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Missaoui and Akhandaf v Belgium: Cold shower for Belgian applications

by Timothy Roes

Strasbourg Observers (03.12.2024) - It was supposed to be a welcome clarification on religious neutrality in public spaces. Instead, the application by two Muslim women banned from wearing full body swimwear in a public swimming pool was declared inadmissible, calling into question longstanding wisdom and causing considerable uncertainty.

Departing from well-established case law on Article 35 § 1 of the Convention, the Court, in , held that the Belgian applicants had not exhausted all national remedies by forgoing an appeal limited to points of law at the Belgian Court of Cassation after a negative opinion from a lawyer at the Court of Cassation.

Although the Court spends considerable energy justifying this decision as a continuation of earlier case law, the bewilderment among Belgian and French lawyers is indicative of a marked caesura. Quite rightly so. Before this decision, a negative opinion all but guaranteed that a Belgian application would clear the Article 35 § 1 hurdle. For the moment, following this decision, only a judgment by the Court of Cassation will offer similar reassurance.

Facts

Although the Court did not reach the merits, one would be remiss for skimming over the facts of the case for they may help to explain why the Court chose this case to abandon its relaxed interpretation of Article 35 § 1 in the Belgian context – as we will discuss further below.

The application was brought by two women who, in the winter of 2017, were refused access to an indoor public swimming pool for wanting to wear full coverage swimming gear ('burkini'). The public swimming pool, which is run by the City of Antwerp, referred to the local police code to justify a prohibition on this type of swimming gear. Said police code generally requires all bathers, in the interest of 'water quality standards as well as bathers' safety', to wear 'snug-fitting clothing made specifically of cloth designed for swimming' and specifies that women must wear 'a bathing suit or bikini' (see , in Dutch).

The lower courts in Antwerp upheld what has since become known as the 'burkini ban'.

Although city officials have that the measure aims to prohibit full body swimming gear mainly because it is the product of oppressive religious views, the national courts deemed the measure justified to ensure public safety and hygiene. Newspapers have reported that the women purported to wear loosely fitting, with a headscarf made from regular fabric sown on to it. According to the Court of First Instance as well as the Court of Appeals, the City could reasonably consider that such clothing represented a safety risk, since it could get stuck under water or render rescue more difficult.

Facts and arguments relating to the exhaustion of domestic remedies

After the judgment of the Antwerp Court of Appeal of 23 November 2020, the applicants decided not to pursue an appeal limited to points of law at the Court of Cassation, Belgium's highest court. In civil matters, such an appeal may only be lodged by a specialized *avocat à la Cour de Cassation* or cassation lawyer for short (Article 478 of the Judiciary Code). Having sought the advice of one such lawyer on the viability of a cassation appeal, the applicants obtained a twelve-page legal opinion counselling against it. Based on the Court's prior case law, the applicants assumed that this negative opinion was sufficient to clear the Article 35 § 1 hurdle.

To their surprise, the Belgian government argued that the application had to be declared inadmissible for failure to exhaust domestic remedies: the applicants should have lodged an appeal to the court of cassation. The Belgian government emphasized that the Court of Cassation had never had the opportunity to pronounce itself on the issue, even though the lower courts seemed to be divided on the matter. Moreover, the applicants were not bound by the (negative) opinion of a cassation lawyer. Indeed, not only could they have

insisted that the lawyer lodge an appeal anyway, they could also have sought the opinion of another lawyer. Finally, the Belgian government distinguished the case from , where the Court had clearly accepted a similar negative opinion as sufficient, by pointing out that the defendant had not raised a plea of inadmissibility in that case.

From their side, the applicants argued that the negative opinion proved conclusively that an appeal to the Court of Cassation was bound to fail, in which case the Court typically accepted that the applicant has done everything that could be reasonably be expected of him to exhaust domestic remedies. Requiring further proof from an applicant would be tantamount to undermining the special role that cassation lawyers fulfil as a filtering mechanism. Finally, the applicants distinguished their case from , based on the fact that they had obtained the negative opinion in good time, that is, well before the time limit for bringing a cassation appeal ended.

The Court's reasoning

The Court set out by recalling that its case law requires that the national courts have pronounced themselves on the asserted violations – a requirement stemming from the subsidiary nature of the Court's review (§ 40).

Turning subsequently to the burden of proof the Court remarks that it is up to the defendant who raises the plea of inadmissibility to demonstrate that a domestic remedy was available and would have been effective under the circumstances. Yet, once that threshold has been crossed, it is up to the applicant to prove that it has made use of that remedy or, when he has not, that this remedy would not have been adequate or effective under the circumstances (§ 41). Therefore, the Court forewarns, merely raising doubts on the viability of a remedy is not sufficient. The applicant must conclusively show, notably through national case law, that an appeal is bound to fail (§ 42).

Prior to applying these principles to the case at hand, the Court insists on clarifying its Article 35 § 1 case law when the applicant foregoes an appeal at the Court of Cassation after a negative opinion by a cassation lawyer (§§ 43-44).

In *Van Oosterwijck*, the negative opinions were not sufficient to cross the Article 35 § 1 threshold because (1) they had not been obtained in good time, rendering a cassation appeal impossible and (2) they had not examined the issue from all angles, including the Convention. Additionally (3) the Court of Cassation had not pronounced itself on the legal issue at hand and therefore there was no case law that the applicant could rely on to demonstrate that a cassation appeal was bound to fail.

In *Chapman*, by contrast, the (1) negative opinion had been obtained in good time and (2) contained an examination in light of the Convention, observing that lower court judgments correctly applying the Convention were not annulled in cassation. For these reasons the applicant had done everything that could reasonably be expected of him to exhaust domestic remedies. Moreover, (3) the defendant, i.e. the Belgian government, had not raised a plea of inadmissibility in that case.

Turning then to the case at hand, the Court starts off by emphasising that, unlike in *Chapman* and many other cases against Belgium, the Belgian government did raise a plea of inadmissibility here (§§ 46-48). In the absence of such a plea, the Court deems that it lacks the power to raise the failure to exhaust domestic remedies of its own motion and presumes the defendant to renounce the argument. Here, however, the Belgian government argued that the applicant could and should have sought a second opinion. If that were negative also, he could have insisted to the cassation lawyer that the appeal be brought 'on the applicant's request' ('*sur réquisition*').

Whether a negative opinion by a cassation lawyer suffices to exhaust domestic remedies must be decided starting from the established principle that the Belgian cassation appeal is part of the domestic remedies that must be exhausted before the Court may exercise its subsidiary role – a point the Court supports with a reference to the judgment in *Van Oosterwijck* and a decision in .

While the Court appreciates that the Belgian cassation lawyer has a role in filtering applications to the Court of Cassation, his legal opinion cannot be equated to the decision of a court or tribunal (§ 53). Following the arguments of the Belgian government, the Court confirms that a negative opinion by a cassation lawyer does not automatically establish that a cassation appeal is bound to fail. To determine whether a cassation appeal is bound to fail with regard to the pleas based on the Convention, the regard must be had to the "content" of the cassation lawyer's opinion, as well as to "the object of the legal question at hand, taking into account the context in which it is raised" (§ 53).

The Court rules that, in the case at hand, neither the negative opinion nor the applicants themselves demonstrate, based on national case law or other elements, that a cassation appeal was bound to fail. An important factor in that regard is the fact that the Court of Cassation has never pronounced itself on the wearing of the burkini in a public swimming pool, either in light of the Convention or analogous national or international norms. What is more, lower national courts appear to be divided on the issue, since the Ghent Court of Appeals has ruled, in 2021, that a provision prohibiting the wearing of the burkini was discriminatory on the basis of religion.

Analysis

This decision causes considerable uncertainty about the admissibility of pending and future applications originating in Belgium. Prior to this decision, it was generally accepted that the exhaustion of domestic remedies required, as a baseline, that a Belgian applicant had obtained a negative opinion from a cassation lawyer in good time and that the violation of the Convention (or analogous rights) had been raised in national court. The negative opinion was seen as conclusive proof that lodging a cassation appeal was bound to fail.

This decision heralds a stricter approach. While it always fell to the applicant to demonstrate that lodging a cassation appeal would have been futile, a negative opinion of a cassation lawyer now is no longer conclusive. The Court will have to examine its content, though it gives little guidance on the criteria that it will apply (§ 53). It appears to be important that the opinion discusses the Court of Cassation's stance on the violation of the relevant Convention rights. If the Court of Cassation has never pronounced itself on the issue, the admissibility of the application is particularly unlikely.

The upshot is that, with the likely exception of issues on which a clear line of case law by the Court of Cassation exists, a diligent lawyer will have to advise his client to lodge a cassation appeal over and against the misgivings of one or more (see §§ 56-57) cassation lawyers. In the fairly common scenario in which the Court of Cassation has not yet pronounced itself on the substantive issue yet and the cassation lawyer indicates that the case escapes that court's jurisdiction because the judgment under appeal is couched as a factual assessment, the applicant must go through the effort of bringing the appeal anyway.

For this reason, there is no doubt that this change in the Court's position undermines the role of the cassation lawyer as a filtering mechanism in the Belgian (and French) judicial system. Unlike in certain other Member States, a petitioner to the Belgian and French supreme court does not have to obtain leave to appeal, be it from the high court itself, like in Sweden, or from the lower court whose decision is being challenged, like in the United Kingdom. Yet, in practice, the preliminary opinion of the cassation lawyer performs a similar function in that it weeds out potential petitions that have little chance of success.

This filtering mechanism requires, of course, that potential litigants abstain from a cassation appeal when faced with a negative opinion. In *Chapman v Belgium* (§ 33), the Court still acknowledged this 'preventive role' of the cassation lawyer and cited with approval the Constitutional Court's view that this role was 'in the interest both of that court and of the potential litigants'. But the Court did more than paying lip service. By recognising the authority of the cassation lawyer's opinions, litigants could safely adhere to them without jeopardising a subsequent application to the Strasbourg Court. Now that this is no longer guaranteed, the Court of Cassation will likely have to brace itself for a significant increase in its case load.

What motivated this momentous shift? Clearly the shift was prepared over a longer period, because there were warning signs. In (2024), which also concerned the prohibition of religious symbols in public spaces, the Belgian government had similarly raised the inadmissibility of the case based on the failure to exhaust local remedies. In that case, the Court conspicuously declined to say whether the negative opinion on which the applicants relied was sufficient to dispel any concerns arising from Article 35 § 1. Because it ultimately decided that the case was inadmissible due to being manifestly ill-founded, the Court could avoid answering that question. Considering the present decision, the refusal to confirm the governing understanding of *Chapman v Belgium* now makes sense.

As far as the Court's motivation goes, the subsidiary nature of the Convention machinery looms large in the decision. As Andreas von Staden has written, the requirement to exhaust local remedies expresses not only the *duty* of domestic institutions to try to remedy alleged violations, but also their *right* to do so in accordance with their domestic arrangements ().

By itself, this reference to subsidiarity is nothing new in cases involving the exhaustion of domestic remedies. The Court has said before that national courts should initially have the opportunity to decide on the compatibility of domestic law with the Convention but also that it should have 'the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries' (see e.g. , § 20). Given the sensitivity of the legal question that was presented to the Court, it was perhaps primarily this last sentiment that prevailed here.

Indeed, behind the abstract subsidiarity language may well loom a growing unwillingness to allow the Court of Cassation to outsource controversial questions to Strasbourg. The public display of religious symbols, notably those demonstrating adherence to the Islamic faith, is a highly contentious subject in Belgian society. It has repeatedly led government officials openly to court decisions. Deciding such cases is challenging for a court's legitimacy and so delegating the decision to is an attractive strategy for national courts. The present decision, much like the CJEU's decision in , suggests that international courts are loath to play along.

Conclusion

For Belgian applications, the decision in *Missaoui and Akhandaf v Belgium* brings a major change in the way in which the exhaustion of domestic remedies requirement of Article 35 §1 is applied. Only in exceptional cases will the applicant be able to meet that requirement only by relying on a negative opinion of a lawyer at the Court of Cassation. For pending cases, it may be wise to supplement the case file with a brief providing additional reasons why a cassation appeal was bound to fail.

This shift in the case law appears to be motivated by a concern for subsidiarity. Politically sensitive decisions such as the wearing of religious symbols in public spaces, ought not to be outsourced to the Strasbourg court but deserve to be treated first by the State's highest court. The present decision will likely lead to a significant decrease in the Court's case load but ironically achieves this by radically undermining a longstanding domestic procedural arrangement, namely the filtering role of the cassation lawyer.

On Strasbourg Observers

Strasbourg Observers is an academic blog that discusses recent developments at the European Court of Human Rights. The editorial team of Strasbourg Observers is based at the Human Rights Centre of Ghent University and the Centre for Government and Law of Hasselt University.

Hindu Forum celebrated a first step to state recognition of Hinduism

By Willy Fautré, director of Human Rights Without Frontiers

The European Times (04.12.2024) - On 22 November, the Hindu community of Belgium celebrated the first legal step to the recognition of Hinduism by the Belgian Government and Parliament with their decision last year to grant a subsidy to the Hindu Forum Belgium, the official interlocutor of the Belgian State.

This platform for all Vedic spiritual traditions will coordinate cooperation among various Hindu/Vedic communities and organisations in Belgium towards full recognition.

"Recognition is more than just a legal formality or access to government benefits; it is a moral acknowledgment of the positive contributions that Hindu communities make to Belgian society," said in his introduction to the event, Martin Gurvich, President of the Hindu Forum.

"It places them on an equal footing with other faith communities and non confessional philosophies and affirms their place in Belgium's rich cultural and spiritual tapestry," he also stressed.

Other speakers were Caroline Sägesser (CRISP), Prof. Winand Callewaert (KULeuven), Ambassador of India H.E. Saurabh Kumar, Hervé Cornille from the Belgian Parliament and Bikram Lalbahadoersing (Hindu Council of The Netherlands). The event was enchanced with music and dances.

Hinduism in Belgium in short

The Hindu Forum Belgium was launched in 2007 in Brussels. It comprises 12 Hindu organizations and is affiliated with the Hindu Forum Europe. It is estimated that about 20,000 people in Belgium practice a form of Hinduism.

The first Hindu immigrants arrived in Belgium in the late 1960s, mostly from the Western Indian State of Gujarat. More recently, they have come from Kenya, Malaysia, Mauritius Nepal, Sri Lanka, and Afghanistan.

The Hindu Forum of Belgium represents the richness of Hindu/Vedic culture and provides a unified platform for all spiritual traditions rooted in the Vedic scriptures. It embraces the diversity of perspectives within Hinduism, from Vaishnavism (worship of Vishnu), Shaivism (worship of Shiva), Shaktism (worship of the Goddess), Smartism (worship of five major deities: Vishnu, Shiva, Shakti, Ganesha, and Surya), and other traditions.

Hinduism has close links with vegetarianism, non-violence towards living beings and also with yoga. In 2014, the United Nations proclaimed 21 June as the International Day of Yoga to raise awareness worldwide of the many benefits of practicing yoga.

Hinduism is an umbrella for a wide range of Indian religious and spiritual traditions, having no identifiable founder. It is often referred to as Sanātana Dharma (a Sanskrit phrase meaning "the eternal law") by its adherents. It calls itself a revealed religion, based on the Vedas. It originated in the Indian subcontinent in ancient times. It is the world's third-largest religion, with approximately 1.2 billion followers, or around 15% of the global population.

The financing of Hinduism

A first amount of 41,500 EUR was granted to hire two people in their secretariat (one full-time and one part-time) and to pay the charges of their premises in Brussels, for six months in 2023. Annually, this subsidy will be doubled: 83,000 EUR. This is only a first step towards a path that promises to be long to obtain full recognition.

Indeed, on 5 April 2022, the European Court of Human Rights ruled in the case **Congregation of Jehovah's Witnesses of Anderlecht and Others v. Belgium** (application no. 20165/20) noted that neither the criteria for recognition nor the procedure leading to recognition of a faith by the federal authority were laid down in an instrument satisfying the requirements of accessibility and foreseeability.

The European Court observed, firstly, that recognition of a faith was based on criteria that had been identified by the Belgian Minister of Justice only in reply to a parliamentary question dating back to last century. Moreover, as they were couched in particularly vague terms they could not, in the Court's view, be said to provide a sufficient degree of legal certainty.

Secondly, the Court noted that the procedure for the recognition of faiths was likewise not laid down in any legislative or even regulatory instrument. This meant, in particular, that the examination of applications for recognition was not attended by any safeguards. No time-limits were laid down for the recognition procedure, and no decision had yet been taken on the applications for recognition lodged by the Belgian Buddhist Union and the Belgian Hindu Forum in 2006 and 2013 respectively.

State financing of religions in Belgium: 281.7 million EUR

In 2022, the public authorities financed Belgian religions at the level 281.7 million euros:

112 million from the Federal State (FPS Justice) and 170 million from the Regions and Communities (maintenance of places of worship and accommodation religious leaders).

These figures are from Jean-François Husson, Dr in political and social sciences (University of Liège). The amounts were distributed as follows:

210,118,000 EUR for Catholics (75%),

8,791,000 EUR for Protestants (2.5%)

1,366,000 EUR for Jews (0.5%)

4,225,000 EUR for Anglicans (1.5%)

38,783,000 EUR for secularism (15%)

10,281,000 EUR for Muslims (5%)

1,408,500 EUR for Orthodox (0.5%)

(in the historical order of state recognition)

Belgium silently continues to finance the Russian Orthodox Church despite the war in Ukraine

By Willy Fautré, director of Human Rights Without Frontiers

HRWF (19.09.2024) - Despite the weaponizing of the Russian Orthodox Church/ Moscow Patriarchate by President Vladimir Putin in his war against Ukraine, Belgium silently continues to finance the Russian Orthodox Church.

Belgium finances a number of state-recognized religions and Orthodoxy has been one of them since 1985. A wide range of Orthodox Churches are present on the Belgian territory and the Russian Orthodox Church is one of them.

The Russian Orthodox Church in Belgium (ROC/ Belgium) is fully associated with the Moscow Patriarchate which has endorsed Putin's decision to invade Ukraine and has called his "special operation" a "holy war."

While Patriarch Kirill in Moscow was blessing the war and encouraging Russian citizens to express their patriotism by joining the army, the ROC in Belgium kept silent about Russia's invasion of Ukraine, about the crimes against humanity perpetrated in Bucha and other places, about the deportation of Ukrainian children in Russia and many other war crimes.

However, in June last, high-level clerics of the ROC in Belgium were invited to and participated in the celebration of Russia's Day at the Embassy of the Russian Federation in Brussels: the rector of the Church of the Intercession of the Most Holy Theotokos in Brussels, priest Adrian Alaoui and his wife; the rector of the Sainte-Juste-Anne church in Laaken (Brussels), the priest Andrei Popa and his wife; the cleric of Saint-Nicolas Cathedral in Brussels, priest Alexandre Motorny; priest Andrey Krayushkin, cleric of the Holy Trinity Church in Brussels, and his wife; The secretary of the Belgian diocese, Archpriest Pavel Nedosekin, with his wife. One can imagine the content of the official speeches in Russia's embassy.

On this occasion, an article and photos were posted on the website of the ROC in Belgium.

It seems Belgium prefers to turn a blind eye to this situation and to silently go on financing the ROC in Belgium despite Brussels being a strategic place with all its international organizations.

Deweaponizing the Russian Orthodox Church in Europe, a security issue

In Ukraine, the Ukrainian Orthodox Church (UOC) in communion with the Patriarchate of Moscow is persona non grata and is on the verge of being banned.

In EU countries, the presence of Orthodox Churches subordinated to the Russian Orthodox Church/ Moscow Patriarchate has raised national security concerns because in a number of cases they were suspected or accused of serving as relays for Putin's propaganda or Russia's spying activities. Czechia, Estonia, Lithuania, Sweden and Ukraine have taken various measures to anticipate or tackle security risks, including with the assistance of the Patriarchate of Constantinople.

The Russian Orthodox Church in Norway is also under close scrutiny because it has acquired properties next to military bases. Voices were recently raised to put an end to the state financing to the ROC in Norway perceived as a threat for the security of the country.

According to cadastral data, the ROC bought in 2017 a building in the town of Sherrey (Bergen community), located on a hill three kilometers away from Haakonsvern, which offers a view onto the main base of the Royal Norwegian Navy and the largest naval base in the Nordic area. Before the acquisition of this house, the religious community was located in the city center.

In the town of Stavanger, the former priest of the local community of the Russian Orthodox Church has a property near the NATO Joint Warfare Centre (JWC) in Jatta, according to Dagbladet. It is located just one kilometer away from an important military building, about fifteen minutes' walk. That NATO Centre celebrated its 20th anniversary during a formal ceremony on 26 October 2023. Over the last two decades, the JWC has planned and delivered more than 100 exercises and training events and ensure that NATO's commanders and their staffs are well-prepared and ready to respond to any mission, whenever and wherever the call may come.

Archbishop Simon (Vladimir Nikolaevich Ishunin) of the ROC in Brussels

On the website of the Patriarchate of the Russian Orthodox Church in Moscow, Archbishop Simon (Vladimir Nikolaevich Ishunin) is presented as follows with his picture:

"He was born on December 7, 1951 in Leningrad in the family of a priest. After graduating from high school in 1970, he entered the Leningrad Theological Seminary. In 1970-72 he served in the ranks of the Soviet army, after demobilization he continued his studies in the LDS.

On January 17, 1975, he was tonsured to monasticism. On January 19, he was ordained a hierodeacon. In the same year, he entered the Leningrad Theological Academy.

On June 13, 1976, he was ordained a hieromonk.

In 1975-78, he obeieded the secretary of the Metropolitan of Leningrad and Novgorod Nikodim (Rotov).

Since 1978, he has been obedicing the assistant inspector of the LDAiS. After graduating from the LDA in 1979, he taught the history of the Russian Church at the seminary. In 1981 he defended his PhD thesis.

In 1981-82, he served in the Novo-Valaam Monastery in Finland.

In 1982, he was elevated to the rank of archimandrite, appointed rector of the Exaltation of the Cross Cathedral in Petrozavodsk and dean of the churches of the Olonets Diocese.

On April 11, 1987, in the Trinity Cathedral of the Alexander Nevsky Lavra, he was consecrated Bishop of Brussels and Belgium.

In September 1991, he was appointed temporary governor of the Hague and Dutch Diocese.

In 1994, he was elevated to the rank of archbishop.

By the decision of the Holy Synod of December 28, 2017 (journal № 116) he was released from the temporary administration of the Hague-Netherlands Diocese.

Education:
Leningrad Theological Seminary.
1979 — Leningrad Theological Academy.

Diocese: Brussels-Belgian Diocese
(Ruling bishop)

Awards:

- 2008 - Order of the Blgv. Daniel of Moscow II st. ;
- 2011 - Order of Prp. Seraphim of Sarov II st. ;
- 2012 - Order of Equal Ap. Mary Magdalene II st. (Polish Orthodox Church);
- 2015 - Order of St. Innocent of Moscow II st. ;
- 2021 - Order of the Blgv. Alexander Nevsky III st. ;
- Order of Prp. Sergius of Radonezh II st."

Islamic security threat and Russian Orthodox Church threat, double standards

Since the beginning of this century, Muslim organizations in Belgium have been under close surveillance due to national security risks.

In light of security threats attributed to the Russian Orthodox Church/ Moscow Patriarchate in an increasing number of European countries, the Belgian state has chosen to turn a blind eye and a deaf ear. Should it go on financing the ROC in Belgium which is fully subordinated to the Patriarchate of Moscow and did not disagree with Kirill's support to Putin's war on Ukraine? A public debate is however urgently needed.

Simon, Archbishop of Brussels and Belgium

Strongly recommended reading:

Wolf in sheep's clothing? The two faces of the Russian Orthodox Church (EU Observer, 19.09.2024)

A strange court decision: Catholic bishops to pay 1500 EUR on a gender-based issue

Only men can become deacons in the Catholic Church. The judges say they cannot change this but can sentence Catholic authorities to indemnify the woman.

By Massimo Introvigne

Bitter Winter (02.07.2024) - On June 25, the Civil Tribunal of Malines, in Belgium, rendered a strange decision against two Roman Catholic Bishops. Jozef De Kesel, the former Archbishop of Malines-Brussels, and the current Archbishop of the same Archdiocese, Luc Terlinden, have been sentenced to pay Euro 1,500 to a woman called Veer Dusauchoit.

The woman tried twice to enroll in training to become a Catholic deacon and was rejected with the motivation that only men can become deacons in the Roman Catholic Church. While the matter whether women can be ordained as deacons (a lesser position with respect to priests) is being discussed in the Catholic Church, Pope Francis has repeatedly expressed his negative opinion on the issue.

The decision is both surprising and dangerous since it is yet another intrusion of secular courts into the internal affairs of a religious organization. It would be inconceivable in the

United States and in other countries that affirm the principle that the corporate freedom of religion of religious organizations prevails on the individual rights of the devotees.

However, the decision should be read in its entirety, and has been somewhat misinterpreted by some international media. First, the decision does not compel the Belgian Catholic Church to ordain women as deacons. It emphasized that its subject matter was Dusauchoit's right to attend a training, irrespective whether at the end of the training she might be ordained or not.

Second, the decision was very cautious in affirming that, not to violate principles of religious liberty, the court cannot compel the Catholic Church to admit Dusauchoit to the training. It can only sentence her bishops to pay to her a monetary indemnification.

It is difficult to avoid the impression that the court wanted to accommodate prevailing feminist orthodoxy without violating general principles of religious liberty in a way that would compel the European Court of Human Rights, if not higher Belgian courts, to intervene (unless the Catholic Church would prefer to settle and close the case for public relations reasons).

As it is, the decision is a legal monstrosity. Churches and other religious organizations have the right to organize trainings and courses restricted to certain categories of persons (a man cannot train to become a nun either). The religious liberty of individual devotees such as Dusauchoit is protected by their possibility to leave the Roman Catholic Church and join one among many other Christian churches that ordain women as deacons and even as priests. Nobody compels Dusauchoit to remain in the Roman Catholic Church. But as long as she stays there, she should respect its rules—which should be left to the Holy See and the bishops, not to secular Belgian courts.

Ban on Islamic headscarf in Flemish schools admissible

Ban on visible symbols of belief in the official education system of the Flemish Community not incompatible with Article 9 of the Convention

Registrar of the European Court (16.05.2024) - In its decision in the case of Mikyas and Others v. Belgium (application no. 50681/20) the European Court of Human Rights has, by a majority, declared the application inadmissible. The decision is final.

The case concerned three young women who identify as Muslims. They complained that they were unable to wear the Islamic headscarf in their secondary schools (except during religious education classes), following the prohibition on wearing any visible symbols of one's beliefs in the official education system of the Flemish Community.

The Court stated that the concept of neutrality in the Community's education system, understood as prohibiting, in a general manner, the wearing by pupil of visible symbols of one's beliefs, did not in itself run counter to Article 9 of the Convention and the values underlying it.

The Court noted in the present case that the contested ban did not concern solely the Islamic veil, but applied without distinction to all visible symbols of belief. It considered that the national authorities had been entitled, having regard to the discretion ("margin

of appreciation") enjoyed by them, to envisage that the Flemish Community's education system would provide a school environment in which pupils did not wear religious symbols.

The contested restriction could therefore be said to be proportionate to the aims pursued, namely the protection of the rights and freedoms of others and of public order, and thus was "necessary" "in a democratic society". It followed that the applicants' complaint under Article 9 of the Convention was manifestly ill-founded. Their other complaints were rejected for failure to exhaust the domestic remedies.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

Belgium is a federal State, in which education comes within the competence of the Communities (Article 127 of the Constitution).

The three applicants are Belgian nationals who were born between 2001 and 2004 and live in Maasmechelen (Belgium). They stated that they identified as Muslims and that they wore the Islamic veil in accordance with their religious beliefs.

At the relevant time they were pupils in schools which belonged to the 14 Maasland school group and were part of the official education system organised by the Flemish Community (according to the Flemish education system's statistical yearbook for the 2022-23 academic year, this category concerned approximately 17% of the Flemish school population for the primary level and about 22% for the secondary level).

In 2009 the Education Council of the Flemish Community (*GO ! Onderwijs van de Vlaamse Gemeenschap* ("the GO!")) decided to extend the ban on wearing visible symbols of one's beliefs throughout its network. The measure was intended to apply to all school activities, with the exception of religious education and non-denominational ethics classes. The schools attended by the applicants implemented this ban.

When the applicants were enrolled in their respective secondary schools, their parents signed school regulations containing the prohibition in question.

In 2017 the applicants' parents, in their capacity as legal representatives, brought proceedings against the GO!, relying on the applicants' right to freedom of religion. The following year, the Tongeren Court of First Instance found that the prohibition in question was incompatible with Article 9 of the Convention. In 2019, however, the Antwerp Court of Appeal quashed that decision and held that the applicants' claims were unfounded. In 2020 a lawyer at the Court of Cassation indicated to the applicants that there was little prospect of lodging a successful appeal on points of law. The applicants decided not to lodge an appeal on points of law.

Complaints

Before the Court, the applicants alleged that the prohibition in question infringed their rights and freedoms as guaranteed by Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) of the Convention and Article 2 of Protocol No. 1 (right to education) to the Convention, taken alone and in conjunction with Article 14 (prohibition of discrimination). They also submitted that they had been discriminated against in the enjoyment of those rights.

Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 12 November 2020. The decision was given by a Chamber of seven judges, composed as follows:

Arnfinn **Bårdsen** (Norway), *President*, Jovan **Ilievski** (North Macedonia), Pauliine **Koskelo** (Finland), Saadet **Yüksel** (Türkiye), Frédéric **Krenc** (Belgium), Diana **Sârcu** (the Republic of Moldova), Davor **Derenčinović** (Croatia), and also Hasan **Bakırcı**, *Section Registrar.* Decision of the Court

The Court held that the part of the application which concerned Articles 8, 10 and 14 of the Convention and Article 2 of the Protocol No. 1 to the Convention were inadmissible for failure to exhaust the domestic remedies, since the applicants had failed to submit to the national authorities (either expressly or in substance) any legal arguments concerning the rights guaranteed by those Articles.

With regard to Article 9 of the Convention, the Court noted that the present case concerned a type of public education, namely the official education system in the Flemish Community. In accordance with Article 24 § 1 (3) of the Constitution, this education had to be neutral. Under this constitutional provision, neutrality implied, in particular, respect for the philosophical, ideological or religious convictions of parents and pupils.

In order to comply with this constitutional requirement, the GO! Council had decided to introduce a general prohibition on wearing visible symbols of belief within its establishments, and the Constitutional Court had held that this concept of neutrality was compatible with Article 24 § 1 (e) of the Constitution. Detailed reasons were given for the GO! Council's decision, taking into account both the context of the education system put in place by the Flemish Community and the various interests at stake under Article 9 of the Convention.

Referring to its previous case-law and reiterating that the national authorities enjoyed a certain discretion ("margin of appreciation") in regulating the wearing of symbols of belief in State educational establishments, the Court considered that the concept of neutrality in the Community's education system, understood as prohibiting, in general, the wearing by pupils of visible symbols of belief, did not in itself run counter to Article 9 of the Convention and its underlying values.

In this connection, it noted that the contested ban was not confined to the Islamic veil but applied without distinction to any visible symbols of one's beliefs.

Moreover, the applicants had freely chosen to attend schools within the Community education system, and could not have been unaware that the relevant governing bodies were required by the Constitution to ensure compliance with the principle of neutrality in such schools. The applicants had also been informed in advance of the rules applicable in the schools concerned and had agreed to abide by them.

In so far as the contested ban had been intended to protect pupils from any form of social pressure and proselytization, the Court reiterated that it was important to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion. In this connection, it saw no reason to call into question the findings of the GO! Council with regard to problematic acts, nor those of the Antwerp Court of Appeal, according to which incidents had occurred in certain schools coming under the remit of the Community education system.

Lastly, the Court was not unaware of the different situation in which teachers and pupils found themselves. While the former were symbols of authority *vis-à-vis* the latter and could accordingly be subject to restrictions on the expression of their beliefs, underage pupils were, for their part, more vulnerable. The Court had already held in this connection that a prohibition on pupils wearing religious symbols could correspond to a specific concern to prevent any form of exclusion or pressure, while respecting pluralism and the freedom of others.

In the present case, the national authorities had been entitled, having regard to the discretion available to them, to envisage that the Flemish Community's education system would provide a school environment in which pupils did not wear religious symbols. The Court had emphasised on several occasions that pluralism and democracy were to be based on dialogue and a spirit of compromise, necessarily entailing various concessions on the part of individuals that were justified in order to maintain and promote the ideals and values of a democratic society. The contested restriction could therefore be regarded as proportionate to the aims pursued, namely the protection of the rights and freedoms of others and of public order, and thus "necessary" "in a democratic society". It followed that the complaints under Article 9 of the Convention were manifestly ill- founded.

Sikhism's quest for recognition

Request for Sikhism to be officially recognized as a religion in Belgium is set to be discussed in parliament before the current legislative session ends in June.

La Croix International (15.04.2024) - In early April, Belgium's Justice Minister Paul Van Tigchelt revealed that Sikhs had sought official recognition of their religion, and comes at a time when a similar plea for Buddhism is under consideration. Belgium officially recognizes six religious denominations Catholicism, Judaism, Anglicanism, Protestant-Evangelicalism, Islam, Orthodoxy -- along with one philosophical belief -- liberal-humanism. Currently, there are more than 10,000 Sikhs in Belgium, and Sikhs have played a role in Belgian history for years, fighting as part of the British troops in Belgium during World War I.

Sikhism, established in the 15th century in the Punjab region of northwest India, bordering Pakistan, is a religion followed by Sikhs, meaning "disciple" in Punjabi. Sikhs believe in an eternal, creator God, who is both immanent and transcendent. The faith promotes an honest life, eschewing the consumption of meat, alcohol, and tobacco. Sikhism was founded by Guru Nanak (1469-1539), followed by nine other Gurus. Following the death of the tenth Guru in 1708, the Sikh holy scripture, the Guru Granth Sahib, was designated as the eternal Guru.

Fifth-largest religion in the world

As the fifth-largest religion globally, Sikhism boasts 30 million followers, primarily in Punjab, where it surpasses Buddhism, Christianity, Hinduism and Islam. Sikhs assert their faith's distinctiveness from Hinduism, although some Western scholars view it as an offshoot of Hinduism with potential Islamic influences through historical interactions with the Mughal Empire that dominated India in the 16th century.

A significant evolution of Sikhism occurred under the sixth Guru, Guru Hargobind, who added a temporal authority to his spiritual leadership, challenging the Mughal Empire. This political endeavor eventually led to the foundation of an independent state in 1799,

later annexed by the colonial British in 1894. Guru Gobind Singh, the tenth and final Guru, established the Khalsa, a warrior order, selecting its first members from disciples willing to sacrifice themselves.

The "Five Ks"

Contemporary Sikhs, by joining the Khalsa, adhere to distinctive practices and the markers of Sikh identity, known as the "Five Ks," including **uncut hair (kesh)** covered by a specific type of turban, and a beard; a **wooden comb (kangha)** for the hair; a **bracelet (kara)**; an **undergarment (kachera)**, and a **small curved sword or knife (kirpan)**. Many Sikh men adopt the name "Singh," meaning "lion," as seen in former Indian Prime Minister Manmohan Singh, while women often carry the name "Kaur," meaning "princess," like Canadian poet Rupi Kaur.

Since the 1970s, a faction of Sikhs in India has been pushing for the establishment of a theocratic state. This culminated in the tragic 1984 event where hundreds were killed in the Golden Temple by the Indian army, which then led to the retaliatory assassination of Prime Minister Indira Gandhi by two of her Sikh bodyguards.

Kassasjonsdomstolen stadfester Jehovas vitners rett til å ekskludere medlemmer

En endelig avgjørelse som i stor grad er blitt ignorert av belgiske medier

English version

HRWF (05.01.2023) – Den 19. desember 2023 avgjorde den belgiske kassasjonsdomstolen at Jehovas vitners religiøse tro og praksis i forbindelse med eksklusjon, inkludert å begrense kontakten med tidligere medlemmer som er ekskludert, er helt lovlig og er en del av forsamlingsfriheten, så vel som religionsfriheten.

En kort oppsummering av saken

I 2015 oppsøkte et tidligere Jehovas vitne statsadvokatens kontor og hevdet at medlemmene som forlot samfunnet, ble utfryst og fullstendig sosialt isolert etter ordre fra organisasjonen.

Statsadvokatens kontor i Gent stevnet Jehovas vitner på fire punkter: oppfordring til diskriminering av en person og mot en gruppe på religiøst grunnlag og oppfordring til hat eller vold mot en person og mot en gruppe.

I 2020 tok påtalemyndigheten ut tiltale mot Jehovas vitner for angivelig å ha brutt Belgias diskrimineringslov, paragraf 22. Saken fikk utstrakt mediedekning i mars 2021, da dommeren avsa en kontroversiell kjennelse i favør av aktor og hver av saksøkerne. Rettsavgjørelsen ble i stor grad kritisert av internasjonale juridiske eksperter. Den belgiske foreningen av Jehovas vitner anket avgjørelsen.

Den 7. juni 2022 omgjorde ankedomstolen i Gent dommen som ble avsagt i førsteinstansdomstolen, ved å anvende Den europeiske menneskerettighetsdomstolens omfattende rettspraksis, og frikjente Den belgiske foreningen av Jehovas vitner uforbeholdent for alle anklager om diskriminering og oppfordring til hat. Ankedomstolen i Gent bekreftet dermed at Jehovas vitners bibelske praksis med å begrense eller unngå kontakt med tidligere medlemmer var lovlig og ikke oppfordrer til diskriminering, segregering, hat eller vold.

Human Rights Without Frontiers dekket rettsforhandlingene i stor utstrekning i Bitter Winter i 2021 og The European Times i 2022.

Kassasjonsdomstolen avviste anken til UNIA, et interføderalt senter mot diskriminering

Det interføderale senteret for likestilling og bekjempelse av diskriminering og rasisme (The inter-federal center for equal opportunities and fight against discrimination and racism, UNIA) tok parti med de tidligere medlemmene av Jehovas vitner, men anken ble avvist 19. desember 2023 av kassasjonsdomstolen.

I kjennelsen avviste kassasjonsdomstolen bestemt alle argumentene til UNIA og de individuelle saksøkerne og ga sin fulle støtte til avgjørelsen til ankedomstolen i Gent. Kassasjonsdomstolen avgjorde at Jehovas vitners «policy for unngåelse» (av ankedomstolen i Gent omtalt som «passiv sosial unngåelse») er lovlig, og at Den europeiske menneskerettskonvensjon garanterer at «alle», også menigheter, har rett til å bestemme hvem de vil ha sosial kontakt med.

Kassasjonsdomstolens dom er helt i tråd med Den europeiske menneskerettighetsdomstolens rettspraksis og samsvarer med lignende kjennelser fra ankedomstoler og høyesterettsdomstoler i mange land over hele verden, for eksempel Argentina, Brasil, Canada, England, Irland, Italia, Japan, Polen, Sør-Afrika, Tyskland og USA.

Jehovas vitner uttrykte i en pressemelding takknemlighet overfor de høyeste juridiske institusjonene i Belgia for at de har renvasket deres gode navn og rykte.

Den første rettsavgjørelsen mot Jehovas vitner skapte store overskrifter i pressen, men kassasjonsdomstolens endelige avgjørelse, som var i deres favør, ble ignorert, deriblant av UNIA, som per 30. desember fortsatt ikke har publisert noe om saken.

De få mediene som publiserte Belgas pressemelding om saken, slik som RTL Info, La Dernière Heure Les Sports, La Libre Belgique og Het Nieuwsblad, fortjener ros.

The Ghent saga ends: Cassation Court confirms shunning is legal

On December 19, 2023, the Belgian Court of Cassation confirmed the appeal decision favorable to the Jehovah's Witnesses.

By Massimo Introvigne

Bitter Winter (04.01.2023) - "Bitter Winter" and its parent organization CESNUR, the Center for Studies on New Religions, have followed with great interest a legal case in

Belgium concerning the so-called "shunning" practiced by the Jehovah's Witnesses (and, in different forms, by other religions as well). Jehovah's Witnesses counsel their members in good standing not to associate with ex-members who have been disfellowshipped for serious sins, and have not repented, or have publicly disassociated himself from the organization. Cohabiting relatives are not shunned, nor are those "lapsed" members who simply become inactive without publicly disassociating themselves from the Jehovah's Witnesses either through a declaration or by joining a different religion or an organization whose membership in the Witnesses regard as incompatible with Biblical teachings.

While courts in different countries of the world (including in Belgium itself) had consistently recognized that shunning as taught and practiced by the Jehovah's Witnesses is protected by religious liberty and is not illegal, on March 16, 2021, the Court of Ghent stated that suggesting that current members of a religious organization do not associate with ex-members who have been disfellowshipped or have publicly left the organization amounts to discrimination and incitement to hatred and should be prohibited. "Bitter Winter" published several articles criticizing the decision as dangerous for religious liberty. CESNUR organized a webinar on the decision on April 9, 2021, with the participation of lawyers, human rights activist, and leading scholars of religion including James T. Richardson, George Chryssides, and Eileen Barker.

On June 7, 2022, the Court of Appeal of Ghent overturned the first-degree decision, ruling in favor of the Jehovah's Witness against both the ex-members who had acted against them and the federal Belgian anti-discrimination agency UNIA, which had entered the proceedings as a civil party. The appeal judges stated that teaching and practicing shunning in the form advocated by the Jehovah's Witnesses, which they characterized as "passive social avoidance" of those shunned, is not illegal and is in fact protected by the principles of religious liberty. It should not be confused with cases (reported about different religions, but not about the Jehovah's Witnesses) where ex-members are "stalked, harassed, bullied, or threatened."

Both the hostile ex-members and UNIA filed an appeal for Cassation. On December 19, 2023, the Court of Cassation ruled again in favor of the Jehovah's Witnesses, and finally put an end to the Ghent saga. Apart from procedural questions, the Belgian Cassation examined two arguments, that shunning as taught and practiced by the Jehovah's Witnesses violates article 8 (on the rights of the family) and article 9 (on religious liberty—in this case, of the shunned ex-members) of the European Convention on Human Rights (ECHR) and the corresponding articles of the Belgian Constitution, and that it amounts to discrimination and harassment of those shunned.

Following the Court of Appeal, the Cassation noted that article 8 does not apply to the case of the Jehovah's Witnesses, as their practice of shunning does not extend to cohabiting spouses and children.

The Cassation also stated that the Jehovah's Witnesses' shunning does not violate the freedom of religion or belief of those shunned and does not imply discrimination or harassment. The Court wrote that in the case of the Jehovah's Witnesses the teachings on shunning consist of "guidelines relating to ordinary social intercourse," which "strongly discourage contacts" with members who have been disfellowshipped or have publicly disassociated themselves from the organization. The guidelines "label them [these contacts] as sinful, without, however, inciting manifestly unlawful conduct," including "stalking, threats, or harassment."

The Cassation acknowledges that it would be forbidden to "harass, threaten, or bully ex-members," but states that this is by no means part of the shunning policy of the Jehovah's Witnesses. It is true that shunning may lead "to social isolation towards other members of the faith community," but this should not be confused with a "generalized social isolation." The Belgian Jehovah's Witnesses are a "small faith community of about 26,000 members across Belgium," and those shunned remain free to associate with all the other people living in the country.

In fact, article 9 of the European Convention on Human Rights (ECHR) should indeed be applied to the case, the judges note, but to protect the religious liberty of the Jehovah's Witnesses to organize themselves as they deem fit. "The circumstance of feeling aggrieved, hurt or socially isolated from the original circle of friends by the shunning policy is not sufficient to neutralize the effect of Article 9 ECHR," the Cassation writes," as "it must be accepted that conducts protected under Article 9 ECHR may, where appropriate, give rise to alienation vis-à-vis those close to them and hurt their feelings."

At any rate, the Cassation concludes, "Articles 8 and 9 ECHR and Articles 19 and 22 of the Belgian Constitution also imply that everyone has the right to decide independently with whom to maintain social contacts and with whom not. Criminal courts, in accordance with the case law of the European Court of Human Rights, have only a small margin of appreciation to intervene in both (a) choices that people make in their private lives or (b) the pursuit of a religious standard of conduct within the sphere of their personal autonomy."

Through a final decision, thus, Belgium joins several other democratic countries, including most recently the Netherlands, in recognizing that teaching and practicing shunning by the Jehovah's Witnesses is not illegal and is part of their normal exercise of their freedom of religion or belief.