Neutral Citation Number: [2024] EAT 141

Case No: EA-2021-000488-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 September 2024

Before :

THE HONOURABLE MR JUSTICE SHELDON

- -

Between :

MR S THOMAS

(Appellant)

- and -

SURREY AND BORDERS PARTNERSHIP NHS FOUNDATION TRUST

(First Respondent)

MS A BRETT

(Second Respondent)

- -
- -

Mx Oscar Davies (instructed by Tilbrook's Solicitors) for the **Appellant**
Miss Rehana Azib KC (instructed by Bevan Brittan LLP) for the **Respondents**

Hearing date: 12-13 June 2024

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JUDGMENT

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

The claimant alleged that his assignment with an NHS Trust had been terminated because of his belief in English nationalism. He claimed that this was belief discrimination contrary to the Equality Act 2010 ("the EqA"). At a preliminary hearing, the employment tribunal held that the claimant's belief was not protected by the EqA. The claimant appealed against this decision.

The appeal is dismissed. The claimant's views are of an English nationalism which believes that there is no place in British society for Muslims or Islam itself. Among the claimant's views are that Muslims should be forcibly deported from the United Kingdom. These views are not capable of protection under the European Convention of Human Rights ("the Convention") as they would offend Article 17 which 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."

The claimant is not prevented from holding his views, but he is outside of the right to complain that he has been discriminated against in relation to those beliefs in the circumstances covered by the EqA.

THE HONOURABLE MR JUSTICE SHELDON

Introduction

1. Steven Thomas, who I shall refer to as the claimant, appeals from the decision of Employment Judge Hyde, sitting at London South Employment tribunal ("the employment tribunal"), dismissing his claim for discrimination under the Equality Act 2010 ("the EqA") on a preliminary issue: that his belief in English nationalism, which includes anti-Islamic views, is not capable of being a protected belief under section 10 of the EqA.

2. The appeal requires this tribunal to consider the scope of section 10 of the EqA, and to review two judgments of the Employment Appeal Tribunal: Burton J in **Grainger plc v Nicholson** [2010] ICR 360, and Choudhury P in **Forstater v CGD Europe** [2022] ICR 1. In doing so, it will be necessary to examine the relevant jurisprudence of the European Court of Human Rights and, in particular, the consideration given by the Strasbourg Court to Article 17 of the European Convention on Human Rights ("the Convention"). Article 17 of the Convention provides under the heading of "Prohibition of abuse of rights" 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."

Background

3. On 1 November 2018, the claimant issued a claim against his former employer, Surrey & Borders Partnership NHS Foundation Trust ("the Trust") and one individual, Ms Alyson Brett (collectively, the Respondents) for, among other things, discrimination on the grounds of religion or belief.

4. The claimant had been engaged through an employment agency (Hays Specialist Services) to deliver consultancy services to the Trust for just under three months from 30 April 2018 to 26 July 2018. On 24 July 2018, he was notified by the employment agency that his assignment had been terminated because it had come to light that he had an unspent conviction which he had failed to declare. The claimant believed that the real rationale for his termination was his political affiliation - that he had stood for political office between 2004 and 2016 for the political party, the English Democrats – and therefore his dismissal was due to his philosophical belief: what he described as "English Nationalism". The claimant alleged that this was discrimination contrary to the EqA.

5. In their response, the respondents denied that the claimant had been dismissed because of his philosophical belief. They contended that his termination was due to him providing misleading information on his CV and Candidate Application Form. In any event, the respondents denied that the claimant's philosophical belief was protected by the EqA.

6. At a case management hearing on 18 March 2020, it was ordered that a preliminary hearing be listed to decide the following issues:

i) Is English nationalism capable of constituting a philosophical belief under section 10 of the Equality Act 2010?

ii) Did the claimant hold anti-Islamic views as part of his philosophical beliefs at the relevant time?

iii) If so, were those anti-Islamic views incompatible with the fundamental rights guaranteed under Articles 2, 5 and 9 of the European Convention on Human Rights, such that they would prevent the claimant's belief in English nationalism from being a protected characteristic?

7. That hearing took place before Employment Judge Hyde on 17 July 2020. The claimant was represented by Mx Oscar Davies, and the respondents by Ms Rehana Azib. Both counsel appeared before me (Ms Azib has become leading counsel in the meantime, and I shall refer to her as Ms Azib KC). As explained in her judgment, by the end of the hearing Employment Judge Hyde considered that the third question from the list of issues was more properly posed as:

> "If so, were those anti-Islamic views worthy of respect in a democratic society, incompatible with human dignity and did they conflict with the fundamental rights of others, such that they would prevent the Claimant's belief in English nationalism from being a protected characteristic?".

The employment tribunal's decision

8. In her decision, Employment Judge Hyde made it clear that she was making no findings of fact concerning the reasons for the claimant's termination, or the other complaints that he had made. She was only considering the preliminary issue with respect to the claimant's belief.

9. Employment Judge Hyde set out the legal framework, referring to section 10 of the EqA; paragraphs 2.52 and 2.57-59 of the Code of Practice on Employment 2011 which include the five criteria from Burton J's judgment in **Grainger**; various provisions of the Convention (including Articles 9 and 10); and the Strasbourg decision in **Redfearn v United Kingdom** [2013] IRLR 51. Employment Judge Hyde rejected the submission made by Mx Davies that **Grainger** had been superseded by **Redfearn**: she held that the domestic law that was applied in **Redfearn** pre-dated that in **Grainger**, and the **Grainger** approach had been judicially approved by the Court of Appeal in the case of **Gray v Mulberry Company (Design) Ltd** [2019] EWCA Civ 1720.

10. With respect to the facts, Employment Judge Hyde referred to the claimant's witness statement where he explained his belief in English nationalism. The summary of these beliefs, as articulated by Mx Davies in their closing submissions, was as follows:

> "12. The Claimant's belief in English nationalism is set out in his witness statement [74]-[79], dated 9 May 2019. In summary:
>
> 12.1 He has had a long-standing interest in the identity of being English, though it was not until he discovered the 'English Democrats' that his interest in politics deepened. He joined the English Democrats' National Council in early 2004 [77/33].
>
> 12.2 To the Claimant, English nationalism is the nationalism

> that asserts that the English are a nation and promotes the cultural unity of English people. In a general sense, it comprises political and social movements and sentiment inspired by a love for English culture, language and history, and a sense of pride in England and the English people. English nationalists see themselves as predominantly English rather than British [77/35].
>
> 12.3 On a political level, some English nationalists have advocated self-government for England. This could take the form of either a devolved English Parliament within the United Kingdom or the re-establishment of an independent sovereign state of England outside the UK [77/37].
>
> 12.4 The Claimant's English nationalism, in its full flowering, welcomes the inclusion of those who choose to live in England to adopt English identity and with it, allegiance to England [79/46].
>
> 12.5 The Claimant's focus is on national identity (which does not depend upon ancestry or race) rather than common descent or race [p79/49].
>
> 12.6 His belief in English nationalism has manifested itself in a period of 13 years of voluntary political activism in which he has invested time, money, his personal image and name p[77/38].
>
> 12.7 He was also a Parliamentary candidate in the 2010 and 2015 General Elections, a candidate in the GLA elections in 2008 and 2012, in the 2012 and 2016 Police & Crime Commissioner Elections and in various other local council elections in Kent [77/41]."

11. Employment Judge Hyde stated that she accepted that these were the claimant's beliefs, and noted that if they were the extent of his beliefs, the issues in this case were unlikely to have arisen: in other words, they would have been found to be protected by the EqA. However, there was more to the claimant's beliefs that needed to be explored as his witness statement did not address the claimant's anti-Islamic beliefs.

12. Employment Judge Hyde went on to make findings about the claimant's anti-Islamic beliefs, based on findings made by a previous employment tribunal that had considered the claimant's beliefs ("the Leeds Employment tribunal") – these findings were said by employment tribunal Judge Hyde to be helpful and persuasive but not binding -- as well as by what was said by the claimant in cross-examination, and from various social media posts. In this appeal, the claimant has not challenged the Employment Judge's findings as to his anti-Islamic beliefs, although it was said by Mx Davies that the claimant had been misunderstood or misinterpreted.

13. Employment Judge Hyde noted that the Leeds Employment tribunal had set out a number of anti-Muslim comments made by the claimant which included the use of the hashtag

"*RemoveAllMuslims*". The claimant's tweets also included the following:

> "[A] religion that finds pork and dogs 'unclean' but does not use toilet paper, and allows camel urine to be drunk, is only for the insane"; and "Ethnic cleansing…always happens to Muslims…wonder why?"

14. Further, Employment Judge Hyde observed that in cross-examination before the Leeds Employment tribunal the claimant had said that Islam in its current form should be banned from England unless it were "*Anglicised*" and "*toned down*" to fit in with society in England. Employment Judge Hyde commented that, at the hearing before her, the claimant did not dispute that these comments were consistent with his English nationalism.

15. Employment Judge Hyde noted that the claimant had stated that only 4% of his tweets concerned Muslims; the rest dealt with English nationalism and Brexit or other subjects. There was no evidence, however, that the claimant had directed his tweets or other public pronouncements in the same way to any other religion. Employment Judge Hyde observed that in re-examination the claimant expressed opposition to multi-culturalism, believing that integration into the host culture was preferable and more unifying. The claimant believed in a multi-racial England, in which all the people from different races had a common culture and were not culturally segregated; as he believed was the case in Brazil.

16. With respect to the post which used the hashtag *RemoveAllMuslims*, the claimant had explained that this had been posted on 4 June 2017 while he was in a very emotional state in the wake of the London Bridge/Borough Market terror incident: his daughter was in Borough Market at the time of the incident, and he said that this comment was mistaken, out of character for him and irrational. Even though the claimant said that this was the only occasion on which he had used the hashtag *RemoveAllMuslims*, he could not discount the possibility that he had posted or reposted a tweet which was negative about Muslims coming to the United Kingdom or being made to leave. Employment Judge Hyde found, however, that the view expressed by the hashtag *RemoveAllMuslims* was characteristic of the views generally expressed by the claimant about Muslims. This finding was reinforced by the claimant's tweet (referred to by the Leeds Employment tribunal) that: "*This is why Japan had the sense to ban Islam*".

17. On the basis of this material, Employment Judge Hyde reasoned that:

> "62. I was satisfied that these provided more than an adequate basis for finding that the Claimant held anti-Muslim views, and that they were part of his belief in English nationalism. There was little basis for thinking that the Claimant's antipathy to what he saw as Muslim practices and beliefs and to the followers of Islam was based on any real acquaintance with the tenets of that religion. He was unaware for example of such basic matters as the existence of different schools of thought in Islam. Much of his information about Islam and Muslims appeared to have come from other tweets, social media communications and apparently poorly informed sources. He was unable to say whether there was any serious public health or hygiene learning on the superiority of the use of toilet paper over other methods of self-cleansing associated with Muslims, and indeed with many other societies in Europe and the Far East where the use of a bidet in

> the bathroom is considered more hygienic.
>
> 63. It was in short, pure prejudice."

18. Employment Judge Hyde also referred to other material that had been examined by the Leeds Employment tribunal. This included a Facebook post in which the Claimant had stated:

> "The only cost-effective way to stop illegal immigrants trying to storm through the Channel Tunnel is to set up a machine gun and take out a few people – that would stop it very quickly and immediately cut dead this tactic…who has got the guts to do this in our politically correct society?".

It was noted that in a further post, the claimant had stated that he did not actually want to see migrants killed, but did advocate the use of armed violence against migrants by saying that guards should be able to fire warning shots and then to consider shooting arms or legs. Employment Judge Hyde commented that these posts were differently targeted from the Claimant's anti-Islamic posts, and they were the only occasions in which the claimant had advocated violence. Employment Judge Hyde held, however, that they demonstrated the claimant's intolerance of illegal immigrants/migrants, as an extension of his nationalist views.

19. Employment Judge Hyde set out a series of the claimant's social media posts (from a bundle of 600 pages) which had been referred to the Leeds Employment tribunal:

> "a. "*the BBC complain that there aren't enough ethnic minorities on TV and they go and axe Crimewatch…go figure*" 19 October 2017 (p759);
>
> b. "*Soldier was asked where do you stand on Muslims? The windpipe usually does the trick he replied*" 14 October 2017 (p772);
>
> c. "*Imam says "We Hav 2 accept Child Brides" MUSLIM paedophilia is part OF THEIR Culture*" re-tweeted from Death2RapeGangs on 14 February 2016 (p715);
>
> d. "*Lets "Trump Muslims" in England with a complete temporary ban also*": 8 December 2015 (487); and
>
> e. Various references to the hashtag "*BanTheBurka*" August 2015 (pp526-527), alongside the suggestion that a woman wearing a headscarf was not welcome in the UK (para 86).

Employment Judge Hyde held that these posts demonstrated varying degrees of antipathy towards and disdain by the claimant for Muslims and various ethnic minority groups. These posts represented "a snapshot of the views the Claimant had publicly posted and demonstrated his attitudes over a number of years, primarily towards Muslims, but also about what English nationalism meant to him".

20. In her assessment and conclusions, Employment Judge Hyde applied the five **Grainger** criteria. She found that the first four of the criteria were met: (i) the Claimant's belief in English nationalism, with anti-Islamic views as part of that, was genuinely held; (ii) the belief was a

belief and not an opinion or viewpoint based on the present state of information available: it was a settled view of the claimant's English identity and how society in England should function; (iii) national identity and how the country is governed were necessarily weighty and substantial aspects of human life and behaviour: the claimant's belief included views about the way in which a society in which those of varied racial origins, religions and cultures should be ordered; (iv) the belief attained a certain level of cogency, seriousness, cohesion and importance: although the terms in which the claimant expressed his views were usually offensive and disparaging, the subject matter was not "outside the bounds of democratic debate".

21. Employment Judge Hyde explained that the fifth **Grainger** criterion -- that the belief must be worthy of respect in a democratic society, must not be incompatible with human dignity and not conflict with the fundamental rights of others -- was designed to draw the boundaries of protection in accordance with Article 17 of the Convention and, as suggested by Burton J in **Grainger**, was "designed to exclude, for example, a racist or homophobic political philosophy".

22. Employment Judge Hyde's application of the fifth **Grainger** criterion to the claimant's case was as follows:

> "86. The fifth *Grainger* criterion was that the belief must be worthy of respect in a democratic society, must not be incompatible with human dignity and not conflict with the fundamental rights of others.
>
> 87. This is the criterion designed to draw the boundaries of protection, in accordance with Article 17 of the ECHR, as outlined in para 28 of the Judgment of Burton J in *Grainger*, cited by Ms Azib in para 30 of her skeleton, by the application of a value judgment about the manifestation of the Claimant's belief. As suggested by Burton J, it was designed to exclude, for example, a racist or homophobic political philosophy. The central purpose of this hearing was to ascertain which side of the line the Claimant's beliefs fell, given that they involved the expressions of 'anti-Islamic' views found.
>
> 88. The Respondents relied on the finding by the Leeds Employment Tribunal in which the issue of whether the Claimant's views amounted to a philosophical belief under the 2010 Act were discussed at paragraphs 84 – 94 of the Reasons.
>
> 89. At para 92 the Leeds Tribunal found that the Article 9 right was infringed by the Claimant's views which were to the effect that Islam in its current form should be banned if not Anglicised and toned down. It found that the view was not compatible with Article 9 as it was based on two stereotypical assumptions: that offensive practices such as female genital mutilation and "grooming" are predominantly or peculiarly to do with the Islamic faith or Muslims, and that all behaviour by Muslims must be taken to be a representation of Islam as a religion (p86). This Tribunal heard no evidence about these views, but they are consistent with the evidence heard.
>
> 90. The Leeds Tribunal further concluded at [86] that the Claimant's

beliefs were a violation of four rights under the European Convention of Human Rights, namely: Article 2 (the right to life), Article 9 (freedom of religion) and Article 5 (the right to liberty) and Article 14 (the right to enjoy substantive rights without discrimination on the grounds of religion). It also concluded that the Claimant's views advocated coercive removal dependent on religion, which would inevitably involve infringements of the liberty of Muslims who did not wish to be removed from the UK.

91. I accepted Mr Davies' general submission that the Claimant's version of English Nationalism did not seek to 'overthrow the state' nor to deprive individuals of property: see *Kelly v Unison* ET case no: 2203854/2008, decided in 2011. In *Kelly*, the Claimants subscribed to an extreme version of socialism that was dedicated to revolution and the overthrow of the state. Their views were held not to be worthy of respect in a democratic society and/or were incompatible with human dignity. He distinguished that situation from the present case. The Claimant's views did not incite violence towards other groups, but rather represented an opinion on matters that concerned the constitution of England.

92. No matter how objectionable, the Claimant's expressed anti-Islamic views did not amount to inciting violence. The Claimant was in no position to implement such a view and could not reasonably be taken to have that power. The manner of expression of his views however, involved subjecting others to justified offence – a generalised form of harassment targeting one particular religion.

…

94. Further, [Mr Davies] submitted, the Respondents could not invoke Convention rights against the individual when neither party is a public body. No restriction can be invoked in terms of an individual's Convention rights except those that are already defined in the Convention of the HRA 1998.

95. The Tribunal accepted this latter submission. However, it appeared to me that this fifth criterion required regard to be had to the actual or potential effect of the expressions of the Claimant's views. It was difficult to conclude that the Claimant's focus on one religion, and ill-informed, disparaging and often recklessly offensive comments were worthy of respect in a democratic society or compatible with human dignity.

…

100. The Tribunal has already commented that Mr Thomas' views about Islam and Muslims did not appear to have been the fruits of serious research, a task he was clearly intellectually well capable of undertaking, should he have been so minded. However, I considered that taken overall his views did not actually infringe the rights of Muslims, or indeed any other minorities to exercise their fundamental freedoms.

…

102. I considered that many of the views which were cited by Ms Azib as tending to show that he did not satisfy the fifth criterion, such as an opposition to faith schools and the wearing of overt religious paraphernalia, and opposition to the methods of preparation of halal meat were shared by groups such as atheists, humanists, feminists and animal rights activists.

103. I was exercised by the meaning of the requirement not to conflict with the fundamental rights of others in the third limb of the fifth criterion.

…

105. I reminded myself that in the case of *Gray* above, albeit in the context of the fourth criterion, the President of the Employment Appeal Tribunal had confirmed that the proper approach was simply to ensure the bar was not set too high and that too much was not demanded in terms of the *Grainger* threshold requirements. That was consistent with the need to balance the effects of depriving a claimant of the opportunity to complain about the loss of their job due to religion and belief discrimination and such a claimant's rights under Articles 9 and 10. I had regard to cautionary words about the potential for abuse highlighted in the *Redfearn* Judgment above (para 55).

106. On the other hand, under domestic law, there is no defence such as justification open to a respondent in a direct discrimination complaint which would allow a tribunal to consider matters such as the potential for discrimination by the Claimant at work or reputational damage to an employer as was apparent in the *Redfearn* case. This consideration had to take place at this stage in accordance with the fifth *Grainger* criterion and in the context of the wording of the qualifications set out in Articles 9(2) and 10(2).

107. I considered that the requirement of a conflict was not limited to a potential breach of the Equality Act 2010 by the manifestation or expression of the Claimant's views. This was consistent with the context of the three limbs of the fifth criterion, and with the submissions of the Equalities and Human Rights Commission cited in the Letsas blog above. It was also the sort of limitation anticipated in the wording of Articles 9(2) and 10(2). It did not prevent the Claimant holding or expressing his views, but it took him outside of the right to complain that he had been discriminated against in relation to those beliefs in the circumstances covered by the Equality Act 2010.

108. I concluded that the Claimant's disdainful and prejudiced focus on Islam, to the exclusion of all other religions or belief systems, and the language in which this was consistently cloaked meant that the belief did not meet the fifth criterion.

> 109. In summary I concluded that:
>
> 1. English Nationalism is capable of constituting a philosophical belief under section 10 of the Equality Act 2010.
>
> 2. The Claimant held anti-Islamic views as part of that philosophical belief at the relevant time, from May to July 2018.
>
> 3. Those anti-Islamic views did not satisfy the fifth *Grainger* criterion, such that they prevented the Claimant's belief in English nationalism from being a protected characteristic."

Grounds of Appeal

23. The Claimant appealed from the employment tribunal's decision. Her Honour Judge Susan Walker allowed the appeal to proceed to a full hearing on 10 August 2023.

24. The Grounds of Appeal are as follows:

> (i) the Employment Judge erred in law by failing to follow the Strasbourg authority of *Redfearn v United Kingdom* (47335/06) (2013) 57 E.H.R.R. 2 ("*Redfearn*") in favour of the EAT decision in Grainger;
>
> (ii) the Employment Judge erred in law by restricting herself to following *Grainger*, a case which wrongly interprets the application of the Convention rights;
>
> (iii) the Employment Judge erred in law by finding that the Appellant failed to pass the fifth *Grainger* criterion when, in light of *Forstater*, it is clear that his belief easily passed the threshold, and was nowhere near the types of beliefs that should be restricted; and
>
> (iv) the Employment Judge erred in law by stating that the fundamental rights of others were not infringed, but yet she went on to conclude that the Appellant's belief was not worthy of protection.

Submissions

25. Mx Davies, on behalf of the Claimant, and Ms Azib KC, on behalf of the Respondents, produced detailed skeleton arguments. They developed their arguments orally before me over two days. Following the hearing, they provided me with brief written submissions on a number of Strasbourg cases that concerned Islam/Muslims. Taking each of the grounds of appeal in turn.

Ground 1: Did the judge err by preferring *Grainger* to *Redfearn*?

26. Mx Davies, for the Claimant, contended that the facts of the Claimant's case were very similar to those in *Redfearn*. They submitted that the reasoning of the Strasbourg Court in *Redfearn*, in particular that those with views that may shock or offend are worthy of protection under the Convention, should take precedence over the decision in *Grainger*. *Redfearn* was decided after *Grainger* and, in any event, a decision of the European Court of Human Rights carried greater weight than a decision of the Employment Appeal Tribunal.

27. Mx Davies highlighted paragraph 92 of the Employment tribunal's judgment, where Employment Judge Hyde found that the Claimant's anti-Islamic views did not amount to inciting violence, but in the same paragraph stated that the Claimant's expression of views involved subjecting others to justified offence, amounting to a generalised form of harassment targeting one particular religion. Mx Davies submitted that this characterisation of the Claimant's views were protected by *Redfearn*.

28. Ms Azib KC contended that the Employment Judge had the principle set out in *Redfearn* firmly in mind when making her decision. Employment Judge Hyde found, however, that the claimant's anti-Islamic beliefs went beyond those that merely offend, shock or disturb, which *Redfearn* protected. Indeed, Ms Azib KC submitted that the facts of the present case were more similar to those in *Norwood v United Kingdom* (2004) 40 EHRR SE 11.1, in which the Strasbourg Court found that words and images that attacked all Muslims in this country were not protected by Article 10 (freedom of expression), as they were regarded as falling within the prohibition from protection set out in Article 17 of the Convention.

Ground 2: Does *Grainger* wrongly interpret the Convention?

29. Mx Davies, for the claimant, argued that *Grainger* wrongly suggests that an employer can invoke Convention rights against individuals. Convention rights are there to protect individuals from the state and emanations of the state and not the other way around. The Employment Judge was, therefore, in error to apply *Grainger* by reasoning that the respondent employer could invoke Convention rights against him. That error was magnified in the present case where the respondent employer is actually a public body, and therefore an emanation of the state.

30. Ms Azib KC submitted that this is a misunderstanding of the Employment tribunal's decision. Whilst it is correct that a respondent employer cannot invoke Convention rights against an individual, the respondent employer can invoke Article 17 of the Convention.

Ground 3: The Employment Judge erred in finding that the claimant failed to satisfy the fifth *Grainger* criterion when, in light of *Forstater*, his belief easily passed the threshold for protection.

31. Mx Davies, for the Appellant, contended that the fifth *Grainger* criterion had been largely redrawn and the threshold for satisfying it had been lowered by Choudhury P in *Forstater*. In *Forstater,* Choudhury P had stated at [79] that

> "only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, … should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection".

Mx Davies submitted that the Claimant's beliefs did not come close to pursuing totalitarianism, advocating Nazism, or espousing violence and hatred in the gravest of forms. At their highest, some of the Claimant's expressions of belief may have been "offensive", and were therefore protected by *Redfearn*.

32. Mx Davies submitted that contrary to the judgment in *Forstater*, the Employment Judge focussed on manifestations of the claimant's belief, looking, for instance, at his social media activity. Manifestation of a person's beliefs should be examined at the second stage of considering a claim, after deciding that a belief is protected, and not in the consideration of whether the belief should be protected at all.

33. Mx Davies also submitted that Employment Judge Hyde had been inconsistent in her analysis. At one point, she stated that the subject matter of the claimant's beliefs was not outside of the bounds of democratic debate (paragraph 84), and yet the Employment Judge had also found that the Claimant's belief was not worthy of respect in a democratic society (paragraph 86).

34. Ms Azib KC submitted, on behalf of the respondents, that this was not a case about English nationalism *per se*. English nationalism may be capable of amounting to a protected belief, depending on the facts. In the instant case, however, the claimant's English nationalism was bound up with his anti-Islamic views.

35. Ms Azib KC contended that the Employment Judge was entitled to have regard to the manifestations of the claimant's beliefs – namely, his social media activity – as they provided evidence of what the claimant's beliefs were. This was not a case where the claimant had set out his anti-Islamic beliefs in a witness statement, which he ought to have done. It was necessary, therefore, for the Employment Judge to examine the manifestations of the claimant's belief so as to detail what his beliefs actually were.

36. Ms Azib KC submitted that *Forstater* did not change the law as set out in *Grainger* by raising the bar or threshold for a belief to be disqualified from protection. Choudhury J had said as much in the more recent case of *Holbrook v Cosgrove* [2023] EAT 168. In *Forstater*, Choudhury P was not saying that a belief had to be akin to totalitarianism to be excluded from protection. Choudhury P held that to exclude the protection of a belief by virtue of Article 17, an employment tribunal had to be satisfied that "the belief in question gave rise to the gravest form of hate speech, was inciting violence, or was as antithetical to Convention principles as Nazism or totalitarianism". The claimant's beliefs were said to fall within each of these three categories, especially when the final category is understood as including what Choudhury P stated at paragraph 100: that Article 17 of the Convention might be applied to "a belief that all non-white people should be forcibly deported for the good of the nation", as any manifestation of this belief "would be highly likely to espouse hatred and incitement to violence", leading to "the inevitability that the rights of others would be destroyed".

37. Ms Azib KC also contended that a belief could fall outside of protection where it was incompatible with human dignity in a broader sense. That was what Burton J was saying in *Grainger* and was consistent with the House of Lords decision of *Williamson v Secretary of State for Education and Employment* [2005] 2 AC 246, per Lord Nicholls at [23].

Ground 4: <u>The Employment Judge erred in her conclusion that the claimant's belief was not worthy of protection, when she had found that the fundamental rights of others were not infringed.</u>

38. Mx Davies, for the claimant, submitted that the Employment Judge's reasoning was inconsistent and contradictory. The Employment Judge had found at paragraph 100 that the claimant's views did not actually infringe the rights of Muslims, and yet at paragraph 107, she found that the claimant's views fell within the derogations in Articles 9(2) and 10(2) of the

Convention: that is, the instances in which the freedom of belief and freedom of expression could be curtailed. Further, in any event, Mx Davies submitted that the claimant's beliefs came nowhere nearing infringing the rights of others as is reflected in Article 17 of the Convention, which refers to the destruction of rights of others.

39. Ms Azib KC submitted that this ground of appeal amounted to a perversity appeal, for which the burden on the claimant was a high one. Even if this tribunal found that there were inconsistencies in the judgment of the Employment tribunal, the claimant would need to make out an overwhelming case that the decision was wrong, and that no reasonable employment tribunal could have reached the conclusion that it did on a proper appreciation of the evidence and relevant law. In the instant case, a belief that singles out an entire religious group, and a belief that an entire religion and its proponents have no place in this society, cannot be a protected belief within the EqA.

40. In any event, the Employment Judge had not made inconsistent findings. Her conclusions at paragraph 100 had to be read in light of paragraphs 92 and 104. The Employment Judge's overall conclusion was that the targeting of a particular religion was not a protected belief, and that conclusion was not wrong.

Post-hearing submissions

41. In their post-hearing submissions, counsel addressed the cases of **Seurot v France** (dec.) no. 57383/00, 18 May 2004; **Soulas & Others v France** (Application No.15948/03), 10 July 2008; **Le Pen v France** (dec.) (Application No. 18788/09), 20 April 2010; **S.A.S. v France** (Application No. 43835/11), (2015) 60 E.H.R.R. 11; and **Sanchez v France** (Application No. 45581/15), 15 May 2023.

42. Mx Davies submitted that these cases were not especially useful for the purposes of determining whether the claimant's belief should be protected under the EqA as a preliminary issue. Most of the cases focus on Article 10 and not Article 9 of the Convention, and the exercise of proportionality for each of these articles is different.

43. Ms Azib KC accepted that these cases dealt predominantly with Article 10 and state interference with that Convention right. Nevertheless, the Strasbourg Court's overall approach to cases with anti-Muslim themes was that the expression of such views ran counter to the values of the Convention. Ms Azib KC submitted that the Strasbourg jurisprudence clearly and consistently shows that: (i) it will not tolerate discrimination or advocating discrimination under the guise of freedom of expression or any other Convention right; (ii) it will not tolerate views that single out or target a particular ethnic or religious group, especially where they are likely to arouse feelings of hostility. This includes views that insult, denigrate or slander particular religious or ethnic groups; (iii) it is particularly sensitive to and intolerant of, anti-Muslim views, comments and sentiments and the need to combat growing hostility against Muslims across Europe; and (iv) the Convention values of social peace, tolerance and non-discrimination are especially important, if not sacrosanct.

Discussion

44. In order to address the various grounds of appeal, it is necessary to set out the relevant legal framework and principles.

Section 10 of the Equality Act 2010

45. The starting point for considering the issues raised by the appeal is section 10 of the EqA. This provides (removing the references to religion, with which we are not concerned in this case) that

> "(2) Belief means any . . . philosophical belief and a reference to belief includes a reference to a lack of belief.
>
> (3) In relation to the protected characteristic of . . . belief –
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular . . . belief;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same . . . belief."

The Employment Statutory Code of Practice

46. The term "philosophical belief" is not defined by the EqA. Guidance is provided by the Equality and Human Rights Commission's Statutory Code of Practice: Employment, published in 2011 ("the Code"). Paragraph 2.52 of the Code provides that:

> "The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion)".

47. Paragraph 2.59 of the Code provides that:

> "For a philosophical belief to be protected under the Act:
>
> • it must be genuinely held;
>
> • it must be a belief and not an opinion or viewpoint based on the present state of information available;
>
> • it must be a belief as to a weighty and substantial aspect of human life and behaviour;
>
> • it must attain a certain level of cogency, seriousness, cohesion and importance;
>
> • it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others."

48. The Code also gives an example:

> "A woman believes in a philosophy of racial superiority for a particular racial group. It is a belief around which she centres the important decisions in her life. This is not compatible with human dignity and conflicts with the fundamental rights of others. It would therefore not

> constitute a 'belief' for the purposes of the Act."

Grainger plc v Nicholson

49. The five bullet points set out at paragraph 2.59 of the Code are derived from the *Grainger* judgment. That was a case concerning the claimant's philosophical belief in anthropogenic climate change. In the course of his analysis in **Grainger**, at [28], Burton J accepted the proposition that the definition of philosophical belief did not include support of a political party, but stated that this does not mean that a belief in a political philosophy or doctrine such as Socialism, Marxism, Communism or free-market Capitalism would not qualify as a philosophical belief.

50. Burton J expressed concern, however, that reliance could be placed upon "an alleged philosophical belief based on a political philosophy which could be characterised as objectionable: a racist or homophobic political philosophy for example". Burton J went on to say that the way to deal with this would be to conclude that the philosophy in question offended against the requirement that the belief relied upon must be "worthy of respect in a democratic society and not incompatible with human dignity" (referring to **Campbell and Cosans v United Kingdom** 4 E.H.R.R. 283 at [36]), or "a belief consistent with basic standards of human dignity or integrity" (referring to **Williamson** [2005] 2 AC 246 at [23]). Burton J commented that the requirement in **Campbell** at [36] was derived from article 17 of the Convention, which deals with the "Prohibition of abuse of rights".

51. It is clear, therefore, that the formulation of the fifth criterion of **Grainger** was intended to be consistent with article 17 of the Convention and would describe those beliefs that would be protected by the Convention.

52. The **Grainger** criteria were referred to by the Court of Appeal in **Gray v Mulberry Company (Design) Limited** [2020] ICR 715 at [13], without disapproval. There was, however, no discussion of the fifth **Grainger** criterion in that case.

Campbell and Cosans v United Kingdom

53. The decision of the European Court of Human Rights in **Campbell**, referred to by Burton J, concerned the objection to corporal punishment as a disciplinary measure in schools. The Strasbourg Court considered an argument that the administration of corporal punishment contravened Article 2 of Protocol 1 to the Convention ("Right to Education"), which provides that "No person shall be denied a right to an education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and *philosophical convictions*" (emphasis added). At [36], the Strasbourg Court held that:

> "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 the child to education, the whole of Article 2 being dominated by its first sentence...
>
> The applicants' views relate to a weighty and substantial aspect of

> human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general."

Williamson v Secretary of State for Education and Employment

54. The decision of **Williamson**, referred to by Burton J, was also an education case. The claimants were teachers or parents of children at schools established to provide Christian education based on biblical observance, and they believed that the use of mild corporal punishment *should* be administered by those schools as this was part of their fundamental Christian beliefs. At [23], Lord Nicholls stated that everyone was entitled to hold whatever beliefs they wish, but when questions of "manifestation" arise, a belief had to satisfy

> "some modest, objective minimum requirements. These threshold requirements are implicit in article 9 [of the Convention]. . . The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection."

Forstater v Centre for Global Development Europe

55. The decision in *Forstater* involved consideration of whether gender-critical beliefs, which includes the belief that sex is immutable and not to be conflated with gender identity, was a philosophical belief and therefore protected by section 10 of the EqA. The Employment Judge had found that the claimant's belief was "absolutist", that the claimant would "refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment", and was not one that was "worthy of respect in a democratic society".

56. In his extremely detailed judgment, Choudhury P (speaking on behalf of a tribunal with lay members) set out the **Grainger** criteria at [21], and stated at [22] that it was not in dispute that these were "the appropriate criteria by which to assess whether a belief qualifies for protection under s.10, EqA". On its face, therefore, it is clear that Choudhury P accepted all of the *Grainger* criteria.

57. In examining the scope and ambit of the fifth **Grainger** criterion, Choudhury P set out relevant articles from the Convention: Article 9 (freedom of thought, conscience and religion); Article 10 (freedom of expression); and Article 17.

58. In determining whether the belief was a "philosophical belief", Choudhury P observed that the domestic provision of section 10 of the EqA needed to be read and understood so as to conform with the Convention (Articles 9 and 10), with Article 9 being the most directly applicable right. Choudhury P pointed out at [55] that numerous authorities had been referred to by the Employment Appeal Tribunal "emphasising the high importance attached by the ECtHR to diversity or pluralism of thought, belief and expression and their foundational role in a liberal democracy".

59. With respect to the fifth criterion in **Grainger**, Choudhury P noted at [57] that the bar was not to be set "too high". In doing so, Choudhury P rejected the respondent's argument (see [38]) that the fifth **Grainger** criterion should not be reduced to a consideration of whether the belief is of a kind to engage the high threshold of Article 17 of the Convention. The respondent had argued that in **Campbell and Cosans v UK**, the Strasbourg Court had said no more than that Article 17 was one of the factors to be taken into account, and that other beliefs, not crossing the Article 17 threshold, could also be not worthy of respect in a democratic society. The respondent had argued that "Were that not the case, then only a belief in Nazism or totalitarianism could fail Grainger V". For Choudhury P, Article 17 was the defining feature: if a belief did not fall within Article 17 it could be protected.

60. Choudhury P explained at [59] that Article 17

> "prohibits the use of the ECHR to destroy the rights of others. It becomes relevant where a State, group or person seeks to rely on Convention rights in a way that blatantly violates the rights and values protected by the Convention. One cannot, for example, rely on the right to freedom of expression to espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the principles of democracy: see the ECtHR's Guide on Article 17 of ECHR at para 26. The level at which Article 17 becomes relevant is clearly (and necessarily) a high one. The fundamental freedoms and rights conferred by the Convention would be seriously diminished if Article 17, and the effective denial of a Convention right, could be too readily invoked: see **Vajnai v Hungary** (2010) 50 EHRR 44 at paras 21 to 26. Thus, when the ECtHR refers to Article 17 (as it did in **Campbell and Cosans v UK**) in considering whether a philosophical conviction is worthy of respect in a democratic society and not in conflict with the fundamental rights of others, it would have had in mind that it is only a conviction that e.g. challenges the very notion of democracy that would not command such respect. To maintain the plurality that is the hallmark of a functioning democracy, the range of beliefs and convictions that must be tolerated is very broad. It is not enough that a belief or a statement has the potential to "offend, shock or disturb" (see **Vajnai** at para 46) a section (or even most) of society that it should be deprived of protection under Articles 9 (freedom of thought conscience and belief) or Article 10 (freedom of expression). The stipulation that the conviction or belief must not be in conflict with the fundamental rights of others must also be viewed with regard to Article 17. The conflict between rights in this context of satisfying threshold requirements is not merely that which would arise in any case where the exercise of one right might have an impact on the ECHR rights of another; in order for a conviction or belief to satisfy threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others."

61. Choudhury P then discussed **Williamson** – the other case relied upon by Burton J in **Grainger** – stating at [61] that the reference in **Williamson** to a belief involving "torture or inhuman punishment" was consistent with the principle that only the gravest violations of Convention principles should be denied protection, holding that: "Such violations go far beyond what might be regarded as potentially justifiable interference with a right: they seek to

destroy such rights".

62. Choudhury P proceeded to state at [62] that:

> "The two passages on which Burton J relied in formulating Grainger V clearly establish the extremely grave threat to Convention principles that would have to exist in order for a belief not to satisfy that criterion. We do not accept Ms Russell's submission that the Claimant has misconstrued these passages in pursuit of her submission that Article 17 provides the appropriate standard against which Grainger V is to be assessed. Far from being merely one of the factors to be taken into account, it appears to us that Article 17 was mentioned because that is the benchmark against which the belief is to be assessed; only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society. We do not consider that the ECtHR would have referred to Article 17, or the House of Lords to "torture and punishment", if a belief involving some lesser violation of others' rights - not sufficiently grave to engage Article 17 - was also capable of being not worthy of such respect."

63. Choudhury P then analysed two recent decisions of the European Court of Human Rights to illustrate the kinds of views that had to be espoused before Article 17 deprived them of Article 10 protection: **Ibragimov v Russia** (Applications nos. 1413/08 and 28621/11), and **Lilliendhal v Iceland** (Application no. 29297/18). In both of these cases, the Strasbourg Court had held that "Article 17 is only applicable on an exceptional basis and in extreme cases."

64. **Ibragimov** concerned publications of Muslim groups which were banned on the grounds that they were extremist and sought to incite religious discord. The applicant challenged the ban under Article 10 of the Convention. The state argued, however, that Article 10 protection should be removed by the operation of Article 17. The European Court of Human Rights held (in passages quoted by Choudhury P) that:

> "62. The Court reiterates that, as recently confirmed by the Court, Article 17 is only applicable on an exceptional basis and in extreme cases. Its effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 114, ECHR 2015 (extracts)).
>
> 63. Since the decisive point under Article 17 – whether the text in question sought to stir up hatred, violence or intolerance, and whether by publishing it the applicant attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it – overlaps with the question whether the interference with the applicant's rights to freedom of expression and freedom of religion was "necessary in a democratic society", the Court

> finds that the question whether Article 17 is to be applied must be joined to the merits of the applicant's complaints under Articles 9 and 10 of the Convention (see *Perinçek*, cited above, § 115).
>
> . . .
>
> 123. Having regard to the above considerations and its case-law on the subject, the Court finds that the domestic courts did not apply standards which were in conformity with the principles embodied in Article 10 and did not provide "relevant and sufficient" reasons for the interference. In particular, it is unable to discern any element in the domestic courts' analysis which would allow it to conclude that the book in question incited violence, religious hatred or intolerance, that the context in which it had been published was marked by heightened tensions or special social or historical background in Russia or that its circulation had led or could lead to harmful consequences. The Court concludes that it was not necessary, in a democratic society, to ban the book in question.
>
> 124. The Court therefore rejects the Government's preliminary objection under Article 17 and finds that there has been a violation of Article 10 of the Convention."

65. **Lilliendhal** was a case in which the applicant had been convicted for making homophobic comments that were considered to constitute the public threatening, mocking, defaming and denigrating of a group of persons on the basis of their sexual orientation and gender identity. Choudhury P referred to the **Lilliendhal** case at paragraph 64 of **Forstater**, quoting the following passages:

> "25. The decisive point under Article 17 is whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it (*Perinçek v. Switzerland* [GC], no. 27510/08, §§ 113-115, 15 October 2015). If applicable, Article 17's effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. As the Court held in *Perinçek*, Article 17 is only applicable on an exceptional basis and in extreme cases. In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (*ibid*., § 114).
>
> 26. The Court finds that the applicant's statement cannot be said to reach the high threshold for applicability of Article 17 as set out in the above-mentioned judgment in *Perinçek* (*ibid*.). Although the comments were highly prejudicial, as discussed further below, it is not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention (compare . . . *Norwood v. the United Kingdom* (dec.), no. 23131/03, 16 November 2004. . .). The

> applicant is thus not barred from invoking his freedom of expression in this instance. What remains to be decided is whether his conviction complied with Article 10 of the Convention."

66. Choudhury P summarised the effect of these two Strasbourg cases at [66]:

> "It is clear from these judgments that, in assessing whether a person's rights under Article 9 or Article 10 have been infringed, there is a preliminary question as to whether the person qualifies for protection at all, or, to use the ECtHR's terminology, as to whether the person "fall[s] outside the scope of protection of Article 10 of the Convention by virtue of Article 17": **Lilliendahl** at para 39. Where the expression amounts to the "gravest form of hate speech" then the protection would not apply, as Article 17 would operate to deprive the person of the protection that they seek to invoke. However, if the expression does not fall into that first category, then the question is whether the steps taken by the State to restrict such expression are justified within the meaning of Article 10(2). Thus even comments which are "serious, severely hurtful and prejudicial", or which promote intolerance and detestation of homosexuals would not fall outside the scope of Article 10 altogether. However, that does not mean that the individual making such comments has free rein to make them in any circumstance at all. The individual's freedom to express their views is limited to the extent provided for by Article 10(2) and it will then be for the Court to assess whether any limitation imposed by the State is justified".

67. At [68], Choudhury P explained that in determining whether a person falls within the protection of section 10 of the EqA, the employment tribunal was considering the 'first stage' of the two-stage analysis that would be conducted under Article 9: the second-stage being whether interfering with the manifestation of a belief was justified. Choudhury P held that "In relation to *Grainger* V, that means that only those beliefs whose characteristics are such that they would fall outside the scope of Article 9, ECHR by virtue of Article 17 would fail to satisfy that criterion."

68. With respect to the submission that an approach based on Article 17 of the Convention would mean that only beliefs "akin to Nazism or espousing totalitarianism would fail to qualify for protection", Choudhury P commented that:

> "it is clear from Convention case law that that is as it should be; a person is free in a democratic society to hold any belief they wish, subject only to "some modest, objective minimum requirements": per Lord Nicholls in **Williamson**. It is only in extreme cases involving the gravest violation of other Convention rights that the belief would fail to qualify for protection at all".

69. Choudhury P then considered the relevance of the manifestation of one's beliefs. At [77], he stated that "manifestation can be no more than a part of the analysis (assuming that there is any manifestation at all) and should be considered only in determining whether the belief meets the threshold requirements in general".

70. At [79], Choudhury P concluded his legal analysis by stating that:

> "In our judgment, it is important that in applying Grainger V, Tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be."

71. Choudhury P then went on to consider whether the claimant's gender-critical views satisfied the fifth **Grainger** criterion. Of relevance to the present appeal, the learned judge stated at [100] that:

> "*Some beliefs, for example a belief that all non-white people should be forcibly deported for the good of the nation, are such that any manifestation of them would be highly likely to espouse hatred and incitement to violence. In such cases, it would be open to the Tribunal to say that the belief fails to satisfy Grainger V.* However, the rationale for doing so would be that it is the kind of case to which Article 17 might be applied because of the inevitability that the rights of others would be destroyed. The Claimant's belief is not comparable."

(Emphasis added).

72. At [111], Choudhury P held that:

> "Most fundamentally, the Claimant's belief does not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of Article 17. That is reason enough on its own to find that Grainger V is satisfied. The Claimant's belief might well be considered offensive and abhorrent to some, but the accepted evidence before the Tribunal was that she believed that it is not "incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender" . . . That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether".

73. Choudhury P also identified two factors which were at odds with the view that the claimant's gender-critical belief was not worthy of respect in a democratic society: first, that the belief was not unique to her, but was widely shared, including amongst respected academics. Choudhury P noted, however, that "The popularity of a belief does not necessarily insulate it from being one that gravely undermines the rights of others; history is replete with instances where large swathes of society have succumbed to philosophies that seek to destroy the rights of others": see [113]. Second, the belief that sex is immutable and binary is consistent with the law: see [114]. At [115], Choudhury P stated that "Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it

should be declared as one not worthy of respect in a democratic society."

Holbrook v Cosgrove

74. In **Holbrook**, an appeal heard after the conclusion of the judge's period as President of the Employment Appeal Tribunal, Choudhury J considered the status and effect of his judgment in **Forstater**. The case concerned a barrister who was expelled from his Chambers after sending a tweet which his colleagues considered to be discriminatory and offensive. The claimant alleged that his treatment was because of his belief in social conservatism. He brought his claim out of time, but sought an extension of time on the basis that it was only after the Employment Appeal Tribunal's decision in **Forstater** that he regarded his claim as having prospects of success, and so his delay in pursuing the claim was not unreasonable. The employment tribunal rejected this argument, and the claimant appealed.

75. On the appeal, Choudhury J observed at [39] that paragraph 28 of **Grainger** (where Burton J had commented that a racist or homophobic political philosophy may not be capable of protection) was entirely *obiter*. In referring to beliefs that "could be characterised as objectionable", Burton J was said to be "doing no more than identifying the types of philosophies that might be considered objectionable; he was not thereby stipulating any threshold, criteria or "test" by which to assess whether a particular philosophy should in fact be regarded as such. That is clear from the concluding words of the relevant sentence, "for example".

76. Further, at [42(iv)], Choudhury J held that:

> "Grainger V, in particular, was derived from existing authority. The decision in Forstater-EAT, far from being a "game-changer" as the Claimant submits, did no more than restate long-established principles relating to freedom of speech and apply them to the specific context of the gender-critical views relied upon in that case."

At [50], Choudhury J stated that:

> "Forstater-EAT, far from representing a seismic shift, was an application of well-established principles".

Redfearn v United Kingdom

77. The Claimant in this case has relied on the decision of the European Court of Human Rights in *Redfearn v United Kingdom* [2013] IRLR 51. This case pre-dated *Grainger*. It concerned a white British employee who had been dismissed from his job transporting children and adults with physical and/or mental disabilities, the majority of whom were of Asian origin. He had been identified as a candidate for the British National Party, at a time when only white nationals could belong to that political party, and the party was opposed to any form of integration between British and non-European people. The employee was dismissed on grounds that his continued employment posed a potential health and safety risk due to the anxiety among passengers and their carers, and that this would damage the reputation of his employer. His claim for race discrimination failed before the Court of Appeal, which held that the complaint related to discrimination on political grounds and this was not protected by the domestic equality legislation.

78. The Strasbourg Court held that the dismissal was capable of striking at the very substance of the employee's rights under Article 11 of the Convention (freedom of association). The Court observed that it was not being asked "to pass judgment on the policies or aims, obnoxious or otherwise, of the BNP at the relevant time (the BNP is, in any case, not a party to these proceedings), but solely to determine whether the applicant's rights under Article 11 were breached in the particular circumstances of the instant case". The Court also noted that the British National Party was not an illegal party under domestic law nor were its activities illegal.

79. The Court held that:

> "55. The Court has previously held that political parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system, the Court considers that in the absence of judicial safeguards a legal system which allows dismissal from employment solely on account of the employee's membership of a political party carries with it the potential for abuse.
>
> 56. Even if the Court were to acknowledge the legitimacy of Serco's interest in dismissing the applicant from its workforce having regard to the nature of his political beliefs, the policies pursued by the BNP and his public identification with those policies through his election as a councillor, the fact remains that *Art.11 is applicable not only to persons or associations whose views are favourably received or regarded as inoffensive or as a matter of indifference, but also those whose views offend, shock or disturb*. For the Court, what is decisive in such cases is that the domestic courts or tribunals be allowed to pronounce on whether or not, in the circumstances of a particular case, the interests of the employer should prevail over the Art.11 rights asserted by the employee, regardless of the length of the latter's period of employment.
>
> 57. Consequently, the Court considers that it was incumbent on the respondent State to take reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation, either through the creation of a further exception to the one-year qualifying period or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation. As the UK legislation is deficient in this respect, the Court concludes that the facts of the present case give rise to a violation of Art.11 of the Convention."

(Emphasis added).

The Claimant relies in the instant case on the emphasised words.

Norwood v United Kingdom

80. The Respondents rely on the earlier case of **Norwood**. This involved an individual who had been convicted of displaying a poster which was threatening, abusive or insulting within the hearing or sight of a person to whom it was likely to cause harassment, alarm or distress, and which was religiously aggravated. The poster which he displayed in the first-floor window

of his flat contained the words: "Islam out of Britain" and "Protect the British people"; it bore a reproduction of a photograph of one the World Trade Centre towers in flames on 11th September 2001 and a Crescent and Star surrounded by a prohibition sign. The applicant complained that the conviction infringed his right to freedom of expression under Article 10 of the Convention. On appeal from conviction to the Court of Appeal, Auld LJ had found at [33] that:

> "The poster was a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people. In my view, it could not, on any reasonable basis be dismissed as merely an intemperate criticism or protest against the tenets of the Muslim religion, as distinct from an unpleasant and insulting attack on its followers generally".

81. An application was made to the European Court of Human Rights. The Strasbourg Court held that the application was inadmissible, relying on Article 17. The Court stated as follows:

> "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. The Court, and previously, the European Commission of Human Rights, has found in particular that the freedom of expression guaranteed under Art.10 of the Convention may not be invoked in a sense contrary to Art.17 . . .
>
> The poster in question in the present case contained a photograph of the Twin Towers in flame, the words "Islam out of Britain—Protect the British People" and a symbol of a crescent and star in a prohibition sign. The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such 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 applicant's display of the poster in his window constituted an act within the meaning of Art.17, which did not, therefore, enjoy the protection of Arts 10 or 14 . . . ".

82. The decision in **Norwood** was not discussed by Choudhury P in **Forstater**, although the case is quoted in **Lilliendahl** in an extract which was set out in **Forstater**: see paragraph 65 above. It was, however, referred to by the Grand Chamber of the European Court of Human Rights in **Perinçek v Switzerland** (2016) 63 E.H.R.R. 6, a case concerning statements made by the chairman of the Turkish Workers Party denying the Armenian genocide in 1915: see [206].

83. In the case of **Sanchez v France** (referred to by counsel in their post-hearing submissions), the Grand Chamber considered an application brought by a local councillor and candidate for election to the French Parliament who had been convicted of incitement to hatred or violence against a group when he failed to remove Islamophobic comments posted by third parties on his publicly accessible *Facebook* 'wall'. The Grand Chamber considered the notion

of "Hate speech" at paragraphs [154] to [157]. At [157], the Court stated that:

> "Hate speech is not always openly presented as such. *It may take various forms, not only through patently aggressive and insulting remarks that wilfully undermine the values of tolerance, social peace and non-discrimination (which may give rise to the application of Article 17 of the Convention* – see, among many other authorities, *Ayoub and Others v. France*, nos. 77400/14 and 2 others, 8 October 2020, and the numerous authorities cited therein at §§ 92-101), but also implicit statements which, even if expressed guardedly or in a hypothetical form (see *Smajić v. Bosnia and Herzegovina* (dec.), no. 48657/16, 16 January 2018), prove equally as hateful".

(Emphasis added).

In **Ayoub v France** (77400/14), one of the cases that it referred to was **Norwood**. This was described at [90] as a case in which "pursuant to Article 17 of the Convention … the Court considered that an applicant convicted for a general, vehement attack against Muslims could not avail himself of the protection afforded by Article 10".

Discussion

84. Against this background, and taking each of the Grounds of Appeal in turn.

Ground 1: the Employment Judge erred in law by failing to follow the Strasbourg authority of *Redfearn* in favour of the EAT decision in *Grainger*

85. There is no basis to this ground of appeal. I do not consider that the decision in **Grainger** is inconsistent with the Strasbourg Court's decision in **Redfearn**. The latter case is authority for the proposition that Article 11 of the Convention (freedom of association) applies not only to persons or associations whose views are favourably received or regarded as inoffensive or as a matter of indifference, but also those whose views offend, shock or disturb (see also **Vajnai v Hungary** (2010) 50 E.H.R.R. at [46]). The judgment in **Grainger** does not say, or purport to say, that views that merely offend, shock or disturb would not be protected.

86. In the instant case, the Employment Judge was well aware of the judgment in **Redfearn** and the principles expressed in that case. She set them out in her discussion of the legal framework and made mention of them in her reasoning. At paragraph 95, the Employment Judge did say that it was "difficult to conclude that the Claimant's focus on one religion, and ill-informed, disparaging and often *recklessly offensive* comments were worthy of respect in a democratic society or compatible with human dignity" (emphasis added). If this was the only characterisation of the claimant's beliefs, then this would call into question whether Employment Judge Hyde had properly applied **Redfearn**. However, the Employment Judge also stated at paragraph 92 that the Claimant's expression of his views amounted to "a generalised form of harassment targeting one particular religion", and at paragraph 108 that there was a "disdainful and prejudiced focus on Islam". These findings demonstrate that the claimant's beliefs were more than offensive, shocking or disturbing.

87. Insofar as Mx Davies was seeking to argue that the claimant's views were similar to those held by the claimant in **Redfearn** and therefore should have been protected, the Employment Judge was aware of the political programme of the BNP with whom the claimant

in **Redfearn** was associated. At paragraph 21, Employment Judge Hyde observed that the Strasbourg Court had set out "the race-based tenets of the BNP". This is clearly a reference to **Redfearn** at [9], where the Strasbourg Court stated that:

> "At the relevant time the BNP only extended membership to white nationals. According to its constitution it was:
>
> '... wholly opposed to any form of integration between British and non-European peoples. It is therefore committed to stemming and reversing the tide of non-white immigration and to restoring, by legal changes, negotiation and consent, the overwhelmingly white makeup of the British population that existed in Britain prior to 1948.' "

The claimant's beliefs, as reflected in his social media posts, went beyond this position. They included, as found by the Leeds Employment tribunal, a belief in the "coercive removal" of Muslims from the United Kingdom: see paragraph 90 of the judgment in the present case.

Ground 2: the Employment Judge erred in law by restricting herself to following *Grainger*, a case which wrongly interprets the application of the Convention rights

88. It is difficult to criticise the Employment Judge for following **Grainger** when she made her decision in the instant case. **Grainger** was the leading authority from this tribunal, and was binding on the employment tribunal. The formulation of the various criteria by Burton J in **Grainger** were also reflected in the Code, a document which the employment tribunal was obliged to take into account given that it was clearly relevant to the decision it was required to make: see section 15(4) of the Equality Act 2006. The **Grainger** test had also been referred to, without disapproval, by the Court of Appeal in **Gray**.

89. In any event, Choudhury P clearly regarded his decision in **Forstater** as consistent with **Grainger**. Otherwise, the learned judge would no doubt have said so. Indeed, Choudhury P specifically noted that there was no dispute that the **Grainger** criteria were appropriate. Furthermore, as explained by Choudhury J in **Holbrook**, the decision in **Forstater** was not a "game changer".

90. As I will explain further, in response to Ground 3, I do not regard **Forstater** as departing from **Grainger**. Rather, I understand **Forstater** as being a decision which provides greater detail about the approach that needs to be taken when applying the fifth **Grainger** criterion, recognising that the fifth **Grainger** criterion was designed to give effect in domestic law to Article 17 of the Convention.

91. Nevertheless, I appreciate that given the comments at paragraph 28 of **Grainger** (see paragraph 50 above) the case may have been misunderstood by some people as applying a lower threshold and, in particular, of giving the impression that views that were merely racist or homophobic would not be protected. As Choudhury P pointed out in **Holbrook** at [39], Burton J's comments at paragraph 28 of **Grainger** were *obiter dicta*. I agree.

92. The Employment Judge in this case did refer to Burton J's *obiter dicta* at paragraph 87 of her judgment. Had the Employment Judge simply stopped there and decided that the claimant's anti-Islamic philosophy was analogous to a racist philosophy and therefore necessarily fell outside of protection of section 10 of the EqA, then her analysis may have involved an error of law. As Choudhury P pointed out in **Forstater** at paragraph 111, for a

belief to fall outside of the protection of section 10 of the EqA it will need to be one that would warrant the application of Article 17 of the Convention and it is doubtful that all racist beliefs would be treated as falling foul of Article 17. In many cases, the manifestation of racist beliefs or expression of such views would fail to be protected under Article 9 or 10 as interference with those Convention rights could be justified, but that would involve consideration of all of the context: see **Perinçek** at [204]-[208] (discussed further below).

93. On a careful reading of her decision, however, the Employment Judge did not simply stop her analysis at that point. Having referred to Burton J's comments at paragraph 28 in **Grainger**, the Employment Judge went on to examine the content of the claimant's anti-Islamic views, concluding that they amounted to a "disdainful and prejudiced focus on Islam", and were "consistently cloaked" in language that did not meet the fifth **Grainger** criterion. As I will explain further below, that included a desire to remove Muslims forcibly from the United Kingdom which I consider takes the claimant's beliefs outside of the fifth **Grainger** criterion.

94. I do not accept Mx Davies' submission that the Employment Judge in the present case, in reliance on **Grainger**, was in error in suggesting that an employer can invoke Convention rights against individuals. The Employment Judge's analysis was that the fifth **Grainger** criterion involved consideration of what was protectable by the Convention, by virtue of Article 17: this was set out at paragraph 87 of Employment Judge Hyde's judgment. Where a respondent employer invokes Article 17, it is not invoking its own Convention rights; rather, it is asserting what is or is not protectable under the Convention.

Ground 3: the Employment Judge erred in law by finding that the Appellant failed to pass Grainger 'V' when, in light of *Forstater*, it is clear that his belief easily passed the threshold and was nowhere near the types of beliefs that should be restricted, per *Forstater*

95. In my judgment, the decision in **Forstater** is not inconsistent with the **Grainger** criteria, including the fifth criterion. What **Forstater** has done is to provide further colour to the fifth criterion, explaining in greater detail the contours of Article 17 of the Convention which delineates the boundary between beliefs (as well as speech and association) that are capable of being protected by the Convention (albeit interference with the manifestation of such belief, or speech and association, may depending on the circumstances be justified) and those which are not. The claimant's belief in anthropogenic climate change that was subject to appeal in **Grainger** was not one which could have fallen foul of Article 17, and so it was not necessary for Burton J to explore Article 17 in great detail.

96. As explained repeatedly by the Strasbourg Court, Article 17 is a protective mechanism. It is designed to preclude States, groups or persons, from engaging in activities or performing acts that undermine the very purpose of the Convention itself and the rights that it protects. That is, it will not protect those activities or acts that are "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." Article 17 is itself derived from Article 30 of the Universal Declaration of Human Rights which provides that: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein".

97. Choudhury P was correct to say that "Article 17 is only applicable on an exceptional basis and in extreme cases." As a corollary, it will only be exceptionally and in extreme cases that an individual's belief is not protected by section 10 of the EqA, and so it is only exceptionally and in extreme cases that an individual can be discriminated against by an

employer (or a service-provider) merely because they hold a particular belief. The threshold for a belief not being protectable at all is, therefore, necessarily high.

98. The narrowness of the field in which Article 17 operates was spelt out by the Grand Chamber in **Perinçek**, where it stated that:

> "114. However, Article 17 is, as recently confirmed by the Court, only applicable on an exceptional basis and in extreme cases . . . Its effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the Court. In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention . . .
>
> 115. Since the decisive point under Article 17 – whether the applicant's statements sought to stir up hatred or violence, and whether by making them he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it – is not immediately clear and overlaps with the question whether the interference with the applicant's right to freedom of expression was "necessary in a democratic society", the Court finds that the question whether Article 17 is to be applied must be joined to the merits of the applicant's complaint under Article 10 of the Convention..."

99. In its examination of the factors relevant to the Article 10 analysis, the Grand Chamber in **Perinçek** referred to whether the statements could be seen as a call not only for violence, but also as a justification of violence, hatred or *intolerance*, referring to the decision in **Norwood** among other cases. The relevant passage of **Perinçek** is at [206]:

> "Another factor has been whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance . . . In assessing that point, the Court has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups (see *Seurot v. France*. . . , *Soulas*. . . . , and *Le Pen*, . . . all of which concerned generalised negative statements about non-European and in particular Muslim immigrants in France; *Norwood v. the United Kingdom* . . . which concerned statements linking all Muslims in the United Kingdom with the terrorist acts in the United States of America on 11 September 2001; *W.P. and Others v. Poland* . . . and *Pavel Ivanov v. Russia*. . . , both of which concerned vehement anti-Semitic statements; *Féret*, . . . which concerned statements portraying non-European immigrant communities in Belgium as criminally minded; *Hizb ut-Tahrir*. . . and *Kasymakhunov* and *Saybatalov*, . . . which concerned direct calls for violence against Jews, the State of Israel, and the West in general; and *Vejdeland* . . . which concerned allegations that homosexuals were attempting to play down paedophilia and were responsible for the spread of HIV and Aids)."

100. From **Perinçek**, it might be thought that Article 17 applied only where, in the context of an applicant relying on his Article 10 rights, the statements sought to stir up violence or hatred but not *intolerance*, and that stirring up intolerance was only relevant to the question as to whether Article 10 rights were justifiably interfered with. This is supported by the Second Section of the Strasbourg Court in its decision in **Lilliendhal**, discussed by Choudhury P in **Forstater**: see paragraph 65 above. At paragraphs 33-39, the Court in **Lilliendhal** referred to the two different categories of "hate speech". The first category comprised of the "gravest forms of 'hate speech'", which the Court has considered falls under Article 17 and is excluded entirely from the protection of Article 10. The comments of the applicant in **Lilliendhal** were found not to fall into that category. The second category was comprised of "'less grave' forms of 'hate speech'" which did not fall entirely outside of Article 10 but could be restricted.

101. In **Ibragimov** on the other hand, the applicants complained that their Article 9 and 10 rights had been violated by the Russian courts declaring that certain books that had been published and used for religious and educational purposes were "extremist". The Court in **Ibragimov** having quoted from **Perinçek**, stated that the "decisive point under Article 17" was "whether the text in question sought to stir up hatred, violence or *intolerance*" (emphasis added). That was consistent with what the Fourth Section of the Strasbourg Court had said in **Norwood**: that Article 17 protected the values of "tolerance, social peace and non-discrimination". Support for this approach may also be found in the judgment of the Grand Chamber in **Sanchez**: see paragraph 83 above. Indeed, the decisions in **Norwood** and **Sanchez** also provide some support for the proposition that beliefs that do not reflect the principle of "non-discrimination" may also fall foul of Article 17.

102. It seems to me, therefore, that there is some dissonance in the Strasbourg jurisprudence. To that extent, therefore, the conclusion of the legal analysis in **Forstater** at [79] that only those beliefs that would be "an affront to Convention principles in a manner akin to that of pursuing totalitarianism or advocating Nazism, or espousing violence and hatred in the gravest of forms" fall foul of Article 17 may not be the last word on the matter. Beliefs that espouse *intolerance* or *discrimination* might also fall outside of the protection of the Convention. It is not necessary, however, for me to express a firm view on this point as it is clear to me that Employment Judge Hyde was right to conclude that the claimant's beliefs are not protected even if the stricter approach in **Forstater** is adopted.

103. The core of the Employment Judge's analysis was that the claimant's beliefs about Muslims are disdainful and prejudiced. Whilst these beliefs would not (as the Employment Judge expressly found at paragraphs 91-2) have the effect of inciting violence towards Muslims, they do espouse and would necessarily stir up disdain, and therefore, hatred of Islam and Muslims. As such, the language used by the claimant falls within the grave forms of "hate speech" identified in the Strasbourg jurisprudence.

104. The Employment Judge referred to the language in which the claimant's disdain for and prejudice towards Islam was "consistently cloaked" (see paragraph 108). She was right to do so. The Employment Judge had already discussed, among other things, the claimant's use of the hashtag *RemoveAllMuslims* which was found to be characteristic of the claimant's views, his statement that "This is why Japan had the sense to ban Islam", as well as the claimant's attitudes as reflected in some of his social media posts over the years. The Employment Judge had also referred to the earlier findings by the Leeds Employment tribunal, from which she was able to conclude that the claimant believed that Islam in its current form should be banned (paragraph 89); further that the claimant's views advocated coercive removal (paragraph 90).

105. In essence, therefore, the claimant's views are of an English nationalism which believes that there is no place in British society for Muslims or Islam itself. In my judgment, that shares features with an ideology such as Nazism which did not see there being any place within German society for Jews. In my judgment, these views are not capable of protection under the Convention as they would offend Article 17. They are akin to the views expressed by the applicant in **Norwood** which were found to fall within Article 17. They are also analogous to the views of the political party whose policy was to remove all non-white people from the Netherlands, which were considered by the European Commission of Human Rights in **Glimmerveen v Netherlands** (1982) 4 E.H.R.R. 260. In **Glimmerveen,** it was held that the applicant political party could not rely on Article 10 of the Convention, due to the application of Article 17.

106. This conclusion is also consistent with the observation of Choudhury P at paragraph 100 in **Forstater** where he stated that it would be open to an employment tribunal to find that "a belief that all non-white people should be forcibly deported for the good of the nation" fails to satisfy the fifth **Grainger** criterion. That observation was *obiter* in **Forstater**, but it faithfully reflects the Strasbourg jurisprudence. Forcible deportation of Muslims from the United Kingdom would undoubtedly amount to the destruction of their Convention rights.

107. In my judgment, therefore, whilst it is correct that the threshold for protection under the Convention, and therefore under section 10 of the EqA, is low, the Employment Judge did not err in finding that the claimant's beliefs did not pass that threshold. The claimant's beliefs, as found by the Employment Judge, aligned with the types of beliefs which would fall foul of Article 17 of the Convention.

108. Mx Davies criticised the Employment Judge's conclusions as being based on the manifestation of the claimant's beliefs through his social media comments. This was, however, entirely appropriate on the facts of this case. The claimant had made no mention of his anti-Islamic beliefs in his witness statement where he set out his belief in English nationalism. The Employment Judge was right to decide, therefore, that that was not a comprehensive reflection of his views, and the only ways in which the full views could be ascertained was by considering the social media comments as well as what was said in oral evidence before her as well as before the Leeds Tribunal.

109. Furthermore, contrary to Mx Davies' submissions, the Employment Judge was not precluded from taking into account the claimant's public expressions merely because he was involved, or had a status, with a political party. The claimant's involvement with a political party may have been relevant if it was necessary to consider the second stage of an Article 9 or 10 analysis – whether interference was justified. In the instant case, however, the claimant's beliefs fell at the first hurdle, irrespective of their political connotations, as they were contrary to Article 17.

110. I do not consider that there was an inconsistency in Employment Judge Hyde's analysis that the subject matter of the claimant's beliefs was not outside of the bounds of democratic debate but his beliefs were not worthy of respect in a democratic society. It is one thing for there to be discussion about particular practices adopted by some Muslims (eg. The wearing of particular clothing, or the role of faith-based schools); another to hold a view that Islam should be banned or that Muslims should be forcibly removed from the country where they live.

Ground 4: the Employment Judge erred in law by stating that the fundamental rights of others were not infringed, but yet she went on to conclude that the Appellant's belief was not worthy

of protection

111. At paragraph 100, the Employment Judge states that "I considered that taken overall [the claimant's] views did not actually infringe the rights of Muslims, or indeed any other minorities to exercise their fundamental freedoms". At paragraph 103, however, the Employment Judge stated that she was "exercised by the meaning of the requirement not to conflict with the fundamental rights of others in the third limb of the fifth criterion", and in the full knowledge that this was a key component of the fifth **Grainger** criterion, the Employment Judge went on to find that that criterion was not met. The Employment Judge must therefore have concluded that the claimant's belief was in conflict with the fundamental rights of others. A finding that the claimant's beliefs included the banning of Islam or the forcible removal of Muslims from the United Kingdom is only consistent with an infringement (and in fact the destruction) of rights of others. Indeed, at paragraph 90, Employment Judge Hyde referred to the findings of the Leeds Tribunal that advocating coercive removal dependent on religion would inevitably involve infringements of the liberty of Muslims who did not wish to be removed from the United Kingdom.

112. I agree with Mx Davies that there is an inconsistency in the Employment Judge's reasoning here, and I cannot see how the two findings can be reconciled with one another. I do not consider, however, that this inconsistency amounts to an error of law that requires the matter to be remitted to the Employment tribunal. It is clear to me that based on Employment Judge Hyde's findings as to the content of the claimant's beliefs, the conclusion that they were not capable of protection under section 10 of the EqA was the only permissible conclusion for her to reach. For the reasons explained under Ground 3, the Claimant's beliefs would fall within Article 17 of the Convention.

Conclusion

113. For the foregoing reasons, therefore, I dismiss this appeal. In doing so, I echo the comments made by Employment Judge Hyde at paragraph 107 of her judgment: the claimant is not prevented from holding his views, but he is outside of the right to complain that he has been discriminated against in relation to those beliefs in the circumstances covered by the EqA.