

Papageorgiou and Others v Greece: Exemption from a Mandatory Course in Religion and the Art of Reading between the Lines

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INTRODUCTION

Religious education is probably one of the most attractive topics in law and religious studies—a truly bottomless pit which, every now and then, reveals new questions and new challenges. The most recent judgment of the European Court of Human Rights (ECtHR) concerning this matter is the one delivered on 31 October 2019 in the case of *Papageorgiou and others*.¹ The judgment only became final at the end of January 2020, under Article 44(2) of the European Convention of Human Rights (ECHR), so as yet it has not received much scholarly attention. However, it should be expected that there will be no lack of such attention, as the judgment deserves it for at least two reasons.

First, the case is not an isolated one, but is rather another episode in an endless saga of how Greek law inevitably clashes with the European standard of freedom of religion or belief. Indeed, Greece is a frequent visitor to Strasbourg when it comes to religious matters. The Hellenic Republic guaranteed itself a prominent place in the handbooks of law and religion in 1993, when for the first time the court declared a breach of Article 9 ECHR in a case against Greece.² It was, without a doubt, a landmark case for the protection of freedom of religion or belief.³ But Greece also holds the record for the greatest number of violations of Article 9 in the Strasbourg case law, having lost as many as 13 cases between the years 1958 and 2019.⁴ In passing, we can note that the

1 *Papageorgiou and others v Greece* App nos 4762/18 and 6140/18 (ECtHR, 31 October 2019).

2 *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993).

3 M Evans, "The freedom of religion or belief in the ECHR since *Kokkinakis*: or "quoting *Kokkinakis*", (2017) 12:2–3 *Religion and Human Rights* 83–98.

4 Statistics available at <https://www.echr.coe.int/Documents/Stats_violation_1959_2019_ENG.pdf>, accessed 28 February 2020.

actual number of problematic issues related to the Greek approach to religious freedom is somewhat higher, for its violations do not always need to be examined in the light of Article 9, owing to overlaps of the rights enshrined in the Convention; such is the case of *Papageorgiou*, and such was one of the most widely discussed cases of 2018, *Molla Sali*,⁵ in which the Grand Chamber of the court had the opportunity to assess the mandatory application of Islamic law to an inheritance dispute. Without elaborating further on the matter, suffice to say that the Greek system of relations between the state and religious communities, rooted in the Orthodox Christian tradition and recognising a state religion, has been troubling Europe for many years now.⁶

Second, *Papageorgiou* may be yet another case in which the ECtHR deals with the organisation of religious education in public schools, but only at first sight does the judgment seem entirely predictable and obvious. As often happens in life, and just as often in Strasbourg, the most interesting part is not what has been openly stated but what has been left deliberately unsaid, or tacitly excluded from examination.

THE CIRCUMSTANCES OF THE CASE

Before going any further, it will prove useful to briefly recapitulate the facts of the case and the relevant legal framework. As stated above, Greece is a confessional state, with the Eastern Orthodox Church officially recognised as the prevailing religion (Article 3(1) of the Greek Constitution). A child's religious affiliation is recorded in their birth certificate. The course entitled 'Orthodox Christian instruction' is mandatory in primary and secondary education and, according to the current Law on Education, it is aimed at developing students into citizens 'in whom is instilled faith in their homeland and the genuine elements of Orthodox Christian tradition'.⁷ This seems very much in line with the Greek Constitution, Article 16(2) of which reads: 'Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious conscience and at their formation as free and responsible citizens'. The official teaching programme adds that students should be provided with a background in Orthodox Christianity, which is 'a living source of inspiration, faith, morality and meaning'.⁸

5 *Molla Sali v Greece* App no 20452/14 (ECtHR, 18 March 2011).

6 For a more extensive discussion on this, see E Diamantopoulou, 'Orthodox Christianity and freedom of religion in European Court of Human Rights case law' in E Diamantopoulou and L Christians (eds), *Orthodox Christianity and Human Rights in Europe: a dialogue between theological paradigms and socio-legal pragmatics* (Brussels, 2018), pp 71–108.

7 *Papageorgiou* at para 17.

8 *Ibid* at para 25.

The law allows non-Orthodox and non-religious students to apply for exemption from this grossly one-sided education, but it sets some high demands. As explained in the ministerial circular on exemption from the religious education course, of which the court quotes a vast part,⁹ thus letting the reader note the overbearing and unpleasantly didactic tone of the document, ‘there have been abuses of the right to exemption from the religious education course on grounds not associated with freedom of religious conscience’ and therefore it is of utmost importance that the grounds for exemption be investigated by the school authorities. The Greek law stipulates that facts not evidenced by an identity card must be brought before a public authority with a solemn declaration. This can be used to declare that the student is not an Orthodox Christian and therefore seeks exemption from religious instruction. The significance of such an act—which to many may disturbingly resemble an act of apostasy, although no further religious justification is required by the form—is strengthened by potential legal repercussions. School principals should caution those seeking exemption about the seriousness of such a declaration and warn them about the legal consequences of false statements, for any person declaring false facts in it may be punished by imprisonment for at least three months. The declaration also needs to be countersigned by the teacher. The exempted students are not free to do whatever they wish, notably they ‘shall have no right to remain in the classroom . . . and may under no circumstances roam inside or outside the school premises or be unjustifiably absent’.

It should hardly be a surprise that this legal framework ended up being challenged before the Strasbourg court. The present case originated in two applications filed by students and their parents, all of them living in small communities on two Greek islands (Milos and Sifnos). The applicants alleged that they had been victims of violations of Article 8 and 9 ECHR, and Article 2 of Protocol No 1, read in conjunction with Article 14 ECHR. Notably, they complained that they had had to submit a solemn declaration stating that they did not affiliate with the Eastern Orthodox Church, that the school principal had been obliged to enquire as to whether the declaration was true and that the said documents had to be retained with the school records. Apart from the peculiar exemption procedure, the applicants also complained about the religious education programme, as they considered that Greece had not ensured that its content would be objective, critical and pluralistic, in conformity with the requirements of the Convention and its Protocols.

9 Ibid at para 27.

THE COURT'S RULING

The court held unanimously that there had been a violation of Article 2 of Protocol No 1 (the right of parents to respect for their own religious and philosophical convictions). This was the only provision under which the court decided to assess the complaint, leaving the remaining articles aside but bearing them in mind while considering the circumstances of the case, as explained in the preliminary remarks by the court itself.¹⁰

In fact, the examination of the case was reduced to a single question, namely whether the conditions imposed by the circular were likely 'to place an undue burden on parents and require them to disclose their religion or philosophical convictions in order to have their children exempted from the religious education course'.¹¹ The court did not need to go to great lengths to discover that this is just what had happened. The circular as such may not have required religious justification to be provided in the exemption form, but checking the seriousness of the solemn declaration implied that the school principal was obliged to verify whether the statements of the applicants were true; if not, the principal was under an obligation to alert the public prosecutor.¹² This was sufficient for the court to conclude that the Greek system of granting exemptions from religious instruction was 'capable of placing an undue burden on parents with a risk of exposure of sensitive aspects of their private life and that the potential for conflict [was] likely to deter them from making such a request',¹³ and it was sufficient to decide the case.

CRITIQUE

On the face of it, this was a simple case and there was no other way it could have ended. Yet a vigilant reader will realise that the judgment is in fact too simple. First of all, it is remarkable how swiftly the court abandoned any inquiry into the content of the course in religious education, especially since it had made a point of reiterating that the state must ensure that information included in the school curriculum is conveyed in an objective, critical and pluralistic manner.¹⁴ This principle, first mentioned by the ECtHR in 1976,¹⁵ was apparently reiterated for no reason, since a few paragraphs later the court proceeded to declare that 'In the circumstances of the case, the content of religious education lessons as such is not directly connected to that of exemption from the course and the

¹⁰ Ibid at paras 35–39.

¹¹ Ibid at para 84.

¹² Ibid at paras 85–86.

¹³ Ibid at para 87.

¹⁴ Ibid at para 75.

¹⁵ *Kjeldsen, Busk Madsen and Pedersen v Denmark* App nos 5095/71, 5920/72 and 5926/72 (ECtHR, 7 December 1976) at para 53.

Court will not consider it separately'.¹⁶ Maybe it would have been more accurate for the court to say that it would not be considered at all.

But is the content of the course really not connected to the exemption arrangements? In light of the earlier Strasbourg case law, the syllabus does matter. The model approach in this respect was established some years ago by the Grand Chamber in *Folgerø and others*,¹⁷ followed shortly afterwards by one of the court's chambers in *Hasan and Eylem Zengin*.¹⁸ As Ian Leigh rightly points out, if a state decides that some knowledge about religion is an essential part of education and makes it compulsory, there is no violation of the Convention as long as the syllabus passes the 'critical, objective, and pluralistic' test.¹⁹ It is therefore essential to take into account the educational content before deciding whether the right to exemption is necessary at all. If the answer is positive, the next step should be to assess whether partial exemptions are sufficient or whether claims for a full opt-out should be accommodated. Leigh seems sceptical about the existing standard, calling for a less interventionist approach which would refrain from endorsing any particular pattern for religious education.²⁰ There may be some strong arguments supporting this position. Nevertheless, whenever the court sits as a chamber, as in *Papageorgiou*, it should not depart from the interpretation established by the Grand Chamber.

No less surprising is the decision to examine the case solely on the grounds of Article 2 of Protocol No 1. It would be understandable if the use of the remaining articles invoked by the applicants had involved some further examination – laborious but in the end superfluous, since the final decision might not have been different. Nonetheless, such examination would not have entailed any additional effort, with the rights overlapping and the issues being inseparable in this case. Assessing the case under Article 9 ECHR would have made clear that it was not only the parents' rights that had been breached but also those of the students, who acted as applicants just like their parents. As regards the right to respect for private life, the court admits that the exemption system posed a risk to the applicants: 'exposure of sensitive aspects of their private life'. It can be argued that in this way the court in fact acknowledged the violation of Article 8 ECHR,²¹ despite its earlier declarations.

16 *Papageorgiou* at para 81.

17 *Folgerø and others v Norway* App no 15472/02 (ECtHR, 29 June 2007).

18 *Hasan and Eylem Zengin v Turkey* App no 1448/04 (ECtHR, 9 October 2007).

19 I Leigh, 'Objective, critical and pluralistic?' in L Zucca and C Ungureanu (eds), *Law, State and Religion in the New Europe: debates and dilemmas* (Cambridge, 2012), pp 192–214 at pp 204–205.

20 *Ibid.*, p 214.

21 S Ninatti, 'Diritto all'istruzione, libertà religiosa e vita privata: la Grecia è di nuovo a Strasburgo', (2019) 27 *Quaderni di Diritto e Politica Ecclesiastica* 785–795 at 794.

CONCLUDING REMARKS

In *Papageorgiou* the ECtHR confronted the problem with a rather superficial approach and remained silent about the crucial elements of the legal knot. It appears that the court rushed to get the case off its desk, as Effie Fokas rightly observed, also noticing that the judgment was delivered within less than two years, at ‘a speed for which this particular court is not reputed’.²²

When the legal analysis does not provide sufficient explanation of the court’s reluctance to engage in a deeper examination of a case, sometimes more insight can be gained by embracing the political context. The recent developments regarding religious education in Greece reveal that the legal framework is steadily evolving, much in the right direction.²³ The court’s deep interference, quite paradoxically, would have been likely to provoke a conservative backlash. Also, an important clue may be found in a separate paragraph, in which the court draws attention to ‘its fundamentally subsidiary role in the Convention protection system’,²⁴ in a manner somewhat detached from its following considerations. It needs to be remembered that any international court of human rights is, by its very nature, permanently torn between what is desirable in legal terms and what is possible in political terms. Should the supervision be exercised too strictly, the authority of the court could be jeopardised, as in the well-remembered case of *Lautsi and others*,²⁵ in which the Grand Chamber recognised the need to retreat on the issue of crucifixes being displayed in Italian public schools. The reluctance to comment more on the Greek system of religious education may be due to that post-*Lautsi* trauma.

Yet sometimes silence speaks louder than words, and not necessarily as the speaker would wish. In the abovementioned case of *Molla Sali*, the ECtHR decided not to repeat its earlier findings on the incompatibility of sharia with democracy and human rights, provoking immediate concern about the systemic implications of the judgment.²⁶ It would be most unfortunate if the same thing happened with *Papageorgiou*.

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22 E Fokas, ‘Stuck in the middle with *Papageorgiou*: missed or new opportunities?’, 27 November 2019, <<https://strasbourgobservers.com/2019/11/27/stuck-in-the-middle-with-papageorgiou-missed-or-new-opportunities>>, accessed 3 March 2020.

23 Ibid.

24 *Papageorgiou* at para 79.

25 *Lautsi and others v Italy* App no 30814/06 (ECtHR, 18 March 2011).

26 D McGoldrick, ‘Sharia law in Europe? Legacies of the Ottoman empire and the European Convention of Human Rights’, (2019) 8 *Oxford Journal of Law and Religion* 517–566 at 564–565.