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## **Bayatyan – a European Court judgment with an impact far beyond Armenia**

By Derek Brett, Conscience and Peace Tax International <http://www.cpti.ws>

Forum 18 News (26.07.2010) / HRWF (22.08.2011) - <http://www.hrwf.net> - The European Court of Human Rights (ECtHR) has unequivocally declared that conscientious objection to military service is protected under Article 9 ("Freedom of thought, conscience and religion") of the European Convention on Human Rights and Fundamental Freedoms. Derek Brett of Conscience and Peace Tax International <http://www.cpti.ws/> argues, in this personal commentary for Forum 18 News Service, that the ECtHR judgment in favour of Vahan Bayatyan, an Armenian Jehovah's Witness jailed for conscientious objection to compulsory military service has implications far beyond Armenia. He notes that the judgment also has implications for Azerbaijan and Turkey within the Council of Europe, and for states outside the organisation such as Belarus. He suggests that the ECtHR may develop its thinking to directly address the problem of coercion to change a belief such as conscientious objection, as well as to follow the UN Human Rights Committee in strengthening the protection of conscientious objection.

On 7 July, after 61 years of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the European Court of Human Rights (ECtHR) in Strasbourg ruled unequivocally that conscientious objection to military service is protected under the ECHR. In the case of Bayatyan v Armenia (Application no. 23459/03), it found under Article 9 ("Freedom of thought, conscience and religion") that the 2002 conviction of Vahan Bayatyan, a Jehovah's Witness, for his refusal to perform military service, at a time when no alternative was available, was an unnecessary interference with his freedom to manifest his religion. Bayatyan had been jailed from September 2002 to July 2003 for refusal on grounds of conscience to perform compulsory military service.

Of the 17 judges who took part, only the Armenian judge, Alvina Gyulumyan, dissented from this month's Grand Chamber decision. The latest decision overturns a controversial judgment delivered by a seven-person Chamber of the ECtHR in October 2009. Bayatyan had been given leave to appeal against this to the Grand Chamber, whose decision is final.

The judgment has been welcomed by human rights defenders in Armenia, but it has not resulted in the freeing of the 69 conscientious objectors who were still jailed there at the time. All had refused the "alternative service" available under a law which was being prepared at the time Bayatyan was jailed, and which he himself was never given the

option of performing. But this "alternative service" is not purely civilian in nature, and compared with military service is of a discriminatory duration. Legislation brought forward by the government still does not seem to deal with these inadequacies.

When Bayatyan was convicted, there was no alternative to armed military service in Armenia; the alternative service law came into being only in December 2003, six months after he was released on parole having served ten months of a two-and-a-half year sentence. Its inadequacies therefore did not feature directly in this case. The judgment does, though, open the door for the treatment of the current detainees and the adequacy of Armenia's provisions for conscientious objection to military service to be challenged before the ECtHR. It is also directly relevant to the current situation in Azerbaijan and Turkey within the Council of Europe and has implications for Belarus if it aspires to join the Council of Europe. In the longer term, the effects will be felt world-wide.

### **The Grand Chamber judgment**

In making this month's judgment

(<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=887947&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>)

, the Grand Chamber first considered whether the case law needed to be updated, in line with the concept that the ECHR is a "living instrument", the interpretation of which develops over time. It noted how many states have in recent decades allowed for conscientious objection to military service, and decided that it was no longer adequate for a state to require a conscientious objector to perform military service simply because its laws did not provide for any alternative. It must justify in each individual case the strict necessity for the limitation thus placed on the freedom of thought, conscience and religion.

This is similar to the line which has been taken by the UN Human Rights Committee in interpreting the International Covenant on Civil and Political Rights (ICCPR).

### **"Judgments issued by the European Court cannot be ignored"**

Armenia claimed that Bayatyan's conviction had been necessary to protect public order. The ECtHR was dismissive of this argument, noting for example in paragraph 117 that: "The Court, however, does not find [this] to be convincing in the circumstances of the case, especially taking into account that at the time of the applicant's conviction the Armenian authorities had already pledged to introduce alternative civilian service and, implicitly, to refrain from convicting new conscientious objectors".

The ECtHR also noted that "democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position". It went on to argue that "respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society".

This is a strong indication that the ECtHR would not look kindly on continued actions against Jehovah's Witnesses in Armenia over the issue of military service.

The next step in bringing the treatment of conscientious objectors to military service in Armenia into line with international standards may however come through the political organs of the Council of Europe, acting on the reports of Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights.

Hammarberg argued on 19 July 2011 that "judgments issued by the European Court cannot be ignored" and that "prompt, full and effective execution of the Court's judgments is key for the effective implementation of the European Convention's standards in domestic law".

Pressure may also come through UN Human Rights Committee consideration of Armenia's report under the ICCPR in July 2012. The Committee has repeatedly encouraged States to ensure that the arrangements for alternative service are entirely under civilian control. In Armenia they are not, even under the latest proposals.

Moreover, the Committee ruled on 9 November 1999, in the case of Frédéric Foin v. France (CCPR/C/67/D/666/1995 <http://www.wri-irg.org/node/6140>), that any difference in duration between military and alternative service must be "based on reasonable and objective criteria". This statement in paragraph 10.3 was accompanied by the comment that a difference in duration could not be set in order to test the sincerity of applicants' convictions. The Committee has subsequently described as "punitive" alternative service which lasts 50 per cent longer than military service.

In Armenia, the duration of alternative service, at 42 months, is the longest in the world. So is the difference (18 months) between the length of military and of alternative service.

### **Implications for Turkey, Azerbaijan and Belarus**

No Council of Europe member state will again be able to claim successfully before the ECtHR that it can prosecute conscientious objectors to military service just because it has no appropriate legislation. This applies particularly to Turkey and Azerbaijan.

Turkey has never acknowledged the right of conscientious objection to military service. In 2006 the ECtHR ruled that the repeated imprisonment of Turkish conscientious objector Osman Murat Ülke, and his continuing situation of undocumented "civil death" amounted to inhuman and degrading treatment. But the ECtHR but did not rule on the issue of conscientious objection itself.

On 7 July 2010, in an interim directive, the ECtHR instructed Turkey to "suspend all penal actions" against Bar#305;s Görmez, a Jehovah's Witness conscientious objector, and "not to execute any sentence issued" until it rendered its final judgment in the Bayatyan case. Turkey ignored this; on 26 January 2011 Görmez was sentenced to imprisonment for the ninth time, having been yet again called up to perform military service. The interim directive had been issued in response to a case filed with the ECtHR in March 2008 by Görmez and three other Turkish Jehovah's Witness conscientious objectors. The ECtHR will probably now move rapidly to declare this case admissible. It will almost certainly be decided in line with the Bayatyan judgment.

Also, now that the ECtHR has stated clearly that conscientious objection to military service is protected under the ECHR, a challenge could be launched to Article 318 of the Turkish Penal Code ("Alienating the population from the armed forces"). This Article has been interpreted by the Turkish courts as criminalising all media reporting on the issue.

Azerbaijan included the right to conscientious objection in its 1995 Constitution, but is still delaying implementation of its commitment (given on joining the Council of Europe) to respect this right. In March 2008, two Jehovah's Witnesses in Azerbaijan who had been imprisoned for their conscientious objection to military service, Mushfiq Mammedov and Samir Husenyov, filed applications to the ECtHR. A third, Farid Mammedov (no relation of Mushfiq) is following them, having had his appeal to the Supreme Court rejected in January 2011. No ECtHR admissibility decision has yet been made, but these cases too will almost certainly be decided in line with the Bayatyan judgment.

Belarus is not at present a member of the Council of Europe, so there is no recourse to the ECtHR for the three conscientious objectors sentenced since January 2009 for refusing military service. The country was also considering introducing an Alternative Service Law. But no more has been heard of this following the recent political crackdown. If Belarus is ever to be admitted to the Council of Europe, it is now almost certain that an Alternative Service Law compatible with international standards will first have to be passed.

### **South Korea, and the Organisation of American States**

The implications of the Bayatyan judgment will also resonate far beyond Europe. It will be seen as placing a seal of approval on what the ECtHR called a "virtually general consensus on the question [of conscientious objection to military service] in Europe and beyond". Bayatyan should weigh heavily with the Constitutional Court in South Korea, which is about to adjudicate on the issue. And when the issue next comes before the Inter-American Commission on Human Rights, that body is likely to bring its jurisprudence into line with the ECtHR.

### **Where next?**

Bayatyan is a Jehovah's Witness, as are the other conscientious objectors to military service who currently have cases pending with the ECtHR. However the Court made clear that its new position on conscientious objection to military service did not concern just members of one religious group, or conscientious objection on religious grounds. Paragraph 110 of the Bayatyan judgment stated: "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9". This definition could include a secular pacifist objector, such as in the Turkish case of Ülke mentioned above.

### **Coercion the next ECtHR jurisprudential development?**

It will be interesting to watch the further development of the jurisprudence. One part of Bayatyan's original complaint was that the primary goal of his prosecution was to coerce him into abandoning his religious and conscientious objection to military service. In December 2006 the ECtHR had ruled this part of the complaint inadmissible, claiming there was no evidence for it. This was a very strange decision, given that Bayatyan's sentence had been increased on appeal partly on the grounds that he had not repented of his "crime". Also at the time of his appeal an offer had been made to drop all charges if he now withdrew his objection and consented to perform military service.

The inadmissibility decision was not subject to review by the Grand Chamber, so this aspect of the case was not directly addressed in the latest judgment.

Previously, in the January 2006 Ülke v. Turkey judgment, the Court had likewise ignored the effect of the repeated prosecution – trial – punishment cycle in applying strong coercion to a person to change his beliefs. Nevertheless, this month's Bayatyan judgment does refer to the findings of the UN Working Group on Arbitrary Detention in relation to both Ülke (Opinion No. 36/1999 – available at <http://www.wri-irg.org/node/1600>) and four Israeli conscientious objectors (Opinion No. 24/2003 – available at <http://www.wri-irg.org/node/6481>). In both cases, the Working Group found that the authorities' actions "would be tantamount to compelling someone to change his/her mind for fear of being deprived of liberty if not for life, then at least until the age at which citizens cease to be liable for military service."

In its 2001 Report to the UN Commission on Human Rights (E/CN.4/2001/14 <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2001/14&Lang=E>)

the Working Group stated that: "repeated incarceration in cases of conscientious objectors is directed towards changing their conviction and opinion, under threat of penalty. The Working Group considers that this is incompatible with Article 18 ["Freedom of thought, conscience and religion"], Paragraph 2, of the International Covenant on Civil and Political Rights, under which no one shall be subject to coercion which would impair his freedom to have or adopt a belief of his choice".

Unfortunately, an explicit coercion provision does not exist in the ECHR. But it would be difficult for the ECtHR to deny that coercion breaches the spirit and purpose of Article 9 of the ECHR.

### **The right to change one's beliefs**

Although silent on coercion, Article 9 is unequivocal in stating that freedom of thought, conscience and religion includes freedom to change one's religion or belief. This would imply that a genuine change of belief by someone who had originally volunteered for military service is protected. This view is supported by the Council of Europe's Committee of Ministers, who on 24 February 2010 adopted Recommendation CM/Rec(2010)4 on the human rights of members of the armed forces (see ). This included at paragraph 42 the stipulation that: "Professional members of the armed forces should be able to leave the armed forces for reasons of conscience".

The Bayatyan case could therefore have implications not only for the diminishing number of Council of Europe member states which still have conscription, but also for those with all-volunteer armed forces.

### **Will ECtHR reasoning follow UN Human Rights Committee?**

Finally, it will be interesting to see whether the reasoning of the ECtHR develops in line with the latest approach taken by the UN Human Rights Committee. In March 2011, faced with communications from 100 imprisoned Jehovah's Witness conscientious objectors in South Korea, the UN Human Rights Committee ruled that: "The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion". (UN Document CCPR/C/101/D/1642-1741/2007, accessible at [http://www.wri-irg.org/system/files/Views\\_24\\_March\\_2011\\_0.pdf](http://www.wri-irg.org/system/files/Views_24_March_2011_0.pdf) ). In other words, it is part of the right and not just a manifestation of religion or belief.

Under Article 9 of the ECHR it is only the freedom to manifest one's religion or belief which may be limited in certain circumstances. The freedom of thought, conscience and religion itself is not subject to limitations. So if in a future case the ECtHR followed the reasoning now adopted by the Human Rights Committee, it would not even have to consider and dismiss arguments that limitations on conscientious objection to military service were necessary on grounds of public order, or for any other reason.

The Bayatyan judgment will continue to have implications in Armenia and far beyond.

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## **Court rules complaints against Swiss minaret ban non admissible**

Strasbourg Consortium (07.2011) / HRWF (19.07.2011) - [www.hrwf.net](http://www.hrwf.net) - Following the 26 November 2009 popular vote (57.5%) in Switzerland to prohibit the building of

minarets, the European Court of Human Rights received a number of complaints. On 28 June 2011 the Court ruled the following applications inadmissible:

[Ligue des Musulmans de Suisse and Others v. Switzerland](#) (no. 66274/09) and [Ouardiri v. Switzerland](#) (no. 665840/09).

The Court ruled that the applicants, though offended, were not victims in any sense defined by the European Convention and could not claim damage from theoretical future events, reiterating that Article 13 (guarantee of effective remedy) does not guarantee a remedy "allowing a State's legislation to be challenged on the ground of being contrary to the Convention."

An estimated 4.5% of Swiss residents are Muslims, mainly from southeastern Europe and Turkey. Currently there are more than 100 mosques in Switzerland, but only four minarets: in Zurich, Geneva, Winterthur and Wangen near Olten. The legal battle is continuing over a proposed minaret in Langenthal, the plans for which were underway before the ban for future construction took effect.

One of the applicants, Hafid Ouardiri, co-president of the Interknowing Foundation, and former spokesman for the Geneva mosque, told the Swiss News Agency that he felt "positive and calm" after the ruling: the European court had "set a process in motion", and reminded the Swiss state of its duty. Ouardiri's lawyers issued a statement saying they were "encouraged" by the ruling, since they were convinced the Swiss courts were bound to conclude that the ban violates human rights and is a threat to religious peace.

For further commentary:

- [Strasbourg minaret ruling causes no surprise](#) by Julia Slater and Alexander Künzle, *Swiss Info*  
[http://www.swissinfo.ch/eng/politics/Strasbourg\\_minaret\\_ruling\\_causes\\_no\\_surprise.html?cid=30645168](http://www.swissinfo.ch/eng/politics/Strasbourg_minaret_ruling_causes_no_surprise.html?cid=30645168)
- [Legal move against Swiss minaret ban thrown out](#) by Urs Geiser, *Swiss Info*  
[http://www.swissinfo.ch/eng/politics/Legal\\_move\\_against\\_minaret\\_ban\\_thrown\\_out.html?cid=30640398](http://www.swissinfo.ch/eng/politics/Legal_move_against_minaret_ban_thrown_out.html?cid=30640398)
- [Swiss Minaret Decisions](#) by Antoine Buyse, *ECHR Blog*  
<http://echrblog.blogspot.com/2011/07/swiss-minaret-decisions.html>
- [Europe rights court rejects appeals against Switzerland minaret ban](#) by Aman Kakar, *The Jurist*  
<http://jurist.org/paperchase/2011/07/europe-rights-court-rejects-appeals-against-switzerland-minaret-ban.php>

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## **The case of the Swiss Raelian Movement against Switzerland to be re-examined by the Grand Chamber**

HRWF (19.07.2011) - [www.hrwf.net](http://www.hrwf.net) - A week ago, a panel of five judges declared admissible the request of the Swiss Raelian Movement to re-examine their case against Switzerland (Ref. 16354/06).

The applicant association, established in 1977, is a non-profit association registered in Rennaz (Canton of Vaud) set up to make contact with extraterrestrials. In 2001, the association requested permission from the Neuchâtel police to put up posters featuring: the faces of extraterrestrial, a flying saucer and the Raëlien Movement's Internet address

and telephone number. Permission to put up the posters was denied on the ground that the Raëlien Movement had engaged in activities that were immoral and contrary to public order. It promoted "geniocracy" and human cloning and had been found to "theoretically" advocate paedophilia and incest and had been the subject of criminal complaints about sexual practices concerning children.

In its judgment of 13 January 2011, the Court held, by majority, that there had been no violation of Article 10 (freedom of expression) of the Convention.

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## **Chamber Judgments: December 2010**

Milanović v. Serbia (no. 44614/07) - Chamber Judgment, 14 December 2010. The applicant, Života Milanović, is a Serbian national who lives in Belica (Jagodina Municipality, Serbia). Since 1984 he has been a leading member of the Hare Krishna Hindu community in Serbia and has received numerous threats and, beginning in 2001, has been assaulted physically many times by non-State agents. Relying on Articles 2 (right to life), 3 (prohibition of torture and inhuman treatment), and 13 (right to an effective remedy), he complained about the failure of the authorities to prevent the repeated attacks on him as well as to investigate properly those incidents. Under Article 14 (prohibition of discrimination) taken together with Article 3, he further alleged that this failure was due to his religious affiliation. In its judgment of 14 December 2010, the Court held unanimously that there had been a violation of Article 3 and by 6 votes to 1 that there had also been a violation of Article 14 taken in conjunction with Article 3. The Court further ruled, unanimously, that it was not necessary to examine separately the complaints under Articles 2 and 13. Serbia is to pay EUR 10,000 in respect of non-pecuniary damage and EUR 1,200 in respect of costs and expenses.

Full judgment: <http://strasbourgconsortium.org/document.php?DocumentID=5162>

HADEP and Demir v. Turkey (no. 28003/03) - Chamber Judgment, 14 December 2010. The applicants are Halkın Demokrasi Partisi (People's Democracy Party, "HADEP"), a political party established on 11 May 1994, and Turan Demir, its general secretary, elected to that post in February 2003. Relying mainly on Article 11 (freedom of assembly and association), the applicants complained about the dissolution, in March 2003, of the HADEP party. They further complained about the party's dissolution under Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 14 (prohibition of discrimination), Article 1 of Protocol No. 1 (protection of property) and Article 3 of Protocol No. 1 (right to free elections). In its judgment of 14 December 2010, the Court held, unanimously, that there had been a violation of Article 11 and that in view of these findings, there was no need to examine the other complaints. Under Article 41, the Court further held that Turkey is to pay Mr. Demir EUR 24,000 in respect of non-pecuniary damage, to be held by him for members and leaders of HADEP, and also that EUR 2,200 is to be paid to the applicants jointly, in respect of costs and expenses.

Full judgment: <http://strasbourgconsortium.org/document.php?DocumentID=5157>

O'Donoghue and Others v. the United Kingdom (no. 34848/07) - Chamber Judgment 14 December 2010). The applicants are a Nigerian national, Osita Chris Iwu, and three dual British and Irish nationals, Sinead O'Donoghue, Ashton Osita Iwu and Tiernan Robert O'Donoghue. Relying, in particular, on Article 12 (right to marry) and Article 14 (prohibition of discrimination) in conjunction with Article 12, the applicants complained about the existence of a Certificate of Approval Scheme, which required people subject to immigration control to pay a fee in order to obtain permission to marry, and about how that scheme has been applied to them. Relying further on Article 9 (freedom of thought, conscience and religion) alone and in conjunction with Article 14, and Article 8 (right to

respect for private and family life) alone and in conjunction with Article 14, the applicants complained about not being able to marry, unless they did so in an Anglican church, and about undue interference with their private and family life. In its decision of 14 December 2010, the Court found, unanimously, violations of Article 12, Article 14 (in conjunction with Article 9), and Article 12. There was no need, said the Court, to examine separately the complaints under Article 8, either read alone or in conjunction with Article 14. By way of just satisfaction (under Article 41), the Court held that the United Kingdom is to pay the applicant EUR 8,500 in respect of non-pecuniary damage, 295 British pounds in respect of pecuniary damage, and EUR 16,000 for costs and expenses.

Full judgment: <http://strasbourgconsortium.org/document.php?DocumentID=5160>

Savez crkava "Rijec Zivota" and Others v. Croatia (no. 7798/08) - Chamber Judgment, 9 December 2010. The applicants are Savez crkava "Rijec Zivota" (Union of Churches "The Word of Life"), Crkva cjelovitog evanđelja (Church of the Full Gospel) and Protestantska reformirana krscanska crkva u Republici Hrvatskoj (Protestant Reformed Christian Church in the Republic of Croatia). Based in Zagreb and Tenja, they are churches of a Reformist denomination which have been registered as religious communities under Croatian law since 2003. The case concerns the applicant churches' complaint that, unlike other religious communities in Croatia, they could not provide religious education in public schools and nurseries or obtain official recognition of their religious marriages as the domestic authorities refused to conclude an agreement with them regulating their legal status. They relied on Article 6 § 1 (access to a court), Article 9 (freedom of thought, conscience and religion), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination) and Article 1 of Protocol No. 12 (general prohibition of discrimination). In a chamber judgment issued 9 December 2010, the Court found no reason that Croatia's argument that other religious communities satisfied the criterion of being "historical religious communities of the European cultural circle" could not equally be applied to the applicant churches. The Court concluded that the criteria were not applied on an equal basis to all religious communities, and that this difference in treatment did not have an objective and reasonable justification, in violation of Article 14 in conjunction with Article 9. The Court considered that it was not necessary to examine the Article 1 issue, and found the complaints under Article 6 and Article 13, and under Article 9 alone to be inadmissible. Under Article 41 (just satisfaction) of the Convention, the Court held that Croatia was to pay to each applicant church EUR 9,000 in respect of non-pecuniary damage and EUR 4,570 in respect of costs and expenses.

Full judgment: <http://strasbourgconsortium.org/document.php?DocumentID=5154>

Jakobski v. Poland (no. 18429/06) - Chamber Judgment, 7 December 2010. The applicant, Janusz Jakobski, is a Polish national serving an eight-year prison sentence for rape, for which he was convicted in 2003. The applicant observed that other religious groups in the prison were allowed special diets, while he, a Buddhist, was consistently refused the meat-free diet required by the Mahayana Buddhist dietary rules he follows. He noted further that refusal of the food offered would have been regarded as beginning a hunger strike, resulting in disciplinary punishment. The 7 December judgment of the Court held unanimously that there had been a violation of Mr. Jakobski's Article 9 rights (freedom of thought, conscience and religion), but no need for a separate examination under Article 14 (prohibition of discrimination). The Court reasoned that removing meat from the applicant's diet, which diet could be seen as motivated or inspired by a religion, would not entail disruption to the management of the prison or decline in the standard of meals served to other prisoners. Under Article 41 (just satisfaction), the Court held that Poland should pay EU 3,000 in non-pecuniary damage.

Full judgment: <http://strasbourgconsortium.org/document.php?DocumentID=5140>

Source: Strasbourg Consortium

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## **Grand chamber judgment issued in Irish abortion rights case**

Strasbourg Consortium (16.12.2010) / HRWF (11.01.2011) - Website: <http://www.hrwf.net> - In a Grand Chamber Judgment issued 16 December 2010 in the case A, B, and C v. Ireland (<http://www.strasbourgconsortium.org/document.php?DocumentID=5163>), the Court found, in respect of the third applicant, a violation of Article 8 of the European Convention on Human Rights (right to private and family life) while declining to assert that the ECHR supports a right to abortion in contravention of national laws to the contrary. The case concerned three women, two Irish nationals and one Lithuanian national, who because of restrictions in Ireland sought abortions elsewhere. They claimed that the impossibility of having an abortion in Ireland made the procedure unnecessarily expensive, complicated, and traumatic and that the Irish restrictions stigmatized and humiliated them, risked damaging their health, and, in the third applicant's case, her life.

In the case of the first and second applicants, the Court found that the prohibition on the termination of the pregnancies did represent an interference with their right to respect for their private lives, but that interference had been in accordance with the law and had pursued the legitimate aim of protecting public morals as understood in Ireland. Ireland's law, noted the Court, is based "on the profound moral views of the Irish people as to the nature of life," and therefore Ireland is entitled to an extra "margin of appreciation" in the its prohibitions on abortion.

In the case of the third applicant, however, the Court noted that she had a rare form of cancer and feared it might relapse as a result of her being pregnant. The Court considered that the establishment of any such risk to the applicant's life clearly concerned fundamental values and essential aspects of her right to respect for her private life, which are constitutionally protected in Ireland. It went on to find that the only non-judicial means for determining such a risk on which the Government relied, the ordinary medical consultation between a woman and her doctor, was ineffective and that the applicant's recourse to the constitutional courts for determination of the lawfulness of an abortion was also ineffective. The third applicant was therefore awarded EUR 15,000 in respect of non-pecuniary damage.

Source: Strasbourg Consortium: Freedom of Conscience and Religion at the European Court of Human Rights

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## **Neulinger and Shuruk v. Switzerland (Application no. 41615/07)**

### ***Child custody case in a religiously mixed marriage***

Press release issued by the Registrar (06.07.2010)

### **Principal facts**

Strasbourg Consortium (06.07.2010) / HRWF (11.01.2011) - Website: <http://www.hrwf.net> - The applicants, Isabelle Neulinger and her son Noam Shuruk, are Swiss nationals who were born in 1959 and 2003 respectively and live in Lausanne (Switzerland, Canton of Vaud). In 1999 Ms Neulinger settled in Israel where she married Shai Shuruk in 2001. Their son, Noam, was born in Tel Aviv in 2003. Fearing that Noam

would be taken by his father to a "Chabad-Lubavitch" community – she described the Lubavitch movement as ultra-orthodox, radical and known for its zealous proselytising – Ms Neulinger applied to the Tel Aviv Family Court, which in 2004 imposed a ban on Noam's removal from the country until he attained his majority. She was awarded temporary custody and guardianship was to be exercised by both parents jointly. The father's access rights were subsequently restricted on account of his threatening behaviour.

In February 2005 the parents divorced and in June Ms Neulinger secretly left Israel for Switzerland with her son. In a decision of 30 May 2006, issued following an application by the child's father, the Tel Aviv Family Court observed that Noam was habitually resident in Tel Aviv and that the parents had joint guardianship. The court held that the child's removal from Israel without the father's consent was wrongful within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ("the Hague Convention").

In a decision of 29 August 2006 the father's application for his son's return to Israel was dismissed by the Lausanne District Justice of the Peace on the ground that there was a grave risk that the child's return to Israel would expose him to physical or psychological harm or otherwise place him in an intolerable situation. The Vaud Cantonal Court dismissed the father's appeal, confirming that this case was an exception to the principle of the child's prompt return, in accordance with Article 13, sub-paragraph (b), of the Hague Convention.

On 16 August 2007 the Swiss Federal Court allowed the father's appeal, on the ground that the Article in question had been wrongly applied, and ordered Ms Neulinger to return the child to Israel.

In February 2009 the applicants provided the European Court of Human Rights with the certificate of a doctor who had examined Noam in 2005, and several times since then, indicating that "an abrupt return to Israel without his mother would constitute a significant trauma and a serious psychological disturbance for this child".

In a provisional-measures order of 29 June 2009 the Lausanne District Court, at the request of Ms Neulinger, decided that Noam should live at his mother's address in Lausanne, suspended the father's right of access in respect of his son and granted parental authority to the mother, so as to allow her to renew the child's identity papers.

### **Complaints, procedure and composition of the Court**

The applicants relied, in particular, on Article 8 of the European Convention on Human Rights, submitting that Noam's return to Israel would constitute an unjustified interference with their right to respect for their family life.

The application was lodged with the European Court of Human Rights on 26 September 2007. In a judgment of 8 January 2009, the Court held, by four votes to three, that there had been no violation of Article 8. On 5 June 2009 the case was referred to the Grand Chamber at the applicants' request. A Grand Chamber hearing took place in the Human Rights Building, in Strasbourg, on 7 October 2009.

Source: Strasbourg Consortium: Freedom of Conscience and Religion at the European Court of Human Rights

See judgment at: <http://strasbourgconsortium.org/document.php?DocumentID=5011>