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## Islamic Headscarves and the CJEU: *Achbita* and *Bougnaoui*

Erica Howard\*

### ABSTRACT

*This article contains an analysis of the recent CJEU cases on the wearing of Islamic headscarves at work. It is argued that the CJEU had four main options in answering the questions referred by the national courts in these cases: it could have found that the employer's rules in these cases constituted direct discrimination; it could have held that there was no direct discrimination but that there might be indirect discrimination, but that a very strict justification test should be applied; it could have concluded that there might be indirect discrimination and that a very lenient justification test should be applied; or, it could have found that the wish of customers not to have services provided by an employee wearing a headscarf is a genuine and determining occupational requirement. The CJEU appears to have chosen the third option, and in doing so, has missed the opportunity to take a strong lead in providing protection against religion or belief discrimination and against discrimination of minorities.*

**Keywords:** Religious Discrimination; Islamic Headscarves; Direct Discrimination; Indirect Discrimination; Genuine and Determining Occupational Requirements.

### §1. Introduction

On 14 March 2017, the Grand Chamber of the Court of Justice of the European Union (CJEU) issued its first judgments on discrimination on the grounds of religion or belief under Directive 2000/78/EC.<sup>1</sup> Both of these cases concerned women, who wanted to wear Islamic

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<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

headscarves at work. Both cases were heard together in March 2016. In *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. G4S Secure Solutions NV*,<sup>2</sup> a Muslim woman worked for G4S as a receptionist and was permanently contracted out to a third party. After she had worked for G4S for three years, she informed them that she intended to start wearing an Islamic headscarf during working hours. G4S had an unwritten rule that workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace and thus Ms Achbita was told that she could not wear the headscarf as this was against the employer's strict neutrality rule. When she refused to take off her headscarf at work, she was subsequently dismissed. Both the Labour Court and the Higher Labour Courts in Antwerp, Belgium, rejected Ms Achbita's claim that this dismissal was based on discrimination on the ground of her religion or belief contrary to Directive 2000/78/EC. The Belgian Court of Cassation asked the CJEU for a preliminary ruling on the following question: '[s]hould Article 2(2)(a) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?'<sup>3</sup>

In *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v. Micropole Univers SA*,<sup>4</sup> a design engineer, who went out to work at customer's sites, was told by her employer to remove her Islamic headscarf when visiting clients, after a complaint by a client's staff member. When she refused to follow this instruction, she was subsequently dismissed. Her claim that the dismissal constituted discrimination on the ground of religion or belief was rejected by the Labour Tribunal in Paris and, on appeal, the French Court of Cassation referred the following question to the CJEU for a preliminary ruling:

Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?<sup>5</sup>

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<sup>2</sup> Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. G4S Secure Solutions NV*, EU:C:2017:203.

<sup>3</sup> *Ibid.*, para 21.

<sup>4</sup> Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v. Micropole Univers SA*, EU:C:2017:204.

<sup>5</sup> *Ibid.*, para. 19.

This article contains an analysis of the two judgments, including the two divergent opinions of Advocates General Kokott (in *Achbita*)<sup>6</sup> and Sharpston (in *Bougnaoui*).<sup>7</sup> It is submitted that the CJEU had four main options in answering the questions referred: it could have found that the employer's rules in these cases constituted direct discrimination (answering the question referred by the Belgian Court of Cassation in the affirmative); it could have held that there was no direct discrimination but that there might be indirect discrimination, but that a very strict justification test should be applied; it could have concluded that there might be indirect discrimination, but could have applied a very loose justification test; or, it could have found that the wish of customers not to have services provided by an employee wearing a headscarf was a genuine and determining occupational requirement (and thus replying in the affirmative to the question referred by the French Court of Cassation). The analysis of the cases explores these four options.

Although *Achbita* and *Bougnaoui* were the first CJEU cases concerning religion or belief discrimination, the European Court of Human Rights (ECtHR), which oversees the European Convention on Human Rights and Fundamental Freedoms (ECHR), has decided on a number of cases concerning the wearing of religious clothing or symbols and, where necessary, the analysis will incorporate this case law. First, the definition of religion or belief will be discussed.

## **§2. The definition of religion or belief**

Directive 2000/78/EC prohibits among other grounds discrimination on the grounds of religion or belief. However, the Directive does not give a definition of these terms as the CJEU pointed out in both cases.<sup>8</sup> The CJEU referred to Article 10 of the Charter of Fundamental Rights (the Charter), which guarantees freedom of religion, and stated that Article 10 of the Charter corresponds to Article 9 ECHR, and thus, in accordance with Article 52(3) of the Charter, that right has the same meaning and scope.<sup>9</sup> Therefore, according to the CJEU, the term religion should be interpreted in a broad sense 'as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation

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<sup>6</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, EU:C:2016:382.

<sup>7</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, EU:C:2016:553.

<sup>8</sup> Case C-157/15 *Achbita v. G4S*, para. 25; Case C-188/15 *Bougnaoui v. Micropole*, para. 27.

<sup>9</sup> *Ibid.*, *Achbita* para. 27; *Bougnaoui*, para. 29.

of religious faith in public'.<sup>10</sup> The CJEU followed the Opinion of Advocate General Kokott, who pointed out that in order to achieve the objective of Directive 2000/78/EC, which aims to combat discrimination in employment and occupation, its scope cannot be defined restrictively.<sup>11</sup> Therefore, the term 'religion' should be given a broad interpretation.

The CJEU did not elaborate any further on this and appeared to find its considerations above enough to accept that the wearing of the Islamic headscarf was within the scope of the protection of the Directive. Advocate General Kokott, however, stated this expressly when she considered that, although a broad interpretation did not mean that any behaviour or actions were automatically protected because they were based on a religious conviction, in this case it was clear that Ms Achbita wore a headscarf for religious reasons and that there was no reason to doubt the sincerity of her motivation. Therefore, following the ECtHR's approach in relation to Article 9 ECHR, the CJEU 'should regard the foregoing as a factor linking this case to religion to an extent sufficient to bring it within the substantive scope of the EU-law prohibition on religious discrimination'.<sup>12</sup> Advocate General Sharpston stated that she regarded the wearing of distinctive apparel as part of one's religious observance and that this fell squarely under the freedom to manifest one's religion and she subsequently dealt with the case under Directive 2000/78/EC.<sup>13</sup> Therefore, the CJEU and both Advocates General considered restrictions on the wearing of the Islamic headscarf as falling under the protection against religion or belief discrimination as contained in Directive 2000/78/EC.

### **§3. Direct discrimination**

According to Article 2(2)(a) of Directive 2000/78/EC, direct discrimination on the ground of religion or belief shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of religion or belief. In *Achbita*, Ms Achbita argued that the national court had misconstrued the concepts of direct and indirect discrimination by failing to characterize the ban as unequal treatment between those who wear an Islamic headscarf and those who do not.<sup>14</sup> However, the CJEU considered that G4S's internal rule referred 'to the wearing of visible signs of

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<sup>10</sup> Ibid., *Achbita*, para. 28; *Bougnaoui*, para 30.

<sup>11</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 35.

<sup>12</sup> Ibid., para. 37-38.

<sup>13</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 73.

<sup>14</sup> Case C-157/15 *Achbita v. G4S*, para. 20.

political, philosophical or religious beliefs’ and thus covered ‘any manifestation of such beliefs without distinction’.<sup>15</sup> The rule treated all workers the same and there was no evidence that the rule was applied differently to Ms Achbita and thus there was no direct religion or belief discrimination.<sup>16</sup> In *Bougnaoui*, the CJEU stated that it was not clear whether the referred question was based on a finding of direct or indirect discrimination. The CJEU then went on to point out, with a reference to *Achbita*, that it was for the referring court to decide whether the dismissal was directly or indirectly discriminatory.<sup>17</sup>

Advocate General Kokott pointed out that G4S argued that there was no discrimination at all, while France and the UK assumed that there was indirect discrimination, while Belgium and the *Centrum (voor Gelijkheid van Kansen and Racismebestrijding*, who assisted Ms Achbita), considered there to be direct discrimination. She also mentioned that the EU Commission supported a finding of indirect discrimination in *Achbita*, and an assumption of direct discrimination in *Bougnaoui*; and, that the practice of national courts was also inconsistent.<sup>18</sup> Advocate General Kokott concluded that there was nothing in the case to indicate that an individual was treated less favourably and that there was no discrimination between religions in this case: the measure in question was not directed specifically against employees of the Muslim faith or against female employees of that religion. As the rule also explicitly prohibited visible political and philosophical signs, the rule applied without distinction and was neutral from the perspective of religion and ideology. There was thus no direct discrimination, but the rule could nevertheless constitute indirect discrimination.<sup>19</sup>

Advocate General Sharpston came to a different conclusion: Ms Bougnaoui’s dismissal amounted to direct discrimination because she was treated less favourably on the ground of her religion than another would have been treated in a comparable situation. A design engineer working with Micropole who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed’.<sup>20</sup> Advocate General Sharpston referred to her Opinion in an earlier case in the footnote and concluded that ‘here it is

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<sup>15</sup> *Ibid.*, para. 30.

<sup>16</sup> *Ibid.*, para. 31-32. The Higher Labour Court in Antwerp had expressed the same opinion, see *ibid.*, para. 18.

<sup>17</sup> Case C-188/15 *Bougnaoui v. Micropole*, para. 31-32.

<sup>18</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 41.

<sup>19</sup> *Ibid.*, para. 48-49, 51-57.

<sup>20</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 88.

precisely the prohibition on wearing apparel that manifests the employee's religious affiliation that leads to the adverse treatment, namely her dismissal'.<sup>21</sup>

There was thus disagreement on whether bans on the wearing of religious symbols constituted direct or indirect discrimination. The difference is important because direct discrimination on the ground of religion or belief cannot be justified unless this is specifically provided for by Directive 2000/78/EC, while indirect discrimination can be objectively justified if there is a legitimate aim and the means used to achieve that aim are proportionate and necessary (Article 2(2)(b) of Directive 2000/78/EC). Both are further discussed below. In *Chez Razpredelenie*, the CJEU explained that a practice constitutes direct discrimination if the protected discrimination ground (in this case ethnic origin) determined the decision to impose the treatment or if that measure proved to have been introduced and/or maintained for reasons relating to a protected discrimination ground.<sup>22</sup> Amnesty International and the European Network Against Racism (ENAR) conclude from this that 'it is undeniable that the measure imposed by G4S explicitly refers to religion or belief and introduces a difference of treatment on that ground'.<sup>23</sup> An employee who manifests his or her religion or belief by wearing a visible religious symbol or dress is treated less favourably than an employee who does not do so and thus 'the measure puts the former employee in a less favourable situation than the latter precisely on the grounds of religion or belief'.<sup>24</sup> They conclude that the ban imposed by G4S constituted direct discrimination.

It is suggested that the different opinions on whether there is direct discrimination are linked to the choice of comparator: direct discrimination is less favourable treatment compared to someone else, and therefore, to establish this, a comparison needs to take place. The CJEU and Advocate General Kokott compared Ms Achbita with other people who wanted to manifest their religion or belief through the wearing of religious symbols at work: since these people were also banned from doing so due to the fact that the ban applied to all visible signs without distinction and there was no less favourable treatment, Advocate General Kokott and

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<sup>21</sup> Ibid., footnote 81.

<sup>22</sup> Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, EU:C:2015:480, para. 76, 91.

<sup>23</sup> Amnesty International and European Network Against Racism, 'Wearing the Headscarf in the Workplace Observations on Discrimination Based on Religion in the Achbita and Bougnaoui Cases', <https://www.amnesty.org/en/documents/eur01/5077/2016/en/>.

<sup>24</sup> Ibid. In the same vein, see Open Society Justice Initiative, 'Briefing Paper: Employer's Bar on Religious Clothing and European Union Discrimination Law', <https://www.opensocietyfoundations.org/sites/default/files/briefing-cjeu-headscarves-20160712.pdf>, para. 19.

the CJEU concluded that the ban could not constitute direct discrimination.<sup>25</sup> Ouald Chaib and David note that this reasoning ‘starts from a wrong comparison. It compares the different manifestations of religious, political or philosophical beliefs targeted by the policy with each other, while the true comparator should be the “other” employee who doesn’t manifest any belief’.<sup>26</sup> This latter comparator was chosen by Advocate General Sharpston, Amnesty International, ENAR and the Open Society Justice Initiative. The Open Society Justice Initiative writes that ‘a policy barring the headscarf, turban, and kippah is not “neutral” between religions. To the contrary [sic], such a policy disfavours persons whose religious beliefs require an outward manifestation of those beliefs’.<sup>27</sup>

Academic opinion on this issue also appears to be divided. Vickers, for example, writes that ‘both allegations of direct discrimination were, unsurprisingly, rejected. Discrimination based on a generally applicable dress code is not direct discrimination’.<sup>28</sup> Jolly expresses the view that ‘a rule expressed neutrally on workplace attire or apparel is more likely to constitute indirect discrimination, unless there is evidence of particular stereotyping, prejudice or intent behind the rule which could lead it to be direct discrimination’.<sup>29</sup> Jolly does not elaborate further on this, as she focuses on justification, but she notes in a footnote, that Advocate General Sharpston’s opinion that Ms Bougnaoui’s dismissal amounted to direct discrimination ‘without further factual explanation, appears faulty’.<sup>30</sup> Advocate General Kokott also mentioned that ‘if a ban such as that at issue here proved to be based on stereotypes or prejudice in relation to one or more specific religions — or even simply in relation to religious beliefs generally’, then ‘it would without any doubt be appropriate to

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<sup>25</sup> Case C-157/15 *Achbita v. G4S*, para. 30-31; Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 49.

<sup>26</sup> S. Ouald Chaib and V. David, ‘European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights could Close it’, *Strasbourg Observers* (2017), <https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/>.

<sup>27</sup> Open Society Justice Initiative, ‘Briefing Paper: Employer’s Bar on Religious Clothing and European Union Discrimination Law’, para. 26.

<sup>28</sup> L. Vickers, ‘Direct Discrimination and Indirect Discrimination: Headscarves and the CJEU’, *Oxford Human Rights Hub* (2017), <http://ohrh.law.ox.ac.uk/direct-discrimination-and-indirect-discrimination-headscarves-and-the-cjeu/>.

<sup>29</sup> S. Jolly, ‘Islamic Headscarves and the Workplace Reach the CJEU: the Battle for Substantive Equality’, 6 *European Human Rights Law Review* (2016), p. 675. See also, S. Benedi Lahuerta, ‘Wearing the Veil at Work: Achbita and Bougnaoui – Can a Duty to Reasonable Accommodation be Derived from the EU Concept of Indirect Discrimination?’, *EU Law Analysis* (2016), <http://eulawanalysis.blogspot.co.uk/2016/03/wearing-veil-at-work-achbita-and.html>.

<sup>30</sup> S. Jolly, 6 *EHRLR* (2016), footnote 15.

assume the presence of direct discrimination based on religion. According to the information available, however, there is nothing to indicate that that is the case'.<sup>31</sup>

On the other hand, Brems writes on the *Achbita* judgment that

it is astonishing that, in the eyes of the European Court, direct discrimination on grounds of religion or belief exists only when a measure targets a single religion or a selection of religions, but not when a measure targets all religions and beliefs. Generalized hostility toward religions is apparently a manifestation of neutrality.<sup>32</sup>

Brems continues by saying that, as not all employees have a religion or belief or want to express this at work, 'hostility against all religions and beliefs targets only part (arguably a small minority) of the employees'.<sup>33</sup> She compares this with disability as a discrimination ground and concludes that 'it seems unthinkable that the ECJ [CJEU] would rule that a measure excluding without distinction persons with all kinds of disabilities would not constitute direct discrimination. What is different about religion? Has anti-religious sentiment become so normalized in Europe, that it has become invisible – the new normal'?<sup>34</sup> Spaventa also remarks that

the Court seems to imply that a rule that discriminates all religious people would not be problematic. (...) This interpretation seems restrictive and not supported by the text of the directive (or the Charter) that refers to discrimination on grounds of religion in general. In any event, in discrimination cases it is crucial to identify the comparator, and the Court fails to do so clearly and to support its choice with sound legal arguments.<sup>35</sup>

It can also be argued that stereotypes and prejudice played a role in both cases and thus that there was direct rather than indirect discrimination. Bribrosia and Rorive, for example, point out that, 'in the *Bougnaoui* case, there is a body of evidence that stereotype and prejudice found the dismissal'.<sup>36</sup> And Ouald Chaib writes that Advocate General Kokott's main argument was 'that the possible prejudicial preferences of clients can trump the right of an

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<sup>31</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 55.

<sup>32</sup> E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', *Blog of the IACL, AIDC* (2017), <https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/>.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> E. Spaventa, 'What is the point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the *Achbita* Case', *EU Law Analysis* (2017), <http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html>.

<sup>36</sup> E. Bribrosia and I. Rorive, 'ECJ Headscarf Series (4): The Dark Side of Neutrality', *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/14/ecj-headscarf-series-4-the-dark-side-of-neutrality/>.

employee not to be discriminated against on the basis of her religion’.<sup>37</sup> Ouald Chaib continues by saying that ‘this reasoning accepts prejudicial ideas about people on the basis of their appearance as a justification for unequal treatment of employees’ with a reference to the following paragraph from Advocate General Sharpston’s Opinion:<sup>38</sup>

Here, I draw attention to the insidiousness of the argument, “but we need to do X because otherwise our customers won’t like it”. Where the customer’s attitude may itself be indicative of prejudice based on one of the “prohibited factors”, such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice.<sup>39</sup>

Brems writes that it is bewildering that there is no reference in the judgment ‘to either the Europe-wide context of Islamophobia, or the widespread existence of negative stereotypes about Muslim women, and in particular those who wear Islamic dress’.<sup>40</sup> It is submitted that this is even more astonishing because the cases were referred by national courts from Belgium and France, the two EU Member States that have national legal bans on the wearing of face-covering clothing in all public spaces. Although these laws are worded in neutral language, the fact that they are most often referred to as ‘burqa bans’ shows that their real target is Muslim women who wear face-covering veils.

Therefore, there were arguments that would have supported a finding of direct discrimination. However, the CJEU followed the Opinion of Advocate General Kokott in holding that there was no direct discrimination in *Achbita*. However, because it was not inconceivable that the referring court might conclude that the internal rule at issue constituted indirect discrimination, the CJEU provided further guidance on this issue.

#### **§4. Indirect discrimination and justification**

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<sup>37</sup> She refers here to the Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 95. S. Ouald Chaib, ‘ECJ Headscarf Series (6): The Vicious Circle of Prejudice against Muslim Women’, *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/20/ecj-headscarf-series-6-the-vicious-circle-of-prejudices-against-muslim-women/>.

<sup>38</sup> *Ibid.*

<sup>39</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 133.

<sup>40</sup> E. Brems, ‘Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace’, *Blog of the IACL, AIDC* (2017), <https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/>. See also on this, for example, European Network Against Racism, ‘Forgotten Women: the Impact of Islamophobia on Muslim Women’, [http://www.enar-eu.org/IMG/pdf/forgottenwomenpublication\\_lr\\_final\\_with\\_latest\\_corrections.pdf](http://www.enar-eu.org/IMG/pdf/forgottenwomenpublication_lr_final_with_latest_corrections.pdf).

According to Article 2(2)(b) of Directive 2000/78/EC, indirect religion or belief discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Following on from what was said above, this definition can be read as saying that indirect discrimination takes place when there is a neutral rule, which applies to everyone equally, but with which some people cannot comply because of their religion or belief. Such a rule will thus be unlawful unless it is objectively justified.

If read like this, then the rule applied by G4S would be indirectly discriminatory: it applies to every employee equally, but people who want to wear specific clothing or symbols for religious reasons cannot comply with it. This appears to be the reasoning behind the CJEU's decision in *Achbita*, that there was no direct discrimination. But if a rule can be seen as constituting indirect discrimination, then the way the justification test from Article 2(2)(b) of Directive 2000/78/EC is applied becomes important. In both *Achbita* and *Boungaoui*, the CJEU pointed out that it was up to the referring court to ascertain whether there was direct or indirect discrimination.<sup>41</sup> However, in *Achbita*, the CJEU went on to provide guidance on indirect discrimination and on the justification test. As was mentioned above, this guidance could have provided for a very strict or for a very lenient justification test. The CJEU appears to have opted for the latter and has been criticized for doing so, as will become clear in the following paragraphs.

In *Achbita*, the CJEU held that 'the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate' because it relates to the freedom to conduct a business as guaranteed by Article 16 of the Charter, notably where only those workers who are in contact with the employer's customers are covered.<sup>42</sup> The CJEU pointed out that this was supported by the case law of the ECtHR in *Eweida and Others v. the UK*,<sup>43</sup> which also allowed restrictions on the freedom of religion in pursuit of the aim of neutrality.<sup>44</sup> There was no further explanation as to why neutrality must be considered legitimate. Steijns criticizes the CJEU for focusing

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<sup>41</sup> Case C-157/15 *Achbita v. G4S*, para. 34; Case C-188/15 *Boungaoui v. Micropole*, para. 32.

<sup>42</sup> Case C-157/15 *Achbita v. G4S*, para. 37-38.

<sup>43</sup> ECtHR, *Eweida and Others v. the United Kingdom*, Judgment of 15 January 2013, Application No. 48420/10, 59842/10, 51671/10 and 36516/10, para. 94.

<sup>44</sup> Case C-157/15 *Achbita v. G4S*, para. 39.

on the freedom to conduct a business in Article 16 of the Charter, but completely ignoring Article 31(1) of the Charter, which determines that ‘every worker has the right to working conditions which respect his or her (...) dignity’.<sup>45</sup> Solomon remarks that the aim of preserving religious neutrality is not mentioned in either Article 10 of the Charter, read in conjunction with Article 52 of the Charter, or in Article 9 ECHR.<sup>46</sup>

In both *Achbita* and *Bougnaoui*, the employers were private employers. Spaventa criticizes the CJEU for not discussing the distinction between public and private employment or the views of the Belgian and French governments, the two governments directly affected by the rulings.<sup>47</sup> She points out that both the Belgian and the French governments sided with the claimants in these cases and drew a ‘very conceptual limit to the principle of *laïcité* [secularism] which is justified, in this view, because of the very nature of the State and its duty of neutrality, a duty which cannot be extended to private parties (or if so only exceptionally)’.<sup>48</sup> Brems also sees it as problematic that the CJEU ‘accepts the expansion of neutrality into the private sphere without the least degree of scrutiny’.<sup>49</sup> She continues that extending neutrality to the private sector is ‘a big leap’ and that ‘neutrality can be an easy cover-up for prejudice’.<sup>50</sup>

Therefore, the CJEU in *Achbita* can be criticized for not explaining, in more detail, why a policy of neutrality for a private company can be a legitimate aim, although it did follow the opinions of both Advocates General in this regard. Advocate General Kokott, in *Achbita*, discussed the legitimate aim in relation to Article 4(1) Directive 2000/78/EC, which contains a similar justification test, and concluded that, if there is a genuine and determining occupational requirement under that article, then the aim of this requirement would be legitimate under Article 2(2)(b) of Directive 2000/78/EC.<sup>51</sup> Advocate General Sharpston, in

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<sup>45</sup> M. Steijns, ‘Achbita and Bougnaoui: Raising more Questions than Answers’, *Eutopia Law* (2017), <https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/>.

<sup>46</sup> S. Solomon, ‘The Right to Religious Freedom and the Threat to the Established Order as a Restriction Ground: Some Thoughts on Account of the Achbita Case’, *European Journal of International Law –Talk* (2017) <https://www.ejiltalk.org/the-right-to-religious-freedom-and-the-threat-to-the-established-order-as-a-restriction-ground-some-thoughts-on-account-of-the-achbita-case/>.

<sup>47</sup> E. Spaventa, ‘What is the Point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case’, *EU Law Analysis* (2017), <http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html>.

<sup>48</sup> Ibid. This is based on Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 63.

<sup>49</sup> E. Brems, ‘Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace’, *Blog of the IACL, AIDC* (2017), <https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/>.

<sup>50</sup> Ibid.

<sup>51</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 129.

*Bouagnaoui*, concluded that the interests of the employer’s business were a legitimate aim for the purposes of Article 2(2)(b) Directive 2000/78/EC.<sup>52</sup> She also stated that ‘a policy of requiring that employees wear a uniform or a particular style of dress or maintain a “smart” outward appearance will fall within the concept of a legitimate aim’.<sup>53</sup>

However, it is submitted that the CJEU should have scrutinized neutrality as a legitimate business aim more closely. For example, Advocate General Kokott pointed out that the neutrality rule was ‘essential to avoid the impression that external individuals might associate with G4S itself or with one of its customers, or even attribute to the latter, the political, philosophical or religious beliefs publicly expressed by an employee through her dress’.<sup>54</sup> However, it can be questioned if this is really happening when an employee wears a religious (or indeed any other) symbol at work. Kokott did not bring forward or refer to any evidence that this was indeed taking place in practice. Jolly asks whether the fact that the CJEU mentioned that the rule would be justified if it was limited to customer-facing roles, means that other G4S employees do not believe that G4S religious neutrality is compromised but that other members of society are unable to make that distinction. She then writes that this is ‘really quite an extraordinary assumption in a modern, diverse and plural society’.<sup>55</sup>

If there is a legitimate aim, the next step is to assess whether the means used to achieve that aim are appropriate and necessary. The CJEU held that the ban on visible political, philosophical or religious signs, imposed by G4S in *Achbita*, was appropriate to achieve the aim of the policy of neutrality as long as that policy was ‘genuinely pursued in a consistent and systematic manner’.<sup>56</sup> The CJEU referred to two of its previous cases here – *Hartlauer*<sup>57</sup> and *Petersen*<sup>58</sup> – but these cases both concerned rules laid down in national legislation rather than in an individual employer’s work rule. Moreover, neither case contained any issue of religion or belief. The CJEU’s finding goes against the opinion of the Belgian and French Governments and the *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding* that

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<sup>52</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bouagnaoui v. Micropole*, para. 134.

<sup>53</sup> *Ibid.*, para. 116.

<sup>54</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 95.

<sup>55</sup> S. Jolly, ‘Achbita & Bouagnaoui: A Strange Kind of Equality’, *Cloisters Blog* (2017), <https://www.cloisters.com/blogs/achbita-bouagnaoui-a-strange-kind-of-equality>.

<sup>56</sup> Case C-157/15 *Achbita v. G4S*, para. 40.

<sup>57</sup> Case C-169/07 *Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung, Oberösterreichische Landesregierung*, EU:C:2009:141, para. 55.

<sup>58</sup> Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, EU:C:2010:4, para. 53.

the rule was not appropriate.<sup>59</sup> Advocate General Sharpston stated that it is up to the national court to decide on the question of proportionality, but that it was, in her view, unlikely that the prohibition imposed on Ms Bougnaoui was proportionate.<sup>60</sup> This is further analysed below.

In relation to the necessity of the rule in *Achbita* to achieve the aim of neutrality, the CJEU stated that the prohibition must be limited to what is strictly necessary and concluded that this is the case if the G4S rule covers only workers who interact with customers.<sup>61</sup> The CJEU also stated that it is for the referring court to ascertain whether it would have been possible for G4S, when faced with Ms Achbita's refusal to take off her headscarf, to offer her a post not involving any visual contact with customers.<sup>62</sup>

Advocate General Kokott pointed out, in relation to Article 4(1) of Directive 2000/78/EC, that the issue of necessity includes examining whether the objective could have been achieved by more lenient means and mentioned that both France and the EU Commission stressed this because the G4S rule could be regarded as too general and too indiscriminate.<sup>63</sup> The EU Commission had actually suggested that G4S could provide its female employees with a uniform which included an optional headscarf in a matching colour and style and, as Kokott agreed, this would be less intrusive for employees such as Ms Achbita.<sup>64</sup> However, Advocate General Kokott added that this would be much less satisfactory for the purposes of achieving neutrality.<sup>65</sup> She also suggested as an alternative solution that employees such as Ms Achbita could possibly be moved to back-office positions where they would not have face-to-face contact with external individuals; or, they could be deployed only with customers who had no objections to the employment of a receptionist who wears visible and conspicuous signs of a religious belief such as the Islamic headscarf, although allowing the latter would undermine the employer's neutrality policy.<sup>66</sup>

Advocate General Sharpston considered that, under Article 2(2)(b)(i) of Directive 2000/78/EC, the means must be proportionate and that this means that it is necessary to find

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<sup>59</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 63.

<sup>60</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 132.

<sup>61</sup> Case C-157/15 *Achbita v. G4S*, para. 42.

<sup>62</sup> *Ibid.*, para. 43.

<sup>63</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 104.

<sup>64</sup> *Ibid.*, para. 105, 106.

<sup>65</sup> *Ibid.*, para 107.

<sup>66</sup> *Ibid.*, para. 108, 109.

the right balance between the different interests involved.<sup>67</sup> It is submitted that this same balancing test must be applied to Article 4(1) of Directive 2000/78/EC. From the above it can be concluded that, in relation to this balancing test, the CJEU has indicated that the following factors are important: that a rule against all visible political, philosophical and religious symbols is genuinely pursued in a consistent and systematic manner and thus that it does not distinguish between different religions or different (religious, philosophical or political) beliefs; that the rule is limited to customer-facing employees; and, that the employer considers whether the employee can be moved to a job without contact with customers. Advocate General Kokott mentioned that the following factors need to be taken into account to decide on the proportionality under Article 4(1) of Directive 2000/78/EC: the size and the conspicuousness of the religious symbol; the role and nature of the employee's activity; the context in which she has to perform that activity; whether any difference in treatment on other grounds is also present; and, the national identity of the Member State concerned.<sup>68</sup> In relation to the latter, Advocate General Kokott opined that

this may mean that, in Member States such as France, where secularism has constitutional status and therefore plays an instrumental role in social cohesion too, the wearing of visible religious symbols may legitimately be subject to stricter restrictions (even in the private sector and generally in public spaces) than in other Member States the constitutional provisions of which have a different or less distinct emphasis in this regard.<sup>69</sup>

Advocate General Kokott therefore came to the conclusion that 'in the light of all those considerations, there is much to support the argument that a ban such as that at issue here does not unduly prejudice the legitimate interests of the employees concerned and must therefore be regarded as proportionate'.<sup>70</sup>

However, it is submitted that what is missing in the judgment of the CJEU and the Opinion of Advocate General Kokott in *Achbita*, is any consideration of Ms Achbita's right to freedom of religion and the importance of being able to manifest her religion through the wearing of the headscarf.<sup>71</sup> These rights are guaranteed by Article 10 of the Charter. Surely, if a

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<sup>67</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 120, 121.

<sup>68</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 118-125.

<sup>69</sup> *Ibid.*, para. 125.

<sup>70</sup> *Ibid.*, para. 126.

<sup>71</sup> See on this also: S. Jolly, 'Achbita & Bougnaoui: A Strange Kind of Equality', *Cloisters Blog* (2017), <https://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality>; S. Ouald Chaib and V. David, 'European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights could Close it', *Strasbourg Observers* (2017),

balancing exercise needs to take place, then issues on both sides should be weighed in the balance: the importance for the employer of presenting a neutral company image against the importance of being able to wear a religious symbol as a manifestation of his or her religion to work for the employee. This would be in line with what the ECtHR did in the above mentioned case of *Eweida and Others v. the UK*, where the importance of presenting a professional corporate image was weighed against the employee's right to manifest her religion by wearing a small silver cross with her uniform.<sup>72</sup> The ECtHR found in favour of Ms Eweida and held that a fair balance had not been struck between her right to freely manifest her religion and her employer's wish to protect its corporate image and that the domestic courts had given too much weight to the latter.<sup>73</sup> The CJEU referred, in its *Achbita* judgment, to this ECtHR case<sup>74</sup> but did not follow it when considering whether the rule was appropriate and necessary. It should have done so, as Article 10 of the Charter must be interpreted in accordance with the ECHR and the case law of the ECtHR, as prescribed by Article 52(3) of the Charter.

Advocate General Sharpston, in *Bouagnaoui*, followed a different approach, as she stated that, in the context of examining whether the right balance had been struck, the starting point must be that an employee has, in principle, the right to wear religious apparel or a religious sign but that the employer also has, or may have, the right to impose restrictions.<sup>75</sup> She then continued to suggest that it would not be unreasonable to require employees to do as much as possible to meet the uniform rule requirements. An employer could thus stipulate that employees wear a headscarf in the colour of the uniform or require the employee to wear the religious symbol discretely, where it is possible to do so.<sup>76</sup> Sharpston suggested that

the employer and employee will need to explore the options together in order to arrive at a solution that accommodates both the employee's right to manifest his religious belief and the employer's right to conduct his business. Whilst the employee does not, in my view, have an absolute right to insist that he be allowed to do a particular job within the organisation on his own terms, nor should he readily be told that he should look for alternative employment. A

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<https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/>; M. Steijns, 'Achbita and Bouagnaoui: raising more questions than answers', *Eutopia Law* (2017), <https://eutopialaw.com/2017/03/18/achbita-and-bouagnaoui-raising-more-questions-than-answers/>.

<sup>72</sup> ECtHR, *Eweida and Others v. the United Kingdom*, para. 94.

<sup>73</sup> *Ibid.*

<sup>74</sup> Case C-157/15 *Achbita v. G4S*, para. 39.

<sup>75</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bouagnaoui v. Micropole*, para. 122. Sharpston refers to ECtHR, *Eweida and Others v. the UK* in a footnote here. *Ibid.*, para. 123, 124.

solution that lies somewhere between those two positions is likely to be proportionate. Depending on precisely what is at issue, it may or may not involve some restriction on the employee's unfettered ability to manifest his religion; but it will not undermine an aspect of religious observance that that employee regards as essential.<sup>77</sup>

Advocate General Sharpston added that, as a last resort, the business interest in generating maximum profit should, in her view, 'give way to the right of the individual employee to manifest his religious convictions'.<sup>78</sup> It is submitted that this is a much more nuanced approach to proportionality which leaves room for the weighing of all interests involved, of both employee and employer, in order to find a fair balance. It is also submitted that the CJEU should have followed this approach and should have opted for a strict justification test by scrutinizing the legitimate aim more closely and by conducting a much more nuanced balancing exercise, giving sufficient weight to the importance of the manifestation of their belief by the applicants. Instead, the CJEU appears to have opted for a finding of indirect discrimination and applying a fairly loose justification test. Much of the critique levelled against the judgment refers to this point.<sup>79</sup>

More support for the application of a strict justification test can be found in the CJEU's previous case law.<sup>80</sup> First, the CJEU has consistently held that restrictions and limitations on individual rights in EU law, which include the right not to be discriminated against, should be interpreted strictly.<sup>81</sup> Second, the justification test for indirect sex discrimination has, according to the CJEU in *Bilka Kaufhaus*, three parts: the means chosen must correspond to a

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<sup>77</sup> Ibid., para. 128.

<sup>78</sup> Ibid., para. 133.

<sup>79</sup> See, for example: S. Ouald Chaib and V. David, 'European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights could Close it', *Strasbourg Observers* (2017), <https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/>; E. Spaventa, 'What is the point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case', *EU Law Analysis* (2017), <http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html>; I. Tourkochoriti, 'Protection with Hesitation: on the Recent CJEU Decisions on Religious Headscarves at Work', *Verfassungsblog* (2017), <http://verfassungsblog.de/protection-with-hesitation-on-the-recent-cjeu-decisions-on-religious-headscarves-at-work/>; L. Vickers, 'Direct Discrimination and Indirect Discrimination: Headscarves and the CJEU', *Oxford Human Rights Hub* (2017), <http://ohrh.law.ox.ac.uk/direct-discrimination-and-indirect-discrimination-headscarves-and-the-cjeu/>.

<sup>80</sup> See also on this, E. Howard, 'Protecting Freedom to Manifest One's Religion or Belief: Strasbourg or Luxembourg?', 32 *Netherlands Quarterly of Human Rights* (2014), p. 159-182.

<sup>81</sup> See for example, Case 222/83 *Johnston v. Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para. 36; Case C-273/97 *Sirdar v. the Army Board and Secretary of State for Defence*, EU:C:1999:523, para. 23; Case C-285/98 *Kreil v. Bundesrepublik Germany*, EU:C:2000:02, para. 20; (all three concerned sex discrimination); Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, para. 60; Case C-447/09 *Prigge and Others v. Deutsche Lufthansa AG*, EU:C:2011:573, para. 56 and 72 (the latter two cases concerned age discrimination).

real need; they must be appropriate to achieving the objective pursued and, they must be necessary to that end.<sup>82</sup> The latter includes considering whether there is an alternative, less discriminatory way of achieving the aim pursued.<sup>83</sup> This clearly means that the interests of the individual must be weighed in the balance. As the test for justification of indirect sex discrimination is worded in the same way as the justification tests for other discrimination grounds covered by the EU anti-discrimination directives, there appears to be no reason not to apply the same test to these other discrimination grounds, including that of religion or belief. This is supported by the fact that the CJEU is generally concerned with the uniform application of EU law and with a desire to avoid inconsistencies. This would, therefore, favour treating all discrimination grounds the same.

On the other hand, it can be asked whether religion or belief as a ground for discrimination should be treated differently from other grounds of discrimination. The Advocates General expressed different views on this issue. Advocate General Kokott saw religion as different from other characteristics because

unlike sex, skin colour, ethnic origin, sexual orientation, age or a person's disability, the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence. While an employee cannot 'leave' his sex, skin colour, ethnicity, sexual orientation, age or disability 'at the door' upon entering his employer's premises, he may be expected to moderate the exercise of his religion in the workplace, be this in relation to religious practices, religiously motivated behaviour or (as in the present case) his clothing.<sup>84</sup>

Therefore, Advocate General Kokott saw religion as a question of choice and thus it could be lawfully restricted by the employer. In contrast, Advocate General Sharpston raised doubts about this. She wrote that 'to someone who is an observant member of a faith, religious identity is an integral part of that person's very being' and that 'it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not'.<sup>85</sup> Seeing religion as part of a person's identity would lead to more weight

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<sup>82</sup> Case C-170/84 *Bilka Kaufhaus v. Karin Weber von Harz*, EU:C:1986:204, para. 36

<sup>83</sup> See on this, D. Schiek, 'Indirect Discrimination', in D. Schiek, L. Waddington and M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007), p. 357; S. Haverkort-Speekenbrink, *European Non-Discrimination Law - A Comparison of EU law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012), p. 76.

<sup>84</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 116.

<sup>85</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 118.

being given to the importance of being able to manifest this identity at work in the balancing which is required to assess whether indirect discrimination is justified. This would, as was submitted above, lead to a more nuanced and stricter justification test. It would also be in line with Article 31(1) of the Charter that ‘every worker has the right to working conditions which respect his or her (...) dignity’, as was mentioned before.

Advocate General Kokott also appears to favour giving a ‘measure of discretion’ to national authorities and in particular to national courts in applying the proportionality test, where she considered that the CJEU

does not necessarily have to prescribe a solution that is uniform throughout the European Union. Rather, it would be sufficient, in my opinion, for the Court to indicate to the national court all of the material factors that it must take into account in carrying out the proportionality test but otherwise to leave to that court the actual task of striking a balance between the substantive interests involved.<sup>86</sup>

This is similar to the ‘margin of appreciation’ which the ECtHR uses to reflect national differences in cases pertaining to freedom of religion. Jolly points out that this ‘has the effect of demoting religious discrimination among a hierarchy of protected characteristics’.<sup>87</sup> In other words, it would lead to less protection against religion and belief discrimination than the protection provided by EU law against other forms of discrimination. Vickers writes that this introduction of a margin of discretion raises particular concerns

in the context of equality law, because equality has usually been developed to eradicate entrenched inequality. Given that it would seem inconceivable that a court would allow a state to argue that national traditions should be allowed to justify sex or race discrimination in employment, it is questionable whether such reasoning should be accepted in the different context of religion.<sup>88</sup>

Therefore, it is suggested that the CJEU should have applied the same strict justification test for indirect discrimination on the grounds of religion or belief as it applies to all other grounds of discrimination covered by EU anti-discrimination directives. Religion or belief, as a discrimination ground, should thus not be treated differently. The Open Society Justice Initiative gives another, related reason why religion or belief as discrimination ground should

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<sup>86</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 99.

<sup>87</sup> S. Jolly, 6 *EHRLR* (2016), p. 677.

<sup>88</sup> L. Vickers, ‘Blog Series 2: The Role of Choice; and the Margin of Appreciation’, *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/08/blog-series-the-role-of-choice-and-the-margin-of-appreciation/>.

not be treated differently from other grounds where it remarks that the CJEU ‘should respect and build on its case law in other fields of discrimination to avoid serious impacts on protection from discrimination on grounds such as ethnicity, sexual orientation and sex’.<sup>89</sup> This refers to the possible effect of ‘levelling down’: applying a more lenient justification test for indirect religion or belief discrimination could lead to such a test also being applied to the other grounds covered by EU anti-discrimination law and thus to lowering the protection against indirect discrimination.<sup>90</sup>

More support for the argument that religion is not special or different can be found in the fact that the Council of the European Union has provided guidelines on freedom of religion or belief which state that ‘persons holding non-theistic or atheistic belief should be equally protected [by the guarantee of freedom of religion], as well as people who do not profess any religion or belief’.<sup>91</sup> It could also be argued that the CJEU itself, by referring to ‘religious, philosophical and political beliefs’, does not see religious beliefs as different from other forms of belief.

Based on the above analysis, it is submitted that the CJEU should have used a stricter justification test for indirect discrimination than it did. In contrast, the CJEU did apply a stricter justification test to establish whether there was a genuine and determining requirement under Article 4(1) of Directive 2000/78/EC, as will be discussed in the following paragraphs.

## **§5. Genuine and determining occupational requirements**

The French court in *Bougnaoui* asked the CJEU whether the wish of a customer not to be served by an employee wearing an Islamic headscarf is a genuine and determining occupational requirement, in accordance with Article 4(1) of Directive 2000/78/EC. This article determines that:

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article

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<sup>89</sup> Open Society Justice Initiative, ‘Briefing Paper: Employer’s Bar on Religious Clothing and European Union Discrimination Law’, para. 4, 29.

<sup>90</sup> See on this also L. Vickers, ‘Blog Series 2: The Role of Choice; and the Margin of Appreciation’, *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/08/blog-series-the-role-of-choice-and-the-margin-of-appreciation/>.

<sup>91</sup> Council of the European Union, ‘EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief’, [https://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/137585.pdf](https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137585.pdf), para. 2.

It shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Therefore, the prohibition of discrimination does not apply where having a particular characteristic, including religion or belief, is a genuine and determining occupational requirement, subject to a justification test. In *Achbita*, the CJEU did not mention the genuine and determining occupational requirement at all; while it was rather brief in its considerations on this matter in *Bouagnaoui*. The CJEU pointed out that, ‘in accordance with Recital 23 of Directive 2000/78, it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement’.<sup>92</sup> It then considered that the concept of ‘genuine and determining occupational requirement’ in Article 4(1) ‘refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer’ and thus, the CJEU concluded that this was not a genuine and determining occupational requirement.<sup>93</sup>

The Advocates General in both cases considered this issue in more detail. Both mentioned that Article 4(1) of Directive 2000/78/EC must be interpreted strictly and that the exception should apply only ‘in very limited circumstances’, according to Recital 23 of the Preamble to Directive 2000/78/EC.<sup>94</sup> Article 4(1) was not mentioned in *Achbita*, but Advocate General Kokott discussed it in case the CJEU found that there was direct discrimination because the genuine and determining occupational requirement can justify direct discrimination.<sup>95</sup> However, the Advocates General interpreted Article 4(1) of Directive 2000/78/EC and the words ‘by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out’ quite differently. Advocate General Kokott expressed the opinion that ‘either of those two elements [nature or context] can in and of itself serve as a ground of justification for a difference of treatment based on religion’.<sup>96</sup> She then stated that

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<sup>92</sup> Case C-188/15 *Bouagnaoui v. Micropole*, para. 38.

<sup>93</sup> *Ibid.*, para. 40, 41.

<sup>94</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 72; Opinion of Advocate General Sharpston in Case C-188/15 *Bouagnaoui v. Micropole*, para. 95.

<sup>95</sup> Opinion of Advocate General Kokott in Case C-157/15 *Achbita v. G4S*, para. 62.

<sup>96</sup> *Ibid.*, para. 73.

the work of a receptionist can be performed just as well with a headscarf as without one.<sup>97</sup> In other words, the nature of the job of receptionist did not require Ms *Achbita* to take off her headscarf. However, the context of the job could do so, because ‘one of the conditions of carrying out that work may nonetheless be compliance with the dress code laid down by the employer (...) in which case the employee carries out her work in a context in which she must refrain from wearing her headscarf’.<sup>98</sup> Kokott then came to the conclusion that the ban imposed by G4S ‘may be regarded as a genuine and determining occupational requirement within the meaning of Article 4(1)’.<sup>99</sup>

By way of contrast, Advocate General Sharpston expressed the opinion that the exception for occupational requirements ‘cannot be used to justify a blanket exception for all the activities that a given employee may potentially engage in’.<sup>100</sup> Advocate General Sharpston stated that the wording of Article 4(1) reflected its narrowness: the occupational requirement must be both ‘genuine’ and ‘determining’ and this meant that ‘the derogation must be limited to matters which are absolutely necessary in order to undertake the professional activity in question’.<sup>101</sup>

Therefore, the application of the derogation in Article 4(1) could not be justified by the commercial interest of the business in its relations with its customers.<sup>102</sup> Advocate General Sharpston also pointed out that accepting the view of the employer would ‘risk “normalising” the derogation’ which ‘cannot be right’ as ‘it is intended that the derogation should apply only in the most limited of circumstances’.<sup>103</sup> There was nothing ‘to suggest that, because she [Ms Bougnaoui] wore the Islamic headscarf, she was in any way unable to perform her duties as a design engineer’ and thus the requirement not to wear the headscarf could not be a genuine and determining occupational requirement.<sup>104</sup>

The CJEU thus followed the interpretation given by Advocate General Sharpston and concluded that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement. This follows the CJEU’s previous case law that derogations from the principle of equality must be interpreted strictly, as was

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<sup>97</sup> Ibid., para. 75.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid., para. 84.

<sup>100</sup> Opinion of Advocate General Sharpston in Case C-188/15 *Bougnaoui v. Micropole*, para. 95.

<sup>101</sup> Ibid., para. 96.

<sup>102</sup> Ibid., para. 100.

<sup>103</sup> Ibid., para. 101.

<sup>104</sup> Ibid., para. 102.

mentioned above. This is to be welcomed, but it raises the question whether there is a tension between this and the acceptance, in *Achbita*, that the aim of neutrality can be legitimate aim. As Peers writes, ‘there is a thin line between saying that employee headscarves can’t be banned just because customers ask for it on the one hand, and allowing employers to ban such clothing in effect due to *anticipation* of customer reaction’.<sup>105</sup> Jolly points out that ‘*Achbita* begs the question of whether those customer’s wishes suffice in order to bring about the neutrality rule in the first place’.<sup>106</sup> And Mahlmann asks: ‘what other reasons, apart from anticipated or real wishes of customers, could serve to justify the creation of a brand image of neutrality’?<sup>107</sup> However, according to McCrea, this can be explained by the fact that, in *Achbita*, the CJEU focused on the justification of indirect discrimination, while in *Bouagnaoui* there was direct discrimination (a customer request that targeted symbols of a particular faith) and ‘as the test for justification of directly discriminatory measures (“genuine and determining occupational requirements”) is so much more demanding than that for indirectly discriminatory measures, the reasons for the apparent contrast in the outcomes in the two cases becomes clear’.<sup>108</sup> It is suggested that this does not really assuage the tension between the two judgments.

## §6. Conclusion

In this article, the first two judgments of the CJEU in relation to religion or belief discrimination, *Achbita* and *Bouagnaoui*, have been analysed. Both cases concerned employees who were dismissed from their jobs when they refused to remove their Islamic headscarves at work. In *Achbita*, the CJEU concluded that there was no direct discrimination but that there could be indirect discrimination, which was for the referring court to decide. However, the CJEU provided guidance on this. It held that a neutrality policy was a legitimate aim, as it was part of the freedom to conduct a business, guaranteed by Article 16 of the Charter. In considering whether the ban was appropriate and necessary, the CJEU held

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<sup>105</sup> S. Peers, ‘Headscarf Bans at Work: Explaining the ECJ Rulings’, *EU Law Analysis* (2017), <http://eulawanalysis.blogspot.co.uk/2017/03/headscarf-bans-at-work-explaining-ecj.html>. See also, R. McCrea, ‘Faith at Work: the CJEU’s Headscarf Rulings’, *EU Law Analysis* (2017), <http://eulawanalysis.blogspot.co.uk/2017/03/faith-at-work-cjeus-headscarf-rulings.html>.

<sup>106</sup> S. Jolly, ‘*Achbita* & *Bouagnaoui*: A Strange Kind of Equality’, *Cloisters Blog* (2017), <https://www.cloisters.com/blogs/achbita-bouagnaoui-a-strange-kind-of-equality>.

<sup>107</sup> M. Mahlmann, ‘ECJ Headscarf Series (3): The Everyday Troubles of Pluralism’, *Strasbourg Observers* (2016), <https://strasbourgobservers.com/2016/09/12/ecj-headscarf-series-3-the-everyday-troubles-of-pluralism/>.

<sup>108</sup> R. McCrea, ‘Faith at Work: the CJEU’s Headscarf Rulings’, *EU Law Analysis* (2017), <http://eulawanalysis.blogspot.co.uk/2017/03/faith-at-work-cjeus-headscarf-rulings.html>.

that the ban on visible political, philosophical or religious symbols was justified as long as the ban was genuinely pursued in a consistent and systematic manner and thus the CJEU did not make a distinction between different religions or different (religious, philosophical or political) beliefs; as long as the rule was limited to customer-facing employees; and, as long as the employer had considered whether the employee could be moved to a job without contact with customers.

In *Bouagnaoui*, the CJEU held that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement. It repeated that it was for the referring court to decide whether there was direct or indirect discrimination and it referred to its judgment in *Achbita* for the factors to be taken into account in deciding, if there was indirect discrimination, whether this was justified.

But what does this mean in practice? The judgments do not give employers the right to ban Islamic headscarves or symbols of one particular religion only, so an actual headscarf ban would not be acceptable. The CJEU has made clear that any bans should cover all religious, philosophical and political symbols and thus would have to include skullcaps, crucifixes and turbans as well as clothing or badges with political or philosophical slogans. The judgment also makes it difficult for an employer to justify restrictions on clothing for those employees who do not come into contact with customers. Moreover, the fact that the CJEU has indicated that the employer should consider whether the employee can be moved to a job where he or she will not have contact with customers, indicates that there is some obligation on the employer to try and accommodate religious employees in another role within the company. The rejection of customer wishes as a genuine and determining occupational requirement is also a very positive development.

McCrea acknowledges that ‘what is seen as neutral is culturally specific and so compliance with neutral rules will be more difficult for adherents to minority faiths’, but that ‘it is not clear that any other option was open to the Court of Justice’. He concludes that ‘the solution recognising the legitimacy of general bans but requiring that such bans avoid targeting specific faiths seems like a reasonable one’.<sup>109</sup> However, it is submitted that the CJEU had other options: as was argued before, there was support for a finding of direct discrimination and, even if the CJEU did not want to take that route, it could have applied a more rigorous justification test for indirect discrimination, as it does for indirect discrimination on other

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<sup>109</sup> Ibid.

grounds covered by EU anti-discrimination law. It has been argued that religion or belief as a ground for discrimination should not be treated differently from these other grounds because this would create inconsistencies and might lead to diminished protection against discrimination on all the grounds of discrimination covered by EU law. The CJEU could and should also have given more weight to the individual applicant's right to manifest their religion, a right that is guaranteed by Article 10 of the Charter. Moreover, as McCrea acknowledges, the judgment puts more obstacles in the way of minority communities and could have an effect on Muslim women especially<sup>110</sup> and it can be questioned whether this fits in with the founding values of the EU. Article 2 TEU declares that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The judgments do not seem to give sufficient weight to the values of human dignity, the rights of persons belonging to minorities, pluralism and tolerance. As Silvestri remarks,

At a time when Europe is short of big ideals and existing conflicts and demographic transformations indicate we need to pay more, not less, attention to freedom of religion and of expression, it does not help that such a prominent international court is unwilling to be bolder in dealing with these fundamental freedoms and the idea of tolerance.<sup>111</sup>

Silvestri also points out that 'the ruling is likely to provide ammunition and political legitimacy to all those across Europe who are promoting anti-Muslim, anti-religious and anti-migrant feelings'.<sup>112</sup> The CJEU could have taken the lead in providing strong protection

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<sup>110</sup> See on this, for example, E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', *Blog of the IACL, AIDC* (2017), <https://iacl-aicd-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/>; S. Jolly, 'Achbita & Bougnaoui: A Strange Kind of Equality', *Cloisters Blog* (2017), <https://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality/>; S. Ouald Chaib and V. David, 'European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights could Close it', *Strasbourg Observers* (2017), <https://strasbourgothers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/>; M. Steijns, 'Achbita and Bougnaoui: Raising more Questions than Answers', *Eutopia Law* (2017), <https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/>.

<sup>111</sup> S. Silvestri, 'Freedom of Religion under Threat across Europe after EU Court Rules Employers can Ban Headscarves', *The Conversation*, (2017) <http://theconversation.com/freedom-of-religion-under-threat-across-europe-after-eu-court-rules-employers-can-ban-headscarves-74583>.

<sup>112</sup> *Ibid.*

against religion or belief discrimination and against discrimination of minorities, but seems to have let the opportunity to do so slip away.