EHRM 16 december 2004, Supreme Holy Council of the Muslim Community/Bulgarije

Gerards, J.H.

15

Europees Hof voor de Rechten van de Mens
16 december 2004, 39023/97.
(Rozakis (President)
Lorenzen
Tulkens
Vajic
Botoucharova
Kovler
Zagrebelsky)
Noot Gerards

Supreme Holy Council of the Muslim Community
tegen
Bulgarije

Godsdienstvrijheid; Overheidsbemoeienis met organisatie geloofsgemeenschap; Religieus pluralisme; Scheiding tussen kerk en staat.

[EVRM art. 9, art. 13, art. 41]

In 1989 werd in Bulgarije het communistische bewind vervangen door een democratische regering. Deze regering stelde dat Gendzhev, de leider van het Supreme Holy Council of the Muslim Community, had samengewerkt met het communistische regime. Zij streefde er daarom naar Gendzhev te laten vervangen. Het Directorate of Religious Denominations verklaarde de eerdere verkiezing van Gendzhev tot Chief Mufti nietig. Dit leidde tot verdeeldheid en interne conflicten binnen de moslimgemeenschap. Een nationale conferentie van moslims in 1992 koos een nieuwe leider, Hasan, maar deze verkiezing werd betwist door Gendzhev. In 1994 hielden de aanhangers van Gendzhev een nationale conferentie, waarbij Gendzhev tot president van het Supreme Holy Council werd verkozen. Na een regeringswisseling in 1994 werd zijn leiderschap ook door de waarnemend minister-president erkend. Hasan wendde zich hierop tot het Supreme Court, dat vaststelde dat deze erkenning een “unlawful administrative intervention into the internal organisation of a religious community” opleverde. De regering zag hierin echter geen aanleiding om het leiderschap van Hasan te erkennen. Na een nieuwe regeringswisseling in 1997 spoorden de nieuwe minister-president en het Directorate of Religious Denominations de rivaliserende leiders aan om tot unificatie te komen. Het Supreme Holy Council stelde daarop de organisatie van een gezamenlijk unificatiecongres voor; de rivaliserende factie stemde daarmee in. Na klachten over dreigementen door leden van een politieke partij (de DPS), die de vrije verkiezing van afgevaardigden belemmerden, trok Gendzhev zich echter terug uit de conferentie. Hij vond dat de DPS te veel bemoeienis had met de organisatie van de conferentie. De conferentie had niettemin plaats. Hasan werd verkozen tot leider; zijn leiderschap werd erkend door de minister-president. Gendzhev stelt echter dat hij nog steeds als leider moet worden beschouwd, omdat de conferentie onwettig was.
Het Hof stelt voorop dat overheidsmaatregelen die een bepaalde leider of groepering in een verdeelde geloofsgemeenschap bevoordelen, of die de gemeenschap tegen zijn zin dwingen tot een bepaalde organisatorische structuur, in zichzelf reeds een inbreuk op de vrijheid van godsdienst opleveren. Staten hebben wel de plicht om religieuze tolerantie en goede relaties tussen geloofsgroepen te bevorderen. Dit kan betekenen dat zij neutrale poging tot bemiddeling doen. I.c. legde de wet echter een verplichte organisatiestructuur met één enkele leider op. Bovendien is duidelijk dat een aantal politieke personen veel te nauw betrokken was bij de organisatie van het unificatiecongres.
Het is volgens het Hof niet nodig om een oordeel te geven over de wetmatigheid van de hierdoor veroorzaakte inbreuk op art. 9 EVRM, omdat de klacht primair betrekking heeft op de noodzaak van het overheidsoptreden. Ten aanzien van de proportionaliteit stelt het Hof vast dat de regering niet duidelijk heeft gemaakt waarom zij haar doelstellingen (herstel van rust) niet kon bereiken met andere middelen, dat wil zeggen zonder de gemeenschap tot één enkel leiderschap te dwingen. Daardoor is sprake van schending van art. 9 EVRM.

The law

I. Alleged violation of Article 9 of the Convention

64. The applicant organisation complained that the authorities had organised and manipulated the October 1997 Muslim conference with the aim of favouring one of the rival leaderships and removing Mr Gendzhev, thus arbitrarily

intervening in the affairs of the Muslim community.
65. The Court considers that the above complaints fall to be examined under Article 9 of the Convention, which provides:

> **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." {eov|M*}

A. The parties' submissions

1. The applicant organisation

66. The applicant organisation submitted that Mr Gendzhev had been unlawfully removed in 1992 by Mr Hasan and that in 1997 Mr Hasan had sought a repeat of these events, counting on the support of the SDS, the political party which had "helped" him in 1992, and which had again come to power in 1997.
67. The applicant organisation further stated that Mr Gendzhev had actively sought the achievement of unification, which he considered important for the well-being of the Muslim community, but had had to withdraw because of irregularities in the election of delegates. The Government's argument that the withdrawal of several persons did not affect the legitimacy of the conference was flawed since the leaders had withdrawn precisely because of the illegitimacy of the local elections of delegates.
68. In particular, the authorities had gone far beyond what was necessary for the organisation of the conference and had mounted a concerted effort to remove Mr Gendzhev. Pressure had been brought to bear on local communities in the elections for delegates. The election results had been manipulated since, contrary to the relevant regulations, elections had been held in many villages which were not independent municipalities. On at least three occasions the results had been forged.

2. The Government

69. The Government stated that the divisions within the Muslim religious community in Bulgaria since 1989 had been caused by conflicts of a political and personal nature. In 1997 efforts had been made to overcome these differences and unify the community. The representatives of the rival groups had signed an agreement for the holding of a unification conference and had solicited the assistance of the Directorate of Religious Denominations. The role of the Directorate had been that of a neutral guarantor of the agreement entered into freely by the opposing factions. Mr Gendzhev himself had solicited such participation of the Directorate, apparently considering it vital in the unification process. The joint committee had freely decided that it wished the results of local elections of delegates to be certified by the mayors.
70. Furthermore, as established by the courts later, the election of delegates had proceeded normally. The large turnout had demonstrated the community's will for unification.
71. The Government also underlined that the case did not concern a process of putting two religious communities under a single leadership but a situation where one religious community had two leaderships. Contradictory decisions of the authorities during the period 1992-1997, including those criticised by the Court in its *Hasan and Chaush v. Bulgaria* judgment, had resulted in confusion as to the leadership of the Muslim community. Unlike in previous years, however, in 1997 the State had not interfered in the internal affairs of the community but had only assisted it in its efforts to achieve unification, as part of the authorities' duty under the Constitution to help maintaining a climate of tolerance in religious life.
72. The Government stated that the reasons given by Mr Gendzhev and the five members of the contact group nominated by the Supreme Holy Council presided over by him for their withdrawal from the national conference were vague and left the impression that they had simply been dissatisfied with the results of the primary elections of delegates. The Government considered that the withdrawal of five persons did not call into question the legitimacy of the national conference and that the authorities had rightly accepted its results.

B. The Court's assessment

1. Applicability of Article 9

73. In accordance with the Court's case-law, while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Participation in the life of the community is a manifestation of one's religion, protected by Article 9 of the Convention. The right to freedom of religion under Article 9, interpreted in the light of Article 11, the

provision which safeguards associations against unjustified State interference, encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, par. 62, ECHR 2000-XI).
74. The applicant organisation was the official body representing and managing the Muslim religious community in Bulgaria between February 1995 and October 1997. It complained about alleged arbitrary interference by the State with the organisation and leadership of that community. An ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention (see, [GC], no. 27417/95, par. 72, ECHR 2000-VII).
75. It follows that the applicant organisation's complaints fall within the ambit of Article 9 of the Convention, which is applicable.

2. Compliance with Article 9
a) Whether there was an interference
76. According to the Court's case-law, State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion (see *Serif v. Greece*, no. 38178/97, paras. 49, 52 and 53, ECHR 1999-IX and *Hasan and Chaush v. Bulgaria*, cited above, par. 78).
77. The present case concerns the replacement of the Bulgarian Muslim community's leadership in October 1997 and the ensuing proceedings. The central issue in dispute is whether these events were the result of undue State pressure or nothing more than a change of leadership freely effected by the community.
78. The impugned change of leadership was decided in October 1997 by a unification assembly convened pursuant to an agreement entered into by the two rival leaderships, in accordance with rules set out by a joint committee that included representatives of the applicant organisation (see paragraphs 31-33 above). The Directorate of Religious Denominations and the local authorities participated in the process in that they urged the two groups to unite, took an active part in the organisation of the October 1997 assembly and registered the leadership it elected as the sole representative of the Muslim community in Bulgaria (see paragraphs 28-30, 34 and 37 above).
79. The Government argued that the authorities had merely mediated between the opposing groups and assisted the unification process as they were under a constitutional duty to secure religious tolerance and peaceful relations between groups of believers.
80. The Court agrees that States have such a duty and that discharging it may require engaging in mediation. Neutral mediation between groups of believers would not in principle amount to State interference with the believers' rights under Article 9 of the Convention, although the State authorities must be cautious in this particularly delicate area.
81. The Court notes, however, that the unification process in 1997 took place against the backdrop of the events in 1992 and 1995 when changes of government were swiftly followed by State action to replace religious leaders and grant legal recognition to one of the two rival leaderships (see paragraphs 8-20 and 27 above). It is highly significant that the relevant law as applied in practice required - and still requires - all believers belonging to a particular religion and willing to participate in the community's organisation to form a single structure, headed by a single leadership even if the community is divided, without the possibility for those supporting other leaders to have an independent organisational life and control over part of the community's assets (see paragraphs 17, 23, 40, 53-63 above). The law thus left no choice to the religious leaders but to compete in seeking the recognition of the government of the day, each leader proposing to "unite" the believers under his guidance.
82. Against that background, the fact that in 1997 the new Government called for the unification of the divided Muslim community (see paragraphs 28-30, 34 and 37 above) is of particular significance.
83. The Court considers that the applicant organisation's allegation that the mayors of a number of localities and political figures participated too closely in the selection of delegates to the October 1997 assembly does not appear implausible.
84. Furthermore, even if the initial participation of the Directorate is seen as nothing more than neutral mediation in the preparation of a unification assembly, matters changed at the moment when the Directorate continued to insist on "unification" despite the fact that the leaders of the applicant organisation decided to withdraw. It was not for the State to decide whether or not Mr Gendzhev and the organisation presided over by him should or should not withdraw. The Directorate could have noted the failure of the unification effort and expressed readiness to continue assisting the parties through mediation, if all concerned so desired. Instead, the leaders elected by the October 1997 conference obtained the status of the sole legitimate leadership of the Muslim community and as a result the applicant

organisation could no longer represent at least part of the religious community and manage its affairs and assets according to the will of that part of the community (see paragraphs 31-40 above).
85. The Court thus finds that there has been an interference with the applicant organisation's rights under Article 9 of the Convention in that the relevant law and practice and the authorities' actions in October 1997 had the effect of compelling the divided community to have a single leadership against the will of one of the two rival leaderships.
86. Such an interference entails a violation of that provision unless it is prescribed by law and necessary in a democratic society in pursuance of a legitimate aim.

b) Whether the interference was prescribed by law

87. The Government's decision registering a change of leadership in the Muslim community relied on sections 6 and 16 of the Religious Denominations Act (see paragraph 53 above).
88. In the case of *Hasan and Chaush v. Bulgaria*, cited above (par. 86), the Court found that the interference with the internal organisation of the Muslim community in 1995-1997 had not been "prescribed by law" as it had been arbitrary and based on legal provisions which allowed an unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability of the law.
89. Although the same legal provisions applied in the present case, the Court observes that there were considerable differences in the authorities' approach. In 1997 the authorities did not make use of the unfettered discretion they enjoyed under the applicable law and proceeded on the basis that the rival groups had set up their own rules through an agreement derogating from the existing statute of the Muslim denomination (see paragraphs 31 and 46 above).
90. In these specific circumstances, the Court, having regard to the fact that the gist of the applicant organisation's allegations concerns the alleged lack of justification for the State interference with the internal affairs of the Muslim community, considers that it is not necessary to rule on the lawfulness of that interference.

c) Whether the interference pursued a legitimate aim

91. The applicant organisation submitted that the authorities' aim had been to remove Mr Gendzhev and the leadership presided over by him. The Government stated that they had sought to help resolve the conflict in the Muslim community and remedy the consequences of past unlawful State actions.
92. The Court accepts that the authorities' general concern was to restore legality and remedy the arbitrary removal in 1995 of Mr Hasan and the leadership presided over by him. Seen in this perspective, the interference with the internal organisation of the Muslim community was in principle aimed at the protection of public order and of the rights and freedoms of others.

d) Whether the interference was necessary in a democratic society

93. The Court reiterates that the autonomous existence of religious communities is indispensable for pluralism in a democratic society. While it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and beliefs. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country's problems through dialogue, even when they are irksome (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p.18, par. 33, *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, par. 123 ECHR 2001-XII, and *Hasan and Chaush v. Bulgaria*, cited above, par. 78).
94. In the present case, the relevant law and practice and the authorities' actions in October 1997 had the effect of compelling the divided community to have a single leadership against the will of one of the two rival leaderships (see paragraph 85 above).
95. As a result, one of the groups of leaders was favoured and the other excluded and deprived of the possibility of continuing to manage autonomously the affairs and assets of that part of the community which supported it (see paragraph 84 above).
96. It is true that States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities (see *Cha'are Shalom Ve Tsedek v. France*, cited above, par. 84). The Court reiterates, however, that in democratic societies the State does not need in principle to take measures to ensure that religious communities remain or are brought under a unified leadership. The role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. As the Court has already stated above, State measures favouring a particular leader of a divided religious community or seeking to

compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion. (see *Serif v. Greece*, cited above, paras. 49, 52 and 53, and *Hasan and Chaush v. Bulgaria*, cited above, par. 78).
97. The Government have not stated why in the present case their aim to restore legality and remedy injustices could not be achieved by other means, without compelling the divided community under a single leadership. It is significant in this regard that despite the "unification" process in 1997 the conflict in the religious community continued (see paragraphs 49 and 50 above).
98. In sum, the Court considers that the Bulgarian authorities went beyond the limits of their margin of appreciation under Article 9 par. 2 of the Convention.
99. It follows that the interference with the applicant organisation's rights under Article 9 of the Convention in 1997 was not necessary in a democratic society for the protection of public order or the rights and freedoms of others and was therefore contrary to that provision.

II. Alleged violation of Article 13 of the Convention

100. The applicant organisation complained that the judicial proceedings it had instituted had not provided an effective remedy against the arbitrary acts of the authorities and that no other remedies had been available.
101. The Court considers that the above complaint falls to be examined under Article 13 of the Convention, which provides:
"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."
102. The Government submitted that the courts, by examining the applicant organisation's appeals on the merits, provided an effective remedy against the alleged interference with the believers' Article 9 rights.
103. In accordance with the Court's case-law, Article 13 guarantees the availability at national level of a remedy in respect of grievances which can be regarded as "arguable" in terms of the Convention. Such a remedy must allow the competent domestic authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they discharge their obligations under Article 13. The remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakycy v. Turkey* [GC], no. 23657/94, par. 112, ECHR 1999-IV).
104. The applicant organisation's claim under Article 9 of the Convention was undoubtedly arguable (see paragraph 99 above). It follows that Article 13 required the availability of an effective domestic remedy.
105. The applicant organisation was provided with a judicial remedy. The Supreme Administrative Court examined on the merits its claim that there had been unlawful and arbitrary State interference with the internal organisation of the Muslim community (see paragraphs 45-48 above).
106. The Supreme Administrative Court decided against the applicant organisation as it assessed the organisation's complaints in the light of the domestic legal regime and practice that forces a divided religious community to have a single leadership, even against the will of one of the rival groups (see paragraphs 46, 48, 53-57 and 81 above).
107. The Court reiterates, however, that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see *Sunday Times v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, par. 61; *Kudla v. Poland* [GC], no. 30210/96, par. 151, ECHR 2000-XI, and *Connors v. the United Kingdom*, no. 66746/01, par. 109, 27 May 2004).
108. The applicant organisation's complaint related in essence to one of the principles underlying the applicable legal regime. It cannot be considered that Article 13 of the Convention required the provision of a remedy to challenge that regime.
109. It follows that there has been no violation of Article 13 of the Convention.

III. Alleged violations of Articles 6 and 14 of the Convention

110. The applicant organisation alleged that there had been a number of separate violations of Article 6 of the Convention in the 1998-2000 proceedings before the Supreme Administrative Court. It also considered that the events complained of disclosed discrimination contrary to Article 14 of the Convention since the authorities had favoured one of the rival leaderships of the Muslim community.
111. The provisions relied upon provide in so far as relevant:
Article 6 par. 1

"In the determination of his civil rights and obligations (...), everyone is entitled to a fair (...) hearing (...) by an (...)impartial tribunal (...)"
Article 14
"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."
112. Having regard to its findings under Article 9 and 13 of the Convention, the Court finds that it is not necessary to examine the same issues under Articles 6 and 14 of the Convention.

IV. Application of Article 41 of the Convention

113. Article 41 of the Convention provides:
"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

114. The applicant organisation claimed 25,000 euros ("EUR") for the alleged damage to the reputation of Mr Gendzhev and the leadership presided over by him and the consequences of the State interference in the internal affairs of the Muslim community.
115. The Government considered that the amount claimed was excessive and that the finding of a violation of the Convention would be sufficient just satisfaction.
116. Having regard to the circumstances of the present case and its case-law concerning claims for non-pecuniary damage made on behalf of legal persons or organisations (see *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, par. 57, ECHR 1999-VIII; *Comingersoll S.A. v. Portugal* [GC], no 35382/97, ECHR 2000-IV, par. 35; *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, par. 121, ECHR 2001-IX; and *Metropolitan Church of Bessarabia and Others v. Moldova*, cited above, par. 146), the Court considers that an award under this head is appropriate. The unjustified State interference with the organisation of the religious community must have caused non-pecuniary damage to the applicant organisation. Deciding on an equitable basis, the Court awards EUR 5,000 in respect of non-pecuniary damage, to be paid to Mr N. Gendzhev as the representative of the applicant organisation.

B. Costs and expenses

117. The applicant organisation claimed approximately EUR 6,800 for legal work in the domestic proceedings and before the Convention institutions and the equivalent of approximately EUR 500 for translation costs, express mail and overhead expenses. It presented copies of legal-fee agreements between the applicant organisation and Mrs Margaritova-Vutchkova, its legal representative before the Court, receipts showing that it had paid sums to three lawyers, including Mrs Margaritova-Vutchkova, for work done in several sets of separate judicial proceedings in Bulgaria and receipts concerning translation costs and postal expenses.
118. The Government stated that no time-sheet for Mrs Margaritova-Vutchkova's work had been submitted and that some of the fees paid to other lawyers concerned domestic proceedings unrelated to the present case. The Government also stated that the fees and expenses claimed were excessive.
119. On the basis of the legal-fee agreement submitted by the applicant organisation and the relevant receipts, the Court concludes that the legal costs claimed were, for the most part, actually and necessarily incurred, but applies a reduction on account of the fact that some of the initial complaints were declared inadmissible (see paragraph 6 above). Deciding on an equitable basis, the Court awards EUR 5,000 for costs and expenses.

C. Default interest

120. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court unanimously

1. *Holds* that there has been a violation of Article 9 of the Convention;
2. *Holds* that there has not been a violation of Article 13 of the Convention;
3. *Holds* that it is not necessary to examine the complaints under Articles 6 and 14 of the Convention;
4. *Holds*
a) that the respondent State is to pay to Mr N. Gendzhev, the representative of the applicant organisation, within three months from the date on which the judgment becomes final according to Article 44 par. 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
i) EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

ii) EUR 5,000 (five thousand euros) in respect of costs and expenses;
iii) any tax that may be chargeable on the above amounts;
b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Noot
1. Met deze uitspraak bouwt het Hof voort op *Hasan en Chaush t. Bulgarije* (EHRM 26 oktober 2000 (GC), *EHRC* 2000/90, m.nt. Gerards). Is het in bovenstaande zaak Gendzhev (de leider van het Supreme Holy Council) die zich beklaagt over de overheidsbemoeienis met zijn geloofsgemeenschap, in Hasan en Chaush was het zijn rivaal die hierover een klacht had ingediend. Dat beide rivalen bij het Hof terecht kwamen, is niet zo verwonderlijk, omdat de verschillende Bulgaarse regeringen die in de jaren '90 aan de macht waren, afwisselend het leiderschap van de ene dan wel de andere factie ondersteunden. Een verschil is wel dat Hasan zich beklaagde over het feit dat zijn rivaal door het Directorate for Religious Denominations als leider werd erkend. Gendzhev en zijn factie klagen daarentegen over de enige tamelijk neutrale bemiddelingspoging die de staat ondernam: zij stellen dat ook dit al strijd opleverde met art. 9 EVRM. Daarmee is een interessante vraag opgeroepen, namelijk de vraag hoever een staat mag gaan bij het interveniëren in ruzies tussen verschillende geloofsgemeenschappen of onderdelen daarvan.
2. In *Hasan en Chaush* gaf het Hof geen duidelijk antwoord op deze vraag. Het ging daar vooral in op de vraag of het handelen van de regeringen gebaseerd was op een voldoende voorzienbare en duidelijke wettelijke regeling - daarvan was in de verste verte geen sprake. In bovenstaande zaak laat het Hof juist deze kwestie buiten beschouwing. Het stelt dat "the gist of the applicant organisation's allegations concerns the lack of justification for the State interference" en dat het daarom niet noodzakelijk is om op de wetmatigheid van de inbreuk in te gaan. Procedureel gezien is dit een interessant punt. Normaal gesproken bekijkt het Hof ambtshalve of is voldaan aan alle criteria voor de rechtvaardiging van een inbreuk. Als dit anders is, is dit vooral omdat het Hof vindt dat het punt van de wetmatigheid niet interessant is. Het is niet ongebruikelijk dat het Hof daarbij iets stelt als het volgende: "The Court does not consider it necessary to rule on the question of whether the interference in issue was 'prescribed by law' because, in any event, it is incompatible with Article 9 on other grounds" (EHRM 14 december 1999, *Serif*, *EHRC* 2000/14, m.nt. Heringa, par. 42; vgl. ook EHRM 26 september 1996, *Manoussakis e.a.* , Reports 1996-IV, par. 38). De reden die het Hof nu aanvoert, is een andere. Het Hof stelt dat het de kwestie terzijde laat, omdat de klacht van het Supreme Holy Council in essentie op het noodzakelijkheidsaspect ziet ("the gist of the applicant organisation's allegations concerns the alleged lack of justification for the State interference", par. 90). Daarmee lijkt het Hof haast een soort grievenstelsel te creëren, waarbij de formulering van de klacht bepalend is voor de wijze van toetsing. Het is echter niet waarschijnlijk dat dit de bedoeling is geweest. De kans is groot dat het Hof het punt van de wetmatigheid vooral laat rusten omdat het daarover in *Hasan en Chaush* al een uitspraak heeft gedaan, waaraan het weinig meer kan toevoegen (het Hof stelt dit impliciet ook in par. 88-89, al geeft het aan dat de omstandigheden nu iets anders zijn). Een negatief oordeel over de wetmatigheid betekent bovendien dat het Hof niet meer kan toekomen aan een oordeel over de noodzakelijkheid van de maatregel. Het is goed voorstelbaar dat het Hof juist dit een interessante kwestie vond en dat het om die reden over het gebrek aan wetmatigheid is heengestapt. Uit de wat ongelukkig gekozen formulering kan dan ook niet worden afgeleid dat het Hof de reikwijdte van zijn toetsing ook in andere gevallen zal laten bepalen door de specifieke punten die de klagers naar voren hebben gebracht.
3. Het oordeel over de inbreuk op art. 9 bouwt voort op eerdere jurisprudentie over dit onderwerp. In *Hasan en Chaush*, maar ook al in *Serif* (reeds aangehaald), stelde het Hof vast dat de overheid zich niet mag bemoeien met de interne organisatie van een religieuze gemeenschap. Een verschil met *Hasan en Chaush* is wel dat het Hof daar benadrukte dat er een verband bestaat tussen art. 9 en art. 11 als het gaat om de vrijheid van religieuze gemeenschappen om zichzelf te organiseren. Het Hof stelde uitdrukkelijk dat

art. 9 tegen de achtergrond van de verenigingsvrijheid moet worden uitgelegd, hetgeen betekent dat “the believer’s right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention” (par. 62). In bovenstaande zaak wordt niet op dit verband gewezen. Het Hof stelt eenvoudigweg dat “according to the Court’s case-law, State measures favouring a particular leader or group in a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will could constitute an infringement of the freedom of religion” (par. 76). In hoeverre de verenigingsvrijheid daadwerkelijk een ondersteunende rol speelt bij de interpretatie van art. 9, blijft daardoor onduidelijk.

4. Belangrijk is verder dat het Hof in deze uitspraak nader uitlegt wat de taak van de overheid kan zijn waar het gaat om het waarborgen van pluralisme en religieuze tolerantie. Veel concrete invulling heeft het Hof tot nu toe nog niet gegeven aan deze taak. Duidelijk was wel al dat het in een democratische samenleving niet noodzakelijk is dat de staat ervoor zorgt dat religieuze gemeenschappen één duidelijke structuur met één duidelijk leiderschap hebben (*Serif*, par. 52). In hoeverre de overheid mag ingrijpen in de organisatievrijheid van geloofsgemeenschappen stond echter nog niet vast. Er kan echter van uit worden gegaan dat religieuze gemeenschappen normaal gesproken heel wel in staat moeten worden geacht om hun eigen problemen op te lossen binnen hun eigen organisatie. Overheidsingrijpen moet echt een laatste redmiddel zijn, dat pas mag worden ingezet als de religieuze conflicten direct gevaar lijken te gaan opleveren voor het normale reilen en zeilen van de samenleving, bijvoorbeeld omdat de spanningen zich dreigen te uiten in geweld. Gesteld zou misschien kunnen worden, zoals de Bulgaarse regering ook doet, dat neutraal bemiddelen niet als daadwerkelijk “ingrijpen” van de overheid kan worden aangemerkt. Zoals het Hof aangeeft is een uiterst terughoudende opstelling echter ook hier geboden. Ook hier geldt immers dat niet te gemakkelijk mag worden aangenomen dat de problemen in een geloofsgemeenschap zo groot zijn geworden dat ze niet meer zonder hulp kunnen worden opgelost. Bovendien is in dit soort gevallen steeds de vraag of, zelfs als een geloofsgemeenschap uit elkaar dreigt te vallen, de overheid zich daarmee heeft te bemoeien. Het Hof vindt dat dit zeker niet het geval is: “The role of the authorities in such cases is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other” (*Serif*, par. 55). Als regel kan wellicht gelden dat zelfs voor een weinig ingrijpende vorm van overheidsin-grijpen als bemiddeling alleen ruimte bestaat als de religieuze groeperingen daar zelf om vragen, of als de conflicten de religieuze sfeer dreigen te overstijgen (bijvoorbeeld doordat geweld dreigt). Het Hof heeft daarmee een aanwijzing gegeven die het gedrag van overheden op een nuttige manier kan sturen.

5. Met het voorgaande is echter nog niet de vraag beantwoord wat “neutraliteit” van de staat in godsdienstige aangelegenheden in zijn algemeenheid inhoudt. De in Nederland soms geuite wens om bepaalde eisen te stellen aan imamopleidingen is een voorbeeld van een geval waarbij het veel moeilijker zal zijn om te beoordelen of op ontoelaatbare wijze wordt “ingegrepen” in de godsdienstvrijheid of de organisatievrijheid van een geloofsgemeenschap. Bij een kwestie als deze is het ook veel lastiger om een strikte scheiding te handhaven tussen staat en religie. De angst is immers juist dat belligerente uitlatingen van imams invloed hebben op de seculiere sfeer, bijvoorbeeld doordat zij gelovigen aanzetten tot misdaden. De hierboven genoemde criteria zijn in dat soort situaties niet echt behulpzaam: zij zijn juist gericht op de situatie waarin het relatief gemakkelijk is om de sfeer van de seculiere overheid te onderscheiden van de religieuze sfeer. In de Nederlandse situatie komt het er echt op aan zorgvuldig te definiëren welke doelstellingen gediend worden door de overheidsmaatregel en om te onderzoeken hoe noodzakelijk en geschikt eventuele maatregelen zijn om deze doelstellingen te bereiken. Deze beoordeling moet bovendien steeds worden uitgevoerd in de wetenschap dat hierdoor sprake is van een beperking van zeer wezenlijke rechten. Daarbij is vervolgens weer van belang dat ook goed wordt vastgesteld hoe groot die beperking nu precies is, en hoe wezenlijk het recht dat beperkt wordt. Het stellen van opleidingseisen aan imams is wellicht een minder vergaande beperking van de godsdienstvrijheid dan het verbieden van preken. Alleen als de kwestie op deze

manier zorgvuldig uiteengerafeld wordt, valt hierover op een redelijke manier na te denken en kunnen acceptabele afwegingen worden gemaakt.
J.H. Gerards