Higher Administrative Court

Decision

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The 7th Senat [chamber] of the Federal Administrative Court decided on February 1, 2006, by the Chairman Judge Sailer and the judges on the Federal Administrative Court Herbert and Neumann:

The complaint against the non-admissibility of appeal in the decision of the Higher Administrative Court [OVG] in Berlin on March 24, 2005, is rejected.

The defendant carries the costs of the complaints procedure.

The value of the matter in dispute is set for the complaints procedure at Euro 10, 000.

R e a s o n s

1. The plaintiff, the Association of Jehovah's Witnesses in Germany, requests the grant of rights as a Public Corporation according to Art. 140 GG in connection with Art. 137, par. 5, Sen. 2 Weimarer Reichsverfassung (Weimar Constitution WRV). The defendant State Berlin especially asserts that the plaintiff could not be granted the status of a public corporation because it did not adhere to the law (was not "rechtstreu"). The Administrative Court obligated the defendant to grant the plaintiff the legal position of a public corporation in the State of Berlin. The OVG rejected the defendant's appeal by means of the challenged decision, and essentially stated: According to the findings, which the Senat [Court], on the basis of the evidence submitted by the defendant and the exhaustion of all other sources of information available to it, , the defendant's arguments could not be verified, [namely] that the plaintiff hindered State protection of minors in cases where parents refused to consent to life-saving blood transfusions; In cases where a member withdraws or is disfellowshipped it actively worked towards the separation of marriage partners or families, and by means of its binding child-rearing guidelines for their members, endangered the child's interests. Also otherwise there were no tangible indications that the Religious Association of Jehovah's Witnesses, [whose members] have practiced their faith in Germany since 1897, did not conduct themselves in adherence to the law, especially did they not violate nor endanger the constitutional rights committed to State protection, nor the fundamental principles of religious body and church-and-state rights described in Art 79, Par. 3 GG.

2. The OVG did not permit the appellate review against its decision. It is against this that the defendant appeals.

3. The complaint is unfounded. The reasons asserted for permitting an appeal do not exist.

4. 1. The case has no fundamental importance in the sense of § 132, par. 2, No. 1 VwGO.

5. The defendant is of the opinion that the issue is in need of fundamental clarification,

   whether in a lawsuit of a religious association desiring the status of a public corporation according to Art. 140 GG, in connection with Art. 137, par. 5, sen. 2WRV, the burden of proof and explanation for the question as to whether the Religious Association fulfills the (unwritten) prerequisite for so-called “fidelity to the law” lies with the religious association making the request or the authority rejecting to grant recognition; especially whether the Religious Association offers the guarantee that its future conduct will not encroach upon or endanger the fundamental constitutional principles described in Art. 79, par. 3 GG, the fundamental rights of third parties committed to State protection, as well as the basic principles of religious body and church- state rights in the constitutional law.

6. This question would not be considered in the aspired appeal proceedings and therefore does not justify the admission of the appeal. The defendant imputes with his question that the OVG in actuality did not concludingly determine the prerequisites for the asserted claim, but in this respect made a decision according to the rules of the burden of proof. That is not the case however.

7. According to the constitutional guidelines the appeal court, by means of a standard overall consideration and an overall evaluation of all of the merits of the case, had to conduct a prognosis as to whether the plaintiff, according to its present conduct and that to be expected, offers the guarantee not to encroach upon or endanger the fundamental constitutional principles described in Art. 79, par. 3 GG, the fundamental rights of third parties committed to State protection and the fundamental principles regarding religious body and church-state rights in the constitutional law (Federal Constitutional Court, decision of December 19, 2000 – 2 BvR 1500/97 – BverfGE 102, 370, 396). After the obligatory decision of the Federal Administrative Court rejecting an appeal, May 17, 2001 – BverwG 7 C 1.D1 – (Buchholz 11 Art. 140 GG No. 66) only certain accusations raised by the defendant were of sufficient importance and therefore suitable to justify the acceptance of a lack of fidelity to the law. Therefore only these needed further clarification.

8. The OVG proceeded from this standpoint. “On the basis of the material submitted by the participants and by exhausting all of the information sources available to it,” it was unable to determine that the assertions against the plaintiff were applicable, which would give cause to doubt its fidelity to the law. According to the findings of the OVG there exist no tangible indications that in the past the plaintiff conducted itself in an unlawful manner. In fact, the OVG therewith made a prognosis that the plaintiff would conduct itself in fidelity to the law, especially in not encroaching upon or endangering fundamental rights of third parties, which are committed to State protection. The finding that no tangible indications for the opposite exist, is the same as a finding that the plaintiff provides the guarantee of fidelity to the law.

9. In other respects the defendant has a misconception of the contested decision. The OVG, of course, in the reasons for the decision, did specify among other things that the defendant's arguments that the plaintiff hindered the state protection of minors in cases where the parents refused to consent to life-saving blood transfusions, in cases where a member withdraws or is disfellowshipped it worked actively towards separating the marriage partners or families, and by means of its binding child-rearing guidelines endangered the child's interests, could not be "verified." Therewith the OVG did however not assign the defendant officials the burden of proof and explanation for a lack of fidelity to the law on the part of the Religious Association making the application. The court only has to investigate whether and in which direction an endangerment of goods to be protected could be expected of the Religious Association making the application insofar as a reason exists for it, especially based on the submission by the participants, but also based on aspects which otherwise become recognizable. The OVG correctly proceeded from this standpoint. Besides, it did not only consult the defendant's arguments, but rather the OVG enjoined the plaintiff to submit the documents which could provide information about its conduct in the question of blood transfusion, association with members who withdrew or were disfellowshipped and regarding its guidelines in child-rearing.

10. 2. The contested decision is not based on the criticized procedural error (§ 132 par. 2 No. 3 VwGO). The OVG did not violate its duty to clarify the facts of the case, (ex officio) by virtue of its office. (§ 86, par. 1 VwGO)

11. The OVG was not obligated to hear persons named by the defendant as witnesses regarding the issue, as to whether the plaintiff actively strived to have drop-outs or disfellowshipped members of families ostracized by the family members who remained in the Religious Association, in a manner which would endanger the existence of marriage and family protected by Art. 6, par. 1 GG, and at the same time could work as a sustaining barrier to prevent withdrawal from the association.

12. To clarify the issue as to whether this accusation is correct the OVG first consulted and evaluated the plaintiff's own statements. In this respect the defendant's accusation that the OVG did not evaluate the documents submitted by the defendant, is not correct (p. 19 of the reasons for the appeal under aa.). The OVG expressly determined that the plaintiff, in case of a withdrawal or disfellowshipping of a member of their association, recommends avoiding this member and not to have association with him. On the other hand, the OVG concluded from the plaintiff's own literature submitted in the proceedings, but also from its directives in a case of withdrawal or disfellowshipping of a close family member, simply no longer to maintain "spiritual association" in the sense of common worship of Jehovah; with regard to things of daily life, however, to continue "to loyally deal with one another in love."

13. Proceeding from this finding, it was of importance for the Higher Administrative Court, relevant to the decision, whether the plaintiff's actual conduct is at variance therewith, whether in actual practice, over and above the

refusal to associate spiritually, in the sense of common worship of Jehovah, it actively strives to prevent within the family all other association with a family member who has withdrawn or been disfellowshipped. To this the OVG evaluated inquiries made of officials and institutions, as to their knowledge of this issue, which they should have—if at all in existence. As a result, it has established that the investigations so far carried out, not only extensively but altogether yielded no results. And this despite the fact that already for years now inter-ministerial work groups of the Federation and the States exist in the area of new religious and ideological associations and psycho groups, which essentially serve the purpose of an all-embracing exchange of information, and in this field they work together with leading associations in the community, the police and other institutions. In the proceedings the OVG ultimately analyzed the extensively documented jurisdiction of family courts, as to whether it could be concluded that the plaintiff ‘s influence is hostile toward families or if it systematically hindered court ordered contact and custody regulations.

14. The defendant does not cast doubt on the credibility of the OVG with its complaint, in that the officials, courts, and other institutions involved had no findings of the asserted hostile conduct of the plaintiff towards families. [The defendant] was of the opinion the OVG should have additionally heard former members of the plaintiff, and named as witnesses by the defendant, as to the plaintiff’s actual conduct. The defendant’s suggestions of evidence aiming in this direction, however, offered no sufficient reason for a further hearing of evidence.

15. The OVG first called attention to the fact that the defendant submitted numerous accounts from former members of the plaintiff. However, it did not examine these as to their relevance to the questions, which according to the remanding decision of the Federal Administrative Court were to be clarified exclusively. It was therefore not recognizable to the OVG what contribution a hearing of the ones named by the defendant as witnesses would have on the knowledge regarding the decisive questions. This reasoning by the OVG is not invalidated by the complaint. Additionally, in its complaint the defendant only listed which witnesses he named for the OVG, without any distinct reference to the issue to be clarified by the OVG. According to the defendant’s presentation a considerable number of the persons named by it should have revealed the plaintiff’s practice towards apostate members. However, their experiences did not concern the significant issue with regard to association with drop-outs or disfellowshipped family members within the family (parents and children). That the plaintiff categorically uses its influence to avoid association with a drop-out or disassociated member of the association and to no longer associate with him was expressly determined by the OVG. Therefore there was no need for hearing of evidence. Other persons were to give information about the proceedings, in which the plaintiff disfellowships members from its association. Furthermore the defendant has asserted in its offer of evidence that the plaintiff also disfellowshiped such members of the association who read literature of apostates. In its complaint it has also accused the OVG of procedural error for ignoring this offer of evidence, without even basically going into the question as to what extent a hearing of

evidence hereto was relevant to the decision, proceeding from the OVG's substantive opinion. Taking everything into account, also after the complaint submission it remains completely open, which of the numerous evidence offers and suggestions were aimed at ascertaining facts relevant to the proceedings.

16. At any rate with a view to this the OVG, for the further reason it named, did not need to pursue these evidence offers and suggestions. The OVG correctly referred thereto, that the defendant's arguments additionally left open the question, whether the reports presented by it allowed the sufficiently certain evaluation, that the described experiences of individuals, over and above the individual case, would indicate a conduct which corresponds to the plaintiff's binding guidelines. Therewith the OVG cast doubt on the usefulness of the offer of evidence.

17. In any case, after it discussed this doubt with the participants in the oral proceedings and the defendant subsequently refrained from official motions for the admission of evidence, the OVG did not feel compelled to hear evidence, because the defendant, represented by a lawyer, evidently was satisfied with the suggestion of the OVG.

18. The Senat, according to § 133, par. 5, sen. 2, 2nd half sentence VwGO, dispenses with further reasons.

19. The court order as to costs is based on § 154, par. 2 VwGO, the assessment of costs of litigation is according to § 47, par. 1, sen. 1 and par. 3, § 52, par. 2 GKG.

Sailer Herbert Neumann