From: Jennifer Lea, Robert Clarke
Date: 12 March 2020
Re: Case note on *Grimmark v. Sweden* and *Steen v. Sweden* (nos. 43726/17; 63209/17)

(a) Facts

1. The cases concern the right of conscientious objection in Sweden. Between 2013 and 2014, Ms. Grimmark and Ms. Steen were denied employment as midwives when they refused to participate in abortions because of their Christian faith.

2. In the spring of 2013, Ms. Grimmark completed a midwifery internship at Höglandssjukhuset women's clinic and was subsequently offered a summer job and employment. After she explained to her employers that she could not perform an abortion because of her Christian faith, she received notice from the head of the maternity ward stating that she was "no longer welcome to work with them." In January 2014, Ms. Grimmark applied for a job at Värnamo Hospital women's clinic. She informed the Värnamo Hospital that she could not perform abortions because of her Christian faith. During her hiring interview, the employer assured her they could find a solution to accommodate her beliefs and a week later she was offered a position. However, on 27 January 2014, the head of the maternity ward called Ms. Grimmark and explained that they were withdrawing the employment offer "because of the large media attention caused by her complaint against Höglandssjukhuset."

3. In January 2014, Ms. Steen applied for a job at the Women's Clinic of Nyköping. In mid-March 2015, she emailed the nursing unit manager at the labor ward in Nyköping and explained that she could not end a human life. She received a letter from the management team stating: "It is not our policy or our approach to leave any opening for a conscience clause. We have neither the ability nor intention to work with such exceptions." Thereafter, she applied at a women's clinic in Eskilstuna but the officer from the first hospital contacted the Eskilstuna employers. Subsequently, the Eskilstuna hiring manager cancelled her hiring interview and told her that the County Council's policy was to not employ anyone who would not perform abortions.

4. On 21 May 2014, Mrs. Grimmark and Ms. Steen, represented by Scandinavian Human Rights Lawyers, filed a civil lawsuit claiming that the potential employers' decisions to deny/terminate employment based on their religious beliefs regarding life, constituted an interference with their right to freedom of religion

and conscience under Article 9 of the European Convention on Human Rights (the "Convention").

5. On 3 July 2014 and 10 January 2016, ADF International filed an amicus brief in the Swedish courts in the cases of Ms. Grimmark and Ms. Steen respectively. Relying on a report from the Parliamentary Assembly of the Council of Europe, ADF International argued that "no person, hospital or institution shall be coerced, held liable or discriminated against in any matter because of a refusal to perform, accommodate, assist or submit to an abortion." ADF International also highlighted the positive duty to protect freedom of conscience in international law.

6. On 15 August 2017, after exhausting all state remedies, Ms. Grimmark and Ms. Steen lodged two separate complaints at the European Court of Human Rights ("ECtHR" and "the Court") claiming that the national judgments upholding the potential employers' decisions to deny/terminate their employment based on their religious beliefs regarding life, constituted a violation of their right to freedom of religion and conscience under Article 9, their freedom of expression under Article 10, and amounted to discrimination in violation of Article 14.

(b) Decision

7. In a unanimous decision of three judges, Georgios A. Serghides, Erik Wennerström, and Lorraine Schembri, the Court found the two complaints inadmissible.

8. The Court dealt first with both complaints under Article 9 and recalled at the outset that: a) the Convention does not guarantee a right to obtain any specific employment,[1] b) the midwives' refusal to participate in abortions due to their religious beliefs constituted a manifestation of their religion, protected under Article 9,[2] c) the employers' denial of employment based on those beliefs constituted an interference with their freedom of religion under Article 9 § 1.[3]

9. Highlighting the state's margin of appreciation, the Court also found that these particular interferences with employment were "prescribed by law" since, under the Swedish law, an employee is under a duty to perform all work duties given to him or her.[4] Further, the Court stated that the interferences pursued the legitimate aim of protecting the health of women seeking abortion.[5] The Court emphasized that the interferences were "proportionate" in that Sweden provides abortion

---

[1] *Regner v. the Czech Republic* [GC], no. 35289/11, § 111, 19 September 2017.
[2] *Grimmark v. Sweden*, no. 43726/17, para. 25; *Steen v. Sweden*, no. 63209/17, para. 20.
[3] *Ibid*.
[4] *Wretlund v. Sweden* (dec.), no. 46210/99, 9 March 2004.
[5] *Grimmark,* para. 25; *Steen*, para. 20.

nationwide and therefore has a positive obligation to organize its health system to ensure that the effective exercise of freedom of conscience of health professionals does not prevent the provision of abortion.[6] Noting that the state authorities had carefully balanced the different competing rights,[7] the Court found that the requirement that all midwives should be able to perform all midwifery duties inherent to the jobs in question was not disproportionate or unjustified.[8]

10. With regards to Article 10,[9] the Court adopted the domestic authorities' findings noting that that the reason for not employing the applicant was not her opinion as such but solely her refusal to perform all duties inherent to the posts. The Court also underscored that the applicant failed to allege any adverse impact *other than* denial of employment. The Court concluded that it had already examined this issue under Article 9 and applied equivalent conclusions.

11. While the Court reasoned in almost identical terms in respect of the two cases under Articles 9 and 10, the decisions diverged on Article 14.

12. In *Grimmark v. Sweden*, the Court recognized that notwithstanding the absence of a violation under Articles 9 or 10, there may yet be a violation under Article 14 if the subject matter falls within the "ambit" of one of the substantive provisions. The Court considered that this case did fall within the scope of Articles 9 and 10, making Article 14 applicable. Nonetheless, the Court considered that the comparator of a midwife "who [was] willing to perform all duties in inherent to the vacant posts…" was not sufficiently similar and thus there was no demonstrable different in treatment.

13. In *Steen v. Sweden*, the Court found the Article 14 complaint inadmissible as the Court found that the applicant had failed to raise the issue before the domestic courts. The Court therefore considered that the applicant failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention as far as the complaint under Article 14 of the Convention is concerned.[10]

(c) Analysis

14. The Court's decision is deeply disappointing from a legal perspective. The 3-judge formation, 9-page[11] finding of inadmissibility is just shy of an actual judgment in length and topics covered, yet not nearly as weighty or informative.

---

[6] *Grimmark*, para. 26, *Steen*, para. 21.
[7] *Grimmark*, para. 27, *Steen*, para. 22.
[8] *Grimmark*, para. 26, *Steen*, para. 21.
[9] *Grimmark*, paras. 29-37, *Steen*, paras. 24-32.
[10] *Grimmark*, paras. 38-45, *Steen*, paras. 33-36.
[11] *Grimmmark*, 9 pages; *Steen*, 8 pages.

15. Sadly, the Court fails to really engage with arguments on freedom of conscience under Article 9 and side-steps an opportunity to protect the public space for free expression. Significantly, the Court misses an opportunity to reinforce its position on *Eweida and Others v. the United Kingdom*, which rightly stands for the fact that no one should be required to leave their job simply because of the manifestation or expression of their faith.[12]

16. While it is welcome to see the Court recognize that there was an interference with these midwives' rights under Article 9, the broad way in which that interference was justified does not withstand much scrutiny.

17. Religious freedoms safeguard pluralism, broadmindedness, and tolerance, essential ingredients of a democratic society.[13] This Court has long held that, save for very exceptional cases, the right to freedom of religion excludes any discretion on the part of the State to determine whether religious beliefs or the *means used* to express such beliefs are legitimate.[14]

18. Yet, the Court's decisions in *Grimmark* and *Steen* seriously blur the scope of Article 9 and what it means to have the freedom to manifest one's faith and live in accordance with one's conscience. Had the Court not summarily dismissed this case as inadmissible, it could have built on its judgment in *Eweida* to ensure the strictest of scrutiny for state limitations on fundamental freedoms based on generic – rather than specific – countervailing considerations.

19. While the Court finds that the Swedish authorities adequately balanced competing rights, their decision effectively swept away two midwives' very real, concrete Convention rights in exchange for setting up a medical system where every single midwife is obliged to provide identical services, in every part of the country. In reality, midwives all perform different services in different parts of the country and in different clinics. It is clear from the facts of these cases that midwives in Sweden have seen their conscientious convictions respected in the past. That should not be surprising. A law protecting freedom of conscience is a low cost, high benefit, ideology-free, solution to practical social problems in the workplace that benefits both employees and employers. The Court unfortunately failed to address this option – preferred by almost every other European country – and thus failed to uphold the rights at the heart of Article 9.

(d) Conclusion

[12] *Eweida and Others v. the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, 27 May 2013.
[13] *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993.
[14] *Serif v. Greece*, no. 38178/97, (14 December 1999), § 53.

20. By adopting the Swedish authorities' decision, the Court blurred the scope of Article 9 and backtracked on its holding in *Eweida* which rightfully upheld the principle that no one should be required to leave their job simply because of the manifestation or expression of their faith.[15]

21. The Swedish authorities' decisions are out of line with the rest of Europe's stance on medical conscience clauses. That consensus is no coincidence but a product of the robust protections for conscience in international law, and the memory of a continent which, at Nuremburg, put individuals on trial for *failing* to follow their conscience. Losing a calling, a career, a job, and a livelihood is a severe price to pay for living in accordance with what one believes. The Court's lack of proactivity in rendering a judgment, and substituting a 9-page 'decision' in its place, reveals a real struggle ahead: Article 9 is no longer the shelter it was drafted to be, and this cornerstone of democracy stands in the balance.

[15] *Eweida,* previously cited.