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

Information Note on the Court's case-law 260

March 2022

Communauté genevoise d'action syndicale (CGAS) v. Switzerland - 21881/20

Judgment 15.3.2022 [Section III]

Article 11

Article 11-1

Freedom of peaceful assembly

Blanket ban on public meetings for two and a half months at the start of the COVID-19 pandemic, with associated criminal sanctions and no judicial review of proportionality: *violation*

[This case was referred to the Grand Chamber on 5 September 2022]

Facts – The applicant is an association whose declared aim is to defend the interests of working and non-working persons and of its member organisations, especially in the sphere of trade-union and democratic freedoms. Relying on Article 11 of the Convention, it alleged that it had been deprived of the right to organise or take part in any public gatherings, under a federal ordinance ("O.2 COVID-19") enacted during the early months of the COVID-19 pandemic (March-May 2020).

Law

Article 35 § 1 (*exhaustion of domestic remedy*): At the relevant time, in view of the overall public-health and political situation, the applicant association had not had an effective remedy, available in practice, by which to complain of a violation of Article 11. While federal ordinances could normally be the subject of a preliminary ruling on constitutionality by the Federal Supreme Court, including in the absence of any current interest, that court, in the very particular circumstances of the general lockdown declared by the Federal Council as part of efforts to tackle COVID-19, had not examined freedom-of-assembly applications on the merits and had not assessed the compatibility of Ordinance O.2 COVID-19 with the Constitution.

Conclusion: preliminary objection dismissed.

Article 11: The ban on public gatherings, which formed part of measures to tackle COVID-19, amounted to interference with the exercise by the applicant association of its right to freedom of assembly. The interference had been based on Ordinance O.2 COVID-19 and had pursued the legitimate aims of protecting health and protecting the rights and freedoms of others.

Switzerland had a margin of appreciation that was not unlimited. The threat to public health from COVID-19 had been very serious, and knowledge of the characteristics and dangerousness of the virus had been very limited at the beginning of the pandemic;

accordingly, States had had to react swiftly during the period under consideration in the present case. Furthermore, there had been competing interests at stake in the very complex circumstances of the pandemic, especially with regard to the positive obligation for the States Parties to the Convention to protect the lives and health of the persons within their jurisdiction, under Articles 2 and 8 of the Convention in particular.

Between 17 March and 30 May 2020 all the public events by means of which the applicant association might have conducted its activities in accordance with its statutory aim had been subject to an outright ban. A blanket measure of this kind required strong reasons to justify it and called for particularly thorough scrutiny by the courts empowered to weigh up the interests at stake. Even assuming that such a reason had existed – namely the need to tackle the global COVID-19 pandemic effectively – it transpired from the Court's examination of the exhaustion of domestic remedies that no such scrutiny had been performed by the courts, including the Federal Supreme Court. It followed that the balancing exercise between the competing interests at stake, required by the Court for the purposes of assessing the proportionality of such a drastic measure, had not been carried out. This was especially worrying in terms of the Convention given that the blanket ban had remained in place for a significant length of time.

Furthermore, access to workplaces such as factories and offices had continued to be allowed even when they were occupied by hundreds of people. The Government had not answered the question as to why such activities had continued to be possible, on condition that employers took adequate organisational and technical measures to ensure compliance with the advice on hygiene and social distancing, whereas the organisation of an event in the public space, and thus outdoors, was not allowed even if the public-health protocols were adhered to. For a measure to be considered proportionate and necessary in a democratic society, there had to be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.

The quality of the parliamentary and judicial review of the necessity of a general nationwide measure was also of particular importance in assessing its proportionality, including with regard to the operation of the relevant margin of appreciation. It was true that, in view of the urgency of taking appropriate action to counter the unprecedented threat posed by COVID-19 in the early stages of the pandemic, it was not necessarily to be expected that very detailed discussions would be held at domestic level, and especially involving Parliament, prior to the adoption of the urgent measures needed to tackle this global scourge. However, in such circumstances independent and effective judicial review of the measures taken by the executive was all the more vital.

As to the penalty for a breach of the ban on public rallies under O.2 COVID-19, the imposition of criminal sanctions had to be justified by particularly strong reasons, and the organisation of a peaceful gathering should not normally entail a risk of such sanctions. As of 17 March 2020, under the ordinance in question, any person who deliberately violated the ban was liable to a custodial sentence not exceeding three years or to a fine (except in the presence of a more serious offence within the meaning of the Criminal Code). These were very severe penalties that were liable to have a chilling effect on potential participants or groups seeking to organise such events.

Lastly, in the face of the worldwide public-health crisis, Switzerland had not had recourse to Article 15 of the Convention, which allowed a State Party to take certain measures derogating from its Convention obligations in time of war or other public emergency threatening the life of the nation. Accordingly, it had been required to abide by the Convention under Article 1 and to comply fully with the requirements of Article 11, within the margin of appreciation afforded to it.

While by no means disregarding the threat posed by COVID-19 to society and to public health, the Court nevertheless held, in the light of the importance of freedom of peaceful

assembly in a democratic society, and in particular of the topics and values promoted by the applicant association under its constitution, the blanket nature and significant length of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, that the interference with the enjoyment of the rights protected by Article 11 had not been proportionate to the aims pursued. Moreover, the domestic courts had not conducted an effective review of the measures at issue during the relevant period. The respondent State had thus overstepped the margin of appreciation afforded to it in the present case. Consequently, the interference had not been necessary in a democratic society.

Conclusion: violation (four votes to three).

Article 41: finding of a violation constituted sufficient just satisfaction in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.
