September 2010

EUROPEAN COURT OF HUMAN RIGHTS

ECHR, 02/02/2010, Sinan Isik v. Turkey, n°21924/05 – Article 9 ECHR

Subject: Indication of religion on identity cards is in breach of art. 9 ECHR

Key facts of the case

Sinan Işık is a Turkish national and a member of the Alevi religious community. In 2004, Mr Işık applied to a court requesting that his identity card refers to the word 'Alevi' rather than the word 'Islam'. His request was dismissed by the court, which had deemed that the Alevi community being a sub-group of Islam, the indication on the identity card was accordingly correct.

Main reasoning of the Court

*The ECHR handed down the decision under the perspective of the negative aspect of the religious freedom, namely the right for the individual not to be obliged to disclose his or her religion.

* The Court does not agree with the Turkish government's argument, that the indication of religion on identity car does not compel the Turkish citizens to disclose their religious convictions and beliefs.

* Concerning the rectification on the identity card of the applicant, the Court considers that it led the State to interpret the applicant's religious convictions and that such an assessment is incompatible with the State's duty of neutrality and impartiality in this matter.

* The Court is not either convinced by the possibility recently given by a 2006 Act to let the "religion" box blank.

Key words

Public Space– ECHR – Turkey – Freedom of religion – Religious belonging

Court Decision Full Text at:

http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&source=tkp&highlight=21924/05&sessionid=59295984&skin=hudoc-en

COURT OF JUSTICE OF THE EUROPEAN UNION

Relevant Cases

Case C-275/92 Her Majesty's Customs and Excise v Schindler [1994] ECR I-01039.

Subject: Compatibility with EU law of Member State restrictions on gambling.

Key facts of the case

Two German lottery agents were charged with attempting to sell German lottery tickets in the UK, contrary to English law.

The defendants argued that the charges were incompatible with EU law (Article 30 or Article 59 of the Treaty on the free movement of goods and services).

In a preliminary reference ruling, the Court of Justice upheld the UK legislation.

Main reasoning of the Court

The Court held that importation of lottery advertisements and tickets into a Member State can be regarded as a "service" within the meaning of Article 56 of the Treaty (TFEU).

Considerations such as the protection of recipients of a service and maintenance of order in society figure among those objectives which can justify restrictions on freedom to provide services.

The Court of Justice stated that it was "not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling in Member States" which were held to grant the Member States in question a "degree of latitude" entitling it to restrict gambling notwithstanding the EU law duty to respect the freedom to provide services and provided those restrictions were not discriminatory on the basis of nationality.

Consequently, the Court ruled that Treaty provisions relating to the freedom to provide services do not preclude legislation such as the United Kingdom's lotteries legislation.

Key words

Freedom to provide services - Restrictions - maintenance of public order

Link to the original document:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992J0275:EN:HTML

Case C-268/99 Jany and Others v. Staatssecretaris van Justitie

***Subject**:* The Court assessed whether prostitution could be categorised as a service under Community law.

Key facts of the case

Two Polish and four Czech women invoked the right of establishment contained within the Europe Agreements with Poland and the Czech Republic in order to obtain Dutch residence permits and then be able to work as self-employed prostitutes in the red light district in the centre of Amsterdam.

The national court asked whether the activity at stake, namely prostitution, could be regarded as an economic activity within the meaning of the Europe Agreements, in view of its illegal nature and/or for reasons of public morality.

The Court held that in terms of its treaty obligations, the Dutch government could not refuse residence permits to self-employed prostitutes from Poland and the Czech Republic.

Main reasoning of the Court

The Court held that prostitution could be categorised as a service under EU law. As for the (alleged) immorality of prostitution, the Court held that this does not affect its finding as to the economic nature of this activity. The host Member State can, however, derogate from the application of the provisions on the freedom of establishment on grounds of, inter alia, public policy.

Use of this public policy derogation presupposes in any event that there is a "genuine and sufficiently serious threat affecting one of the fundamental interests of society". However, conduct may not be considered to be of a sufficiently serious nature to justify restrictions on entry to, or residence within, the territory of a Member State where this Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct. The Court ruled that as the status of prostitution was legal under Dutch law, non-nationals could not be accorded more restrictive treatment than nationals.

Key words

Freedom to provide services - prostitution – public order – public morality

Link to the original document:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0268:EN:HTML

Case C-159/90 SPUC v. Grogan [1991] ECR I-8615.

***Subject**:* The compatibility of Member States' actions preventing the distribution of information concerning abortion provision abroad with the EU principle of free movement of services.

Key facts of the case

The Irish Supreme Court ruled that it was against the Irish Constitution to help Irish women to have abortions by informing them about the location and identity of abortion clinics abroad. A number of Irish student unions provided the details of abortion clinics in the United Kingdom. The Society for the Protection of the Unborn Child (SPUC) was granted an injunction preventing the distribution of abortion information by the defendants. The case was referred to the Court of Justice. Although the Court held that abortion services could be categorised as a "service" under Article 56 TFEU it ruled that their actions fell outside the scope of the Treaty.

Main reasoning of the Court

The Court held that abortion as a medical service provided legally in another member state for remuneration meets the definition of a service under EU law, and that arguments of a moral nature should not influence that assessment by national courts.

However, the Court stated that the lack of remuneration in this case precluded the defendants' actions from being defined as a "service" under Article 56 TFEU. By establishing the requirement of an economic link between the distributor of information and the provider of services, the Court was able to avoid having to rule on the substantive elements of the case and avoid the particularly sensitive nature of the abortion issue and the lack of consensus among Member States regarding it.

Key words

Freedom to provide services - Restrictions – abortion

Link to the original document:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0159:EN:HTML

NATIONAL COURT DECISIONS

Decision of the Higher Regional Court, Hamm, 27.01.2010, 2 WF 259/09 (Germany)

Subject: Compatibility between German order public and Islamic Talaq

Key facts of the case

Compatibility of talaq with German ordre public depends on the particular case. In case of incompatibility, the problem is to solve with foreign legal order before using German law.

Main reasoning of the Court

The compatibility of the Islamic talaq with the German law (ordre public according to Art. 6 EGBGB) can be examined by checking the circumstances of the particular case. German public policy (ordre public) permits the recognition of foreign law, if the result is compatible with German law. Otherwise it has to be tried solving the problem by the principles of the foreign law (e.g. hardship clauses etc.) before applying German law.

According to Art 17 I 1, 14 Nr. 1 EGBGB foreign law (in this case Moroccan law) has to be applied to both Moroccan citizens. The husband declared a talaq (unilateral divorce), which he was allowed to according to Art 44 ff. MCC (Moroccan Civil Code). Considering the particular case circumstances (the requirements for a divorce under German law are given and that the wife agreed to the divorce) the result of the foreign law recognition is compatible with German law.

German procedural law is to apply (lex fori).

Key words

Divorce - *Talaq* - Ordre public - *lex fori*

Link to the original document:

http://www.justiz.nrw.de/nrwe/olgs/hamm/j2010/2_WF_259_09beschluss20100127.html

Administrative court of appeal of Lyon, 16.03.2010, n.07LY02583 (France)

Subject: War memorial – Christian cross on a funerary monument

Key facts of the case

The city council of Fontenelle decided to relocate a war memorial, formerly placed before a church, to another public place of the town. The local federation of the freethinking and an inhabitant lodged an appeal against this decision on the ground that it infringes the provisions of the December 9th, 1905 Act (art.28), which bans the display of religious signs and emblems on public monuments and spaces. The administrative court rejected the appeal.

Main reasoning of the Court

Firstly, the administrative court of appeal judged that the 1905 Act distinguishes between the cemeteries and the funerary monuments. The later, including the war memorials, are not submitted to the banning of religious signs and emblems.

Secondly, the court deemed that even if the cross, by its height and the inscription it bears (God – Homeland), may be considered as a religious emblem, this fact does not affect the legality of the city council's decision, which did not ordered the affixing of this emblem but the relocation of the monument.

Accordingly, the appeal of the applicants was rejected.

Key words

Public space (War memorial) – Religious symbol (Christian cross)

Link to the original document:

http://www.droitdesreligions.net/juris/caa/caa_lyon_07ly02583_16032010.htm

Council of State, 06.04.2010, n.1911 (Italy)

***Subject**:* Non-discriminatory effect of a pastoral visitation in public schools

Key facts of the case

The school councils of two villages, situated in Veneto region, decided to authorise the pastoral visitation of the school. The Union of the Atheists and Agnostic Rationalists (UAAR) appealed against this decision considering that it could discriminate non-Catholic students.

Main reasoning of the Court

The Administrative Tribunal of Veneto Region had decided that the appeal of the Union of the Atheists and Agnostic Rationalists (UAAR) was inadmissible as the association was not competent to appeal. The Council of State decided to receive the appeal but recognised the pastoral visitation as a cultural event, not a worship activity nor a care of souls. As a consequence, the pastoral visitation in public schools does not have a discriminatory effect on non-Catholic believers.

Key words

Public space – School – Education – Discrimination

Link to the original document: http://www.giustizia-amministrativa.it/DocumentiGA/Consiglio%20di%20Stato/Sezione%206/2008/200800898/Provvedimenti/201001911_11.XML