IN THE EUROPEAN COURT OF HUMAN RIGHTS

Fourth Section

F-67075 Strasbourg Cedex

France

Application No. 36516/10

Date of Introduction: 9 August 2007

GARY McFARLANE

- v -

UNITED KINGDOM

Additional Documentary Material

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SUMMARY OF THE FACTS

1. Mr. Gary McFarlane was an employee of Relate Avon Ltd, where he was employed from 2003 to 2008 as a Counsellor. Relate provides counselling services for couples.

2. In December 2005 the Applicant was asked to assist a lesbian couple. Because he was concerned about this in relation to his Christian faith, he discussed the matter with his counselling supervisor. As a result of the discussion, the Applicant accepted that counselling such a couple does not involve endorsement of any sexual relationship between them and proceeded with counselling.

3. In September 2006 the Applicant commenced a postgraduate course in psychosexual therapy – a form of directive sexual therapy where the counsellor discusses specific sexual techniques. After the commencement of the course Relate actively sought an assurance on the part of the Applicant that he would counsel same-sex couples even in directive sexual therapy. As the Applicant was unable to give such an assurance, he was dismissed.

4. The dismissal came in a situation in which the number of same sex couples requesting counselling was very small and there were other counsellors ready to counsel same-sex couples in directive sexual therapy. The dismissal was thus premised wholly on a hypothetical basis that the Applicant refused to assure his employer that he would counsel same-sex couples in directive sex therapy and thereby violate his religious conscience.

CURRENT LEGAL DEVELOPMENTS

5. The purpose of this brief is to highlight most current developments in jurisprudence with regard to the issues of freedom of thought, conscience and religion; rights of conscience and reasonable accommodation. The scope of the brief is to deal with developments at the European level and at the domestic level in the United Kingdom.

6. As evidenced by the Written Observations of the United Kingdom in its reply to the application, the respondent Government sought to diminish the fundamental nature of freedom of thought, conscience and religion to a much more narrow freedom of worship

or protection of merely private inner manifestations of faith. The Written Observations could be summarized with one phrase: "freedom of religion and conscience do not extend to the workplace and if an employee cannot as a matter of conscience fulfill their job criteria they are free to find alternative employment where the conscience question is not an issue."

7. The European Court of Human Rights ("the Court") has elevated the rights guaranteed by Article 9 to being one of the cornerstones of a democratic society.[1] The Court has held that religious freedom is one of the vital elements that go to make up the identity of believers and their conception of life.[2] Article 9 has taken the position of a substantive right under the European Convention.[3]

8. In this respect, the first significant legal happening in recent months has been the legal opinion of the Advocate General of the CJEU in *Federal Republic of Germany v. Y* and *Federal Republic of Germany v. Z*.[4] While the Advocate General's opinion is not yet binding on the CJEU and while CJEU judgments are not binding on the ECHR, the opinion should nonetheless hold strong persuasive weight in defining the substance of religious liberty and rights of conscience. The premise of the Advocate General's opinion is that external manifestation of one's religious faith is a key component of freedom of thought, conscience and religion. Therefore, in the context of European Communities asylum law, a state cannot expect an asylum seeker to "hide" his faith if returned to his country of origin.

9. The case before the *Bundesverwaltungsgericht* (Supreme Administrative Court) involves two Pakistani nationals – both of whom are active members of the Ahmadiyya community in Pakistan. The activities of the Ahmadiyya community are severely restricted in Pakistan. In particular, Y and Z were not allowed to profess their faith publicly without those practices being considered blasphemous.[5] As such, Y and Z sought asylum in Germany.

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[1] ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31: AFDI, 1994, p. 658.
[2] ECHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A, No. 295-A: JDI, 1995, p. 772.
[3] *Kokkinakis op.cit.*, ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C: JDI, 1994, p. 788; *Otto-Preminger-Institut*, *op. cit.*; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749.
[4] Case C-71/11 and Case C-99/11.
[5] Advocate General's Opinion at § 2.

10. The *Bundesverwaltungsgericht* essentially asked the CJEU three questions: *First*, to what extent is an infringement of freedom of religion, and in particular the right of the individual to live his faith openly and fully, likely to be an "act of persecution" within the meaning of Article 9(1)(a) of the Directive? *Secondly*, should the concept of an act of persecution be restricted to infringements affecting only what is referred to as a "core area" of freedom of religion? *Thirdly*, is a refugee's fear of persecution is well-founded within the meaning of Article 2(c) of the Directive where the refugee intends, on his return to his country of origin, to perform religious acts which will expose him to danger to his life, his freedom or his integrity or rather is it reasonable to expect that person to give up the practice of such acts?[6]

11. The Advocate General proposed that the Court should reply to the questions submitted by the *Bundesverwaltungsgericht* as follows:

    11.1 *First,* Article 9(1)(a) of Directive 2004/83/EC must be interpreted as meaning that a severe violation of freedom of religion, regardless of which component of that freedom is targeted by the violation, is likely to amount to an "act of persecution" where the asylum-seeker, by exercising that freedom or infringing the restrictions placed on the exercise of that freedom in his country of origin, runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude, or of being prosecuted or imprisoned arbitrarily. Under Article 3 of Directive 2004/83, the Member States remain free to adopt or maintain more favourable standards provided, however, that they are compatible with the Directive.

    11.2 *Secondly,* Article 2(c) of Directive 2004/83 must be interpreted as meaning that there is a well-founded fear of persecution where the asylum-seeker intends, once back in his country of origin, to pursue religious activities which expose him to a risk of persecution. In this context, and in order to ensure observance of the fundamental rights enshrined in the Charter of Fundamental Rights of the

[6] *Id.*, at §§3-5.

European Union, the authority responsible for examining the application for asylum cannot reasonably expect the asylum seeker to forego these activities, and specifically to forego manifesting his faith.[7]

12. Most central to this opinion and its applicability to present case are the implications of the interpretation of freedom of religion to national authorities. The Advocate General resolutely held that it is not possible for national authorities to identify "core areas" of a person's particular religious belief.[8] The Advocate General noted the significant risk of arbitrariness if authorities were given the responsibility of defining "core areas" of religion, stating that "there will be as many views as there are individuals".[9]

13. In several recent cases, national courts have strayed beyond their mandate and started to speculate as to what may be a "core area" of religion. However, it is not for judges to judge religious doctrine.[10] Notably, several cases before the courts of the United Kingdom have erred in this respect. For example, in *Ladele v. The London Borough of Islington*[11], one of four companion cases being heard together by the Court along with the current case, Lord Neuberger held that: "Ms Ladele's objection [to performing same-sex civil partnerships] was based on her view of marriage, **which was not a core part of her religion...**"[12]

14. The Advocate General's opinion clearly affirmed that freedom of religion cannot be limited to the private sphere. The Advocate General stated that if the so-called "core area" of religious belief comprised only of "private conscience", it would render any protections for "the external manifestation of that freedom" effectively "meaningless".[13] He further held that "...there is nothing in the case-law of the Court or, specifically, of the European Court of Human Rights, to support the proposition that the 'core area' of freedom of religion must be limited to private conscience and the freedom to manifest one's religion in private

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[7] *Id.*, at § 107.
[8] *Id.*, at § 39.
[9] *Id.*, at § 41.
[10] *See*: D. Boucher, 'A Little Bit Against Discrimination? Reflection on the opportunities and challenges presented by the Equality Bill 2009-2010', *Care Research Paper*, 2009, p.59.
[11] [2009] EWCA Civ 1357.
[12] *Id.,* at § 52. Emphasis added.
[13] Advocate General opinion at § 46.

or within the circle of those who share the faith, thus excluding the public manifestation of religion."[14]

15. The Advocate General pointed to the judgment of this Court in *Metropolitan Church of Bessarabia and Others v Moldova*[15] to support this position, and stated that "bearing witness in words and deeds is bound up with the existence of religious convictions".[16] Moreover, the Advocate General stated that "[t]he manifestation of religion is inseparable from faith and is an essential component of freedom of religion, whether it be practiced in public or in private." He pointed to the jurisprudence of the European Commission of Human Rights,[17] where it was held that the term "in private or in public" in the legislation "means nothing other than allowing the faithful to manifest their faith in one form or the other, and should not be interpreted as being mutually exclusive or as leaving a choice to the public authorities."[18] Such an interpretation of the relationship between belief and manifestation is certainly to be welcomed. Clearly belief and manifestation cannot be easily separated, and whether in "private" or in "public", freedom of religion enjoys strong protections.

16. A second recent development relates to the Court's jurisprudence on the right to conscientious objection. Although this was referred to in our previous submissions, the case-law has continued to develop rapidly in recent months,[19] as reflected by the Court's new factsheet on "Conscientious Objection", dated June 2012.[20]

17. The seminal case is *Bayatyan v. Armenia*,[21] where the Court upheld the right to conscientious objection in the field of the military, overruling previous decisions and a settled jurisprudence by the European Commission ("the Commission"). In the case of *X*

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[14] *Id.,* at § 49.
[15] Judgment of 13 December 2001, ECHR *Reports* 2001-XII.
[16] *Id.,* at § 114
[17] ECHR, *X v. United Kingdom*, judgment of 12 March 1981, D.R. , 22, p. 39, § 5.
[18] Advocate General opinion at § 50.
[19] For example, see *Erçep v. Turkey*, Application no. 43965/04) 22 November 2011; *Bukharatyan v. Armenia*, Application no. 37819/03 10 January 2012; *Tsaturyan v. Armenia*, Application no. 37821/03, 10 January 2012;*Demirtaş v. Turkey*, Application no. 5260/07, 17 January 2012, *Savda v. Turkey*, Application no. 42730/05, 12 June 2012.
[20] http://www.echr.coe.int/NR/rdonlyres/2053881B-5606-42C4-977E-120AF07B8C73/0/FICHES_Objection_de_conscience_EN.pdf.
[21] ECHR, *Bayatyan v. Armenia*, application no. 23459/03, Judgment of 7 July 2011 [Grand Chamber].

v. Austria[22] the Commission stated that, in interpreting Article 9 of the Convention, it had also taken consideration the terms of Article 4 § 3 (b) of the Convention, which provide that forced or compulsory labour should not include "any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service". The Commission made an important textual argument, that by including the words "in countries where they are recognised" in Article 4 § 3 (b), a choice was left to the High Contracting Parties whether or not to recognise conscientious objectors in the military arena and, if they were so recognised, to provide some substitute service.

18. Notwithstanding the textual basis of Article 4 § 3 (b), the Court came to a conclusion that not providing for conscientious objection in the military field "imposed on citizens an obligation which had serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like to applicant, refused to perform military service. In the Court's opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant."[23]

19. It should follow *a fortiori* that in the context of the present case, without a clear textual reference to the contrary, a failure of the Government to recognize conscientious objection runs afoul of striking a fair balance between the interests of the society and those of the applicant.

20. As far as the Applicant's case is concerned – counselling to same-sex couples is being provided by many other service providers. The interests of other members of the society are therefore duly recognised. The need to "strike a fair balance", on the other hand, requires the Government to accommodate any conscientious objection which does not create an undue burden on any of the legitimate interests the Government might have.[24]

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[22] Commission decision of 2 April 1973, no. 5591/72.
[23] *Bayatyan* at §124.
[24] *Savda v. Turkey*, Application no. 42730/05, 12 June 2012, §100: "A la lumière de ce qui précède, la Cour observe qu'un système qui ne prévoit aucun service de remplacement (*Erçep,* précité, § 63) et aucune procédure accessible et effective au travers de laquelle le requérant aurait pu faire établir s'il pouvait ou non bénéficier du droit à l'objection de conscience ne peut passer pour avoir ménagé un juste équilibre entre l'intérêt de la société dans son ensemble et celui des objecteurs de conscience. Il s'ensuit que les autorités compétentes ont manqué à leur obligation tirée de l'article 9

CONCLUDING REMARKS

21. The jurisprudence of the Court makes it crystal clear that Article 9 protects not only the sphere of personal beliefs, the *forum internum*, but it also protects the *forum externum*, on the basis that "bearing witness in words and deeds is bound up with the existence of religious convictions."[25]

22. The Court has held that guaranteeing freedom of thought, conscience and religion assumes State neutrality. Therefore, where necessity and proportionality are lacking, a State must seek to **accommodate** religious beliefs no matter how irksome it finds them. This notion stems from the reluctance of European civilization – born of decency, forbearance, and tolerance – to compel our fellow citizens to humiliate themselves by betraying their own consciences.

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de la Convention (voir, *mutatis mutandis*, *Membres (97) de la Congrégation des témoins de Jéhovah de Gldani*, précité, § 134)."

[25] *Kokkinakis op.cit.*, ECHR, 23 June 1993, § 31.