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

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Complaint concerning ban on wearing a burkini at a public swimming pool: the two applicants had not exhausted domestic remedies

In its decision in the case of Missaoui and Akhandaf v. Belgium (application no. 54795/21), the European Court of Human Rights has unanimously declared the application inadmissible.

The case concerned two applicants who complained that they had been prohibited from entering a public swimming pool in Antwerp while wearing burkinis, on the basis of a municipal by-law. In the domestic proceedings, the applicants did not lodge an appeal on points of law because a lawyer at the Court of Cassation had given a negative opinion on the chances of lodging a successful appeal.

The Court was mindful of the importance of the role of the lawyers who were members of the Court of Cassation Bar, in particular their filtering role at that court. It pointed out, however, that a negative opinion from a lawyer at the Court of Cassation on the chances of lodging a successful appeal did not automatically mean that such an appeal would be "bound to fail" within the meaning of the Court's case-law. The Court indicated that, in deciding whether an appeal was "bound to fail", consideration had to be given to the content of the opinion and the subject matter in issue, having regard also to the wider context. In the present case, the Court observed that neither the lawyer at the Belgian Court of Cassation in his negative opinion, nor the applicants before the Court, had relied on any domestic case-law or any other relevant materials demonstrating that an appeal was bound to fail. The Court noted that the Court of Cassation had never ruled on the lawfulness of a judicial decision concerning the wearing of a burkini at a public swimming pool. It also observed that there appeared to be divergent case-law on the matter in the lower courts in Belgium. In consequence, the Court considered that the single negative opinion from a lawyer at the Court of Cassation was not, in the circumstances of the case, a valid reason for exempting the applicants from lodging an appeal on points of law with the Court of Cassation for the purposes of Article 35 § 1 of the Convention.

The decision is final.

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

Principal facts

The applicants are two Belgian nationals who were born in 1988 and 1986 and live in Antwerp (Belgium).

In 2017 the applicants, dressed in burkinis, went to the ticket office of a public swimming pool in Antwerp, where they were refused entry to the pool on the basis of a municipal by-law.

In the same year they applied to the President of the Antwerp Court of First Instance, complaining that the ban on wearing a full-body swimsuit for religious reasons, which could be inferred from the by-law in question, amounted to discrimination on grounds of religion. Sitting as the court hearing urgent applications, that court rejected their application. In 2020 the Antwerp Court of Appeal dismissed an appeal subsequently lodged by the applicants, finding that the impugned ban was relevant and proportionate.

The applicants then sought the opinion of a lawyer at the Court of Cassation as to their chances of lodging a successful appeal on points of law. The lawyer gave them a negative opinion, while indicating that some of the Court of Appeal's considerations were open to factual criticism. The applicants did not lodge an appeal on points of law.

Complaints

Relying on Article 14 (prohibition of discrimination) of the Convention taken together with Article 9 (right to freedom of thought, conscience and religion), the applicants complained that the impugned ban amounted to discrimination on grounds of religion.

Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 22 October 2021.

The decision was given by a Chamber of seven judges, composed as follows:

Arnfinn **Bårdsen** (Norway), *President*,
Jovan **Ilievski** (North Macedonia),
Pauliine **Koskelo** (Finland),
Lorraine **Schembri Orland** (Malta),
Frédéric **Krenc** (Belgium),
Davor **Derenčinović** (Croatia),
Gediminas **Sagatys** (Lithuania),

and also Hasan **Bakırcı**, *Section Registrar.*

Decision of the Court

The question which arose in this case was whether the applicants were exempted from lodging an appeal on points of law with the Court of Cassation, given that they had received a negative opinion on its chances of success from a lawyer practising at that court.

The Government submitted that the rule on the exhaustion of domestic remedies required the lodging of an appeal on points of law before the Court of Cassation, if necessary after seeking a second opinion and, if that was also negative, then "on instruction". The applicants did not dispute that they could have lodged an appeal on points of law despite the negative opinion of the lawyer at the Court of Cassation, including by means of an appeal "on instruction", but argued that it would have been bound to fail.

The Court reiterated that an appeal on points of law was one of the remedies that had in principle to be exhausted in order to comply with Article 35 § 1 of the Convention. The supervision carried out by the Court in accordance with Article 19 of the Convention was subsidiary to that carried out by the ordinary courts, at the apex of which was the Court of Cassation.

The Court was mindful of the importance of the role of the lawyers who were members of the Court of Cassation Bar, in particular their filtering role at that court. The fact remained, however, that an opinion by a lawyer at the Court of Cassation did not constitute a judicial decision, no matter how renowned the lawyer might be.

The Court therefore considered that the fact that a lawyer at the Court of Cassation gave a negative opinion on the chances of lodging a successful appeal did not automatically mean that such an appeal would be "bound to fail" within the meaning of the Court's case-law.

In deciding whether an appeal was "bound to fail", consideration had to be given to the content of the opinion and the subject matter in issue, having regard also to the wider context.

In the present case, the Court noted that neither the lawyer at the Court of Cassation in his opinion of 22 April 2021, nor the applicants in their arguments before the Court, had relied on any domestic case-law or any other relevant materials demonstrating that an appeal was bound to fail.

In that connection, the Court observed that the Court of Cassation had never ruled on the lawfulness of a judicial decision concerning the wearing of a burkini at a public swimming pool, whether under the Convention or in the light of other similar provisions of national or international law.

The Court also noted that there appeared to be divergent case-law on the matter in the lower courts in Belgium. In that connection, it considered that the Court of Cassation, the highest-ranking judicial court, had jurisdiction to state the law and thereby set the course for subsequent judicial decisions.

In consequence, the Court considered that the single negative opinion received from a lawyer at the Court of Cassation and submitted by the applicants was not, in the circumstances of the case, a valid reason for exempting them lodging an appeal on points of law with the Court of Cassation for the purposes of Article 35 § 1 of the Convention. The applicants had not afforded the national courts the opportunity to prevent or put right in the domestic legal order the alleged violation of the Convention complained of before the Court. The application was therefore inadmissible for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

The decision is available only in French.

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