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Freedom of expression in a religious context

Conviction of author and editor for article's remarks on Islam was excessive, breached their freedom of expression

Registrar of the European Court (05.12.2019) - www.echr.coe.int - In today's Chamber judgment in the case of Tagiyev and Huseynov v. Azerbaijan (application no. 13274/08) 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 the applicants' conviction for inciting religious hatred and hostility with their remarks on Islam in an article they had published in 2006.

The Court found in particular that the national courts had not justified why the applicants' conviction had been necessary when the article had clearly only been comparing Western and Eastern values, and had contributed to a debate on a matter of public interest, namely the role of religion in society.

Indeed, the courts had simply endorsed a report finding that certain remarks had amounted to incitement to religious hatred and hostility, without putting them in context or even trying to balance the applicants' right to impart to the public their views on religion against the right of religious people to respect for their beliefs.

Principal facts

The applicants, Rafig Nazir oglu Tagiyev and Samir Sadagat oglu Huseynov, are Azerbaijani nationals who were born in 1950 and 1975 respectively. Mr Tagiyev, now deceased, lived in Baku and was a well-known writer and columnist. Mr Huseynov lives in

Lankaran (Azerbaijan) and used to work as editor-in-chief of Sanat Gazeti (Art Newspaper).

The case concerns the applicants' conviction for the publication of an article in November 2006 in Sanat Gazeti as part of a series written by Mr Tagiyev comparing Western and Eastern values. The article, entitled "Europe and us", led to criticism by various Azerbaijani and Iranian religious figures and groups and to a religious fatwa calling for the applicants' death.

Shortly after publication of the article, the applicants were prosecuted for inciting religious hatred and hostility. A district court ordered the applicants' detention pending trial.

The investigator in charge of the case ordered a forensic linguistic and Islamic assessment of the article. The resulting report characterised certain remarks, in particular those concerning morality in Islam, the Prophet Muhammad, Muslims living in Europe and Eastern philosophers, as incitement to religious hatred and hostility.

Endorsing the conclusions of that report, the domestic courts found the applicants guilty as charged in May 2007 and sentenced them to three and four years' imprisonment respectively. All their subsequent appeals were unsuccessful.

The applicants were released in December 2007 following a presidential pardon, having spent more than one year in detention.

Complaints, procedure and composition of the Court

Relying in particular on Article 10 (freedom of expression), the applicants alleged that their criminal conviction had been unjustified and excessive.

The application was lodged with the European Court of Human Rights on 7 March 2008.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika Nußberger (Germany), President, Gabriele Kucsko-Stadlmayer (Austria), Ganna Yudkivska (Ukraine), Síofra O'Leary (Ireland), Mārtiņš Mits (Latvia), Lətif Hüseynov (Azerbaijan), Lado Chanturia (Georgia),

and also Claudia Westerdiek, Section Registrar.

Decision of the Court

First, the Court noted that there was no dispute that the applicants' criminal conviction had amounted to an interference with their right to freedom of expression. That interference had had a basis in national law, Article 283 of the Criminal Code, and had aimed at protecting the rights of others and preventing disorder.

The Government had argued that the applicants' conviction had also met a pressing social need as their article had been an abusive attack on Islam and had offended and insulted religious feelings.

The Court, on the other hand, found that it was clear from reading the whole text of the article that it had mainly been a comparison of Western and European values and should therefore be examined not only in the context of religious beliefs, but also in that of a debate on a matter of public interest, namely the role of religion in society.

Furthermore, it found that the national courts had failed to justify the applicants' conviction with "relevant and sufficient" reasons. The courts had merely endorsed the forensic report, without giving any explanation as to why certain remarks in the article had been singled out as constituting incitement to religious hatred and hostility. The report had essentially provided a legal characterisation of those remarks, thus going far beyond resolving language and religious issues. Such a situation was unacceptable for the Court, which stressed that all legal matters should be resolved exclusively by the courts.

Moreover, the courts had not assessed the remarks in context. They had neither considered the public interest nor the author's intention, and in particular whether the use of provocation or exaggeration had been justified.

Indeed, in their decisions convicting the applicants, the courts had not even tried to balance the applicants' right to impart to the public their views on religion against the right of religious people to respect for their beliefs.

Lastly, the Court found that there had been no justification for the imposition of imprisonment on the applicants. Such a severe sanction could dissuade the press from openly discussing religion and its role in society, and generally have a chilling effect on freedom of expression in Azerbaijan.

The Court concluded that the applicants' conviction had been disproportionate and had therefore not been "necessary in a democratic society", in violation of Article 10.

Just satisfaction (Article 41)

The Court held that Azerbaijan was to pay Mr Tagiyev's wife and Mr Huseynov 12,000 euros (EUR) each in respect of non-pecuniary damage and EUR 850 in respect of costs and expenses.

An Afghan asylum-seeker converted to Christianity should not be deported

Switzerland would breach the Convention by returning to Afghanistan an Afghan convert to Christianity

Registrar of the ECHR (05.11.2019) - In today's Chamber judgment 1 in the case of A.A. v. Switzerland (application no. 32218/17) the European Court of Human Rights held, unanimously, that there would be:

a violation of Article 3 of the European Convention on Human Rights in the event of the applicant's return to Afghanistan.

The case concerned the removal from Switzerland to Afghanistan of an Afghan national of Hazara ethnicity who was a Muslim convert to Christianity.

The Court noted that according to many international documents on the situation in Afghanistan, Afghans who had become Christians or who were suspected of conversion

would be exposed to a risk of persecution by various groups. It could take the form of State persecution and result in the death penalty.

The Court noted that, while the authenticity of the applicant's conversion in Switzerland had been accepted by the Federal Administrative Court, it had not carried out a sufficient assessment of the risks that could be personally faced by the applicant if he were returned to Afghanistan. The Court found in particular that the file did not contain any evidence that the applicant had been questioned about the everyday practice of his Christian faith since his baptism in Switzerland and how he could, if returned, continue to practise it in Afghanistan, in particular in Kabul, where he had never lived and where he said that he would be unable to rebuild his future life.

Principal facts

The applicant is an Afghan national who claims to have been born in 1996 and lives in the Canton of Ticino.

In March 2014 A.A. arrived in Switzerland. He applied for asylum and stated that he had left Afghanistan because of the lack of security in that country and his conversion from Islam to Christianity.

In February 2015 the State Secretariat for Migration (SEM) rejected his application, noting that the grounds for asylum were not credible.

In October 2016 the Federal Administrative Court confirmed the SEM's decision on the credibility of the asylum grounds, but found that the applicant's conversion in Switzerland was genuine. It was of the view that the applicant would not be exposed to serious harm in Afghanistan as a result of his conversion and ordered his removal to that country. It further held that, while the complainant could not be returned to his region of origin (Ghazni province), he would have an internal protection alternative in Kabul, where his uncles and cousins lived. His conversion to Christianity, which had occurred in Switzerland, was not a decisive factor, as it was not known to his relatives in Kabul.

In May 2017 the duty judge decided to apply Rule 39 of the Court's Rules of Court and asked the Swiss government not to deport A.A. to Afghanistan during the proceedings before the European Court of Human Rights.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), A.A. alleged that he would be subjected to ill-treatment if returned to Afghanistan.

The application was lodged with the European Court of Human Rights on 27 April 2017.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul Lemmens (Belgium), President, Georgios A. Serghides (Cyprus), Paulo Pinto de Albuquerque (Portugal), Helen Keller (Switzerland), Alena Poláčková (Slovakia), María Elósegui (Spain), Erik Wennerström (Sweden),

and also Stephen Phillips, Section Registrar.

Decision of the Court

Article 3

The Court noted that according to many international documents on the situation in Afghanistan, Afghans who had become Christians or who were suspected of conversion would be exposed to a risk of persecution by various groups. It could take the form of State persecution and result in the death penalty.

The Court found that in its judgment of 21 October 2016 the Federal Administrative Court, the only judicial body to have examined the case, had not looked at the applicant's practice of his Christian faith since his baptism in Switzerland or how he could, if returned, continue to practise it in Afghanistan. The court had merely presumed that he would have an internal protection alternative by going to live in Kabul with his uncles and cousins, on the basis that his conversion to Christianity was not known to his relatives there.

In the Court's view this argument did not stand up to serious scrutiny of the specific circumstances of the case. The Federal Administrative Court should have carried out its examination by looking at how the applicant practised his Christian faith in Switzerland and could continue to practise it in Afghanistan, for example by referring that assessment back to the first-instance authority or by submitting a list of relevant questions to the applicant; but it had not done so.

In the Court's view, the Federal Administrative Court's explanation that the applicant's return to Kabul would not be problematic because he had not spoken of his conversion to Christianity to his relatives in Afghanistan, but that he had only shared his beliefs with those closest to him, implied that the applicant would nevertheless be obliged, in the event of his return, to change his social conduct by confining it to a strictly private level. He would have to live a life of deceit and could be forced to renounce contact with other Christians. The Court further noted that, in a leading judgment published shortly after the judgment in the present case, the Federal Administrative Court had itself conceded that the daily dissimulation and negation of one's inner beliefs in the context of Afghan society could, in certain cases, be characterised as a form of unbearable mental pressure.

Lastly, the Court observed that the applicant belonged to the Hazara community, which continued to face a degree of discrimination in Afghanistan. Even though the applicant had not specifically relied on his ethnic origin in support of his asylum application and this factor was not decisive for the outcome of the case, the Court could not completely overlook this aspect, which had not been referred to at all by the domestic courts. The Court noted that the Federal Administrative Court's comparison of the situation in Afghanistan to that in central Iraq appeared particularly problematic as it was not substantiated by international reports on the experience of converts to Christianity in Afghanistan.

The Court found that the Federal Administrative Court, while accepting that the applicant, of Hazara ethnicity, had undergone a conversion from Islam to Christianity while in Switzerland and that he could therefore be regarded as belonging to a group that was exposed to a risk of ill-treatment if returned to Afghanistan, had not engaged in a sufficiently serious examination of the consequences of the applicant's conversion. Consequently, there would be a violation of Article 3 if the applicant was returned to Afghanistan.

Just satisfaction (Article 41)

As the applicant had not claimed just satisfaction, the Court took the view that there was no need to make any award on this basis.

The judgment is available only in French.

1. 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.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

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ECHR / AZERBAIJAN: Conscientious objection to military service: Jehovah's Witnesses win their case

Lack of civilian service as an alternative to military service precluded recognition of conscientious objection, in breach of the Convention.

Registrar of the European Court (17.10.2019) - In today's Chamber judgment 1 in the case of Mushfig Mammadov and Others v. Azerbaijan (application no. 14604/08) the European Court of Human Rights held, unanimously, that there had been: a violation of Article 9 (right to freedom of conscience, thought and religion) of the European Convention on Human Rights.

The case concerned the applicants' refusal on religious grounds to serve in the army.

The Court observed that the criminal prosecutions and convictions of the applicants on account of their refusal to perform military service had stemmed from the fact that there was no alternative service system under which individuals could benefit from conscientious objector status. That amounted to an interference which had not been necessary in a democratic society.

The case highlighted an issue relating to the lack of legislation on civilian service as an alternative to military service in Azerbaijan. The enactment of such a law corresponded to a commitment entered into by Azerbaijan on its accession to the Council of Europe and was also a requirement under the country's own Constitution.

Principal facts

The applicants, Mushfig Faig oglu Mammadov, Samir Asif oglu Huseynov, Farid Hasan oglu Mammadov, Fakhraddin Jeyhun oglu Mirzayev and Kamran Ziyafaddin oglu Mirzayev, are five Azerbaijani nationals who were born in 1983, 1984, 1987, 1993 and 1994 respectively and live in Baku and Ganja (in the case of Mr Fakhraddin Jeyhun oglu Mirzayev) (Azerbaijan). All five state that they are Jehovah's Witnesses.

The applicants, who are all of age to be called up for military service, informed their local military commissariats or recruitment offices that they wished to be exempted from such service and, in the case of most of them, to perform alternative civilian service. They were all prosecuted under Article 321.1 of the Penal Code and sentenced to imprisonment. Their appeals were dismissed.

Complaints, procedure and composition of the Court

Relying on Article 9 (right to freedom of conscience, thought and religion), the applicants complained about their convictions for having refused to serve in the army. Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), the first applicant alleged that his second conviction amounted to a violation of that provision.

The applications were lodged with the European Court of Human Rights on 7 March 2008, 18 July 2011, 3 December 2013 and 21 August 2015.

1. 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.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution. Judgment was given by a Chamber of seven judges, composed as follows:

Angelika Nußberger (Germany), President, Ganna Yudkivska (Ukraine), Yonko Grozev (Bulgaria), Síofra O'Leary (Ireland), Mārtiņš Mits (Latvia), Lətif Hüseynov (Azerbaijan), Lado Chanturia (Georgia), and also Claudia Westerdiek, Section Registrar.

Decision of the Court

Article 9

The Court observed that the applicants' objection to performing military service had been based on sincere religious convictions which had come into serious and insuperable conflict with their military service obligations.

The Court reiterated that freedom of thought, conscience and religion was one of the cornerstones of a "democratic society" within the meaning of the Convention. That freedom presupposed, inter alia, the liberty to adhere, or not to adhere, to a religion and the right to decide whether or not to practice it. According to its established case-law, the Court allowed States Parties some margin of appreciation to assess the existence and extent of the necessity of interference. The Court's task was to ascertain whether the measures taken at the domestic level were justified in principle and proportionate.

The Court noted that when Azerbaijan had acceded to the Council of Europe it had undertaken to enact, within two years of its accession, a law on alternative service in conformity with European standards. Furthermore, Article 76 § 2 of the Azerbaijani Constitution authorised persons whose convictions were incompatible with the performance of active military service to carry out alternative service in place of that compulsory service. The Court noted, however, that no law had yet been enacted on an alternative service.

The criminal prosecutions and convictions of the applicants on account of their refusal to perform military service had stemmed from the fact that there was no alternative service system under which individuals could benefit from conscientious objector status, and amounted to an interference which had not been necessary in a democratic society. There had therefore been a violation of Article 9 of the Convention.

Article 4 of Protocol No. 7

The complaint under that provision was out of time, since it had been lodged more than six months after 29 December 2010, the date of the last decision given by the Supreme Court dismissing the appeal on points of law lodged by Mr Mushfig Faig oglu Mammadov. That complaint therefore had to be rejected.

Article 46

The Court observed that the present case highlighted an issue relating to the lack of legislation on civilian service as an alternative to military service in Azerbaijan. The enactment of such a law corresponded to a commitment entered into by Azerbaijan on its accession to the Council of Europe, and was also a requirement under Article 76 § 2 of its Constitution.

2 The Court considered it necessary to point out that such a situation in principle called for legislative action by the State in order to fulfil its obligations to enable the applicants and other persons in the same situation to benefit from the right to conscientious objection.

Just satisfaction (Article 41)

The Court held that Azerbaijan was to pay 5,000 euros (EUR) to the first applicant, EUR 8,400 to the second applicant, EUR 10,800 to the third applicant, EUR 9,600 to the fourth applicant and EUR 3,500 to the fifth applicant in respect of non-pecuniary damage, and EUR 161 to the first applicant, EUR 430 to the second applicant, EUR 195 to the third applicant, EUR 83 to the fourth applicant and EUR 100 to the fifth applicant in respect of costs and expenses.

This judgment is only available in French at:
https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-197066%22%5D%7D

Ruling about a case involving the True Orthodox Church and Athens Mosque

A ban on access to a place of worship constructed in a public space in breach of urban planning regulations was justified.

Registrar of the European Court (10.10.2019) - In its decision in the case of Pantelidou v. Greece (application no. 36267/19) the European Court of Human Rights has unanimously declared the application inadmissible, noting that it was manifestly ill-founded.

The case concerned Ms Pantelidou's not being able to have access to a church that had been opened in a public green space by the congregation of the "True Orthodox Christians" in breach of the urban planning code. The site was earmarked for the construction of the Athens Mosque under that code. The applicant alleged a violation of her right to freedom of religion (Article 9).

The Court pointed out that the public interest of rational urban development could not be superseded by the liturgical needs of a religious community which had arbitrarily encroached on the public sphere in order to establish and operate a place of worship in breach of the relevant urban development plan. Therefore, having regard to the margin of appreciation enjoyed by States in the area of regional and urban planning and development, the Court held that the impugned measure had been justified in principle

and been proportionate to the aim pursued (preventing public disorder and protecting the rights and freedoms of others).

The decision is final.

Principal facts

The applicant, Aikaterini-Veatriki Pantelidou, is a Greek national who was born in 1951 and lives in Athens.

In September 2016 the congregation of the "True Orthodox Christians" (adhering to the Julian calendar for religious festivals) appropriated a public green space belonging to the Greek national navy and transformed it into a place of worship.

In November 2016 the police evacuated the premises for the purposes of constructing the Athens Mosque, work on which had just begun. Access to the church attended by Ms Pantelidou was prohibited.

In December 2016 Ms Pantelidou and other adherents of the group brought an action for annulment, but their case was dismissed by the Council of State.

The church was demolished in August 2018.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 4 July 2019.

Ms Pantelidou complained of an infringement of her right as secured under Article 9 (right to freedom of thought, conscience and religion), considering that she had been prevented from acceding to her place of worship.

The decision was given by a Committee of three judges, composed as follows:

Krzysztof Wojtyczek (Poland), President, Armen Harutyunyan (Armenia), Pere Pastor Vilanova (Andorra), and also Renata Degener, Deputy Registrar.

Decision of the Court

Article 9 (right to freedom of thought, conscience and religion)

In its decision the Council of State had pointed out that the "True Orthodox Christians" church was installed and operating in a publicly-owned area, in a building which had been erected by the Greek National Navy, and that those premises had been arbitrarily occupied by persons unknown between June and September 2016.

Furthermore, some of the National Navy installations had already been expropriated by the State with a view to building the Athens Mosque, in accordance with the law. Work had already started on the Mosque when the building had been converted into a church by the congregation in question, in breach of the provisions governing the urban planning status of the neighbourhood.

The Court ruled that the public interest of rational urban development could not be superseded by the liturgical needs of a religious community which had arbitrarily encroached on the public sphere in order to establish and operate a place of worship inconsistent with the urban development plan. Consequently, having regard to the margin of appreciation enjoyed by States in the area of urban planning and development,

the Court held that the impugned measure had been justified in principle and been proportionate to the aim be pursued.

The applicant was therefore manifestly ill-founded (Article 35 §§ 3 (a) and Article 4 of the Convention).

The decision is available only in French: https://bit.ly/2puawpw

See as well Law & Religion in UK: https://bit.ly/2VORR3Q

In short, you can't merely take over someone else's building, turn it into a church, then plead Article 9 when you're turfed out.

Property disputes and Orthodoxy: Orlović *and* Metropolitan Church of Bessarabia

By Frank Cranmer

Law & Religion UK (08.10.2019) - https://bit.ly/2ATS4Jy - Though the Iron Curtain came down in 1989/90 and the civil wars in the former Yugoslavia ended in the mid-1990s, outstanding property disputes between rival religious groups arising out of adherence to different jurisdictions or previous dispossession continue to take up the time of the courts – as the following two recent cases show.

In ***Metropolitan Church of Bessarabia and Nativity of the Virgin Mary Parish v The Republic of Moldova*** **[2019] ECHR 658** [*in French*], the Nativity Parish had sought recognition in 2005 of its ownership of a plot of land in Mihalaşa to finalise the construction of a church. The court had acknowledged the Metropolitan Church's right of ownership and the judgment had become final in November 2005.

According to the applicants, Act No. 979 of 1992 on cults, in force at the material time, was not explicit about the property rights of the Church as opposed to those of the Parish. In 2006 the land was registered to the Metropolitan Church and the Parish obtained a planning certificate to construct the church [1-9]. In 2009, however, the Assumption of the Virgin Mary Parish of the rival Orthodox Church of Moldova (under the Moscow Patriarchate) succeeded in overturning those decisions in the Bălţi Court of Appeal, which ordered a re-examination of the case [10-21]. The applicants complained that the Court of Appeal's admission of the application for review and the annulment of the earlier judgment was, in fact, a disguised and improper appeal [22], while the Government argued that the purpose of the review had been to correct a miscarriage of justice [23].

The Court noted that the final judgment in 2005 in favour of the Metropolitan Church had been annulled after the admission of the application for revision from the Orthodox Church of Moldova. However, the domestic law at the material time had not provided such a ground for review, it did not appear that another ground had been raised, and the lower court had rejected the request because it had not revealed any of the grounds provided in Article 449 of the Code of Civil Procedure [25]. The Court of Appeal, however,

had held that a registration certificate alleging ownership of the disputed land by the Assumption Parish was a new fact justifying a review [26].

It was clear both from law and practice that only new facts of essential importance to a case could justify a retrial. The certificate presented as a "new fact" had a different registration number and had apparently related to a different parcel of land, nor had the Bălţi Court of Appeal explained the relevance and importance of the alleged "new fact". The certificate was not, therefore, a genuine piece of new evidence with which to resolve the case [27].

In reality, the review proceedings had indeed been a "disguised appeal" intended to obtain a new examination rather than the proper review provided for in the Code of Civil Procedure [29]. There had therefore been a violation Article 1 of Protocol No 1 ECHR (respect for property) [30]. As to the complaint under Article 6 (fair trial), there had been a violation in relation to the Nativity Parish, but not in relation to the Metropolitan Church itself [32].

In ***Orlović and Others v Bosnia and Herzegovina*** **[2019] ECHR 653**, Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, which put an end to the 1992–95 war, guaranteed the free return of refugees to their homes and restitution of their property. To comply with it, the Republika Srpska (one of the two constituents of Bosnia and Herzegovina) enacted the Restitution of Property Act in 1998. Under it, the Commission for Real Property Claims of Displaced Persons and Refugees ("CRPC") had granted the applicants full restitution in 1999, confirmed by a further decision of the Ministry for Refugees and Displaced Persons in 2001. Both were final and enforceable; but when the land was returned, a plot on which a church had been built was not.

The applicants failed in their administrative claim for repossession and in a civil suit against the Serbian Orthodox Church. In the meantime, in 2004 the Orthodox parish obtained planning permission for the church. The applicants complained that they had been prevented from using their property, contrary to Article 1 of Protocol No. 1 ECHR (protection of property), because the church – built unlawfully – had not been removed from their land and that the domestic courts' judgments in their civil claim had violated Article 6 (fair trial).

The Court noted that there was no dispute that the applicants owned the property and that, as internally displaced persons, they had been entitled under Annex 7 to the Framework Agreement to have their land restored. That right had been established in the decisions of 1999 and 2001 but the authorities had not implementing them, nor had the Government had given any justification for the authorities' inaction. There had therefore been a violation of A1P1 and, given that finding, there was no need to examine the complaint under Article 6.

Further, to comply with Article 46 (binding force and execution of judgments), the state had to enforce the CRPC's and the Ministry for Refugees' decisions – including, in particular, *the removal of the church from the applicants' land* – without further delay and at the latest within three months of the judgment becoming final. The first applicant was awarded €5,000 and the others €2,000 each in respect of pecuniary damage. Judge Kjølbro expressed a partly dissenting opinion, which is annexed to the judgment.

Frank Cranmer, "Property disputes and Orthodoxy: *Orlović* and *Metropolitan Church of Bessarabia*" in *Law & Religion UK*, 8 October

2019, http://www.lawandreligionuk.com/2019/10/08/property-disputes-and-orthodoxy-orlovic-and-metropolitan-church-of-bessarabia/

Serbian Orthodox church must be removed

Bosnia and Herzegovina must enforce decisions ordering removal of church built on Srebrenica genocide survivors' land.

Registrar of the Court (01.10.2019) - https://bit.ly/2orGEtV - In today's Chamber judgment 1 in the case of **Orlović and Others v. Bosnia and Herzegovina (application no. 16332/18)** the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights.

The case concerned a church built by the Serbian Orthodox Parish on the applicants' land after they had had to flee their property during the 1992-95 war.

The Court found in particular that the authorities' failure to comply with final and binding decisions of 1999 and 2001 ordering full repossession of the land by the applicants, without any justification on the part of the Government for such inaction, had seriously frustrated their property rights.

It also held, by six votes to one, under Article 46 (binding force and implementation) that the respondent State had to ensure enforcement of the two decisions in the applicants' favour, including in particular the removal of the church from the applicants' land, at the latest within three months of this judgment becoming final.

Principal facts

The applicants are a family of 14 citizens of Bosnia and Herzegovina, born between 1942 and 1982. They live in Konjević Polje and Srebrenik, in Bosnia and Herzegovina. They survive the first applicant's husband and more than 20 other relatives who were killed in the Srebrenica genocide in 1995.

During the 1992-95 war they were forced to flee from their home in Konjević Polje. The property belonged to the first applicant's husband and his brother and consisted of several individual and agricultural buildings, fields and meadows.

In 1998 a church was built on their land following expropriation proceedings in favour of the Drinjača Serbian Orthodox Parish. The applicants were never informed of those proceedings.

The General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Peace Agreement") put an end to the 1992-95 war. In order to implement Annex 7 to the agreement, which guaranteed the free return of refugees to their homes of origin and restitution of their property, the Republika Srpska (one of the two constituent entities of Bosnia and Herzegovina) enacted the Restitution of Property Act in 1998.

The applicants brought restitution proceedings for their property under that Act. They were granted full restitution in a decision by the Commission for Real Property Claims of

Displaced Persons and Refugees ("the CRPC") in 1999, followed by another decision by the Ministry for Refugees and Displaced Persons in 2001. The decisions were both final and enforceable.

The land was subsequently returned to the applicants, except for a plot on which the church had been built. The applicants sought full repossession in the following years, without success.

The applicants also brought civil proceedings against the Serbian Orthodox Church seeking to recover possession of the plot of land and to have the church removed. In 2010 they modified their claim, asking the courts to recognise the validity of an out-of-court settlement. The lower courts dismissed the claim, finding that no agreement had been concluded between the parties, which was then confirmed by the Supreme Court in 2014 and the Constitutional Court in 2017.

In the meantime in 2004, there were other developments including the construction inspectorate authorities issuing an order banning the use of the church, which the local deputy mayor opposed, and the Serbian Orthodox Parish requesting and obtaining planning permission for the church.

Complaints, procedure and composition of the Court

Relying on Article 1 of Protocol No. 1 (protection of property), the applicants complained that they had been prevented from effectively using their property because the unlawfully built church had not yet been removed from their land.

They also relied on Article 6 § 1 (right to a fair trial) to complain about the domestic court decisions concerning their civil claim.

The application was lodged with the European Court of Human Rights on 30 March 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Jon Fridrik Kjølbro (Denmark), President, Faris Vehabović (Bosnia and Herzegovina), Paul Lemmens (Belgium), Iulia Antoanella Motoc (Romania), Carlo Ranzoni (Liechtenstein), Jolien Schukking (the Netherlands), Péter Paczolay (Hungary), and also Andrea Tamietti, Deputy Section Registrar.

Decision of the Court

It was not in dispute that the applicants were the owners of the property in question and that, as internally displaced persons, they had been entitled under Annex 7 to the Dayton Peace Agreement to have the land restored to them.

Furthermore, the Court noted that the applicants' right to full restitution had been established in the decisions of 1999 and 2001 and that the authorities had been required to take practical steps to ensure enforcement. However, instead of implementing the decisions, the authorities had initially in 2004 – done the opposite by effectively authorising the church to remain on the applicants' land.

Indeed, the applicants were still being prevented from full repossession of their property 17 years after ratification of the Convention and its protocols by Bosnia and Herzegovina. The Government had not given any justification for the authorities' inaction. The Court considered that such a long delay clearly amounted to a refusal to enforce the decisions, which had left the applicants in a state of uncertainty.

As a result of the authorities' failure to comply with the final and binding decisions, the applicants had suffered a serious frustration of their property rights and had been made to bear a disproportionate and excessive burden.

The Court therefore concluded that there had been a violation of Article 1 of Protocol No. 1.

Given that finding, the Court considered that there was no need to examine the applicants' complaint under Article 6.

Binding force and implementation (Article 46)

The Court reiterated that, in order to help a State comply with its obligations under Article 46, it might exceptionally indicate individual and/or general measures that could be taken to put an end to the violation of the Convention it had found.

In the particular circumstances of the applicants' case, the Court considered that the respondent State had to take all the necessary measures to ensure enforcement of the CRPC's decision of 1999 and the Ministry for Refugees' decision of 2001, including in particular the removal of the church from the applicants' land, without further delay and at the latest within three months of this judgment becoming final.

Just satisfaction (Article 41)

The Court held, unanimously, that Bosnia and Herzegovina was to pay 5,000 euros (EUR) to the first applicant and EUR 2,000 to each of the remaining applicants in respect of pecuniary damage.

Separate opinion

Judge Jon Fridrik Kjølbro expressed a partly dissenting opinion, which is annexed to the judgment.

Jehovah's Witnesses of Kryvyi Rih's Ternivsky District v. Ukraine

Application no. 21477/10 – Full judgment: https://hudoc.echr.coe.int/eng#

Registrar of the Court (03.09.2019) - The applicant community is the Religious Community of Jehovah's Witnesses of Kryvyi Rih, Ternivsky District, Dnipropetrovsk Region.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: http://www.coe.int/t/dghl/monitoring/execution. The case concerned the community's complaint that it had not been able to construct a building for worship on land it had purchased owing to the domestic authorities' inactivity.

In 2004 the applicant community purchased a residential building in Kryvyi Rih in order subsequently to erect a place of worship, a "Kingdom Hall", on the site. In February 2005 the city's Architecture and Planning Council approved the placement of the Kingdom Hall on the land and seven months later the city's planning authority submitted a draft decision to approve a land allocation project and to grant the applicant community a lease, but this plan was not adopted at subsequent City Council meetings.

In February 2007 the applicant community initiated a first set of proceedings against the City Council, seeking to have its lack of activity declared unlawful. In June 2007 the Regional Court allowed the claim, but in August 2007 a draft decision on the applicant community's project failed to get enough votes to be adopted by the City Council.

In January 2008 the community lodged a second claim against the City Council for a declaration that it had the right to lease the plot of land and for the City Council to be ordered to enter into a lease agreement. In December 2008 the Regional Court rejected the claim, holding in particular that land allocation decisions fell within the exclusive competence of councils and that the courts could not replace the City Council and take the decision in its place. All further appeals by the religious community were rejected.

Relying in particular on Article 9 (freedom of thought, conscience, and religion) and Article 1 (protection of property) of Protocol No. 1, the applicant community alleged that the City Council's failure to allow it to establish a place of worship had breached its rights.

Violation of Article 9 Violation of Article 1 of Protocol No. 1

The European Court

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 9 of the Convention;
3. *Holds*, unanimously, that there has been a violation of Article 1 of Protocol No. 1;
4. *Holds*, unanimously, that the complaints under Articles 6 and 13 of the Convention raise no separate issue;
5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant community, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant community, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, unanimously, the remainder of the applicant community's claim for just satisfaction.

Done in English, and notified in writing on 3 September 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

'Unauthorised' clergy, criminal sanctions and Article 9 ECHR: Tothpal and Szabo

By Frank Cranmer

Law & Religion UK (25.02.2019) - https://bit.ly/2TmJRs4

Introduction

Romanian criminal law makes it an offence to act as a cleric without due authorisation from a religious organisation. Article 23 § 4 of Law no 489/2006 provides that:

> "The exercise of the priestly office or any other function that involves the exercise of the priestly prerogatives without the authorisation or the explicit agreement of religious structures with or without legal personality shall be punished as provided criminal law"[28].

Furthermore, Article 281 of the former Romanian Criminal Code, in force until 1 February 2014 – which was carried over into the current Penal Code as Article 348 – made the illegal practice of a profession an offence, in these terms:

> "The illegal practice of a profession or any other activity for which the law requires an authorisation … shall be punished with imprisonment [*ranging*] from one month to one year or a fine" [29 & 30].

In ***Tothpal and Szabo v Romania*** **[2019] ECHR 157** (French only), the Court considered applications from two ministers, Bela Tothpal and Csongor Szabo, who had been suspended from the exercise of ministry by their respective Churches. Because of the similarity of the facts, the cases were joined under Article 42(1) of the Rules.

Tothpal

Mr Tothpal was the Lutheran pastor in Arad. Following disciplinary proceedings, the Lutheran Church dismissed him and appointed a new pastor. Mr Tothpal continued to conduct services for some of the members of the community.

In March 2010, the Lutheran Church and the parish, represented by the new pastor, lodged a criminal complaint against him for the unlawful exercise of the duties of a cleric. The public prosecutor's office gave a discontinuance decision but nonetheless noted that priestly duties could only be performed with the agreement of the relevant religious organisations and that Mr Tothpal's permission had been withdrawn – and gave him an administrative fine of 1,000 Romanian lei (some 235 euros). The complainants challenged that order and the Arad Court of First Instance imposed a criminal fine of 4,000 on Mr Tothpal of 4,000 lei (some 900 euros). The court of appeal upheld that judgment on the grounds that Mr Tothpal had conducted specific Lutheran religious ceremonies despite the legal obstacle to him doing so because of his dismissal.

Szabo

In 1995, Mr Szabo was appointed as parish minister of the Reformed Church in Băiţa. In 2008, following a dispute, the Reformed Church terminated his contract of employment, dismissed him from the ministry and banned him from conducting religious services. A new minister was appointed to the parish. In February 2009, the Reformed Church lodged a criminal complaint against Mr Szabo for the unlawful exercise of the duties of a

minister. The public prosecutor's office dismissed the complaint, noting that the Băiţa Reformed community had been split since 2008 and that some of the congregation had deliberately followed Mr Szabo and attended his services, which differed from the usual Reformed Church service. The Reformed Church appealed.

The Gherla Court of First Instance convicted Mr Szabo of unlawfully exercising the duties of a cleric. It found that he had acted in a manner incompatible with Christian teachings and had fomented controversy within the Băiţa Reformed community. The court sentenced him to an immediate two-month custodial sentence on the grounds that only imprisonment could induce him to think about his conduct and mend his ways by fasting and praying for at least 40 days, after which he could be released on licence. Mr Szabo appealed, and the Cluj Court of Appeal ruled that, having regard to the rifts in the Băiţa Reformed community, imprisoning Mr Szabo would be liable to exacerbate the conflict.

The arguments

Before the ECtHR, the applicants alleged that their criminal conviction for the unlawful exercise of the duties of a minister of religion amounted to a violation of their right to freedom of religion, contrary to Article 9 ECHR and contrary to religious pluralism. Mr Tothpal invited the Court to draw a distinction between the activity of a minister of religion in a professional sense and his activity in the biblical sense, arguing that he was acting as the spiritual leader of a group of people who were following him willingly [43]. Mr Szabo said that he had intervened at the request of part of the community to guide, but not to celebrate the Reformed rite or to make financial gain. In this regard. The criminal law did not specify the duties of a minister or the criteria for determining them, it was not based on objective criteria and judges had no theological training from which to make an objective assessment [44].

The Government accepted that the applicants' criminal convictions had interfered with their right to freedom of religion, but the offence in question was in accordance with the provisions of Law No 489/2006 and the Criminal Code and had pursued the legitimate goal of protecting the rights of others, specifically those concerned churches and their faithful. The national courts had delivered reasoned decisions and held that the applicants had continued to celebrate the specific rituals of their respective religions; they had also balanced the fundamental rights of the parties, giving priority to respect for the autonomy of religious communities. Their criminal convictions were justified by a pressing social need and were not disproportionate [45].

The judgment

The convictions of the two applicants had been an interference with their right to freedom of religion under Article 9 ECHR and the Government had admitted that fact [46]. The interference was "prescribed by law"; and the Court was prepared to accept that the interference pursued the legitimate aim of protecting the rights of Churches and their members [46 & 47]. As to whether the interference was "necessary in a democratic society", the Court had recently summarised the principles applicable in this field in the case *SAS v France*. In particular, it had emphasised the role of the state as a neutral and impartial organizer of the exercise of various religions, faiths and beliefs and had and stated that this role helped to ensure public order, religious harmony and tolerance in a democratic society [49].

In the present case, the impugned acts used to justify the criminal conviction of the applicants came within the religious sphere: they were criticized for having provided religious services and participating in marriage ceremonies, baptisms or burials (paragraphs 15 and 26 above). They had not engaged in the performance of acts likely to produce legal effects, nor had the Government argued before the Court that, under

Romanian law, the applicants had jurisdiction to carry out such acts. As for the criminal conviction of Mr Tothpal for fraudulent management of the property of the parish, the Court considered that that was not relevant to the consideration of the current application because that sentence had been imposed after a separate criminal prosecution that had been the subject of a separate application with the Court, No 55662/13, [*which had been **struck out** in 2014*] [50].

The applicants had consistently claimed to have acted with the support of a part of their communities and the Government did not dispute in its observations to it – and the Court had previously said that punishing a person for merely acting as the religious leader of a group that willingly followed him could hardly be considered compatible with the demands of religious pluralism in a democratic society [51]. Nor had it been established that the split of the two communities had created tensions or confrontations requiring action on the part of state authorities. In condemning the two applicants for their religious activities, the Romanian authorities had *de facto* placed part of the religious communities of the cities of Arad and Băiţa under the auspices of the Lutheran and Reformed Churches – excluding the faithful who wished to attend the services at which the applicants officiated [52].

The sentences imposed on the applicants had not been justified by "a pressing social need" and the interference with their right to manifest their religion collectively in public by worship and teaching was not "necessary in a democratic society". There had therefore been a violation of Article 9 of the Convention [53].

Court decision and other documents available at
https://hudoc.echr.coe.int/eng#{"itemid":["001-191069"]}

Registration of a Seventh-Day Adventist organization rejected

Altınkaynak et autres c. Turquie (no. 12541/06)

Strasbourg Consortium (15.01.2019) - https://bit.ly/2T1i80O - Applicants are six Turkish nationals who attempted, in September 2004, to register a religious organization, Tükiye Yedincigün Adventisterli Vakfı (Foundation of the Seventh-day Adventists) in Istanbul. The tribunal of the first instance rejected their demand, judging that the objective of the organization was to meet the religious needs of people embracing the faith of Seventh-day Adventists and that this was contrary to provisions of the Turkish Civil Code prohibiting the establishment of foundations whose purpose is to support members of a particular community. The judgment was upheld in further court action.

The applicants brought the case before the European Court of Human Rights alleging violations of Articles 9, 11, 14, 17, and 18 in the abridgment of their rights to freedom on thought/conscience, freedom of peaceful assembly, and in contravention to prohibitions against discrimination, destruction of Convention rights and freedoms, and application of restrictions for unprescribed purposes.

In its judgment of 15 January 2019 the Court decided to examine the applicants' complaints under Article 11 only and, finding a violation of their right to freedom of (religious) assembly, awarded EUR 2,724 (pecuniary damage), EUR 3,000 (non-pecuniary damage), and EUR 3,000 (costs and expenses) to the applicants jointly.

Court decision and other documents available at:
https://www.strasbourgconsortium.org/portal.case.php?pageId=10#caseId=597