



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

SECOND SECTION

CASE OF FRANCESCO SESSA v. ITALY

(Application no. 28790/08)

JUDGMENT
[Extracts]

STRASBOURG

3 April 2012

FINAL

24/09/2012

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Francesco Sessa v. Italy,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 6 March 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28790/08) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Francesco Sessa (“the applicant”), on 3 June 2008.

2. The applicant was represented by Ms M. Cozza, a lawyer practising in Salerno. The Italian Government (“the Government”) were represented by their Agent, Ms E. Spatafora.

3. The applicant alleged, in particular, a violation of his freedom to manifest his religion.

4. On 6 July 2009 the President of the Second Section decided to communicate the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and lives in Naples.

6. The applicant is Jewish and a lawyer by profession. On 7 June 2005 he appeared before the Forli investigating judge at a hearing concerning a request for the immediate production of evidence (“*incidente probatorio*”) in his capacity as representative of one of the two complainants in criminal

proceedings against several banks. The investigating judge in charge of the case was prevented from sitting and his replacement invited the parties to choose between two dates for the adjourned hearing – either 13 or 18 October 2005 – already identified by the investigating judge.

7. The applicant pointed out that both dates coincided with Jewish religious holidays (Yom Kippur and Sukkot respectively) and stated that he would be unable to attend the adjourned hearing because of his religious obligations. He explained that he was a member of the Naples Jewish community, and alleged a breach of sections 4 and 5 of Law no. 101 of 8 March 1989 governing relations between the State and the Union of Italian Jewish communities.

8. The investigating judge set the hearing down for 13 October 2005.

9. The same day the applicant lodged an application with the investigating judge in charge of the case to have the hearing adjourned. On 20 June 2005, after examining the application, the judge decided to add it to the case file without ruling on it.

10. On 11 July 2005 the applicant lodged a criminal complaint against the investigating judge in charge of the case and his replacement, alleging that they had breached section 2 of Law no. 101 of 1989. The same day he informed the Supreme Council of the Judiciary about the complaint.

11. At the hearing of 13 October 2005, the investigating judge noted that the applicant was absent for “personal reasons” and asked the parties to express their views on the application for an adjournment made on 7 June. The prosecution and counsel for the defendants objected to the application, arguing in particular that it was not based on any of the statutory grounds for adjournment. However, counsel for the other complainant supported the applicant’s request.

12. In an order issued the same day the investigating judge rejected the application for an adjournment. He noted at the outset that, under Article 401 of the Code of Criminal Procedure, only the prosecution and counsel for the defendant were required to be present at hearings concerning the immediate production of evidence; the presence of counsel for the complainant was optional. He went on to observe that the Code of Criminal Procedure did not oblige the judge to adjourn a hearing where counsel for the complainant had legitimate reasons for being unable to appear. Lastly, he stressed that a large number of individuals were involved in the proceedings (the defendants, the complainants, court-appointed experts and experts appointed by the parties) and that, “in view of the heavy workload of the office, which would [have meant] adjourning the hearing until 2006, the application, submitted by an individual with no legitimate reason to request an adjournment, ha[d] to be rejected in accordance with the principle that cases should be heard within a reasonable time”.

13. On 23 January 2006 the Supreme Council of the Judiciary informed the applicant that it was not competent to examine the matter since the applicant's complaints related to the exercise of judicial activity.

14. In the meantime, on 9 January 2006, the Ancona public prosecutor's office had requested that no further action be taken on the applicant's complaint. The applicant objected to this request on 28 January 2006.

15. On 21 September 2006 the Ancona investigating judge made an order discontinuing the proceedings concerning the applicant's complaint, noting that the applicant had not objected to the request for no further action submitted by the public prosecutor's office.

16. On 19 January 2007 the applicant lodged an appeal on points of law, complaining of the investigating judge's failure to take account of the objection he had lodged on 28 January 2006. The Court of Cassation, observing that the failure to take the applicant's objection into account had probably been due to a registry error, set aside the order of 21 September 2006 and referred the case back to the Ancona District Court.

17. On 12 February 2008 the applicant and the prosecution attended a hearing before the Ancona investigating judge. On 15 February 2008 the latter issued an order discontinuing the proceedings. He noted that there was nothing in the case file to suggest that the investigating judge in charge of the case or the judge who had replaced him at the hearing of 7 June 2005 had had any intention of infringing the applicant's right to practise his Jewish faith freely or of offending the applicant's dignity on account of his religious faith.

II. RELEVANT DOMESTIC LAW

18. Law no. 101 of 8 March 1989 contains provisions governing relations between the State and the Union of Italian Jewish communities. Section 2 recognises the right to practise and manifest the Jewish religion freely. Under section 4, Italy grants persons of Jewish faith who so request the right to observe the Sabbath, in the context of flexible working arrangements and without prejudice to the requirements of the essential services provided for by the State legal system.

Section 5 of Law no. 101 states that Yom Kippur, Sukkot and other Jewish religious holidays are to be treated in the same way as the Sabbath.

19. According to the fifth paragraph of section 2 of the Law, manifestations of religious intolerance and prejudice are punishable by the penalties provided for in section 3 of Law no. 654 of 1975, which is the Law ratifying the International Convention on the Elimination of all Forms of Racial Discrimination. Under the latter provision, anyone who disseminates ideas based on superiority or on racial or ethnic hatred, or incites others to commit acts of racial, ethnic, national or religious discrimination, is liable to a prison sentence of up to eighteen months.

20. The first paragraph of Article 401 of the Code of Criminal Procedure, which governs the procedure for the immediate production of evidence (“*incidente probatorio*”) reads as follows:

“The hearing shall take place in private. The public prosecutor and counsel for the defendant shall be required to attend. Counsel for the injured party shall also have the option of attending.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

21. The applicant alleged that the refusal of the judicial authority to adjourn the hearing in question, which had been listed for a date corresponding to a Jewish religious holiday, had prevented him from appearing in his capacity as representative of one of the complainants and had infringed his right to manifest his religion freely. He relied on Article 9 §§ 1 and 2 of the Convention, which provide:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

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.”

22. The Government contested that argument.

...

B. Merits

1. *The parties’ submissions*

29. The applicant contended that the judges dealing with his case had acted with the intention of infringing his right to manifest his religion freely.

30. In his view, he was entitled under Law no. 101 of 1989 to be absent from work on official Jewish religious holidays in order to be able to practise his religion freely. Furthermore, no indispensable-service requirement could be relied upon in the instant case as justification for restricting that right, since the hearing of 13 October 2005 could have been adjourned for another date without adversely affecting the proper conduct of

the proceedings and the rights of the other participants in the trial. Since it had not related to a detention measure or to the rights of a person in detention, the hearing in question had not been in any way urgent. As the request for an adjournment had been made four months in advance, the authorities had had ample time to organise the timetable of hearings in such a way as to ensure respect for the various rights at stake.

31. The Government, for their part, submitted that there had been no interference with the applicant's right to manifest his religion freely since he had never been prevented from taking part in Jewish festivals and practising his religion freely. The authorities had simply sought to ensure that the applicant did not hamper the smooth operation of essential State services in exercising his right to request that the hearing be adjourned.

32. In the Government's view, the right relied on by the applicant was not of an absolute nature. Although Law no. 101 of 1989 concerned the professional relationship between lawyers and the courts, it was a fact that the second paragraph of section 4 of the Law stated explicitly that essential-service requirements took precedence over the right of individuals to practise their religion freely. The administration of justice was an essential State service which had to take priority in all circumstances.

Furthermore, the attendance of counsel for the injured party at a hearing concerning the immediate production of evidence was not compulsory. In any event, a lawyer who was prevented from attending a hearing for personal reasons could appoint a replacement under the terms of Article 102 of the Code of Criminal Procedure. In choosing not to avail himself of that option, the applicant had declined to reconcile his religious obligations with the requirements of the proper administration of justice.

33. Lastly, the adjournment of the hearing in question had been liable to affect adversely the proper conduct of the proceedings and to infringe the right of the twenty-one defendants to be tried within a reasonable time, since, had the request for adjournment been accepted, notice of the new hearing date would have had to be sent out to the large number of persons involved in the trial in various capacities.

2. The Court's assessment

34. The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private (see *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A). Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief (see *Kalaç v. Turkey*, 1 July 1997, § 27, *Reports of Judgments and*

Decisions 1997-IV, and *Kosteski v. "the former Yugoslav Republic of Macedonia"*, no. 55170/00, § 37, 13 April 2006).

35. Thus, for instance, the protection afforded by Article 9 was found not to extend to the dismissal of a public servant who failed to adhere to his working hours on the grounds that the Seventh-day Adventist Church, to which he belonged, prohibited its members from working after sunset on Fridays (see *Konttinen v. Finland*, no. 24949/94, Commission decision of 3 December 1996, *Decisions and Reports (DR)* 87-A, p. 68), or the compulsory retirement for breaches of discipline of a member of the armed forces with fundamentalist views (see *Kalaç*, cited above; see also *Stedman v. the United Kingdom*, no. 29107/95, Commission decision of 9 April 1997, *DR* 89-A, p. 104, concerning the dismissal of an employee by her private-sector employer for refusing to work on Sundays). In these cases, the Commission and the Court considered that the measures taken by the authorities in respect of the applicants had not been based on the applicants' religious beliefs but had been justified by the specific contractual obligations between the persons concerned and their respective employers.

36. In the present case the Court observes that the rejection by the investigating judge of the applicant's application for an adjournment was based on provisions of the Code of Criminal Procedure according to which the adjournment of a hearing concerning the immediate production of evidence is warranted only if the public prosecutor or counsel for the defendant is absent; counsel for the complainant is not required to be present at the hearing.

37. In view of the circumstances of the present case, the Court is not convinced that setting the case down for hearing on a date which coincided with a Jewish holiday and refusing to adjourn it to a later date amounted to a restriction on the applicant's right to practise his religion freely. It is not disputed between the parties that the applicant was able to perform his religious duties. Furthermore, he could have expected that his request for an adjournment would be refused on the basis of the statutory provisions in force and could have arranged to be replaced at the hearing in question to ensure that he complied with his professional obligations.

Lastly, the Court notes that the applicant did not demonstrate that pressure had been exerted on him to make him change his religious beliefs or to prevent him from manifesting his religion or beliefs (see *Knudsen v. Norway*, no. 11045/84, Commission decision of 8 March 1985, *DR* 42, p. 247, and *Konttinen*, cited above).

38. In any event, even supposing that there was interference with the applicant's rights under Article 9 § 1, the Court considers that it was prescribed by law, was justified on grounds of the protection of the rights and freedoms of others – and in particular the public's right to the proper administration of justice and the principle that cases be heard within a reasonable time (see paragraph 12 above) – and that it observed a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, *mutatis mutandis*, *Casimiro and Ferreira v. Luxembourg* (dec.), no. 44888/98, 27 April 1999).

39. Accordingly, there has been no violation of Article 9 of the Convention.

...

FOR THESE REASONS, THE COURT

...

2. *Holds* by four votes to three that there has been no violation of Article 9 of the Convention.

Done in French, and notified in writing on 3 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Tulkens, Popović and Keller is annexed to this judgment.

F.T.
F.E.P.

JOINT DISSENTING OPINION OF JUDGES
TULKENS, POPOVIĆ AND KELLER

(Translation)

We do not share the position of the majority that there has been no violation of Article 9 of the Convention in the present case. We will explain our reasons below.

1. The facts of the case are relatively straightforward. In his capacity as a lawyer, the applicant represented one of the two civil parties in a set of criminal proceedings against certain banks. On 7 June 2005 he appeared before the investigating judge at a hearing concerning the production of evidence. The judge in charge of the case was prevented from sitting and his replacement invited the parties to choose between two dates for the adjourned hearing – 13 and 18 October 2005 – in accordance with the timetable already drawn up by the judge in charge of the case. The applicant pointed out that both the proposed dates coincided with Jewish religious holidays (Yom Kippur and Sukkot respectively). The judge nevertheless scheduled the hearing for 13 October 2005.

2. On the same day, 7 June 2005, the applicant lodged an application with the judge in charge of the case for the hearing to be adjourned. On 20 June 2005 the latter added the application to the case file without ruling on it.

3. At the hearing on 13 October 2005 the judge observed that the applicant was absent for “personal reasons”. After consulting the prosecution and counsel for the defendants, he rejected the application to adjourn the case made by the applicant on 7 June 2005, although counsel for the other civil party had supported the application.

4. The Court’s assessment is based on rather brief reasoning which, viewed in terms of both its aspects (the existence of interference and proportionality), appears to us to raise issues as regards freedom of religion, which “is ... one of the most vital elements that go to make up the identity of believers and their conception of life, but ... is also a precious asset for atheists, agnostics, sceptics and the unconcerned ... and entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion”¹.

1. See *Bayatyan v. Armenia* [GC], no. 23459/03, § 118, ECHR 2011. See also, among other authorities, *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I.

Existence of interference

5. The majority first consider that there was no interference with the applicant's rights under Article 9 of the Convention. They observe that the decision by the investigating judge not to allow the applicant's request for an adjournment was based on the provisions of the Code of Criminal Procedure according to which hearings concerning the immediate production of evidence take place in private and the public prosecutor and counsel for the defendant must be present. The majority infer from this that the presence of counsel for the complainant was therefore not required (see paragraph 36 of the judgment) and that, accordingly, the fact that the case was set down for hearing on a date which coincided with a Jewish holiday, and the refusal to adjourn it to a later date, did not amount to a restriction on the applicant's right to practise his religion freely (see the first sub-paragraph of paragraph 37 of the judgment).

6. We cannot subscribe to this reasoning. Although Article 401 of the Code of Criminal Procedure states that the attendance of the public prosecutor and counsel for the defendant is compulsory, it also states that "[c]ounsel for the injured party shall ... have the option of attending". It is therefore up to the lawyer and no one else to decide, with an eye to his or her client's interests, whether or not to take advantage of this option; the judicial authorities may not interfere in the exercise of individuals' defence rights or presume that the attendance of counsel is not required.

7. In support of their argument the majority further note, curiously, that the applicant did not demonstrate that any pressure had been exerted on him to make him change his religious beliefs or to prevent him from manifesting his religion or beliefs (see the second sub-paragraph of paragraph 37 of the judgment). It seems to us to be contrary to the enjoyment of freedom of religion guaranteed by Article 9 of the Convention for the exercise of that freedom, in either its internal or external aspect, to be subordinated to or even made conditional upon the furnishing of evidence by the applicant of the pressure to which he was allegedly subjected.

Relationship of proportionality

8. Next, the majority consider that, even supposing that there was interference with the applicant's rights under Article 9 § 1 of the Convention, it was justified on the ground of the protection of the rights and freedoms of others, namely the public's right to the proper administration of justice, and that there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. We do not agree.

9. As to the proportionality requirement, which is the test of whether the interference was necessary in a democratic society, the Court's case-law is

very clear: for a measure to be proportionate, the authorities, when choosing between several possible means of achieving the legitimate aim pursued, must opt for the measure that is least restrictive of rights and freedoms¹. From that standpoint, seeking a reasonable accommodation of the situation in issue may, in some circumstances, constitute a less restrictive means of achieving the aim pursued².

10. In the present case we believe that the conditions were met for attempting to reach a *reasonable accommodation* of the situation, that is to say, one that did not impose a disproportionate burden on the judicial authorities. By dint of a few concessions, this would have made it possible to avoid interfering with the applicant's religious freedom without compromising the achievement of the clearly legitimate aim of ensuring the proper administration of justice.

11. First of all, as soon as the date of the hearing was set, the applicant drew attention to the difficulty it presented for him, and requested an adjournment. He therefore notified the judicial authorities four months in advance, giving them a reasonable opportunity to organise the timetable of hearings in order to ensure that the various rights at stake were respected.

12. By converse implication, the decision in *S.H. and H.V. v. Austria* (no. 18960/91, Commission decision of 13 January 1993) seems to us to acknowledge the force of this argument. The applicants, who were practising members of the Jewish faith, criticised the refusal of an Austrian court to grant their request for a hearing in a case concerning them to be adjourned on the grounds that the date set coincided with an important Jewish holiday. The Commission found that, had the applicants, on learning of the date of the hearing, duly informed the court that it presented them with a problem for religious reasons, the court would have had to set a new date. In that case, however, the applicants had reacted too late: although they had been informed on 30 May that the hearing would take place on 4 October, they had not written to the court until 25 September in order to request an adjournment. In view of the complexity of the proceedings, which involved a large number of persons, and the fact that the request had been made at short notice, the Commission held that the court's decision had not been unreasonable.

13. Next, it has not been demonstrated in the instant case that the applicant's request, had it been granted, would have caused such a degree of disruption to the functioning of the public judicial service. This is what we might refer to as the public-service disturbance test. The reasonable-time

1. S. Van Drooghenbroeck, *La Proportionnalité dans le droit de la Convention européenne des droits de l'homme. Prendre l'idée simple au sérieux*, Brussels, Bruylant, Publications des Facultés universitaires Saint-Louis, 2001, pp. 190-219.

2. E. Bribosia, J. Ringelheim and I. Rorive, "Aménager la diversité: le droit de l'égalité face à la pluralité religieuse", *Revue trimestrielle des droits de l'homme*, 2009, pp. 319 et seq.

requirement relied on by the Italian judge in refusing the applicant's request is undoubtedly legitimate but, in the absence of any further explanation, appears in this case to be more in the nature of an excuse. Of course, the requested adjournment might have caused some administrative inconvenience stemming, for instance, from the need to inform the parties involved of the new date for the hearing. But this seems to us to be minimal and should perhaps be seen as the small price to be paid in order to ensure respect for freedom of religion in a multicultural society¹.

14. Lastly, it is not apparent from the case file that the hearing in question was urgent, as it did not relate to a detention measure or to persons in detention. Had that been the case it would have been for the applicant to make some concessions, for instance by arranging to be replaced at the hearing.

15. In these circumstances, and given that the authorities have furnished no evidence that they took the reasonable steps required to ensure respect for the applicant's right to freedom of religion under Article 9 of the Convention, we are of the view that there has been a violation of that provision.

1. *Ibid.*, p. 342.