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

THIRD SECTION

DECISION

Application no. 43726/17
Ellinor GRIMMARK
against Sweden

The European Court of Human Rights (Third Section), sitting on 11 February 2020 as a Committee composed of:

Georgios A. Serghides, *President,*
Erik Wennerström,
Lorraine Schembri Orland, *judges,*
and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 14 June 2017,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Ellinor Grimmark, is a Swedish national who was born in 1976 and lives in Saltnes. She was represented before the Court by Ms R. Nordström, a lawyer practising in Uppsala.

The circumstances of the case

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

1. Background of the case

3. The applicant was employed as a nurse by the County Council of Jönköping (*Jönköpings läns landsting*) in 2010. On 1 July 2012 she became permanently employed as a nurse in the geriatric rehabilitation clinic at Högland Hospital. In August 2012 she was granted leave of absence to train as a midwife for three semesters. The County agreed to pay her a student salary equivalent to 1,750 euros (EUR) a month during her midwifery studies.

4. During her studies in spring 2013, the applicant was going to take a summer job at Högland Women's Clinic. Before starting, she informed her employer that she would be unable to assist in carrying out abortions because of her religious faith and conscience. A few days later she received a telephone call from the hospital during which she was told that she was not welcome to work at the hospital during the summer or at any later date. On 23 August 2013 she was informed by the County that her student salary would be withdrawn for the last study semester.

5. On 21 July 2013 the applicant sought employment at Ryhov Women's Clinic, indicating that she was very flexible with working hours but that she would not be able to perform abortions since it was contrary to her religious faith and conscience. According to the applicant, in July and August 2013 she was told that a summer job in the clinic would not be a problem. This was confirmed again in autumn 2013 when she was in her second training period in the clinic's obstetrics section. However, in December 2013, the applicant received an email from the clinic saying that no exemption from abortions could be made, even for the summer months, although it was widely known that there was a shortage of midwives.

6. The applicant then applied for a job at the women's clinic at Värnamo Hospital, telling them that she was not able to carry out abortions but that she had no problem caring for women seeking an abortion. She was called for an interview, as a result of which she was allegedly orally offered a job for six months with the possibility of extension. According to the applicant, her salary was agreed at 26,000 Swedish kronor (SEK) and her starting date and leave of absence from the nurse's post at Högland Hospital were discussed. She submits that she told her then current employer that if no leave of absence were granted to her, she would resign from the nurse's post.

2. Complaint to the Discrimination Ombudsman and its consequences

7. Meanwhile, the applicant had complained about her treatment at Högland Hospital and at Ryhov Women's Clinic to the Discrimination Ombudsman (*Diskrimineringsombudsmannen*).

8. Through public documents, the media found out about her pending case and interviewed her for a local newspaper. Once the article was published on 23 January 2014, the recruiters at Värnamo Hospital contacted the applicant and told her that her employment at the hospital would no longer be possible. The applicant was offered counselling in order to come to terms with abortions and to change her mind.

9. On 19 March 2014 the applicant received her midwife's licence.

10. On 10 April 2014 the Discrimination Ombudsman found no discrimination in the case and closed it. She noted that it was part of a midwife's professional role to take part in abortions. The applicant, who had said that she would refuse to perform part of the work, was not in a

comparable situation to those midwives who could perform all of their tasks. Nor was it her religious faith as such which was at stake: another midwife refusing a part of the work other than on religious grounds would not have been treated any differently from the applicant. There was thus no direct discrimination involved. As to the indirect discrimination, the Discrimination Ombudsman found, referring to the case-law of the Court, especially the case *Eweida v. the United Kingdom,* that the applicant's religious faith was protected by Article 9 of the Convention. However, according to the Swedish legislation, employers had the right to request that an employee perform all the tasks which naturally fell within the scope of the work in question. The requirement to take part in abortions was thus "prescribed by law" and pursued the legitimate aim of protecting health since it guaranteed an effective access to abortions in Sweden. The interference with the applicant's freedom of religion was also proportionate and there was thus no violation of Article 9 of the Convention.

3. Compensation proceedings

11. On 21 May 2014 the applicant brought the matter to a court, seeking compensation directly on the basis of the Convention.

12. On 12 November 2015 the Jönköping District Court (*tingsrätten*) found that the applicant's complaints relating to her lost employment at Högland Hospital, the alleged defamation by a member of the personnel of that hospital as well as the complaint concerning the withdrawal of her student salary were all statute-barred. As to the rest, the court rejected the applicant's action, finding that she had not been discriminated against on the basis of her religion. The court agreed with the conclusions of the Discrimination Ombudsman that the requirement that a midwife should be able to perform all tasks falling with the scope of such employment, even abortions, was a neutral one and both justified and necessary. Moreover, this requirement had no connection to the alleged violation of freedom of religion. No violation of Article 9 of the Convention had thus taken place. The court further held that the Swedish Discrimination Act provided for an effective remedy under Article 13 of the Convention and that the applicant had had proper access to it.

13. The applicant appealed to the Court of Appeal (*hovrätten*). After a request by the County, the case was transferred to the Labour Court (*arbetsdomstolen*).

14. On 12 April 2017 the Labour Court rejected, with a final judgment, all the applicant's claims. It found that the applicant's compensation claim could not be accepted in respect of her lost employment at Högland Hospital, the alleged defamation by a member of the personnel of that hospital nor the complaint concerning the withdrawal of her student salary since all these complaints were statute-barred. For the rest, the court agreed that the applicant's religious faith was protected by Article 9 of the

Convention. However, the fact that the applicant lost her position because she did not intend to perform all duties inherent to the vacant post did not constitute direct discrimination, nor did it constitute a violation of Article 9 of the Convention. All other midwives refusing a part of the work on any other grounds would have been treated the same way as the applicant. The applicant had therefore not been discriminated against within the meaning of Article 14 of the Convention.

15. As to indirect discrimination, the Labour Court found that, according to the Swedish legislation, employers had the right to request that an employee perform all the tasks which naturally fell within the scope of the work in question and that the legality criterion was thereby fulfilled. Although only medical doctors could order abortions, midwives often executed these orders by performing abortions with medicines. Employers had great flexibility in deciding how the work was to be organised and this right had not been infringed in the present case. The interference pursued the legitimate aim of protecting the health of abortion-seeking women. The court noted that the Swedish State had an obligation to guarantee access to abortions in accordance with the Act on Abortions since a failure to do so would violate the abortion-seekers' right to respect for their private life under Article 8 of the Convention. The interference with the applicant's freedom of religion was proportionate and justified with the view of achieving a legitimate aim. There was thus no indirect discrimination either. Moreover, the court stressed that the applicant knew, when seeking the employment, that the duties inherent to the vacant post could limit her possibilities to manifest her religion. There was thus no violation of Articles 9 and 14 of the Convention.

16. The Labour Court further found, in respect of Article 10 of the Convention, that no binding employment contract had been concluded with Värnamo Hospital when the newspaper article of 23 January 2014 came out. The reason for not employing the applicant was not the content of the article but her "professional limitations" to perform all required tasks. The fact that these limitations came fully to the County's knowledge via the article did not mean that there was a violation under Article 10 of the Convention, nor had Article 10 been violated in any other respects. Moreover, the applicant had continued to express her opinions on abortions for over two years until 2016, while still working for the County as a nurse. The fact that the County allowed her employment to continue despite the media publicity showed that it had no fundamental opinions on the matter.

COMPLAINTS

17. The applicant complained under Article 9 of the Convention that, by prohibiting her to work as a midwife, the Swedish authorities had interfered with her right to freedom of thought, conscience and religion, and that this

interference had not been prescribed by law and had not pursued a legitimate aim, and that it had been discretionary and arbitrary. Nor had the interference been necessary in a democratic society, or proportionate.

18. Further, she complained under Article 10 of the Convention of the violation of her freedom of expression for having expressed her opinion in the media.

19. Lastly, the applicant complained under Article 14 of the Convention of discrimination against her since she had been treated less favourably because of her religious beliefs and her public stand on abortion.

THE LAW

A. Complaint under Article 9 of the Convention

20. The applicant complained under Article 9 of the Convention that her right to freedom of thought, conscience and religion had been violated.

21. Article 9 of the Convention reads as follows:

> "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."

22. The Court notes at the outset that the Convention does not guarantee a right to be promoted or to occupy a post in the civil service (see *Regner v. the Czech Republic* [GC], no. 35289/11, § 111, 19 September 2017). Therefore, the applicant had no right under the Convention to obtain any of the vacant posts.

23. The Court reiterates that religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private, but also to practise in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 105, ECHR 2005-XI, and *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, § 80, ECHR 2013 (extracts)). Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set

out in Article 9 § 2. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

24. According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (see *Leyla Şahin*, cited above, § 110, and *Eweida and Others*, cited above, § 84).

25. The Court notes that the applicant's refusal to assist in abortions due to her religious faith and conscience constitutes such a manifestation of her religion which is protected under Article 9 of the Convention. There was thus an interference with her freedom of religion under Article 9 § 1 of the Convention. This interference was, as was considered also by the domestic courts, prescribed by law since, under Swedish law, an employee is under a duty to perform all work duties given to him or her (see *Wretlund v. Sweden* (dec.), no. 46210/99, 9 March 2004). The Court is satisfied that the interference thus had a sufficient basis in Swedish law and that it was prescribed by law. It also pursued the legitimate aim of protecting the health of women seeking an abortion.

26. The interference was also necessary in a democratic society and proportionate. The Court observes that Sweden provides nationwide abortion services and therefore has a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of such services. The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified. Employers have, under Swedish law, great flexibility in deciding how work is to be organised and the right to request that employees perform all duties inherent to the post. When concluding an employment contract, employees inherently accept these duties. In the present case, the applicant had voluntarily chosen to become a midwife and apply for vacant posts while knowing that this would mean assisting also in abortion cases. Moreover, as a result of the refusals, the applicant was not left unemployed but was able to continue to work as a nurse at Högland Hospital, where she had a post and where she worked until March 2016.

27. Furthermore, the Court notes that the domestic courts carefully balanced the different rights against each other and provided detailed conclusions which were based on sufficient and relevant reasoning. A proper balance was thus struck between the different, competing interests.

28. Accordingly, the Court finds that this complaint is manifestly ill-founded and it must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaint under Article 10 of the Convention

29. The applicant complained under Article 10 of the Convention of the violation of her freedom of expression for having expressed her opinion in the media.

30. Article 10 of the Convention reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

31. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be strictly construed. The need for any restrictions must be established convincingly (see, for example, *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

32. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I).

33. The Court's task in exercising its supervision is not to take the place of national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

34. The Court notes that the Labour Court established that the applicant had not concluded any binding work contract with Värnamo Hospital (see paragraph 16 above). There was thus no binding work contract between the applicant and the hospital when the applicant's interview was published in the local newspaper on 23 January 2014.

35. The applicant argued that there was an interference with her freedom of expression since, as a result of the newspaper article, she was not employed by Värnamo Hospital. On the other hand, the Labour Court established that the reason for not employing the applicant was not the content of the article but her "professional limitations" to perform all required tasks (see paragraph 16 above).

36. The Court considers that there is no separate interference with the applicant's freedom of expression under Article 10 of the Convention. It has not even been alleged that the publication of the newspaper article produced adverse effects on the applicant, other than the loss of the job opportunity at Värnamo Hospital. The Court has already examined this issue above and concluded that the complaint under Article 9 of the Convention was inadmissible (see paragraph 28 above). Equivalent conclusions apply under Article 10 of the Convention.

37. In conclusion, the Court finds that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

C. Complaint under Article 14 of the Convention

38. Finally, the applicant complained under Article 14 of the Convention of discrimination against her.

39. Article 14 of the Convention 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 sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

40. The Court reiterates that Article 14 of the Convention 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 enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, and to this extent it is autonomous, there can be no room for its application unless the facts in issue fall within the ambit of one or

more of the latter (see, for instance, *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013).

41. The Court has established in its case-law that, in order for an issue to arise under Article 14, there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Burden v the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

42. It is clear in the present case that the applicant's situation falls within the scope of Articles 9 and 10 of the Convention. Consequently, Article 14 of the Convention, taken in conjunction with Articles 9 and 10, is applicable.

43. The Court notes that the applicant's complaint under Article 14 of the Convention relates to her complaints under Articles 9 and 10 of the Convention that she had been treated less favourably because of her religious beliefs and her public stand on abortion. In her complaints, the applicant compared her situation to that of midwives who were willing to perform all duties inherent to the vacant posts, including abortions.

44. The Court considers that the applicant's situation and the situation of other midwives who had agreed to perform abortions are not sufficiently similar to be compared with each other. The applicant cannot therefore claim to be in the same situation as those midwives.

45. In conclusion, the Court finds that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 12 March 2020.

Stephen Phillips Registrar	Georgios A. Serghides President