Ladele

JOINT PARTLY DISSENTING OPINION OF
JUDGES VUČINIĆ AND DE GAETANO

1. We are unable to share the majority's opinion that there has been no violation of the Convention in respect of the third applicant (Ms Ladele). Our vote under operative head no. 9 of the judgment must be read only in light of the fact that, in view of the majority decision regarding the third applicant, it would have served no practical purpose to have a separate head on just satisfaction in respect of the said applicant.

2. The third applicant's case is not so much one of freedom of religious belief as one of freedom of conscience – that is, that no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience. Although freedom of religion and freedom of conscience are dealt with under the same Article of the Convention, there is a fundamental difference between the two which, in our view, has not been adequately made out in §§ 79 to 88 of the judgment. Even Article 9 hints at this fundamental difference: whereas the word "conscience" features in 9 § 1, it is conspicuously absent in 9 § 2. Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and to avoid evil. In essence it is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives. The pre-eminence (and the ontological roots) of conscience is underscored by the words of a nineteenth century writer who noted that "...Conscience may come into collision with the word of a Pope, and is to be followed in spite of that word."[1]

3. As one of the third party intervenors in this case – the European Centre for Law and Justice (ECLJ) – quite pointedly put it: "[J]ust as there is a difference in nature between conscience and religion, there is also a difference between the prescriptions of conscience and religious prescriptions." The latter type of prescriptions – not to eat certain food (or certain food on certain days); the wearing of the turban or the veil, or the display of religious symbols; attendance at religious services on certain days – may be subject to limitations in the manner and subject to the conditions laid down in Article 9 § 2. But can the same be said with regard to prescriptions of conscience? We are of the view that once that a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector[2]) and negatively (by refraining from actions which punish the objector or discriminate against him or her). Freedom of conscience has in the past all too often been paid for in acts of heroism, whether at the hands of the Spanish Inquisition or of a Nazi firing squad. As the ECLJ observes, "It is in order to avoid that obeying one's conscience must still require payment in heroism that the law now guarantees freedom of conscience."

4. The respondent Government accepted that the third applicant's objection to officiating at same-sex civil partnership ceremonies was a genuine and serious one, based as it was on her conviction that such partnerships are against God's law. In this sense her conscientious objection was also a manifestation of her deep religious conviction and beliefs. The majority decision does not dispute this – indeed, by acknowledging that "[t]he events in question fall within the ambit of Article 9 and Article 14 is applicable" (see § 103), the majority decision implicitly acknowledges that the third applicant's conscientious objection attained a level of cogency, seriousness, cohesion and importance (see § 81) worthy of protection.

5. It is at this point pertinent to observe that when the third applicant joined the public service (as an employee of the London Borough of Islington) in 1992, and when she became a registrar of births, deaths and marriages in 2002, her job did not include officiating at same-sex partnership ceremonies. There is nothing to suggest, and nor has it been suggested by anyone, that it was to be expected (perhaps by 2002) that marriage registrars would have to officiate at these ceremonies in the future. If anything, both the law (the Civil Partnership Act 2004) and the practice of other local authorities allowed for the possibility of compromises which would not force registrars to act against their consciences (see § 25). In the third applicant's case, however, a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights) eventually led to her dismissal. The iter lamentabilis right up to the Court of Appeal is described in §§ 26 to 29. We underscore these facts because the third applicant's situation is substantially different from the situation in which the fourth applicant found himself, or, more precisely, placed himself. When Mr McFarlane joined Relate he must have known that he might be called upon to counsel same-sex couples. Therefore his position is, for the purposes of the instant case, not unlike that of a person who volunteers to join the army as a soldier and subsequently expects to be exempted from lawful combat duties on the grounds of conscientious objection. While we agree that with regard to the fourth applicant his dismissal did not give rise to a violation of Article 9, whether taken alone or in conjunction with Article 14, we do not fully subscribe to the reasoning in § 109, and in particular to the statement to the effect that "[t]he State authorities...benefitted from a wide margin of appreciation in deciding where to strike the balance between the applicant's right to manifest his religious belief and the employer's interest in securing the rights of others." In our view the State's margin of appreciation, whether wide or narrow, does not enter into the equation in matters of individual moral conscience which reaches the required level mentioned in paragraph 4, above. In our view the reason why there was no violation of Article 9 in respect of the fourth applicant is that he effectively signed off or waived his right to invoke conscientious objection when he voluntarily signed up for the job.

6. As the majority judgment correctly notes, the third applicant did not complain of a violation of Article 9 taken alone, but rather that "she had suffered discrimination as a result of her Christian beliefs, in breach of Article 14 taken in conjunction with Article 9" (§ 103). We also agree that for the purposes of Article 14 the relevant comparator in the third applicant's case is a registrar with no religious objection – we would rather say, no conscientious objection – to officiating at same-sex unions. It is from here that we part company with the majority. First of all, the reasoning and arguments in § 105 are at best

irrelevant and at worst a case of inverted logic: the issue in Ms Ladele's case is not one of discrimination by an employer, a public authority or a public official vis-à-vis a service user of the Borough of Islington because of the said service user's sexual orientation. Indeed, no service user or prospective service user of the Borough seems to have ever complained (unlike some of her homosexual colleagues) about the third applicant. The complainant is not a party or prospective party to a same-sex civil partnership. The aim of the Borough of Islington to provide equal opportunities and services to all without discrimination, and the legitimacy of this aim, is not, and was never, in issue. No balancing exercise can, therefore, be carried out between the third applicant's concrete right to conscientious objection, which is one of the most fundamental rights inherent in the human person – a right which is not given by the Convention but is recognised and protected by it – and a legitimate State or public authority policy which seeks to protect rights in the abstract. As a consequence, the Court was not called upon to determine whether "the means used to pursue this aim were proportionate" (§ 106).

7. What is in issue is the discriminatory treatment of the third applicant at the hands of the Borough, in respect of which treatment she did not obtain redress at domestic level (except before the first instance Employment Tribunal, § 28). Given the cogency, seriousness, cohesion and importance of her conscientious objection (which, as noted earlier, was also a manifestation of her deep religious convictions) it was incumbent upon the local authority to treat her differently from those registrars who had no conscientious objection to officiating at same-sex unions – something which clearly could have been achieved without detriment to the overall services provided by the Borough including those services provided by registrars, as evidenced by the experience of other local authorities. Instead of practising the tolerance and the "dignity for all" it preached, the Borough of Islington pursued the doctrinaire line, the road of obsessive political correctness. It effectively sought to force the applicant to act against her conscience or face the extreme penalty of dismissal – something which, even assuming that the limitations of Article 9 § 2 apply to prescriptions of conscience, cannot be deemed necessary in a democratic society. Ms Ladele did not fail in her duty of discretion: she did not publicly express her beliefs to service users. Her beliefs had no impact on the content of her job, but only on its extent. She never attempted to impose her beliefs on others, nor was she in any way engaged, openly or surreptitiously, in subverting the rights of others. Thus, even if one were to undertake the proportionality exercise referred to in § 106 with reference to whatever legitimate aim the Borough had in view, it follows that the means used were totally disproportionate.

8. For the above reasons, our conclusion is that there was a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.