# BELGIUM : Burkini or not in swimming-pools? Strasbourg must decide

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### BANNING BODY-COVERING SWIMWEAR: THE HUMAN RIGHTS CENTRE SUBMITTED A THIRD PARTY INTERVENTION TO THE ECTHR IN MISSAOUI AND AKHANDAF V. BELGIUM

**By Cathérine Van de Graaf**

Human Rights Center of Ghent University (28.10.2022) – https://bit.ly/3DkWwAX – On the 12th of September, the Human Rights Centre[1] (HRC) of Ghent University (Belgium) submitted a third party intervention (TPI) before the European Court of Human Rights (ECtHR or the Court) in the communicated case of Missaoui and Akhandaf v. Belgium, after being granted leave to intervene by the President of the Court's Third Section.

In the case, the Court is asked whether the prohibition of body-covering swimwear in a public swimming pool in Antwerp constitutes indirect discrimination based on religion under the European Convention on Human Rights (ECHR or Convention). In our submission to the Court, we highlight relevant elements of the Belgian legal and societal context as well as possible pathways for development of the Court's reasoning, based on our Centre's expertise on the topic.

***Facts of the case***

With this application the Court is asked to rule on the prohibition of body-covering swimwear imposed on the basis of the police regulations of the city of Antwerp (Belgium). The applicants are two women of Muslim faith who wished to swim in a swimming pool in the city but were denied entrance.

On the 22nd of September 2017, they first lodged a motion of cessation against the regulation before the president of the Antwerp Court of First Instance. The motion was based on the Decree of the 10th of July 2008 on the framework of the Flemish policy of the equal opportunities and treatment and the Law of

the 10th of May 2007 to combat certain forms of discrimination. Their request was rejected by a judgment of 18th of December 2018. Then, on November 23, 2020, the Antwerp Court of Appeal dismissed the appeal lodged by the applicants against this judgment. Finally, on the 22nd of April 2021, a lawyer at the Court of Cassation gave a negative opinion on the chances of an appeal against the judgment of the Court of Appeal.

As such, the applications exhausted the domestic remedies and the case was submitted to the Court on the 22nd of October 2022. Relying on Article 14 in conjunction with Article 9 of the Convention, the applicants complain of indirect discrimination based on religion.

***Legal and societal context***

In the third party intervention, we first highlighted several relevant elements of the legal and societal context of the case of which the Court might not be aware. This includes the situation regarding bans on body-covering swimwear in swimming pools in Belgium, the broader context of other bans on religious signs/dress in Belgium, the broader context of hostility against Muslims in Belgian society, and the treatment of bans on religious signs/dress in international human rights law.

***Bans on body-covering swimwear in swimming pools in Belgium***

First, we referred to a study from 2017 by the HRC, focusing on Flanders (the Dutch-speaking Northern part of Belgium),

which revealed that regulations concerning the wearing of body-covering swimwear were commonplace in public swimming pools. Among the 128 pools about which information could be obtained, only 30 responded that they allowed or would allow body-covering swimwear.

In the 76 swimming pools where ‘burkinis’ were not allowed, interviewees were asked what the reason was for the bans. 50 interviewees replied to that question by stating reasons such as hygiene (36 mentions), water quality (3 mentions), safety (13 mentions), majority morals favouring uncovering (7 mentions), the burkini being offensive (3 mentions) as well as concepts of neutrality, integration, tradition, and gender equality (each 1 mention).

We also mentioned the July 2017 advice of the Belgian inter-federal equality body (Unia) on body-covering swimwear. The advice states that a ban on body-covering swimwear is discriminatory against those who wear such swimwear for religious reasons, and that it affects individual autonomy and religious freedom. Thus far, three local ‘burkini bans’ have been challenged in court. The Court of First Instance of Ghent held in two judgments of July 2018 that such a ban violates the prohibition of discrimination based on religion.

One of these judgments was upheld when challenged before the Ghent Court of Appeal, the other was never challenged. However, the Court of First Instance of Antwerp ruled in a judgment of December 2018 that an implicit ‘burkini’ ban in a public swimming pool in the city of Antwerp did not amount to an indirect discrimination on grounds of religion. This diverging case law by courts in Ghent and Antwerp confronts local governments with legal uncertainty which will be further

clarified below.

### *Other bans on religious signs/dress and hostility against Muslims in Belgian society*

In Belgium, bans on veiling are "spreading like an oil spill" across the various sectors of society: when confronted with any manifestation of Islamic veiling, banning has become the default option in Belgian society. This way, veiling – whether it is in the form of a headscarf or as part of a swimsuit – is de facto denormalized and almost automatically problematized.

The ban on body-covering swimwear case is an example of a particularly disturbing trend where Muslims wearing a hijab are denied access to services and facilities which other persons can make use of without any impediments. We cite cases where women were refused to enter an ice-cream bar, the terrace of a restaurant, the gym, a bowling alley and now a public swimming pool because they wore religious clothing.

This negative attitude seems to have resulted in a growth of explicit and measurable physical and verbal attacks toward Muslims. These hate crimes are often heavily gendered. In a study conducted by the EU Fundamental Rights Agency, out of all Muslim respondents in Europe (10 527), 31% of Muslim women who at least sometimes wear religious clothing in public reported experiencing harassment 12 months before the survey.

The decision-making processes over the 'burkini' often took place at a local level with often very limited actors involved

where personal attitudes can easily play a role (as shown by this study). We thus invited the Court to be mindful of how the myriad of above-mentioned bans facilitate and legitimatise Islamophobic discourse by the general public.

## *Bans on religious signs/dress in international human rights law*

We submitted that, in 2016, when multiple French municipalities banned body-covering swimsuits on their beaches, the United Nations Office of the High Commissioner for Human Rights expressed its support for the French Conseil d'État's decision to overturn the ban in one of those municipalities, and urged other municipalities to repeal their bans as well, calling them 'a grave and illegal breach of fundamental freedoms' and 'highly discriminatory'.

Additionally, we mentioned the clear consensus among UN treaty bodies that the practice of bans on religious dress in public spaces, particularly those affecting Muslim women, reveals problematic attitudes towards Muslim women in Belgium, and violate those women's right to freedom of religion as well as right to non-discrimination. We also noted that – on a global level – bans on body-covering swimwear remain few. They occur almost exclusively in only three European countries – France, the Netherlands and Belgium – and even in those countries, they are only implemented on an individual basis, by a minority of swimming pools and municipalities.

## *Legal Reasoning under the European Convention on Human Rights*

We respectfully submitted that (explicit and implicit) bans on body-covering swimwear in public swimming pools are not in conformity with Article 9 ECHR taken alone and read in conjunction with Article 14 ECHR. Since it is clear that Muslim women wear body-covering swimwear for religious reasons, there can be no doubt that the issue falls within the ambit of Article 9 ECHR. In view of the limited scope of our intervention, we particularly focused on the context of legal uncertainty that surrounds bans on body-covering swimwear bans, which impacts the legality test under Article 9 ECHR, and the discriminatory nature of these bans.

We stated that the Court has held on multiple occasions that only a standard stated with sufficient precision to enable a person to regulate their conduct can be considered a 'law'. In the context at hand, vague provisions are not uncommon and – as the present case also demonstrates – their interpretation or application to a concrete case is often left to the person working at the ticket desk. We discussed that, if people working within the swimming pool have doubts about how certain rules should be applied, a person visiting the swimming pool will *a fortiori* be unable to regulate their conduct.

First, we argued that a general policy can constitute a case of indirect discrimination if it causes 'disproportionately prejudicial effects' which discriminate against a group, in spite of its ostensibly neutral phrasing. Some swimming pool regulations do explicitly mention body-covering swimwear, or even 'burkini's, as banned, whilst dress code regulations in other swimming pools solely contain a more generally formulated dress code, from which a ban on body-covering swimwear is subsequently deduced. In the present application, the latter is the case.

Hence, whilst Muslim women are not denied entry to swimming pools on the grounds of their religion as such, the swimming

pool regulations do institute a difference in treatment on account of the prejudicial effect which they inflict onto them. Here, we outlined that Muslim women (who wear body-covering swimwear) constitute a vulnerable group, because they clearly appear today as a minority group that is suffering 'from widespread stigma and exclusion'. We submit that the jurisprudence on vulnerable groups should therefore apply, and 'very weighty reasons' should be required to justify a prima facie case of discrimination in the exercise of the freedom of religion.

We discussed the objectives that have been relied upon by municipalities according to the abovementioned study carried out by Unia and submit that none of these can be qualified as sufficiently weighty reasons capable of justifying a blanket (implicit) ban on body-covering swimwear in swimming pools.

First, we stated that, in spite of their legitimacy, neither hygiene concerns, nor concerns pertaining to the alleged complexity of verifying the correct use constitute sufficiently weighty reasons in this respect.

Then, we mentioned that, in light of the current absence of any concrete evidence in this regard, the argument regarding the protection of safety remains purely hypothetical and consequently does not constitute a (sufficiently weighty) reason capable of justifying a ban on body-covering swimwear.

We reminded the Court that, in the broader context of the neutrality of public services, it generally did not consider the behaviour of the users to pose a potential threat to the neutrality of the State. As certain swimming pools have invoked the fact that body-covering swimwear might be

considered offensive by fellow swimmers by way of justification, we mentioned that the Court has already indicated that the wearing of a burkini is an instrument that actually enhances the integration of Muslim women. We therefore submit that the argument of 'living together' cannot be legitimately relied upon in order to justify a blanket ban on body-covering swimwear.

Consequently, we respectfully asked the Court to not to accept (as in previous case law) the aim of gender equality when it is not accompanied by concrete evidence of the alleged oppression of women, and to allow women to regulate their own appearance in the swimming pool.

We submitted that the present case offers a perfect opportunity for the Court to engage with intersectionality, which is increasingly recognized as a necessary dimension for supranational human rights bodies to engage with. The situation of Muslim women who prefer to wear body-covering swimwear in a country such as Belgium exemplifies the relevance of intersectionality analysis. Their gender, religion and race interact in a way that places them in a unique position and subjects them to a variety of vulnerabilities at all levels of society. As such, legal analyses that artificially limit their cases to the religious aspect consequently ignore the ways in which 'burkini bans' impact Muslim women not just based on their religion, but on its specific intersection with their gender and race.

The full third party intervention can be found on the website of the Human Rights Centre.

[1] For the Human Rights Centre, the academic team consisted

of Dr. Pieter Cannoot, Dr. Sarah Ganty, Dr. Cathérine Van de Graaf, Tobias Mortier and Sarah Schoentjes.

**Further reading about FORB in Belgium on HRWF website**