**Appeal No. UKEAT/0081/20/JOJ**

**IN THE EMPLOYMENT APPEAL TRIBUNAL**

**BETWEEN:**

**MAYA FORSTATER**

**Appellant**

**-and-**

**(1) CGD EUROPE**
**(2) CENTER FOR GLOBAL DEVELOPMENT**
**(3) MASOOD AHMED**

**Respondents**

**-and-**

**INDEX ON CENSORSHIP**

**Intervenor**

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# SKELETON ARGUMENT ON BEHALF OF INDEX ON CENSORSHIP

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## Introduction

1. Index on Censorship is a leading international free speech non-governmental organisation, which campaigns for and defends free expression worldwide.

2. By the Appeal Tribunal's Order dated 4 May 2020, Index on Censorship was given permission to intervene in this appeal. The following submissions, which will be developed orally, are aimed at assisting the Appeal Tribunal with the interpretation of protected characteristics under the Equality Act 2010 ("the 2010 Act") in light of the relevant jurisprudence on the protection of freedom of expression.

3. The Employment Tribunal's ("ET's") decision that the Appellant's belief (that sex is binary and biologically immutable, and that men and women are defined by reference to sex rather than gender) is not protected under the Equality Act because "in its absolutist nature, [it] is incompatible with human dignity and fundamental rights of others" and "is not worthy of respect in a democratic society" (§§84 and 85) raises questions of great significance as to the protection of rights guaranteed by Article 10 of the European Convention on Human Rights ("the ECHR", "the Convention"). Index on Censorship's view is that the ET's approach to

determining whether a belief is be protected for the purposes of the 2010 Act is not consistent with the proper approach to qualified rights protected by the ECHR and, in particular, with the jurisprudence on the protection of Article 10.

**Freedom of expression: the context**

4. Article 10 ECHR provides, so far as relevant, as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3. Human rights jurisprudence at both the domestic and European levels (and, indeed, internationally) is replete with references to the fundamental importance of the right to freedom of expression which, as the European Court of Human Rights ("ECtHR") put it in *Handyside v UK* (1979-90) 1 EHRR 737 (§49):

> "constitutes one of the essential foundations of … a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to para. 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

4. Article 10 protects the expression of views, opinions or beliefs which some (or even many) consider offensive, wrong or invalid. In the words of Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 1 BHRC 375 (§20):

> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical the unwelcome and provocative…Freedom only to speak inoffensively is not worth having…"

5. The rights protected by Article 10 are not unlimited. Article 10(2), reproduced above, provides for restrictions proportionate to the countervailing rights and interests set out therein. And expression which falls within Article 17 ECHR will be outside the scope of protection all together. That Article, which prevents the Convention from being relied upon in service of acts which are antithetical to its fundamental principles, provides that:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

6. The Strasbourg case law demonstrates that Article 17 presents a low bar for persons seeking to rely on the Convention for protection of their fundamental rights. In *Glimmerveen and Hagenbeck v Netherlands* (1982) 4 EHRR 260 the European Commission of Human Rights ruled that Article 10 did not protect the possession of leaflets inciting racial hatred and calling for the removal of all non-white people from the Netherlands because the material fell within Article 17 whose purpose was to "to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention [by limiting] … those rights which, if invoked, will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention":

> [22] The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms referred to above.
> Consequently, the Commission finds that the applicants cannot, by reason of the provisions of Article 17 of the Convention, rely on Article 10 of the Convention.

7. And in its admissibility decision in *Norwood v UK* (2005) 40 EHRR SE1 the ECtHR said at 133 that:

> "The general purpose of Art.17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention."

8. The Applicant in *Norwood* argued that his Article 10 rights had been violated by his conviction for publicly displaying a poster carrying a photograph of the Word Trade Center in flames, the words "Islam Out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. The European Court held that this was an attack on all Muslims in the UK and that "[s]uch a general, vehement attack against a religious group, linking the group as

a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination." The act of displaying the poster "constituted an act within the meaning of Art.17" and, as a result, did not enjoy protection under Article 10 ECHR.

9. More recently, in *Lilliendahl v Iceland* (case 29297/18, judgment of 12 May 2020) the ECtHR determined that the applicant's reliance on Article 10 in respect of highly pejorative and offensive homophobic comments made on a news website was admissible notwithstanding the Government's reliance on Article 17. In particular, the Court considered that the comments were not aimed at inciting violence or hatred or destroying the rights and freedoms protected by the Convention: see §26. The Court held that the applicant's comments, although highly prejudicial, could not be said to reach the "high threshold for applicability of Article 17"; ruled that the comments were protected under Article 10; and went on to find that the interference with that right was justified.

10. Properly understood, Article 17 serves the purpose only of excluding the most extreme cases which are antithetical to the fundamental values of democracy and anti-totalitarianism on which the Convention is based. Such cases are rare.

11. Article 10(2) ECHR has limited application to speech which can be categorised as political and/or pertaining to matters of public interest. In *Lehideux v France* (1998) 30 EHRR 665, for example, the ECtHR having decided that the Applicants' defence of crimes of collaboration of the Vichy regime did not fall within Article 17, it went on to decide that applicants' criminal convictions breached Article 10. In *Gündüz v Turkey* (2005) 41 EHRR 5 the ECtHR ruled that Article 10 had been violated by the conviction and imprisonment on charges of hate speech of the leader of an Islamist sect in respect of televised comments he made calling for the destruction of democracy and the imposition of Shariah law and stating, *inter alia*, that "anyone calling himself a democrat, secularist … has no religion"; that "Democracy in Turkey is despotic, merciless and impious" and that "'if [a] person has his wedding night after being married by a council official authorised by the Republic of Turkey, the child born of the union will be a [bastard]…". In *Ergin v Turkey (No.6)* (2008) 47 EHRR 829 the ECtHR indicated that where, as there, the applicant was subject to criminal conviction in respect of a newspaper article, the "essential element to be taken into consideration" was whether the article "constitute[d] hate speech" (§34). And in *Vajnai v Hungary* (2010) 50 EHRR 44, the ECtHR ruled at §47 that "that there is little scope under art.10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest".

12. The recent decision of the High Court in *R (Miller) v College of Policing* [2020] EWHC 225 (Admin), [2020] 4 All ER 31 is on all fours with the approach of the Convention organs. There the High Court considered the degree of protection which should be afforded to views which are (broadly framed) similar to those of the Appellant in this case. Like the Appellant, the claimant in *Miller* expressed those views and beliefs in the context of an ongoing debate in the UK as to the legal recognition of transgender identities. The High Court held that the expression of those beliefs was protected by Article 10, Julian Knowles J observing that the claimant had expressed a point of view "on a topic of current controversy, namely gender recognition" which was "congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons" (§251). These observations are important when considering the ET's determination that the Appellant's belief is not protected under s10 of the 2010 Act because they are "not worthy of respect in a democratic society" on the basis that they are "incompatible" with the fundamental rights of others (see §85).

**Article 10 ECHR and protected characteristics under the 2010 Act**

13. In considering the interpretation of the protected characteristic of religion or belief (including philosophical belief) under the 2010 Act, regard must be had to the rights guaranteed under the ECHR and the Human Rights Act 1998 (s3(1) HRA).

14. It is important at the outset to highlight the interaction between Articles 9 and 10 ECHR, particularly in the context of the protected characteristic of religion or belief under the 2010 Act. The meaning and application of that protected characteristic has implications not only for the protection of freedom of conscience and belief under Article 9 but also for the rights protected by Article 10.

15. A person who is discriminated against on the basis of their expressed views will not be protected by the 2010 Act unless those opinions or views arise from a belief (or, potentially, another characteristic) which is itself protected. There is no freestanding protection under the 2010 Act from discrimination because of the expression of views or beliefs: not all views whose expression is protected by Article 10 will constitute "philosophical beliefs" for the purposes of Article 9, but people who do express such beliefs are entitled to the protection of Article 10. In considering the ambit of the protection from discrimination afforded by the 2010 Act to "philosophical beliefs" it is therefore necessary to ensure that due regard is had to the implications for freedom of expression.

**Consideration of Article 10 rights in the ET's judgment**

16. It is respectfully suggested that the ET's reasons do not demonstrate due regard to the right to freedom of expression. The relevant part of the decision is at §91:

> "[w]here it is [necessary for the Claimant to refer to a person's sex], I consider requiring the Claimant to refer to a trans woman as a woman is justified to avoid harassment of that person. Similarly, I do not accept that there is a failure to engage with the importance of the Claimant's qualified right to freedom of expression, as it is legitimate to exclude a belief that necessarily harms the rights of others… The human rights balancing exercise goes against the Claimant because of the absolutist approach she adopts."

17. The starting point is the proper approach to analysing qualified rights under the ECHR (here, Article 10). It is abundantly clear from the domestic and European case law that there are two separate and sequential questions. The first is whether the matter in issue falls within the scope of the relevant ECHR provision. The second, which is a distinct and separate question, is whether (assuming that the answer to the first question is "yes"), the restriction of that right is nevertheless justified as "necessary in a democratic society" in pursuit of one of the relevant rights or interests in respect of which it may be qualified. This requires a balancing exercise between competing rights and interests but does not go to the issue of whether the applicant's right is protectable in the first place, which is resolved at the first stage of the analysis.

18. It is respectfully suggested that the ET took the wrong approach to considering the Appellant's Article 10 rights by eliding the two separate stages in the analysis of ECHR qualified rights. The Judge stated that "it is legitimate to exclude a belief that necessarily harms the rights of others". As set out above, this is not the correct approach. A person's right to free expression may be protected (i.e. not excluded altogether) even where an interference with that right is justified, for example because it interferes with the Convention rights of others.

19. The ET appears to have based its conclusion on what is properly the second stage of analysis. The reasons state that "[t]he human rights balancing exercise goes against the Claimant…" This was not, however, a question which the ET should have considered when deciding whether the Appellant's belief qualified for protection. The balancing exercise is relevant at the point of determining whether an interference with a protected right is justified: not (as in the ET's approach) whether the Appellant's belief was worthy of protection at all. In a case like this one, the ET's approach necessarily gives insufficient protection to the ECHR right being relied upon.

20. Even if, contrary to the argument above, the ET was correct to adopt a balance of rights approach to the question whether a belief fell to be protected under s10 of the 2010 Act, its approach did not give due regard in that balance to the Appellant's Article 10 rights, particularly in the context of ongoing public and political debate on which a range of views are held by different people. This is particularly evident from §91 of the ET's reasons which indicate that very little, if any, weight was afforded to the Appellant's right to freedom of expression in the balancing exercise, given that the Judge had already determined that the Appellant's belief could legitimately be excluded from protection on the basis that it was deemed to be "incompatible" with the rights of those who hold gender recognition certificates.

**The fifth *Grainger* requirement: 'worthy of respect in a democratic society'**

21. It is submitted that the ET fell into error because it conflated the question of whether a belief is "worthy of respect in a democratic society" with the question of whether any interference with a right to hold and express that belief is "necessary in a democratic society".

22. The first issue refers to the language of the fifth 'Grainger' criterion for determining whether a belief constitutes a protected characteristic under the 2010 Act.[1] The second issue uses the language of the qualified rights under the ECHR, including Articles 9 and 10: these rights may only be subject to such limitations as are prescribed by law and are necessary in a democratic society on the basis of specified countervailing interests.

23. The distinction is important in that the first issue (properly understood) presents a much lower threshold to protection than the latter and does not involving a balancing exercise. Failing to recognise that distinction therefore runs the risk of affording insufficient protection to a claimant's fundamental rights in interpreting and applying "protected characteristics" under the 2010 Act.

24. An analysis of the relevant case law demonstrates that any requirement that a belief be "worthy of respect in a democratic society", insofar as it is properly relevant for the purposes of s10 of the 2010 Act at all, is merely a threshold requirement and does not involve an evaluative or balancing exercise considering the impact of that belief on the rights of others.

25. In particular, it is necessary to consider two judgments on the protection of religious and philosophical beliefs under the ECHR which were relied upon by the EAT in *Grainger v Nicholson* [2010] ICR 360 to develop the five 'criteria' to be applied when considering whether

[1] *Grainger v Nicholson* [2010] ICR 360

a belief constitutes a protected characteristic under domestic equalities legislation. Those two judgments are *Campbell and Cosans v UK* (1982) 4 EHRR 293 and *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.

26. The origin of the requirement that a belief should be "worthy of respect in a democratic society", at least insofar as it has emerged in the UK case law on what is now s10 of the 2010 Act in *Grainger,* is the ECtHR's judgment in *Campbell and Cosans*. That case was brought (*inter alia*) under Art 2, Protocol 1 of the Convention (A2P1), which requires states to "respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." The applicants objected to the use of corporal punishment (which at that time was lawful) in their child's school. Considering the meaning of "philosophical convictions" for the purposes of A2P1 the Court held (at §36):

> "Having regard to the Convention as a whole, including Article 17, the expression 'philosophical convictions' in the present context denotes, in the Court's opinion, such convictions as are worthy of respect in a 'democratic' society and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of a child to education, the whole of Article 2 being dominated by the first sentence."[2]

27. The ECtHR's judgment in *Campbell and Cosans* was considered at the domestic level by the House of Lords in *Williamson*. The claimants in that case argued that the legal ban on corporal punishment in schools (which ban had been introduced after the judgment in *Campbell and Cosans*) breached their Article 9 right to manifest their religious belief. The claimants contended that their wish to have their children educated at a school where corporal punishment was used was a manifestation of their fundamental Christian beliefs. Considering whether the claimants' beliefs were protected by the Convention at all, Lord Nicholls (with whom Lords Bingham, Walker, and Brown and Baroness Hale agreed) said at §23:

> "Everyone…is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity and integrity. Manifestation of religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection…Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention."

[2] The first sentence of A2P1 states: "No person shall be denied the right to education."

28. Lord Walker, with whom Lord Brown and Lady Hale agreed, accepted at §§59-60 that the qualifications suggested by Arden LJ in the Court of Appeal in *Williamson* (that "to be protected by art 9, a religious belief, like a philosophical belief, must be consistent with the ideals of a democratic society, and that it must be compatible with human dignity, serious, important, and (to the extent that a religious belief can reasonably be required so to be) cogent and coherent") were "not without some support in the jurisprudence of the Strasbourg Court" (citing *Campbell and Cosans*). He went on to state, however, that they were:

> "rather alarming, especially if they are to be applied to religious beliefs. For the reasons already noted, the court is not equipped to weigh the cogency, seriousness and coherence of theological doctrines. Anyone who feels in any doubt about that might refer to the hundreds of pages of the law reports devoted to 16 years of litigation, in mid-Victorian times, as to the allegedly 'Romish' beliefs and devotions of the incumbent of St Alban's, Holborn … Moreover, the requirement that an opinion should be 'worthy of respect in a "'democratic society"' begs too many questions. As Mr Diamond (following Mr Dingemans) pointed out, in matters of human rights the court should not show liberal tolerance only to tolerant liberals."

29. Lord Walker went on to point out at §61 that *Campbell and Cosans* "was concerned with the meaning of 'philosophical convictions' in art 2 of the First Protocol" and that "The reference to a 'democratic society' …suggests that so far as it may be relevant to art 9 also, it must be looking at the article as a whole, including art 9(2)…"

30. As Lord Walker indicated in *Williamson* it is important to note, in considering that case and *Campbell and Cosans*, that A2P1 and Article 9 ECHR do not share the same structure. A2P1 does not protect a primary right to hold or manifest a belief but places an obligation on states to "respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions." Unlike the position in relation to Art 9, a court considering A2P1 does not need to go on to consider whether any interference with a protected right is justified. Either a parent's philosophical convictions are protected under A2P1 or they are not and there is no violation for the purposes of that provision. This is important context because it sheds light on why the ECtHR in *Campbell and Cosans* saw a need to apply an "evaluative filter" in defining "philosophical convictions". In the case of the qualified rights in Articles 9 and 10, by contrast, the evaluative exercise is better suited to the balancing exercise, which is only undertaken once the court has determined there is a protectable right at all.

31. Moreover, it is significant that when referring to the requirement that philosophical convictions must, in order to be protected by A2P1, be "worthy of respect in a democratic society and … not incompatible with human dignity", the European Court in *Campbell and Cosans* expressly had regard to Article 17 which, as is clear from above, presents a low bar to persons seeking to rely on their Convention rights.

32. The case law highlighted above indicates that, insofar as *Grainger* properly imported the requirement into the 2010 Act that, for a belief to be protected, it must be "worthy of respect in a democratic society", that requirement means no more than that the belief would be not be inadmissible as a result of Article 17 ECHR. It does not invite or permit courts and tribunals to undertake a balancing exercise between competing rights. It is submitted that any other approach would not afford adequate protection to fundamental rights guaranteed under the Convention and Human Rights Act, because it will necessarily leave out of the 2010 Act's protection beliefs which *are* protected under Article 9, and whose expression is protected under Article 10.

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**11 KBW**
**13 APRIL 2021**