ALLIANCE DEFENSE FUND

RE: ___Lautsi v. Italy_____
Application No. 30814/06
DATE: 13 November 2009

Introduction

The Italian Government has made public that it will exercise its right under European Convention of Human Rights Article 43 to appeal the judgment of the Second Section in the case of Lautsi v. Italy (application no. 30814/06, judgment of 3 November 2009). Article 43 reads thus:

> Article 43—Referal to the Grand Chamber
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> 1. Within a period of three months from the date of a judgment of the Chamber, any party to the case may, in exceptional cases, request the case be referred to the Grand Chamber.
> 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
> 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of judgment.

In the instant matter, it is clear that grounds for an appeal are well founded in accordance with the criteria set forth in Article 43 § 2. First, the judgment in Luatsi v. Italy raises several serious questions affecting the interpretation of the European Convention of Human Rights by creating inconsistencies among Protocol 1, Article 2 judgments and decisions. Second, the case wrongly substitutes the issue of separation of church and state with the issue of parental rights in education. Third, a serious issue of general importance arises with regard to the overreaching of the Second Section into matters that fall within the margin of appreciation of Member States under the principle of respect for cultural sovereignty. Fourth, the scope of the instant decision has wide reaching consequences for numerous Member States who also have symbols of their Christian heritage within public schools. Fifth, the judgment raises questions as to the integrity of moral damages awards where no real damage is suffered by the applicant.

(a) Subsidiarity

The judgment overreaches the Court's competencies with regard to respect for the cultural sovereignty of each Member State. The Crucifix is representative of the long and rich heritage of the Italian Republic and has become a staple of Italian culture. Its forced removal from public schools is a breach of customary international norms governing subsidiarity and respect for national identity. It is not the role of the European Court of Human Rights to rid the public square of symbols representative of a nation's heritage and culture.

Member States who ratified the Convention, and in particular Protocol 1, Article 2 and Article 9, could have never imagined that one day the Convention would be used as a sword to defile national heritage and compel radical secularism. States are bound by international treaty law *pacta sunt servanda* where there has been a meeting of the minds and fully informed consensual accession. Not a single High Contracting Party filed a reservation regarding their right to govern their own cultural affairs and to protect their heritage with relation to the Articles on education and thought, conscience, and religion. It is therefore clear that no Member State understood or foresaw these articles to mean that intimate symbols of culture and identity could be removed from public schools by the court for educative purposes. As such the instant judgment would bind Italy to a "right" it did not itself accede to.

The Court misapplies the principle of separation of church and state to the guarantees afforded by Protocol 1, Article 2 and Article 9 of the Convention. The mere presence of crosses in the historically and culturally Christian nation has no correlation to the establishment of a religion by the Italian government. The presence of crosses presents no level of compulsion to become or practice Roman Catholicism. More fundamentally, the judgment of the Court in reality in focusing on the issue of separation of church and state and overreaching in its interpretation of educative rights to do so in a manner wholly inconsistent with existing case law on the subject. The fact that the Court finds that the mere presence of a crucifix may be disturbing to non-Christian or atheist students does not meet the threshold of finding a violation of the Convention under Protocol 1, Article 2. The education protocol, whether taken alone or in conjunction with the freedom of thought, conscience and religion, does not guarantee a right to not be offended.

To the contrary, the Court in its previous decisions has recognized that issues relating to the setting and planning of education fall within the competencies of the individual Contracting

States and will vary according to country and era.[1] The Grand Chamber in Folgero and Others v. Norway held that such discretion must fall within the margin of appreciation of Member States for if Contracting Parties were to listen to the philosophical or religious objections of all parents then all institutionalized teaching would run the risk of being impracticable.[2] The very recognition of the Court of the fact that the planning and setting of education differs according to the country and era in question, clearly suggests that great deference must be afforded by the Court to Contracting Parties with regards to their obligations in the competency of education. Grounds for appeal therefore exist as clearly no such deference was afforded Italy in the instant matter.

The judgment in Lautsi is further inconsistent with Article 4, paragraph 3 of the European Charter on Local Self-Government which affirms the role of the principle of subsidiarity among Council of Europe Member States. The Charter calls for action and respect for the work of those authorities closest to the citizen with regard to the specific functions of state government. This same principle was reaffirmed by the Council of Europe in 1995 in its Recommendation On the Implementation of the Principle of Subsidiarity.[3] The manifestation of the principle of subsidiarity in European Court of Human Rights jurisprudence is of course the doctrine of the margin of appreciation which holds that local authorities are better suited to assessing the cultural, legal and social elements of their own nation than are judges sitting in Strasbourg. The instant judgment represents a serious departure from these guiding values.

(b) Inconsistency in Protocol 1, Article 2 Judgments and Decisions

The Lautsi judgment has created an inconsistency within the existing case-law governing Protocol 1, Article 2 by mandating that the mere general presence of Crucifixes in public schools has the power to indoctrinate whereas the Court has not shown deference to direct instances of state interference with the ability of parent's to raise their children according to their own religious and philosophical convictions.

In the decision of Konrad and Others v. Germany[4], the Court held that state respect for parental rights to raise one's children according to their own religious and philosophical

[1] ECHR, Folgero and Others v. Norway [Grand Chamber], application no. 15472/02, judgment of 29 June 2007, §84(g).

[22] Id.

[3] Council of Europe, Committee of Ministers, On the Implementation of the Principle of Subsidiarity, Recommendation No. R (95) 19 (adopted on 12.10.1995).

[4] ECHR, Konrad and Others v. Germany, application no. 35504/03, decision of 11.09.2006.

convictions did not include the right to home educate for reasons based on religious belief. The applicants in Konrad argued that in accordance with their Christian convictions and values, education of their children was their sole duty and could not be easily transferred to a third party. In German home education cases, parents have a valid claim that the educational climate and curriculum of German schools so radically opposes their religious convictions that their continued education in state mandated schools obliterates their ability to raise their children according to their own religious convictions.

The Court held in its decision that Protocol 1, Article 2 guaranteed only respect for parental convictions and did not guarantee absolute freedom to educate according to one's religious or philosophical convictions. Additionally, the Court stated that parents were free to educate their children according to their religious and philosophical convictions on weekends and during the week when they are not in school.[5] The ability to provide such education therefore does not, according to the Court, create a disproportionate emphasis on the education that is being provided to children in state run schools. This argument clearly applies equally therefore to the instant case. Whatever impression the presence of crucifixes may have on the wall of public schools, it is in no way disproportionate to the means available to parents to instill their own religious or philosophical convictions to their children when they are not at school. Precisely stated, the presence of crosses in public schools does not deprive parents of their right to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions.

The decision in Konrad taken in conjunction with the judgment in Lautsi has the very strong underlying inference that parental rights with regard to religion are only guaranteed as relates to freedom from religion. The Court cannot realistically claim that the presence of crosses in public schools disproportionately affects the ability of parents to raise children according to their own religious and philosophical convictions when compared to the views of parents who wish to home educate because the mandatory school curriculum provides teaching which is diametrically opposed to their religious and philosophical convictions.

The Court further held in Valsamis v. Greece[6] that the protections afforded to parental rights by Protocol 1, Article 2 did not include the right to remove the child of Jehovah's

[5] id., §1 para. 9.
[6] ECHR, Valsamis v. Greece, application no. 21787/93, judgment of 18 December 1996.

Witnesses', who held pacifism as a major religious tenet, from school for a single day where a mandatory parade was taking place to celebrate a national holiday that commemorated the outbreak of the war between Greece and Italy on 28 October 1940. The family argued that pacifism was a religious conviction protected by Article 9 which had been recognized as such by the Court in Arrowsmith[7] and that commemoration of any military event was contrary to the Jehovah's Witness faith.

The judgment, using the same reasoning that would later be used by the Konrad court, held that a minor disturbance to the religious beliefs of the families does not deprive the family of their right "to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions.[8] As in Konrad, where a direct interference with the religious beliefs of the parents occurred, the Court held that parental rights are not absolute and must be subject to the first sentence of the Protocol guaranteeing the right to education and recognizing that Contracting parties have a broad margin of appreciation with regard to this competency.

In the case of Kjeldsen, Burk Madsen and Pedersen v. Denmark[9] opt-outs for "sexual education" were refused to parents who wished their children not to participate in the classes because of the family's religious convictions. The Court in so holding stated that respect for parental rights in education was ancillary to the State's responsibility to guaranteeing the provision of education.[10] The Kjeldsen, Burk Madsen and Pedersen court also strongly held to the guiding principle that competency in educational matters falls to the State. In so doing it noted that parents' have the option of private education and in many states home education if they object to the convictions being taught in public schools.[11]

A glaring inconsistency is created where a direct threat to the respect for the religious and philosophical convictions of parents are ignored as in the above noted cases and where the

[7] ECHR, Arrowsmith v. the United Kingdom, application no. 7050/75, Decision and Reports 19, p. 19, para. 69.

[8] ECHR, Valsamis v. Greece, *op. cit.*, para. 31.

[9] ECHR, Kjeldsen, Burk Madsen and Pederson v. Denmark, application no. 5095/71; 5920/72; 5926/72, judgment of 7 December 1976.

[10] Id., §52.

[11] Id., § 54.

indirect presence of a religious symbol is deemed to offend parents' right to educate their child according to their own religious or philosophical convictions.

Furthermore, nothing in the legislative history of Protocol1, Article 2 or in its case law speaks on education outside of that being directly imparted to students by their teachers.[12] As the instant application therefore speaks to non-educative matters, it is manifestly unfounded and should have been deemed inadmissible by the Court.

The standard of the Court with regard to the second clause of Protocol 1, Article 2 is that a Contracting Party's only obligation to minority rights is to ensure that an abuse of the dominant position by the majority does not occur.[13] Precisely stated, the Court must afford Contracting Parties a wide margin of appreciation with regards to the organization and supervision of education to the extent that an abuse of the majority position does not occur. The placement of crucifixes in schools cannot be said to be an abuse of the dominant position and therefore should have fallen within Italy's margin of appreciation. The crosses, which are commonplace in Italian society, did not compel the applicant to any religious belief. Nor was the applicant required to pay homage to or even to look at the crosses. It therefore begs the question of how such an indirect act by the state as allowing crosses to be on the wall in public schools could be deemed to be an abuse of minorities by the dominant position.

The Court further defines the scope of Protocol 1, Article 2 as affording to the state discretion to exercise autonomy from Convention supervision to the limit that it not pursue an aim of indoctrination that might be regarded as not respecting parents' religious and philosophical convictions.[14] Indoctrination with regard to religion is defined by the Court as abusing a position of authority to unduly influence or coerce another to adhere to a specific religious belief or philosophical belief.[15] As crosses are such a commonplace symbol in Italy, with meanings as varied as those associated with religious belief to those being merely a symbol of heritage and unity, it cannot be said that the presence of crosses in schools has any more of an indoctrinating effect as crosses anywhere else in Italian society do. Thus, the Lautsi court erred in applying an improper standard by which to govern indoctrination and abuse of the majority position with regard to crosses in Italian schools.

[12] *See e.g.*: Id., § 50, which provides an analysis of the *travaux preperatoires* of Protocol 1, Article 2.

[13] ECHR, Young, James and Webster v. the United Kingdom, judgment of 13 August 1981, Series A, no. 44, p. 25, para. 63.

[14] ECHR, Kjeldsen, Busk Madsen and Pedersen v. Denmark, *op. cit.*, para. 53.

[15] *See e.g.*: ECHR, 25 May 1993, Kokkinakis v. Greece, Series A No. 260-A: AFDI, 1994, p. 658.

(c) Scope of the Judgment

In providing grounds for an appeal, it is of paramount importance that the scope of the instant judgment be stressed. While Italy has a unique history and heritage steeped in Catholicism, it is by no means the only Council of Europe member with rich cultural and historical ties to the Christian religion. Similarly, these Member State also use symbols of their Christian heritage, including the cross, in public schools and other state sponsored entities as signs of culture and unity.

Furthermore, the Court has already held that the stressing of one religion over another based on the national history and tradition of the respondent State does not in and of its own illustrate a departure from the principles of pluralism and objectivity amounting to indoctrination.[16] The Grand Chamber has gone further in stating that precisely for these reasons, the margin of appreciation afforded to Contracting Parties takes into account the planning and setting of curriculum.[17]

Additionally, the European Court of Human Rights does not deal directly with church and state relations. Indeed, it is not a violation of the Convention to have a State church[18] or to show preference to a specific religious denomination in a Member State[19]. This therefore clearly raises the question of why the doctrine of the separation of church and state was used to define its analysis of Protocol 1, Article 2. The President of the Section which delivered the decision in Lautsi, Judge Francoise Tulkens, has herself stated that the European Court is not a Constitutional Court, but a human rights supervisory organ.[20]

The removal of the Cross is a violation of both the religious freedom of the majority of Italians and a violation of the cultural sovereignty of all Italians. A value natural state does not exist. Taking down all Crosses in public schools after their presence there for centuries is a powerfully radical secular statement. Those Member States who now display crosses in public schools who were recently under the yoke of communism, such as, Croatia, Poland, Romania and Slovakia, know all too well that the forced absence of religious symbols in public places and

[16] ECHR, Angelini v. Sweden, application no. 1041/83 (dec.), 51 DR (1983).
[17] ECHR, Folgero and Others v. Norway, *op. cit.*, § 89.
[18] *See*: ECHR, Darby v. Sweden, application no. 11581/85, 31 Eur. Comm'n H.R. Dec. & Rep. 1 (1989) (Commission Report).
[19] ECHR, E. & G.R. v. Austria, application no. 9781/82, 37 Eur. Comm'n H.R. Dex. & Rep. 42 (1984).
[20] *See*: Francoise Tulkens, The European Convention of Human Rights and Church-State Relations: Pluralism v. Pluralism, Cardoza Law Review 30:6, 2576, 2577.

the presence of bare white washed walls has ominous ideological undertones. The consequent of the judgment in Lautsi however would be to revert these nations back to their white washed walls and all of the negative historical connotations that go along with them.

Numerous Contracting Parties, with and without a state recognized church, have crucifixes in their schools. As already mentioned, Croatia, Poland, Romanian and Slovakia are among the Member States to do so. The Romanian Supreme Court has twice upheld the rights of schools to have crosses in suits similar to that in Lautsi. Germany, Greece, Ireland, Malta, Portugal, Spain, and Slovenia also have crosses in public schools. While these countries, unlike Italy, do not make mandatory the presence of crosses in public schools, it is nonetheless clear from the judgment that the same principles used by the Court in finding the crosses to violate Protocol 1, Article 2, are equally applicable to any public school which allows for the presence of crosses.

With the amount of nations potentially affected by this decision being very large, it is absolutely paramount, based on the criteria set forth by Article 43 under the element of general public importance that an appeal be granted in the instant matter.

(d) Damages

The finding of non-pecuniary damages in the amount of 5000 Euro has no legal or equitable basis as the applicants suffered no actual physical, financial or moral damages. In no way can the mere presence of crucifixes on school walls cause such moral suffering as to justify the damages awarded by the Second Chamber. The purpose of the award of damages is not to unjustly enrich the applicant, but to compensate for actual harm suffered. In the instant matter, there is absolutely no basis on which a finding of moral harm could be found.

The punitive measures in the instant case far exceed the purported injury to the applicants. Furthermore, the Court's decision lacks both forseeability in the interpretation of the Convention or proportionality to the mere act of having crucifixes on the walls of Italian public schools.

The Court has held that when assessing damages, only injury to the applicant can be assessed.[21] Furthermore, a causal link must be drawn between the damage claimed and the

[21] *See e.g.*: ECHR, Supreme Holy Council of the Muslim Community v. Bulgaria, application no. 39023/97, § 116, 16 December 2004, with further references,

violation of the Convention.[22] The damage must be actual; awards for non-pecuniary damages cannot be awarded for theoretical suffering or as a means of punishing the state as a deterrent. Finally, regarding non-pecuniary damages, the Court may rule only on an equitable basis, having regard to the particular circumstances of the case and to the actual suffering which occurred.[23] The award of the damages in the instant matter is clearly excessive and ignores the general rules established by the court in pleading and awarding damages, particularly where the option of allowing the judgment itself to represent just satisfaction exists. By not granting review of both the judgment and the damages award, the court sets a precedent wholly inconsistent with its existing jurisprudence on the matter, thus abusing the principles of *stare decisis.*

Conclusion

It is clear from the totality of reasons provided above the sufficient grounds exist for an appeal to be granted. Primarily, it is of fundamental importance to note that nothing in Protocol 1, Article 2 remotely empowers the European Court of Human Rights to remove crucifixes, which are national symbols of heritage and unity from the classroom. To do so would stretch Protocol 1, Article 2 beyond any conceivable logic and would create great confusion in interpreting the Convention as relates to educative and parental rights. Second, it must be stressed that the scope of this decision goes far beyond Italian public schools and has wide sweeping implications for Member States throughout the Council of Europe which also share rich historical and cultural ties to Christianity. In summation, the precedent set by Lautsi would do violence to the principle of subsidiarity and make illusory the doctrine of the margin of appreciation. This level of judicial activism is not in line with the principles establishing the Council of Europe which are that a minimal level of rights be established in order to foster peace, unity and plurality. Finally, the award of damages in the instant case was wholly inconsistent with both the alleged violation and the principles used by the Court in assessing damages claims. To allow the damages award to stand would set a precedent which would negatively affect future damage awards before the Court. In conclusion, the Grand Chamber of the European Court of Human Rights should grant Italy an appeal in the matter of Lautsi v. Italy.

[22] *See*, among other authorities, ECHR, Barberà, Messegué and Jabardo v. Spain, judgment of 13 June 1994 (Article 50), Series A no. 285-C, pp. 57-58, §§ 16-20; ECHR, Salman v. Turkey [GC], no. 21986/93, § 137, ECHR 2000-VII; and ECHR, Demiray v. Turkey, no. 27308/95, § 67, ECHR 2000-XII.

[23] *Cf*., ECHR, Case of Oneryildiz v. Turkey [GC], application no. 48939/99, judgment of 30.12.2004, § 160.