APPLICATION/REQUÊTE N° 16278/90

Senay KARADUMAN v/TURKEY

Senay KARADUMAN c/TURQUIE

DECISION of 3 May 1993 on the admissibility of the application

DÉCISION du 3 mai 1993 sur la recevabilité de la requête

Article 9, paragraph 1 of the Convention *This provision primarily protects the sphere of private, personal beliefs, and not every act in the public sphere which is dictated by such convictions*

The term "practice" in this provision does not cover an act which does not directly express a belief, even though it is motivated or influenced by it

The fact that a secular university has regulations on students' dress and that its administrative services are subject to compliance with those regulations does not constitute an interference with the right to freedom of religion and belief In this case refusal of a Turkish university to issue a degree certificate to a female student who, by submitting for the certificate an identity photograph in which she is wearing a Muslim headscarf, did not comply with university regulations prohibiting the wearing of such a headscarf

Article 26 of the Convention

a) The exhaustion of domestic remedies may take place after the introduction of an application but must have taken place before the Commission is called upon to decide on the admissibility

b) *An applicant must make normal use of those domestic remedies which are apparently effective and sufficient.*

As the Turkish administrative courts can examine the lawfulness of an administrative decision in an individual case, an applicant is not required in addition to challenge the lawfulness of the administrative regulations on which the decision was based

A request to the Turkish Council of State to reconsider a final judgment in which it applied established case-law is not an effective remedy.

c) *Domestic remedies have been exhausted if, before the highest domestic body, the applicant has submitted in substance his complaint before the Commission, even without particular reference to the Convention.*

(TRANSLATION)

THE FACTS

The applicant, a Turkish national born in 1966, has a bachelor's degree in pharmacology and is resident in Bursa (Turkey).

The facts, as submitted by the parties, may be summarised as follows.

The applicant, having completed her university studies at the faculty of pharmacology in Ankara, asked the university registry for a provisional certificate stating that she had obtained a bachelor's degree She supplied an identity photograph which showed her wearing a headscarf In a letter dated 28 July 1988 the dean of the faculty informed the applicant that he was refusing to issue the certificate in question, as the identity photograph supplied by the applicant did not comply with the university's disciplinary regulations or with the circular of 30 December 1982 issued by the Higher Education Council He stated that he was prepared to issue the certificate requested on condition that the applicant supplied an identity photograph which complied with the regulations

On 19 September 1988 the applicant appealed to the Ankara Administrative Court seeking annulment of the administrative decision of 28 July 1988 She alleged, *inter alia*, an infringement of her right to freedom of religion and the freedom to manifest her religion, as guaranteed by the Turkish Constitution and the Universal Declaration of Human Rights

In a judgment dated 9 March 1989 the Ankara Administrative Court dismissed the applicant's appeal on two grounds

Firstly, the court noted that Rule 29 of Ankara University's regulations on degree courses required an identity photograph taken in accordance with the university's rules on dress" to be affixed to the degree certificate Secondly, the court noted that the circular issued on 30 December 1982 by the Higher Education Council on dress requirements for university students required the latter to wear clean, simple and smartly ironed clothing, to wear nothing on their heads and to have tidily cut hair In the light of the provisions of the two sets of regulations mentioned, the court held that the applicant was obliged to supply an identity photograph on which her dress complied with the requirements described above

Thirdly, the court noted that on the identity photograph in question the applicant was wearing a headscarf which framed her face in such a way that it concealed her forehead, ears and lower jaw, and that as a result this photograph was not adequate to identify the student concerned

On 25 April 1989 the applicant appealed against this judgment to the Council of State She pleaded, *inter alia*, the inapplicability of the regulations relied on by the Administrative Court when it dismissed her appeal, and further alleged a violation of her right to freedom of religion, as she had done before the court of first instance She also claimed that her identity card, her passport and her driving licence carried photographs of her wearing a headscarf

The defence of the administrative authority (Ankara University) was based on the provisions of the circular of 30 December 1982 prohibiting the wearing of the Muslim headscarf in universities

In a judgment dated 16 October 1989 the Council of State upheld, by a majority, the judgment of 9 March 1989 It held, in the light of its established case-law, that the administrative decision impugned by the applicant was consistent with the university's regulations on student dress

In the meantime, in a judgment given on 7 March 1989 and published in the Official Journal on 5 July 1989, the Constitutional Court had declared unconstitutional a legal provision authorising the wearing of headscarves in higher education establishments on the ground that the provision in question was contrary to the principle of secularity enunciated in the Constitution

Two members of the Council of State expressed the view in their dissenting opinion that the university's refusal was null and void because there was no regulation which expressly indicated what form the photograph to be affixed to a degree certificate should take

COMPLAINTS

Before the Commission the applicant complains of an infringement of her right to freedom of thought, conscience and religion, contrary to Article 9 of the Convention, in that for a period of two years her degree certificate was withheld from her because she had not supplied an identity photograph showing her bare-headed, when to appear thus would have been incompatible with the manifestation of her religious beliefs

The applicant further complains of discrimination by the administrative authorities between female students of foreign nationality and those of Turkish nationality She asserts that female foreign nationals have total freedom as to dress in Turkish universities, whereas Turkish female students are subject to the restrictions mentioned above which infringe their freedom of religion In that connection she relies on Article 14 of the Convention

THE LAW

The applicant complains of an infringement of her right to freedom of religion and conscience, given that the way she is required to dress for the identity photograph to be affixed to her university degree certificate is contrary to her religious beliefs In that connection she relies on Article 9 of the Convention

Under Article 9 para 1 of the Convention, everyone has "the right to freedom of thought, conscience and religion" This right "includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance

1. *As to the exhaustion of domestic remedies*

The respondent Government first plead inadmissibility on the ground of failure to exhaust domestic remedies. Their objection has four separate limbs.

Firstly, they observe that the applicant lodged her application with the Commission before she had exhausted domestic remedies, to be precise on the same date as the decision of the administrative court, which tried the case at first instance (1st limb of the objection).

The respondent Government further claim that the applicant, who contested in the administrative courts the administrative decision refusing to issue her a degree certificate, omitted to challenge the lawfulness of the circular of 30 December 1982 on which the impugned administrative decision was based (2nd limb of the objection).

The Government also assert that the applicant omitted to appeal against the judgment of the Council of State. They maintain in this connection that such an appeal, in which the appellant asks the Council of State to reconsider its final judgment, and which may be brought without seeking leave, has become an "ordinary" remedy in the practice of the courts (3rd limb of the objection).

Lastly, the respondent Government maintain that the applicant omitted to invoke in the Turkish courts Articles 9 and 14 of the Convention, on which the complaints she now lays before the Commission are based (4th limb of the objection).

The applicant rejects the arguments of the respondent Government and maintains that she has exhausted domestic remedies.

She maintains that she argued in the Turkish courts that the administrative decision rejecting her request and the circular on which this decision was based were neither provided for by law nor compatible with the Constitution (2nd limb of the objection). The applicant also asserts that she appealed to the highest national administrative court, namely the Council of State (3rd limb of the objection) and prayed in aid before that court the right to freedom of religion and the principle of non-discrimination, as set forth in the Constitution (4th limb of the objection).

The Commission has examined the submissions of the parties on the subject of the exhaustion of domestic remedies and has reached the following conclusions.

With regard to the 1st limb of the Government's objection, the Commission refers to its established case-law, upheld by the Court in its Ringeisen judgment:

> "Thus, while it is fully upheld that the applicant is, as a rule, in duty bound to exercise the different domestic remedies before he applies to the Commission, it must be left open to the Commission to accept the fact that the last stage of such remedies may be reached shortly after the lodging of the application but before the Commission is called upon to pronounce itself on admissibility" (judgment of 16 July 1971, Series A no. 13, p. 38, para. 91).

The Commission recalls that it has previously held that it is not obliged to reject a complaint for failure to exhaust domestic remedies on account of the fact that appeals were still pending at the time when it was introduced (see, among other authorities, Luberti v. Italy, Dec. 7 7 81, D R. 27 p. 181). Accordingly, it considers that this limb of the objection cannot be upheld.

With regard to the possibility of seeking the annulment of the circular of 30 December 1982 (2nd limb of the objection), the Commission observes that the applicant invoked in the Turkish courts the provisions of the Constitution guaranteeing freedom of religion and the principle of non discrimination. The Commission also points out that the Turkish administrative courts can examine of their own motion the lawfulness of an impugned administrative decision taken in an individual case, separately from the issue of the lawfulness of the relevant administrative regulations The courts trying the applicant's case were therefore in a position to give a ruling as to whether there had been a violation of the Convention Consequently, the applicant was not obliged to exercise other remedies, including that suggested by the Government (cf , *mutatis mutandis*, Eur Court H R , Airey judgment of 9 October 1979, Series A no 32, p. 12, para. 23, No 9697/82, Dec 7 10 83, D R. 34 p 131)

With regard to the appeal seeking reconsideration of a judgment mentioned by the Government (3rd limb of the objection), the Commission notes that in Turkish law such an appeal involves asking the court which has given the impugned judgment to reconsider its decision, on the ground that it has made a mistake In fact, the court concerned must retry the case if the parties exercise their right to appeal, without there being any fresh evidence

The Commission must assess in the light of each case whether a particular domestic remedy seems to offer the applicant an effective means to remedy the matter of which he complains (cf , among other authorities, Nos 5577-5583/72, Dec 15 12 75, D R 4 pp 4, 64) The applicant is not required to use a remedy that, according to "the settled legal opinion" which existed at the time, was not of such a nature as to satisfy the complaints (Eur. Court H R., De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no 12, p. 34, para. 62).

In this case, the Commission notes that in dismissing the applicant's appeal the Council of State applied its established case-law to the effect that students must comply with university regulations on dress. Consequently, it considers that in the circumstances of this case an appeal seeking reconsideration of the judgment was not an effective remedy for this type of complaint.

With regard to the possibility of invoking the provisions of the Convention before the Turkish courts (4th limb of the objection), the Commission refers to its well-established case-law to the effect that domestic remedies are exhausted when, before the highest national authority, the applicant has raised in substance the complaint he submits to the Commission, even without referring to the Convention (cf., among other authorities, Nos 7299/75 and 7496/76, Dec 4 12 79, D R 18 p 5). It notes that in this

case the applicant, by invoking the right to freedom of religion and the principle of non-discrimination, as guaranteed by the Turkish Constitution, satisfied the above condition.

That being the case, the Commission takes the view that the objection raised by the Government cannot be upheld It follows that the applicant has satisfied the requirement concerning the exhaustion of domestic remedies, in accordance with Article 26 of the Convention.

2 *As to the merits*

The Government maintain in the first place that the refusal the applicant complains of did not interfere with her freedom of religion and worship They consider that a person is not prevented from practising her religion either by the fact that she must go bare-headed on university premises or by the fact that she must provide an identity photograph which shows her bare-headed in order to comply with the university's disciplinary regulations

Secondly, the respondent Government maintain that the obligation to respect the principle of secularity imposed on university students must be held to be congruous with the restrictions provided for in paragraph 2 of Article 9 of the Convention. They observe that the Turkish Constitutional Court, in a judgment dated 7 March 1989, declared unconstitutional a legal provision permitting the wearing of headscarves in higher education establishments on the ground that this provision was contrary to the principle of secularity It further held that the wearing of the Muslim headscarf could lead to claims that those women who do not wear headscarves are atheists, and thus create social conflict

On the other hand, the applicant observes that, although she successfully completed her university studies five years ago, she still cannot obtain her degree certificate because she has not supplied an identity photograph on which she must appear bare-headed. She maintains that covering her head with a headscarf is one of the observances and practices prescribed by religion.

The applicant further maintains that the university's refusal to issue her with her degree certificate constituted an interference with her freedom of religion and belief which could not be justified by respect for the principle of secularity. She draws a distinction between the principle of secularity and the question of dress She maintains that secularity is one of the political principles of Government policy. By wearing a Muslim headscarf or turban an individual merely takes part in a religious practice which does not impinge on the secularity of the State

The Commission recalls that Article 9 of the Convention expressly protects "worship, teaching, practice and observance" as manifestations of a religion or belief.

The Commission has previously ruled that Article 9 of the Convention does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief In particular, the term "practice" as employed in Article 9 para 1 does not cover each act which is motivated or influenced by a religion or belief (cf. No. 7050/75, Arrowsmith v the United Kingdom, Comm. Report 12.10.78, para 71, D R. 19 p. 5, and No. 10358/83, Dec. 15.12.83, D.R 37 p. 142).

In order to determine whether there has been a violation of Article 9 in this case. it must first be ascertained whether the measure complained of constituted interference with the exercise of the freedom of religion.

The Commission observes that the rules applicable to the identity photographs to be affixed to degree certificates, although they do not form part of the ordinary disciplinary rules governing the daily life of the universities, do form part of the university rules laid down with the aim of preserving the "republican", and hence "secular", nature of the university, as the Turkish courts which gave judgment in this case held

The Commission takes the view that by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion Where secular universities have laid down dress regulations for students, they may ensure that certain fundamentalist religious movements do not disturb public order in higher education or impinge on the beliefs of others

The Commission notes that in the present case the university regulations on dress require, *inter alia*, that students forbear from wearing headscarves The Commission also takes into consideration the observations of the Turkish Constitutional Court, which has held that the act of wearing a Muslim headscarf in Turkish universities may constitute a challenge towards those who do not wear one

The Commission recalls that it has held to be compatible with the freedom of religion protected by Article 9 of the Convention the obligation requiring a teacher to observe normal working hours where, as he claimed, these clashed with his attendance at prayers (No. 8160/78, X v the United Kingdom, Dec 12 3 81, D R 22 p 27). The same applies to the obligation requiring a motorcyclist to wear a crash helmet, which he claimed was incompatible with his religious duties (No 7992/77, X v the United Kingdom, Dec 12.7.78, D R 14 p 234) The Commission considers that a student in a secular university is implicitly subject, by the nature of things, to certain rules of conduct laid down in order to ensure respect for the rights and freedoms of others. The regulations of a secular university may also require that the degree certificates issued to students do not reflect in any way the identity of a movement owing allegiance to a particular religion in which these students may take part

The Commission also takes the view that a university degree certificate is intended to certify a student's capacities for employment purposes, it is not a document intended for the general public The purpose of the photograph affixed to a degree certificate is to identify the person concerned. It cannot be used by that person to manifest his religious beliefs.

The Commission observes that in this case the administrative authorities and the Turkish courts found that the university regulations required the applicant to supply an identity photograph which complied with the regulations on dress. It further notes that the university authorities' rejection of the applicant's request for her degree certificate is not final but conditional, in so far as issue of the certificate is dependent on realisation of the condition that the applicant produce an identity photograph which complies with the regulations

The Commission also notes that the applicant has not claimed that during her studies at the university she was obliged, against her will, to observe the regulations on dress

That being the case, the Commission considers, having regard to the requirements of a secular university system, that regulating students' dress and refusing them administrative services, such as the issue of a degree certificate, for as long as they fail to comply with such regulations does not, as such, constitute an interference with freedom of religion and conscience

The Commission accordingly finds no interference with the right guaranteed by Article 9 para 1 of the Convention. It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention

As regards the applicant's complaint of discrimination concerning dress in Turkish universities between foreign female students and Turkish female students, the Commission is not required to state its opinion as to whether the facts alleged by the applicant disclose the appearance of a violation of that provision, since, under Article 26 of the Convention, the Commission may only deal with a matter "after all domestic remedies have been exhausted".

That condition is not satisfied by the mere fact that the applicant submitted her case to the various competent courts. The complaint submitted to the Commission must also have been raised, at least in substance, during the proceedings in question In this connection the Commission refers to its constant case-law (cf , for example, No. 5574/72, Dec. 21.3 75, D.R. 3 p. 10, at p 15; No 10307/83, Dec 6.3.84, D R. 37 p 113, at p 120)

In this case the applicant did not raise during the proceedings before the Council of State the precise complaint she now makes before the Commission Moreover, examination of the case has not revealed any particular circumstance which might have absolved the applicant from the obligation to raise this complaint in the proceedings mentioned.

It follows that the applicant has not satisfied the exhaustion of domestic remedies requirement and that this part of her application must accordingly be rejected, pursuant to Article 27 para. 3 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.