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Exclusion from a courtroom of a woman wearing the Islamic headscarf (hijab)

Lachiri v. Belgium: Case 3413/09
Judgment in French - https://bit.ly/2Q7zOlu

Lachiri v. Belgium (no. 3413/09) [Judgment in French only] - Second Section Chamber Judgment 18 September 2018. The applicant complained before the Court that the decision of a magistrate of a court of appeals to exclude her from the courtroom when she refused to remove her hijab to testify at the trial of the man who had killed her brother infringed her rights under ECHR Article 9 to freedom of thought, conscience, and religion. In its judgment of 18 September 2018, the Court found by six votes a violation of Article 9. [From the Court's press release:} "The Court found that the exclusion of Mrs Lachiri – an ordinary citizen, not representing the State – from the courtroom had amounted to a restriction" on the exercise of her right to manifest her religion. It also held that the restriction had pursued the legitimate aim of "protecting public order", with a view to preventing conduct that was disrespectful towards the judiciary and/or disruptive of the proper conduct of a hearing. The Court found, however, that Mrs Lachiri's conduct on entering the courtroom had not been disrespectful and had not constituted – or been liable to constitute – a threat to the proper conduct of the hearing. The Court therefore held that the need for the restriction in question had not been established and that the infringement of Mrs Lachiri's right to freedom to manifest her religion was not justified in a democratic society."

Registrar of the court (18.09.2018) - https://bit.ly/2zv4M1A - In today's Chamber judgment in the case of Lachiri v. Belgium (application no. 3413/09) the European Court of Human Rights held, by a majority (six votes to one), that there had been: a violation of Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights.

The case concerned Mrs Lachiri's exclusion from a courtroom on account of her refusal to remove her *hijab*. The Court found that the exclusion of Mrs Lachiri – an ordinary citizen, not representing the State – from the courtroom had amounted to a "restriction" on the exercise of her right to manifest her religion. It also held that the restriction had pursued the legitimate aim of "protecting public order", with a view to preventing conduct that was disrespectful towards the judiciary and/or disruptive of the proper conduct of a hearing. The Court found, however, that Mrs Lachiri's conduct on entering the courtroom had not been disrespectful and had not constituted – or been liable to constitute – a threat to the proper conduct of the hearing. The Court therefore held that the need for the restriction in question had not been established and that the infringement of Mrs Lachiri's right to freedom to manifest her religion was not justified in a democratic society.

Principal facts

Mrs Lachiri, and other members of her family, applied to join the proceedings as civil parties seeking damages in a crime case in which her brother had been killed. In 2007 the accused was committed to stand trial before the Criminal Court on charges of premeditated assault and wounding resulting in unintentional death. Mrs Lachiri and the other civil parties appealed against that decision, submitting that the offence should be classified as murder and that the accused should be tried by an Assize Court. On the day of the hearing before the Indictments Division, in accordance with a decision of the presiding judge the court usher informed Mrs Lachiri that she could not enter the hearing room unless she removed her headscarf. Mrs Lachiri refused to comply and did not attend the hearing. Subsequently Mrs Lachiri unsuccessfully challenged that decision in an appeal on points of law.

Complaints, procedure and composition of the Court

Relying on Article 9 (right to freedom of thought, conscience and religion), Mrs Lachiri complained that her exclusion from the hearing room had infringed her freedom to express her religion. The application was lodged with the European Court of Human Rights on 24 December 2008. On 22 March 2016 the Government submitted a unilateral declaration, which the Court decided not to accept.

Judgment was given by a Chamber of seven judges, composed as follows:
Robert **Spano** (Iceland), *President*,
Paul **Lemmens** (Belgium),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Valeriu **Griţco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco),
and also Stanley **Naismith**, *Section Registrar.*

Decision of the Court

Article 9 (freedom of thought, conscience and religion)

Observing that, according to its case-law2, wearing the *hijab* (headscarf covering the hair and neck while leaving the face uncovered) could be regarded as an act "motivated or inspired by a religion or religious belief", the Court considered that excluding Mrs Lachiri from the courtroom on the grounds that she had refused to remove her headscarf had amounted to a "restriction" on the exercise of her right to manifest her religion. The purpose of that restriction, which had been based on Article 759 of the Judicial Code requiring persons entering a courtroom to do so without wearing headgear, had in the

present case been to prevent conduct that was disrespectful towards the judiciary and/or disruptive of the proper conduct of a hearing. The Court concluded that the legitimate aim pursued had been the "protection of public order".

With regard to the necessity of the restriction in a democratic society, the Court specified first of all that the Islamic headscarf was headgear and not, as in the case of *S.A.S. v. France3*, a garment which entirely concealed the face with the possible exception of the eyes. It then noted that Mrs Lachiri was a mere citizen: she was not a representative of the State engaged in public service and could not therefore be bound, on account of any official status, by a duty of discretion in the public expression of her religious beliefs. Moreover, the Court indicated that whilst a court could be part of the "public arena", as opposed to the workplace for example, it was not a public place comparable to a public street or square. A court was indeed a "public" institution in which respect for neutrality towards beliefs could prevail over the free exercise of the right to manifest one's religion, like public educational establishments. In the present case, however, the aim pursued in excluding the applicant from the courtroom had not been to maintain the neutrality of the public arena. The Court therefore limited its examination to determining whether that measure had been justified by the aim of maintaining order. In that connection it noted that Mrs Lachiri's conduct when entering the courtroom had not been disrespectful and had not constituted – or been liable to constitute – a threat to the proper conduct of the hearing. Consequently, the Court held that the need for the restriction in issue had not been established and that the infringement of Mrs Lachiri's right to freedom to manifest her religion was not justified in a democratic society.

There had therefore been a violation of Article 9 of the Convention.

Article 41 (just satisfaction)
The Court held (by six votes to one) that Belgium was to pay Mrs Lachiri 1,000 euros (EUR) in respect of non-pecuniary damage.

Separate opinions
Judges Vučinić and Gritco expressed a joint concurring opinion. Judge Mourou-Vikström expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

Ibragim Ibragimov and Others v. Russia: Application of the law on extremism to peaceful religious groups invalidated

By Patricia Duval, Human Rights Attorney, Paris

Freedom of Conscience (13.09.2018) - https://bit.ly/2D5jcsY - In a landmark decision, *Ibragim Ibragimov and others v. Russia* (28 August 2018),[1] the European Court of Human Rights has invalidated the Russian Extremism Law as far as the Law's definition of extremism allows the ban of religious publications even in the absence of any violence or hate speech.

[1] *Ibragim Ibragimov and others v. Russia*, Nos 1413/08 and 28621/11.

The decision is extremely significant as the Human Rights Court found that any application of the Extremism Law must be based on actual incitement to hatred or violence in order to justify any restriction of freedom of expression of religious beliefs.

It is also significant that the Human Rights Court rejected the national courts' reliance and wholesale adoption of the findings of one-sided experts' reports to rule religious publications extremist, without any meaningful and independent analysis by the courts of materials characterized as extremist by experts retained by the government. The Human Rights Court also emphasized that the civil or criminal parties must be given an opportunity to adduce counter-evidence to counter extremist charges. The total process relied on by the courts in Russia in extremist cases has constituted a breach of the equality of arms principle, a practice of Russian courts which has become systematic in the recent years.

The case was referred to the Court by three applicants, a Russian national, a publisher and a religious association, who complained that the Russian courts had ruled in 2007 and 2010 that books by Said Nursi, a well-known Turkish Muslim theologian and commentator of the Qur'an, were extremist and banned their publication and distribution.

The applicants relied both on Article 9 (freedom of religion or belief) and Article 10 (freedom of expression) of the Convention. As the case concerned a ban on the distribution of books, and the books at issue were a commentary on the Qur'an, the Court deemed that it had to be examined under Article 10, interpreted in the light of Article 9.

The Court found that the ban, which amounted to an interference by the Russian State with the right to freedom of expression of Nursi's followers' religious convictions, had not been justified by the Russian courts and was not necessary in a democratic society.

In doing so, the Court detailed its principles and case law on "hate speech" which must be characterized to allow restrictions of freedom of speech.[2]

1. Hate Speech

The Court noted that, under paragraph 2 of Article 10, the exercise of freedom of expression carries with it duties and responsibilities, and in particular, in the context of religious beliefs, the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs, including a duty to "avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".

On the other hand, the Court has also emphasised that those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

This reasoning has been developed in its jurisprudence on so-called "blasphemy laws". In this line, the Court issued a decision on 18 July 2018 in the so-called "Pussy Riot" case[3] where it defined clearly what can be considered "hate speech". In this case, the Court

[2] *Gündüz v. Turkey*, No. 35071/97, para. 41.

[3] *Mariya Alekhina v. Russia*, No. 38004/12.

referred to the *General Policy Recommendation no. 15 on Combating Hate Speech* adopted by ECRI[4] on 8 December 2015 which defined "hate speech" as follows:

> "Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;
> (…)
> Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions;"

In the Pussy Riot case, the feminist applicants, wearing flashy clothes and balaclavas, burst into Moscow's Christ the Saviour Cathedral and attempted to perform a song "Punk Prayer – Virgin Mary, Drive Putin Away" from the altar, in order to protest against the Orthodox Patriarch support of Putin's politics. They were put in custody and found guilty by the District Court under Article 213 § 2 of the Russian Criminal Code of hooliganism for reasons of religious hatred and enmity and sentenced each of them to two years' imprisonment. The trial court held that the applicants' choice of venue and their apparent disregard for the cathedral's rules of conduct had demonstrated their enmity towards the feelings of Orthodox believers, and that the religious feelings of those present in the cathedral had therefore been offended.

In contrast, the European Court found that, although certain reactions to the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution, the applicants actions and speech did not rise to the level of hate speech as the applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers.

The Court reiterated that, in principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence or criminal sanctions and concluded to a violation of Article 10 of the Convention since the sanctions were not proportionate to the legitimate aim pursued.

2. Russian Extremism Law in the Context of Religious Literature

In the Said Nursi's followers' case, the ban of religious books as extremist publications by national courts was based on the Extremism Law, specifically on its definition of extremist activity at Article 1, and in particular incitement of religious discord (Article 1.1.3) and propaganda about people's superiority or deficiency on the basis of their attitude to religion (Article 1.1.4).

The Court underlined from the outset that the Extremism Law does not require any element of violence or incitement to violence for such an activity to constitute "extremist

[4] ECRI, the European Commission against Racism and Intolerance, under the Council of Europe.

activity", a point which has been criticized by the Venice Commission[5] in its 2012 Opinion.[6]

Regarding Article 1.1 point 3 of the Law, the Venice Commission stated that "in order to qualify 'stirring up of social, racial, ethnic or religious discord' as 'extremist activity', the definition should expressly require the element of violence."

Regarding Article 1.1 point 4 of the Law 'propaganda of the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion', the Commission found:

> "In the view of the Venice Commission, to proclaim as extremist any religious teaching or proselytising activity aimed at proving that a certain worldview is a superior explanation of the universe, may affect the freedom of conscience or religion of many persons and could easily be abused in an effort to suppress a certain church thereby affecting not only the freedom of conscience or religion but also the freedom of association. The ECtHR protects proselytism and the freedom of the members of any religious community or church to 'try to convince' other people through 'teachings'. The freedom of conscience and religion is of an intimate nature and is therefore subject to fewer possible limitations in comparison to other human rights: only manifestations of this freedom can be limited, but not the teachings themselves."

And the Commission concluded:

> "It therefore appears that under the extremist activity in point 4, not only religious extremism involving violence but also the protected expressions of freedom of conscience and religion may lead to the application of preventive and corrective measures. This seems to be confirmed by worrying reports of extensive scrutiny measures of religious literature having led, in recent years, to the qualification of numerous religious texts as 'extremist material'."

The European Court actually followed the same line and found that the application of these provisions of the Law to Said Nursi publications violated the right to freedom of expression of religious beliefs of its followers since the Russian authorities had not demonstrated any incitement to violence or hatred.

3. Systematic Reliance on One-Sided Experts' Reports

The Court first noted that the national courts simply endorsed the overall findings of one-sided experts' reports to declare the religious books extremist, without making any meaningful assessment of those findings. They instructed linguists and psychologists, who were not expert in religions, to examine the religious texts and to provide the courts with a report on their qualification of extremist publications. This alone was not conform to what experts' reports are supposed to provide. The Court stated:

> "The Court notes that the District Court endorsed the experts' conclusions without making any meaningful assessment of them, stating simply that it had no reason to doubt them. (…) Moreover, the relevant expert examinations went far beyond resolving merely language or psychology issues. Rather than restricting

[5] European Commission for Democracy through Law (the Venice Commission), under the Council of Europe.

[6] Opinion of the Venice Commission on the Federal Law on Combating Extremist Activity, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

> themselves to defining the meaning of particular words and expressions or explaining their potential psychological impact, they provided in essence a legal qualification of the texts. Indeed, it is evident from the judgment that it was not the court which made the crucial legal findings as to the extremist nature of the books, but the linguistics and psychology experts. The Court stresses that all legal matters must be resolved exclusively by the courts."

The Court also noted that the national courts ignored the fact that Nursi's books belonged to moderate, mainstream Islam. It observed that Said Nursi is a well-known Turkish Muslim theologian and commentator of the Qur'an. Muslim authorities both in Russia and abroad, as well as Islamic studies scholars, all affirm that Said Nursi's texts belong to moderate mainstream Islam, advocate open and tolerant relationships and cooperation between religions, and oppose any use of violence.

However, the national courts denied the applicants the possibility to provide evidence in this regard and rebut their experts' reports. The Court found:

> It is also significant that the applicants were unable to contest the findings of the expert reports or to effectively put forward arguments in defence of their position. Indeed, the District Court summarily rejected all evidence submitted by them, including the opinions of Muslim authorities and Islamic studies scholars who explained the historical context in which the books had been written, their place in the body of Islamic religious literature, in particular the fact that they belonged to moderate rather than radical Islam, their importance for the Russian Muslim community and their general message of tolerance, interreligious cooperation and opposition to violence (…). Although the above facts were plainly relevant for the assessment of whether banning the books was justified, the Koptevskiy District Court did not make any meaningful analysis of that material, holding that it should be disregarded because the persons cited by the applicants were not linguists or psychologists and were therefore not competent to establish the meaning of the contested texts. (emphasis added)

The European Court previously found a violation of Article 10 of the Convention on account of a breach of equality of arms in freedom-of-expression cases, in particular in situations where the applicants had been hindered in adducing evidence in support of their position or where the domestic courts had dismissed all the arguments in the applicant's defence in a summary manner, thereby stripping him of the procedural protection that he had been entitled to enjoy by virtue of his rights under Article 10 of the Convention.

The Court reached the same conclusion in the present case and concluded that the domestic courts did not apply standards which were in conformity with the principles embodied in Article 10.

The Court also found that the national court took terms and expressions out of context to declare the books extremist.

Relying on the experts' reports, the domestic court noted, in particular, that Muslims were described in the book positively as "the faithful" and "the just", while everyone else was described negatively as "the dissolute", "the philosophers", "the idle talkers" and "little men". The book also proclaimed that not to be a Muslim was an "infinitely big crime". The domestic court concluded from those expressions that the book treated non-Muslims as inferior to Muslims.

Although the European Court accepted that some people might be offended by such statements, it reiterated that merely because a remark may be perceived as offensive or

insulting by particular individuals or groups does not mean that it constitutes "hate speech".

Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression. For the Court, the key issue in the present case was thus whether the statements in question, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance.

The Court found that the domestic court did not assess the statements in question in the light of the book as a whole; it quoted them out of their immediate textual context and failed to examine which idea they sought to impart. In particular, it did not take into account the fact that they were part of a religious text and that, according to the experts, such statements were common in religious texts because any monotheistic religion was "characterised by a psychologically based belief in the superiority of its world-view over all other world-views, which made it necessary to substantiate the choice of that world-view", in particular by claiming that it was better than the others.

Although the impugned statements clearly promoted the idea that it was better to be a Muslim than a non-Muslim, the Court found significant that they did not insult, hold up to ridicule or slander non-Muslims; nor did they use abusive terms in respect of them or of matters regarded as sacred by them.

Furthermore, there was no indication in the judgment that the domestic court perceived those expressions as capable of leading to public disturbances. Neither the domestic courts nor the Government referred to any circumstances indicative of a sensitive background at the material time – such as existence of interreligious tensions or an atmosphere of hostility and hatred between religious communities in Russia – against which the impugned statements could risk unleashing violence, giving rise to serious interreligious frictions or leading to similar harmful consequences.

In view of the above, the Court considered that the above-mentioned statements were not shown to be capable of inciting violence, hatred or intolerance.

4. Denial of Proselytism Rights

Lastly, the domestic court endorsed the experts' finding that the books in question could influence the reader by making him adopt the author's religious ideology and that that was indeed the author's intention.

In this regard, the European Court reiterated that freedom to manifest one's religion includes the right to try to convince one's neighbour, for example through "teaching", failing which "freedom to change [one's] religion or belief", enshrined in Article 9, would be likely to remain a dead letter, and stressed that, in the absence of improper proselytism, e.g. through the use of violence, the mere fact that the author's intention was to convince the readers to adopt his religious beliefs was insufficient, in the Court's view, to justify banning the book.

In particular, the Court could not 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 concluded that it was not necessary, in a democratic society, to ban the book in question.

In conclusion, the Court found that there has been a violation of Article 10 of the Convention.

Conclusion

The findings of the European Court in the Said Nursi case invalidated the provisions of the Russian Extemism Law in the following way.

It found that in order to qualify religious publications as 'extremist activity' on the basis that they were '*stirring up of religious discord*', the national courts must demonstrate that the publications in question, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance.

It also found that the expression of the belief in the superiority of its world-view over all other world-views, which makes it necessary to substantiate the choice of that world-view, in particular by claiming that it was better than the others, is common to all religions and does not suffice for accusing religious publications of being an 'extremist activity' based on '*propaganda about people's superiority or deficiency on the basis of their attitude to religion*'.

The same goes with proselytism, which is a right protected by the European Convention. The mere fact that the author's intention was to convince the readers to adopt his religious beliefs is insufficient to justify banning a book.

As long as there is no element which would allow the Court 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 that its circulation had led or could lead to harmful consequences, the Court found that the ban of the book violated Article 10 interpreted in the light of Article 9 of the Convention.

The Court also found that the systematic and wholesale reliance by Russian courts on the findings of one-sided experts' reports, without any possibility for the defendants to bring contradictory evidence, breached the principle of equality of arms and violated the standards which were in conformity with the principles embodied in Article 10.

Those findings should entail further developments since, as the Venice Commission already noted back in 2012, the Russian authorities have qualified numerous religious texts as 'extremist materials' in recent years and numerous applications are pending at the European Court, filed by various religious groups such as Jehovah's Witnesses, Scientologists and others.

Religion, banned books and the ECHR: Ibragimov and Others

By Frank Cranmer

LawandReligionUK.org (29.08.2018) - https://bit.ly/2BZElUR -

Background

Salekh Ogly Ibragimov, the Nuru Badi Cultural Educational Fund, a publisher based in Moscow, and the United Religious Board of Muslims of the Krasnoyarsk Region complained about the banning of various books written in the first half of the 20th

century by Said Nursi, a Muslim Turkish scholar. The domestic courts had ruled in 2007 and 2010 that the books were extremist: in particular, that they incited religious discord and constituted propaganda on the superiority of the Muslim faith, contrary to the provisions of the Suppression of Extremism Act 2002. In coming to their decisions, the domestic courts had relied on expert reports ordered by the court or submitted by the prosecutor that had been written by specialists in linguistics, philology, psychology and philosophy. Subsequent appeals were rejected.

The judgment

In ***Ibragim Ibragimov and Others v Russia*** [2018] ECHR 684, the Court noted that the domestic courts' decision to ban the books from publication and distribution because they were "extremist" had been an interference by a public authority with the applicants' rights under Article 10 ECHR (freedom of expression), interpreted in the light of their right to freedom of religion under Article 9. That interference had had a basis in national law under the Suppression of Extremism Act and had aimed at preventing disorder and protecting territorial integrity, public safety and the rights of others. However, overall, the Russian courts had failed to justify why it had been necessary to ban the books, which had first been published in Russia in 2000 – seven years before the ban – without them ever having caused interreligious tensions, let alone violence. They had also been translated into about 50 languages and were widely available in many countries without any problem.

The domestic courts had not discussed the necessity of banning the books. They had banned them on the basis of experts' conclusions without making their own assessment; nor had they specified which passages of the books were problematic. Furthermore, the experts' report had gone far beyond issues of language or psychology and had strayed, in essence, into a legal classification of the texts – which, said the Court, was a legal matter exclusively for determination by the courts.

Nor had the applicants been able to contest the expert reports. The courts had summarily rejected all evidence they had submitted, including the opinions of Muslim authorities and Islamic scholars who had explained the historical context in which the books had been written and the fact that they belonged to moderate rather than radical Islam, their importance for the Russian Muslim community and their general message of tolerance, interreligious cooperation and opposition to violence. Scholarly opinions had simply been disregarded because the authors of the expert reports had not been linguists or psychologists.

Though the domestic courts had quoted several expressions which they considered problematic because they had promoted the idea that it was better to be a Muslim than a non-Muslim and had used military metaphors, they had not assessed those expressions in context and had failed to take into account that it was common in religious texts for a religion to claim that it was superior to other religions. Importantly, the texts in question had not been abusive towards non-Muslims nor insulted nor slandered them. Nor had the use of military metaphors been set in context. Similarly, the mere fact that Said Nursi's intention had been to convince readers to adopt his religious beliefs was insufficient to justify the ban.

As to Article 9, where several religions coexisted within the same population, it might be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups within society and ensure that everyone's beliefs were respected. However:

> "The Court has frequently emphasised that States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and

tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs … The Court has also stressed that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed … Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other" [90]

As to Article 10:

> "The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no "democratic society". As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, *and the need for any restrictions must be established convincingly*' [91: emphasis added].

It had not been "necessary in a democratic society" to ban the books in question and there had therefore been a violation of Article 10 [124].

Cite this article as: Frank Cranmer, "Religion, banned books and the ECHR: Ibragimov and Others" in Law & Religion UK, 29 August 2018, http://www.lawandreligionuk.com/2018/08/29/religion-banned-books-and-the-echr-ibragimov-and-others/

See the text of the decision of the European Court at https://bit.ly/2wzn3rN

Islamic book ban in Russia breached freedom of expression

Registrar of the European Court (28.08.2018) - In today's **Chamber** judgment1 in the case of **Ibragim Ibragimov and Others v. Russia** (application nos. 1413/08 and 28621/11) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 10 (freedom of expression)** of the European Convention on Human Rights.

The case concerned anti-extremism legislation in Russia and a ban on publishing and distributing Islamic books. The three applicants in the case, a Russian national, a publisher and a religious association, complained that the Russian courts had ruled in 2007 and 2010 that books by Said Nursi, a well-known Turkish Muslim theologian and commentator of the Qur'an, were extremist and banned their publication and distribution. The applicants had either published some of Nursi's books or had commissioned them for publication.

The Court found in particular that the Russian courts had not justified why the ban had been necessary. They had merely endorsed the overall findings of an expert report carried out by linguists and psychologists, without making their own analysis or, most notably, setting the books or certain of their expressions considered problematic in

context. Furthermore, they had summarily rejected all the applicants' evidence explaining that Nursi's books belonged to moderate, mainstream Islam.

Overall, the courts' analysis in the applicants' cases had not shown how Nursi's books, already in publication for seven years before being banned, had ever caused, or risked causing, interreligious tensions, let alone violence, in Russia or, indeed, in any of the other countries where they were widely available.

Principal facts

The applicants are Salekh Ogly Ibragimov, a Russian national; the Cultural Educational Fund "Nuru Badi", a publisher based in Moscow; and, the United Religious Board of Muslims of the Krasnoyarsk Region, a religious association. Mr Ibragimov is the chief executive officer of the second applicant.

The case involved two sets of civil proceedings brought by the prosecuting authorities regarding books written by Said Nursi.

The first set of proceedings was brought in 2006 asking that books from Nursi's *Risale-I Nur* collection, written in the first half of the 20th century, be declared extremist and banned. The second applicant is a publisher of this collection.

The second set of proceedings was brought in 2008, asking the courts to rule that one of Nursi's books from the *Risale-I Nur* collection, namely *The Tenth Word: The Resurrection and the Hereafter,* be declared extremist and to confiscate all printed copies. Just before this, the third applicant had commissioned a publisher to print this particular Nursi book.
Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

The applicant publisher and religious association were invited to participate in these proceedings as third parties, and submitted information explaining that Said Nursi's texts belonged to moderate, mainstream Islam.

In both resulting judgments, delivered in 2007 and 2010, the courts ruled however that the books at issue were extremist. They found in particular, under the Suppression of Extremism Act of 2002, that the books incited religious discord and constituted propaganda on the superiority of the Muslim faith. In coming to their decisions, the courts relied on expert reports ordered by the court or submitted by the prosecutor. The reports had been written by specialists in linguistics, philology, psychology and philosophy.

In the first set of proceedings the courts referred in particular to the overall findings in expert reports of February and May 2007, agreeing with the specialists that the books contained "humiliating depictions, an unfavourable assessment and a negative evaluation of persons on the basis of their attitude to religion". The courts rejected all evidence submitted by Mr Ibragimov and the applicant publisher, including the opinions of Muslim authorities and Islamic scholars, because they were neither linguists nor psychologists and were not therefore competent to establish the meaning of the texts.

Similarly, in the second set of proceedings the courts generally endorsed a specialists' report of December 2008 finding that the book at issue was extremist and used military metaphors to instil in the reader's mind the idea of an enemy and potential military action. They also quoted several expressions in the book describing Muslims as "the

faithful" and "the just", while everyone else was "the dissolute", "the philosophers", "the idle talkers" and "little men", and proclaiming that not being a Muslim was an "infinitely big crime".

The applicants' appeals were all subsequently rejected.

Complaints, procedure and composition of the Court

Relying on Article 9 (freedom of religion) and Article 10 (freedom of expression), the applicants complained in particular about the ban on the distribution of Islamic books they had published or commissioned for publication, because they were extremist.

The applications were lodged with the European Court of Human Rights on 3 December 2007 and 4 April 2011, respectively.

Judgment was given by a Chamber of seven judges, composed as follows:
Helena **Jäderblom** (Sweden), *President*,
Dmitry **Dedov** (Russia),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),
Jolien **Schukking** (the Netherlands),
María **Elósegui** (Spain),
and also Stephen **Phillips**, *Section Registrar.*
Decision of the Court
First, the Court noted that the courts' decisions on the books which the applicants had published or commissioned for publication, finding them "extremist" and banning them from publication and distribution, had amounted to "interference by a public authority" with their right to freedom of expression, interpreted in the light of their right to freedom of religion. That interference had had a basis in national law, namely the Suppression of Extremism Act, and had aimed at preventing disorder and protecting territorial integrity, public safety and the rights of others.

However, it found that, overall, the Russian courts had failed to justify why it had been necessary to ban the books, which had first been published in Russia in 2000, that is seven years before being banned, without them ever having caused interreligious tensions, let alone violence. They had also been translated into about 50 languages, and were widely available in many countries without problem.

It went on to examine the domestic court decisions in both sets of proceedings, and found that they had a number of shortcomings.

In the first set of proceedings concerning the *Risale-I Nur* collection, the courts had merely endorsed the experts' conclusions, without making their own assessment. They had not specified which passages of the books had been problematic, and had only referred to the overall findings of the experts' report. Moreover, the report had gone far beyond language or psychology issues and had provided, in essence, a legal classification of the texts. The Court stressed that all legal matters should be resolved exclusively by the courts.

Nor did the courts discuss the necessity of banning the books, bearing in mind the context in which they had been published, their nature and wording and their potential to lead to harmful consequences.

Moreover, the applicants had been unable to contest the expert reports. The courts had summarily rejected all evidence they had submitted, including the opinions of Muslim authorities and Islamic scholars who had explained the historical context in which the

books had been written and the fact that they belonged to moderate rather than radical Islam, their importance for the Russian Muslim community and their general message of tolerance, interreligious cooperation and opposition to violence. Indeed, this material had simply been disregarded because the authors had not been linguists or psychologists.

While the proceedings concerning the book *The Tenth Word: The Resurrection and the Hereafter,* also from the *Risale-I Nur* collection, had essentially the same shortcomings, the Court noted that the courts had nonetheless quoted several expressions which they considered problematic because they had promoted the idea that it was better to be a Muslim than a non-Muslim and had used military metaphors.

However, the courts had not assessed those expressions in context. They had failed to take into account that it was common in religious texts for a religion to claim that it was superior to other religions. Importantly, the texts in question had not been abusive towards non-Muslims, and had neither insulted nor slandered them. Besides, it was not reasonable for religious groups to expect that they would never be criticised.

Nor had the use of military metaphors been set in context. In fact, the courts had simply endorsed the specialists' findings, without even quoting any examples. The use of such metaphors was therefore not enough to consider that the texts had amounted to hate speech or calls to violence.

Similarly, the mere fact that the author's intention had been to convince readers to adopt his religious beliefs was insufficient to justify banning the book.

The Court therefore concluded that it had not been necessary, in a democratic society, to ban the books in question, in violation of Article 10.

Just satisfaction (Article 41)
The Court held that Russia was to pay Mr Ibragimov 7,500 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in English.

Jehovah's Witnesses in the NKR and Sargis Avanesyan v. Armenia

Application no. 41817/10

Willy Fautré, Human Rights Without Frontiers

HRWF (14.06.2018) – The Nagorno-Karabakh Republic is a disputed territory between Azerbaijan and Armenia. An armed conflict erupted between both former Soviet Republics in the wake of the collapse of the Soviet Union and only came to an end with a cease-fire reached on 12 May 1994 through Russian negotiation. After the war, Azerbaijan lost its control over the region which, under the protection of Armenia, unilaterally proclaimed its independence under the name of Nagorno-Karabakh Republic. The NKR has a total area of about 4400 km² and a population of around 146,000 inhabitants. It is a de facto self-proclaimed independent state with Armenian ethnic majority. It is not recognized by the international community. It is consequently not a member of the Council of Europe, the OSCE and the UN. Therefore, the European Court of Human Rights faces a basic problem: which country can be involved in the procedure?

In the case of a Moldovan detainee in Transnistria (the self-proclaimed Moldavian Republic of Transdniestria) who had to lodge a complaint against another de facto state unrecognized by the international community, the Court admitted a complaint against both Moldova and Russia (Application no 11138/10). This area was part of the former Moldavian SSR, and since the dissolution of the USSR it has been claimed by the Republic of Moldova as the Administrative-Territorial Units of the Left Bank of the Dniester but it is unable to exert its jurisdiction on this territory.

In the case of Jehovah's Witnesses in Nagorno-Karabakh, the European Court declared admissible the complaint against the sole Armenia.

The applicants are the Christian Religious Organization of Jehovah's Witnesses NKR, a religious community established in the Republic of Nagorno Karabakh in 1993 ("the applicant community") and an Armenian national, Mr. Sargis Avanesyan, who was born in 1962 and is the community elder living in Stepanakert ("the applicant"). They are represented before the Court by Mr A. Carbonneau and Mr R. Khachatryan, lawyers practising in Strasbourg and Yerevan.

In June 2009, the applicant community applied to the NKR Government for state registration. In July 2009, the NKR government staff provided an expert opinion to determine if the applicant community fulfilled the requirements of Article 5 of the NKR law. The expert opinion concluded that by their ideology, the applicant community is "far from a Christian organization." In August 2009, the State Registry Department rejected the application relying on the expert opinion. In spring of 2010, the police raided the religious meetings of the applicant community and arrested five members who were charged with an administrative offense. The applicants complain under Articles 9 and 11 of the Convention of the continued refusal of the NKR authorities to register the applicant community as a religious organization.

See the full details of the statement of facts at https://www.strasbourgconsortium.org/portal.case.php?pageId=10#caseId=1530 but here are some excerpts of this section:

"1. Background to the case

Jehovah's Witnesses have been present in the unrecognised Republic of Nagorno Karabakh (the NKR) since 1993. At the material time they had approximately five hundred members.

Since 8 October 2004 Jehovah's Witnesses have been a registered religious organisation in the Republic of Armenia.

On 26 November 2008 the NKR Law on the Freedom of Conscience and on Religious Organisations (the Law) was enacted.

On 20 June 2009 the General Assembly of the applicant community held a meeting. It decided, inter alia, to apply for legal registration by submitting the required documents, including those necessary for the mandatory expert report, and elected the applicant as the Chairman of its Council.

2. The first attempt to obtain state registration

On 22 June 2009 the applicant applied to the NKR Government for state registration by virtue of Article 14 of the Law, seeking an expert conclusion as to whether the applicant community fulfilled the requirements of Article 5 of the Law.

On 6 July 2009 the Chief Minister of the NKR Government Staff provided the applicant with an expert opinion of 6 July 2009 prepared by A.S., Chief of the Department for National Minorities and Religious Affairs of the NKR Government Staff (the Expert Opinion)."

> The expert group refrained from examining purely theological issues but considered that "by their ideology Jehovah's Witnesses are far from being a Christian organisation" because the presented documents do not state that the organisation accepts the Nicene Creed, which is a prerequisite for being a Christian organisation or church." The experts also stressed that "according to Article 17 of [the Law] only the Armenian Apostolic Holy Church has the right to preach freely and spread its beliefs in the territory of Nagorno Karabakh" and that all other religious organisations having state registration can only preach within the circle of their own believers. They also accused Jehovah's Witnesses of mental manipulation and of endangering the national defence as they are objectors to military service.

On 9 July 2009 the applicant and two other members of the applicant community applied on its behalf to the State Registry Department of the NKR Ministry of Justice for state registration but on 3 August 2009 the State Registry Department rejected the applicant community's application, relying on the Expert Opinion.

On 15 March 2018, the European Court sent three questions to the parties:

"1. Does Armenia have jurisdiction over the matters complained of, within the meaning of Article 1 of the Convention (see *Muradyan v. Armenia*, no. 11275/07, §§ 126 and 127, 24 November 2016)?

2. Does the Nagorno Karabakh authorities' refusal to register the applicant community to date constitute an interference with the applicant community's freedom of association, within the meaning of Article 11 § 1 of the Convention read in the light of Article 9 of the Convention? If so, is the interference justified in terms of Article 11 § 2 of the Convention? (see, in particular, *Jehovah's Witnesses of Moscow v. Russia*, no. 302/02, §§ 161-182, 10 June 2010)

3. Has the applicant community suffered discrimination in the enjoyment of its Convention rights, contrary to Article 14 of the Convention read in conjunction with either Article 9 or 11?"

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25 May 1993 – 25 May 2018 : 25th anniversary of Kokkinakis case, the first religious freedom case ruled by the European Court

By Willy Fautré, Human Rights Without Frontiers

HRWF (24.05.2018) - On 25 May 1993, the European Court of Human Rights held, by six votes to three, that there had been a breach of Article 9 of the European Convention (freedom of religion or belief) in the case Kokkinakis v. Greece (*Application no. 14307/88*).

The Kokkinakis case is a landmark judgment and a pilot case of the European Court of Human Rights. In 1993, it was the first religious freedom case with which the European Court was confronted. Its decision endorsing the fundamental right to share one's beliefs with others concerned not only Greece but all the 47 member states of the Council of Europe and their populations, around 820 million people in all. However, beyond the case, there was a man…

Beyond the court case, there was a man

I had the privilege to know Minos Kokkinakis. I met him in his apartment in Crete for an interview, I publicized his case during the lengthy proceedings in Strasbourg and I organized a press conference with him in Brussels. He was interviewed by the national Belgian television for the evening TV news and despite his age (84), he captivated the interviewer with his energy and his passion for the defence of his rights. He was a charismatic fighter for justice.

Mr Minos Kokkinakis (1909-1999), a retired shopkeeper of Greek nationality, was born into an Orthodox family at Sitia (Crete) in 1909. After becoming a Jehovah's Witness in 1936, he was arrested more than 60 times for proselytism. He was also interned and imprisoned on several occasions.

The periods of internment, which were ordered by the administrative authorities on the grounds of his activities in religious matters, were spent on various islands in the Aegean Sea (Amorgos, Milos, Makronisos…).

These periods of imprisonment, to which he was sentenced by the courts, were mainly for acts of proselytism (three sentences of two and a half months in 1939 - he was the first Jehovah's Witness to be convicted under the Laws of the Metaxas Government -, four and a half months in 1949 and two months in 1962), for conscientious objection (eighteen and a half months in 1941) and for holding a religious meeting in a private house (six months in 1952).

During the German occupation in WWII, in 1941, he was arrested as a conscientious objector. He could have been executed for that but he had a deeply rooted belief that God had prevented him, and the other Christians, from killing human beings. He was ready to die for that.

In his lifetime, Mr. Kokkinakis served a cumulative total of more than six years in prison.

On 2 March 1986 he and his wife called at the home of Mrs Kyriakaki in Sitia and engaged in a discussion with her. Mrs Kyriakaki's husband, who was the cantor at a local Orthodox church, informed the police, who arrested Mr and Mrs Kokkinakis and took them to the local police station, where they spent the night of 2-3 March 1986.

He ultimately appealed his last conviction to the ECtHR. The court issued its decision on 25 May 1993 in his favor, stating that the Greek government had breached Article 9 of the ECHR (freedom of religion).

More than ever, this case is bearing fruit, especially in post-Soviet countries where the right to share one's beliefs is more and more restricted, and criminalized. His case is a beacon in the night for all the lawyers who defend the right of believers, whatever their religion, to share their beliefs with others.

The current drama is that more and more illiberal governments in the CoE space and beyond turn a blind eye to that "disturbing court decision" and combat it in law and in practice.

Greece was the only EU country to criminalize the right to share one's beliefs

Minos Kokkinakis and his wife were prosecuted under section 4 of Law no. 1363/1938 making proselytism an offence. This law, which was adopted during the dictatorship of Metaxas (1936-40), was exclusively used to protect the Orthodox Church and was in force for more than 45 years.

In 1939, that section was amended by section 2 of Law no. 1672/1939, in which the meaning of the term "proselytism" was clarified as such:

> "1. Anyone engaging in proselytism shall be liable to imprisonment and a fine of between 1,000 and 50,000 drachmas; he shall, moreover, be subject to police supervision for a period of between six months and one year to be fixed by the court when convicting the offender.
>
> The term of imprisonment may not be commuted to a fine.
>
> 2. By 'proselytism' is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (eterodoxos), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.
>
> 3. The commission of such an offence in a school or other educational establishment or a philanthropic institution shall constitute a particularly aggravating circumstance."

More than ever, the Kokkinakis case is bearing fruit, especially in post-Soviet countries where the right to proselytize is more and more restricted, and criminalized. His case is a beacon in the night for all the lawyers who have defend the right of believers, whatever their religion, to share their beliefs with others.

The drama is that more and more illiberal governments in the CoE space and beyond turn a blind eye to that "disturbing court decision" and combat it in law and in practice.

Greek Dictator Metaxas' spirit is back

Unfortunately, the evil spirit of Dictator Metaxas is back on the European continent…

In April 2017, **Russia** banned the movement of Jehovah's Witnesses as extremist (!). Its 350 congregations and its headquarters have been declared illegal and their properties have been confiscated by the state. The 175,000 Jehovah's Witnesses in Russia may not exercise their freedom of religion anymore, and if they do they are prosecuted. Six of them have been in custody for several months, including a Danish citizen living in Russia with his wife and their children. He has been behind bars for 1 year and is currently being tried. (See the upcoming issue of Newsweek: http://www.newsweek.com/jehovahs-witnesses-939860 and HRWF Database of FORB Prisoners at http://hrwf.eu/forb/forb-and-blasphemy-prisoners-list/)

Metaxas' anti-proselytism laws have risen from the ashes in Russia under the name of the "Varovaya laws". They are applied in practice to members of non-Orthodox religions: not only to Jehovah's Witnesses are being prosecuted but also Protestants now.

More reading

Court judgment: https://bit.ly/2IMbRgw

World news Media: https://www.theworldnewsmedia.org/topic/30475-minos-kokkinakis/
Independent: https://ind.pn/2s2DGdW

Bektashi Community and Others v. FYROM

(nos. 48044/10, 75722/12, and 25176/13)

ECtHR Registrar Press Release (12.04.2017) - The applicants are the Bektashi Community, a religious association, and two of its members, Mr E. Brahimaj, an Albanian national, and Mr A. Sulejmani, a Macedonian national. They both live in 'the former Yugoslav Republic of Macedonia', in Tetovo and Gostivar. Mr E. Brahimaj holds the highest position in the hierarchy of the community.

The case concerned their complaint that, when new legislation entered into force in 2007, the domestic courts had refused to allow the association to retain its status as a religious organization and to accept its fresh application for registration.

The applicant association operated as an officially recognised religious organisation from 1993.

When new legislation on the legal status of churches, religious communities and groups entered into force in 2007, the association requested that the registration court recognise its continuing legal status. Its request was however refused on a formal ground, namely it had not been registered prior to 1998, but only listed in 2000. It then made a fresh application for registration under the new legislation, but in 2010 this request was also refused, mainly because the courts found that its name and doctrinal sources were identical to those of another already registered religious organization and that this could create confusion among believers.

Relying in particular on Article 9 (freedom of thought, conscience, and religion) and Article 11 (freedom of assembly and association) of the European Convention, the applicants complained about the domestic courts' decisions refusing to recognise the association as a religious organization or to register it anew.

Violation of Article 11 read in the light of Article 9 – in respect of the applicant association

Just satisfaction: 5,000 euros (EUR) (non-pecuniary damage) and EUR 2,000 (costs and expenses) to the applicant association.

Orthodox Ohrid Archdiocese v. FYROM: Grand Chamber Referral Request

HRWF (05.04.2018) - At its next meeting (Monday 9 April 2018), a panel of five judges will examine the following Grand Chamber referral request: "Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)" v. "the former Yugoslav Republic of Macedonia" (no. 3532/07), judgment of 16 November 2017 (https://www.strasbourgconsortium.org/common/document.view.php?docId=7459).

The applicant is a religious organization not granted official status at the national level. It appealed the refusal to register it to the Court, saying that the decision violated its rights

under Articles 9 (freedom of religion) and 11 (freedom of association), and that its members were put in disadvantaged positions in relation to members of recognized churches. In its judgment of 16 November 2017 found, unanimously, that Macedonia's refusal to register the association as a religious entity violated its rights under Article 11 interpreted in the light of Aritcle 9. "It could not be said that the reasons provided by the national authorities, taken as a whole, were 'relevant and sufficient' to justify the interference and the manner in which the domestic authorities refused the recognition of the applicant association as a religious organisation could not be accepted as necessary in a democratic society."

Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

ECtHR endorses German courts' decisions to take Twelve Tribes Church children into care because of caning

See full judgments of the European Court: https://bit.ly/2pwBo5z - https://bit.ly/2GaAu8x

CoE Registrar of the European Court (22.03.2018) - In today's Chamber judgments1 in the cases of Tlapak and Others v. Germany (nos. 11308/16 and 11344/16) and Wetjen and Others v. Germany (application nos. 68125/14 and 72204/14) the European Court of Human Rights held, unanimously, that there had been: no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The cases concerned the partial withdrawal of parental authority and the taking into care of children belonging to the Twelve Tribes Church (Zwölf Stämme), living in two communities in Bavaria (Germany). In 2012 the press reported that church members punished their children by caning. The reports were subsequently corroborated by video footage of caning filmed with a hidden camera in one of the communities. Based on these press reports, as well as statements by former members of the church, the children living in the communities were taken into care in September 2013 by court order. The proceedings before the European Court have been brought by four families who are members of the Twelve Tribes Church. They complain about the German courts' partial withdrawal of their parental authority and the splitting up of their families.

The Court agreed with the German courts that the risk of systematic and regular caning of children justified withdrawing parts of the parents' authority and taking the children into care. Their decisions had been based on a risk of inhuman or degrading treatment, which is prohibited in absolute terms under the European Convention.

The Court pointed out, moreover, that the German courts had given detailed reasons why they had had no other option available to them to protect the children. In particular, the parents had remained convinced during the proceedings that corporal punishment was acceptable and, even if they would have agreed to no caning, there had been no way of ensuring that it would not be carried out by other members of the community.

Therefore, the German courts, in fair and reasonable proceedings in which each child's case had been looked at individually, had struck a balance between the interests of the parents and the best interests of the children.

Principal facts

Both cases concerned four families who are members of the Twelve Tribes Church (Zwölf Stämme), living in two communities in Bavaria (Germany). The applicants in the first case are the parents of the Tlapak and Pingen families, who resided previously in the Wörnitz community. The applicants in the second case are the parents and children of the Wetjen and Schott families, who used to live together in the Klosterzimmern community.

In 2012 the press reported that the Twelve Tribes Church punished their children by caning. A year later a television reporter sent video footage, filmed with a hidden camera, to the local child welfare services and the Nördlingen Family Court, showing the caning of various children between the ages of three and 12.

At the request of the child welfare services, the family courts brought interim custody proceedings regarding all children in the Twelve Tribes communities, including the eight Tlapak, Pingen, Wetjen and Schott children. They based their decisions on the press reports as well as statements by former members of the church. The courts withdrew certain of the parents' rights, including making decisions on their children's place of residence, health and schooling, and in September 2013 the welfare services took the communities' children into care. Some of the children were placed in children's homes, others in foster families.

After the four families' children had been taken into care, the family courts initiated main proceedings concerning custody and commissioned psychologists' expert opinions.

In the proceedings before the European Court, the Wetjen and Schott families complained about the interim proceedings and the Tlapak and Pingen parents complained about the main proceedings. In both sets of proceedings, the courts concluded that caning constituted child abuse and that taking the children into care had been justified by the risk of the children being subjected to such abuse while living with their parents. The courts established this risk after having heard the parents, the children (except for two who were too young to be questioned), the children's guardians ad litem and representatives of the youth office. In the Tlapak and Pingen families' case, the courts also heard the psychologist who had been commissioned to draw up a report as well as the expert commissioned by the applicants. In the Wetjen and Schott families' case, which concerned the interim proceedings, the courts deferred the psychologist's conclusions to the main proceedings. The courts also gave detailed reasons why there was no alternative option to protecting the

children, other than taking them into care. In particular, during the proceedings the parents remained convinced that corporal punishment was a legitimate child-rearing method. Even if the parents themselves would agree to no caning, there was no way of ensuring that other members of the community would not carry out such punishment on their children. Both sets of proceedings ended in August 2015 and May 2014 with the Federal Constitutional Court's refusal to admit the applicants' complaints.

The Tlapak parents moved to the Czech Republic in 2015 and have been living there since, without their son, who remained in care. The court order concerning the Pingens'

son was temporarily lifted in December 2014 because he was just one year and six months old, and was still being breastfed.

The Pingens other children, two daughters, remained in foster care. The Schotts' eldest daughter returned to the community in December 2013 as she was 14 years' old and no longer at risk of being caned. The Schotts' remaining two daughters and the Wetjens' son remained in care at the end of the interim proceedings.

Complaints, procedure and composition of the Court

Relying in particular on Article 8 (right to respect for private and family life), the applicants complained about the proceedings to partly withdraw parental authority and separate the parents from their children. They also alleged that the relevant proceedings (the interim proceedings for the Wetjen and Schott families and the main proceedings for the Tlapak and Pingen families) had been unreasonably long.

The applications were lodged with the European Court of Human Rights on 24 February 2016 (Tlapak and Others) and 17 October and 14 November 2014 (Wetjen and Others).

The judgments were given by a Chamber of seven judges, composed as follows:

Erik Møse (Norway), President,
Angelika Nußberger (Germany),
André Potocki (France),
Yonko Grozev (Bulgaria),
Síofra O'Leary (Ireland),
Gabriele Kucsko-Stadlmayer (Austria),
Lətif Hüseynov (Azerbaijan),
and also Milan Blaško, Deputy Section Registrar.

Decision of the Court

Length of the proceedings

The Court rejected as inadmissible the Tlapak and Pingen parents' complaint that the main custody proceedings had been excessively long. The proceedings had taken one year and 11 months, during which time the Family Court could not be held responsible for any particular delays. On the contrary, the court had been active: it had commissioned a psychologist's opinion, heard the applicants, their children and further witnesses and led negotiations for a settlement between the applicants and the youth office.

In view of the Government's declaration recognising that there had been a violation of Article 8 concerning the length of the interim proceedings, namely from September 2013 to May 2014, in the Wetjen and Schott families' cases and proposing compensation, the Court decided to strike out of its list of cases those parts of the applications.

Withdrawal of parental authority

First the Court found that the decisions to withdraw some parental rights had constituted an interference with the applicants' right to respect for their family life. The decisions,

based in national law and on the likelihood that the children would be caned, had aimed at protecting the "rights and freedoms" of the children.

Furthermore, the Court was satisfied that the decision-making process in the cases had been reasonable. The applicants, assisted by counsel, had been able to put forward all their arguments against withdrawal of parental authority. The courts had had the benefit of direct contact with all those concerned and had diligently established the facts. Even though the Tlapaks and Pingens had withdrawn their consent for the psychologists' opinion to be used as evidence in the proceedings, the Court considered that it had been justified for the German courts to use the opinion given the general interest at stake, namely the effective protection of children in family court proceedings. It also found it acceptable that the family courts had not awaited the conclusions of the psychologist concerning the Wetjens and the Schotts in the interim proceedings, given the need for particular speediness in such proceedings.

Although taking children into care and splitting up a family constituted a very serious interference with the right to respect for family life and should only be used as a last resort, the domestic courts' decisions had been based on a risk of inhuman or degrading treatment, which is prohibited in absolute terms under the European Convention. The courts had taken an individualised approach, taking into account whether each child was of an age where they were at risk of corporal punishment. The courts had also given detailed reasons why there had been no other options available to protect the children and the Court agreed with those conclusions. Moreover, the proceedings had concerned a form of institutionalised violence against minors, considered by the applicant parents as an element of the children's upbringing. Consequently, any assistance by the youth office, such as training the parents, could not have effectively protected the children, as corporally disciplining the children had been based on their unshakeable dogma.

Therefore, based on fair proceedings, the domestic courts had struck a balance between the interests of the applicant parents and the best interests of the applicant children which did not fall outside the domestic authorities' wide room for manoeuvre ("margin of appreciation") when assessing the necessity of taking a child into care.

Just satisfaction (Article 41)

In the case of Wetjen and Others, the Court, taking note of the Government's declaration recognising that there had been a violation of Article 8 as concerned the length of the interim proceedings, directed that Germany was to pay the Wetjens 9,000 euros (EUR) and the Schotts EUR 8,000 in respect of pecuniary and non-pecuniary damage as well as costs and expenses.