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

FIFTH SECTION

DECISION

Application no. 32745/17
Bluma Zipa PERELMAN and Alain Michel PERELMAN
against Germany

The European Court of Human Rights (Fifth Section), sitting on 13 June 2017 as a Chamber composed of:

Erik Møse, *President*,
Angelika Nußberger,
Nona Tsotsoria,
Yonko Grozev,
Síofra O'Leary,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov, *judges*,
and Milan Blaško, *Deputy Section Registrar*,

Having regard to the above application lodged on 28 April 2017,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Ms Bluma Zipa Perelman and Mr Alain Michel Perelman, are French nationals who were born in 1947 and live in Frankfurt/Main. They were represented before the Court by Mr S. Schödel, a lawyer practising in Bonn.

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

3. In November 2002 the applicants moved from France to Frankfurt/Main in Germany. They submitted a registration form dated 11 November 2002 to the local registration authority, to inform the latter of their new place of residence. The form required information about their religion, and for both applicants they indicated "Mosaic" (*"Mosaisch"*) in the relevant part of the form.

4. The applicants remained members of their liberally-oriented Jewish community in France.

5. By letter dated 12 May 2003 the Jewish community of Frankfurt/Main welcomed the applicants as new members. A copy of the community's statutes was attached to the letter. According to the statutes, all persons of Jewish faith whose place of residence or usual abode was in Frankfurt/Main were members of the community, unless they had made a written objection to the community council within three months from their date of arrival.

6. By letter of 11 June 2003 the applicants opposed membership. They further requested *restitutio in integrum* (*Wiedereinsetzung in den vorigen Stand*), pointing out that they had received the community's statutes only after the expiry of the period for filing an objection.

7. As the community did not accept their objection, the applicants, as a precautionary measure, resigned their membership with effect from the end of October 2003. This was accepted by the community.

8. As a public-law entity (*Körperschaft öffentlichen Rechts*) the Jewish community of Frankfurt/Main levies a church tax based on the individual income of their members, which is collected by the State tax authorities. For the period from November 2002 to October 2003 the Frankfurt/Main tax office levied a church tax on the applicants. They objected to paying the church tax in a separate set of proceedings which is not the subject of the application at issue.

9. On 9 June 2005 the applicants brought an action before the Frankfurt/Main Administrative Court to obtain a declaration that they had not been members of the community between November 2002 and October 2003.

10. On 20 September 2005 the Frankfurt/Main Administrative Court rejected the action as inadmissible, denying that such a judgment would have a legitimate interest.

11. The applicants appealed and, on 19 May 2009, the Hesse Administrative Court of Appeal dismissed their appeal. It held that the applicants' action was admissible, but ill-founded because their membership was based on internal regulations of the religious community which had to be recognised by State authorities, in view of the principle of autonomy of religious organisations.

12. On 23 September 2010 the Federal Administrative Court quashed the judgment of the Administrative Court of Appeal and declared that, in the public sphere, the applicants' membership could not have legal effect. It reasoned, in essence, that notwithstanding the autonomy of religious organisations, the State had an obligation to preserve negative religious freedom. Therefore, it had to be determined whether the membership of a religious community was based on a voluntary decision. Under the circumstances of the case, the information given in the registration form that

the applicants' religion was "Mosaic" could not be taken as a declaration of willingness to become members of the local Jewish community.

13. After the Frankfurt/Main Jewish community had lodged a constitutional complaint (no. 2 BvR 278/11), on 17 December 2014 the Federal Constitutional Court, sitting in a chamber of three judges, quashed the Federal Administrative Court's judgment, finding a violation of the community's fundamental right under Article 4 §§ 1 and 2, read in conjunction with Article 140 of the Basic Law and Article 137 § 3 of the Weimar Constitution of 11 August 1919 (*Weimarer Reichsverfassung*). The court held that the Federal Administrative Court had not correctly evaluated the scope and the significance of the guarantee of autonomy (*Selbstbestimmungsrecht*) afforded to religious communities by the aforementioned Articles of the Basic Law. Regulations governing membership had to be seen as affairs that religious communities are free to determine at their own discretion. The State's duty to acknowledge the guarantee of autonomy of religious associations for the secular legal sphere found its limits in the negative religious freedom of potential members. The inclusion of members by religious communities had to be acknowledged where this was legitimised by positive declaration, albeit possibly by an implicit declaration. There were various ways to express willingness to be a member of a religious community. This did not necessarily have to be expressed to the religious community itself. From the information submitted by the applicants to the registration office in Frankfurt/Main it could be concluded, from the objective standpoint of the onlooker (*objektivierter Empfängerhorizont*), that the applicants had expressed their willingness to be members of the Jewish community of Frankfurt/Main.

14. On 21 September 2016 the Federal Administrative Court, to which the case had been remitted, dismissed the applicants' appeal on points of law. It pointed out that, on procedural grounds, the judgment of the Federal Constitutional Court was binding. It nevertheless expressed doubts as to the compatibility of the finding with Article 9 of the Convention. It noted in particular that the Federal Constitutional Court had attached no importance to the fact that the applicants had not been asked for their religious affiliation but for their religion in the registration form at issue. Notwithstanding the Jewish community of Frankfurt/Main's conception of itself as a uniform community, everyone who lived in the community's district and declared his or her religious belief should be free to choose another Jewish community. Due to the binding effect of the judgment of the Federal Constitutional Court, the court considered itself prevented from founding its decision on these aspects.

15. On 23 November 2016 the applicants lodged a constitutional complaint with the Federal Constitutional Court which is still pending (no. 2 BvR 2595/16). Relying on Article 4 § 1 of the Basic Law and Article 9 of the Convention and referring to the Court's case-law they

complained in particular that their membership in the Jewish community of Frankfurt/Main was not based on their consent.

COMPLAINT

16. The applicants complained under Articles 9 and 11 of the Convention of the domestic courts' acknowledgement of the applicants' membership of a religious community which was not based on their consent. They emphasised that they had not declared their willingness to become members of the Jewish community of Frankfurt/Main, which was of orthodox orientation and did not represent the applicants' liberal and progressive beliefs. From their perspective it could not have been foreseen that the information provided in the registration form would be interpreted as such a declaration of willingness, in particular in view of the fact that they had not been asked for their religious affiliation but for their religion.

THE LAW

17. The applicants complained under Articles 9 and 11 of the Convention of the domestic courts' acknowledgement of a religious membership which was not based on their consent.

18. Articles 9 and 11 of the Convention, as far as relevant, provide as follows:

Article 9

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

..."

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others..."

19. The Court, however, does not deem it necessary to decide in the present case whether or not the facts alleged by the applicants disclose any appearance of a violation of the Convention.

20. Article 35 § 1 of the Convention provides that the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. The Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that national courts should initially have the

opportunity to determine questions regarding the compatibility of domestic law with the Convention. In a legal system providing constitutional protection for fundamental rights it is incumbent on the aggrieved individual to test the extent of that protection (*A, B and C v. Ireland* [GC], no. 25579/05, § 142, ECHR 2010). The principle that an applicant must first make use of the remedies provided by the national legal system before applying to an international court is an important aspect of the machinery of protection established by the Convention. The Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (*Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008).

21. However, Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-IV). Applicants are dispensed from pursuing domestic remedies which do not offer reasonable prospects of success (*Aksoy v. Turkey*, 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI). An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any suitable evidence, that an available remedy which he or she has not used was bound to fail (*Marchitan v. Germany* (dec.), no. 22448/07, 19 January 2010). The mere existence of doubt as to the chances of success of a constitutional complaint does not absolve an applicant from the obligation to exhaust it (*Allaoui and others v. Germany* (dec.), no. 44911/98, 19 January 1999).

22. The Court notes that in the present case the applicants lodged a constitutional complaint against the Federal Administrative Court's second judgment, which is still pending. They submit that this was only a precautionary measure, in the event that the Court considered the constitutional complaint a domestic remedy to exhaust. They claim that the exhaustion of domestic remedies in the current circumstances did not require the lodging of a constitutional complaint as the Federal Constitutional Court had already ruled on the case, and had thereby taken into account the guarantee of negative freedom of religion for the applicants, who had previously submitted written observations.

23. The Court reiterates that the constitutional complaint to the Federal Constitutional Court is, as a general rule, an effective and accessible legal remedy unless there are special circumstances which are of such a nature that the Court has to conclude that the complaint would have been bound to fail (*Marchitan v. Germany* (dec.), cited above). A constitutional complaint cannot be considered bound to fail because of the mere fact that the Federal Constitutional Court has ruled on the case before on the basis of a previous constitutional complaint (compare *Saure v. Germany*, no. 78944/12, 25 August 2015). It depends on the specific circumstances of the case what

conclusions can be drawn from a first ruling of the Federal Constitutional Court.

24. The Court notes that in its second judgment, the Federal Administrative Court expressed serious doubts as to the compatibility of the Federal Constitutional Court's finding with Article 9 of the Convention and the Court's case-law, taking into account various aspects which had not been addressed before, either in its first judgment or in the Federal Constitutional Court's decision. Referring to the Court's case-law the applicants complained in their pending constitutional complaint that the domestic courts' acknowledgement of their membership in the Jewish community of Frankfurt/Main violated Article 4 § 1 of the Basic Law and Article 9 of the Convention.

25. In view of these circumstances, the Court is not in a position to rule out the possibility that the Federal Constitutional Court will accept the applicant's constitutional complaint for adjudication and reexamine the case. Therefore, the Court cannot conclude that it is bound to fail.

26. Under those circumstances, and in view of the subsidiary nature of the supervisory mechanism of the Convention, the Court concludes that the application is premature. Therefore, it must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 6 July 2017.

Milan Blaško
Deputy Registrar

Erik Møse
President