



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

Application no. 28167/07
Alida Maria FRANKLIN-BEENTJES and CEFLU-LUZ DA FLORESTA
against the Netherlands
lodged on 4 July 2007

STATEMENT OF FACTS

1. The first applicant, Ms Alida Maria Fränklin-Beentjes, is a Dutch national who was born in 1957 and lives in Zutphen. The second applicant, CEFLU-Luz da Floresta, is a religious association (*kerkgemeenschap*) with legal personality under Netherlands law with its statutory seat in Alkmaar. They are represented before the Court by Mr T. van Kooten, a lawyer practising in Utrecht.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants and apparent from documents available to the public, may be summarised as follows.

1. The Santo Daime church

3. The first applicant is an executive of the applicant association. As a religious association, the applicant association is aligned with the *Centro Eclético da Fluente Universal Raimundo Irineu Serra* (“Cefluris”), an eclectic centre in the Amazon region of Brazil.

4. The aim of the applicant association as set forth in its statutes is to “research, study and practise the teachings of the Holy Daime and to incite with its works and rituals its godly spark in view of its integration with the divine”.

5. An essential part of the applicant association’s rituals comprises the drinking of a tea, or brew, during the church services. This tea, usually referred to as ayahuasca, is specially manufactured from plants and vines unique to the Amazon region and is prepared in accordance with prescribed religious rites. Ayahuasca is described as the “Holy Sacrament” of the applicant association and is referred to by believers as “Santo Daime”.

6. The plants that are used for the manufacturing of ayahuasca contain N,N-Dimethyltryptamine (“DMT”), the consumption of which can have hallucinating effects.

7. When DMT is consumed as an ingredient of ayahuasca, the effects usually begin to occur after 20 minutes. The user can experience changes in visual perception, sensitivity to sounds, feelings of depersonalisation and out-of-body experiences, which are, by believers of the Santo Daime church, usually felt to be the intended effects.

8. Other effects can be gastrointestinal reactions, such as nausea and vomiting. However, some users do not experience these as ‘negative’ effects related to consumption of ayahuasca but rather as part of the catharsis. In addition to these milder effects, there is a possibility of more serious symptoms of acute toxicity such as hypertension and a higher body temperature, a rapid pulse rate and hyperventilation, sensory impairment in the limbs and difficulty in walking.

9. Both the intended and unintended effects are dependent on the consumed dose of ayahuasca.

2. *Criminal Proceedings*

10. On 2 March 1999 police officers searched the first applicant’s house. During this search the police found and confiscated, among other things, ten jerrycans containing a certain liquid. Chemical analysis performed by the Forensic Laboratory (*Gerechtelijk Laboratorium*) showed that the confiscated liquid contained DMT, which is included amongst the banned substances featuring on List 1 annexed to the Opium Act (*Opiumwet*). The liquid was identified as ayahuasca.

11. On 29 August 2000 the Alkmaar Regional Court (*rechtbank*) found the first applicant guilty, *inter alia*, of the offence set out in section 2 (1)(C) of the Opium Act, namely possession of a substance featuring on List 1 annexed to that Act.

12. On 7 September 2000 the first applicant lodged an appeal with the Amsterdam Court of Appeal (*gerechtshof*), sitting in Leeuwarden.

13. On 22 August 2005 the Court of Appeal discontinued the criminal proceedings against the first applicant as it found that the length of the appeal proceedings had exceeded a reasonable time within the meaning of Article 6 of the Convention.

3. *Reclamation of the ayahuasca*

14. On 14 September 2005 the first applicant lodged a notice of complaint (*klaagschrift*) with the Amsterdam Court of Appeal, sitting in Leeuwarden, requesting the return of the ten jerrycans that had initially been confiscated. She stated that she was a member of the “Santo Daime church”, within which ayahuasca is the most important sacrament. She further alleged that the continued confiscation of the ayahuasca violated her rights under Article 9 of the Convention as this interference with her right was not necessary in a democratic society since scientific expert reports showed that there were virtually no health and safety risks related to the drinking of ayahuasca.

15. On 14 December 2005 the Court of Appeal held a hearing on the first applicant's case in the course of which she restated her arguments, claiming that, in her case, the protection of the freedom of religion should outweigh the interests protected by the Opium Act. According to the official record of the hearing the first applicant stated in reply to a question from the court that she could also practise her religion without the use of ayahuasca. The public prosecutor submitted that since the ayahuasca tea contained DMT, a substance featuring on List 1 annexed to the Opium Act, the jerrycans could not be returned to the first applicant.

16. On 25 January 2006 the Court of Appeal dismissed the first applicant's complaint. It considered that her religion, as practised by the applicant association, was protected by Article 9 of the Convention. However, since the expert reports indicated that the use of ayahuasca did constitute a threat to public health, the court found that the interference with the first applicant's rights had not been unreasonable as it was necessary in a democratic society. The Court of Appeal further noted that it had also taken into consideration the first applicant's statement that the use of ayahuasca was not indispensable for the practice of her religion.

17. On 24 April 2006 the first applicant lodged an appeal on points of law with the Supreme Court (*Hoge Raad*). She submitted that the Court of Appeal had drawn the wrong conclusions from the expert report since, after listing the effects of drinking ayahuasca, the report continued by stating that ayahuasca tea was used in the Santo Daime church's services on such a small scale and its consumption took place in such a controlled environment that there existed virtually no risk to public health. According to the first applicant the Court of Appeal had failed to explain why it had not included that part of the report in its reasoning. The first applicant further submitted that the comment she had made at the hearing before the Court of Appeal had been taken out of context since she had only meant to say that she would still adhere to her religious denomination even if she could not use ayahuasca. Therefore, the confiscation of the ayahuasca did indeed interfere with her freedom to practise her religion following the church's own rules and rituals.

18. In his advisory opinion, the Procurator General (*Procureur-Generaal*) at the Supreme Court recommended the rejection of the appeal on points of law. He considered that the judiciary was not empowered to set aside a general prohibition of the possession of the substance solely because of the particular circumstances in which it was used, i.e. the specific situation being judged not to constitute a threat to public health.

19. On 9 January 2007 the Supreme Court dismissed the first applicant's appeal on points of law. It considered that the Court of Appeal had established that ayahuasca contained DMT which was included amongst the banned substances appearing on List 1 annexed to the Opium Act. The Supreme Court further noted that it appeared from the parliamentary history (*wetsgeschiedenis*) of the Opium Act that the substances included on List 1 were banned, among other reasons, in order to comply with international treaty obligations concerning psychotropic substances that could cause damage to health. The fact that section 2 of the Opium Act banned the possession of substances included on List 1 therefore constituted a measure

for the protection of public health. The Supreme Court concluded that the Court of Appeal had not made any errors of law in finding that the ban on the possession of ayahuasca was prescribed by law and necessary in a democratic society for the protection of public health. It further noted that this conclusion was not altered by the first applicant's arguments that ayahuasca, in the manner it was used during church services, caused virtually no danger to (public) health, nor by the suggestion that the Court of Appeal had drawn the wrong conclusions from the scientific report. In relation to the first applicant's comments made at the hearing before the Court of Appeal, the Supreme Court held that it had not been unreasonable for the Court of Appeal to consider them in relation to its finding that the interference with the first applicant's freedom of religion was proportionate to the legitimate aim pursued.

4. Claim for a declaratory judgment

20. On 22 February 2010 the applicants brought proceedings seeking a declaratory judgment which was to hold that, firstly, the applicant association was a religious denomination under section 2:2 of the Netherlands Civil Code, secondly, that the members of the applicant association were excluded from section 2 of the Opium Act for the possession and the use during services of the "Santo Daime" (ayahuasca), and, thirdly, that the State was prohibited from prosecuting the members of the applicant association for the possession and use during services of the "Santo Daime" for as long as the State had not brought its policy into line with the rights protected by Article 9 of the Convention.

21. On 9 February 2011 the Regional Court of The Hague dismissed the first request (National Jurisprudence Number (*Landelijk Jurisprudentie Nummer*), "LJN" BP4424), holding that, although it was of the opinion that the applicant association was indeed a religious denomination within the meaning of section 2:2 of the Netherlands Civil Code, the applicant association had not substantiated that it had any interest in such a declaration. The Regional Court also dismissed the second and third claims referring to the Supreme Court's judgment of 9 January 2007 (see paragraph 19 above).

B. Relevant domestic law and practice

1. Netherlands drugs policy

22. The European Monitoring Centre for Drugs and Drug Addiction ("EMCDD") provides information on the drugs situation in the European Union. In October 2012 EMCDD's website stated in regard of the Netherlands' policy in relation to drugs:

"The Netherlands Opium Act ... defines drug trafficking, cultivation and production, dealing and possession of drugs as criminal acts. The act and its amendments confirm the distinction between 'hard' (heroin, cocaine, ecstasy, amphetamines) and 'soft' drugs (like cannabis or hallucinogenic mushrooms). This distinction is determined by a 'risk scale', based on medical, pharmacological, sociological and psychological properties of a substance.

...

Drug use does not constitute a crime in legal terms. However, there are situations when the use of drugs is prohibited, such as for instance schools and public transportation. It is up to the responsible authorities — which is not the national government — to regulate this.

The possession of small quantities of drugs for personal use is accorded a much lower priority. Anyone found in possession of less than 0.5 grams of [List] I (i.e. ‘hard’) drugs will generally not be prosecuted, though the police will confiscate the drugs and consult a care agency. As for cannabis, a maximum of 5 grams will not lead to investigation or prosecution.

Drug users are convicted when they have committed a crime such as selling, theft, robbery or burglary. A special law — Placement in an Institution for Prolific Offenders (ISD) — was introduced in 2004, meant for the treatment of criminal drug users in prison-like institutions.

Importing and exporting of any classified drug is considered a serious offence. The penalty for hard drug trafficking can run up to 12 to 16 years.”

2. *The Opium Act*

23. The relevant section of the Opium Act reads as follows:

Section 2

“It is prohibited to

- A. import to or export from the territory of the Netherlands;
- B. cultivate, prepare, modify, process, sell, deliver, supply or transport;
- C. possess;
- D. manufacture

the substances featuring on List I annexed to this Act ...”

3. *Relevant domestic case-law*

24. On 21 May 2001 (LJN: AB1739) the Amsterdam Regional Court held in a case similar to the present one, that expert reports indicated that the Santo Daime church should be considered a legitimate religious association and that its teachings constituted a religion (*geloofsovertuiging*) as such. It held that the prohibition contained in the Opium Act should not be applied in view of the fact that the ritual use of ayahuasca in church services entailed virtually no risks to public health. The Regional Court therefore considered that, since the drinking of the ayahuasca tea was such an essential part of the believers’ religious practice, freedom of religion as guaranteed by Article 9 of the Convention should attract greater weight than the prohibition contained in the Opium Act. Subsequently, the accused was discharged from further prosecution of the criminal offence under the Opium Act.

25. On 26 March 2009 (LJN: BH9844) – i.e. after the decision of the Supreme Court in the present case – the Haarlem Regional Court ruled on a

case involving a person who had been apprehended at Amsterdam Schiphol Airport with a number of bags containing ayahuasca in his luggage, intended for use during church services as described in the present case. The Regional Court found that there were virtually no risks to public health involved with consumption of the tea in the setting of the church services. The Regional Court further considered that the import of ayahuasca was regulated by specific rules and regulations issued by the church. The Regional Court concluded that in these circumstances the protection of freedom of religion guaranteed by Article 9 of the Convention outweighed the prohibitions contained in the Opium Act.

26. On 24 February 2012 (LJN: BV6888) the Amsterdam Court of Appeal upheld the Regional Court's judgment of March 2009, against which the Public Prosecution Service (*Openbaar Ministerie*) had appealed. The Court of Appeal considered that there was a certain difference between the case before it and the case decided by the Supreme Court on 9 January 2007 – i.e. the first applicant's case (see paragraph 19 above). In this case, the accused had established that the drinking of ayahuasca was indeed an essential part of the practice of his religion. The Court of Appeal held that this conclusion warranted an examination of the merits of the case and its specific circumstances, whereas the Supreme Court in January 2007 had only carried out an abstract examination of the merits of the case. Restating the judgment of the Haarlem Regional Court, it held that in this case the application of the Opium Act was not "necessary" within the meaning of Article 9 of the Convention.

27. On 17 September 2012 the Government informed the Court of the fact that an appeal on points of law had been lodged by the Public Prosecution Service against the judgment of 24 February 2012.

COMPLAINTS

28. Invoking Article 6 of the Convention the applicants complain that they had not been allowed to advance their arguments properly during the reclamation proceedings and that these proceedings had exceeded a reasonable time.

29. Furthermore, the applicants complain under Article 6 of the Convention that the principle of *ne bis in idem* was violated because the jerrycans were not returned to them even though the criminal proceedings had been discontinued.

30. The applicants complain under Article 9 of the Convention that the refusal to return the jerrycans to the first applicant constitutes an unjustified interference with their freedom of religion.

31. Invoking Article 14 of the Convention, the applicants complain that they were discriminated against since the Netherlands does not act against other religious denominations which, for instance, use alcoholic beverages such as wine in their rituals.

QUESTIONS TO THE PARTIES

Has there been an interference with the applicants' freedom of religion, within the meaning of Article 9 § 1 of the Convention?

If so, was that interference necessary in terms of Article 9 § 2?