Manifestly ill-founded … by a majority
June 17, 2013
by Stijn Smet

In this post I want to flag three inadmissibility decisions, delivered by the Court's Chambers over the past few months, in which the applicant's claims are declared manifestly ill-founded, by a majority.
Like so many inadmissibility decisions, the three summarised below may have easily passed under the radar of many of our readers. These particular decisions are nevertheless worth pointing out, because they raise a number of important questions and concerns. How manifestly ill-founded can a claim really be if a Chamber of seven Judges reaches that conclusion by a majority? Moreover, what does "by a majority" mean in these cases? How many Judges disagreed? And what did their disagreement entail? Did the Judge(s) in the minority consider the claim worthy of an examination on the merits? Or were they of the opinion that the Convention rights of the applicant had been violated?

None of these questions can be satisfactorily answered, for two reasons. Firstly because – unlike in judgments – no information is given on the division in the Chamber that delivered these decisions. The decision merely states "manifestly ill-founded, by a majority", without indicating how many Judges disagreed. Secondly, because there is no room for separate opinions in decisions. We can thus not know why the Judge(s) in the minority disagreed on the finding that the claim was manifestly ill-founded. As a result of both factors, we are left puzzled as to what "manifestly ill-founded, by a majority", a seemingly contradictory statement, might mean.

Below, I briefly summarise the three inadmissibility decisions at issue. I also point out why the case may not have been as clear-cut as the Court's finding of "manifestly ill-founded" would lead us to believe.
Kochieva and Others v. Sweden: Expulsion of Asylum Seekers with Mental Health Problems

The first decision, delivered in Kochieva and Others v. Sweden, concerns the expulsion of asylum seekers with serious mental health issues to Russia. The applicants originate from South Ossetia. They suffer, respectively, from a serious psychological disorder with signs of PTSD, mild depression and panic attacks, and deep depression with recurring rages and signs of an impending breakdown. In its decision, the Court holds, with reference to N. v. the United Kingdom, that the applicants' poor health does not reach the high threshold set by article 3 of the Convention. The Court notes, in particular, that health care, including psychiatric health care, is accessible in Russia. The fact that the applicants' circumstances in Russia may be less favourable than those they enjoy in Sweden cannot, according to the Court, be regarded as decisive from the point of view of article 3. The Court concludes that "[c]onsequently, this part of the application is manifestly ill-founded and must be declared inadmissible." (par. 38). Yet, it reaches that conclusion by a majority, not unanimously.

One of the reasons why the Judge(s) in the minority may have disagreed is because the applicants' case appears to raise a new issue under the Convention – threat to mental health due to expulsion – not previously considered in the Court's case law. In that respect, the decision in Kochieva mirrors the contested, 4-3 split judgment in S.H.H. v. the United Kingdom, in which the dissenters argued that the case – which involved expulsion of a disabled person to Afghanistan – raised a new issue under the Convention (see our post on S.H.H. here). A request for referral of S.H.H. to the Grand Chamber is currently pending. This makes it all the more remarkable that Kochieva was not even deemed worthy of a judgment on the merits.

Ciuvica v. Romania: Politician Accuses Other Politician of Membership of Securitate

The second decision, delivered in Ciuvica v. Romania, concerns a claim by a politician who was convicted under civil law for defamation, after he had publicly accused his primary adversary in the impending elections for mayor of Bucharest of having been a member of Securitate during the Communist regime. The case is interesting, because the applicant actually had documents in his possession that mentioned the name of his political adversary as a "source" of Securitate. The applicant's political adversary acknowledged the existence of the document and recognised that his name indeed featured on the list. However, he claimed that he had no idea about the ultimate destination of the reports he had regularly sent to his superiors as an officer in the navy (e.g. on trips undertaken, on the people he had spoken in foreign ports, and on their equipment and technology). During the defamation proceedings, experts found that – in the absence of the individual's signature – it was impossible to find that he had willingly and knowingly collaborated with Securitate. The applicant admitted that this final, conclusive proof was missing.

In its decision, the Court first points out that, under the Convention, there is very little room for restrictions on political speech. The Court also finds that the speech at issue had taken place in the context of a debate of general interest, namely the potential collaboration of well known public figures in Romania. The Court further recalls that the limits of acceptable criticism are greater with respect to politicians than to private individuals. The Court therefore holds that, in the specific circumstances of the case, the politician in question should show a certain tolerance towards criticism related to potential collaboration with Securitate.

Despite all these elements, which clearly play in favour of the applicant's freedom of expression, the Court rejects his claim as manifestly ill-founded. It does so because (i) the accusations at issue

were particularly grave; (ii) the applicant never publicly indicated that he had any doubts as to his adversary's former collaboration with Securitate, but had instead "posited certainties"; and (iii) the terms used by the applicant to describe his adversary's alleged links with Securitate had not been indispensable to communicate his message; they instead revealed an intention to offend, according to the Court. The Court does point out that the compensation owed by the applicant – EUR 13,600 – is of a certain importance (67 times the average monthly salary in Romania), but does not consider the amount to be arbitrary.

Particularly striking about the decision in Ciuvica is that many elements appeared to play in favour of the applicant. Moreover, unlike in some other cases involving accusations of collaboration with Securitate (see, for instance, Petrina v. Romania), the applicant's accusations actually rested on a factual basis.[1] Nevertheless, the case was not deemed worthy of a judgment on the merits. At least one Judge disagreed, but we do not know why. Having this decision 'pass under the radar' would be all the more troubling, because it is part of a troubling line of case law in which the Court appears to impose a less restrictive alternative test on individuals exercising their rights, instead of on States restricting them (see also, for instance, Peta Deutschland v. Germany, para. 50). Indeed, the finding that "les termes employés par le requérant n'étaient pas indispensables pour la communication de son message" is worrying, because it implies that the room traditionally left for exaggeration and provocation under art. 10, may be narrowing.

Sukyo Mahikari France v. France: Taxation of Religious Organisation

The third and final decision, delivered in Sukyo Mahikari France v. France, concerns the 60% taxation imposed on part of the financial resources of a religious organisation that has been qualified as a sect.
The facts of the case are strikingly similar to Association Les Témoins de Jéhovah v. France. In both cases a religious organisation, qualified as a sect in France, was ordered to pay back taxes on all donations they had received over the past few years, pursuant to their qualification as a for-profit association. In Association Les Témoins de Jéhovah v. France, the Court found a violation of Article 9 due to the lack of foreseeability of the applicable legislation. In Sukyo Mahikari France, the Court first refers to the criteria that led it to find interference in the earlier case. These factors include the size of the due sums and the fact that their payment would result in a vital cut in the association's resources. As a result, the 'Association Les Témoins de Jéhovah' would no longer have been able to concretely guarantee its followers the free exercise of their cult. In Sukyo Mahikari France, conversely, the Court finds no interference with the applicant's freedom of religion. The Court is of the opinion that, since the association

only partly relied on donations (60% of its income), their taxation did not lead to a vital cut in the association's resources, so as to undermine its religious activity. As a result, "the Court finds that the consequences of the taxation are not sufficient to pose a question of lack of respect for the exercise of freedom of religion under paragraph 1 of article 9".[2]

In other words, the applicant's freedom of religion has not even been interfered with. The Court concludes, like in the foregoing decisions, that the applicant's claim under article 9 is manifestly ill-founded and declares it inadmissible, by a majority. Once again, questions arise as to why at least one Judge disagreed. Presumably, the dissenting Judge(s) was of the opinion that there had at least been an interference with the applicant's freedom of religion. After the step forward the Court took in Eweida and Others v. the United Kingdom (see our post here), it is indeed regrettable that it would once again resort to rejecting religious claims at the interference stage in an admissibility decision.[3] The fact that this decision could not be delivered unanimously should have been a sufficient indicator that it was worth some more thought and consideration.

[1] Rather than strengthening the applicant's claim, the availability of documents that appear to support his accusation ultimately played against him. Indeed, the Court's finding that the applicant had "chosen to express certitudes", which had only been possible because he had supporting documents, played an important role in its reasoning ("Celui-ci a choisi d'exprimer des certitudes.", para. 54).

[2] My translation from French. The decision states: "la Cour ne trouve pas que les conséquences de la taxation dénoncées par la requérante soient suffisantes pour poser une question de manquement au respect de l'exercice de la liberté de religion sous l'angle du paragraphe 1 de l'article 9." (para. 21).

[3] Note that the line of reasoning – i.e. the so-called 'freedom to resign' doctrine – discarded by the Court in Eweida of course relied on a different rationale (the applicant had the ability to quit her job to escape her inability to adhere to religious practices) for holding that the applicant had not suffered an interference with her freedom of religion than the one relied on in this case (the consequences of the taxation, from which the organisation could not escape, were not sufficiently serious to amount to an interference).