

## **B) CRÓNICA JURISPRUDENCIAL**



## AUSTRIA

### RECONOCIMIENTO DE PERSONALIDAD JURÍDICA DE LOS TESTIGOS DE JEHOVÁ EN AUSTRIA: EL CASO *RELIGIONSGEMEINSCHAFT DER ZEUGEN JEHOVAS AND OTHERS v. AUSTRIA*.

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**Sentencia del Tribunal Europeo de Derechos Humanos de 31 de julio de 2008.**<sup>117</sup>

#### 1. LOS ANTECEDENTES DEL CASO.

El modelo de reconocimiento de personalidad jurídica de las confesiones religiosas que existe en Austria, es un tanto peculiar, pues parte de la existencia de dos categorías jurídicas claramente diferenciadas:<sup>118</sup>

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<sup>117</sup> Con el patrocinio del Departamento de Educación, Universidades e Investigación del Gobierno Vasco (Resolución 30 de octubre de 2007).

<sup>118</sup> Puede consultarse a este respecto la monografía: TORRES GUTIÉRREZ, ALEJANDRO. *El Derecho de Libertad de Conciencia en Austria*. Dykinson. Madrid. 2006. 494 páginas. Otras obras del autor sobre esta materia:

1) TORRES GUTIÉRREZ, ALEJANDRO. *El reconocimiento estatal de las Confesiones Religiosas en Austria: la Ley Federal sobre reconocimiento de la personalidad jurídica de las comunidades confesionales de carácter religioso*. (BGBl. 19/1998). En: *Laicidad y Libertades. Escritos Jurídicos*. Número 1. Madrid. 2001. Páginas 455 a 490.

2) TORRES GUTIÉRREZ, ALEJANDRO. *El desarrollo jurídico en Austria de la Ley federal sobre reconocimiento de la personalidad jurídica de las comunidades confesionales de carácter religioso*. (BGBl. 19/1998). *El caso de la Comunidad Libre de Cristo - Comunidad Pentecostal*. En: *Laicidad y Libertades. Escritos Jurídicos*. Número 2. Madrid. 2002. Páginas 353 a 382.

1) Las *Confesiones Religiosas plenamente reconocidas* por parte del Estado. La Ley austriaca de reconocimiento de las Confesiones Religiosas de 20 de mayo de 1874, en vigor aún, ha constituido la legislación básica en la materia hasta 1998, y se caracterizaba por su amplia redacción, pues en esencia el reconocimiento quedaba supeditado a la no contradicción con la Ley o el orden público, y a que se ofrecieran unas garantías mínimas de estabilidad y permanencia.<sup>119</sup> Conforme a esta

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3) TORRES GUTIÉRREZ, ALEJANDRO. *Reconocimiento jurídico de las minorías religiosas en Austria*. En: AMÉRIGO, FERNANDO. (Coord.) *Religión, Religiones, Identidad, Identidades. Minorías*. Actas del V Simposio de la Sociedad Española de Ciencias de las Religiones. SECR. Valencia. 2003 Páginas 401 a 423.

4) TORRES GUTIÉRREZ, ALEJANDRO. *Riconoscimento giuridico delle minorie religiose in Austria*. En: *Il Diritto Ecclesiastico*. Fasc 2-2004. Giuffrè. Milán. 2004. Páginas 424 a 444.

TORRES GUTIÉRREZ, ALEJANDRO. *Du Droit Fondamental à la Liberté Religieuse en Autriche*. En: *Civitas Europa*. Volumen 13. Diciembre de 2004. Bruylant. Bruselas. 2004. Páginas 275 a 292.

5) TORRES GUTIERREZ, ALEJANDRO. *El derecho de asociación religiosa y la autonomía interna de las Confesiones Religiosas en la jurisprudencia reciente del Tribunal Constitucional austriaco*. En: *Laicidad y Libertades. Escritos Jurídicos*. Número 4. Madrid. 2004. Páginas 525 a 527.

6) TORRES GUTIÉRREZ, ALEJANDRO. *Interpelaciones a la Comisión Europea en el Parlamento Europeo sobre la legislación en materia de libertad religiosa en Austria en el año 2004*. En: *Laicidad y Libertades. Escritos Jurídicos*. Número 5. Volumen II. Madrid. 2005. Páginas 63 a 65.

7) TORRES GUTIÉRREZ, ALEJANDRO. *Análisis de la nueva legislación federal sobre el estatuto legal de las Iglesias Orientales Ortodoxas, la redenominación dada a la Iglesia "Evangélica"-Metodista, y la nueva política de extranjería en materia de integración de inmigrantes en Austria*. En: *Laicidad y Libertades. Escritos jurídicos*. Número: 6. Volumen II. 2006. Páginas 35 a 69.

<sup>119</sup> Además se incorporaban algunas otras limitaciones que podemos calificar de secundarias, como que sólo pueden ser nombrados miembros de la Junta Directiva de una Confesión Religiosa, los fieles de la misma que ostenten la ciudadanía austriaca y que se encuentren en el pleno goce de los derechos civiles, (artículo 9), y el que como ministros de culto pueden solamente ser designados por la Confesión Religiosa quienes ostenten la ciudadanía austriaca, con una conducta honesta y sean ciudadanos sin tacha, que demuestren una instrucción general mediante la finalización de los estudios de bachillerato, (artículo 10).

legislación, una docena larga de Confesiones religiosas han obtenido pleno reconocimiento estatal.<sup>120</sup>

2) Las meras *Comunidades de creencias de carácter religioso*, que gozan de un estatuto más limitado de derechos, pero que al menos tienen ya personalidad jurídica, y que vienen reguladas por una Ley *ad hoc* de 1998.<sup>121</sup> Para acceder a esta categoría:

1) Será necesaria una solicitud de reconocimiento, que cumpla los requisitos legalmente establecidos.

2) Pero cabe la denegación de este *status* de *Comunidad de creencias de carácter religioso* cuando sea preciso para la protección en una sociedad democrática, de los intereses de la seguridad pública, del orden público, la salud y la moral públicas, o para la tutela de los derechos y libertades de terceros.

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La ausencia de dirigentes y ministros de culto de origen austriaco fue una de las dificultades con las que se encontraron los anglicanos y metodistas para su reconocimiento inmediato conforme a la Ley de 1874. HEINZ, DANIEL. *Church, State and Religious Dissent. A History of Seventh-day Adventists in Austria. 1890-1975*. En: *Archives of International Adventist History*. Tomo 5. Verlag Peter Lang GmbH. Frankfurt am Main. 1993. Página 107.

El artículo 12 establece asimismo ciertas facultades de intervención de la Administración respecto al funcionamiento interno de la Confesión Religiosa, al legitimar al ejecutivo a que exija *la separación de su puesto de un ministro de culto si este fuera reconocido culpable de acciones criminales o delictivas, incurriera en codicia, contraviniera la moralidad pública, produjera escándalo público, o perdiera la ciudadanía austriaca*.

Y en el artículo 15 se hace una quizás en exceso indeterminada referencia a que *la Administración estatal de cultos*, -hoy hay que entender aquí comprendidos a la autoridad administrativa local, al Gobernador Civil y al Ministro Federal de Educación y Asuntos Culturales-, *debe velar por que la Confesión Religiosa reconocida, sus comunidades y órganos, no excedan la esfera de sus competencias y las prescripciones de la presente Ley, así como el fundamento mismo de las disposiciones promulgadas por la autoridad estatal, y que persista la vigencia de las disposiciones de esta Ley. A este fin la autoridad pública puede imponer sanciones por un importe suficiente sobre su patrimonio, así como aplicar las demás medidas legales coercitivas oportunas*.

<sup>120</sup> Véase: TORRES GUTIÉRREZ, ALEJANDRO. *El Derecho de Libertad de Conciencia en Austria*. Dykinson. Madrid. 2006. Páginas 219 y siguientes.

<sup>121</sup> BGBl. 19/1998.

Tal denegación se producirá asimismo en aquellos casos de intimidación con amenazas ilegales, con menoscabo del libre desarrollo psíquico, o con violación de la integridad psíquica debida al empleo de métodos psicoterapéuticos, especialmente con el propósito de interferir en las creencias de un individuo.<sup>122</sup> Habiendo sido aprobada la asociación en el territorio federal será lícita la difusión del fin y de la doctrina religiosa de la Comunidad de creencias de carácter religioso, y el ejercicio del proselitismo.

La nueva categoría legal de *Comunidad de creencias de carácter religioso* se presenta como una fórmula de pendencia hasta la consecución del pleno reconocimiento por parte del Estado, pues el artículo 11 de la Ley Federal sobre reconocimiento de la personalidad jurídica de las Comunidades de creencias de carácter religioso,<sup>123</sup> exige adicionalmente para el pleno reconocimiento de las mismas:<sup>124</sup>

1) Existencia durante al menos 20 años, de los cuales un mínimo de 10 como Comunidad de creencias de carácter religioso con personalidad jurídica en el sentido de esta Ley. Es lo que la doctrina ha denominado como *Bewährungsprobe*, o *Bewährungsfrist*, es decir, período o plazo de *prueba condicional*.<sup>125</sup>

Sin embargo la Ley Federal sobre el estatuto legal de las Iglesias Orientales Ortodoxas en Austria, publicada en el BGBl. el 25 de abril de 2003,<sup>126</sup> ha desarrollado mediante una Ley *ad*

<sup>122</sup> Artículo 5.1.

<sup>123</sup> BGBl. 19/1998.

<sup>124</sup> RGBl. 68/1874.

<sup>125</sup> KALB, HERBERT. *Die Anerkennung von Kirchen und Religionsgemeinschaften in Österreich*. En: POTZ, RICHARD y KOHLHOFER, REINHARD. (Coords.) *Die "Anerkennung" von Religions- gemeinschaften*. Verlag Österreich. Viena. 2002. Página 54.

KALB, HERBERT, POTZ, RICHARD, y SCHINKELE, BRIGITTE. *Religionsrecht*. WUV. Universitätsverlag. Viena. 2003. Página 97.

<sup>126</sup> BGBl. 20/2003.

*hoc* el pleno estatuto de *Corporación de Derecho Público* de la Iglesia Copta Ortodoxa en Austria,<sup>127</sup> que mediante la Resolución de la Ministra Federal de Educación y Asuntos Culturales de 20 de julio de 1998,<sup>128</sup> gozaba ya del *simple* estatuto de *Comunidad de creencias de carácter religioso*, sin tener que pasar por el proceloso cauce de la Ley de 1998, y sin llegar a esperar los 10 años que la misma prevé. KALB<sup>129</sup> ya había señalado con anterioridad que la Iglesia Copta Ortodoxa, podría tener problemas para ser reconocida plenamente mediante el procedimiento de la Ley de 1998, (por estar lejos de cumplir el requisito de contar con el 2 por 1000 de fieles, respecto al total de la población) por ello el legislador austriaco decidió aplicar la Ley de 1874, a una confesión que no se encuentra *bajo sospecha*.

2) Un número de miembros que alcance un mínimo del 2 por 1000 de la población austriaca conforme al último censo. Un requisito que muy pocas de las Confesiones Religiosas que esperan el pleno reconocimiento del Estado bajo la nueva legislación de 1998, van a poder reunir.

La Ley de 20 de mayo de 1874, relativa al reconocimiento legal de las Confesiones Religiosas,<sup>130</sup> no requería un número mínimo de miembros de la Iglesia o Confesión Religiosa, sino la mera garantía del establecimiento y la estabilidad de al menos *una* comunidad de culto, sin determinar si la misma debía estar compuesta por un determinado número de fieles, por lo que era algo que quedaba al prudente arbitrio de los poderes públicos, incluso hay que recordar que el artículo 7 de la Ley de 21 de

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<sup>127</sup> Además del de la Iglesia Armenia Apostólica, (BGBl. 5/1973), y la Iglesia Siria Ortodoxa (BGBl. 129/1988), que ya estaban plenamente reconocidas por el Estado.

<sup>128</sup> El reconocimiento tiene efectos desde el 11 de julio de 1998. GZ 7836/18-9c/98.

<sup>129</sup> KALB, HERBERT. *Die Anerkennung von Kirchen und Religionsgemeinschaften in Österreich*. En: POTZ, RICHARD y KOHLHOFER, REINHARD. (Coords.) *Die "Anerkennung" von Religions- gemeinschaften*. Verlag Österreich. Viena. 2002. Página 53.

<sup>130</sup> RGBl. 68/1874.

marzo de 1890, *Israelitengesetz*, que reguló la estructura externa de las Comunidades Religiosas judías,<sup>131</sup> tan sólo exigía la solicitud de 30 cabezas de familia israelitas, para solicitar la constitución de una *Kultusgemeinde*, es decir, para crear una comunidad de culto, sic.<sup>132</sup>

3) Destino de los ingresos y del patrimonio a fines religiosos (a tal efecto contarán no sólo los fines estrictamente religiosos, sino también los afectos a un interés común o caritativo).

4) Una *actitud positiva* frente a la sociedad y el Estado.<sup>133</sup>

5) Ninguna perturbación ilegal contra la sociedad o contra una Iglesia o Confesión legalmente reconocidas, así como contra otra Comunidad de creencias de carácter religioso.

## **2. LA SITUACIÓN JURÍDICA DE LOS TESTIGOS DE JEHOVÁ EN AUSTRIA A LA LUZ DE LA PRAXIS LEGAL Y ADMINISTRATIVA.**

Los Testigos de Jehová pretendieron el pleno reconocimiento de su personalidad jurídica conforme a la vieja regulación del Imperio, contenida en la Ley de 20 de mayo de 1874, aún en vigor, presentando la oportuna solicitud el 25 de septiembre de 1978. Una serie de dilaciones, silencios administrativos por parte del Ministerio de Educación (competente para resolver la solicitud de reconocimiento) y recursos ante el Tribunal Constitucional y el Tribunal Administrativo, que se dilatan a lo largo de casi dos décadas, culminan con una resolución de 21 de julio de 1997 del Ministro de Educación rechazando la solicitud, bajo la justificación de no

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<sup>131</sup> RGL. 57/1890.

<sup>132</sup> GAMPL, INGE. *Österreichisches Staatskirchenrecht*. Springer Verlag. Viena. 1971. Página 133.

<sup>133</sup> El tenor literal de la Ley es: *positive Grundeinstellung gegenüber Gesellschaft und Staat*.



tener una clara organización interna, y mantener una actitud negativa hacia el Estado y sus instituciones, sobre la base de su objeción de conciencia al servicio militar, su negativa a participar en procesos electorales, y el rechazo a determinados tratamientos médicos.<sup>134</sup>

El 10 de enero de 1998 entró en vigor la nueva Ley sobre reconocimiento de las comunidades de creencias de carácter religioso, y en aplicación de la misma, el 20 de julio de 1998 verán reconocida personalidad jurídica, en virtud de dicha categoría jurídica de *comunidades de creencias de carácter religioso*, que da acceso a un conjunto de derechos más limitado respecto al que gozan las confesiones religiosas plenamente reconocidas como tales por el Estado, especialmente en lo referido al goce de beneficios fiscales, facilidades de acceso al sistema educativo y a los órganos federales de supervisión del sistema escolar, exenciones en el servicio militar y el servicio civil alternativo, así como del cargo de jurados y tutores a favor de los ministros de culto.<sup>135</sup>

Dos días después, el 22 de julio de 1998, los Testigos de Jehová presentan una nueva solicitud de pleno reconocimiento como confesión religiosa, ante el Ministro Federal, conforme a la Ley de 1874, pero es rechazada el 1 de diciembre de 1998, por no haber transcurrido el plazo de 10 años, previsto en la Ley de 1998. Es curioso que en 2003, como ya dijimos, la Iglesia Copta Ortodoxa en Austria, (que había conseguido el reconocimiento como mera comunidad de creencias de carácter religioso el mismo día que los Testigos de Jehová, el 20 de julio de 1998), obtendrá dicho pleno reconocimiento por una Ley *ad hoc*, sin necesidad de esperar ese plazo de 10 años. Hemos tenido ocasión de criticar el sarcasmo que supone este doble rasero en dos trabajos previos, anteriores a la Sentencia que comentamos, y que

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<sup>134</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 26.

<sup>135</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 55.

en el fondo ha venido a ratificar nuestra posición crítica a esta desafortunada forma de proceder de las autoridades austriacas.<sup>136</sup>

El 14 de marzo de 2001, el Tribunal Constitucional rechazó el recurso de los Testigos de Jehová contra la necesidad de esperar 10 años contados a partir de la citada fecha del 20 de julio de 1998, para poder eventualmente acceder a su pleno reconocimiento por parte del Estado, y el 14 de septiembre de 2004 el Tribunal Administrativo ratificó la legalidad de las actuaciones del Ministerio de Educación. Agotados los remedios nacionales, los Testigos de Jehová acuden ante el T.E.D.H. por entender que el rechazo de la administración austriaca a reconocerles plena personalidad jurídica como confesiones religiosas, suponía una violación del derecho a la libertad religiosa contenido en el artículo 9 del Convenio Europeo de Derechos Humanos, y un trato discriminatorio contrario a su artículo 14.

### **3. LA DOCTRINA DEL TRIBUNAL EUROPEO DE DERECHOS HUMANOS EN LA SENTENCIA *RELIGIONSGEMEINSCHAFT DER ZEUGEN JEHOVAS AND OTHERS v. AUSTRIA*, DE 31 DE JULIO DE 2008.**

El TEDH parte de la base que las confesiones religiosas existen tradicionalmente en forma de estructuras organizadas, por lo que el derecho de libertad religiosa recogido en el artículo 9 del Convenio, debe ponerse directamente en conexión con el artículo 11, que salvaguarda el derecho de asociación contra injustificadas interferencias del Estado,<sup>137</sup> añadiendo que uno de

<sup>136</sup> TORRES GUTIÉRREZ, ALEJANDRO. *El Derecho de Libertad de Conciencia en Austria*. Dykinson. Madrid. 2006. Páginas 226, y 244 a 252. TORRES GUTIÉRREZ, ALEJANDRO. *Análisis de la nueva legislación federal sobre el estatuto legal de las Iglesias Orientales Ortodoxas, la red denominación dada a la Iglesia "Evangélica"-Metodista, y la nueva política de extranjería en materia de integración de inmigrantes en Austria*. En: *Laicidad y Libertades. Escritos jurídicos*. Número: 6. Volumen II. 2006. Páginas 35 a 69.

<sup>137</sup> *Relionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 61.

los modos de ejercer el derecho a manifestar la propia religión, especialmente en el caso de una comunidad religiosa, en su dimensión colectiva, es la posibilidad de asegurar la protección judicial de la comunidad, de sus miembros y de sus bienes, por lo que el artículo 9 debe ponerse en conexión no sólo con el artículo 11, sino también con el artículo 6, que reconoce el derecho a un proceso justo.<sup>138</sup>

Las autoridades austriacas argumentaron que no había habido menoscabo del artículo 9 porque la resolución de 20 de julio de 1998 había concedido personalidad jurídica –*limitada*, el subrayado es del autor– a los Testigos de Jehová.<sup>139</sup> El TEDH no se sentirá *persuadido* por dicha argumentación, por dos motivos:<sup>140</sup>

1) Primero habrá que someter a escrutinio si el largo periodo de espera se encuentra suficientemente justificado.

2) En segundo lugar, porque durante dicho plazo, el demandante no habrá tenido personalidad jurídica, con todas las consecuencias que ello acarrea.

El TEDH pasa a continuación a someter a un estricto análisis el largo periodo de tiempo transcurrido desde que el 25 de septiembre de 1978, se inicia el proceso de solicitud de reconocimiento de personalidad jurídica por parte de los Testigo de Jehová, tomando como punto de partida que la existencia autónoma de la comunidades religiosas es fundamental para la consecución del pluralismo en una sociedad democrática, y que afecta al núcleo del derecho de libertad religiosa reconocido en el artículo 9 del Convenio, entendiendo el TEDH que las autoridades nacionales tienen obligación de procurar que el periodo de espera desde que se solicita hasta que se resuelve dicho reconocimiento, sea *razonablemente corto*,<sup>141</sup> en términos

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<sup>138</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 63.

<sup>139</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 65.

<sup>140</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 66.

<sup>141</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 79.

coloquiales, esos procedimientos no pueden *dormir el sueño de los justos*.

El TEDH admite que el reconocimiento de personalidad jurídica limitada del que se beneficiaron los Testigos de Jehová en 1998, les permite gozar de la titularidad de sus propios bienes y capacidad procesal, establecer lugares de culto, ejercer el proselitismo, y producir y distribuir material religioso. Pese a ello, se muestra partidario de ir más allá, y analizar más detenidamente la posición de desventaja de las meras comunidades de creencias de carácter religioso, (constituídas en aplicación de la Ley de 1998), frente a las confesiones religiosas en sentido propio, que gozan de un estatuto de derechos más amplio. Por ello se muestra partidario de resolver este asunto no sólo desde la perspectiva aislada del derecho a la libertad religiosa reconocido en el artículo 9, sino conjuntamente con la prohibición de cualquier tipo de trato arbitrario contenida en el artículo 14.<sup>142</sup>

Los Testigos de Jehová en su escrito de demanda muestran su perplejidad por la discriminación de la que han sido objeto frente a la Iglesia Copta Ortodoxa, que gozó de pleno reconocimiento de personalidad jurídica *ex lege ad hoc* en 2003, pese a no haber transcurrido el plazo de 10 años como comunidad de creencias de carácter religioso que la Ley de 1998 prevé, y pese a tener menor antigüedad y número de fieles.<sup>143</sup> Con ello vienen a reiterar los mismos argumentos que nosotros habíamos venido sosteniendo con anterioridad en nuestra reciente monografía *El Derecho de Libertad de Conciencia en Austria*<sup>144</sup> y en el Volumen II del Número 6 de esta revista,<sup>145</sup> al mostrar

<sup>142</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 82.

<sup>143</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 84.

<sup>144</sup> TORRES GUTIÉRREZ, ALEJANDRO. *El Derecho de Libertad de Conciencia en Austria*. Dykinson. Madrid. 2006. Páginas 226, y 244 a 252.

<sup>145</sup> TORRES GUTIÉRREZ, ALEJANDRO. *Análisis de la nueva legislación federal sobre el estatuto legal de las Iglesias Orientales Ortodoxas, la redenominación dada a la Iglesia "Evangélica"-Metodista, y la nueva política de*

nuestra perplejidad por la doble vara de medir que se estaba empleando en Austria, a raíz del reconocimiento de la Iglesia Copta Ortodoxa en 2003, sin esperar el plazo de 10 años de la Ley de 1998, *manu militari* mediante una Ley *ad hoc*, saltándose a la torera el requisito de un número de fieles que representara al menos el 2 por 1000 de la población austriaca.

Para resolver este asunto, el TEDH pone hincapié en la necesidad de erradicar eventuales tratamientos discriminatorios, que carezcan de una justificación objetiva y razonable,<sup>146</sup> y en la necesidad de que los estados apliquen de manera no arbitraria el marco legal en materia de reconocimiento de la personalidad jurídica de las confesiones religiosas.<sup>147</sup>

El periodo de espera previo al pleno reconocimiento de personalidad jurídica como corporación de derecho público, es según el TEDH un asunto *delicado*, que merece un particular escrutinio,<sup>148</sup> entendiendo que pudiera aceptarse la necesidad del mismo en circunstancias excepcionales, como las que representan por ejemplo colectivos religiosos desconocidos, pero tales demoras son inadmisibles respecto a confesiones religiosas con una larga presencia a nivel internacional, que cuestan con una larga presencia en el territorio nacional, y que por lo tanto resultan *familiares* a las autoridades locales, como es el caso de los Testigos de Jehová, por lo que es tales casos, dichas autoridades deben estar en condiciones de verificar el cumplimiento de los requisitos establecidos por la legislación especial en la materia, en un periodo de tiempo considerablemente menor.<sup>149</sup> Una argumentación similar la habíamos anticipado nosotros, al criticar el perjuicio para *aquellas minorías cuyos expedientes han dormido el sueño de los*

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*extranjería en materia de integración de inmigrantes en Austria.* En: *Laicidad y Libertades. Escritos jurídicos.* Número: 6. Volumen II. 2006. Páginas 35 a 69.

<sup>146</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria.* § 87.

<sup>147</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria.* § 92.

<sup>148</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria.* § 97.

<sup>149</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria.* § 98.

*justos durante muchos años en los despachos de la Administración austriaca, sic, poniendo precisamente como ejemplo prototípico el caso austriaco de los Testigos de Jehová.*<sup>150</sup>

Por todo ello el TEDH entiende *que la diferencia de trato no estaba basada en ninguna “justificación objetiva y razonable”, y concordantemente sentencia que ha habido una violación del artículo 14 de la Convención tomado conjuntamente con el artículo 9.*<sup>151</sup>

El TEDH condena también a Austria por violación del artículo 6 del Convenio, al entender que se ha vulnerado el derecho a un proceso equitativo resuelto en un plazo razonable, por entender excesivo el plazo de tiempo transcurrido entre el 22 de julio de 1998, fecha de solicitud del reconocimiento como confesión religiosa de pleno derecho y la resolución del Tribunal Administrativo de 25 de octubre de 2004, que pone fin al proceso, es decir, casi 5 años y 11 meses después, entendiéndose razonable la demora de 2 años y casi dos meses ante el Tribunal Constitucional, que puede entenderse por la complejidad del caso, pero considerando injustificada la dilación en dictar sentencia por parte de este Tribunal por un plazo de más de 3 años y medio.<sup>152</sup>

En su fallo, el TEDH condena a Austria por 6 votos a 1 por vulneración del artículo 9 y del artículo 14, y por unanimidad por violación del artículo 6 del Convenio Europeo de Derechos Humanos, condenando a la República Federal de Austria al pago de 10.000 euros en concepto de daños no pecuniarios, y 42.000 euros por costas y gastos.

Esta sentencia del TEDH tiene fecha de 31 de julio de 2008, cuando los Testigos de Jehová ya han cumplido el plazo de 10 años, (al que hace referencia la Ley de 1998), como comunidad de creencias de carácter religioso, pues alcanzaron tal

<sup>150</sup> TORRES GUTIÉRREZ, ALEJANDRO. *El Derecho de Libertad de Conciencia en Austria*. Dykinson. Madrid. 2006. Página 237.

<sup>151</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 99.

<sup>152</sup> *Religionsgemeinschaft der Zeugen Jehovas and others v. Austria*. § 116 y 117.

estatuto el 20 de julio de 1998, pese a ello, nunca será tarde para el triunfo del derecho, la justicia y la razón.

ANEXO

**CASO RELIGIONSGEMEINSCHAFT DER ZEUGEN  
JEHOVAS AND OTHERS v. AUSTRIA.**

SENTENCIA DEL TRIBUNAL EUROPEO DE DERECHOS  
HUMANOS DE 31 DE JULIO DE 2008.

(Application no. 40825/98)

JUDGMENT

STRASBOURG

31 July 2008

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

In the case of Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria ...

PROCEDURE

1. The case originated in an application (no. 40825/98) against the Republic of Austria lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a religious community, Religionsgemeinschaft der Zeugen Jehovas in Österreich, and four Austrian nationals, Franz Aigner, Kurt Binder, Karl Kopetzky and Johann Renolder (“the applicants”), on 27 February 1998.

2. The applicants were represented by Mr R. Kohlhofer DR., a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador F.



Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that the refusal of the Austrian authorities to grant legal personality to the first applicant and, subsequently, the decision to grant it legal personality of a more limited scope *vis-à-vis* other religious communities infringed their right to freedom of religion under Article 9 of the convention read alone and in conjunction with Article 14. They further alleged that the proceedings for granting legal personality had lasted an unreasonably long time and that they had no effective remedy to receive a decision on their request for recognition.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. By a decision of 5 July 2005 the Court declared the application partly admissible.

6. Neither of the parties made further observations on the merits (Rule 59 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant is a religious community established in Austria, and the second to fifth applicants were born in 1927, 1935, 1927 and 1930 respectively and live in Vienna.

#### A. First set of proceedings

##### *1. Period before the Constitutional Court's decision of 4 October 1995*

8. On 25 September 1978 the second to fifth applicants and two other claimants requested the Federal Minister for Education and Arts (*Bundesminister für Unterricht und Kunst*) to recognise the first applicant as a religious society (*Religionsgesellschaft*) under the 1874 Recognition Act (*Anerkennungsgesetz*). Since the Minister did not respond, the applicants subsequently filed a

complaint (*Beschwerde*) with the Ombudsman's Office (*Volksanwaltschaft*) about the Minister's inactivity.

9. On 5 February 1981 the Ombudsman's Office issued a statement concerning the complaint. It considered that the Minister's inactivity for almost two years constituted an undesirable state of affairs in public administration (*Missstand im Bereich der öffentlichen Verwaltung*) even though the authority was not formally obliged under the applicable law to take a decision since recognition of a religious society had to be taken in the form of a decree (*Verordnung*). However, since an agreement had been reached in a meeting between the applicants and the Ministry on 3 December 1980, no further steps were required by the Ombudsman's Office. The contents of this agreement were not disclosed by the applicants.

10. On 22 June 1987 the second to fifth applicants requested the Federal Minister for Education, Arts and Sports (*Bundesminister für Unterricht, Kunst und Sport*) to recognise the first applicant as a religious society.

11. The Minister did not grant the request and, after several reminders, informed the applicants that under the 1874 Recognition Act they had no right to obtain a formal decision (*Bescheid*) on their request.

12. On 25 October 1991 the applicants lodged a direct application (*Individualantrag*) with the Constitutional Court (*Verfassungsgerichtshof*). They requested the court to repeal section 2 (1) of the 1874 Recognition Act, as in their view, this provision violated the right to freedom of religion and to freedom of association. They also argued that they were directly affected by this provision without it being necessary for a formal decision by an administrative authority to be taken (Article 140 § 1 *in fine* of the Federal Constitution (*Bundes-Verfassungsgesetz*)).

13. On 14 January 1992 the Federal Government (*Bundesregierung*) submitted their observations to the Constitutional Court. On 27 April 1992 the Constitutional Court

asked the Federal Government to submit supplementary observations, which were filed on 2 June 1992. The Federal Government argued, *inter alia*, that the provisions at issue were in conformity with the Federal Constitution as it was possible for the applicants to found a religious association under the Associations Act (*Vereinsgesetz*).

14. On 25 June 1992 the Constitutional Court rejected the applicants' complaint as inadmissible. Relying on Article 13 of the Convention, the court considered that they were not directly affected by the impugned provisions as, in the light of its judgment of 1988 (*VfSlg* [Judgments and Decisions of the Constitutional Court] 11.931/1988), they had a right to have their case determined by an administrative authority. However, they had not exhausted the legal remedies available to them since they had failed to lodge an application under Article 132 of the Federal Constitution with the Administrative Court (*Verwaltungsgerichtshof*) against the Minister's failure to give a decision (*Säumnisbeschwerde*).

15. On 30 July 1992 the applicants lodged such an application with the Administrative Court. They asked the court to decide on their request for recognition of the first applicant as a religious society under the Recognition Act.

16. On 22 March 1993 the Administrative Court rejected the applicants' request as inadmissible. Referring to its previous case-law on the matter, it found that under the 1874 Recognition Act, a positive decision had to be taken by the competent minister in the form of a decree (*Verordnung*), whereas under Article 132 of the Federal Constitution, the Administrative Court was only competent to deliver individual decisions (*Bescheide*) and not decrees in the place of an administrative authority.

17. On 12 October 1993 the applicants again lodged a direct application under Article 140 § 1 *in fine* of the Federal Constitution with the Constitutional Court, seeking to have sections 1 and 2 of the 1874 Recognition Act repealed. Relying on Article 13 of the Convention, they argued that they had no

effective remedy against the authority which had arbitrarily refused to determine their case.

18. On 10 March 1994 the Constitutional Court dismissed the applicants' complaint as inadmissible. It found that it had already decided the matter in its decision of 25 June 1992. As an *obiter dictum* the court indicated, however, that the second to fifth applicants might request the Constitutional Court to examine a complaint under Article 144 of the Federal Constitution against the Minister's failure to decide on the request for recognition. Once the Constitutional Court refused this request, they could apply to the Constitutional Court under Article 138 of the Federal Constitution for determination of a case where two courts (namely the Administrative Court and the Constitutional Court) declined jurisdiction (*negativer Kompetenzkonflikt*).

19. On 9 May 1994 the second to fifth applicants lodged such a complaint, which the Constitutional Court on 21 June 1994 rejected as inadmissible for lack of jurisdiction. It held that there was no legal provision entitling it to decide on applications about an authority's failure to give a decision.

20. On 16 November 1994 the applicants requested the Constitutional Court under Article 138 of the Federal Constitution to determine the conflict of jurisdiction between the Administrative Court and the Constitutional Court.

21. On 23 June 1995 the Constitutional Court held an oral hearing. On 4 October 1995 the court quashed the Administrative Court's decision of 22 March 1993 and decided that the Administrative Court had jurisdiction to decide on the applicants' complaint of 30 July 1992. The Constitutional Court found that under the 1874 Recognition Act a religious body had a subjective right to recognition as a religious society provided that the conditions laid down in that Act were met. The rule of law required that such a right be an enforceable one, in other words, that refusal to grant recognition should be subject to review by the Austrian courts and not left to the sole discretion of the

administrative authorities. In order to guarantee such a review it was necessary for a negative decision refusing recognition to be taken in the form of a written decision (*Bescheid*). Under the Austrian legal order, only when taking such decisions were the competent authorities bound to deal with a request by a party, whereas no such obligation existed with regard to decrees (*Verordnungen*). A positive decision had to be taken in the form of a decree as it not only had effect *vis-à-vis* the parties but also *vis-à-vis* the general public.

2. *Period after the Constitutional Court's decision of 4 October 1995*

22. On 18 December 1995 the Administrative Court ordered the Federal Minister for Education and Cultural Affairs (*Bundesminister für Unterricht und kulturelle Angelegenheiten* – “the Minister”) to submit the case file within two months and to communicate the arguments in favour of and against recognition.

23. On 13 February 1996 the Federal Minister submitted observations to the Administrative Court, arguing that under the hitherto existing law, a decision was not required and requesting a three-month extension of the time-limit for submission of the case file and detailed observations.

24. On 25 March 1996 the Administrative Court opened preliminary proceedings (*Vorverfahren*) and ordered the Minister to decide within three months on the applicants' request for recognition. The Federal Minister failed to do so.

25. On 28 April 1997 the Administrative Court issued a binding decision (*Erkenntnis*) to the effect that the Minister had a duty to decide on the request for recognition within eight weeks and set out the principles which the Minister had to take into account when taking this decision. On 3 June 1997 the applicants submitted further observations and arguments in their favour to the Minister.

26. On 21 July 1997 the Minister dismissed the applicants' request. It found that the Jehovah's Witnesses could not be

recognised as a religious society under the 1874 Recognition Act because of their unclear internal organisation and their negative attitude towards the State and its institutions. Reference was further made to their refusal to perform military service or any form of alternative service for conscientious objectors, to participate in local community life and elections and to undergo certain types of medical treatment such as blood transfusions.

27. On 3 September 1997 the applicants lodged a complaint against the Minister's decision with the Constitutional Court.

28. On 11 September 1997 the Constitutional Court communicated the complaint to the Minister and requested him to submit, within eight weeks, the case file and any observations he wished to make. The Minister did not respond.

3. *Period after the entry into force of the Act on the Legal Status of Registered Religious Communities (Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften)*

29. On 11 March 1998 the Constitutional Court quashed the Minister's decision of 21 July 1997 and referred the case back to the Minister. It noted that the Minister had neither filed submissions nor submitted the case file, with the result that the decision had to be taken on the basis of the complainants' submissions. The court noted that they had, *inter alia*, argued that the Minister had taken his decision without a proper investigation, basing it on documents of which the complainants had not been informed and on which they had not been given the opportunity to comment. Since the case file was not available to the Constitutional Court, this allegation could not have been refuted. The Constitutional Court therefore concluded that the Minister's decision was arbitrary and violated the principle of equality (*Gleichheitsgrundsatz*).

30. Meanwhile, on 10 January 1998, the Act on the Legal Status of Registered Religious Communities (*Bundesgesetz über die Rechtspersönlichkeit von religiösen*

*Bekennnisgemeinschaften*, hereafter referred to as “the 1998 Religious Communities Act”) had entered into force. Thus, the Minister found that he had to deal with the applicants’ request for recognition under the 1874 Recognition Act as a request under section 11(2) of the 1998 Religious Communities Act. On 20 July 1998 the Minister decided that the first applicant had acquired legal personality as a registered religious community within the meaning of the Religious Communities Act as from 11 July 1998. That decision was served on the applicants on 29 July 1998.

#### B. Second set of proceedings

31. On 22 July 1998 the applicants submitted another request to the Federal Minister for recognition of the first applicant as a religious society under the 1874 Recognition Act.

32. On 1 December 1998 the Federal Minister dismissed the request. It found that, pursuant to section 11(1) of the 1998 Religious Communities Act, a religious community could only be recognised as a religious society under the 1874 Recognition Act if it had already existed as a registered religious community for a minimum of ten years. The first applicant, however, did not meet this requirement at the time when the request for recognition was submitted on 22 July 1998.

33. On 21 January 1999 the applicants lodged a complaint against that decision with the Constitutional Court.

34. On 14 March 2001 the Constitutional Court dismissed the complaint. It found that the ten-year waiting period for registered religious communities as a precondition for a successful application for recognition under the 1874 Recognition Act was in conformity with the Federal Constitution and referred to its previous decision of 3 March 2001 (*VfSlg. 16.102/2001*) on that issue. The decision was served on the applicants’ lawyer on 29 March 2001.

35. Further to a request by the applicants, the case was referred to the Administrative Court in April 2001.

36. On 14 September 2004 the Administrative Court dismissed the applicants' complaint, finding that it concerned in essence questions of the constitutionality and interpretation of section 11(1) of the 1998 Religious Communities Act, which, in the light of the Constitutional Court's ruling of 14 March 2001, did not raise a problem in terms of the Federal Constitution. The Federal Minister had therefore correctly applied that provision. The decision was served on the applicants' lawyer on 25 October 2004.

## II. RELEVANT DOMESTIC LAW

### A. Constitutional provisions

#### 1. *Basic Law 1867* (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger)

37. Under Article 14 of the Basic Law, everybody is granted freedom of conscience and belief. The enjoyment of civil and political rights is independent from religious belief; however, the manifestation of religious belief may not derogate from civic obligations.

38. Article 15 provides that recognised churches and religious communities have the right to manifest their faith collectively in public, to organise and administer their internal affairs independently, to remain in possession of acquired institutions, foundations and funds dedicated to cultural, educational and charitable purposes, however, they are, like all other societies, subordinated to the law.

39. Article 16 entitles the supporters of non-recognised religious communities to domestic manifestation of their faith unless it is unlawful or *contra bonos mores*.

#### 2. *Treaty of St Germain of 10 September 1919 between the Allied Powers and the Republic of Austria*

40. Article 63 § 1 states that Austria undertakes to ensure full and complete protection of life and liberty to all inhabitants of



Austria without distinction on the basis of birth, nationality, race or religion.

41. Article 63 § 2 guarantees to all inhabitants of Austria the right to manifest publicly and privately their thought, religion and beliefs, unless these are incompatible with the protection of public order or morals.

## B. Statutory provisions

### 1. *Recognition of religious societies*

#### **(a) Act of 20 May 1874 concerning the Legal Recognition of Religious Societies (*Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften*), RGBI (*Reichsgesetzblatt*, Official Gazette of the Austrian Empire) 1874/68**

42. Section 1 of the Act provides that all religious faiths which have not yet been recognised in the legal order may be recognised as a religious society if they fulfil the conditions set out in the Act, namely that their teaching, services and internal organisation, as well as the name they choose, do not contain anything unlawful or morally offensive and that the setting up and existence of at least one community of worship (*Cultusgemeinde*) satisfying the statutory criteria is ensured.

43. Section 2 provides that if the above conditions are met, recognition is granted by the Minister for Religious Affairs (*Cultusminister*). Recognition has the effect that a religious society obtains legal personality under public law (*juristische Person öffentlichen Rechts*) and enjoys all rights which are granted under the legal order to such societies. Sections 4 et seq. regulate the setting up of communities of worship, membership of them, delimitation of their territory, and their bodies and statutes. Sections 10 to 12 deal with the nomination of religious ministers (*Seelsorger*) of religious societies, the qualifications such persons must have and how their nomination must be communicated to the authorities. Section 15 provides that the public authorities

responsible for religious matters have a duty to monitor whether religious societies comply with the provisions of the Act.

**(b) Examples of recognised religious societies**

*(i) Recognition by international treaty*

44. The legal personality of the Roman Catholic Church is, on the one hand, regarded as historically recognised, and, on the other hand, explicitly recognised in an international treaty, the Concordat between the Holy See and the Republic of Austria (Federal Law Gazette II, No. 2/1934 – *Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich, BGBl. II Nr. 2/1934*).

*(ii) Recognition by a special law*

45. The following are examples of special laws recognising religious societies:

(a) Act on the External Legal Status of the Israelite Religious Society, Official Gazette of the Austrian Empire, No. 57/1890 (*Gesetz über die äußeren Rechtsverhältnisse der Israelitischen Religionsgesellschaft, RGBl. 57/1890*);

(b) Act of 15 July 1912 on the recognition of followers of Islam [according to the Hanafi rite] as a religious society, Official Gazette of the Austrian Empire No. 159/1912 (*Gesetz vom 15. Juli 1912, betreffend die Anerkennung der Anhänger des Islam [nach hanefitischen Ritus] als Religionsgesellschaft, RGBl. Nr. 159/1912*);

(c) Federal Act on the External Legal Status of the Evangelical Church, Federal Law Gazette No. 182/1961 (*Bundesgesetz vom 6. Juli 1961 über die äußeren Rechtsverhältnisse der Evangelischen Kirche, BGBl. Nr. 182/1961*);

(d) Federal Act on the External Legal Status of the Greek Orthodox Church in Austria, Federal Law Gazette No. 229/1967 (*Bundesgesetz über die äußeren Rechtsverhältnisse der*

*Griechisch-Orientalischen Kirche in Österreich, BGBl. Nr. 182/1961*);

(e) Federal Act on the External Legal Status of the Oriental Orthodox Churches in Austria, Federal Law Gazette No. 20/2003 (*Bundesgesetz über äußere Rechtsverhältnisse der Orientalisch-Orthodoxen Kirchen in Österreich, BGBl. Nr. 20/2003*).

(iii) *Recognition by a decree (Verordnung) under the Recognition Act 1874*

46. Between 1877 and 1982 the competent ministers recognised a further six religious societies.

## *2. Registration of religious communities*

**Act on the Legal Status of Registered Religious Communities (*Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*), Federal Law Gazette - BGBl I 1998/19**

47. The Religious Communities Act entered into force on 10 January 1998. Pursuant to Section 2(3) of the Act, the Federal Minister for Education and Culture has to rule in a formal written decision (*Bescheid*) on the acquisition of legal personality by the religious community. In the same decision the Minister has to dissolve any association whose purpose was to disseminate the religious teachings of the religious community concerned (section 2(4)). The religious community has the right to call itself a “publicly-registered religious community”.

48. Section 4 specifies the necessary contents of the statutes of the religious community. Among other things, they must specify the community’s name, which must be clearly distinguishable from the name of any existing religious community or society. They must further set out the main principles of the religious community’s faith, the aims and duties deriving from it, the rights and duties of the community’s adherents, including the conditions for terminating membership (it is further specified that no fee for leaving the religious community may be charged), how its bodies are appointed, who represents the religious community externally

and how the community's financial resources are raised. Lastly, the statutes must contain provisions on the liquidation of the religious community, ensuring that the assets acquired are not used for ends contrary to religious purposes.

49. Under section 5, the Federal Minister must refuse to grant legal personality to a religious community if, in view of its teachings or practice, this is 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 freedom of others; this is in particular the case if its activities involve incitement to commit criminal offences, obstruction of the psychological development of adolescents or undermining of people's mental integrity, or if the statutes do not comply with section 4.

50. Under section 7, the religious community must inform the Federal Minister for Education and Cultural Affairs of the name and address of the persons belonging to its official bodies and of any change of its statutes without delay. The Minister must refuse to accept the notification if the appointment of the official bodies contravened the statutes or if the change of the statutes would constitute a reason for refusal of registration under section 5.

51. Section 9 specifies the reasons for termination of a community's legal personality. Legal personality ceases to exist if the religious community dissolves itself or if the acknowledgment of its legal personality is revoked. Reasons for revoking legal personality are set out in subsection (2): for example, if the reasons for granting legal personality no longer subsist or if for more than one year no bodies representing the religious community externally have been appointed.

52. The Act only regulates the granting of legal personality. Once legal personality has been granted to a religious community, it may pursue the activities referred to in its statutes. There are no specific laws in Austria regulating the acquisition of assets by religious societies or communities, the establishment of

places of worship or assembly, or the publication of religious material. However, provisions which contain explicit references to religious societies are spread over various statutory instruments (see below).

53. Since the entry into force of the Religious Communities Act on 10 January 1998, non-recognised religious associations may be granted legal personality upon application. A previous application for recognition under the Recognition Act is to be dealt with as an application under the Religious Communities Act pursuant to section 11(2).

54. Section 11(1) of the Religious Communities Act establishes additional criteria for a successful application under the Recognition Act, such as the existence of the religious association for at least twenty years in Austria and for at least ten years as a registered religious community; a minimum number of two adherents per thousand members of the Austrian population (at the moment, this means about 16,000 persons); the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the State; and no illegal interference as regards the community's relationship with recognised or other religious societies.

### *3. Specific references to religious societies in the Austrian legal order*

55. In various Austrian laws specific reference is made to recognised religious societies. The following list, which is not exhaustive, sets out the main instances.

Under section 8 of the Federal School Supervision Act (*Bundes-Schulaufsichtsgesetz*), representatives of recognised religious societies may sit (without the right to vote) on regional education boards.

Under the Private Schools Act (*Privatschulgesetz*), recognised religious societies, like public territorial entities, are presumed to possess the necessary qualifications to operate private schools, whereas other persons have to prove that they are qualified.

Under section 24(3) of the Military Service Act, ordained priests, persons involved in spiritual welfare or in religious teaching after graduation from theological studies, members of a religious order who have made a solemn vow and students of theology who are preparing to assume a pastoral function and who belong to a recognised religious society are exempt from military service and, under section 13 of the Civilian Service Act, are also exempt from alternative civilian service.

Under sections 192 and 195 of the Civil Code (*ABGB*), ministers of recognised religious societies are exempt from the obligation to submit an application to be appointed as guardians, and under section 3 (4) of the 1990 Act on Juries of Assizes and Lay Judges (*Geschworenen- und Schöffengesetz*) they are exempt from acting as members of a jury of an assize court or as lay judges of a criminal court.

Section 18(1)(5) of the Income Tax Act provides that contributions to recognised religious societies are deductible from income tax up to an amount of 100 euros (EUR) per year.

Section 2 of the Land Tax Act (*Grundsteuergesetz*) provides that real property owned by recognised religious societies and used for religious purposes is exempt from real-estate tax.

Under section 8(3)(a) of the 1955 Inheritance and Gift Act (*Erbschafts- und Schenkungsteuergesetz*), which was still in force at the relevant time, donations to domestic institutions of recognised churches or religious societies were subject to a reduced tax rate of 2.5%.

## **THE LAW**

### **I. ALLEGED VIOLATION OF ARTICLES 9 AND 11 OF THE CONVENTION**

56. The applicants complained that the refusal of the Austrian authorities to grant legal personality to the first applicant by conferring on it the status of a religious society under the Recognition Act violated their right to freedom of religion. They

further submitted that the legal personality conferred on the first applicant under the Religious Communities Act was limited and insufficient for the purposes of Article 9 of the Convention. The applicants also relied on Article 11 of the Convention. These provisions read as follows:

**Article 9: Freedom of thought, conscience and religion**

“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 and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to 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 11: Freedom of assembly and association**

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

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others...”

**A. Submissions by the parties**

57. The applicants submitted that the refusal of the Austrian authorities to grant legal personality to the first applicant by conferring on it the status of a religious society recognised under the Recognition Act violated their right to freedom of religion. In particular, before July 1998, the first applicant could not have been established as a legal entity and, thus, could not have entered into legal relations, concluded contracts or acquired

assets. The first applicant had, thus far, no internal autonomy, could not hire the necessary religious ministers and was not entitled to perform its pastoral work for believers in hospitals or prisons. The second to fifth applicants, as leading executives of the first applicant, were also limited in exercising their right to freedom of religion. Neither the Basic Law 1867 nor the 1998 Religious Communities Act provided explicitly for the internal autonomy of a religious community. The Constitutional Court had found (in its judgment of 3 March 2001, B1713/98 – see paragraph 34 above) that registered religious communities, unlike recognised religious societies, did not enjoy the right to comprehensive organisation and administration of their internal affairs without State interference. Lastly, the applicants contested that they would have had the possibility of forming an association under the Associations Act. They referred to the Constitutional Court's finding of 1929 (*VfSlg. 1265/1929*), confirming the administrative authorities' practice not to allow religious societies to form an association, and thus refusing the request of the Jehovah's Witnesses (*Ernste Bibelforscher*) to set up an association. Thereafter the Jehovah's Witnesses had not tried again to form an association, but auxiliary associations (*Hilfsvereine*) with specialised religious aims had been created. The two examples of associations submitted by the Government were likewise merely auxiliary associations. It was not until the enactment of the 2002 Associations Act that religious societies had been allowed to set up an association.

58. The Government contested that there had been an interference with the applicants' right to freedom of religion. Since the entry into force of the 1919 Treaty of St Germain, all Austrian inhabitants had been allowed to practise publicly and privately their thought, religion and beliefs, irrespective of whether their religious society, community or church was recognised or had legal status. The right to autonomous administration of the entity's internal organisation was likewise guaranteed. Referring to a judgment of the Constitutional Court



(*VfSlg. 10.915/1986*), the Government contended that the refusal of recognition did not impede the applicants' exercise of their right to freedom of religion within the meaning of Article 9 of the Convention. Against this background, they contested that the first applicant had no legal personality in Austria, was legally non-existent and could not acquire assets or enter into legal relations, because these allegations concerned the first applicant's situation before it had obtained legal personality as a registered religious community on 11 July 1998. Even before the entry into force of the 1998 Religious Communities Act, the first applicant had had the possibility of setting up an association with a religious purpose under the Associations Act, as the Federation of Evangelical Municipalities in Austria (*Bund Evangelikaler Gemeinden in Österreich*) had on 21 March 1992, and the Church of Scientology in Austria (*Scientology Kirche Österreich*) on 20 May 1984. However, the applicants did not appear to have made any efforts to that end.

59. The Government maintained that the status conferred on the first applicant as a registered religious community under the 1998 Religious Communities Act complied with the requirements of Article 9; it only provided a legal status and in no way restricted the exercise or enjoyment of the right to freedom of religion. In conclusion, there had been no interference with the applicants' rights under Article 9 of the Convention.

## **B. The Court's assessment**

60. The Court considers that the above complaints fall to be considered under Article 9 of the Convention, although in interpreting these provisions due regard to Article 11 of the Convention will be had (see *Hasan and Chaush v. Bulgaria*, no. 30985/96, §§ 62 and 91, ECHR 2000-XI).

61. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to

“manifest [one’s] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions (see *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260, p. 17, § 31; and *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I). Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords (see *Hasan and Chaush*, cited above, § 62).

62. The Court reiterates further that the ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning. The Court has consistently held the view that a refusal by the domestic authorities to grant legal-entity status to an association of individuals amounts to an interference with the applicants’ exercise of their right to freedom of association (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 52 et passim, 17 February 2004, and *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, *Reports of Judgments and Decisions* 1998-IV, § 31 et passim). Where the organisation of the religious community was at issue, a refusal to recognise it has also been found to constitute interference with the applicants’ right to freedom of religion under Article 9 of the Convention (see *Metropolitan Church of Bessarabia*, cited above, § 105).

63. In addition, one of the means of exercising the right to manifest one’s religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also

in the light of Article 6 (see, *mutatis mutandis*, *Sidiropoulos and Others v. Greece*, judgment of 10 July 1998, *Reports* 1998-IV, p. 1614, § 40; *Canea Catholic Church v. Greece*, judgment of 16 December 1997, *Reports* 1997-VIII, p. 2857, §§ 33 and 40-41; and *Metropolitan Church of Bessarabia and Others*, cited above, § 118).

*1. Whether there was an interference*

64. The Court must first determine whether there was an interference with the applicants' right to freedom of religion. In this connection it observes that in 1978 some of the applicants and other persons applied for recognition of the first applicant as a religious society under the 1874 Recognition Act, thereby seeking to have legal personality conferred on the first applicant. After complex proceedings, on 20 July 1998 the first applicant was granted legal personality under the Religious Communities Act, which had been passed in the meantime.

65. The Government maintained that there had been no interference with the applicants' rights under Article 9 because the first applicant had eventually been granted legal personality and the members of the Jehovah's Witnesses had not been hindered in practising their religion individually and could have set up an association having an organisational structure and legal personality.

66. The Court is not persuaded by that argument. On the one hand the period which elapsed between the submission of the request for recognition and the granting of legal personality is substantial and it is therefore questionable whether it can be treated merely as a period of waiting while an administrative request was being processed. On the other hand, during this period the first applicant did not have legal personality, with all the consequences attached to this lack of status.

67. The fact that no instances of interference with the community life of the Jehovah's Witnesses have been reported during this period and that the first applicant's lack of legal personality may be compensated in part by running auxiliary

associations, as stated by the applicants, is not decisive. The Court reiterates in this connection that the existence of a violation is conceivable even in the absence of prejudice or damage; the question whether an applicant has actually been placed in an unfavourable position is not a matter for Article 34 of the Convention and the issue of damage becomes relevant only in the context of Article 41 (see, among many authorities, *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 27; *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, § 66; and *Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, § 38; see also *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 64-65, ECHR 2006-...; *Church of Scientology Moscow v. Russia*, no. 18147/02, § 72, 5 April 2007).

68. The Court therefore considers that there has been an interference with the applicants' right to freedom of religion, as guaranteed by Article 9 § 1 of the Convention.

69. In order to determine whether that interference entailed a breach of the Convention, the Court must decide whether it satisfied the requirements of Article 9 § 2, that is, whether it was "prescribed by law", pursued a legitimate aim for the purposes of that provision and was "necessary in a democratic society".

## 2. *Whether the interference was prescribed by law*

70. Neither the applicants nor the Government made any observations on this point.

71. The Court refers to its established case-law to the effect that the terms "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measures have some basis in domestic law, but also refer to the quality of the law in question, which must be sufficiently accessible and foreseeable as to its effects, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see *The Sunday Times v. the United Kingdom (no. 1)*, judgment of 26

April 1979, Series A no. 30, p. 31, § 49; *Larissis and Others v. Greece*, judgment of 24 February 1998, *Reports 1998-I*, p. 378, § 40; *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; and *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V).

72. In the present case the Court notes that Section 2 of the 1874 Recognition Act requires religious denominations to be recognised by the competent federal minister and that it is a precondition for recognition that the conditions under sections 1 and 6 are met.

73. The Court therefore accepts that the interference in question was “prescribed by law”.

### 3. *Legitimate aim*

74. The parties did not make any observations on this point either.

75. The Court considers that States are entitled to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety (see *Metropolitan Church of Bessarabia and Others*, cited above, § 113).

76. Having regard to the circumstances of the case, the Court considers that the interference complained of pursued a legitimate aim under Article 9 § 2, namely protection of public order and public safety.

### 4. *Necessary in a democratic society*

77. The Court notes that from 1978, when the applicants submitted the request for recognition of the first applicant as a religious society, some 20 years elapsed until legal personality was eventually conferred on the first applicant.

78. The Court finds that such a prolonged period raises concerns under Article 9 of the Convention. In this connection the Court reiterates that the autonomous existence of religious communities is indispensable for pluralism in a democratic

society and is thus an issue at the very heart of the protection which Article 9 affords (see *Hasan and Chaush*, cited above, § 62).

79. Given the importance of this right, the Court considers that there is an obligation on all of the State's authorities to keep the time during which an applicant waits for conferment of legal personality for the purposes of Article 9 of the Convention reasonably short. The Court appreciates that during the waiting period the first applicant's lack of legal personality could to some extent have been compensated by the creation of auxiliary associations which had legal personality, and it does not appear that the public authorities interfered with any such associations. However, since the right to an autonomous existence is at the very heart of the guarantees in Article 9 these circumstances cannot make up for the prolonged failure to grant legal personality to the first applicant.

Since the Government have not relied on any "relevant" and "sufficient" reasons justifying this failure, the above measure went beyond what would have amounted to a "necessary" restriction on the applicants' freedom of religion.

80. It follows that there has been a violation of Article 9 of the Convention.

81. The applicants also complain that the legal personality conferred on the first applicant under the Religious Communities Act was limited and insufficient for the purposes of Article 9 of the Convention.

82. The Court observes that through its recognition as a religious community the first applicant had legal personality, which allowed it to acquire and manage assets in its own name, to have legal standing before the courts and authorities, to establish places of worship, to disseminate its beliefs and to produce and distribute religious material. In so far as the applicant argued that the status thus obtained put it at a disadvantage *vis-à-vis* religious

societies, this matter will be examined below under Article 14 read in conjunction with Article 9 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 9

83. The applicants submitted that the status of a registered religious community was inferior to that of a religious society, and that this constituted discrimination prohibited by the Convention. They relied on Article 14 read in conjunction with Article 9 and 11 of the Convention. Article 14 of the Convention, in so far as relevant, reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... religion, political or other opinion ... or other status.”

### A. Submissions by the parties

84. The applicants submitted that the status of a registered religious community was inferior to that of a religious society and insufficient. They contended that the first applicant was subject to State control in respect of its religious doctrine, its rules on membership and the administration of its assets pursuant to sections 3-5 and 11 of the 1998 Religious Communities Act. They repeated in essence their above complaints. In particular, the applicants disputed the necessity of the ten-year waiting period, as the recognition of the Coptic Orthodox Church by a specific law in 2003 (see paragraph 45(e) above) proved the contrary. The Coptic Orthodox Church had only existed in Austria since 1976 and had been registered as a religious community in 1998. The applicants argued that most of the registered religious communities and even most of the recognised religious societies did not fulfil the criterion for the minimum number of adherents, which showed that this requirement was unnecessary for the observance of public duties, contrary to what the Government maintained. Since the first applicant, which was the fifth largest religious community in Austria and was thus even

bigger than most recognised religious societies, also complied with the necessary number of adherents, it should have been recognised a long time ago. Further, the requirement of the use of income and other assets for religious purposes, including charity activities, was discriminatory as it interfered in an unjustified way with the first applicant's internal administration and organisation, in breach of both Article 9 of the Convention and Article 15 of the Basic Law 1867. The prerequisite of a positive attitude towards society and the State was discriminatory as it was not required in respect of any other natural or legal personality in Austria. Further, it did not meet the "prescribed by law" requirement under Article 9 § 2 of the Convention. The same applied to the criterion of non-interference with other religious societies. Moreover, under Austrian law, recognised religious societies enjoyed privileged treatment in various fields which did not extend to religious communities.

85. The Government contended that there had been no discrimination of the applicants in respect of the first applicant's status as a registered recognised community, as the criteria introduced by section 11 of the 1998 Religious Communities Act had already corresponded to the administrative authorities' practice for granting recognition under the 1874 Recognition Act before the entry into force of the 1998 Act. In respect of the ten-year waiting period for registered religious communities, the Government referred to the Constitutional Court's finding of 3 March 2001 (*VfSlg. 12.102/2001*) that that requirement served the legitimate aim of ensuring that the competent authority could verify during this period of time whether the religious community was ready to integrate into the existing legal order, in particular whether it performed unlawful activities as a consequence of which legal personality had to be withdrawn (section 9(2) and section 5(1) of the Religious Communities Act). Examples of such unlawful activities were incitement to commit criminal offences, endangering the psychological development of minors,



violating the psychological integrity of persons or using psychotherapeutic methods to disseminate its religious beliefs.

86. As regards the requirement of a certain number of adherents, the Government maintained that this criterion was not only important for the religious community's existence but also for ensuring that certain duties were fulfilled, such as organising and monitoring the teaching of its beliefs in schools. The precondition of the use of income for religious purposes was also provided for under the 1874 Recognition Act (sections 5 and 6) and was thus not new. Since recognised religious societies obtained the status of a legal person under public law, which entailed duties and obligations in the public interest, the requirement of a positive attitude towards society and the State – meaning acceptance of a pluralistic State and the basic principles of the rule of law, which did not preclude the disapproval of particular provisions for reasons of conscience – did not appear discriminatory. Finally, the obligation not to interfere illegally with recognised or other religious societies was not discriminatory either.

### **B. The Court's assessment**

87. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the “rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter (see *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, p. 585, § 22). Moreover, a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, 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 (*ibid.*, § 30).

88. Having regard to the above findings under Article 9, the Court finds that there is no doubt that Article 14 of the Convention, taken in conjunction with Article 9, is applicable in the present case.

89. The applicants submitted that the status of a religious community conferred upon the first applicant was inferior to the status held by religious societies, as religious communities were subject to more severe State control in respect of their religious doctrine, their rules on membership and the administration of their assets pursuant to sections 3-5 and 11 of the 1998 Religious Communities Act.

90. The Court would point out at the outset that in proceedings originating in an application lodged under Article 34 of the Convention it has to confine itself, as far as possible, to the examination of the concrete case before it. Its task is not to review domestic law and practice *in abstracto* and to express a view as to the compatibility of the provisions of legislation with the Convention, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention (see *Eriksson v. Sweden*, judgment of 22 June 1989, Series A no. 156, p. 23, § 54; *Findlay v. United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, p. 279, § 67; and *Fédération Chrétienne des Témoins de Jéhovah de France v. France* (dec.), no. 53430/99, ECHR 2001-XI). Accordingly, by the term “victim”, Article 34 of the Convention means the person directly affected by the act or omission which is in issue. Article 34 of the Convention may not be used to found an action in the nature of an *actio popularis*. It may only exceptionally entitle individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246, p. 22, § 44; *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142,

pp. 15-16, §§ 30-32; and *S.L. v. Austria* (dec.), no. 45330/99, 22 November 2001).

91. The applicants further complained of the discriminatory nature of section 11 of the 1998 Religious Communities Act. This provision amended the Recognition Act in that it introduced further requirements for recognition as a religious society. In particular, it requires the existence of the religious association for at least twenty years in Austria and for at least ten years as a registered religious community; a minimum number of two adherents per thousand members of the Austrian population (at the moment, this means about 16,000 persons); the use of income and other assets for religious purposes, including charity activities; a positive attitude towards society and the State; and no illegal interference as regards the association's relationship with recognised or other religious societies.

92. The Court observes that under Austrian law, religious societies enjoy privileged treatment in many areas. These areas include exemption from military service and civilian service, reduced tax liability or exemption from specific taxes, facilitation of the founding of schools, and membership of various boards (see "Relevant domestic law" above). Given the number of these privileges and their nature, in particular in the field of taxation, the advantage obtained by religious societies is substantial and this special treatment undoubtedly facilitates a religious society's pursuance of its religious aims. In view of these substantive privileges accorded to religious societies, the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain requires therefore that if a State sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner.

93. The Court notes that in the present case the Federal Minister for Education and Cultural Affairs, on 1 December

1998, dismissed the request for recognition of the first applicant as a religious society, relying on section 11(1) of the Religious Communities Act, on the ground that it had not existed as a registered religious community for a minimum of ten years. Since only this element of section 11 was applied, the Court does not find it necessary to examine the other parts of this provision that were challenged by the applicants.

94. The Government argued that the ten-year waiting period for registered religious communities served a useful purpose as it allowed the competent authority to verify during this period of time whether the religious community was ready to integrate into the existing legal order, in particular whether it performed unlawful activities as a consequence of which legal personality had to be withdrawn (section 9(2) and section 5(1) of the Religious Communities Act).

95. The applicants disputed the necessity of the ten-year waiting period, as the recognition of the Coptic Orthodox Church by a specific law in 2003 (see paragraph 45(e) above) proved the contrary. The Coptic Orthodox Church had only existed in Austria since 1976 and had been registered as a religious community in 1998, whereas the first applicant, which had existed in Austria for a considerably longer period, was still a religious community.

96. The Court reiterates that Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of that Article (see “*Case relating to certain aspects of the laws on the use of languages in education in Belgium*” (merits), judgment of 23 July 1968, Series A no. 6, § 10, and *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). A difference of treatment is, however, 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 (see *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, § 39).

97. The Court finds that the imposition of a waiting period before a religious association that has been granted legal personality can obtain a more consolidated status as a public-law body raises delicate questions, as the State has a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs (see *Metropolitan Church of Bessarabia and Others*, cited above, § 116). Such a waiting period therefore calls for particular scrutiny on the part of the Court.

98. The Court could accept that such a period might be necessary in exceptional circumstances such as would be in the case of newly established and unknown religious groups. But it hardly appears justified in respect of religious groups with a long-standing existence internationally which are also long established in the country and therefore familiar to the competent authorities, as is the case with the Jehovah's Witnesses. In respect of such a religious group, the authorities should be able to verify whether it fulfils the requirements of the relevant legislation within a considerably shorter period. Further, the example of another religious community cited by the applicants shows that the Austrian State did not consider the application on an equal basis of such a waiting period to be an essential instrument for pursuing its policy in that field.

99. The Court therefore finds that the difference in treatment was not based on any "objective and reasonable justification". Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 9.

### III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

100. The applicants complained under Article 6 of the Convention about the length of the proceedings concerning their request for recognition of the first applicant as a religious society.

101. Article 6, as far as relevant, provides as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time... by [a] ... tribunal...”

#### A. Submissions by the parties

102. The applicants maintained that Article 6 was applicable to the proceedings at issue as their determination was crucial for their civil rights and obligations, even if it also involved legal consequences under public law.

103. As regards the length of the proceedings, they contested that the Austrian authorities had not been responsible for the delay. In particular, in their observations of 19 December 2003, the applicants submitted that they had requested recognition as far back as September 1978. As the Minister had failed to give a decision, the Ombudsman’s Office, further to a complaint by the applicants, issued a notice on 5 February 1981 finding that the inactivity of the Minister constituted an undesirable state of affairs in public administration (*Missstand im Bereich der öffentlichen Verwaltung*). The applicants pointed out that the Constitutional Court had already found in 1988 (*VfSlg. 11.931/1988*) that the Ministry was obliged to decide on a request for recognition. The lapse of time of nine years between their first request for recognition in 1978 and the one they submitted in 1987 had already been in breach of the reasonable-time requirement under Article 6 of the Convention. In 1992 the Constitutional Court had again decided that the applicants had a right to obtain a decision and even their complaint about the authority’s inactivity had not resulted in a decision. Only in

December 1995 had the Administrative Court followed the Constitutional Court's opinion and requested the Minister to give a decision and to submit the case file, but the Minister had failed to comply. It was not until the Administrative Court's decision of 28 April 1997 that the Minister had been obliged to take a decision on the request for recognition. The Minister's inactivity between 1992 and 1997, despite numerous requests to give a decision – even, eventually, by both the highest courts – could not be considered to have been unattributable to the administrative authorities as the Government contended. The Administrative Court and the Constitutional Court had likewise not decided speedily. Moreover, the proceedings were not complex; they only involved one issue, namely the availability of a legal remedy as provided for by Article 13 of the Convention. In addition, the determination of the requirements for recognition was not complicated and did not justify delaying a decision from 1978 until 2008, which would be the first possible date for recognition after the entry into force of the 1998 Religious Communities Act. In conclusion, all the delays were exclusively attributable to the Austrian authorities.

104. The Government contested that Article 6 was applicable to the case, arguing that the subject-matter of the proceedings was the applicants' request to obtain legal personality and the ensuing status of a public-law corporation under the 1874 Recognition Act. However, irrespective of the fact that the applicants had had the possibility of obtaining legal status as an association, as well as the fact that the first applicant had been granted legal status under the 1998 Religious Communities Act with effect from 11 July 1998, the Government found that it was not discernable to what extent a decision in recognition proceedings determined "civil rights and obligations", within the meaning of Article 6, since recognition also entailed the assumption of public duties on the part of a religious community. Referring to the cases of *Canea Catholic Church* (cited above, §§ 41-42) and *Metropolitan Church of Bessarabia and Others* (cited above, §§ 141-142), the Government submitted that the question of non-recognition or

recognition under the 1874 Recognition Act did not have any bearing on the first applicant's assets either.

105. Assuming that Article 6 was applicable, the Government argued that the duration of the proceedings was reasonable and resulted from the complexity of the case. Such complexity could be inferred from the difficulties in implementing a law dating back to 1874 and from the process of finding a solution to the diverging legal opinions of the Constitutional Court, on the one hand, and the Administrative Court, on the other, on the question whether or not the first applicant had a right to obtain an individual decision if the requirements for recognition under the 1874 Recognition Act were not met. It was only from 28 April 1997, when the Administrative Court had departed from its previous case-law and adopted the Constitutional Court's view that the first applicant had a right to obtain a decision, that this legal conflict had been resolved. As regards the conduct of the administrative authorities and courts, the Government submitted that no delays had occurred; in particular, the Administrative Court and the Constitutional Court had taken their decisions as quickly as possible.

## **B. The Court's assessment**

### *1. Applicability of Article 6 § 1 of the Convention*

106. The Court reiterates that the applicability of Article 6 depends on whether there was a dispute over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law, and, if so, whether this "right" was of a "civil" character within the meaning of Article 6 § 1 (see *Oerlemans v. the Netherlands*, judgment of 27 November 1991, Series A no. 219, pp. 20-21, §§ 45-49).

107. The Court further notes that, in principle, the civil-law limb of this provision applies to proceedings concerning the registration of associations by which they obtain legal personality (see for example, *Apeh Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, § 32-36, ECHR 2000-X).



108. In the present case the proceedings concerning the applicants' request for recognition of the first applicant as a religious society also concerned the first applicant's legal status and, in so far as there existed a right to such a decision under domestic law, the proceedings complained of involved the determination of the applicants' civil rights. To this extent Article 6 applies.

## *2. Compliance with Article 6 § 1 of the Convention*

109. The Court notes at the outset that two different sets of proceedings need to be distinguished, namely the proceedings concerning the application for recognition submitted on 25 September 1978 and those concerning the application submitted on 22 July 1998.

### **(a) Proceedings concerning the request for recognition of 25 September 1978**

110. As regards the length of the first set of proceedings, the Court must also determine from what moment such a right under Article 6 existed. While the Federal Minister for Education, Arts and Sports and the Administrative Court, relying on its own and the Constitutional Court's decisions, found that no formal decision had to be taken when a request for recognition was refused, as there was no right to such a decision, the Constitutional Court, in its decision of 4 October 1995 in the context of special proceedings for determining a dispute between the highest courts, found that the Recognition Act had to be construed in such a way that a right to a decision on a request for recognition existed. It was from that moment that the domestic authorities were under an obligation to give a formal decision – positive or negative – on a request for recognition. It was also from that moment that the period to be taken into consideration under Article 6 § 1 started to run. The proceedings ended on 29 July 1998, when the decision of the Federal Minister granting the first applicant legal personality under the Religious Communities Act was served on the applicants. Thus, the proceedings lasted approximately two years and ten months.

111. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in the litigation (see, for instance, *Humen v. Poland* [GC], no. 26614/95, § 60, 15 October 1999).

112. In the Court's view the proceedings were complex, as the domestic authorities decided on the applicants' case on the basis of a change in the Constitutional Court's case-law and new legislation enacted in the meantime. Moreover, the applicants' case was dealt with twice by the competent Federal Minister as well as by the Administrative Court and the Constitutional Court. In these circumstances, the Court does not find that the duration of the above proceedings exceeded the reasonable-time requirement under Article 6 § 1.

113. It follows that there has been no breach of the reasonable-time requirement as regards the proceedings concerning the first application for recognition.

**(b) Proceedings concerning the request for recognition of 22 July 1998**

114. On 22 July 1998 the applicants submitted another request for recognition of the first applicant as a religious society. The relevant period under Article 6 § 1 started on 1 December 1998, when the Federal Minister dismissed the applicants' request, as it was then that the "dispute" within the meaning of Article 6 arose. It ended on 25 October 2004 with the service of the Administrative Court's decision. The proceedings thus lasted almost five years and eleven months.

115. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the

relevant authorities (see, among other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II).

116. The Court observes that during the relevant period the applicants' request was determined at three levels of jurisdiction. There were, however, two lengthy periods of inactivity. First, the case was pending for two years and almost two months before the Constitutional Court, which examined the constitutionality of various provisions of the Religious Communities Act and gave a reasoned decision on the merits of the applicants' complaint. Secondly, more than three and a half years elapsed before the Administrative Court decided on the complaint. While the lapse of time before the Constitutional Court may be explained by the complexity of the issue, the inactivity of the Administrative Court remained unexplained by the Government.

117. In conclusion, the Court considers that the second set of proceedings did not comply with the reasonable-time requirement under Article 6 § 1. Accordingly, there has been a violation of Article 6 of the Convention.

#### IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

118. The applicants complained under Article 13 of the Convention that they had no effective remedy at their disposal to receive a decision on their request for recognition.

Article 13 reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

119. The applicants argued that for more than 110 years both the highest courts in Austria had been of the opinion that there was no remedy against an administrative authority's failure to decide on a request for recognition. Only in 1988 had the Constitutional Court held for the first time that the right to recognition was legally enforceable, a position which the

Administrative Court had eventually acknowledged in 1997. With the entry into force of the 1998 Registered Religious Communities Act, the right to recognition had again been suspended. Thus, throughout a period of 130 years after the enactment of the 1874 Recognition Act there had been no enforceable remedy available for recognition.

120. The Government submitted that the applicants' right under Article 13 of the Convention had not been violated. Though the present proceedings were of some complexity, they showed that the Federal Constitution provided for remedies for legal protection, of which the applicants had made use.

121. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

122. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII). The term "effective" is also considered to mean that the remedy must be adequate and accessible (see *Paulino Tomás v. Portugal* (dec.), no. 58698/00, ECHR 2003-VIII).

123. The Court observes that on the whole the applicants successfully used the remedies available under the Federal Constitution and eventually obtained redress at domestic level for their complaint. In particular, the Constitutional Court, in its decision of 4 October 1995, resolved the conflict of jurisdiction between the two highest courts and found that the applicants had

a right to receive a decision on their request for recognition. After having been granted recognition as a religious community under the Act on the Legal Status of Registered Religious Communities on 20 July 1998, the applicants again applied to the Constitutional Court, challenging particular provisions of that act. It is true that the Constitutional Court dismissed this complaint on 14 March 2001, but the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome (see, among other authorities, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 62, § 40). The applicants consequently had available to them a remedy satisfying the requirements of that provision and it follows that there has been no breach of Article 13 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

“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.”

### A. Damage

125. The applicants submitted that they were entitled to compensation for non-pecuniary damage because of the breaches of the Convention that had occurred. They had suffered serious damage to their reputation because of the failure to recognise the first applicant as a religious community on an equal footing with other religious communities and societies in Austria and because of its treatment as a dangerous sect by the Austrian authorities in the past. Furthermore, the particularly long period during which its recognition as a religious society had been refused should be taken into account. They left it to the Court to determine the amount to award in damages but pointed to previous and comparable cases, such as *Metropolitan Church of Bessarabia and Others* (cited above, § 146), in which the Court had granted

20,000 euros (EUR) for non-pecuniary damage (no. 45701/99, § 146, ECHR 2001-XII).

126. The applicants also claimed an award for pecuniary damage. In their view, they had suffered loss essentially because they had had to pay taxes, such as inheritance and gift tax and real-estate tax, from which they would have been exempted if they had been recognised as a religious society in 1991, and because they had not received donations from members since, as the first applicant was not a recognised religious society, such donations were not deductible from income tax. The applicants, referring to several appeal decisions by the tax authorities and decisions by the Administrative Court, disputed that the associations referred to by the Government could have reduced their tax liability by claiming tax privileges. The applicants claimed that the financial loss they had sustained exceeded EUR 500,000.

127. The Government disputed the applicants' claims. As to the claim for non-pecuniary damage, they submitted that in any case the finding of a violation would constitute sufficient redress. Further, the sum implicitly claimed was excessive because the case of *Metropolitan Church of Bessarabia and Others* was not comparable to the present one. In the former case the applicant community had not been granted legal personality at all, whereas in the present case the first applicant had been recognised as a religious community in the course of the proceedings.

128. As to pecuniary damage the Government submitted that the claim submitted by the applicants under this head was likewise excessive and unjustified. The Government submitted in particular that the associations which had been founded in order to support and facilitate the first applicant's religious activities and which had been subject to liability for inheritance and gift tax and real-property tax could have applied for tax privileges on the ground that they pursued non-profitable or charitable purposes. According to the 2001 Guidelines for Associations (*Vereinsrichtlinien 2001*), issued by the Federal Ministry for Finance,

associations such as the ones mentioned by the applicants were eligible for tax privileges.

129. As to non-pecuniary damage, the Court considers that the violations it has found must undoubtedly have caused the applicants some prejudice under this head. In assessing the amount, the Court takes into account the fact that the applicants have not shown that at any instant they were actually hindered in pursuing their religious aims. Accordingly the Court awards, on an equitable basis, EUR 10,000 under this head.

130. Since there must be a causal link between the violation found and the damage alleged in order for an award to be made for pecuniary damage, the Court considers that such a causal link would only exist if, in the absence of one of the violations found, the applicants would have been entitled to the tax privilege on the lack of which they based their claim. The Court has found a breach of Article 14 read in conjunction with Article 9 in that the Austrian authorities, in rejecting the applicants' request of 22 July 1998 for recognition of the first applicant as a religious society, relied on a ground which was discriminatory. As there are various other requirements under the relevant law for recognition as a religious society and the first applicant would not have been automatically entitled to such recognition had the Austrian authorities not relied on that ground, the Court cannot speculate as to the outcome of such proceedings (see, *mutatis mutandis*, *Société Colas Est and Others v. France*, no. 37971/97, § 54, ECHR 2002-III). Consequently, it makes no award under this head

## **B. Costs and expenses**

131. The applicants claimed EUR 77,091.22 for costs incurred in the domestic proceedings and EUR 68,702.53 for costs incurred in the proceedings before the Court. The latter amount included the sum of EUR 5,226 for assistance by Mr Daniel, a United Kingdom barrister, to the applicant's principal lawyer, Mr Kohlhofer, in advising him on the Court's case-law under Article

41 of the Convention. These sums included value-added tax (VAT).

132. In the Government's submission, the applicants' claims for costs were excessive. As regards the domestic proceedings, the applicants were only entitled to reimbursement of costs incurred for those steps taken in the course of the proceedings which had served to prevent the violation of the Convention found. Thus, only the procedural steps taken after the decision of the Federal Minister of Education and Cultural Affairs of 21 July 1997 could be taken into account. Moreover, the costs should have been calculated on the basis of the Autonomous Remuneration Guidelines and not the Lawyers' Remuneration Act, which would have resulted in a smaller amount. The number of joined parties for which costs were claimed was also questionable. As to the claim for reimbursement of expenses incurred for a further lawyer assisting Mr Kohlhofer, the Government could not see why there was any need for assistance in formulating claims under Article 41 of the Convention.

133. The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses which were necessarily incurred in the domestic proceedings in order to prevent or redress the violation and are reasonable as to quantum (see *Société Colas Est and Others*, cited above, § 56).

134. The Court agrees with the Government that only those costs which were incurred after the refusal by Federal Minister for Education and Culture to recognise the first applicant as a religious society on 21 July 1997 should be taken into account. It considers that the sums claimed are not reasonable as to quantum. Regard being had to the information in its possession and to the sums awarded in comparable cases, the Court considers it reasonable to award the sum of EUR 42,000 covering costs under all heads.



### **C. Default interest**

135. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

#### **FOR THESE REASONS, THE COURT**

1. *Holds* by six votes to one that there has been a violation of Article 9 of the Convention;
2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention read in conjunction with Article 9;
3. *Holds* unanimously that there has been a violation of Article 6 of the Convention;
4. *Holds* unanimously that there has been no violation of Article 13 of the Convention;
5. *Holds* by six votes to one
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 42,000 (forty-two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicants;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 31 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN  
Registrar

Christos ROZAKIS  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly dissenting of Judge Steiner is annexed to this judgment.

C.L.R.  
S.N.

## **PARTLY DISSENTING OPINION OF JUDGE STEINER**

I voted against the finding of a violation of Article 9 of the Convention, read alone and in conjunction with Article 14, for the following reasons.

The applicants initially complained under Article 9 of the Convention about the non-recognition of the first applicant as a religious society and later under Article 14 in conjunction with Article 9 that the status conferred on it, that of a registered religious community, was inferior to the status of a religious society.

In my view the essential element for the examination of these complaints is that the first applicant was registered as a religious community on 20 July 1998. After that moment the applicants can clearly no longer maintain that the first applicant was refused legal personality and can therefore no longer claim to be victims of a violation of Article 9. It is true that the granting of legal personality took a considerable amount of time and it would have been preferable if this had happened earlier; however, this aspect of the application has, to my mind, been considered sufficiently in the context of the applicants' complaint under Article 6 of the Convention.

As regards the period before that date, I again consider that the applicants cannot claim to be the victims of a breach of Article 9 of the Convention.

Neither the first applicant nor the four other individual applicants were at any stage of the proceedings prevented from manifesting their belief in worship, teaching, practice and observance and they did not complain of any measures of interference with the first applicant's internal organisation by State authorities, such as dissolution of the first applicant, removal of its ministers or other leading personalities or deprivation of property owned by it or premises used for religious offices or ceremonies. Rather, they argued that the first applicant, instead of existing as a legal body having legal personality, preferably that of a religious society, did not have and could not

have had legal personality of its own but, on the contrary, had to resort to the subterfuge of availing itself of the legal personality put at its disposal by so-called “auxiliary associations”. If I were persuaded that this had been the only avenue open to the applicants I might have gone along with the majority in finding a breach of Article 9 but I do not find the arguments raised by the applicants in this connection persuasive. In my view there was a reasonable possibility that the first applicant could have directly acquired legal personality as an association (*Verein*) under Austrian law and that such status would have been by no means inferior to the status of a religious community that was actually conferred on it.

The applicants’ contention that the first applicant did not have the possibility of using the legal form of an association for obtaining legal personality is based on a Constitutional Court decision of 1929. However, we can see from the facts that in this field the Constitutional Court is quite ready to change even long-standing case-law and the Government also referred to two religious groups which actually established themselves in the form of an association before the Act on the Legal Status of Registered Religious Communities had entered into force. Lastly, the provision in section 2(4) of this Act, whereby the competent Minister, in the same decision by which he or she registers a religious community, has to dissolve any association whose purpose was to disseminate the religious teachings of the religious community concerned (see paragraph 47 of the judgment), would not have any meaning if an association could not be created with a view to pursuing religious aims, as seems to be the contention of the applicants. Having regard to the contents of the Act as described in detail in the judgment (see paragraphs 47-54), which essentially lays down rules for establishing, monitoring and dissolving a religious community and whose sole purpose is to confer legal personality on it, I cannot see how these rules are substantially different from the ones existing under Austrian law for establishing an association. Thus, given that the

applicants had a reasonable possibility of obtaining legal personality for the first applicant even before its registration as a religious community and that even in the absence of this step no interference by the public authorities with the applicants' exercise of freedom of religion has been alleged, I cannot find that they can claim to be victims of a violation of Article 9 of the Convention.

As regards the applicants' complaint that the legal personality eventually conferred on the first applicant was of an inferior status to that enjoyed by religious societies, this complaint, in my view, relates rather to various issues which are linked to the participation of the first applicant in public life, in the economic field or other issues of public and social concern such as the obligations of its ministers in the field of national defence, or the organisation and management of public and private schools.

Although I appreciate that all these matters are of interest and concern to the applicant community and the individual applicants, I do not share the view of the majority that all these privileges (see paragraph 55 of the judgment) are essential for the exercise of its freedom of religion and form one consolidated body of rules. On the basis of that approach, it was only natural that the majority should state that an obligation to ensure that all religious groups had an opportunity to obtain this status was to be derived from Article 9 of the Convention, and consequently examined whether the conditions for applying for the status of a religious society were fair and equal.

I would have preferred a different approach. My starting point is rather that the right to freedom of religion – in particular, as in the present case, read in the light of Article 11 of the Convention – is that it essentially confers a right to legal personality which enables a religious group to create an internal sphere, shielding it against undue interference by the State or others, and a right to create, within that sphere, its own institutions which it considers appropriate for pursuing its aims and, at an external level, to interact with others in order to obtain and protect the means it

requires to pursue its goals. In the present case I consider that, through the granting of legal personality as a religious community to the first applicant, these criteria are met. As regards the various privileges granted to religious societies, which are spread out over different provisions of law and relate to very different fields of interest, I cannot see them as forming one consolidated body of rules which are to be seen as a “status”. Rather, I would have preferred the Court to examine on a case-by-case basis *in concreto* whether the examples cited by the applicants in order to demonstrate the difference in treatment between the first applicant and a recognised religious society – which do not contain any accounts of decisions actually taken by the Austrian authorities – constitute discrimination. For example, whether or not the first applicant is entitled to specific treatment under the provisions of tax law is a matter to be examined on the basis of a concrete decision taken by the competent Austrian tax authorities and after the available domestic remedies have been exhausted as required by Article 35 of the Convention (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33).

To my mind such a way of proceeding would be more consistent with the Court’s competence, as defined by the Convention, in particular the principle of individual application enshrined in the Convention and the resulting refusal to accept an *actio popularis* (see *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992, Series A no. 246, p. 22, § 44; *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, pp. 15-16, §§ 30-32; and *S.L. v. Austria* (dec.), no. 45330/99, 22 November 2001) or to examine legislation *in abstracto* (see *Eriksson v. Sweden*, judgment of 22 June 1989, Series A no. 156, p. 23, § 54; *Findlay v. United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 279, § 67; and *Fédération Chrétienne des Témoins de Jéhovah de France v. France* (dec.), no. 53430/99, ECHR 2001-XI).

Accordingly, I cannot find that there has been a breach of Article 9 of the Convention, read alone and in conjunction with Article 14 of the Convention.

