

Federal Constitutional Court Hears Arguments in Asylum/Headscarf Case.

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[1] On November 21st the Second Senate of the Federal Constitutional Court (FCC) held oral arguments in the constitutional complaint proceeding of two Iranian women who had been denied asylum in Germany. The complainants, mother and daughter, fled Iran after the Islamic revolution toppled the Shah. Having been denied asylum, the women were obligated by German law to return to Iran. The women were required to present or obtain for presentation a valid passport as part of the preparation for their return to Iran. Iran, however, will only validate passports for women if they are wearing a headscarf in the passport photo. The women refused to pose for and provide the mandated headscarf photos and the courts of the state Bayern (regional and state administrative courts) entered judgments holding that the women were obligated to comply with the mandate as part of their failed asylum proceedings.

[2] The women complained to the FCC alleging that the lower court rulings, which upheld the administrative authorities' decision to require the passport photos with headscarves, constituted a violation of the constitutional protection of human dignity (Art. 1 of the Basic Law), the constitutional right to freely develop one's personality (Art. 2 of the Basic Law), the constitutional prohibition against discrimination -- on gender and religious grounds (Art 3.3 of the Basic Law) and the "negative" constitutional right to religious freedom -- that is the right to be free from state interference in religious matters (Art. 4 of the Basic Law).

[3] In the argument the state Bayern found itself defending, as a provision of Bayern state and German federal law, an Iranian regulation that is indisputably applicable only to women. The Iranian women held the stronger side on the discrimination issue, arguing that the FCC previously decided that gender based distinctions are permissible, in light of Art. 3.3, only when they address "natural," that is to say, the biological differences between men and women. Headscarves obviously have no biological justification. The state Bayern was left to argue, unconvincingly, that its enforcement of the rule was neutral in its intent, even if it was not neutral in its application.

[4] The case was more equally fought on the religious freedom issue (both the Art. 3.3 anti-discrimination grounds and the Art. 4 "negative" right to be free from state interference with religion). At the argument the parties focused on the inherent meaning and social significance of headscarves, particularly whether they necessarily constitute a religious expression. The state Bayern argued that headscarves are religiously neutral cultural items and supported this position with the following claims: (1) the Koran itself does not require headscarves; (2) all women in Iran are required to wear headscarves, whatever their religious affiliation; and (3) headscarves are worn by some for political reasons (citing Yassar Arafat as an example). The lawyer for the Iranian women countered that the determinative test for answering questions about the meaning of the headscarves should be the intent and perception of the relevant and related communities. The lawyer argued that there was no secular tradition regarding headscarves in Iran and that the obligation to wear them arose only after the Islamic revolution. The lawyer argued that, although not a concrete religious symbol like the cross or crescent, headscarves had attained a representative religious meaning, like a nuns habit. The lawyer for the Iranian women proposed that headscarves were sufficiently characteristic of a religion as to trigger Art. 3 and Art. 4 religious freedom issues. Ultimately, the lawyer for the Iranian women argued that the state should refrain from seeking to define the meaning and scope of elements of faith, which is an inherently private and often very subjective issue. It should be enough, the argument went, that these women believe that the headscarves have a constitutionally significant religious meaning.

[5] Justice, Professor Udo Di Fabio, the newest member of the Courts Second Senate, again made a strong impression in pressing both parties to sharpen their arguments. He asked the lawyer for the Iranian women if the same analysis and arguments would apply to a woman from Turkey who wanted to wear a headscarf but was not allowed to do so by the secular Turkish government. Prof. Di Fabio asked the state Bayern to address his concern that Bayern's position in the case (tying German law to policies of another country), if accepted by the Court, might frustrate the purpose of the German asylum regime (which is to provide an escape from unjust policies in other countries).

[6] Justice, Professor Lerke Osterloh challenged the state Bayern to rationalize its position in this case (headscarves have no religious significance) with the view held by some Germans that public school teachers should be prohibited from wearing headscarves when they teach because of the religious significance of the headscarves.

[7] Insight into the standards the FCC might apply to the case can be drawn from the "Religious Oath" case (BVerfGE 33, 23 (1972)), the "School Prayer" case (461 K) and the "Classroom Crucifix II" case (472 K).

For more information:

English language version of the Basic Law on-line:

<http://www.uni-wuerzburg.de/law/gm00000>">www.uni-wuerzburg.de/law/gm00000

Germany's asylum regime includes the Constitutional provision of the right to seek asylum (Art. 16a of the Basic Law) and the Asylum Procedure Act (in English) on the web at the German Law Archive under "Statutes" and then "Nationality, Immigration and Asylum":

<http://www.iuscomp.org/gla/>">www.iuscomp.org/gla/

See Donald Kommer's exhaustive treatment of Germany's religious freedom jurisprudence in *The Constitutional Jurisprudence of the Federal Republic of Germany*, chapter 9.