



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

THIRD SECTION

DECISION

Application no. 28167/07

Alida Maria FRÄNKLIN-BEENTJES and CEFLU-LUZ DA FLORESTA
against the Netherlands

The European Court of Human Rights (Third Section), sitting on
6 May 2014 as a Chamber composed of:

Josep Casadevall, *President*,

Alvina Gyulumyan,

Ján Šikuta,

Dragoljub Popović,

Luis López Guerra,

Johannes Silvis,

Valeriu Grițco, *judges*,

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 4 July 2007,

Having regard to the observations submitted by the respondent
Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Ms Alida Maria Fränklin-Beentjes, is a Netherlands national who was born in 1957 and lives in Zutphen. The second applicant, CEFLU-Luz da Floresta, is a religious association (*kerkgenootschap*) with legal personality under Netherlands law and its statutory seat in Alkmaar. They were represented before the Court by Mr T. van Kooten, a lawyer practising in Utrecht. The respondent Government were represented by their Agent, Mr R.A.A. Böcker of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

1. *The Santo Daime church*

3. The first applicant is an office-holder of the second applicant. The second applicant is a religious association.

4. The applicant association claims affiliation to the *Centro Eclético da Fluente Luz Universal Raimundo Irineu Serra* (Eclectic Center of the Universal Flowing Light Raimundo Irineu Serra, “CEFLURIS”), an organisation based in Brazil. 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 with a view to its integration with the divine”. Its teachings are stated to be based on revelations by the Virgin Mary to the religion’s founder, Raimundo Irineu Serra (1892-1971, referred to by his followers as Mestre (“Master”) Irineu). CEFLURIS was founded after the death of Mestre Irineu by Sebastião Mota de Melo (1920-1990, alias Padrinho (“Godfather”) Sebastião).

5. An essential part of the applicant association’s rites is the drinking of a particular hallucinogenic decoction, or brew, during the services. This decoction is stated to be produced in accordance with prescribed religious rituals; its ingredients are taken from plants and vines unique to the Amazon region. It is described as the “Holy Sacrament” of the applicant association and is referred to by believers as “Santo Daime” (from the Portuguese *dai me*, “give me”). In other circles it is more commonly referred to as ayahuasca (from the Quechua *aya*, spirit, and *waska*, liana or vine).

6. The plants that are used for the production of ayahuasca, and hence the decoction itself, contain, *inter alia*, N,N-Dimethyltryptamine, also described chemically as 3-[2-(dimethylamino)ethyl]indol (hereafter “DMT”).

7. DMT is a substance that can cause hallucinations if taken internally. When it is consumed in the form of ayahuasca, other possible effects include gastrointestinal reactions, such as nausea and vomiting. There is a possibility of more serious symptoms of acute toxicity, such as hypertension and increased body temperature, a rapid pulse rate and hyperventilation, sensory impairment in the limbs and difficulty walking.

2. *Criminal proceedings*

8. 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 each containing twelve liters of an unknown liquid. Chemical analysis performed by the Forensic Laboratory (*Gerechtelijk Laboratorium*)

showed that the confiscated liquid contained DMT, which is one of a number of banned substances featuring on List 1 annexed to the Opium Act (*Opiumwet*, see below). The liquid was identified as ayahuasca.

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

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

11. 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. *Proceedings for the return of the ayahuasca*

12. 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 argued 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: in her submission, scientific expert reports showed that there were virtually no health and safety risks related to the drinking of ayahuasca.

13. 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 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 brew contained DMT, a substance featuring on List 1 annexed to the Opium Act, the jerrycans could not be returned to the first applicant.

14. 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 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.

15. 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 was used in the Santo Daimé 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. Accordingly, the confiscation of the ayahuasca did indeed interfere with her freedom to practise her religion following the church's own rules and rituals.

16. In his advisory opinion, the Procurator General (*Procureur-Generaal*) at the Supreme Court expressed the view that the appeal on points of law should be dismissed. 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.

17. 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 in which 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. *Proceedings for a declaratory judgment*

18. 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 (*Burgerlijk Wetboek*), 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.

19. 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 Civil Code, the applicant association had not substantiated its 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 17 above).

B. Relevant domestic law and practice

1. *The Opium Act*

20. The relevant sections of the Opium Act read 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 ..."

Section 6

"1. The Minister [of Health, Well-being and Sports (*Volksgezondheid, Welzijn en Sport*)] can ... grant an exemption from a prohibition as referred to in section 2 ..."

Section 8

“1. An exemption can be granted only if the person requesting it has satisfied the Minister:

- a. that it serves the interest of public or animal health;
- b. it is needed for carrying out scientific or analytical-chemical research or for educational purposes, in so far as the interest of public health is not harmed thereby, or
- c. it is needed for carrying out an act as referred to in section 2 ... pursuant to an agreement with:
 1. another person to whom an exemption has been granted under section 6;
 2. a pharmacist, or a physician who keeps a pharmacy;
 3. a veterinary surgeon;
 4. an institution or person indicated under section 5(2) or (3) [i.e. specifically authorised medical, dental or veterinary institutions or practitioners, and their patients];
 5. a person holding a license or exemption granted in another country for the import of the substances in issue into that country, in so far as the interest of public health is not harmed thereby. ...”

21. DMT appears on List I annexed to the Opium Act under the appellations N,N-dimethyltryptamine and 3-[2-(dimethylamino)ethyl]indol.

2. *Relevant domestic case-law*

22. 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 religious conviction (*geloofsovertuiging*) in themselves. 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.

23. 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 above. The Regional Court found that there were virtually no risks to public health involved in the consumption of the brew 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. It 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.

24. 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 17 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.

25. On 17 September 2012 the Government informed the Court that an appeal on points of law had been lodged by the Public Prosecution Service against the Amsterdam Court of Appeal's judgment of 24 February 2012. As far as the Court is aware, the proceedings are still pending.

C. Relevant international law

26. The Convention on Psychotropic Substances (United Nations Treaty Series, "UNTS", volume 1019, pages 175 and following) was adopted in Vienna on 21 February 1971. It entered into force on 16 August 1976. The Netherlands acceded to it on 8 September 1993. Attached to that Convention are four Schedules listing various categories of psychotropic substances.

27. As relevant to the case before the Court, the Convention on Psychotropic Substances provides as follows:

"Article 7

SPECIAL PROVISIONS REGARDING SUBSTANCES IN SCHEDULE I

In respect of substances in Schedule I, the Parties shall:

- a) Prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;
- b) Require that manufacture, trade, distribution and possession be under a special licence or prior authorization;

c) Provide for close supervision of the activities and acts mentioned in paragraphs a) and b);

d) Restrict the amount supplied to a duly authorized person to the quantity required for his authorized purpose;

e) Require that persons performing medical or scientific functions keep records concerning the acquisition of the substances and the details of their use, such records to be preserved for at least two years after the last use recorded therein; and

f) Prohibit export and import except when both the exporter and importer are the competent authorities or agencies of the exporting and importing country or region, respectively, or other persons or enterprises which are specifically authorized by the competent authorities of their country or region for the purpose. The requirements of paragraph 1 of article 12 for export and import authorizations for substances in Schedule II shall also apply to substances in Schedule I.”

28. DMT is listed on Schedule I as 3-[2-(dimethylamino)ethyl]indol.

COMPLAINTS

29. Invoking Article 6 of the Convention the applicants complained that they had not been allowed to advance their arguments properly during the proceedings for the return of the ayahuasca and that these proceedings had exceeded a reasonable time.

30. In addition, the applicants complained under Article 6 of the Convention that the principle of *ne bis in idem* had been violated because the jerrycans were not returned to them even though the criminal proceedings had been discontinued.

31. The applicants complained under Article 9 of the Convention that the refusal to return the jerrycans with the ayahuasca to the first applicant, which prevented the applicants from performing an essential sacrament, constituted an unjustified interference with their freedom of religion.

32. Invoking Article 14 of the Convention (as the Court understands it, in conjunction with Article 9 of the Convention), the applicants complained that they had been discriminated against since the Netherlands did not act against other religious denominations which used the alcoholic drink wine in their rituals.

THE LAW

A. Alleged violation of Article 9 of the Convention

33. The applicants complained of the refusal to allow them to retain for their own sacramental use a quantity of ayahuasca. They relied on Article 9 of the Convention, which provides as follows:

“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.”

The Government denied that this Article had been violated.

1. Whether there has been an interference with the applicants’ right to manifest their religion

34. The Government argued that there had been no interference with the applicants’ rights under Article 9. Firstly, they questioned the second applicant’s status as a genuine religious denomination affiliated to CEFLURIS; secondly, they referred to the first applicant’s admission, made before the Court of Appeal on 14 December 2005, that she was able to practise her religion without the use of ayahuasca.

35. The applicants asked the Court to dismiss these arguments. As to the first, they pointed to, *inter alia*, regular meetings of members of the second applicant for the purpose of religious worship. As to the second, the purport of the first applicant’s statement had been that the prohibition on the use of ayahuasca did not affect her religious beliefs, as such, but that nonetheless ayahuasca was an essential element of her religious practice.

36. The Court, for its part, is prepared to accept that denying the applicants the possession for use of ayahuasca in their rites interfered with their right to manifest their religion in “worship”, as guaranteed by Article 9 of the Convention. That Article is thus applicable.

2. Whether the interference was “prescribed by law”

37. The applicants argued that domestic law was deficient, given that it failed to allow the controlled use, for sacramental purposes, of limited quantities of otherwise banned substances.

38. The Government expressed the view that the interference in issue, if interference there be, had a clear statutory basis.

39. The Court agrees with the Government that the interference in issue was in accordance with the Opium Act, which bans, among other things, the possession of DMT. The question whether an exemption should apply for sacramental use is one to be addressed under the head of “necessity in a democratic society”.

3. *Whether the interference pursued a “legitimate aim”*

40. The Government stated that the interference complained of had pursued the interests of protecting public order, preventing crime and protecting public health. The applicants did not dispute this.

41. The Court accepts that the interference in issue was intended, at the very least, for the protection of public order and public health. Both these aims are legitimate under Article 9 § 2.

4. *Whether the interference was “necessary in a democratic society”*

42. The Government drew the Court’s attention to the sheer quantity of ayahuasca seized and the need to remove it from circulation in order to protect public order and public health. They pointed to the need to counter the scourge of drug trafficking and the possibility of abuse that would result from allowing the ostensibly cultic use of harmful illegal substances.

43. The applicants stated that the use of ayahuasca was part of their core beliefs. They argued that controlled sacramental use in limited quantities should be exempt from the prohibition laid down in the Opium Act, in the same way as scientific or medical use was.

44. The applicants also prayed in aid the judgments given on 21 May 2001 by the Amsterdam Regional Court (see paragraph 22 above), on 26 March 2009 by the Haarlem Regional Court (see paragraph 23 above) and on 24 February 2012 by the Amsterdam Court of Appeal (see paragraph 24 above) in support of their argument that the perception of ayahuasca as harmful when used sacramentally in limited quantities was misconceived.

45. As to the quantities of ayahuasca which they had held, the applicants stated that these had been dictated by the time and expense involved in importing it from abroad and the need to ensure that stocks were sufficient.

46. 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, among many other authorities, *Kalaç v. Turkey*, 1 July 1997, § 27, *Reports of Judgments and Decisions* 1997-IV; *Kosteski v. “the former Yugoslav Republic of Macedonia”*, no. 55170/00, § 37, 13 April 2006; and *Francesco Sessa v. Italy*, no. 28790/08, § 34, ECHR 2012 (extracts)). In particular, it does not confer a right to refuse, on the basis of religious convictions, to abide by legislation the operation of

which is provided for by the Convention and which applies neutrally and generally (see, *mutatis mutandis*, *C v. the United Kingdom*, no. 10358/83, Commission decision of 15 December 1983, Decisions and Reports (DR) 37, p. 142).

47. It has long been recognised by the Convention bodies that restrictions on religious practices may be justified for the protection of health; thus it was, for example, that the Commission accepted that the compulsory use of a crash helmet by a motorcyclist, in the interest of road safety, might be held to override the religious duty of a male Sikh believer to wear his turban (see *X v. the United Kingdom*, no. 7992/77, Commission decision of 12 July 1978, DR 14, p. 234). More recently, the Court accepted that a hospital nurse could be required, in the interest of her own health and safety as well as her patients', not to wear a Christian cross on a chain around her neck while on duty (see *Eweida and Others v. the United Kingdom*, no. 48420/10, §§ 98-99, ECHR 2013 (extracts)).

48. In the present case, the Court reaches a similar conclusion. It considers that the respondent party was entitled to consider that the prohibition of the possession for use of DMT was necessary in a democratic society for the protection of health, considering its known effects as described above (see paragraph 7 above).

49. The Court notes in addition that the illicit nature of DMT is reflected not only in the Opium Act but also in rules of international law binding on the respondent Party. These rules require the respondent Party to prohibit all possession for use of that substance except for scientific and very limited medical purposes by duly authorised persons, in medical or scientific establishments subject to the Government's direct control or specific approval (see paragraphs 26-28 above).

50. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 14 of the Convention taken together with Article 9

51. The applicants alleged discrimination contrary to Article 14 of the Convention taken together with Article 9. Article 14 of the Convention provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

52. The applicants compared themselves to established churches, in particular the Roman Catholic Church and the Protestant Church in the Netherlands. Both these churches performed rituals involving the sacramental use of wine, which the applicants described as a beverage

containing a significant proportion of the addictive narcotic substance alcohol.

53. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, as a recent authority among many others, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013).

54. The Court confines itself to noting that, quite apart from the fact that wine is not subject to the repressive regulatory regime of the Opium Act, the rites referred to differ significantly from those practised by the applicants, most notably – for present purposes – in that participants neither intend nor expect to partake of psychoactive substances to the point of intoxication. The applicants are therefore not in a position relevantly similar to that of the churches with which they compare themselves.

55. It follows that this complaint too is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Other complaints

56. The applicants complained that they had not been allowed to advance their arguments properly during the proceedings for the return of the ayahuasca; that these proceedings had exceeded a reasonable time; and that the principle of *ne bis in idem* had been violated in that the jerrycans of ayahuasca were not returned to them even though the criminal proceedings had been discontinued.

57. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

58. It follows that these complaints also are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President