Annotation: EHRM 2010-06-15

Napel, Hans-Martien ten

EHRC 2010/90
Europees Hof voor de Rechten van de Mens
15 juni 2010, 7710/02.
(Mr. Bratza President
Mr. Garlicki
Mr. Bonello
Mr. Mijovic
Mr. Björgvinsson
Mr. Bianku
Mr. Poalelungi)

Grzelak
tegen
Polen

Godsdienstvrijheid, Recht op onderwijs, Religieuze en filosofische overtuigingen ouders, Ontbreken rapportcijfer, Facultatief vak godsdienst/ethiek, Openbare school, Negatieve godsdienstvrijheid

[EVRM - 9 jo. 14; 2 Eerste Protocol]

» Samenvatting

De zaak komt voort uit een klacht van twee Poolse ouders en hun elfjarige zoon. Beide ouders zijn verklaarde agnosten. Conform hun wens woonde de zoon – als enige uit zijn lagere schoolklas – niet het facultatieve godsdienstonderwijs bij. Volgens de ouders werd hun zoon hierop het slachtoffer van discriminatie en fysieke en psychologische 'harassment' door medeleerlingen. Om deze reden verplaatsten de ouders hun zoon in de loop van het derde jaar naar een andere school en vervolgens nog naar een andere school. Een en ander bracht evenwel geen verbetering in de situatie. Verzoekers klagen dat de schoolautoriteiten hebben verzuimd om een vak ethiek aan te bieden bij wijze van alternatief voor het facultatieve godsdienstonderricht alsmede over het ontbreken van een cijfer voor religie/ethiek op de diverse schoolrapporten van de zoon.

Het Hof behandelt laatstgenoemde klacht onder art. 14 jo. art. 9 EVRM. Het bevestigt dat de godsdienstvrijheid tevens een negatieve dimensie omvat, te weten het recht van een individu om niet verplicht te worden zijn geloof of religieuze overtuigingen kenbaar te maken. De afwezigheid van een cijfer voor religie/ethiek valt hieronder. Weliswaar is het geven van een cijfer voor religie/ethiek als zodanig niet in strijd met art. 14 jo. art. 9. Het ontbreken van een cijfer zal echter door elk redelijk persoon worden opgevat als een aanwijzing dat de zoon geen religieus onderrricht heeft gevolgd, dat immers in het overwegend rooms-katholieke Polen op ruime schaal wordt aangeboden. Vanaf 2007 gingen de resultaten van facultatieve vakken bovendien meetellen bij de berekening van het gemiddelde van een leerling, hetgeen nadelig uitpakt voor wie niet in de gelegenheid is om het alternatieve vak ethiek te volgen. Om deze redenen is het ontbreken van een cijfer voor religie/ethiek niet geheel neutraal, maar veeleer een vorm van ongegronde stigmatisering van de zoon. De beoordelingsmarge van de staat is in casu overschreden, aangezien de kern van de godsdienstvrijheid van de zoon in het geding is.

Wat betreft de klacht over schending van het recht op onderwijs overeenkomstig de religieuze en filosofische overtuigingen van de ouders aangezien geen alternatief vak ethiek was aangeboden, oordeelt het Hof dat de

vormgeving van het systeem voor het geven van facultatief onderwijs in godsdienst en ethiek binnen de beoordelingsmarge van Polen valt. Deze omvat tevens eventuele regels met betrekking tot een minimumaantal leerlingen dat in beide vakken geïnteresseerd moet zijn. Deze klacht is derhalve kennelijk ongegrond. Schending van art. 14 jo. art. 9 EVRM.

» Uitspraak

The Law

Alleged violation of Article 14 taken in conjunction with Article 9 of I. the Convention

The applicants alleged that the school authorities had failed to 49. organise a class in ethics for the third applicant and complained about the absence of a mark in his school reports in the space reserved for "religion/ethics". They claimed that the third applicant had been subjected to discrimination and harassment for not having followed religious education classes. The applicants invoked Articles 9 and 14 of the Convention. The Court raised of its own motion a complaint under Article 8 of the Convention, namely whether the facts of the case disclose a breach of the State's positive obligation to ensure effective respect for the applicants' private life within the meaning of that provision.

The Court considers that it is appropriate to examine these complaints 50. under Article 14 taken in conjunction with Article 9 of the Convention as regards the absence of a mark for the subject "religion/ethics". Article 9 of the Convention provides as follows:

Everyone has the right to freedom of thought, conscience and religion; "1. 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.

Freedom to manifest one's religion or beliefs shall be subject only to 2. 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."

Article 14 reads:

"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."

Admissibility A.

Compatibility 1. ratione personae

The Government pleaded that the first two applicants did not have victim 51. status in respect of the complaints under Articles 9 and 14 of the Convention. In particular, they submitted that Mr and Mrs Grzelak could not be considered victims of any violations of Articles 9 and 14 caused by the actions or omissions of the public authorities with regard to the provision of religious

instruction (ethics) or with regard to the form of school reports, as those issues concerned exclusively the rights of Mateusz Grzelak, the third applicant. The applicants did not comment.

The Court recalls that the complaint under Article 14 taken in 52. conjunction with Article 9 concerns the absence of a mark for the subject "religion/ethics" in the third applicant's school reports. Having regard to the scope of the complaint under Article 14 taken in conjunction with Article 9, it accepts the Government's argument and notes that the issues arising under this provision of the Convention concern only the third applicant, Mateusz Grzelak (see, *mutatis mutandis, Valsamis v. Greece*, 18 December 1996, par. 34, *Reports of Judgments and Decisions* 1996-VI). The Article 14 complaint taken in conjunction with Article 9 is therefore incompatible *ratione personae* with respect to the first and second applicants.

Exhaustion 2. of domestic remedies

The (a) Government

The Government claimed that the third applicant had not exhausted 53. domestic remedies with regard to his allegations of discriminatory treatment because no class in ethics had been provided as an alternative to religious instruction and because of the form of the school reports. They submitted that the Ordinance regulated in a comprehensive manner the duties of school authorities regarding the organisation of classes in religion or ethics. It imposed no obligation on schools to provide a class in ethics, as that depended on parents or pupils requesting it and on there being sufficient numbers of interested pupils. If Mr and Mrs Grzelak had considered that their son was being discriminated against by the school authorities on account of the absence of a course in ethics, they should have challenged the provisions of the Ordinance which did not provide for compulsory teaching of ethics instead of religious instruction. In their view, the applicant should have lodged a constitutional complaint against the manner of organising classes in ethics provided for in paragraphs 1 to 3 of the Ordinance.

The Government submitted that the Constitutional Court, in its judgment 54. of 20 April 1993, had reviewed the constitutionality of the Ordinance in the light of the then applicable constitutional provisions. However, following the entry into force of the new Constitution in 1997 the applicants could have lodged a constitutional complaint relying on its provisions, in particular Article 53 par. 4.

The Constitutional Court held in its judgment of 20 55. April 1993 that the Ordinance should be construed so as to allow every pupil to follow classes in both religious education and ethics. Thus, the Government maintained that the Constitutional Court had not reviewed the optional character of courses in ethics as an alternative to religious instruction in the light of the constitutional principles of equality (Article 32) and freedom of thought, conscience and religion (Article 53). Similar considerations applied should the applicants wish to challenge the very fact of giving a mark for "religion/ethics" or the lack of such a mark on their son's school report. In that case, they should

have challenged paragraph 9(1) of the Ordinance.

The (b) third applicant

The third applicant argued that he had exhausted all domestic remedies. 56. Regarding the possibility of a constitutional complaint, he submitted that it had not been available in his case. The Constitutional Court Act stipulated that a constitutional complaint could be lodged after legal remedies had been exhausted, in so far as such remedies were available, and within three months following the service of a final decision. The third applicant submitted that in his case no final decision had been given on the basis of the unconstitutional Ordinance and that he could not therefore have availed himself of that remedy. Furthermore, he had put the matter to the Ombudsman in June 2001, who had informed him that he was bound by the Constitutional Court's judgment of 20 April 1993 and could not challenge the same provisions of the Ordinance again.

The (c) Court

The purpose of Article 35 par. 1, which sets out the rule on exhaustion 57. of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, par. 74, ECHR 1999-V). The rule in Article 35 par. 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Kudla v. Poland* [GC], no. 30210/96, par. 152, ECHR 2000-XI).

Nevertheless, the only remedies which Article 35 of the Convention 58. requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, *inter alia*, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, par. 142, ECHR 2006-...).

The Court notes that before lodging a constitutional complaint a 59. claimant is obliged to obtain a final decision from a court or an administrative authority. More importantly, the Court points out that a constitutional complaint can be recognised as an effective remedy only where the individual decision which allegedly violated the Convention was adopted in direct application of an unconstitutional provision of national legislation (see *Szott-Medynska v. Poland* (dec.), no. 47414/99, 9 October 2003, and *Pachla v. Poland* (dec.), no. 8812/02, 8 November 2005). However, in the present case the applicants could not obtain any judicial or administrative decision in respect of their request that their son be taught a course in ethics instead of religious instruction and the Government did not claim that they could have obtained such decision. The Court observes in this connection that no such course was provided as the number of pupils interested was below the minimum number required by the Ordinance. Consequently, Mateusz Grzelak did not follow a course in ethics and had a

straight line on his school reports in the space reserved for “religion/ethics”.

Moreover, the Court notes that the Constitutional Court, in its judgment 60. of 2 December 2009 (case no. U 10/07 – see relevant domestic law and practice above) reviewing the compatibility with the 1997 Constitution of the amended Ordinance of the Minister of Education on the marking of pupils, upheld the findings made in its earlier judgment of 20 April 1993, in particular with regard to the constitutionality of providing religious instruction (ethics) and the resulting insertion of marks for those subjects. It is true that the Constitutional Court on both occasions did not address the specific issue of the non-insertion of a mark or the insertion of a straight line. However, the Court notes that in its judgment of 20 April 1993 the Constitutional Court did not accept the argument that the recording of marks for religion in school reports amounted to a breach of the principle of separation of Church and State and the principle of the State’s neutrality. The Constitutional Court further considered that the recording of such marks did not give rise to an issue as regards the right not to reveal one’s religion or convictions as provided in section 2 (5) of the Freedom of Conscience and Religion Act. In these circumstances, the Court finds that any attempt to mount a successful challenge to the issue of the non-insertion of a mark for “religion/ethics” would be futile. For the above reasons, the Court considers that a constitutional complaint cannot be regarded with a sufficient degree of certainty as an effective remedy in the present case.

It follows that the Government’s plea of inadmissibility on the ground 61. of non-exhaustion of domestic remedies must be dismissed.

Conclusion 3. as to admissibility

The Court notes that this complaint is not manifestly ill-founded within 62. the meaning of Article 35 par. 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible with respect to the third applicant.

Merits B.

The 1. third applicant’s submissions

The third applicant alleged a breach of Article 9 of the Convention 63. since his school reports did not feature a mark for “religion/ethics”. In addition, despite numerous requests submitted by his parents to the various primary and secondary schools attended by the third applicant, he had been unable to follow a class in ethics. Moreover, Mateusz Grzelak had been discriminated against on account of his and his parents’ convictions.

The third applicant submitted that the entire education system in Poland 64. was geared towards Catholicism and that those who did not share that faith were discriminated against. He argued that in practice classes in ethics were not provided in State schools. For that reason many non-Catholic parents sent their children to religious instruction classes in order to avoid the problems which the third applicant had been confronted with.

The third applicant claimed that in the conditions prevailing in Poland 65. a person could not freely decide on his

own or with the help of his parents about such a fundamental issue as belief in God and choosing one's religion. In his view, the possibility to make independent decisions in that sphere was one of the most important human rights. He claimed that he had been deprived of the right to freedom of thought, conscience and religion on account of the defective Ordinance and its unreasonable application. He referred to the specific circumstances of his case, such as the obligation to submit a declaration stating that he would not follow religious instruction, the impossibility of his following a class in ethics owing to organisational difficulties, the presence of a straight line instead of a mark on his school reports, the fact that teachers tolerated his humiliation and the failure of the State authorities to react to these problems. The third applicant stressed that the issues concerned might not appear particularly serious when viewed in isolation, but that their cumulative effect meant that the he had been deprived of his right to freedom of thought, conscience and religion.

The third applicant maintained that that freedom was very important to 66. him and that he had fought hard for it. The price he paid was humiliation, social ostracism, being forced to change schools and being subjected to physical violence. These examples of suffering showed that the third applicant had been personally stigmatised. He concluded that the facts of their case amounted to a breach of Articles 9 and 14 of the Convention.

The 2. Government's submissions

In Poland there was no form of compulsory religious or ethical education 67. in State schools, which made the present case entirely different from *Folger⊘ and Others v. Norway* ([GC], no. 15472/02, ECHR 2007-VIII). The Government stressed firstly that in accordance with paragraph 1(1) of the Ordinance, religion or ethics classes could be provided only at the request of parents or of pupils who had reached the age of majority. Secondly, the teaching of religion or ethics could be organised only if sufficient numbers of parents (pupils) expressed such a wish (see relevant domestic law and practice above). The Government submitted that in cases where it was particularly justified, either of these optional subjects could be organised in a different manner from that specified in the Ordinance, depending on the resources available to the local authority which ran the school. There was no obligation to organise such classes where there were insufficient numbers of interested pupils in a municipality, if the latter did not have adequate resources to cover the costs involved. Having regard to the above, the Government maintained that the school authorities or the authority which administered the schools attended by Mateusz Grzelak had not been obliged to organise a course in ethics for him, given that there were not enough interested pupils in the same school or municipality.

The Government submitted that the circumstances of the case gave no 68. indication of any interference with the third applicant's rights under Article 9 of the Convention on account of the fact that no ethics class had been organised for him in State schools. There were no indications that the third applicant had been in any way indoctrinated or subjected to any form of pressure as to his personal beliefs. Article 9 of the

Convention did not deal with States' obligations regarding the content of school curricula.

As to the absence of a mark for "religion/ethics", the Government 69. pointed out that the Convention institutions had already dealt with this issue on two occasions. In *C.J., J.J. and E.J. v. Poland* (no. 23380/94, 16 January 1996), the European Commission of Human Rights had declared the application manifestly ill-founded. In the case of *Saniewski v. Poland* ((dec.), no. 40319/98, 26 June 2001), the Court had found that the applicant had not substantiated his claim that the absence of a mark for "religion/ethics" on his school report might prejudice his future educational or employment prospects. Furthermore, no conclusions could be drawn on the basis of the school report as to whether the applicant had chosen not to attend the courses for which no mark was given or whether those courses had simply not been organised in his school in that particular year.

The Government argued that the third applicant's situation in the 70. present case was very similar to the *Saniewski* case. The school report was an official document which contained objective information as to the attendance and assessment of a pupil's achievements in courses which had been organised and had been attended by him or her. It might happen that a pupil did not attend some courses for various reasons, for instance because he or she was exempted from physical education on health grounds. Where pupils did not attend a given course, such as a course in religion or ethics or physical education, this was normally reflected in the standard school reports, as it would be unreasonable to expect that those pupils should receive their reports in a different form.

The Government stressed that the lack of a mark for "religion/ethics" on 71. the third applicant's school reports did not constitute interference with his rights under Article 9, as the reports did not disclose his philosophical or religious beliefs. The absence of a mark or the presence of a line on a school report could not be interpreted as anything more than official information as to whether or not a pupil had been following a religion/ethics class in a particular year. Hence, the third applicant's right to remain silent with regard to his philosophical or religious beliefs had been fully respected. Furthermore, the Government claimed that the applicant had not provided any evidence that the form of the school reports constituted interference with his Article 9 rights. He had not pointed to any inconvenience of a sufficient degree of seriousness to be considered as a breach of his rights under Article 9.

The Government further submitted that the mark for "religion/ethics" was 72. not included in the calculation of the so-called "average mark" (*srednia*), with the result that pupils not following those courses were not discriminated against compared with those who followed them. As to the 2007 amendments to the relevant Ordinance of the Minister of Education on the marking of pupils' work which changed the above rule, the Government maintained that counting the mark for religion/ethics towards the "average mark" was just a consequence of the choice made with respect to attendance at religion/ethics classes.

In addition, the mark for "religion/ethics" on the school diplomas 73. awarded at the end of primary school or *gimnazjum* did not influence a pupil's prospects in respect of the level of his or her subsequent education, since access to both junior secondary schools and to secondary schools depended solely on the results of the examination taken at the end of the relevant education period. The Government stressed that under no circumstances would the absence of such a mark be problematic when it came to admission to university.

Furthermore, the Government claimed that it was difficult to deduce a 74. positive obligation to conceal whether a pupil followed a religion/ethics class in a State school in terms of the protection of Article 9 rights. The provisions of the Ordinance contained sufficient positive measures to protect pupils and their parents against having to reveal their convictions and beliefs. Any "special" protective or positive measures in respect of pupils whose parents did not wish them to follow religion/ethics classes could turn against the children themselves; this would hardly be desirable. There was no objective justification for awarding different school diplomas for pupils given a mark for "religion/ethics" and those with no such mark.

The Government observed that the issue of whether or not pupils followed 75. religion/ethics courses was a delicate one, since the parents' choice, taken in conformity with their own convictions, might cause their child to belong to a minority in a certain class or school. The authorities should do their utmost to minimise the risk of a child's stigmatisation because he or she did not follow a religion/ethics course. It was the school's duty to provide pupils who did not follow a class in religion or ethics with care and supervision whenever they were on the school premises. It was also the school's duty to react to all manifestations of intolerance towards such children. The Government claimed that those obligations had been complied with in the present case. They also noted that, owing to the nature of the issue, it was not only the school which had positive obligations with respect to freedom of thought, conscience and religion; it was first and foremost the parents' duty to ensure that their children understood the choice made by them as regards religion/ethics education at school. The Government observed that the press articles attached to the application lodged by Mr and Mrs Grzelak did not support the assertion that it was their intention to protect their personal beliefs from being disclosed.

The Government submitted that the Ordinance did not focus on any 76. particular religion, although it was true that the vast majority of religion classes concerned the Catholic faith.

The 3. third-party intervener's comments

According to the Helsinki Foundation for Human Rights, statistical data 77. showed that there was a huge disparity between the availability of classes in religious education and classes in ethics. As indicated by the Ministry of Education, of 32,136 schools, 27,500 (85.57%) organised religious instruction classes (all religions), while ethics was taught only in 334 schools (1.03%). There were 21,370 teachers of religion and only 412 teachers of ethics. [noot:1]

The lack of clear provisions and guidelines concerning the teaching of ethics made the right to choose it as an alternative to religious instruction only a theoretical possibility. The minimum number of seven pupils per class for inter-class teaching, as provided for in the Ordinance, resulted in indirect discrimination of pupils belonging to minorities, whether religious or non-believing. At national level the relevant criteria were met only by the Catholic Church, and on the regional level by the Orthodox Church and the Lutheran Church. In 2003 the number of Catholics was estimated at 34,443,998 (90.1% of the whole population), the number of Orthodox Christians at 510,712 (1.34%) and the number of Protestants at 162,102 (0.42%).

78.

The criterion of a minimum of seven children for a class or inter-class group, while it appeared practical, was set at a high level. It could be lower, as was the case regarding the teaching of national or ethnic minority languages. [noot:2] Financial considerations could not provide a convincing explanation for the differences in the provision of teaching in minority languages and the teaching of ethics. Moreover, individual classes could be organised for gifted children, those who were ill or those who had difficulties with the curriculum, and the same opportunities should be available to pupils who wanted to follow ethics classes. The minimum number of three pupils for an inter-school group was more reasonable. However, such groups were not organised since the Ordinance did not provide any details regarding the procedure for organising them, by contrast to the rules concerning minority languages. Accordingly, the relevant provisions of the Ordinance were illusory and ineffective. In Warsaw such inter-school groups were never organised.

79.

The third party observed that the Ordinance focused primarily on the rights of followers of the Catholic Church. That was evident, *inter alia*, from its structure, as the majority of provisions concerned the teaching of religion. In some cases the rules concerning the organisation of religious instruction, which were to be applied by analogy to the organisation of courses in ethics, did not have any equivalent in relation to the latter. Furthermore, there were no curriculum guidelines (*podstawa programowa*) for courses in ethics in the first three years of primary school. The lack of courses in ethics created a certain pressure on pupils to attend religious instruction, even leaving aside the intentions of the school staff.

80.

The third party maintained that the unavailability of courses in ethics in Polish schools meant that there was no option to attend such a course. As a result, interested pupils would have either no mark for “religion/ethics” on their school reports, or a straight line. This signified that a particular pupil had not followed the religious instruction which was organised in almost all schools. Not following that course did not in itself mean that the pupil was a non-believer; however the cultural context of a given country had to be taken into consideration in this respect. In a Catholic society such pupils were very likely to be perceived as non-believers. There was a risk of discrimination in that regard.

81.

The third party argued that the right not to disclose one’s religion or

82.

convictions was a fundamental right. However, where no mark or a straight line was given for "religion/ethics", the person's convictions were disclosed indirectly. The third party pointed out that the Constitutional Court, in its judgment of 20 April 1993, had held that the mark for "religion/ethics" made it impossible to determine which of the two subjects had been followed by a pupil. However, where courses in ethics were not provided in schools, there were many pupils who had a straight line or no mark for "religion/ethics". The risk of discrimination associated with revealing on a school report that a pupil attended religion or ethics classes had been acknowledged by the Minister of Education, as evidenced by the second sentence of paragraph 9(1) of the Ordinance. The third party maintained that a school report was a public document which should not contain information concerning a person's convictions, as this could adversely influence the rights of the individual in a predominantly Catholic society. In its opinion, supported by research carried out in 1996, discrimination on the basis of beliefs was not merely a fringe phenomenon in Polish schools.

83. The problems described by the third party would become even more acute starting in the 2007/2008 school year. The relevant Ordinance of the Minister of Education on the marking of pupils had been amended in such a way that the mark obtained for "religion/ethics" would have a real impact on whether or not a pupil moved up to the next class, because the mark would count towards the average overall grade achieved by the pupil in a given school year. In those circumstances, there was a risk that pupils would follow religious instruction against their will in order to have the mark counted as part of their average mark.

The 4. Court's assessment

84. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, par. 33, *Reports of Judgments and Decisions* 1997-I, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, par. 34, ECHR 2000-X).

85. Further, the Court reiterates that freedom of thought, conscience and religion, as enshrined in Article 9, is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v. Greece*, 25

May 1993, par. 31, Series A no. 260-A, and *Buscarini and Others v. San Marino* [GC], no. 24645/94, par. 34, ECHR 1999-I).

In democratic societies, in which several religions coexist within one 86. and the same population, it may be necessary to place restrictions on freedom of thought, conscience and religion in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see *Kokkinakis*, cited above, par. 33). The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs**,** and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society (see *Leyla Sahin v. Turkey* [GC], no. 44774/98, par. 107, ECHR 2005-XI).

The Court reiterates that freedom to manifest one's religious beliefs 87. comprises also a negative aspect, namely the right of individuals not to be required to reveal their faith or religious beliefs and not to be compelled to assume a stance from which it may be inferred whether or not they have such beliefs (see *Alexandridis v. Greece*, no. 19516/06, par. 38, ECHR 2008-..., and, *mutatis mutandis*, *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, par. 76 *in fine*, ECHR 2007-XI). The Court has accepted, as noted above, that Article 9 is also a precious asset for non-believers like the third applicant in the present case. It necessarily follows that there will be an interference with the negative aspect of this provision when the State brings about a situation in which individuals are obliged – directly or indirectly – to reveal that they are non-believers. This is all the more important when such obligation occurs in the context of the provision of an important public service such as education.

Having regard to the foregoing, the Court finds that the absence of a 88. mark for "religion/ethics" on the successive school reports of the third applicant falls within the ambit of the negative aspect of freedom of thought, conscience and religion protected by Article 9 of the Convention as it may be read as showing his lack of religious affiliation. It follows that Article 14 taken in conjunction with Article 9 is applicable in the instant case.

For the purposes of Article 14 a difference in treatment between persons 89. in analogous or relevantly similar positions 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Van Raalte v. the Netherlands*, cited above, par. 39; *Larkos v. Cyprus* [GC], no. 29515/95, par. 29, ECHR 1999-I; and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, par. 51, ECHR 2006-...).

The third applicant complained of the discriminatory nature of the 90. non-provision of courses in ethics and the resultant absence of a mark for "religion/ethics" on his school reports. The Court considers it appropriate to limit its examination of the alleged difference in treatment between the third applicant, a non-believer who wished to

follow ethics classes, and those pupils who followed religion classes to the latter aspect of the complaint, namely the absence of a mark.

The Court observes that in the present case the parents of the third 91. applicant systematically requested the school authorities to organise a class in ethics for him, as provided for in the Ordinance. However, no such class was organised for the third applicant between the 1998/1999 school year and the 2008/2009 school year, that is to say, throughout his entire schooling at primary and secondary level up to the present day. It appears that the reason was the lack of sufficient numbers of pupils interested in following such a class, in accordance with the requirements set out in the Ordinance. As no ethics class was provided throughout the third applicant's schooling, his school reports and leaving certificates contained a straight line instead of a mark for "religion/ethics".

The Court takes the view that the provisions of the Ordinance which provide 92. for a mark to be given for "religion/ethics" on school reports cannot, as such, be considered to infringe Article 14 taken in conjunction with Article 9 of the Convention as long as the mark constitutes neutral information on the fact that a pupil followed one of the optional courses offered at a school. However, a regulation of this kind must also respect the right of pupils not to be compelled, even indirectly, to reveal their religious beliefs or lack thereof.

The Court reiterates that religious beliefs do not constitute 93. information that can be used to distinguish an individual citizen in his relations with the State. Not only are they a matter of individual conscience, they may also, like other information, change over a person's lifetime (see, *mutatis mutandis*, *Sofianopoulos and Others v. Greece* (dec.), nos. 1977/02, 1988/02 and 1997/02, ECHR 2002-X; and *Sinan Isik v. Turkey*, no. 21924/05, par. 42, 2 February 2010). Although the above cases concerned identity cards, documents of arguably greater significance in a person's life than school reports for primary and secondary education, the Court nonetheless finds that similar considerations apply to the present case.

When reviewing the issue of a mark for "religion/ethics" on school 94. reports, the Constitutional Court in its judgment of 20 April 1993 dismissed the arguments concerning the risk of a division between believers and non-believers (see paragraphs 40-41 above). The Constitutional Court's judgment was based on the assumption that any interested pupil would be able to follow a class in either of the two subjects concerned. Consequently, there would always be a mark on the school report for "religion/ethics". The Constitutional Court further held that a pupil could even follow both subjects in the same year, in which case his or her mark for "religion/ethics" would be an average mark for the two subjects. Having regard to the above, the Constitutional Court held that an outside observer would not be in a position to determine whether a pupil had followed a class in religion or in ethics.

The Court notes that the above analysis of the Constitutional Court, 95. while unquestionable in its substance, appears to overlook other situations which may

arise in practice. In the present case the pupil had no mark for "religion/ethics" on his school reports because the schools could not organise ethics classes despite repeated requests from his parents. The Court considers that the absence of a mark for "religion/ethics" would be understood by any reasonable person as an indication that the third applicant did not follow religious education classes, which were widely available, and that he was thus likely to be regarded as a person without religious beliefs. The Government in their submissions indicated that the vast majority of religious education classes concerned Roman Catholicism. The fact of having no mark for "religion/ethics" inevitably has a specific connotation and distinguishes the persons concerned from those who have a mark for the subject (see, *Sinan Isik*, cited above, par. 51). This finding takes on particular significance in respect of a country like Poland where the great majority of the population owe allegiance to one particular religion.

Further, the Court notes that from 1
96. September 2007 onwards the situation of pupils like the third applicant would become even more problematic on account of the entry into force of the amended Ordinance of the Minister of Education of 13 July 2007 on the marking of pupils' work (see paragraph 46 above). The amended Ordinance introduced the rule that marks obtained for religious education class or ethics would be included in the calculation of the "average mark" obtained by a pupil in a given school year and at the end of a given level of schooling. In this respect the Court observes that the above rule may have a real adverse impact on the situation of pupils like the applicant who could not, despite their wishes, follow a course in ethics. Such pupils would either find it more difficult to increase their average mark as they could not follow the desired optional subject or might feel pressurised – against their conscience – to attend a religion class in order to improve their average. It is noteworthy in this respect that the Constitutional Court in its judgment of 2 December 2009 referred to the risk that the choice of religion as an optional subject could have been the result of pressure from local public opinion, but nevertheless did not address this issue as lying outside its jurisdiction (see paragraph 48 *in fine* above).

For those reasons the Court is not
97. persuaded by the Government's submissions to the effect that the absence of a mark for "religion/ethics" is entirely neutral and simply reflects the fact of following or not following a class in religious education or in ethics. This argument is further undermined by the fact that on the third applicant's primary school leaving certificate there was a straight line and the word "ethics" was crossed out. The message conveyed by such a document is unambiguous and anything but neutral: the ethics class was not available as an optional subject to the third applicant and he chose not to attend religion class.

Nor is the Court convinced by the
98. Government's arguments that there are close similarities between the *Saniewski* inadmissibility decision and the present case. It finds that the present case can be distinguished from *Saniewski* on at least three grounds. Firstly, differently from *Saniewski*, in the instant case the allegations concern all the consecutive school reports of the third

applicant, including his leaving certificate for primary and lower secondary schools. Secondly, in the present case the Court has examined the issues raised in the light of Article 14 taken in conjunction with Article 9 (in its negative aspect). Thirdly, the relevant new factor for the Court is the amended Ordinance of 2007 referred to above.

Having regard to the foregoing, the Court finds that the absence of a 99. mark for "religion/ethics" on the third applicant's school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation of the third applicant.

In these circumstances, the Court is not satisfied that the difference 100. in treatment between non-believers who wished to follow ethics classes and pupils who followed religion classes was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. The Court considers that the State's margin of appreciation was exceeded in this matter as the very essence of the third applicant's right not to manifest his religion or convictions under Article 9 of the Convention was infringed.

There has accordingly been a violation of Article 14 taken in 101. conjunction with Article 9 of the Convention in respect of the third applicant.

Alleged II. violation of Article 2 of Protocol No. 1 to the Convention

The first two applicants complained that the school authorities had not 102. organised a class in ethics for their son in conformity with their convictions. They relied on Article 2 of Protocol No. 1 to the Convention.

The Government claimed that the first two applicants had not complained 103. of any breach of their rights under Article 2 of Protocol No. 1. The Court notes that the first two applicants expressly alleged a breach of that provision in their application, and for that reason dismisses the Government's objection.

The Court reiterates that the general principles concerning the 104. interpretation of Article 2 of Protocol No. 1 were recapitulated in the case of *Folger and Others* (cited above, par. 84). In that case the Court reviewed under Article 2 of Protocol No. 1 the arrangements for a compulsory subject in Christianity, Religion and Philosophy taught during the ten years of compulsory schooling in Norway. The model existing in Poland is different in a number of respects. Religious education and ethics are organised on a parallel basis, for each religion according to its own system of principles and beliefs and, at the same time, it is provided that teaching of ethics is offered to interested pupils. Both subjects are optional and the choice depends on the wish of parents or pupils, subject to the proviso that a certain minimum number of pupils were interested in following any of the two subjects. The Court notes that it remains, in principle, within the national margin of appreciation left to the States under Article 2 of Protocol No. 1 to decide whether to provide religious instruction in public schools and, if so, what particular system of instruction should be adopted. The only limit which must not be exceeded in this area is the prohibition

of indoctrination (see, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, par. 53, Series A no. 23). The Court observes that the system of teaching religion and ethics as provided for by Polish law – in its model application – falls within the margin of appreciation as to the planning and setting of the curriculum accorded to States under Article 2 of Protocol No. 1.

Accordingly, the Court finds that the alleged failure to provide ethics 105. classes does not disclose any appearance of a violation of the rights of the first and second applicants under Article 2 of Protocol No. 1. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 par.par. 3 and 4 of the Convention.

Other III. alleged violations of the Convention

The first two applicants further complained under Article 9 of the 106. Convention that they had been requested to make a declaration as to whether their son would follow religious instruction and had thus been exposed to a risk of disclosure of their convictions. The Court observes that the first two applicants failed to substantiate this complaint. In any event, it notes that under the version of the Ordinance applicable to the facts of the present case the school authorities could not ask parents to make a "negative declaration" to the effect that their child would not follow religious instruction.

The applicants also alleged a breach of Article 13 of the Convention in 107. that there had been no effective remedies available in their case. However, the Court notes that this complaint was formulated in very general terms and without having specified which substantive Article of the Convention it was related to.

Consequently, the Court finds that the above complaints are manifestly 108. ill-founded and must be rejected in accordance with Article 35 par.par. 3 and 4 of the Convention.

Application IV. of Article 41 of the Convention

Article 41 of the Convention provides: 109.

"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."

Damage A.

The applicants claimed 150,000 euros (EUR) in respect of non-pecuniary 110. damage for the suffering and distress occasioned by the violation.

The Government submitted that the claim was exorbitant. Alternatively, 111. they invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

The Court considers that in the particular circumstances of the case 112. the finding of a violation constitutes in itself sufficient just satisfaction for any non-

pecuniary damage which may have been sustained by the third applicant.

Costs B. and expenses

113. The applicants also claimed an unspecified sum for the cost of legal representation, to be awarded in accordance with the applicable rules.

114. The Government submitted that any award should be limited to those costs and expenses which were actually and necessarily incurred and were reasonable.

115. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the fact that the applicants failed to produce any documents showing that the sum claimed had been incurred, the Court rejects the claim for costs and expenses.

For these reasons, the Court

1. *Declares* unanimously the third applicant's complaint under Article 14 taken in conjunction with Article 9 of the Convention about the absence of a mark on school reports admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 14 taken in conjunction with Article 9 of the Convention in respect of the third applicant;

3. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for non-pecuniary damage;

4. *Dismisses* unanimously the remainder of the claims for just satisfaction.

Partly dissenting opinion of Judge David Thór Björgvinsson

I agree with the majority that the issues arising under Article 14 in 1. conjunction with Article 9 or under Article 9 alone only concern the third applicant, Mateusz Grzelak, and that this complaint is incompatible *ratione personae* with regard to the first and second applicants. I can also agree that this complaint, as far as the third applicant is concerned, should be declared admissible. Furthermore, I agree that the alleged failure to provide classes in ethics does not disclose a violation of the rights of the first and second applicants under Article 2 of Protocol No. 1 and that this complaint is manifestly ill-founded and therefore inadmissible in accordance with Article 35 par.par. 3 and 4.

However, I disagree with the majority's finding that there has been a 2. violation of Article 14 taken in conjunction with Article 9 of the Convention.

The complaints made by the third applicant in relation to Articles 9 and 3. 14 are in my view somewhat unclear. Taken as a whole, they seem to be threefold. Firstly, the third applicant alleges a breach of Article 9 of the Convention since his school reports did not include a mark for "religion/ethics" with the result that he is, in his submission, forced to reveal his religious convictions each time he has to present his school reports to someone. Secondly,

in spite of the repeated requests made by his parents to the various primary and secondary schools attended by the third applicant he was unable to follow a class in ethics. Furthermore, the third applicant has been discriminated against on account of his and his parents' convictions.

As to the second complaint the majority does not deal with it as a 4. separate complaint. In my view, although it would of course have been desirable to provide the third applicant with a course in ethics as an alternative to religious instruction, it must be accepted that this may not be feasible for practical purposes, i.e. when, as in this case, there are not enough interested pupils. The failure to provide classes in ethics as such does not reveal a breach of either Article 14 in conjunction with Article 9 or of Article 9 alone. It follows that I will, as the majority did, confine myself to issues relating to the giving of marks for "religion/ethics" or rather the absence thereof, which is a consequence of the fact that classes in ethics were not available.

When Article 14 is applied the first question that must be answered is 5. whether there is a difference in treatment of persons in relevantly similar or analogous situations. In that regard I agree with the majority (see paragraph 90 of the judgment) that it is appropriate, as regards the complaint about the absence of a mark, to limit the alleged difference in treatment to a comparison between the third applicant, a non-believer who wished to follow classes in ethics and those pupils who followed religion classes.

Concerning the question of difference in treatment, it would seem from 6. paragraph 88 of the judgment that the majority's finding that such difference existed is based on the mere fact that the applicant's school report did not feature a mark for "religion/ethics" since he did not attend the relevant class, while others were awarded a mark for their performance. An additional basis for finding difference in treatment would seem to be offered in paragraph 96 where it is mentioned that there is a difference in treatment because a mark for "religion/ethics" was factored into the calculation of a pupil's average mark, whereas a pupil like the third applicant not attending "religion/ethics" did not have this possibility.

It seems to me that these "differences" are not differences in treatment 7. of persons in relevantly similar or analogous situations, within the meaning of Article 14 of the Convention. On the one hand, there are pupils who attended religious classes and received a mark for their performance. On the other hand, there is the applicant whose parents, in the exercise of their rights to freedom of conscience and religion i.e. under Article 9 of the Convention, decided that he should not attend classes on religion and received no mark in consequence since an alternative class in ethics was not available. For the purpose of giving marks for a particular subject, which is the relevant situation in this case, pupils who do not attend a particular class are not in the same situation as those who do attend. Also, as regards the calculation of the average mark after 1 September 2007 I fail to see a difference in treatment that would fall within the ambit of Article 14. In both groups only subjects that a pupil has completed are included in the calculation of his or her average mark. The possible positive or adverse impact

of not having followed a course on religion or ethics, and not having received a mark as a result, could have on the applicant's average is a matter of pure speculation. Everything would hinge on his performance in the subject. The mere possibility that if he scored well enough his average might be increased cannot as such be a sufficient basis for finding a difference in treatment under Article 14. Accordingly, there is in my view, as regards marking or the calculation of an average mark, no difference in treatment of persons in relevantly similar or analogous situations. Having come to this conclusion there is no need to examine the facts of the case any further under Article 14 of the Convention.

However, although Article 14 is not in my view engaged, the question 8. still remains whether there has been in this case a violation of Article 9 taken alone. In assessing this the following points should be kept in mind:

Firstly, the Court has dealt with a similar complaint in the case of i. *Saniewski v. Poland* ((dec.), no. 40319/98, 26 June 2001). In that case it was argued that the applicant's freedom of thought and conscience was breached since the absence of a mark for a course on "religion/ethics" revealed that he did not follow the course, and thus amounted to a public statement about his beliefs or non-beliefs, to the detriment of his future educational or employment prospects. The Court declared the complaint manifestly ill-founded (see also *C.J., J.J. and E.J. v. Poland*, no. 23380/94, Commission decision of 16 January 1996, DR 84, p. 46). As will be shown below, the reasons for the decision in the *Saniewski* case are also for most part relevant in the present case.

The second point to be made is the fact that the applicant's parents are ii. declared agnostics (see paragraph 6 of the judgment). In conformity with his parents' wishes the third applicant did not attend classes in religious instruction. The applicants claim that because of this decision the third applicant is a victim of various forms of inconvenience in the different schools he attended. However, it has not been substantiated that the school authorities can be held responsible for this. Furthermore, the third applicant's parents are declared agnostics in a society that is predominantly Catholic. The case file does not indicate that they had specific reservations about revealing their convictions. On the contrary, the parents have visibly pressed hard to have their rights as non-believers asserted. Although of course this is their right they cannot have it both ways. Furthermore, any degree of social stigmatisation that possibly flows from such a declaration for themselves and the third applicant is hardly more than they could reasonably have expected.

In Poland there is no compulsory religious or ethical education in iii. State schools. Both of these courses are only offered upon the request of the parents or of pupils who have reached the age of majority and provided there is a sufficient number of pupils interested. There are no indications in the case file that the third applicant has been subjected to any kind of indoctrination or pressure by the authorities as regards his religious or philosophical convictions. Nor has he been prevented from

expressing his opinions on religion. (see *Saniewski v. Poland*, cited above).

In iv. *Saniewski v. Poland* (cited above) it was pointed out that the impugned school report had spaces reserved for marks for certain subjects and they were often left blank or treated with a straight line. This is due to the fact that special forms are used for school reports where certain subjects are listed which a pupil has not taken. The non-attendance of a particular class is reflected by the fact that the relevant space is left blank or a straight line is used. In *Saniewski* it was held that no definite conclusion could be drawn from such a procedure as to whether the applicant was unwilling to attend the courses for which there was no mark in the report, or whether these courses simply were not organised in his school in the relevant school years. There are insufficient grounds for finding differently in the present case.

It has not been sufficiently substantiated by the third applicant that v. because of his school reports he will suffer prejudice as regards his future educational or employment prospects or that he has in any other way suffered prejudice. Consequently, the third applicant has not established that the impugned school reports have so far had or will in the future have any real material impact on his interests (see *Saniewski v. Poland*, cited above).

Furthermore, it should be kept in mind that discrimination on religious vi. grounds is prohibited under the domestic law of Poland. The applicant would, therefore, have a remedy to safeguard against any possible risk of future prejudice the school reports might conceivably engender whether in the context of further education or public or private employment (see *Saniewski v. Poland*, cited above).

Finally, as pointed out by the majority in paragraph 98, the facts of vii. the present case are different from those in *Saniewski v. Poland* in that the impugned school reports cover all of the third applicant's primary and secondary schooling, whereas in the *Saniewski* case only one report was at issue. This difference is only quantitative and does not in my view render the reasoning in the *Saniewski* case irrelevant in relation to the facts of the present case.

On the basis of the foregoing I respectfully submit that the third 9. applicant has not substantiated the claim that, because of his school reports, he has in reality suffered, or will in the future suffer, detriment which would amount to an interference with his rights to freedom of thought, conscience and religion under Article 9 of the Convention, whether seen from its positive or negative aspect.

» Noot

Zoals de IJslandse 1. rechter Björgvinsson stelt in zijn *partly dissenting opinion* bij deze uitspraak (par. 5), is het nog maar de vraag of er in casu sprake is van een verschil in behandeling in de zin van art. 14 EVRM. Als het gaat om het al dan niet geven van een rapportcijfer, verkeren leerlingen die een bepaald vak niet hebben gevolgd immers in een andere situatie dan leerlingen die dat wel hebben gedaan. Ook het gaan meewegen van het cijfer voor een facultatief vak bij het berekenen van het gemiddelde van een leerling levert niet zonder meer een relevant onderscheid op in de zin van dit artikel. Of men nu wel

of niet heeft deelgenomen aan het vak, in beide gevallen worden alleen die vakken meegeteld die de leerling daadwerkelijk heeft gevolgd. Het eventuele positieve of negatieve effect hiervan is puur speculatief (par. 7).

Ook ten aanzien van de 2. beoordeling die het Hof geeft van de klacht over art. 9 EVRM rijzen er twijfels. Het Hof heeft zich eerder uitgelaten over een vergelijkbare klacht in de ontvankelijkheidsbeslissing *Saniewski* t. *Polen* (EHRM 26 juni 2001, nr. 40319/98). Nu ging het in die zaak om slechts één rapport en in de onderhavige zaak om alle. Dit betreft echter, zoals rechter Björgvinsson eveneens opmerkt in zijn *separate opinion* (par. 8 vii), een kwantitatief verschil, dat niet werkelijk afdoet aan de inhoudelijke overeenkomsten tussen beide zaken. In *Saniewski* verklaarde het Hof de klacht echter nog kennelijk ongegrond. Zo merkte het op dat de leerling niet verplicht was geweest om tegen zijn wil aan godsdienstonderricht of enige andere schoolactiviteit van religieuze aard deel te nemen en zijn opvattingen over religie vrij had kunnen uiten. Ook had betrokkene niet aangetoond dat de rapporten enig reëel gevolg zouden hebben voor zijn belangen. Mocht dit later onverhoopt toch het geval blijken, dan kon hij hiervoor in Polen een adequate rechtsgang volgen. Dit zijn stuk voor stuk punten die ook in de onderhavige zaak aan de orde zijn (par. 8, iii, v, vi van de *separate opinion*).

De zaak lijkt eveneens 3. op de ontvankelijkheidsbeslissing *C.J., J.J. en E.J.* t. *Polen* (ECieRM 16 januari 1996, nr. 23380/94). In deze zaak constateerde de Commissie evenmin een inbreuk op art. 9 EVRM. De klacht over de schoolrapporten behandelde zij onder art. 8 (jo. art. 14) EVRM, maar achtte zij met een vergelijkbare redengeving als het Hof gebruikte in *Saniewski* kennelijk ongegrond. Ook op het in art. 3 EVRM verankerde recht op foltering werd nog, tevergeefs, een beroep gedaan, in relatie tot de druk die een van de klagers had ondervonden van haar medeleerlingen en onderwijsgevenden.

Het heeft er al met al 4. het nodige van weg dat het Hof negen jaar na *Saniewski* simpelweg van mening is veranderd. De negatieve godsdienstvrijheid lijkt daarbij een belangrijke factor. Zo liet het Hof in *Saniewski* nog de vraag open ‘whether Article 9 of the Convention guarantees a right to remain silent as to one’s religious beliefs’. In de onderhavige zaak verwijst het Hof in par. 87 echter expliciet naar ‘the right of individuals not to be required to reveal their faith or religious beliefs and not to be compelled to assume a stance from which it may be inferred whether or not they have such beliefs’. Het Hof verwijst ter zake naar *Alexandridis* t. *Griekenland* (EHRM 21 februari 2008, «EHRC» 2008/58) betreffende een advocaat die bij zijn eedsaflegging moest kenbaar maken dat hij niet het orthodoxe geloof aanhing. In par. 38 van deze uitspraak omschrijft het Hof de negatieve godsdienstvrijheid als ‘le droit pour l’individu de ne pas être obligé de faire état de sa confession ou de ses convictions religieuses et de ne pas être contraint d’adopter un comportement duquel on pourrait déduire qu’il a – ou n’a pas – de telles convictions’. Het Hof verwijst tevens naar het slot van par. 76 uit *Hasan en Eylem Zengin* t. *Turkije* (EHRM 9 oktober 2007, «EHRC» 2007/142, m.nt. Ten Napel), maar die verwijzing levert

geen toegevoegde waarde op qua omschrijving van de negatieve godsdienstvrijheid.

Ook de onderhavige zaak vat het Hof onder het negatieve aspect van de vrijheid van godsdienst, daarbij in par. 93 bovendien nog verwijzend naar *Sofianopoulos e.a.* t. *Griekenland* (EHRM 12 december 2002, nrs. 1988/02, 1997/02 en 1977/02) en *Isik* t. *Turkije* (EHRM 2 februari 2010, «EHRC» 2010/36, m.nt. Hoefmans en De Hert). Deze beide laatste zaken betreffen identiteitskaarten, dat wil zeggen documenten die van groter gewicht zijn dan lagere schoolrapporten. Toch is er volgens het Hof sprake van vergelijkbare overwegingen. In laatstgenoemde uitspraak herhaalt het Hof in par. 41 in iets andere bewoordingen de hierboven aangehaalde omschrijving van negatieve godsdienstvrijheid uit *Alexandridis*.

Nu dateert het leerstuk 5. van de negatieve godsdienstvrijheid als zodanig niet van de laatste negen jaar. Zo oordeelde de Grote Kamer reeds in *Buscarini e.a.* t. *San Marino* (EHRM 18 februari 1999, nr. 24645/94) dat de verplichting voor parlementsleden om de eed af te leggen door middel van het zweren bij de Heilige Evangelieën in strijd kwam met art. 9 EVRM. Wel is er kennelijk voor het Hof sprake van een toegenomen gewicht van de negatieve dimensie van de godsdienstvrijheid. Complicatie daarbij is dat een te verregaande beklemtoning van de negatieve godsdienstvrijheid de positieve godsdienstvrijheid in het gedrang kan doen komen. Dit dilemma is bijvoorbeeld aan de orde in de recente, geruchtmakende uitspraak *Lautsi* t. *Italië* over kruisbeelden in klaslokalen op een openbare school (EHRM 3 november 2009, «EHRC» 2010/8, m.nt. Ten Napel). In een beschouwing over deze zaak merkt Piret op dat levensbeschouwelijk pluralistische rechtsstaten er niet aan ontkomen een middenweg te zoeken ‘tussen de scylla van de meerderheidstyrannie en de charybdis van een activistische grondrechtenbescherming die elke meerderheidscultuur-gerelateerde waardenoverdracht in de publieke sfeer als een ontoelaatbare schending van de rechten van andersdenkende minderheden opvat’ (J.-M. Piret, ‘Straatsburg en de levensbeschouwelijke neutraliteit van de Italiaanse staat: een commentaar op Lautsi t. Italië (EHRM 13 oktober 2009)’, *Tijdschrift voor Constitutioneel Recht* 2010, afl. 3, p. 307-314, op p. 313-314).

Ook in de onderhavige zaak is het als zodanig zeker niet problematisch om oog te hebben voor de positie van een agnostische minderheid in een overwegend katholiek land. Dit geldt eens te meer nu er aanwijzingen zijn dat het vak ethiek slechts als ‘fig leaf’ fungeert om het godsdienstonderwijs op openbare scholen constitutioneel aanvaardbaar te maken (zie bijvoorbeeld het bericht ‘Creeping evangelisation in state schools’ op de op zichzelf uiteraard gekleurde website www.concordatwatch.eu). De kunst is echter om dit te doen op een manier die het de meerderheid niet op voorhand onmogelijk maakt om haar eigen godsdienstvrijheid op een substantiële wijze vorm te geven, zij het binnen zekere grenzen ook in het openbaar onderwijs. Het is de vraag of het Hof, door het achterwege laten van een cijfer op rapporten als een schending aan te merken, deze balans heeft gevonden. De Poolse regering zelf beschouwt de

kwestie eerder als blijk van een oneffenheid in de praktische uitvoering dan als een frontale aanval op het systeem van het facultatieve godsdienst- en ethiekonderricht zelf (http://www.msz.gov.pl/index.php?document=36524). Toch zal het nog niet zo makkelijk zijn om een einde te maken aan de geconstateerde schending van art. 14 jo. art. 9 EVRM zonder het Poolse model van dit onderwijs opnieuw te doordenken. In die zin bestaat er enige spanning tussen de geconstateerde stigmatisering van leerlingen die geen rapportcijfer ontvangen voor het facultatieve vak en de kennelijke ongegrondheid van de klacht terzake van art. 2, Eerste Protocol.

H.-M.Th.D. ten Napel, Universitair docent staats- en bestuursrecht, Afd. Staats- en Bestuursrecht, Universiteit Leiden

» Voetnoten

[1]

Data for the school year 2006/2007.

[2]

The Ordinance of the Minister of National Education and Sport of 3 December 2002 on the teaching of national or ethnic minority languages.