



COUR EUROPÉENNE DES DROITS DE L'HOMME  
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

**CASE OF KOSTESKI v. THE FORMER YUGOSLAV REPUBLIC  
OF MACEDONIA**

*(Application no. 55170/00)*

JUDGMENT

STRASBOURG

13 April 2006

**FINAL**

*13/07/2006*

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Kosteski v. the former Yugoslav Republic of Macedonia,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,

Mr L. CAFLISCH,

Mr C. BÎRSAN,

Mrs M. TSATSA-NIKOLOVSKA,

Mr V. ZAGREBELSKY,

Mrs A. GYULUMYAN,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 23 March 2006,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 55170/00) against the Former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Macedonian national, Mr Vasko Kosteski (“the applicant”), on 10 December 1999.

2. The Macedonian Government (“the Government”) were represented by their Agent, Mrs R. Lazareska-Gerovska of the Ministry of Justice, Skopje.

3. The applicant complains that he was fined for absence of work on a Muslim holiday, invoking Articles 9 and 14 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 3 May 2001, the Court declared the application partly inadmissible, adjourning the remainder for observations by the parties.

6. On 5 April 2005 the Court declared the remainder of the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

#### **A. Proceedings regarding the applicant's absence from work on 29 January 1998**

8. On 29 January 1998 the applicant did not appear at work at the Electricity Company of Macedonia, a public utility company, despite the instruction of his superior according to which no employee was allowed to take any days off for a week due to the heavy workload. The applicant justified his absence with the fact that he had celebrated a Muslim religious holiday which was a public holiday for the citizens of Muslim faith under the Constitution and the respective law.

9. On 3 February 1998 the disciplinary committee of the company found that the applicant had breached the disciplinary rules and been absent from work without authorisation. The committee decided not to dismiss the applicant but fined him with a 15% cut in his salary for three months.

10. On 12 February 1998 the applicant complained to the second instance committee, arguing that there had been a decision of the Ministry of Labour and Social Politics to the effect that 29 January 1998 had been a public holiday for citizens of Muslim faith. As a member of this religious community, he had informed his superior about his absence the day before.

11. On 27 February 1998 the second instance committee upheld the decision of 3 February 1998, on the ground that the applicant had breached the instruction of 26 January 1998 by which no employee was allowed to take days off because of the heavy workload.

12. On 1 April 1998 the applicant appealed to the Bitola Municipal Court, claiming that his rights set out in Articles 9 and 19 of the Constitution had been breached. In particular, he had been fined only because he had celebrated the Muslim religious holiday and had not come to work on that day, in accordance with the decision of the Ministry of Labour and Social Politics according to which 29 January 1998 was a public holiday for the citizens of Muslim faith.

13. At the hearing before the Bitola Municipal Court the applicant stated that he expressed his religious beliefs individually without going to mosques.

14. On 24 March 1999 the Bitola Municipal Court dismissed the applicant's appeal on the ground that he did not adduce any evidence to prove that he was really of Muslim faith.

15. On 14 June 1999 the Bitola Appellate Court dismissed the applicant's further appeal. It stated that it was true that religious beliefs

were an inner matter for the individual person. However, in the instant case it was to be established whether the applicant's absence from work was justified. Therefore, it was important to establish the applicant's religious confession. The lower court was correct in dismissing the applicant's complaint as the applicant had not proven that he had been a Muslim since he had also celebrated the Christian religious holidays.

#### **B. Proceedings regarding the applicant's absence from work on 7 April 1998**

16. On 14 April 1998 the applicant was again fined for not having appeared at work on 7 April 1998 at the time of the celebration of another Muslim religious holiday, Bayram. The fine corresponded to 15% of his monthly salary over a six month period.

17. On 8 May 1998 the applicant's complaint was dismissed by the second instance committee.

18. The applicant complained to the Bitola Municipal Court that the Electricity Company had deprived him of his right to an additional paid public holiday for Muslim citizens although he had stated before the second instance committee that he was Muslim. However, he had not considered it necessary to change his name and surname accordingly and wished to worship on his own.

19. On 27 May 1999 the Bitola Municipal Court dismissed the applicant's appeal. The court stated that under the relevant law persons of Muslim faith enjoyed the right to paid religious holidays. However, the applicant had not given any evidence to corroborate his statement that he was a Muslim. He had never been absent from work at the time of the Muslim religious holidays before 29 January 1998. On the contrary, he had celebrated the Christian religious holidays, his parents were Christians and his way of life and diet showed that he was of Christian faith. From his employment contract and insurance it transpired that he had been registered as Macedonian without any mention of being a Muslim. The court held that the applicant was a self-proclaimed Muslim in order to justify his unjustified absence from work.

20. On 27 September 1999 the Bitola Appellate Court dismissed the applicant's appeal on the ground that while it was true that the religious beliefs were an inner matter, he had breached the disciplinary rules and had not come to work. He therefore had to justify his absence and it had been necessary to establish through evidence whether the applicant was truly of Muslim faith. There was however no evidence to this effect, as the applicant, an ethnic Macedonian, had been absent from work during the Christian religious holidays and had celebrated them. Therefore, his absence from work was unjustified.

### C. The proceedings before the Constitutional Court

21. On 18 November 1999 the applicant complained to the Constitutional Court that through disciplinary sanctions and judicial decisions he had been discriminated against because of his religious beliefs. In particular, for unknown reasons the courts had not considered his statement that he was of Muslim faith to be credible and had asked him for further proof. He claimed that he should not be required to produce evidence of his religious beliefs.

22. On 12 July 2000 the Constitutional Court refused to examine the applicant's allegations in respect of the decisions of 3 February, 27 February, 14 April and 8 May 1998 of the public utility company, the decisions of 24 March and 27 May 1999 of the Bitola Municipal Court and the decision of 14 June 1999 of the Bitola Appellate Court for being lodged out of the two-month time limit provided for in the Rules of the Constitutional Court.

23. The Constitutional Court however examined the applicant's complaint in regard of the Bitola Appellate Court's decision of 27 September 1999. It noted that the applicant requested the exercise of rights relating to freedom of religion but that he did not produce any evidence concerning his beliefs and refused to do so. As concerned the initial question as to whether when exercising a right to a paid public holiday based on religion it was enough for a citizen subjectively to assert his faith, it held:

“Taking into consideration that the rule of law is fundamental to the constitutional order of the Republic of Macedonia under Article 8, paragraph 1(3) of the Constitution, under which it should be implied that objective legal norms take precedence over subjective will when requesting the exercise of legal rights, and given the viewpoint of the representatives of the Christian and Islamic religions ... (the dean at the Theological Faculty in Skopje and the head of the Islamic community in Macedonia) that there are objective criteria to determine whether a citizen holds Christian and Islamic religious beliefs ... the court held that it was necessary to establish objective facts related to the exercise of a right and to obtain evidence of them in a situation where a right is requested.

In line with this, with a view to establishing objective facts to assess whether there was discrimination on religious grounds in this case, the court held a public hearing (on 27 April 2000) and three consultative discussions (on 16 and 25 May and 8 June 2000) and on the basis of their contents, in particular, on the basis of the applicant's statements, it was established that the contents of his religious belief (even their form) objectively did not correspond to those of the Muslim faith (and its form) on several grounds (for example: a lack of knowledge of the basic most important tenets of the religion through which its essence is expressed ... or of the way in which one ‘joins’ the Muslim faith, etc.)”

24. The court concluded that the applicant had not been discriminated against on the basis of his religious beliefs by the requirement to establish the objective facts and dismissed the complaint.

## II. RELEVANT DOMESTIC LAW

### A. 1991 Constitution

25. Article 9, as far as relevant, provides as follows:

“(1) Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, the colour of skin, national and social origin, political and religious beliefs, property and social status.

(2) All citizens are equal before the Constitution and law.”

26. Article 19, as far as relevant, provides as follows:

“(1) The freedom of religious confession is guaranteed.

(2) The right to express one’s faith freely and publicly, individually or with others is guaranteed.

...”

27. Article 110, as far as relevant, provides as follows:

“The Constitutional Court of Macedonia:

...

(3) safeguards the freedoms and rights of individuals and citizens concerning the freedom of communication, conscience, thought and action, and the prohibition of discrimination among citizens on the grounds of sex, race, religion or national, social or political affiliation;

...”

### B. Rules of the Constitutional Court

28. Section 51 provides that a person who considers that he or she is a victim of a violation of one of the rights set out in Article 110 § 3 of the Constitution shall have the right to file an application with the Constitutional Court within two months from the day he was served with a binding decision or a judgment.

### C. The Public Holidays Act

29. It provides, *inter alia*, that Christmas and Easter shall be public holidays for all the citizens of the former Yugoslav Republic of Macedonia regardless of their confession and that Ramazan Bayram and Kurban Bayram shall be public holidays for citizens of the Muslim faith.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

30. The applicant complains that he was fined for absence from work when he was celebrating a Muslim holiday.

31. Article 9 provides insofar as relevant:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

#### A. The parties’ submissions

##### 1. *The applicant*

32. The applicant submitted that the Government had failed to show why he should be required to prove that he belonged to a particular religion and suffer particular consequences if he failed. The requirement for unspecified evidence was an imposition on his inner conscience and made him feel of an inferior status as no others had been subject to additional conditions in order to join the Muslim religion. No other citizen had ever been required to prove their membership of a certain religion. In his case, he had been penalised for failing to prove his faith and the penalty interfered with the manifestation of his religious beliefs, namely his active involvement and celebration of the Bayram festival.

33. The applicant argued that the Government’s criticisms of his conduct were unsubstantiated. He had not been unjustifiably absent since he had given notification in advance of his absence. He also had not celebrated Orthodox holidays; businesses however closed on such days and he could not work. As concerned his name, this had been given to him at birth and beliefs could legitimately vary afterwards. He had never been interviewed or seen eating by any officials from the relevant authorities and it was not substantiated that his diet or knowledge of Islam was lacking. In any event it was of limited relevance and it would have been immoral and uncivilized to put him to some kind of test in this way, in particular as no one else had been required to prove their assertions of faith. He also argued that this

would prevent uneducated people from joining a religion and allow the educated to join many.

## 2. *The Government*

34. The Government denied that the State had in this case deprived the applicant of his right to manifest his religion freely. The Chief of the Islamic Community had not stated that a believer should abstain from working during Islamic religious holidays as an expression of religion or that working during such holidays was contrary to their beliefs. Absence from work during certain Muslim holidays therefore was not a manifestation or expression of religious beliefs in the sense protected by the Convention.

35. In any event, the imposition of a fine for absence from work was a disciplinary measure for his failure to respect working discipline and could not be regarded as an interference with the applicant's religious convictions. The applicant had not been obstructed in manifesting his religious convictions or subjected to any pressure to change them. Assuming that there had been an interference, the requirement for the applicant to obtain permission for absence was justified. He was employed in a power plant that had to continue working during holidays and at the relevant time there were ongoing repairs. The imposition of a fine for his deliberate flouting of the rules was proportionate in the circumstances.

36. In their view it was also necessary for the courts to assess whether or not his absence from work had been justified. Since the applicant was requesting the exercise of a right, it was not enough for him subjectively to assert the position. Since he failed to provide objective evidence, it was for the courts to draw conclusions from available evidence and they established that he had no knowledge of the Muslim faith, did not follow its diet and that he had previously been observing non-working Christian holidays. Contrary to the applicant's assertion, it was possible to prove adherence to the Islamic religion, as shown by the viewpoint of the head of the Islamic community in Macedonia. They referred to the public confession of certain dogmas and noted that the Muslim religion imposed a lifestyle whereby the believer publicly and regularly carried out acts such as the prayer five times a day, distributing charity, fasting during Ramadan and pilgrimage to Mecca.

## **B. The Court's assessment**

37. The Court's case-law indicates that while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private (see, amongst many authorities, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A § 57). Article 9 lists a

number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance: it does not, however, protect every act motivated or inspired by a religion or belief (*Kalaç v. Turkey*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, § 27). Thus, there was no interference with the right guaranteed by Article 9 where a military officer with fundamentalist beliefs was compulsorily retired for breach of discipline (*Kalaç*, cited above, §§28-31) or where a public service employee, member of the Seventh-day Adventist Church, was dismissed for breach of contract in absenting himself from work in order to keep the Sabbath (*Konttninen v. Finland*, no. 24949/94, Commission decision 3.12.96; see also *Stedman v. the United Kingdom*, no. 29107/95, Commission decision 9.4.1997, D.R. 89 p. 104, where the applicant was dismissed for refusing to work on Sundays).

38. The Court recalls first of all that the present case concerns the alleged violation arising from the applicant's absence from work on 7 April 1998, his complaints concerning the earlier incident having been rejected for non-exhaustion of domestic remedies. It considers that while it may be that this absence from work was motivated by the applicant's intention of celebrating a Muslim festival it is not persuaded that this was a manifestation of his beliefs in the sense protected by Article 9 of the Convention or that the penalty imposed on him for breach of contract in absenting himself without permission was an interference with those rights (see the cases cited at the end of the previous paragraph).

39. Insofar as the applicant has complained that there was an interference with the inner sphere of belief in that he was required to prove his faith, the Court recalls that the courts' decisions on the applicant's appeal against the disciplinary punishment imposed on him made findings effectively that the applicant had not substantiated the genuineness of his claim to be a Muslim and that his conduct on the contrary cast doubt on that claim in that there were no outward signs of his practising the Muslim faith or joining collective Muslim worship. While the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by Macedonian law which provided that Muslims could take holiday on particular days, including the Bayram festival in issue in the present case (see paragraph 29 above). In the context of employment, with contracts setting out specific obligations and rights between employer and employee, the Court does not find it unreasonable that an employer may regard absence without permission or apparent justification as a disciplinary matter. Where the employee then seeks to rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not

forthcoming, to reach a negative conclusion (see, *mutatis mutandis*, cases concerning conscientious objection where the authorities may legitimately require strong evidence of genuine religious objections to justify exemption from the civil duty of military service – e.g. *N. v. Sweden*, no. 10410/83, Commission decision of 11 October 1984, D.R. 40 p. 203, *Raninen v. Finland*, no. 20972/92, Commission decision of 7 March 1996). The applicant however was not prepared to produce any evidence that could substantiate his claims. To the extent therefore that the proceedings disclosed an interference with the applicant’s freedom of religion, this was not disproportionate and may, in the circumstances of this case, be regarded as justified in terms of the second paragraph, namely, as prescribed by law and necessary in a democratic society for the protection of the rights of others.

40. The Court concludes that there has been no violation of Article 9 in the present case.

## II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 9

41. The applicant complains that he was fined for absence from work when he was celebrating a Muslim holiday.

Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### A. The parties’ submissions

#### 1. *The applicant*

42. The applicant submitted that national legislation together with the Constitution and the Convention gave him the right to freely choose his religion, to express it and change it, without having to prove it. The requirement that he had to prove his religious affiliation was contrary to Article 9 and he was treated differently from other citizens, effectively as a second class degree citizen, contrary to Article 14 as a result.

#### 2. *The Government*

43. The Government submitted that, as the applicant’s complaints did not disclose any interference with rights guaranteed under Article 9, Article 14 did not come into play. Further, given that the applicant’s name and way of life had not indicated membership of the Muslim confession and

that he had first declared himself to be a believer in proceedings to justify his absence from work, it was necessary for the domestic courts to establish whether he was in a comparable situation to other Muslim believers. While Muslim believers orally declared their faith and manifested it through their lifestyle and performance of religious duties, the applicant refused to show that he was in such a situation. Even assuming that there was any difference of treatment, they argued that it had reasonable and objective justification as the applicant had never publicly manifested his belonging to the Muslim faith and his conduct cast doubt on his claimed conversion. These doubts were relevant and justified, in particular given that in a period of eight years he had changed his beliefs three times (in 1994 he had stated in the census that he was in an atheist while in 2002 he had stated that he was Orthodox).

### **B. The Court's assessment**

44. Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It may be applied in an autonomous manner as a breach of Article 14 does not presuppose a breach of those other provisions although, since it has no independent existence, it can only come into play where the alleged discrimination falls within the scope of the rights and freedoms safeguarded by the other substantive provisions (see, amongst many others, *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, § 43). Further, different treatment is discriminatory, for the purposes of Article 14, if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”. Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24, and *Camp and Bourimi*, cited above, § 37).

45. In the present case, while there is no right as such under Article 9 to have leave from work for particular religious holidays, the Court notes that the courts' decisions on the applicant's appeal against the disciplinary punishment imposed on him made findings touching on the apparent genuineness of his beliefs. This, in the Court's view, is sufficient to bring the applicant's complaints within the scope of Article 9.

46. However, insofar as the applicant claims that he is the only person of the Muslim faith who has been required to prove his adherence to that religion, the Court considers that any resulting difference of treatment may be regarded as based on objective and reasonable justification. The applicant was making claim to a privilege or exemption to which he was not entitled unless he was a member of the faith concerned and in circumstances

which arguably gave rise to doubts as his entitlement. As found above under Article 9, it was not unreasonable or disproportionate to require him to show some level of substantiation of his claim.

47. The Court concludes in the circumstances that there has been no violation of Article 14 of the Convention in conjunction with Article 9.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Holds* that there has been no violation of Article 9 of the Convention;
2. *Holds* that there has been no violation of Article 14 of the Convention in conjunction with Article 9.

Done in English, and notified in writing on 13 April 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER  
Registrar

Boštjan M. ZUPANČIČ  
President