

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

First Intervenor

COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Second Intervener

---

SUBMISSIONS ON BEHALF OF  
THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

---

Page references HB/x are to the hearing bundle  
Page references AB/x are to the authorities' bundle

### Introduction

1. These submissions are made by the Commission for Equality and Human Rights (EHRC) pursuant to the order of the President dated 21 April 2021.<sup>1</sup>
2. The Employment Appeal Tribunal (EAT) will be familiar with the functions and powers of the EHRC and they will not be repeated here. However, they include the power to intervene<sup>2</sup> in legal proceedings where it appears to the EHRC that the proceedings are relevant to a matter in connection with which the EHRC has a function (s.30(1), Equality Act 2006). The EHRC's functions include promoting understanding of the importance of equality, diversity and human rights and monitoring the effectiveness of the law (ss.8, 9 and 11).
3. The EHRC do not propose to make submissions on the Appellant's grounds of appeal. Instead, these submissions address the issues that arise from the decision of the judgment of the Employment Judge (EJ) more broadly (in accordance with the President's direction).
4. The EHRC notes that the matters underlying this case are highly controversial. The EHRC wishes to make clear that these submissions are directed at the law and the legal approach adopted by the EJ. They should not be taken to indicate in any way the EHRC's view as to the way in which the Claimant may (or may not) have manifested her belief. The EHRC is mindful that these matters may

---

<sup>1</sup> The EHRC is aware that the Appellant cites in her Skeleton Argument a blog post by Karon Monaghan QC. Counsel appears as independent counsel for the EHRC and in the normal way her submissions will reflect her instructions.

<sup>2</sup> Subject to the normal rules on permission etc.

be an issue in the future, in particular if this matter is remitted, and it would be inappropriate for the Commission to express a view.

### The Issue

5. At the hearing with which this appeal is concerned [HB/3], the sole issue before the EJ was whether the philosophical belief upon which the Claimant relied fell within the scope of s.10 Equality Act 2010 (EA 2010).
6. The relevant philosophical belief<sup>3</sup> was identified by the Claimant at §67 of her reamended Particulars of Claim [HB/100] as “‘sex’ is a material reality which should not be ‘conflated with ‘gender’ or ‘gender identity’ ...[and]...sex matters.” The EJ expressed it thus:
  - a. “That sex is immutable, whatever a person’s stated gender identity or gender expression”: §3;
  - b. “Sex is biologically immutable”: §77.<sup>4</sup>
7. Various elaborations were set out by the EJ in his judgment, but this was identified as the Claimant’s “core” belief (§77).

### The Law

8. Section 10, EA 2010 provides that:
  - (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
  - (3) In relation to the protected characteristic of religion or belief –
    - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief...

---

<sup>3</sup> The Claimant did not rely on any religious belief.

<sup>4</sup> See too, §82.

9. The Explanatory Notes<sup>5</sup> give guidance as to the meaning to be afforded s.10:

“It is a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the European Convention on Human Rights. The main limitation for the purposes of Article 9 is that the religion must have a clear structure and belief system. ...and be worthy of respect in a democratic society, compatible with human dignity and not conflict with the fundamental rights of others.”<sup>6</sup>

10. The *Grainger* criteria and its reflection in the EHRC’s Code of Practice provide the framework for determining whether a belief is a protected belief for the purposes of s.10 and will not be repeated here.

11. There are a number of matters of importance deriving from the Explanatory Notes, the *Grainger* criteria and the Code of Practice.

a. Firstly, Art 9 is relevant in determining the scope of protection under s.10 and, consistent with the jurisprudence of the ECtHR and the domestic courts under Art 9, the manifestation of a belief is not relevant to (and certainly not determinative of) the question whether a belief is protected.<sup>7</sup>

b. Secondly, the requirement that a belief be worthy of respect in a democratic society is such as to exclude only extreme beliefs; for

---

<sup>5</sup> Explanatory Notes are always admissible as an aid to construction of a statutory provision and cast light on the mischief to which it is aimed: *R v Montila* [2004] 1 WLR 3141, §35.

<sup>6</sup> Paragraphs 51-53: <https://www.legislation.gov.uk/ukpga/2010/15/notes/data.pdf>.

<sup>7</sup> For example, in *Ladele*, the applicant’s Christian beliefs were undoubtedly protected (that marriage was a partnership of men and women only and Civil Partnerships were wrong), even though those beliefs are highly controversial and offensive to many. The manifestation of the beliefs in *Ladele* - in not engaging in the registration of civil partnerships - was not protected but that was a quite separate question; *Eweida and O’rs v UK* (2013) 57 EHRR 8 [AB/1056].

example, a belief in “racial superiority” (Code of Practice, §2.59) or a “cult involved in illegal activities” (Explanatory Notes, §52). In this regard, Art 17 is relevant in determining whether any belief is worthy of respect in a democratic society (*Campbell v UK* §36 (1982) 4 EHRR 293 AB/244; *Grainger* §28). This means that the fact that a particular belief is deeply offensive to some, or many, does not by itself mean that it is not protected (paradigm examples include a belief that same sexual relationships are sinful (*Eweida and O’rs v UK* (2013) 57 EHRR 8 [AB/1056]) or that abortion is wrong (*Grimmark v Sweden* (2020) Application no. 43726/17)). At the heart of the democratic values underpinning the Convention is respect for diversity and pluralism and “[a] free and plural society must expect to tolerate all sorts of views which many, even most, find completely unacceptable” (*Williamson*, §77).

- c. Thirdly, a belief may be theistic but may too be based in a belief that something is a scientific reality (*Grainger*, §30).

12. A number of other matters can be discerned from the EA 2010 and other authorities.

- a. Firstly, precision in pleading, to define precisely what the belief is, is essential before considering whether a belief amounts to a philosophical belief for the purposes of s.10 (*Gray Mulberry Co (Design) Limited* [2020] ICR 715 § 26 AB/2594)
- b. Secondly, the threshold for determining whether a belief meets the *Grainger*/Art 9 threshold, is low: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, §23 AB/796 (“must relate to matters more than merely trivial”; it must be “coherent” but “too much should not be demanded in this regard”; “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").

- c. Thirdly, it is "emphatically ... not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief": *Williamson*, [§22](#).
- d. Fourthly, "a lack of belief" within the meaning of s.10(1) and (2) does not require that that lack of belief itself reaches the *Grainger* threshold. It must only be shown that the claimant lacks the protected belief in issue. For example, a claimant would be protected where s/he lacked a belief in God. This much is apparent from the wording of s.10 and it is apparent too from the exceptions in the EA 2010. [Schedule 9, para 3](#) EA 2010 provides that a requirement that a person be of a particular religion or belief may be lawful if it meets certain conditions. This is premised on the fact that discriminating against a person because they lack that religion or belief would otherwise be unlawful.
- e. Fifthly, and as alluded to above, the question whether a belief falls within the scope of s.10 is not to be tested by reference to its purported manifestation. The fact of a belief and its manifestation are distinct, and it is important that this is so. Indeed, manifestation is not a useful tool for determining whether a belief meets the *Grainger* threshold in any event, not least because a single belief may be manifested by different people in different ways; alternatively, it may not be manifested at all. Further, it cannot be taken for granted that an alleged manifestation is causally related to the belief in question; it may on inquiry be found not to be so (see, for example, *Gray Mulberry Co (Design) Limited* [2019] ICR 175 [AB/1610](#)). It is also impossible to see how it could be of any

relevance to a lack of belief; a person who is denied a job because he is believed not to be a Christian (direct discrimination) will be protected by s.10 but plainly manifestation would be irrelevant (s/he has nothing to manifest). Introducing manifestation into the inquiry at this stage also creates a risk that ETs will come to judgments as to the value of beliefs based on how they are allegedly manifested (the instant case is an example, see further below). For example, proselytizing by a Jehovah Witness (manifesting) may not be protected by Art 9 if it is overly intrusive, but a Jehovah Witness indisputably holds a protected religious belief. In *Williamson*, Lord Nicholls and Lord Walker indicated that “when” or “by the time” (§23 and 64 respectively) a question arose as to manifestation, a belief must meet the minimum threshold set for protection. It is submitted that this simply means that a court or tribunal *may* not have to trouble itself with whether a belief meets the threshold necessary for protection unless and until manifestation becomes an issue. Of course, an ET may have to decide whether a claimant has a protected belief even where it is not manifested, if it is alleged that discrimination has occurred because of the simple fact of the belief or lack of it. It is respectfully submitted that the judgment in *Gray* places too much weight on the observations of Lord Nicholls and Lord Walker in this respect. Manifestation certainly is not “the focus” when assessing the cogency of a belief, or indeed any of the other *Grainger* criteria, and the judgment in *Gray* was wrong to so conclude. As the EAT will be aware, the Court of Appeal have now dismissed an appeal against the decision of the EAT in *Gray*. In its judgment, the Court of Appeal stated that “It is unnecessary ...for us to consider whether Choudhury J was right to require the focus to be on manifestation when determining whether there is a protected belief by reference to the *Grainger* criteria. Our judgment is not to be taken as endorsing this approach.” (*Gray v. Mulberry Co (Design) Limited* [2020] ICR 715, §30). It is respectfully submitted that the President’s approach in *Gray* was wrong.

### The ET's Decision

13. The EJ adopted the wrong approach when determining whether the Claimant's belief (which it was accepted she held) fell within the scope of s.10.
14. The EJ found that all of the *Grainger* criteria were met, save the fifth ("It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others"). In reaching this conclusion, it is clear that the EJ made a value judgment as to the worth of the Claimant's belief *and* its validity. Thus, the EJ spent two pages addressing the disadvantages experienced by transpeople (§§12-14) and then three pages on the protections the law provides to transpeople against discrimination (§§59-70), self-evidently as part of an assessment of the value of the Claimant's beliefs.
15. Further, the EJ took account of clinical evidence ("source material") relating to the existence of immutable biological sex, and gender (§43-44), and in that context undertook an assessment of the validity of the Claimant's beliefs (§83).
16. These errors were in part contributed to by the EJ's conflation of belief and manifestation. As is submitted above, these are discrete issues. It is clear that the EJ took account of the way in which the Claimant was said to have manifested, or would manifest, her belief in deciding whether it was protected; for example, by misgendering (§85). Further, the fact that the EJ dealt with manifestation as an aspect of the inquiry into the status of the belief meant too that the Claimant's Art 10 rights were not weighed in the balance. Article 10 was alluded to (§75) but without analysis and none would have been needed if the manifestation of the Claimant's beliefs was not taken into account.

17. The effect of this was that the EJ lost sight of his task. The EJ had, correctly, identified the Claimant's stated belief as "sex is immutable." He also recognised that the Claimant's "approach ... is largely that currently adopted by the law, which still treats sex as binary as defined on a birth certificate" (§83). This is so (*Corbett v Corbett* [1971] P83 [AB/119](#); *Elan -Cane v Secretary of State for the Home Department* [2018] 1WLR 5119 [AB/1541](#)). Further, the EA 2010 itself recognises that a religious belief that sex is immutable is a protected belief. Thus, [Sch 3, para 24](#) provides that it is not unlawful gender reassignment discrimination for a person approving or solemnising a marriage under religious rites to refuse to do so if they believe that a person's gender has been acquired under a Gender Recognition Certificate (corresponding provision is made in s.5B of the Marriage Act 1949); that is, because they hold a religious belief that sex is immutable. There can be no justifiable basis in law for distinguishing between religious or philosophical belief (that is, to suggest one is more worthy than another), as s.10 makes clear.
18. Notwithstanding this, the EJ concluded that the Claimant's belief "as to a weighty and substantial aspect of human life and behaviour" which "attain[ed] a certain level of cogency, seriousness, cohesion and importance" (*Grainger*, §24) was not protected.
19. It is submitted that had the EJ approached the issue correctly he would have been bound to conclude that, however unpalatable he found the Claimant's belief, the Claimant's belief was a protected belief. Whether the detrimental treatment that was alleged was sufficiently causally related to that belief, and discriminatory, is a matter for a liability hearing.
20. Finally, the EJ appears to have fallen into error in approaching "lack of belief". It is not clear that this is of any significance (because it does not appear that lack of belief was ultimately relevant) but in the event that it is, it is submitted that

---

<sup>8</sup> ET1, [HB/100](#).

the EJ was wrong to conclude that for a lack of belief to be protected, it itself had to meet the *Grainger* criteria (§58). This is for reasons given above.

KARON MONAGHAN QC

23 April 2021