

SUMMARY

# **ECtHR 26 November 2015, application 64846/11. (Ebrahimian), Religious Discrimination**

## **Summary**

A French hospital did not renew the fixed-term contract of a social worker because she refused to remove her headscarf. The domestic courts rejected her complaint that the hospital had violated her right under Article 9 ECHR to freedom of religion by wearing a headscarf. The ECtHR, distinguishing from *Eweida*, concluded, by six votes to one, that the interference with the exercise of her freedom to manifest her religion had been necessary in a democratic society and that there had been no violation of Article 9.

## **Facts**

Ms Ebrahimian, a French national living in Paris, was recruited on a fixed-term contract within the public hospital service as a social worker in the psychiatric department of Nanterre Hospital and Social Care Centre (“HSCC”), a public health establishment administered by the City of Paris. Her contract, which ran from 1 October to 31 December 1999, was extended for one year from 1 January to 31 December 2000. On 11 December 2000 the Director of Human Resources informed the applicant that her contract would not be renewed, on account of her refusal to remove her headscarf and following complaints from patients. The Director of Human Resources sent Ms Ebrahimian a written reminder of the Conseil d’État’s opinion of 31 May 2000, to the effect that while the freedom of conscience of public officials was guaranteed, the principle of the secular character of the State prevented them from enjoying the visible symbol of religious affiliation constituted a breach of a public official’s duties. Ms Ebrahimian applied to the Paris Administrative Court to set the decision of 11 December 2000 aside. On 15 and 28 February 2001 she was informed by letter of the decision by the Director of Human Resources of the HSCC to include her on the list of candidates for a competition to recruit social assistants. Ms Ebrahimian did not sit the competition. On 17 October 2002 the

Administrative Court found that the decision not to renew her contract had been in accordance with the principles of secularism and neutrality of public services. In a judgment of 2 February 2004 the Paris Administrative Court of Appeal found that the decision complained of related to a disciplinary matter and set it aside on grounds of a procedural flaw as Ms Ebrahimian had not been able to consult her file before the decision was made. In accordance with that judgment, the Director of Human Resources invited Ms Ebrahimian to consult her file and, in a reasoned decision of 13 May 2005, confirmed to her that her contract would not be renewed.

### **National proceedings**

Ms Ebrahimian applied to the Versailles Administrative Court to set that decision aside, but her application was rejected. The Administrative Court of Appeal upheld that judgment. An appeal on points of law by Ms Ebrahimian was declared inadmissible by the Conseil d'Etat.

Ms Ebrahimian lodged an application with the European Court of Human Rights (ECtHR). Relying on Article 9 of the European Convention on Human Rights (the "Convention"), Ms Ebrahimian complained that the decision not to renew her contract as a social worker was in breach of her right to freely manifest her religion. Article 9 of the Convention states:

"1. Everyone has the right to freedom of thought, conscience and religion [.....]2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

### **ECtHR's findings (taken from the Court's press release)**

The Court noted that the reason for the decision not to renew Ms Ebrahimian's contract was her refusal to remove her veil, an expression of her affiliation to the Muslim faith. That measure had to be regarded as an interference with her right to freedom to manifest her religion as guaranteed by Article 9 of the Convention. The Court observed that the interference was prescribed by law. Whilst Article 1 of the French Constitution and the case-law of the Conseil d'État and of the Constitutional Council constituted a sufficiently strong legal basis on which to restrict Ms Ebrahimian's religious freedom, they did not enable her to foresee that the refusal to remove her veil amounted to misconduct exposing her to a disciplinary penalty as the content of the requirement of neutrality did not include a specific provision governing the profession exercised by Ms Ebrahimian. That said, the Court considered that from the time of publication of the Conseil d'État's opinion of 3 May 2000, rendered more than six

months prior to the decision in question, the requirement that public officials observe religious neutrality in discharging their functions had been foreseeable and accessible. The Court accepted that the interference in question had pursued the legitimate aim of protecting the rights and freedoms of others. With regard to the question whether the interference was necessary in a democratic society for the protection of the rights and freedoms of others, the Court found that the requirement of neutrality of public officials could be regarded as justified in principle: the State, as employer of the applicant in a public hospital, could consider it necessary that she refrain from expressing her religious beliefs in discharging her functions in order to guarantee equality of treatment of patients. Turning next to an examination of the proportionality of that prohibition in relation to the aim pursued, the Court reiterated that while public officials enjoyed total freedom of conscience, they were prohibited from manifesting their religious beliefs in discharging their functions. Such a restriction derived from the principle of the secular nature of the State, and that of the neutrality of public services, principles in respect of which the Court had already approved a strict implementation where a founding principle of the State was involved. The Court considered that the fact that the national courts had afforded greater weight to the principle of secularism-neutrality and the State's interest than to Ms Ebrahimian's interest in not having the expression of her religious beliefs restricted did not cause a problem with regard to the Convention. It was not the Court's task to rule, as such, on the French model. There was nothing in any text or decision of the Conseil d'État to say that the requirement of neutrality could be modulated according to the officials and the functions they carried out. It was a strict requirement which had its roots in the relationship established between the secular nature of the State and the freedom of conscience, as stated in Article 1 of the Constitution. That being said, the Court found that it was the administrative courts' task to ensure that the authorities did not disproportionately interfere with the freedom of conscience of public officials where State neutrality was invoked. In that context the disciplinary consequences of the applicant's refusal to remove her veil had been assessed by the authorities having regard to the ostentatious nature of the religious sign and "other circumstances". The administrative court had relied on the French conception of public service and the ostentatious nature of the religious sign worn, and had judged the penalty proportionate. Accordingly, the impact of wearing the veil in discharging her functions had been taken into account in assessing the seriousness of the applicant's misconduct and deciding not to renew her contract. The Court found that the national authorities were better placed to assess the proportionality of the disciplinary penalty, which had to be determined with regard to all the circumstances in which a breach of the requirement of neutrality had been found in order to be compatible with Article 9 of the Convention. With regard to Ms Ebrahimian, for whom it was important to visibly manifest her religion, she had exposed herself to the serious consequence of

disciplinary proceedings. However, following the opinion of 3 May 2000 she had been aware that she had to observe a neutral dress code in discharging her functions. Owing to her refusal to comply with that obligation, and irrespective of her professional qualities, disciplinary proceedings had been instituted against her. She had then had the benefit of the safeguards relating to disciplinary proceedings and remedies before the administrative courts. She had also chosen not to sit the competition to recruit social assistants organised by the HSCC. In those circumstances the Court held that the national authorities had not exceeded their margin of appreciation in finding that there was no possibility of reconciling Ms Ebrahimian's religious convictions with the obligation to refrain from manifesting them, and in deciding to give precedence to the requirement of neutrality and impartiality of the State. The Court concluded that the interference with the exercise of her freedom to manifest her religion had been necessary in a democratic society and that there had been no violation of Article 9 of the Convention.

### **Judgment**

Article 9 of the Convention has not been violated (six votes against one, with one dissenting and one partly dissenting opinion). Editorial note: seeing that neither party referred the matter to the Grand Chamber, the judgment became final on 26 February 2016.

### **Judge O'Leary's partly dissenting opinion:**

“The Court concluded that the interference with the exercise of her freedom to manifest her religion had been necessary in a democratic society and that there had been no violation of Article 9 of the Convention.[.....]Nevertheless, all of the cases cited, bar one, involved restrictions on the individual's right to manifest their freedom of religion in an educational context. As regards teachers, the Court in each case examined whether the correct balance had been struck between, on the one hand, the right of the latter to manifest their religious beliefs and, on the other, respect for the neutrality of public education and the protection of the legitimate interests of pupils and students, ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others. In these cases, the Court's reasoning, when finding no violation or rejecting the complaints as manifestly unfounded, was intimately linked to the role of education and teachers in society, the relative vulnerability of pupils and the impact or influence which religious symbols might have on the latter. In the case-law regarding pupils, the same concerns with the neutrality of state education and the need to protect susceptible and easily influenced pupils and students from pressure and proselytization emerge. In only one of these cases, *Kurtulmuş v. Turkey*, the Court expressed itself in broader terms, not apparently limited to the specificities of the educational sector, when it found that the applicant teacher had chosen to become a civil

servant and the dress code with which she did not wish to comply applied equally to all public servants, irrespective of their functions or religious beliefs. The only other Article 9 case on the wearing of religious symbols in employment is *Eweida and others v. the United Kingdom*, which is both relevant to the present case (see below) and entirely distinguishable. The latter is because, as regards Ms. Eweida, the first applicant, the Court found a violation of Article 9, upholding the applicant's private sector employer's wish to protect its own brand as legitimate but regarding the interference with the applicant's right as disproportionate. As regards Ms. Chaplin, the second applicant, who was a nurse in a public hospital, the prohibition on her wearing a cross was for public health reasons and related to clinical safety. In those circumstances, the Court was unable to conclude that the measures in question were disproportionate. An overview of existing case-law thus reveals clear instances, in cases involving Turkey and France, where the Court has allowed principles of secularism and neutrality to justify bans on the wearing of religious symbols. However, a careful reading of those cases reveals also that those abstract principles were, in each case, translated into a more concrete form than is the case in the present judgment, before they were allowed to defeat the individual applicant's fundamental right to manifest his or her religious beliefs. In addition, in all of these cases, and notwithstanding the broad reference to civil servants in *Kurtulmuş*, the Court's decisions and judgments were carefully tailored to the educational context involved. [...] In *Eweida and others*, as regards the first applicant, the Court found that the employer's legitimate aim to protect a certain corporate image was accorded too much weight in circumstances where "there was no evidence of any real encroachment on the interests of others" (*Eweida and others*, §§ 94 and 95). As regards the second applicant, the very concrete and legitimate aim of protecting health and safety on a hospital ward outweighed the individual right of that applicant to wear her cross (*Eweida and others*, §§ 99-100). In the instant case, given the nature and context of the applicant's work in a psychiatric hospital, the Government could have relied on such a concrete, legitimate aim, expressly provided by Article 9 § 2. It sought instead to rely on abstract principles in support of a blanket ban applicable to all employees of public bodies. It is uncontested that secularism and neutrality in this context are essential principles whose importance has already been recognized by the Court, and repeatedly by the Grand Chamber. In France, the neutrality of the public service is recognized as a constitutional value. Nevertheless, such recognition does not release the Court from the obligation under Article 9 § 2 to establish whether the ban on wearing religious symbols to which the applicant was subject was necessary to secure compliance with those principles and, therefore, to meet a pressing social need. When it comes to the chamber's assessment of proportionality (see below), it can be seen that the abstract nature of the principles relied on to defeat the right under Article 9, tended also to render abstract this assessment. The risk is therefore that any measure taken in the name of

the principle of secularism-neutrality and which does not exceed a State's margin of appreciation – itself very wide because what are at issue are choices of society – will be Convention compatible.”

**Judge Gaetano's dissenting opinion:**

“I have had the benefit of reading the separate opinion of Judge O’Leary. I share entirely the concerns that she expresses so eruditely regarding the reasoning in the judgment. However, those very same concerns lead me ineluctably to the conclusion that in this case there has been a violation of Article 9. The thrust of the judgment is to the effect that the abstract principle of laïcité or secularism of the State requires a blanket prohibition on the wearing by a public official at work of any symbol denoting his or her religious belief. That abstract principle becomes in and of itself a “pressing social need” to justify the interference with a fundamental human right. The attempt to hedge the case and to limit its purport to the specific facts applicable to the applicant is, as pointed out by Judge O’Leary, very weak and at times contradictory. The judgment proceeds from and rests on the false (and, I would add, very dangerous) premise, reflected in paragraph 64, that the users of public services cannot be guaranteed an impartial service if the public official serving them manifests in the slightest way his or her religious affiliation – even though quite often, from the very name of the official displayed on the desk or elsewhere, one can be reasonably certain of the religious affiliation of that official. Moreover, it would also seem that what is prohibited under French law with regard to public officials is the subjective manifestation of one’s religious belief and not the objective wearing of a particular piece of clothing or other symbol. A woman may wear a headscarf not to manifest a religious belief, or any belief for that matter, but for a variety of other reasons. The same can be said of a man wearing a full beard, or a person wearing a cross with a necklace. Requiring a public official to “disclose” whether that item of clothing is a manifestation or otherwise of his or her religious belief does not sit well with the purported benefits enjoyed by public officials as mentioned in paragraph 66 of the judgment. While States have a wide margin of appreciation as to the conditions of service of public officials, that margin is not without limits. A principle of constitutional law or a constitutional “tradition” may easily end up by being deified, thereby undermining every value underpinning the Convention. This judgment comes dangerously close to doing exactly that.”

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**Creator:** European Court of Human Rights (ECtHR)

**Verdict at:** 2015-11-26

**Case number:** 64846/11