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

Press Release
issued by the Registrar of the Court

ECHR 325 (2023)
27.11.2023

An association's application concerning anti-Covid measures banning public events in Switzerland in 2020 is inadmissible

The case of Communauté genevoise d'action syndicale (CGAS) v. Switzerland (application no. 21881/20) concerned measures in force from 17 March to 30 May 2020, which were adopted by the Swiss Government to counter the coronavirus 2019 disease ("COVID -19").

Relying on Article 11 (freedom of assembly and association) of the Convention, the applicant association complained about the blanket ban on public events which had resulted from "Ordinance COVID-19 no. 2", in the version in force during the above-mentioned period.

In today's **Grand Chamber** judgment[1] the European Court of Human Rights held that **the application was inadmissible within the meaning of Article 35 of the Convention.**

- Unanimously, the Court considered that the complaint concerning trade-union freedom fell outside the scope of the case as submitted to the Grand Chamber and that, in any event, it was inadmissible for failure to comply with the six-month deadline (Article 35 of the Convention as in force at the relevant time).

This new complaint had been raised for the first time in the context of the proceedings before the Grand Chamber; it ought to have been lodged, at the latest, within six months of 30 May 2020, the date on which Ordinance COVID-19 no. 2 had ceased to apply.

- By a majority (12 votes to 5), the Court considered that the complaint concerning freedom of peaceful assembly was inadmissible for failure to exhaust the domestic remedies.

The Court noted that the applicant association had failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system. The Court stated, in particular, that an application for a preliminary ruling on constitutionality, lodged in the context of an ordinary appeal against a decision implementing federal ordinances, was a remedy which was directly accessible to litigants and made it possible, where appropriate, to have the impugned provision declared unconstitutional. There had been no particular circumstance which would have released the applicant association from the obligation to exhaust the above remedy. Reiterating its subsidiary role, the Court specified that, in the unprecedented and highly sensitive context of the COVID-19 pandemic, it was all the more important that the national authorities had first been given the opportunity to strike a balance between competing private and public interests or between different rights protected by the Convention, taking into consideration local needs and conditions and the public-health situation as it had existed at the relevant time.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicant association, Communaute genevoise d'action syndicale (CGAS), is an association registered under Swiss law which was set up in 1962 and has its headquarters in Geneva. It is an umbrella organisation for all of the trade unions in the canton of Geneva, and its statutory aim is to

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

defend the interests of workers and of its member organisations, particularly in the field of trade-union and democratic freedoms.

Before the European Court, the applicant association complained that it had been deprived of the right to organise public gatherings, and to take part in such gatherings, as a result of the measures adopted by the Swiss Government in the context of tackling the coronavirus throughout the period of application of Ordinance no. 2 on measures to combat the coronavirus ("Ordinance COVID-19 no. 2"), that is, from 17 March to 30 May 2020.

Complaints

Relying on Article 11 (freedom of assembly and association) of the Convention, the applicant association alleged, for the first time before the Grand Chamber, that the ban on all gatherings, whether public or private, imposed by the above ordinance had also breached its right to trade-union freedom.

Also under Article 11, the applicant association considered that the bans introduced by Ordinance COVID-19 no. 2 had breached its right to freedom of peaceful assembly.

Procedure

The application was lodged with the European Court of Human Rights on 26 May 2020.

In its judgment of 15 March 2022 the Court held, by four votes to three, that there had been a violation of Article 11 of the Convention.

On 10 June 2022 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 5 September 2022 the panel of the Grand Chamber accepted that request.

A hearing was held on 12 April 2023.

Composition of the Court

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Marko **Bošnjak** (Slovenia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),
Arnfinn **Bårdsen** (Norway),
Krzysztof **Wojtyczek** (Poland),
Egidijus **Kūris** (Lithuania),
Branko **Lubarda** (Serbia),
Armen **Harutyunyan** (Armenia),
Stéphanie **Mourou-Vikström** (Monaco),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Lətif **Hüseynov** (Azerbaijan),
María **Elósegui** (Spain),
Ioannis **Ktistakis** (Greece),
Andreas **Zünd** (Switzerland),
Diana **Sârcu** (the Republic of Moldova),

and also Abel **Campos**, *Deputy Registrar.*

Decision of the Court

Admissibility of the complaint concerning trade-union freedom

The Court considered that the elements relating to trade-union freedom which the applicant association had raised for the first time before the Grand Chamber constituted a new complaint relating to the distinct requirements of Article 11 of the Convention. These elements were not therefore within the scope of the case as referred to the Grand Chamber.

The Court also stated that under Article 35 § 1 of the Convention (admissibility criteria) as in force at the relevant time, the applicant association had been required to raise this new complaint, at the latest, within six months of 30 May 2020, the date on which Ordinance COVID-19 no. 2 had ceased to apply.

It followed that the complaint raised by the applicant association with regard to trade-union freedom was, in any event, inadmissible for failure to comply with the six-month rule provided for by Article 35 of the Convention as in force at the relevant time.

Admissibility of the complaint concerning freedom of peaceful assembly

The applicant association's victim status

The applicant association submitted that the ban on public events introduced by Ordinance COVID-19 no. 2 had amounted to a general measure. It argued that in the version of the Ordinance in force from 17 March 2020, the possibility of requesting exemptions for "the exercise of political rights" had been removed, which, in its view, rendered futile any attempt to organise gatherings in pursuit of its statutory aim.

The Court noted, nonetheless, that the granting of exemptions had remained possible "if justified by an overriding public interest" and if the organiser submitted a protection plan that was considered adequate. In consequence, the disputed ban could not be regarded as a "general measure" within the meaning of the Court's case-law.

It then noted that the applicant association had deliberately chosen not to continue the authorisation procedure begun by it with a view to holding an event on 1 May 2020, even before receiving a formal decision from the competent administrative authority that could then have been challenged before the courts. In addition, the applicant association had subsequently refrained from submitting any other authorisation request. In the Court's opinion, such conduct, without adequate justification, had a bearing on the applicant association's victim status.

With regard to the fear of criminal sanctions, which the applicant association had put forward to justify its decision not to continue the authorisation procedure for the event of 1 May, the Court pointed out that, in its capacity as a non-profit-making private association, the applicant association was not subject to such sanctions.

Thus, the Court considered that the effect of the applicant association's conduct had been not only to deprive it of its status as a "direct" victim, within the meaning of Article 34 (right of individual application), but also to deprive it of an opportunity to apply to the courts and to complain, at national level, of a violation of the Convention.

As the issue of compliance with the rule of exhaustion of domestic remedies was closely linked to that of victim status, particularly with regard to a measure of general application such as a law, the Grand Chamber also considered it necessary to examine this question too.

Exhaustion of domestic remedies

The Court considered that its task was to determine whether, in the light of the parties' submissions and all the circumstances of the case, the applicant association had had available to it at the material time a domestic remedy that would have enabled it to obtain a review of whether the Ordinance in question was compatible with the Convention.

It noted that under Swiss law it was possible to obtain review of whether normative acts adopted by the Federal Assembly and the Federal Council were compatible with provisions of superior legal force, by means of a preliminary ruling, as part of the ordinary examination of a specific case by the judicial bodies at all levels. This possibility was clear from the Federal Supreme Court's consistent case-law, several examples of which had been produced by the Government, including in the specific area of combating the COVID-19 pandemic. The Court also considered that there was no particular circumstance which would have released the applicant association, at the relevant time, from the obligation to exhaust the domestic remedies.

It drew attention to its fundamentally subsidiary role and noted that it was appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention.

In addition, the Court stated that it could not ignore the exceptional nature of the context which existed at the relevant time. The emergence of the COVID-19 pandemic had presented States with the challenge of protecting public health while guaranteeing respect for every person's fundamental rights. Thus, all the member States of the Council of Europe had decided to restrict certain fundamental rights, including freedom of assembly in public places. During the first phase of the pandemic, a large number of international organisations and bodies had underlined the need to take urgent measures with a view to mitigating the impact of the pandemic and compensating for the lack of a vaccine and medication. These same bodies had called on States to ensure that the rule of law, democracy and fundamental rights were maintained.

The Court held that, in this unprecedented and highly sensitive context, it had been all the more important that the national authorities were first given the opportunity to strike a balance between competing private and public interests or between different rights protected by the Convention, taking into consideration local needs and conditions and the public-health situation as it stood at the relevant time.

In consequence, the Court considered that the applicant association had failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system, namely, to prevent or put right eventual Convention violations through their own legal system.

The application was therefore inadmissible (Article 35 of the Convention) and had to be rejected.

Separate opinions

Judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktistakis and Zünd expressed a joint dissenting opinion, which is annexed to the judgment.

The judgment is available in English and French.

Press contacts

echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

We would encourage journalists to send their enquiries via email.

Inci Ertekin (tel.: + 33 3 90 21 55 30)
Tracey Turner-Tretz (tel.: + 33 3 88 41 35 30)
Denis Lambert (tel.: + 33 3 90 21 41 09)
Neil Connolly (tel.: + 33 3 90 21 48 05)
Jane Swift (tel.: + 33 3 88 41 29 04)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.