

Vienna, 8 November 2013

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To Whom It May Concern:

We are writing in regard to a case presently under consideration by your office upon a complaint of the Arcigay non-governmental organization and the Omphalos Association. The case involves a religious education class at the Liceo Classico Mariotti, a university preparatory high school, in the Umbrian town of Perugia. According to the complaint, the teacher of an optional Catholic religion class handed out a questionnaire to students asking them to rank from 0 to 10 the gravity of sinfulness of a list of activities, *inter alia*, selling drugs, pollution, war, terrorism, murder, contraceptive methods, abortion, premarital sexual experience and homosexuality. This teaching exercise, not focused on homosexuality and performed during an optional religious instruction class, was described in the complaint as provoking "the pursuit of extremist and discriminatory arguments". While it is not our role to be the fact-finder in the present case, we would kindly like

to offer your office some insight and legal arguments that could be of assistance in the complaint procedure.

Established in 1994, Alliance Defending Freedom (ADF) has a full time litigation team of over 40 lawyers and 2100 allied attorneys, all devoted to litigation surrounding the issue of religious freedom. ADF has argued, co-counseled or intervened in over 20 cases before the European Court of Human Rights (ECHR). ADF has Special Consultative Status with the Economic and Social Council of the United Nations and full accreditation with the Fundamental Rights Agency of the European Union, European Parliament and Organization for Security and Co-Operation in Europe.

We will approach our analysis from the perspective of the European Convention on Human Rights and other international binding documents and will address three issues in particular: freedom of speech, educational freedom, and the confessional nature of the teaching.

## **1. Freedom of Speech**

In the first place, this case involves freedom of speech. In domestic courts that have dealt with the Convention, the orthodox Christian view on homosexuality has been held to be worthy of protection as a religious belief under Article 9. For example, in a case in Northern Ireland, it was held that:

The belief in question is the orthodox Christian belief that the practice of homosexuality is sinful. The manifestation in question is by teaching, practice and observance to maintain the choice not to accept, endorse or encourage homosexuality. Whether the belief is to be accepted or rejected is not the issue. The belief is a long established part of the belief system of the world's major religions. This is not a belief that is unworthy of recognition. I am satisfied that art 9 is engaged in the present case.<sup>1</sup>

Furthermore, in a recent case in the United Kingdom, it was held that: “the defendants genuinely hold a perfectly orthodox Christian belief in the sanctity of marriage and the sinfulness of homosexuality. Such a view...does fall within Article 9 of the European Convention.”<sup>2</sup>

In 2003, Swedish Pastor Ake Green preached a sermon entitled: “Are people born with homosexual orientation or is it the result of influence by evil powers?” He was subsequently arrested and convicted under a Swedish law that criminalized expressions of disrespect towards homosexuals. In 2005, the Supreme Court of Sweden acquitted Mr. Green of all charges.<sup>3</sup> The Court held that under the circumstances, a conviction would likely breach Mr. Green’s Article 9

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<sup>1</sup> *The Christian Institute & Ors, Re Application for Judicial Review* [2007] NIQB 66 at para 50.

<sup>2</sup> *Hall and Preddy v. Bull and Bull*, Case No 9BS02095, 18 January 2011 at para 22.

<sup>3</sup> Case No. B 1050-05, 29 November 2005. Available at: <http://www.emaso.com/links/ref-articles/ref29e/ref29s.htm>.

and Article 10 rights to freedom of religion and freedom of expression under the European Convention. Therefore, the Swedish law had to be interpreted in light of the ECHR.

The Supreme Court referred to several pieces of Convention case law, including *Kokkinakis v. Greece*, where the ECtHR stated that “freedom of thought, conscience and religion is one of the foundations of a “democratic society””<sup>4</sup> and *Handyside v. United Kingdom*, where it was held that:

Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man...it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that **offend, shock or disturb** the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".<sup>5</sup>

This Convention reasoning was continued in a recent case in Northern Ireland where a church was banned from publishing a one page advert in a national newspaper that condemned homosexual behaviour.<sup>6</sup> The High Court overturned the ban, again citing the importance of freedom of religion as outlined in *Kokkinakis v Greece* and freedom of expression as outlined in *Handyside v United Kingdom*, holding that: “Art 10 protects expressive rights which offend shock or disturb.”<sup>7</sup>

Therefore, it is clear that the protections given to freedom of religion and freedom of expression, as enshrined in the ECHR, take precedence over an individual’s “right” not to be offended by statements critical of homosexuality.

## 2. Educational Freedom

In the second place, the case concerns the freedom of the parents and their children to ensure a teaching that conforms to the religious and philosophical convictions of the parents.

### European Convention on Human Rights

Protocol 1, Article 2 of the European Convention on Human Rights states:

*“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”*

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<sup>4</sup> *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, at para 31.

<sup>5</sup> Application no. 5493/72, 7 December 1976 at para 49. Sweden’s Supreme Court reproduced part of this extract in its own judgment. Emphasis added.

<sup>6</sup> *Re Sandown Free Presbyterian Church* [2011] NIQB 26.

<sup>7</sup> *Id.*, at para 73.

Protocol 1, Article 2 explicitly specifies that the State shall respect the right of parents to ensure education and teaching in conformity with their own philosophical convictions. The rights of parents to educate their children according to their own philosophical beliefs and desires as to what may be in their child's best interest must be safeguarded in order to provide the possibility of pluralism in education, this being essential for the preservation of a democratic society.

Protocol 1, Article 2 enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire education programme of a child.<sup>8</sup> That duty is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State. The verb "respect" means more than "acknowledge" or "take into account".<sup>9</sup>

As the European Court of Human Rights (ECHR) has held, *"It is in the discharge of a natural duty towards their children – parents being primarily responsible for the 'education and teaching' of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education."*<sup>10</sup> Secondly and equally pertinently, the ECHR held that: *"Although individual interests must on occasion be subordinated to those of a group, 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 minorities and avoids any abuse of a dominant position."*<sup>11</sup>

### **International Covenant on Civil and Political Rights and other international documents**

Article 18(4) of the Covenant reads as follows:

*"The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."*

The latest case that dealt with Article 18(4) was the case of *Leirvåg v. Norway* decided by the Human Rights Committee (HRC) on 3 November 2004.<sup>12</sup> In *Leirvåg* the parents of school children in Norway were not able to opt-out their children from relevant parts of a mandatory subject named "Christian Knowledge and Religious and Ethical Education" (CKREE). Although exemptions were available from religious instructions, the parents felt that a large portion of the

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<sup>8</sup> ECHR, *Kjeldsen, Busk Madsen and Pederson v. Denmark*, Judgment of 7 December 1976, Application No. 5095/71, 5920/72, 5926/72, § 52. See also: ECHR, *Folgero and Others v. Norway*, App. No. 15472/02, Judgment of 29 June 2007, § 84(c).

<sup>9</sup> ECHR, *Folgero and Others v. Norway*, *op. cit.*

<sup>10</sup> ECHR, *Folgero and Others v. Norway*, *op. cit.*, § 84(e).

<sup>11</sup> ECHR, *Folgero and Others v. Norway*, *op. cit.*, § 84(f).

<sup>12</sup> Communication No. 1155/2003.

remaining curriculum was running contrary to their philosophical beliefs and amounted to religious indoctrination.

The HRC came to a conclusion that CKREE did not meet the requirement of being delivered in a neutral and objective way and opt-outs for relevant parts of the mandatory subject were not available. The HRC found that the system of partial exemptions did not satisfy the rights of the parents under Article 18.4 of the ICCPR.

Numerous other international documents confirm parents as primary and principal educators of their children. By that fact alone, parents have the greatest rights and the greatest responsibility in the education of their children. State institutions should assist them in this task and should not in any case artificially displace the rights of children and the rights of parents by imposing on the children an education contrary to the beliefs of their parents.

The Universal Declaration of Human Rights, Article 26(3), states that: “*Parents have a prior right to choose the kind of education that shall be given to their children.*”<sup>13</sup>

The United Nations Convention on the Rights of the Child clearly states that the rights of parents are not juxtaposed to the rights of children. Moreover, the parents, being the ones who love their children most, are those most called upon to decide on the education of their children. Article 5 of the Convention states that:

*“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”*

Further, the Convention against Discrimination in Education holds in Article 5(1)(b) that it is essential that States, “*respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction.*”<sup>14</sup>

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<sup>13</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>14</sup> General Conference of the United Nations Educational, Scientific, and Cultural Organization, *Convention Against Discrimination in Education* (1960), entered into force 22 May 1962.

### 3. Confessional nature of the teaching

Lastly, it is necessary to consider the confessional nature of the teachings of the Catholic religion. Thus, we must recall number 5 of the Protocol to the Accord modifying the Lateran Concordat, which requires that “the teaching of the Catholic religion ... is taught in conformity to the doctrine of the Church”. This rule is confirmed and reinforced by the fact that each teacher must be “found worthy by the ecclesiastical authority” who, according to Canon 804 of the Code of Canon Law, must be solicitous that these teachers be “excellent for correct doctrine, witness of the Christian life, and pedagogical ability.”

From another angle it is necessary to highlight that, according to the above mentioned Accord, the teaching of the catholic religion in state schools is optional for the students since they have the power to choose to take the class. In particular, in the university preparatory high school, it is the student (even if he has not reached the age of majority) who exercises that choice. As just seen, the optional nature of the teaching means that it cannot be considered an illegal and undesired indoctrination.

#### Concluding remarks

In the context of the present case, the questionnaire that included an assessment – among others – of homosexual activity, was presented to high-school students during an optional Catholic religion class. The official position on homosexual activity is well defined by the Scripture and by the Magisterium of the Catholic Church for centuries. The Catechism of the Catholic Church defines homosexual acts as “acts of grave depravity, tradition has always declared that ‘homosexual acts are intrinsically disordered’ ... [u]nder no circumstances can they be approved.”<sup>15</sup> Of course the Catechism also emphasizes that individuals with homosexual tendencies must be “accepted with respect, compassion and sensitivity”.<sup>16</sup>

It is clear that the questionnaire circulated in the classroom only echoed the official teaching of the Catholic Church – the core element of any Catholic religion class. To require a teacher in a Catholic religion class to ignore the doctrinal teaching of the Church is at the brink of absurdity.

Furthermore, it seems that the questionnaire was drafted and evaluated in a very neutral and non-prejudicial way as far as individuals with same-sex attractions were concerned. The dispositive argument, however, is the fact that religious instruction classes are only optional for students, thus the participation in these classes is a consequence of their or their parents’ choice.

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<sup>15</sup> Catechism of the Catholic Church, § 2357.

<sup>16</sup> *Id.* at § 2358.

Lastly, Alliance Defending Freedom kindly requests that we are informed, in accordance with the Italian law on administrative procedure of 7 August 1990, number 241, about the decisions your office makes in regard to these proceedings. To that end, please use the correspondence address listed below:

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We sincerely hope that you will find this short analysis useful in your decision making procedure, and we thank you for your attention.

Yours faithfully,

Paul Coleman

Legal Counsel

Alliance Defending Freedom