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Aderhold, v. Dalwigk, Knüppel
Rechtsanwaltsgesellschaft GmbH
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FEDERAL CONSTITUTIONAL COURT
- 2 BvR 1908/03 -

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IN THE NAME OF THE PEOPLE

In the proceeding

concerning

the constitutional appeal

by Vereinigungskirche e.V.,
represented by its management board, Schillerstrasse 18,
63189 Schmitten,

- Legal representatives: Aderhold, v. Dalwigk, Knüppel,
Rechtsanwaltsgesellschaft GmbH,
Subbelrather Strasse 15 A, 50823 Köln -

against a) the order of the Federal Administrative Court
dated September 4, 2003 - BVerwG 1 B 288.02 -

b) the judgment of the Rhineland-Palatinate Administrative Court of Appeals
dated June 7, 2002 - 12 A 10349/99.OVG -

the 2nd Chamber of the Second Senate of the Federal Constitutional Court, acting through Justice Bross,
Justice Lübbe-Wolff
and Justice Gerhardt,
unanimously held as follows on October 24, 2006:

The judgment of the Rheinland-Pfalz Administrative Court of Appeals dated June 7, 2002 - 12 A 10349/99.OVG - violates the Appellant's fundamental right arising from Article 4 paragraphs 1 and 2 of the Federal Constitution and is rescinded; the matter is remanded to the Administrative Court of Appeals. The order the order of the Federal Administrative Court dated September 4, 2003 - BVerwG 1 B 288.02 - is therefore moot.

The State of Rhineland-Palatinate shall reimburse the Appellant for the necessary outlays.

Statement of grounds:

A.

The constitutional appeal relates to the issue of the scope of the rights of a religious association protected by Art. 4 par. 1 and 2 GG [German Federal Constitution] in connection with an entry prohibition imposed against its foreign religious leader.

I.

1. The Appellant, a registered association, opposes the alert to refuse entry to Mr. Sun Myung Moon and Ms. Hak Ya Han Moon in accordance with Art. 96 par. 2 of the Convention of June 19, 1990, on the Implementation of the Convention of June 14, 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic Relating to the Incremental Elimination of Controls at the Common Borders (Schengen Implementation Convention) (BGBl. [Federal Statutory Gazette] 1993 II p. 1013).

2. Mr. Moon is the founder of the Unification Church, which is represented worldwide and whose followers in the Federal Republic of Germany are organized in the Appellant organization. Mr. and Mrs. Moon had intended to enter the Federal Republic of Germany at the end of 1995 as part of a world tour. According to the visit itinerary, Mr. Moon was supposed to give a lecture entitled "The True Family and I" at an event held by an associated affiliated with the Appellant; in addition, Mr. and Mrs. Moon intended to conduct discussions with their followers.

3. After various inquiries concerning Mr. and Mrs. Moon's intended trip had been made against the backdrop of the concerns that existed with respect to the appearance and effects of the Appellant and Mr. and Mrs. Moon, the Koblenz Border Protection Directorate, acting pursuant to a request by the Federal Ministry of the Interior, issued an alert at the end of 1995 to refuse entry to Ms. and Mrs. Moon for a period of three years in accordance with Art. 96 par. 2 of the Schengen Implementation Convention (SDÜ). On the basis of the alert, Mr. and Mrs. Moon were denied entry at the time of their arrival in Paris shortly thereafter. The alert was extended on an ongoing basis, most recently in 2004. As a result of the alert, Mr. and Mrs. Moon are denied entry into each Schengen country, unless the relevant country issues an exemption.

4. The Administrative Court dismissed the Appellant's complaint, which sought a declaratory finding that the alert was unlawful, on the grounds of lack of standing to sue. Pursuant to the Appellant's appeal, the Administrative Court of Appeals held by interlocutory judgment that the complaint was procedurally permissible; the *Revision* [second-level appeal of legal issues] of this decision was unsuccessful. The Federal Administrative Court held that the Appellant had standing, because, according to the Court, it has to be assumed that the Appellant can avail itself of rights arising from Art. 4 par. 1 and 2 GG, at least for purposes of the issue of whether the complaint is procedurally permissible.

The Federal Administrative Court held that it is true that the entry provisions under the law governing foreigners do not, from the standpoint of ordinary statutory law, have any protective effect for the benefit of third parties. But if these provisions give the authorities discretion, the Federal Administrative Court stated, it is necessary in the exercise of such discretion to also take into consideration constitutionally adopted values, as well as fundamental rights of third parties affected by the decision being rendered. According to the Court, this corresponds to a personal right on the part of the affected holder of fundamental rights. But, the Court stated, in light of the fact that the scope of the protective sphere of the freedom of exercise of religion and the fact that, under the law governing foreigners, the religious community does not, in principle, have an independent legal position in the proceeding of its religious leader, the state's duty to take the religious community's fundamental rights and interests into account only exists to the extent that the denial of entry negatively affects the community's religious interests based on the community's own understanding. According to the Federal Administrative Court, the issue of whether the Appellant actually has a personal right to have its interests taken into account in the decision rendered under the law governing foreigners and the issue of what consequences would arise therefrom must be examined as part of the merit of the complaint.

5. The Administrative Court of Appeals dismissed the complaint. It held that, according to the theology of the Unification Church, Mr. and Mrs. Moon do not have any special importance for purposes of the community's exercise of religion. According to the Administrative Court of Appeals, the joint exercise of religion is possible on an unrestricted basis even without personal encounters like those that had been planned. The Court stated that the visit by Mr. Moon instead gained its importance to the Appellant's members from the fact that, in the eyes of the Appellant's members, the visit would be an extraordinary community encounter characterized by Mr. Moon's magnetism and personality. It is conceivable, the Court stated, that the believers of the religion established by Mr. Moon place great value in a personal meeting with him and his wife and that he would have an inspiring effect on the Appellant's members, conjure up enthusiasm and spread optimism.

But, according to the Court, these effects have no specifically religious content, such as in the form of a revelatory experience, but rather the effects that are associated with any encounter with a spiritual leader of a church.

6. The Appellants' appeal of the procedural impermissibility of the *Revision* was based on the issue of whether a claim by the Appellant arising from Art. 4 par. 1 and 2 GG requires that the encounter between the religious leader and the members have a special importance—in comparison with other religious communities—and whether the "merely usual" importance of the church leader's visit is insufficient. In addition, the Appellant contends, the personal encounter of the Appellant's members with their religious leader has a special importance that the Administrative Court of Appeals does not deny and that is exclusively religiously based.

7. The Federal Administrative Court rejected the appeal. It held that, in connection with the denial of entry by a foreigner, a state only has a duty to consider the interests of the religious community—and the religious community only has a corresponding right to have its interests considered—if the denial of entry would have a substantially negative effect on the religious interests of the religious community. Whether this is the case, according to the Federal Administrative Court, can only be evaluated in the specific individual case—in this instance, on the basis of the character of the planned visit that led to the denial of entry. The Federal Administrative Court conceded that the contested decision is based on legal principles that deviate from the case law of the Federal Administrative Court and imposes excessively onerous requirements. But, according to the Federal Administrative Court, the contested decision does not rely thereon, because, even upon correct application of the standards developed by the Federal Administrative Court, it cannot be assumed that the visit planned for the fall of 1995 would have had a specifically religious importance in the absence of a presentation to that effect.

II.

By means of the constitutional appeal, the Appellant complains of a violation of Art. 4 par. 1 and 2 and Art. 19 par. 4 GG [German Federal Constitution].

1. According to the Appellant, the goal of the complaint that was brought was a declaratory finding that the alert to deny entry was unlawful in its entirety; the Appellant contends that this goal of legal protection was not satisfied by the decisions of the Administrative Court of Appeals and Federal Administrative Court, which were focused solely on the visit planned in the fall of 1995.

2. According to the Appellant, the order of the Federal Administrative Court, like the judgment of the Administrative Court of Appeals, is based on a standard that does not satisfy Art. 4 par. 1 and 2 GG. Had the correct standard been applied, the Appellant contends, the Federal Administrative Court would have had to rescind the appellate decision. According to the Appellant, the meeting planned in the fall of 1995 had a specifically religious dimension. The Appellant states that the Federal Constitution protects not only the holding of a religious conviction, but also its free development in the exercise of religion. This, according to the Appellant, specifically includes personal contact with religious leaders. According to the Appellant, the special importance of a personal meeting is obvious in the instant case, because Mr. Moon is the founder of the Unification Church and, according to the content of the Church's beliefs, is the messiah. The possibility of meeting the religious leader abroad is not the equivalent of his visit, the Appellant claims. In the Appellant's view, a limitation of the protective sphere of Art. 4 par. 1 and 2 GG to a core sphere of religious exercise is impermissible in this context (as well as others). The Appellant states that it had no reason to address the special importance it attached to the planned meeting as opposed to the special importance its members attached to the planned meeting, because the Federal Administrative Court itself made no differentiation in this regard in its prior decision.

3. In the Appellant's view, there is no recognizable justification for the intrusion into the protective sphere of Art. 4 par. 1 and 2 GG. The Appellant contends that it would only be possible to deny a brief visit if the denial were supported by grounds based on the public welfare that were so significant that they would be valid in the face of Art. 4 par. 1 and 2. However, the Appellant contends, the Defendant's presentation in the initial proceeding was limited to rumors and presumptions. It is also necessary, according to the Appellant, to take into account the negative effect the denial of entry has had on its reputation.

III.

The Federal Ministry of the Interior believes that the Appellant does not have legal standing, because Mr. Moon himself did not oppose his alert in the Schengen information system—at least not in the primary proceeding on the merits. According to the Federal Ministry, the protective sphere of Art. 4 par. 1 and 2 is not affected, at least not with respect to the Appellant, because the visit by Mr. and Mrs. Moon planned in 1995 lacked the necessary specifically religious dimension. The Federal Ministry contends that, although it is necessary to focus on the content of the relevant religion, this does not mean that it is possible to dispense with any and all objectively comprehensible religious connection to the relevant conduct. The Federal Ministry states that such a connection is lacking, as the Administrative Court of Appeals and the Federal Administrative Court correctly found. Even if it were assumed, the Federal Ministry contends, that the protective sphere of Art. 4 par. 1 and 2 GG is affected, the constitutional appeal cannot be successful because the alert in the Schengen information system with respect to Mr. and Mrs. Moon, which only indirectly affected the Appellant, is constitutionally justified.

According to the Federal Ministry, the competent offices reasonably exercised the broad discretion accorded to them in questions of entry. The Federal Ministry contends that the denial of entry was based on problematical content of the doctrine of the Unification Church. In particular, the Federal Ministry points out, the Church's doctrine is in conflict with the Federal Constitution's value decisions expressed in Art. 6 par. 1 and Art. 3 par. 2 GG, as well as Art. 140 GG in conjunction with Art. 137 par. 1 WRV [Weimar Reich Constitution]. In contrast, according to the Federal Ministry, there were no significant religious reasons for the visit by Mr. and Mrs. Moon. The denial of entry does not, in the Federal Ministry's view, have a stigmatizing effect, nor does it negative affect the Appellant's (other) work. The Federal Ministry contends that the denial of entry is also legitimate because the state is thereby fulfilling its protective duties to its citizens arising in the instant case from Art. 6 par. 1 and Art. 3 par. 2 GG, in particular.

B.

The Chamber accepts the constitutional appeal for the purpose of rendering a decision, because it is appropriate to do so in order to enforce the Appellant's rights stated in § 90 par. 1 BVerfGG [Federal Constitutional Court Act] (§ 93a par. 2 letter b BVerfGG). The constitutional appeal is procedurally permissible; in particular, the Appellant, whose specific concern is the enforcement of its own protected interests, cannot be denied standing as a result of Mr. Moon's failure to exercise legal protection remedies. The constitutional appeal is also obviously well-founded—in a manner that establishes the Chamber's competence to render a decision (§ 93c par. 1 sentence 1 BVerfGG); the constitutional issues that govern the evaluation of the constitutional appeal have already been decided by the Federal Constitutional Court.

I.

The judgment of the Administrative Court of Appeals violates the Appellant's fundamental right arising from Art. 4 par. 1 and 2 GG.

1. As a religious association, the Appellant can invoke Art. 4 par. 1 and 2 GG.

a) Associations whose purpose is the cultivation or promotion of a religious creed or the pronouncement of the beliefs of its members can be the holder of the fundamental right arising from Art. 4 GG (see BVerfGE [Decisions of German Federal Constitutional Court] 102, 370 <383>; 105, 279 <293>). Art. 4 par. 1 and 2 GG also protect the freedom of organizational merger for the purpose of the common public creed (BVerfGE 19, 129 <132>; 42, 312 <323>; 70, 138 <161>; 99, 100 <118>; 102, 370 <383>; 105, 279 <293>). However, it is a prerequisite in this regard that the status of a religious community be not only claimed, but that the belief and community must actually constitute a religion and a religious community based on its spiritual content and external appearance (BVerfGE 83, 341 <353>).

b) According to the findings of the Administrative Court of Appeals, the Appellant devotes itself—at least in part—to the joint cultivation of the doctrines of Mr. Moon, which both the Administrative Court of Appeals and the Federal Administrative Court have classified as a religion. No misgivings exist in this regard. There can be no objection from the standpoint of constitutional law if the specialized courts hold that a belief that establishes goals for human existence, addresses the core of man's personality and claims to comprehensively explain the purpose of the world and human life, as is the case with the belief represented by the Appellant, falls within the protection of Art. 4 par. 1 and 2 GG (see BVerfGE 105, 279 <293> concerning the Osho movement). This classification is not barred by the fact that the Appellant might possibly also pursue different—particularly economic—purposes (see BVerfGE 105, 279 <293>).

2. The measure contested in the initial preceding touches upon the protective scope of Art. 4 par. 1 and 2 GG.

a) The fundamental rights protection accorded to a religious community encompasses the right to engage in activity with respect to its own world view or religion, the right to pronounce its faith and the right to cultivate and promote the creed. This includes not only ritualistic acts, as well as compliance with and exercise of religious commandments and customs, such as worship services, gathering of church collections, prayers, receipt of the sacraments, processions, display of church flags and ringing of bells, but also religious education, celebrations and other expressions of the religious life and world view, as well as, generally speaking, the cultivation and promotion of the respective creed (see BVerfGE 19, 129 <132>; 24, 236 <246 f.>; 53, 366 <387>; 105, 279 <293 f.>. The individual actions that are covered are determined in substantial part on the basis of the religious community's own self-definition, because part of the freedom of belief guaranteed by fundamental rights specifically includes the fact that there is an abstention from state determination of genuinely religious questions (see BVerfGE 102, 370 <394>; see also BVerfGE 12, 1 <4>; 18, 385 <386 f.>; 24, 236 <247 f.>; 41, 65 <84>; 42, 312 <332>; 53, 366 <392 f., 401>; 72, 278 <294>; 74, 244 <255>; 102, 370 <394>).

To the extent that the protective sphere of the fundamental rights arising from Art. 4 par. 1 and 2 GG is viewed restrictively in the literature with the help of substantiality criteria (see Jarass, in: Jarass/Pieroth, GG [German Federal Constitution], 8th ed. 2006, Art. 4 margin no. 15; Mager, in: v. Münch/Kunig (ed.), GG [German Federal Constitution], 5th ed. 2000, Art. 4 margin no. 56; Schoch, Die Grundrechtsdogmatik vor den Herausforderungen einer multikonfessionellen Gesellschaft [The Dogma of the Federal Constitution in the Face of the Challenges of a Multi-Denominational Society], in: Festschrift für Hollerbach [Festschrift for Hollerbach], 2001, p. 149 <157 ff.>), these considerations relate primarily to activities, by which the religious community affects the society, beyond the circle of its own members.

It is unnecessary in the instant case to decide whether and the extent to which it would be possible to concur with these considerations, because this case involves the issue that relates to the sphere of the intra-community cultivation and activity of the faith represented by the Appellant. Setting obviously extra-religious aspects of the encounter aside, the respective religious community's self-understanding alone can be determinative for purposes of answering the question of what importance the members of a religious community attribute to a personal encounter with their founder and spiritual leader. This addresses core questions of the cultivation and promotion of the faith protected by Art. 4 par. 1 and 2 GG, which, "in the absence of insight and suitable criteria" (BVerfGE 102, 370 <394>), are fundamentally not subject to evaluation by state agencies. Even if, viewed from the outside, a connection to the exercise of religion is not necessarily apparent, the state is prevented from substituting its own assessments and evaluations of such matters for those of the religious community. Accordingly, it is also not possible to focus on whether the contested state measure makes it completely or substantially impossible for the religious community or its followers to exercise their religion. Separate and apart from the fact that the establishment of such a standard would require a substantive evaluation of religious issues, it would lead to protection of nothing more than a "minimum religious existence," which is not compatible with Art. 4 par. 1 and 2 GG. It is not necessary to discuss here what outside limits are imposed on the definitional power of religious communities.

b) According to the findings of the Administrative Court of Justice, the planned visit by Mr. and Mrs. Moon that gave rise to the entry prohibition was based in the religion represented by the Appellant. Its purpose was—at least in part—to provide contact between the believers and the founder of the religion, which is accorded religious significance according to the self-understanding of the Unification Church.

In light of the central position of the religion founder in any religion focused on such a person, specific evidence not found in this case—such as evidence that the stay was purely of a touristic nature—would have been required to justify an assessment to the contrary. Accordingly, the entry prohibition touches upon the Appellant's fundamental right arising from Art. 4 par. 1 and 2 GG.

3. The judgment of the Administrative Court of Appeals is based on an incorrect understanding of the protective sphere of Art. 4 par. 1 and 2 GG.

a) The Administrative Court of Appeals dismissed the Appellant's complaint because the visit by Mr. and Mrs. Moon planned in the fall of 1995 had no specific importance for purposes of the community's exercise of religion and no specifically religious content for the Appellant's members. The Administrative Court of Appeals therefore based its decision on a weighing of genuinely religious interests from the Appellant's internal sphere, from which, as stated, state agencies are barred. Therein lies a violation of Art. 4 par. 1 and 2 GG.

b) The contested judgment is also based on this fundamental right violation.

aa) The fundamental right protection of religious communities does not, however, result in religious communities being exempted from the outset from the provisions of law applicable to everyone. Nor is it possible to derive from Art. 4 par. 1 and 2 GG a right to enter on the part of the party desiring entry or the religious community interested in his entry. In this regard, the applicable rule with respect to Art. 4 par. 1 and 2 GG cannot be any different than that which applies to other legal rights protected by fundamental rights, such as those arising from Art. 6 par. 1 GG (see in this regard BVerfGE 76, 1 <47, 49 ff.>).

However, it is necessary when interpreting and applying the ordinary statutory provisions concerning entry and residency of foreigners, which in this case provide, in principle, for visa-free entry and thus permit a temporary stay, to take into consideration the self-understanding of the religious community to the greatest extent possible, provided that it is rooted in the sphere of freedom of belief and denominational freedom guaranteed in Art. 4 par. 1 GG and implemented in the exercise of religion protected by Art. 4 par. 2 GG (BVerfGE 83, 341 <356>; similarly previously BVerfGE 24, 236 <251>; 53, 366 <401>, see also Federal Administrative Court, order dated July 4, 1996 - 11 B 23/96 -, NJW 1997, p. 406 <407>).

bb) The Administrative Court of Appeals did not review the requirements for an alert to deny entry—which was a consistent approach based on the Court's legal position. The result of the balancing of the interests pursued via the alert in the Schengen information system and the interests of the Appellant—which would have been undertaken had the scope of the protection guaranteed by Art. 4 par. 1 and 2 GG been correctly determined—is not sufficiently foreseeable for the Federal Constitutional Court to be able to forego rescinding the contested decision and remanding the matter. It is first necessary to take into account the fact that, within the framework of the Schengen Implementation Convention, the legislature obligated itself beyond § 60 par. 3 in conjunction with § 7 par. 2 no. 3 AuslG [Foreigners Act] (now § 15 par. 3 in conjunction with § 5 par. 1 no. 3 AufenthG [Residency Act]), to the extent that the alert for denial of entry in accordance with Art. 96 par. 2 SDÜ [Schengen Implementation Convention], which is binding in principle on all Schengen states, requires the existence of dangers to public safety and order or national security. At the same time, it follows from the examples listed in Art. 96 par. 2 sentence 2 SDÜ, in which the existence of such dangers is assumed and which refer to criminal acts that have been committed or whose commission is feared, that the danger associated with the foreigner's presence must have a certain degree of substantiality.

It is not obvious that a visit by Mr. and Mrs. Moon entails such dangerous potential. And it is even less clear that visitation stays by Mr. and Mrs. Moon involve dangers that, even taking the Appellant's interests into consideration, make the order and maintenance of the alert with respect to Mr. and Mrs. Moon seem justified. It is unnecessary to decide the question of whether or the extent to which § 60 par. 3 in conjunction with § 7 par. 2 no. 3 AuslG [Foreigners Act] (now § 15 par. 3 in conjunction with § 5 par. 1 no. 3 AufenthG [Residency Act]), would have to be interpreted restrictively for a denial of entry effective only at a national level in light of the provision entered into in Art. 20 in conjunction with Art. 5 par. 1 letter d) and e) SDÜ, because the sole subject matter of the initial proceeding is the measure taken on the basis of Art. 96 par. 2 SDÜ. To the extent that the Federal Ministry of the Interior derives the public interest in the denial of entry from conflicts between the content of the Appellant's beliefs and the values adopted in the Federal Constitution, it must be pointed out that, with respect to the content of the beliefs they represent and other purely internal affairs, religious communities are, in principle, not bound by the values of the Federal Constitution that govern the behavior of the state (see BVerfGE 102, 370 <394 f.>) and that, outside of that sphere, the interaction between religious freedom and the restrictive goal must be taken into account through the appropriate balancing of rights (see BVerfGE 72, 278 <289>).

II.

No decision is necessary to the extent that the Appellant sees a violation of Art. 19 par. 3 GG in the fact that the Administrative Court of Appeals and the Federal Administrative Court missed the Appellant's legal protection goal by focusing solely on the visit planned in the fall of 1995 that gave rise to the alert to deny entry. The Appellant can continue to pursue its interests in legal protection before the Administrative Court of Appeals following the remand to the Administrative Court of Appeals order on substantive grounds.

III.

The decision on the reimbursement of outlays is based on § 34a par. 2 BVerfGG.

This decision is unappealable (§ 93d par. 1 sentence 2 BVerfGG).

Bross Lübbe-Wolff Gerhardt

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