. G. Beaman, "'It Was All Slightly Unreal': what's wrong with tolerance and accommodation in the adjudication of religious freedom?" (2011) 23 Canadian Journal of Women and the Law 442, 443.

[119] Per Iacobucci J. in *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 at [42]–[43].

[120] Per McLachlin J. in *British Columbia (Public Service Employee Relations Comm) v BCGEU* [1999] 3 SCR 3 at [54].

[121] Ibid., at paras. [65] and [68].

[122] [1985] 2 SCR 536, per McIntyre J. at para. [23].

[123] [1990] 2 SCR 489.

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of criteria to be considered",[124] noting that it was "not … necessary to provide a comprehensive definition of what constitutes undue hardship".[125] This list[126] focusses on reasons for resisting an accommodation request (either in full or part) and comprises: financial cost,[127] disruption of a collective agreement,[128] morale problems for other employees,[129] inter-changeability of workforce and facilities,[130] the size of the employer[131] and safety.[132] Of course, in some cases the facts will inevitably raise separate matters which fall *outside* the *Alberta* list.[133] This was confirmed in *Chambly (Commission Scolaire Regionale) v Bergevin*[134] where it was said that "[t]hese factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situation presented in each case".[135] Consequently, the list in *Alberta* "must be adapted to the contexts in which accommodation requests are made",[136] suggesting that whilst the reasonable accommodation case law is of indicative use, the context of a given discrimination dispute will be critical in determining the totality of factors that must be considered outside the *Alberta* criteria.

Once factors are identified, the meaning of undue hardship can be considered to ascertain whether an accommodation is possible.[137] In *British Columbia (Public Service Employee Relations Comm) v BCGEU*

[124] G. Moon, 'From Equal Treatment to Appropriate Treatment: what lessons can Canadian equality law on dignity and on reasonable accommodation teach the United Kingdom?' [2006] E.H.R.L.R. 695, 710.

[125] per Wilson J. at p. 520.

[126] Ibid., at p. 521.

[127] For example, see *O'Malley* where a Seventh Day Adventist requested absence from work between sunset on Friday and sunset on Saturday. The court ruled that in situations like this, especially where an employer has already attempted to accommodate, it would not be unreasonable for some cost to be put on the employee: per McIntyre J. at para. [28].

[128] It is not necessarily the case that a multi-party agreement across employer, employees and any relevant union can frustrate any determination of the best mode of accommodation for a particular employee. See, generally, *Central Okanagan School District Number 23 v Renaud* (*Renaud*) [1992] 2 SCR 970.

[129] See *Renaud*: '[t]he employer must establish that actual interference with the rights of other employees, which is not trivial but *substantial*, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society', per Sopinka J. at p. 985.

[130] Where other workers could have been reassigned at no extra inconvenience and without an increase in the work load of other employees, accommodation may be required. See *Moore v British Columbia (Ministry of Social Services)* (1992) 17 CHRR D/426, per The British Columbia Council of Human Rights at para. [68].

[131] This includes the practical challenges of making suitable accommodation: per Wilson J. in *Alberta* at p. 521.

[132] Health and safety concerns will prevail over religious employee accommodation requests: *Pannu v Skeena Cellulose Inc.* (2000) 38 CHRR D/494.

[133] Indeed, this was acknowledged in *Alberta* by Wilson J. at p. 521.

[134] [1994] 2 SCR 525.

[135] Per Cory J. at p. 546. This is reinforced by J-F Gaudreault-DesBiens, "Religious Challenges to the Secularized Identity of an Insecure Polity: a tentative sociology of Québec's 'reasonable accommodation' debate" in R. Grillo et al (eds.), *Legal Practice and Cultural Diversity* (Aldershot 2009), 152.

[136] Ibid., Gaudreault-DesBiens, p. 152.

[137] See note 124 above, p. 710.

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(the *Meiorin* case),[138] "the [c]ourt held that … an employer had to show that the accommodation of the individual in question was *impossible* without imposing undue hardship on the employer".[139] The undue hardship test thus imposes a very high threshold ("impossibility") on employers before it will found that they did not have to accommodate. Accordingly, "employers … must demonstrate that they have made *every* effort to accommodate an employee and that it would be impossible to modify or eliminate a particular requirement without incurring undue hardship".[140]

The high threshold for undue hardship requires that, aside from interrogating the employer's responses to an accommodation claim, sharp focus is also placed on how such responses relate to the *employee's* circumstances in the workplace – in particular, the nature of their job, the extent of responsibilities aligned to that job, the possible terms of any accommodation and how these might impact upon the employer's environment. To this extent, "the decision on what accommodation is reasonable and what hardship is undue … requires a balancing of interests and is based on a proportionality test".[141] This balancing sets up an intriguing, if not precarious, equilibrium between the employee's arguments for accommodation and the employer's legitimate reasons in resisting accommodation. The significance of this for comparative purposes is that the high threshold of impossibility permits, if not *requires*, a highly attuned analysis, necessitating a detailed and forensic assessment of *all* the issues in attempting to achieve maximum possible accommodation. This necessitates a complete interrogation of all accommodation *options* comprising those which either fully or partially meet the employee's request(s).

The Canadian threshold for undue hardship necessitates a much more stringent standard of proportionality review than the approach under US reasonable accommodation. The US model similarly contains an undue hardship standard (together with a set of undue hardship factors which the employer may cite[142]), although this standard has been set extremely *low*. The threshold of undue hardship above which employers are not obliged to provide accommodation has been positioned at the level of a *de minimis* – more than minimal[143] – obligation. This is a fairly nominal burden. Sonné has interpreted it as meaning that undue hardship will be established where accommodation,

[138] [1999] 3 SCR 3.
[139] See note 124 above., p. 711 (emphasis added). See also McLachlin J. at para. [72] of *Meiorin*.
[140] See note 124 above, p. 710 (emphasis added).
[141] Howard, see note 93 above, p. 132.
[142] US Equal Employment Opportunity Commission website: <http://www.eeoc.gov/laws/types/religion.cfm>, accessed 12 August 2013.
[143] 'Minimal' is the level at which the courts interpret undue hardship: per White J. in *Trans World Airlines v Hardison* 432 US 63 (1977), 84 and per Rehnquist C.J. in *Ansonia Board of Education v Philbrook* 479 US 60 (1986), 67.

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"would cost the employer something beyond inconvenience".[144] Cromwell has gone further and suggested that *de minimis* may mean merely "trifling",[145] indicating perhaps a lower threshold. Gregory argues that "the courts [do not need to] grant even the most minor accommodation to religious observers to enable them to follow their religious beliefs and practices".[146] This perhaps reflects a lower standard of overall employee protection in the context of US labour law. Evidently, factors affecting both employer and employee may be of much less prominence in the US than in Canada, apart from in the most flagrant cases of reasonable accommodation failure.

It should be noted that the development of reasonable accommodation in Canada has taken place in a country well renowned for its commitment to multiculturalism, tolerance and diversity. Moreover, whilst *Alberta* has set out clear criteria for reasonable accommodation cases, the subsequent case law in interpreting those criteria has not always been thoroughly clear. Indeed, it has been said "that the outcome of cases depends to a large extent on the ideological approach of the court rather than the technical wording";[147] further, "the highly contextual and casuistic nature of the inquiry pursued by courts adjudicating upon disputes concerning the application of the doctrine has inevitably left some questions unanswered".[148]

Notwithstanding this, Moon comments that the Canadian process of reasoning "certainly provides a useful methodology for testing the extent to which an occupational or service requirement is appropriate and necessary … it appears to produce demonstrably acceptable, workable progressive solutions".[149] Indeed, "despite constitutional and legislative differences, it remains instructive to consider Canadian case law as it may provide guidance on how to tackle the difficult questions of principle that are common to both the UK and Canada. Such questions include … how far employers should be required to accommodate religious practice".[150] With respect to the continuing development of reasonable accommodation in employment, it appears that "the doctrine is a never-ending work in progress".[151]

[144] J. Sonné, "The Perils of Universal Accommodation: the workplace Religious Freedom Act of 2003 and the affirmative action of 147,096,000 souls'"(2003–2004) 79 Notre Dame L.Rev. 1023, 1043–1044.
[145] J. Cromwell, "Cultural Discrimination: the reasonable accommodation of religion in the workplace" (1997) 10 Employee Responsibilities and Rights Journal 155, 159.
[146] R. Gregory, *Encountering Religion in the Workplace: the legal rights and responsibilities of workers and employers* (Ithaca 2011), 186.
[147] L. Vickers, "Approaching Religious Discrimination at Work: lessons from Canada" (2004) 20 International Journal of Comparative Labour Law and Industrial Relations 177, 189.
[148] Gaudreault-DesBiens, see note 135 above, p. 152.
[149] See note 124 above, p. 721.
[150] See note 147 above, p. 190.
[151] Gaudreault-DesBiens, see note 135 above, p. 152.

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IV. Applying the Canadian Model to *Ladele*[152]

Ladele worked for the London Borough of Islington and became a registrar of births, marriages and deaths in 2002. Subsequently, the *Civil Partnership Act 2004* (*CPA*) came into force in December 2005: this afforded legal recognition to same-sex couples who became civil partners. The *CPA* not only provided for the designation of civil partnership registrars (s. 29(1)) but also required that each registration authority ensure that there was a sufficient number of civil partnership registrars for its area to carry out the various functions needed regarding the posts (s. 29(2)). No authorities were required to designate all existing registrars.

In summer 2004, Ladele explained to Islington that she would find it difficult to conduct civil partnerships due to her Christian belief that union should only be between a man and a woman. However, Islington decided that civil partnership duties would be shared out amongst existing registrars and so they elected to designate all registrars as civil partnership registrars. Not all authorities chose to designate all existing registrars. Two other registrars had also raised objections to carrying out civil partnership ceremony duties; one left Islington's service and the other was offered alternative employment on the same pay. This offer was accepted.

Islington's designation policy is relevant to how far Ladele could have avoided her accommodation request – especially given that she could not possibly have known when she commenced her job that she would be required to conduct civil partnership ceremonies in future years. Far from redefining an existing concept relating to her job (for instance, introducing same-sex marriage), the *CPA* introduced a *new* concept to her job: that of the "civil partnership". This was legally distinct to the concept of marriage.[153] Arguably, involvement in civil partnership ceremonies could never, even on an inclusive understanding of "marriage", have formed part of her original job description. If this is correct, it is likely the specific situation rule here did not apply to Ladele: she had not voluntarily agreed to a contract of employment that included civil partnership.[154]

[152] The facts are taken from the judgments of Elias J. in the EAT ([2009] IRLR 154) and Lord Neuberger M.R. in the CA ([2009] EWCA Civ 1357), the Statement of Facts in *Ladele and McFarlane v UK* [2011] ECHR 737, the Equality and Human Rights Commission's (EHCR) submission in *Ladele and McFarlane v UK* (available at: <http://www.equalityhumanrights.com/uploaded_files/legal/ehrc_submission_to_ecthr_sep_2011.pdf>, accessed 12 August 2013), the Foreign and Commonwealth Office's (FCO) Comments on the third party interventions in *Ladele and McFarlane v UK*, 14 October 2011 and the FCO Observations of the Government of the United Kingdom in *Ladele and McFarlane v UK*, 14 October 2011.

[153] This distinction has been debated by Sandberg, see note 24 above, pp. 163–166.

[154] R. Sandberg, 'The Implications of the Court of Appeal Decision in *Ladele* and other Case Law Developments': available at: <http://www.law.cf.ac.uk/clr/networks/ Sandberg%20_%20The%

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On raising objections, Ladele was offered a temporary accommodation by Islington. This would only have required her to conduct civil partnership ceremonies confined to the simple signing process, as opposed to the full ceremonies themselves. Ultimately, she refused the temporary compromise (because it would not have excused her from all civil partnership duties) and renewed her request for full accommodation. During this time she was able to make informal rota swaps with other colleagues to avoid officiating at such ceremonies. Islington ignored this practice. Subsequently, two of Ladele's colleagues who were gay complained to Islington claiming that they found her behaviour offensive and in breach of Islington's "Dignity for All" policy: this provided, *inter alia*, that there should be equality and freedom from discrimination on grounds of, amongst others, sexual orientation for all staff and that all staff were to be treated with dignity and respect. Its services were also to be provided to the public on such terms.

Ladele was the subject of a disciplinary process during summer 2007 during which it was conceded by Islington that there was no obligation to impose civil partnership duties on her and that they were also not part of her job description. This process did not involve any further investigations as to other potential accommodation offers which Islington could have made. Ladele later commenced legal proceedings against Islington. In both the EAT and CA it was found that, *inter alia*, she had not suffered either direct[155] or indirect[156] discrimination. This went against the findings of the ET. In relation to indirect discrimination, both the EAT and CA found that disadvantage had been suffered although this was justified.[157] Ladele was refused leave to appeal to the Supreme Court and subsequently applied to the ECtHR.

A. Accommodation: Pre- or Post-Designation?

Accommodation under the Canadian and US models will be discussed from the *post-designation* perspective in *Ladele*. However, any need for accommodation could have been avoided by not designating her or, once designated, possibly "un-designating"[158] her.

20Implications%20of%20the%20Court%20of% 20Appeal%20Decision%20in%20 Ladele.pdf>, accessed 12 August 2013, p. 7.

[155] Per Elias J at para. [90] in the EAT and per Lord Neuberger M.R. at para. [42] in the CA. Direct discrimination was claimed under the *Employment Equality (Religion or Belief) Regulations 2003*, SI 2003/1660, (*RB Regs 2003*), Regulation 3(1)(a).

[156] Per Elias J. at para. [117] and per Lord Neuberger M.R. at para. [75]. Indirect discrimination was claimed under the *RB Regs 2003*, Regulation 3(1)(b).

[157] Per Elias J. in the EAT at paras [111]–[112] and per Lord Neuberger M.R. in the CA at para. [52].

[158] Whilst ugly, this term captures the idea that Ladele's duties could have reverted to those prior to the coming-into-force of the *CPA*. The alternative term "redesignate" does not sufficiently convey this possibility.

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Designation implemented a substantial change to Ladele's responsibilities which, as Islington conceded, was not part of her original job description.[159] Further, Islington was under no legal obligation to designate her as a civil partnership registrar: they had a choice.[160] Indeed, the Registrar General "had left it to each local superintendent registrar to make the appropriate arrangements".[161] It is regrettable that it "was not fully explored … whether it [had been] proportionate to designate [Ladele] as a civil partnership registrar *in the first place*".[162] Of course, such "un-designation" may have been objected to by Ladele's gay colleagues,[163] although this would need to be considered alongside the circumstances of her designation, the fact that designation was not compulsory and that un-designation may well have been a useful pragmatic solution. Such pragmatism was lauded by Elias J. in the EAT who commented that, "we would be sorry if pragmatic ways of seeking to accommodate beliefs were impermissible … it may be that choosing not to designate those with strong religious objections would be a lawful way of reconciling conflicts in this highly sensitive area".[164]

Whilst Islington's Dignity for All policy committed it to equality on grounds of sexual orientation,[165] non-designation/un-designation would not have been inconsistent with such a policy. Ladele would not be in a position where she would have to refuse to perform civil partnership ceremonies.[166] In any event, the fact that another employee had not been designated (and reassigned elsewhere) suggests that non-designation (and by extension, un-designation) would not have contravened the policy.

B. Post-Designation: Canada and Reasonable Accommodation

In applying the relevant *Alberta* criteria it will be seen that, whilst Islington may have pointed to problematic issues, each of these could be met with counter-arguments which signified that post-designation accommodation was not "impossible".

[159] Per Lord Neuberger M.R. at para. [15].
[160] This choice is made clear in para. [7] of Lord Neuberger M.R.'s judgment where it is noted that Islington '*decide[d]* that civil partnership duties should be shared out between all the existing registrars' (emphasis added). See also comments at para. [46]. The lawfulness of *not* designating religious employees was confirmed by Elias J. in the EAT at para. [116] and by Lord Neuberger M.R. in the CA at para. [75].
[161] Per Elias J. at para. [4] (emphasis added).
[162] See note 62 above, p. 293 (emphasis added).
[163] The morale of Ladele's gay colleagues is discussed below in Part IVB1.
[164] At paras. [116]–[117].
[165] See note 62 above, p. 292.
[166] As noted by Lord Neuberger M.R. in the CA at para. [74]. The dissenting judgment of Vučinić and de Gaetano J.J. in *Eweida and Others* (2013) 57 E.H.R.R. 8 also discussed this in relation to the decision to designate: at paras. [6]–[7].

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1. 'Problems of morale for other employees'

Two gay colleagues objected to Ladele's stance on civil partnerships[167] and argued that any attempt to accommodate it would be demeaning and in breach of the Dignity for All policy. *Central Okanagan School District Number 23 v Renaud*[168] has indicated that the burden of proving any problem of workforce morale on the employer is high,[169] with the test being *substantial* interference with the rights of other employees.[170] It is debatable whether accommodation would have affected the two gay colleagues' *rights* whilst at work (let alone substantially interfered with them); further, it seems unlikely that two would be a sufficient enough number of disgruntled workers to establish undue hardship on Islington in meeting Ladele's full request (the rights and morale of the two gay employees had not been a barrier to partial accommodation offers). In situations such as this (and given that the issue was one of dignity rather than equality rights at work), Vickers has suggested that gay colleagues could pursue harassment claims, assuming that they could establish that accommodation, having regard to all the circumstances, could be reasonably considered as having the purpose or effect of violating dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.[171]

2. 'Inter-changeability of the workforce/size of the employer'

The CA noted that, "it is pretty clear that, by accommodating the wishes of the only registrar who wanted to avoid all civil partnership functions, Islington would not have significantly, if at all, impaired the quality of their registry services, whether in the field of civil partnerships or otherwise".[172] Accommodation would have undoubtedly entailed some sort of equitable and efficient balancing of duties amongst particular employees who, once canvassed,[173] might have been willing to undertake Ladele's civil partnership ceremony duties. This would have depended on unknown factors such as demand for civil partnerships and how many other registrars were available to perform the related functions. Assuming other registrars were willing to swap (previous practice suggested they were), this would have reduced any undue hardship on Islington, particularly if civil partnerships were isolated in their occurrence. Both Ladele and Islington could also have had a more positive dialogue to determine precisely what

[167] Per Lord Neuberger M.R. at para. [40].
[168] [1992] 2 SCR 970.
[169] Per Sopinka J. at p. 985, quoted above: note 129.
[170] Ibid.
[171] See note 62 above, pp. 296–297.
[172] Per Lord Neuberger M.R. at para. [44], quoting from the ET.
[173] *Renaud*, per Sopinka J. at p. 989.

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accommodations would have been reasonable after her designation as a civil partnership registrar. The practical ease with which Islington might have accommodated Ladele is evident again from their accommodation of the other registrar who was moved to another role. However, this might not have provided a workable solution for Ladele given that she wanted to stay in her existing role rather than be transferred elsewhere.

3. Other undue hardship criteria: internal policies and external public relations

There were additional considerations which constituted legitimate matters on which both Islington and the courts rejected the idea of accommodation. In particular, Islington had implemented its own internal Dignity for All policy. This committed it not only to the promotion of equality between its employees but also towards members of the public who were users of its services.[174] Ladele's refusal to perform civil partnerships, "involved discriminating against gay people in the course of [her] job; she was being asked to perform that task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served".[175]

Accommodation of Ladele would have undermined Islington's non-discriminatory objectives. As a result, it was not disproportionate to require all designated civil partnership registrars to perform full civil partnership duties[176] (presumably the partial offer of accommodation made did not violate the policy as that offer was temporary). To have decided otherwise would have risked Islington not only alienating the two gay employees (and any other affected colleagues), but also transmitting negative signals to the public about its attitude towards sexual orientation equality. However, *Meiorin* provides that employers have to accommodate unless it is *impossible* to do so. Accommodating Ladele, whilst inconsistent with the Dignity for All policy, would not have presented an intractable practical problem. The limited nature of the exception could have been emphasised given that it only affected one individual on a religious basis – religion or belief also constituting a protected characteristic in the equality balance.

Of course, the *Meiorin* conception of "impossible" may be defined more widely to mean impossible at the level of policy and public relations. Islington had "not disputed that an effective service could be

[174] Per Lord Neuberger M.R. at para. [45].
[175] Ibid. at para. [52].
[176] Ibid. at paras. [50] and [52].

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provided even if the [appellant] did not carry out the civil partnership duties. [Rather] … part of the commitment to the promotion of equal opportunities and fighting discrimination [was] that employees should not be permitted to refuse to provide services to the community for discriminatory reasons".[177] Overall, Islington preferred to subordinate religious equality to the sexual orientation equality imperative. Sandberg has attacked this subordination, claiming that in *Ladele*, "the obligations on the employer not to discriminate on grounds of sexual orientation trumped the rights of the employee not to be discriminated against on grounds of religion or belief. There seems to be no recognition that equality policy protects discrimination on grounds of religion as well as on grounds of sexual orientation".[178] Nevertheless, the sexual orientation equality values were "entirely rationally connected"[179] with the legitimate aim of requiring all staff to perform their jobs in a non-discriminatory fashion.

4. Other undue hardship criteria: legal obligations on the employer

The Dignity for All policy's guarantee of sexual orientation equality (as towards users of its services) was also legally entrenched by the *Equality Act (Sexual Orientation) Regulations 2007* (*SO Regs 2007*).[180] The CA confirmed that those regulations took "precedence over any right which a person would otherwise have by virtue of his or her religious belief or faith, to practice discrimination on the ground of sexual orientation".[181] A majority of the ECtHR found that this balance was proportionate and within the UK's margin of appreciation.[182]

However, proportionality can be addressed by contrasting Islington's *mode* of self-imposing the Dignity for All policy with its *right* to self-impose such a policy. Whilst self-imposition was Islington's right,[183] the policy might be open to challenge under the impossibility test where it disproportionately impacted specific employees, there being no built-in accommodation mechanisms. Inevitably, this is open to the objection that pragmatic exceptions would have undermined the aims of the policy. However, given that rejecting accommodation also did not guarantee dignity and respect for Ladele (the policy stated, *inter alia*, that "there should be equality

[177] per Elias J. at para. [97].
[178] R. Sandberg, 'Submission to the Consultation on Legal Intervention on Religion or Belief Rights' (EHRC Submission), September 2011: previously available at <http://www.law.cf.ac.uk/clr/research/Russell%20Sandberg%20%28Cardiff% 20University%29%20Submission%20to%20the%20Consultation%20on%20Legal%20Intervention%20on%20Religion%20or%20Belief%20Rights.pdf>, accessed 25 February 2013.
[179] Per Elias J. at para. [100].
[180] SI 2007/1263.
[181] At para. [69].
[182] At para. [106].
[183] As found by both the EAT at para. [98] and the CA at para. [46].

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and freedom from discrimination … for *all* staff'"[184]), it may be asked whether the balance struck between policy and pragmatism achieved maximum fairness. Certainly, practical arguments can be made in favour of redressing the balance.

A pragmatic approach to accommodation has been advocated in the Canadian context of legalised same-sex marriage – specifically, whether marriage commissioners who object for religious reasons to same-sex marriages should be accommodated from having to perform such marriage ceremonies. Lafferty has argued that an employee's "*position and visibility* in relation to the task of solemnization, including the process for same-sex couples to attain civil marriage (which may involve obtaining a license, having a ceremony, and documenting registration) are factors to consider".[185] This seems particularly relevant in *Ladele*. Accommodation might have depended on the parameters of her responsibilities, such as how far she was involved in the initial administrative tasks of arranging civil partnerships and whether this involved her as a first point of contact for members of the public. If there was a risk she might have turned away members of the public then accommodation would have been impossible (so as to cause undue hardship on Islington), unless she had swapped with a colleague which, on the facts, seemed practicable. Critically, this type of swap would not have jeopardised provision of the service in question (as requested by the service user);[186] consequently, it would also have not contravened the Dignity for All policy or the *SO Regs 2007*.

The obvious need to avoid rejection of services (and so not compromise sexual orientation equality policy) has been affirmed in the Canadian same-sex marriage debate: "[s]ame-sex couples appearing at a government office requesting marriage services should expect that they will not experience rejection by being refused service by a state representative whose job it is to serve the public".[187] Furthermore: "[u]ndue hardship would [only] exist if there were no public officials available to … provid[e] a marriage license, ceremony or registration to a same-sex couple other than officials who refused to do so on religious grounds or if there were so few public officials available that reassignment would impose an unreasonable burden on those who had no religious objections".[188] The acceptability of reasonable accommodation co-existing alongside another legitimate policy aim (so that the

[184] This is outlined by Lord Neuberger M.R. at para. [9] (emphasis added).
[185] L. Lafferty, "Religion, Sexual Orientation and the State: can public officials refuse to perform same-sex marriage?" (2007) 85 Can.Bar Rev. 287, 311 (emphasis added).
[186] Lafferty notes that in some Canadian provinces there are accommodations made for designated officials who do not wish to conduct same-sex marriage ceremonies and/or participate in the initial public-contact stages of such enquiries – as long as replacement officials can be identified. Those provinces are Ontario, Québec and Nova Scotia: p. 313.
[187] See note 185 above, p. 311.
[188] Ibid., p. 312.

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latter remains unaffected by the former) has been affirmed elsewhere in Canada: accommodation "does not require that a regulation or statute be abrogated, rather that its discriminatory effects be mitigated".[189] Assuming Ladele could have been accommodated "behind the scenes", it remains unclear how prospective same-sex civil partners would begin to frame a sexual orientation discrimination claim where their attempts to obtain civil partnership services had not been rejected (assuming there were enough civil partnership registrars available to offer the service). Indeed, in the Canadian debate it has been said that "the mere fact that an official officiates only at opposite-sex marriages cannot be qualified as 'individual discrimination'; is at most a kind of abstract, general discrimination, where there is arguably no concrete harm done".[190]

These pragmatic arguments were recently addressed in *Re: Marriage Commissioners Appointed Under the Marriage Act* (*Re: Marriage Commissioners*).[191] Here, the Saskatchewan Court of Appeal considered a reference question from the Canadian Government as to whether proposed legislation allowing public officials to refuse to conduct same-sex marriages would infringe access to public services without discrimination. It was held that there should be no such religious accommodation,[192] the court citing unlawful discrimination on grounds of sexual orientation.[193] Any refusal by a marriage commissioner to a gay couple of the services they required would be "very significant and genuinely offensive".[194]

However, it was declared that in different circumstances practicality could supervene over policy. For instance, where marriage commissioners were not the first port of call for couples seeking to marry,[195] any accommodation could be arranged with commissioners discreetly and behind the scenes.[196] Consequently, a commissioner's refusal "to be involved in a same-sex ceremony would not be apparent to the couple proposing to wed and there would be no risk of the couple approaching

[189] G. Bouchard & C. Taylor, *Building the Future: a time for reconciliation* (Publication of the Québec Government, Québec 2008), 24.
[190] B. MacDougall, E. Bonthuys, K. Norrie and M. van den Brink, "Conscientious Objection to Creating Same-Sex Unions: An International Analysis" (2012) 1 Canadian Journal of Human Rights 127, 155.
[191] [2011] SKCA 3.
[192] The court's decision was not based on a reasonable accommodation analysis. Rather, it was based on a violation of s. 15(1) (non-discrimination on grounds of, amongst others, sexual orientation) of the *Canadian Charter of Rights and Freedoms* which could not be justified as proportionate under s. 1. However, the court's reasoning is relevant to the instant reasonable accommodation analysis.
[193] Per Richards J.A. at paras. [5] and [94]. For treatment of this reason in Canada see B. MacDougall, "Refusing to Officiate at Same-Sex Marriage Ceremonies" (2006) 69 Saskatchewan L.Rev. 351, 358–360.
[194] Per Richards J.A. at para. [41].
[195] Ibid., paras [85]–[86].
[196] Ibid., para. [85].

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a commissioner and being refused services because of their sexual orientation".[197] It is not known how involved Ladele was at the initial civil partnership enquiry stage. In any event, the swapping of duties with colleagues could apply discreetly even where Ladele's employers asked her to be the first contact point for prospective civil partners, assuming this could be done without communicating Ladele's refusal to the service users. This would link with the proportionality reasoning in *Re: Marriage Commissioners*, provided that the service remained available. Recourse to pragmatism in such circumstances would be consistent with the view of the minority in *Eweida and Others*[198] who argued that, "if one were to undertake the proportionality exercise … with reference to whatever legitimate aim [Islington] had in view, it follows that the means used were totally disproportionate".[199]

Ultimately, the UK courts argued that it did not matter that "the civil partnership requirements could have been provided perfectly satisfactorily without obliging the [appellant] to perform these duties".[200] The fact that Islington *would* have been tolerating discriminatory conduct by an employee would be enough to prevent accommodation.[201] This was reiterated elsewhere.[202] Overall, such a position seems inflexible, particularly where accommodation would not have abrogated legal provisions proscribing sexual orientation discrimination (or the internal Dignity for All policy). It is submitted that where a pragmatic solution can be found this will be permitted under the Canadian model if it is able to coexist with a legitimate aim. The suggested accommodation outcome in *Ladele* pursues maximum accommodation but remains cognisant of the competing legitimate equality imperative and the need not to compromise service users' dignity. Of course, the issue of whether such service users may have sufficient evidential grounds to *suspect* that behind-the-scenes accommodation has taken place may become relevant, although procedures should be followed to minimise such risks. In any case, it may be argued that such knowledge, suspicion or offence would be too remote (assuming the service was offered with no problems) so as to affect the proportionality balance. Ladele's accommodation should also be viewed as sidestepping the "core job" rule which requires that excusal from tasks on conscientious grounds should not be permitted "[w]here carrying out the task in question is a significant aspect of the

[197] Ibid., para. [86].
[198] (2013) 57 E.H.R.R. 8.
[199] Per Vučinić and de Gaetano JJ. at para. [7].
[200] Per Elias J. at para. [108].
[201] Per Lord Neuberger M.R. at para. [68], summarising the arguments of Liberty as an intervening party.
[202] Submission of the EHCR at para. [35]. See also paras. [50] and [56].

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job".[203] This would not amount to impossibility under Canadian reasonable accommodation.

V. REASONABLE ACCOMMODATION OF RELIGIOUS EMPLOYEES IN THE UK: CHOICES AND CHALLENGES

A. Reasonable Accommodation and Proportionality

The Canadian reasonable accommodation test is demonstrably more capable of discovering pragmatic leeway for religious employees in the workplace than the current approach in UK indirect discrimination. The Canadian model's schematic outline of prescribed factors in *Alberta* demands a more complete consideration of matters (along with any *other* relevant issues) which may reveal how a full or partial accommodation could actually be provided without troubling the employer's legitimate aim. This exploration is further facilitated by an undue hardship proportionality standard ("impossibility", as stipulated in *Meiorin*) which obliges extensive examination of the facts to verify maximum possible accommodation. Whilst this approach benefits the religious claimant it is not at the expense of undermining or diluting the defendant's legitimate aim: it is clear that this must remain unaffected. The elevated standard is not to give undue recognition to religious interests; rather, it is to *force* courts to engage with all the relevant issues in a case so as to resolve whether, and if so how far, an accommodation should have been made. Some argue that proportionality analyses weaken guarantees of religious liberty. For commentators such as Rivers, it is preferable to enhance certainty of religious liberty through group immunity.[204] The existence of statutory religious exceptions[205] reflects the possibility of such immunity. However, arguably the appeal of proportionality is *precisely* its lack of rigid certainty. Vickers argues that, ironically, the call for more immunity "instead of relying on [a] fact-sensitive proportionality test, would result in less protection for religion and belief".[206] This is because statutory immunity would be necessarily limited. Rather, emphasis on a detailed proportionality test should provide "clear procedural safeguards to ensure that restrictions on religions [liberty] … are only imposed after proper consideration of the varied interests at stake".[207]

Domestic application of Canadian reasonable accommodation in employment would address many commentators' concerns with judicial reasoning at the justification stage of UK indirect discrimination

[203] See note 10 above, p. 170. See also *Noah* [2008] ET 2201867/07 per Judge Auerbach at para. [160].
[204] See note 219 below.
[205] See discussion above, Part IIA.
[206] See note 62 above, p. 299.
[207] See note 10 above, p. 232.

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claims. Sandberg accepts this point when he states that if reasonable accommodation were to put an extra gloss on the legal provisions which was "necessary to ensure that the focus is upon justification … then the concept [of reasonable accommodation] would be helpful'"[208] Moreover, it would "allow for nuanced fact-specific conclusions which do not constrain subsequent cases".[209] Further, it would address Stychin's contention that "balancing and accommodation demands some form of contextual analysis, which engages with the competing interests on the particular facts".[210] The exercise conducted with *Ladele* directly targets a particular lament of Stychin's, namely that in debates on reasonable accommodation of religion, "there is rarely any consideration of *how* this balancing would actually be undertaken in hard cases".[211]

Whilst reasonable accommodation in employment might signify "the triumph of pragmatism over principle"[212] it provides an alternative and context-dependent way in which to deal with competing claims. Accordingly, McGoldrick concludes that, "[s]ensitive and intelligent employment practices may resolve many practical problems but some may require weighing of claims that have at least an appearance of equal weight … [C]onflicts … can sometimes be resolved by common sense, good practice and a sense of proportionality".[213] The promotion of pragmatism was certainly a possible option in *Ladele* where religious conscience clashed with public policy. On this basis, Trigg lauds the fact that reasonable accommodation allows individuals to resist pressure in matters of conscience:

> [d]emocratic agreement of public policy need not imply the enforcement of public norms, and a particular view of morality, on individuals. Doing so may be neater from a bureaucratic point of view, but it rides roughshod over the respect for individuals that should lie at the root of any democracy. It involves coercion, and introduces a new form of discrimination in policies designed to remove other forms.[214]

Nevertheless, difficulties remain. Accommodation of Ladele may indicate that other types of beliefs motivated by religion (for example, racist beliefs[215]) would also have be accommodated at work, lest policy

[208] See note 178 above.
[209] See note 3 above, p. 130.
[210] C. Stychin, "Faith in the Future: sexuality, religion and the public sphere" (2009) 29 O.J.L.S. 729, 749–750.
[211] Ibid., p. 749 (original emphasis).
[212] Ibid., p. 753.
[213] D. McGoldrick, "Accommodating Muslims in Europe: from adopting Sharia law to religiously based opt outs from generally applicable laws" (2009) 9 H.R.L.Rev. 603, 625–626.
[214] R. Trigg, *Equality, Freedom and Religion* (Oxford, 2012), 125.
[215] In the EAT, Elias J. noted Liberty's argument that accommodation could, "lead to situations which almost everyone would find wholly unacceptable. For example, a racist who objected to

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prohibiting other forms of discrimination be elevated above policy prohibiting sexual orientation discrimination. This hypothetical point was not directly addressed in *Re: Marriage Commissioners*, perhaps because religious thinking (particularly in mainstream faiths) is less evolved in matters of sexual orientation than those of race. Indeed, it was noted in *Re: Marriage Commissioners* that same-sex unions tend to "occup[y] centre stage"[216] in religious conscience debates. As a result, clashes between religion and race seem rarer. However, under the Canadian reasonable accommodation model it is *theoretically* possible that religious conscience on matters of race could still be accommodated in the workplace, provided any competing legitimate aim relating to race equality was not compromised. It is accepted that this is undoubtedly controversial (as indeed it already is in relation to sexual orientation), yet it appears an inescapable option under the Canadian impossibility test. A possible solution might be that, should clashes between protected characteristics arise in employment, accommodation be influenced by exceptions policy for religious groups which only tolerates discrimination on grounds of sex, religion or belief and sexual orientation.[217] Such policy may be transferred to cases of religious conscience in the workplace to reveal the limits on how far individuals can "stray from the norms of the society of which they members and still demand 'reasonable accommodation'".[218] Of course, behind the scenes accommodation of racist religious beliefs would still need to be acceptable to other employees whose cooperation in accommodation would be essential. Undeniably, cases of religious conscience in relation to *any* protected characteristic pose insuperable proportionality challenges: by their very nature they are impossible to resolve to everyone's satisfaction – reasonable accommodation is merely one attempt at resolution.

B. Reasonable Accommodation and Individuals

Whatever the type of clash between religious employee and employer, a focus on individualised religious liberty is ultimately vulnerable to the charge that, far from augmenting religious interests, it actually diminishes them. This is because a concentration on individuals is less likely to foster respect for religion at a more global and collective level so as to percolate down to the individual. Rivers thus advocates a more collective dimension to religious rights as rooted in constitutional pri-

performing mixed race marriages or Jewish marriages would have to be accommodated in similar circumstances": at para. [106].

[216] Per Richards J.A. at para. [25].

[217] See above, Part IIA.

[218] See note 214 above, p. 125.

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nciple.[219] He believes this is more apt to achieve religious liberty in the long term because "it requires institutional anchoring in the recognition of a quintessentially religious domain … which is important enough to be immune from state interference. It requires religions and the state to be thought of, in some sense, as coequal in law".[220] This better entrenches religion's position in UK society; it also permits individual rights to flow from it. As with any individualised legal construct, reasonable accommodation is part of the problem and not the solution to ensuring stronger religious liberty.

However, reasonable accommodation and broader respect for religion are not mutually exclusive: they can coexist. In any case, Vickers contests the idea that group rights should be the default basis for religious interests, arguing that the more modern approach is to conceive of them at the individual level. She has reasoned that "collective rights are an important aspect of individual rights, but they derive their value from individual interests … collective rights gain their validity and value from the individuals who make up the collective".[221] Even if this is not accepted, before modes of religious liberty protection are rejected, there should be further debate "over whether religious interests should be understood as individual or collective rights".[222] Certainly, reasonable accommodation has a proven ability to raise the profile of religion across various participatory elements of society, such as the workplace.

The inherently individualistic spirit of reasonable accommodation also coheres with the promotion of human dignity as an accepted normative basis for legal protection of religion or belief. This is embodied in the notion that "[i]f we accept that all humans are equal, we need to give equal concern and respect to the *different* world views that they develop".[223] It also chimes emphatically with the Equality and Human Rights Commission's (EHRC) submission that "recognition of the principles of dignity and autonomy requires an approach to the definition of manifestation that focusses primarily on the conviction of the *adherent*".[224] Additionally, within the human dignity framework, equality as a sub-strand of that framework clearly highlights the role reasonable accommodation can play in anti-discrimination law. It provides a form of individual substantive equality focussing on individual corrective justice. This, along with the dignity imperative, supports a duty of accommodation for religious employees at

[219] See note 28 above, pp. 318–322.
[220] See note 23 above, p. 399.
[221] See note 10 above, p. 42.
[222] L. Vickers, "Twin Approaches to Secularism: organised religion and society" (2012) 32 O.J.L.S. 197, 201.
[223] See note 10 above, p. 40 (emphasis added).
[224] EHRC submission in *Eweida and Chaplin v UK*, at para. [16] (emphasis added).

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work (whatever the type of clash) up to the point of undue hardship. Of course, reasonable accommodation's individualised focus is at odds with indirect discrimination's focus on group disadvantage and distributive justice,[225] leading some to attack reasonable accommodation's assimilationist impact. Schneiderman has claimed reasonable accommodation is a "formalistic standard of review, assimilationist in its objectives, and largely oblivious to the presence of domination".[226] The doctrine "leaves unchallenged and unaffected the underlying discriminatory policy which resulted in the initial exclusion".[227] Indeed, Beaman rebukes reasonable accommodation for tolerating structural inequality[228] and condemns those who use the language of accommodation for invoking a colonial attitude that "'we' will tolerate 'you'".[229] Certainly, assimilation supports Rivers' argument that the individual arena is ill-suited to securing religious interests in the long term: the focus should be on broader protection and acknowledgement.

These arguments reveal weaknesses in the protection claims of reasonable accommodation. However, reasonable accommodation is not a panacea for addressing protection deficits experienced by religion or belief in the work environment. This is not to deter ambition of religious liberty; rather it is to acknowledge that reasonable accommodation is plainly ill-equipped to challenge *deep-rooted* societal problems concerning religion.[230] Indeed, a positive advantage of reasonable accommodation is its concentration on individual matters, associated respect for dignity and ability to secure religious liberty in the workplace through a more forensic proportionality focus. That focus allows reasonable accommodation to search for maximum equitable co-existence between employer and employee, particularly where there is a clash of protected characteristics. This approach is clearly instructive.

Of course, the individualised approach to reasonable accommodation, particularly when using the employee-friendly Canadian

[225] Although see Hatzis, note 61 above, who argues that both distributive and corrective justice have roles to play in indirect discrimination: pp. 303–305.

[226] See note 117 above, p. 67.

[227] See note 100 above, pp. 414–415.

[228] See note 118 above, p. 447.

[229] Ibid., p. 443. In relation to conscientious religious exemptions, Nehushtan has claimed that the principle of tolerance (as opposed to a combination of other explanations, such as ideas of individual/communal/minority rights, affirmative action or equality) best describes the practice of granting such exemptions. This is because tolerance offers the most useful description of the state of mind and behaviour of the state in engaging in that process. See Y. Nehushtan, "What are Conscientious Exemptions Really About?" Oxford Journal of Law and Religion. Advance Access published 14 December 2012, doi: 10.1093/ojlr/rws045.

[230] As an alternative, Alidadi notes the 'deep equality' approach which seeks to undo existing power structures so as to break down existing insider/outsider distinctions. An example given is overhaul of the current public holidays schedule which would mean religious minorities need not request days off – they would have the benefit of not working when their religion so dictated: see note 2 above, p. 712.

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doctrine, is likely to place greater burdens on employers. This is an inevitable result of investigating ways in which maximum accommodation could be achieved for religious employees in employment. It is possible that employers will be faced with increased requests for religious accommodation if only individual (as opposed to group) disadvantage is required. Nonetheless, as Vickers highlights,[231] personal beliefs and associated manifestations are protected elsewhere (such as Article 9*(1)*) signifying that individual disadvantage is not ignored by the law. Of course, the acceptance of individual disadvantage in Canadian reasonable accommodation does not appear to have posed severe problems for employers in Canada. In the majority of UK cases it is submitted that an individual faith conviction will probably be discernible on the facts so as to surmount the existing domestic anti-discrimination test for religious belief.[232] The same domestic test in relation to other beliefs (including philosophical beliefs) would be applied to reasonable accommodation requests on the basis of individual non-theistic convictions.

C. Canadian Reasonable Accommodation and UK Jurisprudence

The exercise in Part IV shows that Canadian reasonable accommodation may have enabled accommodation to have been reached in *Ladele*. Whilst, admittedly, support for pragmatism will always be provocative where two protected characteristics clash, reasonable accommodation in *Ladele* demonstrates that – sometimes – it is not necessary for religion to be placed below sexual orientation in any "hierarchy". The two can co-exist. This expects that "respect for diversity inevitably involves a process of accommodation, as opposed to one side dominating the other".[233] Further, although the employer in *Ladele* was a public entity, application of reasonable accommodation in the public employment sphere could be permitted. Vickers makes the argument that is it "not clear-cut" why public-sector organisations should automatically find it less difficult to justify non-accommodation of religion. Whilst they may exist to perform a more "secular" role than private institutions it could equally be argued that the public sector should "reflect its community and so accommodate both sexual orientation and religion and belief".[234] Rivers has gone further and asserted that arguments against accommodation of religion by public bodies, on the basis that such bodies are publicly funded, are

[231] See note 62 above, p. 289.
[232] See explanation in Part II.
[233] See note 214 above, p. 124.
[234] See above note 62, p. 292 and, generally, pp. 292–294.

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misconceived: "the notion that 'ethics flow with money' [is] 'irrational, wrong and illiberal'".[235]

Accommodation is less likely in *McFarlane*, a case concerning a Christian relationship counsellor who refused to counsel same-sex couples on sexual matters. Whilst there were legal and internal policy reasons counting against accommodation in McFarlane (similar to those in *Ladele*), there was also evidence that employee reallocation would not be practicable[236] (unlike in *Ladele*). This would have made behind the scenes accommodation particularly difficult, irrespective of whether McFarlane was the first point of contact for service users or not. Without the option to reallocate McFarlane elsewhere, there would have been a real danger of compromising provision of the counselling service to same-sex couples which would have abrogated legal and internal policy prohibiting sexual orientation discrimination in the provision of services. This key difference between two ostensibly similar cases highlights that in reasonable accommodation analyses a close assessment of the facts is vital. A single variable can alter the outcome. Interestingly, unlike in *Ladele* (where the accommodation request stemmed from unanticipated later changes to the terms of Ladele's employment), McFarlane must have been aware of the specific parameters of his role when he commenced his post.[237] Accordingly, he was aware of the circumstances which motivated his request for accommodation from the very start of his job. Notwithstanding this, it is possible that under Canadian reasonable accommodation an employee's knowledge of their role from the outset would not *necessarily* be enough to prevent accommodation regarding aspects of that role, assuming service provision remained in tact along with any corresponding and legitimate internal or external policies.[238]

In *Eweida*, it is submitted that accommodation would be permitted under the Canadian scheme: British Airways' predominant reason for denying accommodation was their uniform policy that sought to create

[235] As quoted in A. Donald et al, *Equality and Human Rights Commission Research Report 84: religion or belief, equality and human rights in England and Wales*, p. 103. Available at: <http://www.equalityhumanrights.com/uploaded_files/research/rr84_final_opt.pdf>, accessed 12 August 2013.

[236] Per Underhill J. at para. [26].

[237] For example, see Laws L.J.'s discussion of the facts at para. [4] in the CA.

[238] Others take a more strict view of accommodation in such circumstances. See, for example: M. Hill, "Religious Symbolism and Conscientious Objection in the Workplace: an evaluation of Strasbourg's judgment in *Eweida and others v United Kingdom*" (2013) 15 Ecc.L.J. 191. Hill states that McFarlane's application was "rightly rejected because he voluntarily put himself in a position where he would be expected to provide psycho-sexual counsel to both straight and gay couples; and because accommodating him by filtering clients was not possible" (p. 202). Similarly, Donald has indicated that "individuals whose religion or belief is important to them have a responsibility to make sensible career choices and may have to make personal sacrifices to avoid conflict with the law or professional guidelines, especially where conflict is foreseeable": A. Donald, "Advancing Debate about Religion or Belief, Equality and Human Rights: grounds for optimism?" (2013) 2 Oxford Journal of Law and Religion 50, 63.

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a company brand[239] and, accordingly, prohibit employees from wearing any item(s) above their uniforms. British Airways' *volte face* in later allowing all faith symbols to be worn above uniforms demonstrates that its legitimate business needs could co-exist harmoniously with accommodation. Accordingly, such accommodation was not impossible at the level of internal policy. For this reason, accommodation was also found to be proportionate by the ECtHR under Article 9*(2)* in *Eweida and Others*.[240] It is unlikely accommodation would be available in *Chaplin* where a Christian nurse was refused permission to wear a cross over her work uniform. Chaplin's employers did suggest alternative modes of accommodation[241] but these were rejected by Chaplin in favour of less realistic alternatives.[242] Whilst the refusal followed a change in uniform and jewellery policy (under previous policies Chaplin has been able to wear her cross visibly on top of her uniform[243]), her bosses were ultimately able to point to numerous health and safety concerns[244] with her preferred accommodation solutions (not to mention the need to have a corporate and professional image[245]), the *totality* of which could have attained the impossibility threshold. In *Eweida and Others*, the ECtHR was also persuaded that the health and safety imperative precluded accommodation in the Article 9*(2)* proportionality balance.[246]

VI. Conclusion

Reasonable accommodation's approaches to individual disadvantage and proportionality are distinctive in addressing clashes between religious employees and their employers. The Canadian model is highly instructive in its approach to proportionality via the impossibility test. Given that assessments of *both* group disadvantage and proportionality have presented problems in UK indirect discrimination cases, any UK adoption of the Canadian reasonable accommodation test should be part of a free-standing claim route. Discrimination would exist where an employer failed to comply with a duty to reasonably accommodate an employee with a religion or belief. To this extent, some commentators have argued for a *sui generis* classification of reasonable accommodation. Rather than forming part of indirect discrimination, it should form a wholly independent claim. Waddington and Hendriks support this: "the right to an effective accommodation does not entirely

[239] Per Elias J. in the EAT at para. [17].
[240] See para. [94].
[241] Per Judge Hollow at paras. [20]–[21].
[242] Ibid. at para. [18].
[243] Ibid. at para. [14].
[244] Ibid. at paras. [13] and [19].
[245] Ibid., at para. [29].
[246] See para. [99].

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fit within the prevailing distinction between direct and indirect discrimination".[247] This is supported by Schiek et al.[248] Indeed, given the alternative burdens of proof inherent in both claim routes it appears wiser to create a separate duty for reasonable accommodation so as to keep the duty distinct. In reasonable accommodation, the burden is on the defendant to establish that an accommodation would create undue hardship; in indirect discrimination the initial burden is on the claimant. Vickers alludes to this distinction as a reason for maintaining reasonable accommodation as a distinct duty;[249] similarly, so do Waddington and Hendriks.[250] Debate about UK adoption of a reasonable accommodation model for religion or belief in employment does not presuppose that employer reasonable accommodation duties should also follow for the *EqA 2010*'s other protected characteristics. Any arguments about extending reasonable accommodation beyond the religion or belief perspective form a separate enquiry.

As accommodation in *Ladele* would have had to take place alongside full service provision, this might assuage concerns from trade unions and Lesbian, Gay, Bisexual and Transgender stakeholders that reasonable accommodation could "act as a vehicle for religious people to discriminate and thereby threaten the rights of LGB and T people".[251] Other stakeholders have been particularly keen on the merits of reasonable accommodation. For example, a recent Parliamentary report entitled "Clearing the Ground",[252] prepared by the "Christians in Parliament", argued *inter alia* for research to be undertaken regarding reasonable accommodation for religion to "ensure that the rights of Christians and those of other faiths to manifest their belief were not unduly restricted".[253] However, it also acknowledged that care would need to be taken in not excessively regulating "reasonableness".[254] An evolving knowledge exchange process has encouraged stakeholders elsewhere to welcome the advantages of reasonable accommodation, particularly in light of the more prescriptive approach it affords regarding proportionality. Such stakeholders have noted reasonable accommodation's ability to lead to more religiously plural workplace environments.[255] Clearly, reasonable accommodation is capable of being a model of good employer practice.[256]

[247] See note 100 above, p. 427.
[248] See note 111 above, p. 745.
[249] See note 10 above, p. 224.
[250] See note 100 above, p. 427.
[251] See note 235 above, p. 65.
[252] 'Clearing the Ground: preliminary report into the freedom of Christians in the UK', Christians in Parliament, February 2012. See: <http://www.eauk.org/current-affairs/publications/clearing-the-ground.cfm>, accessed 12 August 2013.
[253] Ibid., p. 35.
[254] Ibid.
[255] See note 235 above, p. 66.
[256] Ibid., pp. 63–64.

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There also exists institutional enthusiasm for a model of reasonable accommodation for religion. In the UK, the EHRC (in response to consultation feedback[257]) has reiterated its commitment to potentially developing a concept of reasonable accommodation in cases concerning religion in order to "help inform [its] early thinking in this area".[258] It also announced that it "intends to continue the dialogue with a range of interested stakeholders to explore this idea further".[259] Furthermore, the Council of Europe's Commissioner for Human Rights has commented that, "[a]s part of the further development of this new generation of [national equality] legislation, consideration needs to be given to extending the provisions on reasonable accommodation to the other grounds covered by the legislation … Reasonable accommodation could be further developed".[260] The Commissioner also confirms that "[a]ll organisations should be required to make reasonable accommodation for the practical implications of diversity across all grounds covered by the [national] legislation".[261]

Recent UK jurisprudence concerning religious discrimination in the workplace has shown that the courts often marginalise religion in the face of other legitimate aims. Rivers argues that this dilution amounts to a "recreationalisation" of religion: "[t]he effect is to turn religion into another hobby … the law need make no space for the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers. Religion thus acquires all the moral weight of stamp-collecting or train-spotting".[262] Adoption of a Canadian reasonable accommodation duty for employers in UK anti-discrimination law would help facilitate better judicial engagement with individual interests as balanced with competing factors. This is likely to result in amelioration of individual disadvantage. Reasonable accommodation emphatically presents an alternative perspective in the legal acknowledgement of employee religious interests so that individuals of faith feel less alienated by the law.

[257] See the Commission's Consultation Response Summary: <http://www.equalityhumanrights.com/uploaded_files/legal/consultation_response_summary.pdf>, accessed 12 August 2013.
[258] See online news announcement, 'Legal Intervention on Religion of Belief Rights': <http://www.equalityhumanrights.com/legal-and-policy/human-rights-legal-powers /legal-intervention-on-religion-or-belief-rights/>, accessed 12 August 2013.
[259] *Ibid.*
[260] T. Hammarberg, *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, Strasbourg, 21 March 2011, p. 5.
[261] Ibid., p. 9.
[262] See note 26 above, p. 398.

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