

[2018] PILARS CC 2

Hamidović v Bosnia and Herzegovina – judging skullcaps in the courtroom

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A. Introduction

In *Hamidović v Bosnia and Herzegovina*,¹ the Fourth Section of the European Court of Human Rights upheld the applicant's complaint under Article 9 of the Convention that the imposition of a fine (automatically converted to a prison sentence following non-payment) for refusing to remove his skullcap in court infringed on his right to freedom of religion or belief.² Husmet Hamidović, a Muslim who wore a skullcap for religious reasons, had appeared as summoned as a witness before the state court but refused an order from the president of the trial chamber to remove his skullcap. Article 81(5) of the Code of Criminal Procedure of Bosnia and Herzegovina mandates that “[s]hould a witness fail to appear and to justify his or her absence, the court may impose upon him or her a fine of up to BAM 5,000 or issue a warrant to arrest the witness and bring him or her before the court”.³

While this case comment agrees with the Fourth Section's ultimate finding of a violation of the applicant's Article 9 rights, it disagrees with two features of the majority's reasoning: first, the review of whether the punishment imposed on the applicant was prescribed by law, and second, the use made of the European consensus concept. While the judgment is interesting for other reasons,⁴ the comment will focus on these two aspects of the case.

B. Whether the applicant's punishment was prescribed by law

The Government accepted that the punishment imposed on the applicant for wearing a skullcap in a courtroom had amounted to a limitation on the manifestation of the applicant's religion.⁵ The Fourth Section found that the punishment was prescribed by law, as it was based on the trial judge's inherent power to regulate the conduct of proceedings so as to prevent abuse of the court and ensure overall fairness.⁶ This power rested in Article 242 § 3 of the Code of Criminal Procedure, which provides as follows:

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¹ *Hamidović v Bosnia and Herzegovina* App no. 57792/15 (ECtHR Fourth Section, 5 December 2017); case note available at: Sabina Garahan, “Hamidović v Bosnia and Herzegovina” (2018) 7(2) Oxford Journal of Law and Religion 355.

² It is worth noting that the judgment has become final pursuant to Article 44 § 2 of the Convention.

³ *supra* n 1, § 15. Curiously, Judge Ranzoni comments in his dissenting opinion that “the restriction on the wearing of a skullcap was very limited, first of all in nature” and the “restriction related to a particular and limited context”. Pursuant to Article 81(5), the context, no matter how “particular and limited”, was one in which the applicant was forced to make himself available, risking a fine or arrest in the alternative.

⁴ See, for instance, Eva Brems, ‘Skullcap in the Courtroom: A rare case of mandatory accommodation of Islamic religious practice’ 11 December 2017, *Strasbourg Observers* <<https://strasbourgobservers.com/2017/12/11/skullcap-in-the-courtroom-a-rare-case-of-mandatory-accommodation-of-islamic-religious-practice/#more-4069>> accessed 3 October 2018, where the author notes the significance of the judgment as being only the second successful claim before the Court for accommodation of Islamic religious practice. Also of interest are the three separate opinions in the case, certain elements of which are alluded to throughout this case comment.

⁵ *supra* n 1, § 29.

⁶ *supra* n 1, § 33.

*Should ... a witness ... cause a disturbance in the courtroom or fail to comply with an order of ... the presiding judge, ... the presiding judge shall warn him or her. If the warning is unsuccessful ... the presiding judge may order that the person be expelled from the courtroom and be fined in an amount of up to BAM 10,000 ...*⁷

Article 242 § 3 was thus the legal basis in domestic law for the impugned measure within the meaning of Article 9 § 2 of the Convention. For the majority, although this provision was “inevitably couched in terms which are vague”,⁸ there were no strong reasons to depart from the Constitutional Court’s finding that the interference was lawful, especially since the president of the trial chamber had informed the applicant both of the relevant rule and the consequences of disobeying it.

The Fourth Section noted that the Constitutional Court had “examined this issue in depth”.⁹ However, subjecting the national court’s judgment to scrutiny reveals fundamental flaws in its reasoning, and subsequently, in the majority’s adoption of its views. The Constitutional Court judgment makes mention of the fact that “the State Court clearly warned the appellant of the consequences of such conduct”, and that “the State Court clearly and unequivocally informed the appellant of the applicable rules in the judicial institutions and of the consequences of disobeying the rules”. The domestic court’s verbal explanations and warnings to the applicant, however, cannot contribute to the resolution of whether there was a basis in domestic law for the impugned measure. This is because the *legal basis* of the inherent power to regulate proceedings was Article 242 § 3 of the Code of Criminal Procedure; it is the quality of that law – namely, its accessibility to the individual concerned and the foreseeability of its effects¹⁰ – that falls to be reviewed, not the accessibility and foreseeability of the domestic court’s on-the-spot briefings to the applicant once he had already appeared before the court in his skullcap. The Fourth Section’s inclusion of these matters within its “prescribed by law” review under Article 9 § 2 was hence misplaced, the State Court’s explanations not constituting the legal basis for the applicant’s punishment.

This is supported by the Court’s long-held standards for attainment of the “prescribed by law” threshold. In *The Sunday Times v the United Kingdom*,¹¹ the Court held that:

*a norm cannot be regarded as a "law" unless it is to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*¹²

The text of Article 242 § 3 provides that a fine can be imposed where an individual either, first, “cause[s] a disturbance in the courtroom”, or, second, fail[s] to comply with an order of ... the presiding judge”. In respect of the first point, upon entering the courtroom, it was unclear to the applicant what consequences his given action, namely the wearing of the skullcap, would entail since this would not, and indeed did not, cause

⁷ supra n 1, § 17.

⁸ supra n 1, § 33.

⁹ supra n 1, § 33.

¹⁰ *Izzettin Doğan and Others v. Turkey* App no. 62649/10 (ECtHR Grand Chamber, 26 April 2016), § 99.

¹¹ *The Sunday Times v. the United Kingdom (No. 1)* App no. 6538/74 (ECtHR Plenary, 26 April 1979).

¹² *ibid*, § 49.

a disturbance in the courtroom (the disturbance was rather created by the judge's protestations against the form of religious dress).

As regards the second point, namely failure to comply with an order of the presiding judge, two interpretations of the text are possible. Pursuant to the first, the wording of Article 242 § 3 reasonably implies that any such order would have the aim of alleviating the "disturbance in the courtroom" previously alluded to in the provision. As Judge De Gaetano puts it, the provision "was never intended to authorise a presiding judge to impart *any order whatsoever* – that would be sheer arbitrariness – but only such orders as were or might be necessary for the proper maintenance of order in the courtroom and for the proper expedition of business"¹³ (Judge De Gaetano's own emphasis). In accordance with the second possible interpretation of the text, Article 242 § 3 really does allow the judge to make *any order* in the context of proceedings, and to impose punishment for its non-compliance. In this case, the provision exposes itself to challenge on the grounds of arbitrariness. In clarifying the process of determining whether a particular measure is "prescribed by law", the Court has previously declared that the relevant law "must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded by [the Convention provision(s)]". Moreover, since the jurisprudential requirement is that the consequences of a *given action* be reasonably foreseeable, simply being able to foresee that *any* disobeying of a judge's order can attract a fine would be insufficient to meet the Article 9 § 2 "prescribed by law" standard. Consequently, on either of the interpretations of this part of Article 242 § 3, as well as in respect of its "disturbance" element, Article 242 § 3, as a standalone provision, is not formulated with sufficient precision to attain the requisite Convention threshold.

In its judgment, the Constitutional Court also cited the House Rules of the Judicial Institutions of Bosnia and Herzegovina as contributing to the creation of a legal grounding for the punishment. Rule 20 of the House Rules reads as follows:

*Visitors must respect the dress code applicable to judicial institutions.
Visitors shall not wear miniskirts, shorts, t-shirts with thin straps, open heel shoes and other garments that do not correspond to the dress code applicable to judicial institutions.*

Thus only "miniskirts, shorts, t-shirts with thin straps, open heel shoes and other garments that do not correspond to the dress code applicable to judicial institutions" are banned. It is a leap to suggest that visitors to the court would class the wearing of a religious head covering in the same category as miniskirts and t-shirts with thin straps. The obvious message proffered by the Rules is that clothing falling within the description of, or that is comparable to, the listed items, ones that it considers to represent immodesty of dress,¹⁴ will not be tolerated. Reading the mentions of, among others, "miniskirts, shorts, t-shirts with thin straps" on display in the State Court building is unlikely to have impressed upon the applicant the necessity of removing his religious head covering and the risk of the subsequent punishment that failure to do so

¹³ Concurring opinion of Judge De Gaetano, § 3.

¹⁴ As per Judge De Gaetano's formulation, "a certain sobriety and propriety in one's dress can be read into the expression 'dress code applicable to judicial institutions'", see § 3 of the concurring opinion of Judge De Gaetano.

could entail. The House Rules thus also fail to meet the requirements of accessibility and foreseeability under Article 9 § 2 of the Convention.

Similarly problematic is the Constitutional Court's justification of the failure to publish the House Rules by declaring that "that is not a problem since the present case concerns a universally accepted and usual standard of conduct in a judicial institution in a civilised and democratic society that Bosnia and Herzegovina aspires to become".¹⁵ In the Constitutional Court's view, the wearing of a skullcap demonstrates incivility. In contrast, the position taken by the Islamic Community in Bosnia and Herzegovina on wearing the skullcap (a group arguably better placed to assess the meaning and import of an action taken by its members) is that "[i]t has always been respected as part of the traditional identity of each person since wearing the skullcap in public was a sign of civility".¹⁶ This divergence of views somewhat undermines the Constitutional Court's pronouncement that "the universally accepted standard of conduct in a civilised society required that upon entering the premises of a public institution one should remove one's headgear out of respect for that institution and its function".¹⁷ The inevitable conclusion is that there is no one set interpretation of the wearing of the Islamic skullcap in Bosnian and Herzegovinian society; no "universally accepted and usual standard of conduct" in this regard. The Fourth Section's judgment shows there was neither a concordance of views between the skullcap wearer and the judges at various instances, nor among the Constitutional Court itself (two of eight judges in the case dissented).¹⁸ The Constitutional Court's observation "that the standard in issue could and should have been known to the appellant"¹⁹ consequently lacks grounding – at no stage of proceedings was the question of what the wearing of the skullcap in the courtroom represented a clear-cut matter.

Moreover, as per the Court's judgment in *Kokkinakis v Greece*, referred to by the Constitutional Court,²⁰ the interpretation and application of laws couched in vague terms "depend on practice".²¹ Having regard to this, the judgment reveals no relevant established practice that would have allowed the applicant to regulate his conduct, and thereby fails to provide justification for the conclusion that his punishment could reasonably have arisen from the vaguely worded Article 242 § 3 of the Code of Criminal Procedure.

Indeed, rather than being based in pre-existing practice, the idea of the skullcap being demonstrative of incivility is one that, for the domestic courts, seemed to be rooted in the nature of the alleged offences that formed the subject of the criminal proceedings, and in the actions of other members of the applicant's religious group. This unfortunate tendency to stereotype sadly resurfaces at multiple points in the domestic courts' judgments and in the Government's pleadings before the Court. The State Court even went so far as to characterise the applicant's actions as a form of "extremism", calling for "a severe and uncompromising reaction on the part of the State, taking all existing repressive measures".²² It also found "this behaviour [to be] connected to a number of other identical cases before it, in which the members of the same religious group

¹⁵ supra n 1, § 10, § 43 of the Constitutional Court's judgment.

¹⁶ supra n 1, § 24.

¹⁷ supra n 1, § 10, § 43 of the Constitutional Court's judgment.

¹⁸ supra n 1, § 11.

¹⁹ supra n 1, § 10, § 43 of the Constitutional Court's judgment.

²⁰ supra n 1, § 10, § 41 of the Constitutional Court's judgment.

²¹ *Kokkinakis v Greece* App no. 14307/88 (ECtHR Chamber, 25 May 1993), § 40.

²² supra n 1, § 7.

behaved in the same manner”.²³ Before the Court, the Government raised the fact that “the impugned measure had been taken in the context of a sensitive and complex case regarding a terrorist attack against the Embassy of the United States” when arguing that the limitation in question had been proportionate.²⁴

C. The majority’s use of the European consensus doctrine

The *Hamidović* judgment includes a comparative study of thirty-eight contracting states establishing that the wearing of religious symbols by private citizens in courtrooms is not regulated, as such, by the laws of any of the states covered.²⁵ However, it would have been more apt for the Court to undertake a study of how many states grant trial judges unbridled powers to regulate the conduct of proceedings, powers which extend to controlling the manner in which participants in those proceedings dress even where items of clothing are not in any way proscribed by legislation. This is, after all, not a case where domestic law banned the wearing of religious symbols in the courtroom, but rather one where a judge used his inherent power to regulate proceedings to ban a religious symbol from “his” courtroom, seemingly as the result of a previously generated distaste for members of the applicant’s religious group. As outlined in the analysis of Article 242 § 3 in Section B above, the problem stemmed either from the very existence of the unrestrained power, or from misplaced use of the broad but nonetheless circumscribed power, in such a way that subjected the applicant to punishment on the trial judge’s whim, matters that should have been dealt with at the “prescribed by law” stage. The relevant factor forming the subject of comparison within the European consensus review was therefore incorrectly selected, the Court’s study reviewing a measure that was not itself in place in the respondent state; it consequently had the capacity neither to narrow nor broaden the margin of appreciation.

D. Conclusion

While anti-Islamic stereotyping has become not only widespread but acceptable across many Council of Europe States,²⁶ the underlying assumptions made by courts of law in Bosnia and Herzegovina about the applicant as a result of his choice of religious dress are disappointing and concerning. Had the Fourth Section in *Hamidović* more closely scrutinised the relevant domestic provisions and judicial reasoning, thereby ceasing its examination at the “prescribed by law” stage without proceeding to a necessity analysis, firmer conclusions could have been drawn from the Section’s judgment. Such conclusions would have made an important contribution to the Court’s Article 9 jurisprudence, in protecting religious dress from the whims of individuals vested with broad discretionary powers, and subjecting it to regulation only by clearly delineated legal norms.

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²³ supra n 1, § 7.

²⁴ supra n 1, § 29.

²⁵ supra n 1, § 21.

²⁶ “Anti-Muslim rhetoric has persisted in many member states during the year”; “Islamophobia and its articulation have gradually become acceptable in the public opinion and media in a growing number of countries” – see European Commission against Racism and Intolerance (ECRI), Annual Report on *ECRI’s Activities covering the period from 1 January to 31 December 2017*, para 14, available at <https://rm.coe.int/annual-report-on-ecri-s-activities-covering-the-period-from-1-january-/16808c168b>.