



Religious Liberty in British Courts: A Critique and Some Guidance

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INTRODUCTION

For centuries, religious liberty in Britain existed as a broad-ranging but principally negative freedom at common law. Individuals were permitted to do as they pleased in matters of faith, unless the law stated otherwise.¹ Religious liberty, thus conceived, was more passive toleration of religion than any active promotion of religious freedom as a fundamental right. All that changed on October 2, 2000 when the Human Rights Act 1998 (“HRA”) – the United Kingdom’s *de facto* Bill of Rights – came into full force and brought with it Article 9 of the European Convention of Human Rights (“ECHR”).² Article 9 provides:

1. Everyone has a right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

¹ See *Malone v. Metropolitan Police Commissioner* (No.2), [1979] Ch. 344, 357. See generally *AG v. Guardian Newspapers Ltd* (No.2), [1990] 1 A.C. 109 (C.A.).

² The Human Rights Act 1998 indirectly incorporates ECHR rights into domestic U.K. law, requiring courts to apply and enforce these rights by statutory interpretation where possible and renders unlawful any conduct of public authorities, including courts, which violates ECHR rights, for which conduct they become liable. The Act had already been brought into force in Scotland (Scotland Act 1998), Wales (Government of Wales Act 1998) and Northern Ireland (Northern Ireland Act 1998).

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.³

Thus religious liberty in Britain is now a positive right with two dimensions. Article 9(1) treats the right to hold a particular belief (*forum internum*) as absolute, whilst the right to manifest a belief (*forum externum*) is subject to the limitations of Article 9(2). The latter provision is the principal battleground for religious freedoms, given the comparative rarity of interference with belief itself.⁴ There are three conditions for a successful Article 9(2) claim:⁵

- I. The claimant sought to manifest his or her religion or belief;
- II. The respondent interfered with this manifestation; and
- III. This interference was unjustified.

This abrupt shift in English law from a negative common law toleration of religious liberty to a positive legal right to religious freedom was initially hailed as “a new dawn for freedom of religion. . .intended to symbolize the freedom of [the] individual.”⁶ Article 9's palpable rights and liberties were meant to offer more protection to individuals and remap the relationship between the citizen and the state.⁷ Such optimism has been short lived. Commentators now argue that, thanks both to Strasbourg and English jurisprudence, the Article 9 tripartite apparatus fails to

³ European Convention on Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221.

⁴ The absolute right to hold a belief is incapable of being interfered with in a democratic society. *See* Van Den Dungen v. the Netherlands, App. No. 22838/93, 80 Eur. Comm'n H.R. Dec. & Rep. 147, 150 (1995) (discusses the *internum* / *externum* distinction and summarizes Article 9 protection of each dimension). The complexities of trying to untangle belief and practice are explored well in G. Moens, *The Action-Belief Dichotomy and Freedom of Religion*, 12 SYDNEY L. REV. 195 (1989).

⁵ *Per* Lord Walker in *R (Williamson) v. Secretary of State for Education and Employment*, [2005] 2 A.C. 246, ¶ 77 (H.L.).

⁶ Mark Hill, *A New Dawn for Freedom of Religion: Grounding the Debate*, in *RELIGIOUS LIBERTY AND HUMAN RIGHTS* 1 (Mark Hill ed., 2002).

⁷ *See* Lord Lester, Address at the University of Cambridge Centre for Public Law: The Human Rights Act and the Criminal Justice and Regulatory Process (Jan. 9, 1999).

offer adequate protection for religious liberty.⁸ Such a charge merits investigation, especially as claims for breaches of Article 9 rights tend to fail.⁹

This paper sets out the current status of each of the three Article 9 conditions now that lower English courts have had opportunities to apply the watershed decision of the House of Lords in *R. (Shabina Begum) v. Governors of Denbigh High School*,¹⁰ itself delivered shortly after the watershed Article 9 decision of the Grand Chamber of the European Court of Human Rights (“ECtHR”) in *Leyla Şahin v. Turkey*.¹¹ We offer both practical guidance (what are the legal tests for each condition?) and purposive critique (does each condition do the job intended for it?), arguing that Article 9 falls well short of its aspirations because the second and third conditions are, in their current forms, materially prejudiced against claimants.

CONDITION I: MANIFESTATION OF BELIEF

For Article 9 to be engaged, the claimant must show that what he or she is being prevented from doing constitutes a manifestation of his or her religion or belief. Given the intrinsic subjectivity of belief, this is the least onerous of the three conditions. It is now settled law, for example, that the wearing of various forms of Islamic and other traditional religious dress is a manifestation of religion for the purposes of Article 9, even where most members of that faith regard such garments as unnecessary.¹²

This condition cannot, however, be taken for granted. In one of the significant cases following the landmark case of *Begum*, *R. (Playfoot) v. Governing Body of Millais School*,¹³ the claimant’s wearing of a silver “purity ring” as a symbol of her commitment to pre-marital sexual abstinence was held not to constitute a manifestation. *Playfoot* illustrates that an activity does not automatically qualify for Article 9 protection simply by virtue of being religiously motivated. Whilst belief is a subjective matter, manifestation of belief is a matter to be tested by the court.

⁸ See generally Tom Lewis, *What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 56 INT’L & COMP. L.Q. 395 (2007); Anastasia Vakulenko, *Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends*, 7 HUM. RTS. L. REV. 717 (2007); Mark Hill & Russell Sandberg, *Is Nothing Sacred? Clashing Symbols in a Secular World*, P. L. 488 (2007).

⁹ In the U.K., see, e.g., *R. (Williamson) v. Secretary of State for Education and Employment*, [2005] 2 A.C. 246 (H.L.) [hereinafter *Williamson*]; *R. (Shabina Begum) v. Governors of Denbigh High School*, [2007] 1 A.C. 100 (H.L.) [hereinafter *Begum*]; *R. (X) v. Governors of Y school*, [2007] EWHC (Admin) 298 [hereinafter *X v. Y*]; *R. (Playfoot) v. Governing Body of Millais School*, [2007] EWHC (Admin) 1698 [hereinafter *Playfoot*]. At the ECtHR, see *Leyla Şahin v. Turkey*, 41 Eur. H.R. Rep. 8 (2005) (ECtHR), 44 Eur. H.R. Rep. 5 (2007) (Grand Chamber).

¹⁰ *Begum*, *supra* note 9.

¹¹ *Şahin*, *supra* note 9. Under § 2 of the HRA, U.K. courts must take into account any relevant case law of the ECtHR.

¹² *Per* Lord Hoffmann in *Begum*, *supra* note 9, ¶ 50.

¹³ *Playfoot*, *supra* note 9.

The decisive tests come from the House of Lords decision in *R (Williamson) v. Secretary of State for Education and Employment*.¹⁴ Here, the claimants' belief that corporal punishment should be administered at their children's school was held to be a manifestation of belief under Article 9. Lord Nicholls' leading judgment, a synthesis of Strasbourg and U.K. principles, shows that courts scrutinize both the alleged manifestation and the belief to which it is attributed, meaning that the common law imposes a twofold test under the first condition for an Article 9 claim.¹⁵

First, the integrity of the belief is tested: "a belief must satisfy some modest, objective minimum requirements...implicit in Article 9" before it qualifies for protection.¹⁶ Lord Nicholls imposes three such requirements: the belief must be "consistent with basic standards of human dignity or integrity" (dignity);¹⁷ it "must relate to matters more than merely trivial" by possessing "an adequate degree of seriousness and importance" (seriousness); and finally, it must be "coherent in the sense of being intelligible and capable of being understood" (coherence).¹⁸ Naturally, the precise "nature and scope of the belief"¹⁹ must be articulated before it can be scrutinized according to these three requirements of dignity, seriousness and coherence.

Secondly, if the belief qualifies for protection, the act must be shown to be "intimately linked" to this belief.²⁰ If the belief takes the form of a perceived obligation to act in a specific way, then this test is passed.²¹ Importantly, however, a perceived obligation is sufficient, but not necessary, for establishing an intimate link.²² Similarly, it is sufficient, but not necessary, that the act reflects the practice of that belief in a "generally recognised form."²³ Case law tends to focus on this second test. In *Playfoot*, for example, the first test was briefly noted, but the second was applied to decisive effect: perceived obligation was not pleaded, nor was any other form of intimate link found.²⁴

¹⁴ *Williamson*, *supra* note 9.

¹⁵ *Id.* ¶¶ 2–52.

¹⁶ *Id.* ¶ 23.

¹⁷ As a hypothetical example, Lord Nicholls cites a belief in torture as ineligible for protection. *Id.*

¹⁸ *Id.*

¹⁹ *Id.* ¶ 32.

²⁰ *Per* Lord Nicholls in *Williamson*, *supra* note 9, ¶ 32. For ECtHR authority, *see generally* *X v. U.K.*, 6 Eur. H.R. Rep. 558 (1984); *Arrowsmith v. U.K.*, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5 (1978).

²¹ *Per* Lord Nicholls in *Williamson*, *supra* note 9, ¶ 32.

²² *Id.* ¶ 33.

²³ *Kalaç v. Turkey*, 27 Eur. H.R. Rep. 552, 558 (1997).

²⁴ *Playfoot*, *supra* note 9, ¶ 23.

Beyond noting the relevance of “how close the subject-matter is to the core of the religion’s values or organisation,”²⁵ UK case law has declined to offer a crisp definition of “intimately linked.” However, the test clearly demands something stronger than “motivated by”²⁶ but weaker than “compelled by.”²⁷ This is, in our view, coextensive with the protection Article 9 seeks to enshrine; it covers more than the bare essentials of a belief set, but less than every action which claimants extrapolate from their beliefs.

The preliminary test – scrutiny of the belief itself – is less frequently contentious, partly because, as emphasized in *Williamson*, it imposes only a minimum threshold which is not set at an onerous level.²⁸ Most religious beliefs would meet the requirements of dignity, seriousness and coherence set out above. As recent cases have illustrated, however, parties to Article 9 disputes should not take this test for granted. In Britain, the human dignity of corporal punishment was contested unsuccessfully in *Williamson*; at the ECtHR, the defendant successfully challenged the seriousness of the claimant’s alleged Islamic convictions in *Kosteski v. Former Yugoslav Republic of Macedonia*;²⁹ and in *McClintock v. Department of Constitutional Affairs*,³⁰ the Employment Appeal Tribunal rejected an agnostic discomfort with same-sex adoption as a basis for a manifested belief, insisting upon the need for an actual and positively asserted belief.³¹

This threefold scrutiny effectively gives courts a limited but real power to deny Article 9 protection to antisocial, disingenuous, or frivolous beliefs. Provided claimants are given the benefit of the doubt, this standard is unproblematic. The Archbishop of Canterbury implicitly endorsed this right of judicial veto in a controversial recent address in which he urged greater accommodation of religious identity within secular law, but nonetheless insisted that “there can be no blank cheques given to unexamined scruples.”³² In short, British law’s current treatment of

²⁵ R (Amicus-MSF section) v. Secretary of State for Trade and Industry, [2004] EWHC 860 (Admin), [2004] I.R.L.R. 430, ¶ 44, cited in the Article 9 context by Lord Walker in *Williamson*, *supra* note 9, ¶ 63.

²⁶ For example, no intimate link was found in *Playfoot* despite the act being motivated by the claimant’s belief.

²⁷ For example, the claimant in *Begum* passed the intimate link test without claiming compulsion.

²⁸ *Williamson*, *supra* note 9, ¶ 23.

²⁹ App. No. 55170/00, 2006 Eur. Ct. H.R. 403. It should be noted that in this case the claimant sought to avail himself of statutory leave allowances extended explicitly to Muslims.

³⁰ [2008] I.R.L.R. 29, ¶ 45.

³¹ The appellant in this case did not, as a matter of principle, reject the possibility that same sex parents could ever be in a child’s best interests, but he felt that the evidence to support that view was unconvincing. The claim was brought under the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, but the Employment Appeal Tribunal drew on Article 9 case law for deciding the question of belief (*see id.* ¶ 41).

³² Dr. Rowan Williams, Archbishop of Canterbury, Lecture at the Royal Courts of Justice: Civil and Religious Law in England - a Religious Perspective (Feb. 7, 2008).

the “manifestation of belief” condition is consistent with the serious but not unlimited protection for which Article 9 was designed.

CONDITION II: INTERFERENCE

The “interference” condition has traditionally been the ECtHR’s preferred means for disposing of Article 9 claims. No interference was found, for example, where an employer refused to accommodate mosque attendance,³³ nor where a recent convert to Seventh Day Adventism was compelled to work after dusk.³⁴ English courts have tended to follow suit, albeit with overt reluctance on occasion: In *Copsey v. Devon Clays Ltd.*,³⁵ the employer’s denial of a Sabbath rest day to a Christian employee would have been deemed interference by the English court had it not been for the authority of Strasbourg’s clear and strict stance on interference.³⁶

Then came the watershed cases. *Şahin* was striking for the Grand Chamber’s change of approach. The defendant university’s ban on Islamic headscarves at academic occasions was held to constitute interference under Article 9(2). However, Leyla Şahin’s claim fell at the justification hurdle (of which more in “Condition III” below). In contrast, *Begum*, decided shortly after judgment in *Şahin*, saw a 3-2 majority of the House of Lords uphold the traditional interference approach.

Consequently, the interference condition remains a formidable obstacle to British claimants. The crux of the condition is this: There is no interference for the purposes of Article 9 if the claimant could have exercised a “choice” that would have averted or ended the conflict between claimant and defendant. Two complementary formulations of this choice principle emerge from *Begum*.

First, there is no interference where claimants voluntarily accepted arrangements that they knew did not accommodate the activity by which they sought to manifest their beliefs.³⁷ Lord Bingham bases this rule on several Strasbourg cases that deal with voluntary acceptance in the contexts of education, such as attending universities with secular dress codes³⁸ or schools with compulsory sex education;³⁹ employment, such as jobs which do not allow time off for prayers⁴⁰ and military careers with associated

³³ *Ahmad v. U.K.*, 4 Eur. H.R. Rep. 126 (1981).

³⁴ *Konttinen v. Finland*, App. No. 24949/94, 87 Eur. Comm’n H.R. Dec. & Rep. 68 (1996).

³⁵ [2005] EWCA (Civ) 932.

³⁶ *Per* Mummery LJ in *id.* ¶ 36. “In the absence of the Commission rulings, I would have regarded this as a case of material interference with Mr Copsey’s Article 9 rights.”

³⁷ *Begum*, *supra* note 9, ¶ 23.

³⁸ *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec. & Rep. 93 (1993).

³⁹ *Kjeldsen v. Denmark*, 1 Eur. H.R. Rep. 711 (1976).

⁴⁰ *Ahmad v. U.K.*, 4 Eur. H.R. Rep. 126 (1981).

behavioral restrictions.⁴¹ Based on this line of authority, the claimant's voluntary selection of her particular school in *Begum* was fatal to her application.

A second formulation of the choice test is that there will be no interference if there are other means by which the claimant could manifest his or her belief without undue hardship or inconvenience. The speeches of Lords Hoffmann⁴² and Scott⁴³ placed particular reliance on this principle in dismissing the *Begum* application on its facts. Whilst claimants no longer need to show that it was *impossible* to manifest their belief elsewhere,⁴⁴ a claim will continue to fall at the interference hurdle if the claimant could find alternative employment⁴⁵ or educational provisions⁴⁶ without substantial hardship or inconvenience.

Both formulations have been applied in British cases since *Begum*. No interference was found in *Playfoot* on either the "voluntary acceptance" or "other means" formulations.⁴⁷ In *R (X) v. Governors of Y School*,⁴⁸ another significant post-*Begum* case, the defendant school's prohibition of the Islamic *niqab* veil did not constitute interference because the claimant could have manifested her belief at a comparable school without significant inconvenience.⁴⁹ Mr. Justice Silber's judgment expressly followed both *Begum*⁵⁰ and the corpus of pre-*Şahin* cases on interference.⁵¹ The decisions in *Playfoot* and *X v. Y School* confirm that the traditional, and now *Begum*-approved, interference test remains good law in the U.K.

This test should not be criticized for its insistence upon compromise. If courts are to strike the balance between public and private interests to which Article 9(2) aspires, they are entitled to insist that each party considers ways of accommodating the interest of the other. As Lord Hoffmann has noted, Article 9 contains an "expectation of accommodation, compromise and, if necessary, sacrifice in the manifestation of religious beliefs."⁵² If compromise is a legitimate consideration under

⁴¹ *Kalaç v. Turkey*, 27 Eur. H.R. Rep. 552 (1997).

⁴² *Begum*, *supra* note 9, ¶¶ 50–52.

⁴³ *Id.* ¶¶ 87–89.

⁴⁴ This ECtHR standard derives from *Cha'are Shalom Ve Tsedek v. France*, App. No. 7417/95, 9 Eur. Ct. H.R. 27, ¶ 80 (2000), in which the Grand Chamber held that "there would be interference...only if the illegality of performing ritual slaughter made it *impossible* for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable" (emphasis added). This 'impossibility' standard describes a limit so extreme as to deprive the right to manifest belief of any meaning. In *Begum*, Lord Hoffmann explicitly eschews the impossibility standard. *Begum*, *supra* note 9, ¶ 52.

⁴⁵ *Stedman v. U.K.*, 23 Eur. H.R. Rep. 168 (1997).

⁴⁶ *Valsamis v. Greece*, 24 Eur. H.R. Rep. 294 (1997).

⁴⁷ *Playfoot*, *supra* note 9, ¶ 32.

⁴⁸ [2007] EWHC (Admin) 298.

⁴⁹ *Id.* ¶ 39.

⁵⁰ *Id.* ¶¶ 31–32.

⁵¹ *Id.* ¶¶ 33–38.

⁵² *Begum*, *supra* note 9, ¶ 54.

Article 9, there can be no problem in principle with interrogating claimants' circumstances and choices, nor with requiring claimants to consider reasonable alternative arrangements that accommodate the disputed manifestations.

The flaw in this interference regime is not that it scrutinizes claimants' choices, but that it does so prior to and in isolation from any parallel scrutiny of defendants' conduct. Claimants bear the full burden of compromise: they must, in effect, show that they took all reasonable steps to avoid the clash before defendants are called upon to justify their conduct at all.⁵³ For example, as the law currently stands a claimant who could have manifested his or her belief elsewhere without undue hardship automatically loses under Article 9, even where the defendant has used oppressive and unreasonable policies to forbid that manifestation. As Professor Hill has remarked, "the approach now taken by English law makes the quality of the policy irrelevant."⁵⁴ Because the emphasis of the ECHR is on accommodation by both the state and the individual, both parties should simultaneously be called upon to justify their stance. It is acceptable, for instance, to require claimants to change jobs or schools, but only for reasons which pass the sort of justification test addressed below. The current law on interference in Britain falls well short of this standard.

Criticism of the *Begum* majority should be tempered by the fact that *Şahin*, Strasbourg's most recent and authoritative Article 9 decision, was silent on a general approach to interference. The Grand Chamber addressed the issue tersely in *Şahin*, offering only a one-paragraph, case-specific endorsement of the lower court's finding.⁵⁵ Thus in *Begum*, Lord Bingham was entitled to maintain that "there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established."⁵⁶ Nonetheless, *Şahin* provided an opportunity, if not an instruction, to reconfigure the interference condition along the lines suggested above. The majority in *Begum* regrettably declined this opportunity, entrenching instead a choice-based interference test stacked heavily in defendants' favor.

There remains some room for lower courts to interpret the *Begum* strictures whilst simultaneously scrutinizing both parties' conduct, by adopting a claimant-friendly interpretation of "undue" in the "undue hardship or inconvenience" test. The facts in *Playfoot* and *X v. Y School* did not lend themselves to any such subtle rebalancing. Consequently, the interference condition in its current form undermines the protection Article 9 offers British claimants.

⁵³ See *Kokkinakis v. Greece*, 17 Eur. H.R. Rep. 397, ¶ 49 (1994) (burden of proving interference lies with applicant).

⁵⁴ Hill & Sandberg, *supra* note 8, at 499.

⁵⁵ *Şahin*, *supra* note 9, ¶ 78 (Grand Chamber endorsing the ECtHR judgment in *Leyla Şahin v. Turkey*, 41 Eur. H.R. Rep. 8, ¶ 71 (2005)). The ECtHR was satisfied that on the facts of that case, the restriction imposed on a religiously motivated act constituted interference.

⁵⁶ *Per* Lord Bingham in *Begum*, *supra* note 9, ¶ 24.

CONDITION III: JUSTIFICATION

If a claimant succeeds at the manifestation and interference stages, the burden shifts to the defendant to show that the interference was justified according to three tests embedded in the Convention. First, Article 9(2) requires that the limitation be “prescribed by law.” In other words, the measure must, as explained in *Şabin*,⁵⁷ have a basis in domestic law and be sufficiently accessible, clear and foreseeable to allow individuals to regulate their conduct accordingly.⁵⁸ This test applies to ECtHR jurisprudence in general, without significant nuances peculiar to Article 9.

Secondly, the measure must be pursuant to a “legitimate aim” or “permissible purpose” that is, in the words of Article 9(2) “necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.”⁵⁹ Notably, the Grand Chamber in *Şabin* found that secularism *per se* constituted a “legitimate aim” under this condition.⁶⁰ At first glance, using secularism to justify the restricting of religious manifestations seems to presuppose the outcome sought.⁶¹ This finding is, however, highly context-specific, with secularisation of certain public spheres a constitutionally enshrined strategy in Turkey for managing religious tensions that compromise public order. In this light, the Grand Chamber’s finding on secularism does not presuppose its outcome, nor is it likely to have wider application in countries without explicit secular agendas. In general, the “legitimate aim” test is unproblematic: it is settled law, for example, that school uniforms meet this condition.⁶²

Thirdly, the limiting measure must be proportionate to its legitimate aim. Proportionality is a generic and familiar ECtHR tool for the balancing of competing interests. At a European level, however, it can be qualified by the “margin of appreciation,” a judge-made doctrine of judicial deference whereby member states are afforded a degree of latitude in how they protect their citizens’ rights.⁶³ In *Şabin*, this doctrine was asserted in stridently defendant-friendly terms, the majority of the Grand Chamber holding that: “by reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an

⁵⁷ This rule applies to the measures legislative, case law, or regulatory. See *Şabin*, *supra* note 9, ¶¶ 84–88.

⁵⁸ *Gorzelik and Others v. Poland*, 40 Eur. H. R. Rep. 4, ¶ 64 (2005); cited approvingly in *Şabin*, *supra* note 9, ¶ 84.

⁵⁹ European Convention on Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221.

⁶⁰ *Şabin*, *supra* note 9, ¶ 116.

⁶¹ The Court of Appeal cautioned against this in *Surayanda v. Welsh Ministers*, [2007] EWCA (Civ) 893, ¶19, *per* Pill LJ.

⁶² Not materially an issue in *Begum*, *supra* note 9, ¶ 26; *Şabin*, *supra* note 9, ¶ 99; or *X v. Y School*, *supra* note 9, ¶ 70.

⁶³ See generally Y. Arai-Takahashi, THE MARGIN OF APPRECIATION AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002); J.A. Sweeney, *Margins of Appreciation: Cultural Relativity and the ECHR*, 54 INT’L & COMP. L.Q. 459–74 (2005).

international court to evaluate local needs.”⁶⁴ The Court continued that “having found that the regulations pursued a legitimate aim, it is not open to the court to apply the criterion of proportionality in a way that would make the notion of an institution’s ‘internal rules’ devoid of purpose.”⁶⁵ This refusal to conduct any meaningful proportionality assessment is, in our submission, a dereliction of duty which belies the ECtHR’s commitment to protecting religious liberty. If the Grand Chamber deems itself incompetent to scrutinize even a university’s decisions, there is little hope of other courts scrutinizing defendants’ justifications in the manner demanded by Article 9.

Fortunately, whilst the margin of appreciation doctrine permits a more relaxed scrutiny of defendants’ conduct at an international level, the U.K.’s domestic common law demands heightened judicial vigilance when Convention rights are at stake. The principle that ECHR cases demand a greater “intensity of review” than domestic judicial review⁶⁶ is established law in the U.K.⁶⁷ However, in the wake of *Şahin*, this vigilance has been compromised by a domestic version of Strasbourg’s margin of appreciation doctrine. Although *Begum* was replete with rigorous and balanced discussions of justification, it also contained this comment from Lord Hoffmann: “[I]n applying the principles of *Şahin v. Turkey* the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school.”⁶⁸ Lord Bingham hinted at a similarly deferential approach in *Begum*.⁶⁹ It is not clear how this wide “area of judgment” is to be reconciled with the “greater intensity of review” principle enshrined in English law. More alarmingly, such a posture of deference would seriously undermine Article 9 by tipping the scales in the defendant’s favor, effectively rendering the justification condition impotent.

The potentially devastating impact of this deference on claimants’ prospects is somewhat softened by the fact that justification was addressed only in obiter dicta in *Begum*. No subsequent case has hinged on this doctrine. It was not even mentioned in *Playfoot*. In *X v. Y School*, Silber J found for the school by scrutinizing and balancing both parties’ conduct and competing interests. However, he observed that had he been in doubt on this finding, the claim would have failed due to the *Şahin/Begum* margin of appreciation.⁷⁰ In *Surayanda v. Welsh Ministers*⁷¹ – the “Shambo” case – proportionality was pivotal to the Court of Appeal’s finding that the defendant authority was justified, given the threat of bovine tuberculosis, in ordering the

⁶⁴ *Şahin*, *supra* note 9, ¶ 121.

⁶⁵ *Id.*

⁶⁶ *Per* Lord Steyn in *R (Daly) v. Secretary of State for the Home Dept*, [2001] UKHL 26, ¶ 27.

⁶⁷ *Per* Lord Bingham in *Begum*, *supra* note 9, ¶ 30.

⁶⁸ *Id.* ¶ 64.

⁶⁹ *Id.* ¶ 34.

⁷⁰ *X v. Y School*, *supra* note 9, ¶ 68.

⁷¹ [2007] EWCA (Civ) 893.

slaughter of a bullock held sacred by a religious community. All three judges in that case noted the doctrine of deference, but reached their proportionality conclusion without resort thereto. Moreover, their discomfort with the doctrine was evident: For example, Lord Justice Thomas refused to defer to the defendant ministers without conducting critical scrutiny,⁷² whilst Lord Justice Lloyd confined the doctrine to “appropriate cases.”⁷³

The status of the doctrine of deference in English law is thus uncertain. It is hoped that subsequent decisions follow the Court of Appeal’s lead in downplaying the deferential approach, although *X v. Y School* rather ominously shows the principle to be latent within the common law, a last-ditch but potentially all-powerful defence. Wide and decisive deployment of the doctrine could effectively nullify Article 9 protection in Britain.

CONCLUSION

Article 9 was never intended to offer exhaustive protection of religious or other belief-based liberties.⁷⁴ Legitimate restrictions were always envisaged, but only subject to scrutiny of both parties’ conduct by the courts. Problematically, restrictions that fall short of this condition could be condoned both by the ECtHR and U.K. courts, thanks to their treatment of the three conditions for a successful claim under Article 9(2).

The “manifestation of belief” condition is unproblematic, imposing no unacceptable burdens on claimants. In contrast, however, the “interference” condition places a hefty burden of accommodation on claimants without assessing the behavior of defendants at all. Finally, the “justification” condition includes a latent doctrine of deference to defendants that will, if widely applied, render any proportionality assessment toothless. Cumulatively, the Article 9 apparatus demands too much of claimants and too little of defendants.

Thus far, these problems have not produced any clearly unjust outcomes, though the risk of future injustice is considerable. This risk could be reduced in two ways. First, claimants’ choices should be examined alongside defendants’ conduct under the justification test, rather than in isolation under the interference test. Interference should simply be treated as a substantial restriction on manifestation. Secondly, defendants should not be afforded a deferentially wide margin of appreciation; rigorous judicial scrutiny is essential to the protection of religious liberty.

Until the House of Lords – or indeed the ECtHR – is given an opportunity to revise the *Begum* stance on the second and third conditions, the flaws identified in this

⁷² *Id.* ¶ 79.

⁷³ *Id.* ¶ 103.

⁷⁴ See B. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE LEGAL PROTECTION 70–81 (1996); see also M.D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE, 172–93 (1997).

paper will retain their grip on belief-based litigation in the United Kingdom. Expect the trend of failed Article 9 claims to continue.

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