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

# THIRD SECTION

# DECISION

Application no. 62309/17
Linda STEEN
against Sweden

The European Court of Human Rights (Third Section), sitting on 11 February 2020 as a Committee composed of:
Georgios A. Serghides, *President,*
Erik Wennerström,
Lorraine Schembri Orland, *judges,*
and Stephen Phillips, *Section Registrar,*
Having regard to the above application lodged on 15 August 2017,
Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Ms Linda Steen, is a Norwegian national who was born in 1974 and lives in Uppsala. She was represented before the Court by Ms R. Nordström, a lawyer practising in Uppsala.

### The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

*1. Background of the case*

3. The applicant was employed as a nurse by the County Council of Södermanland (*Södermanlands läns landsting*) in 2006. From September 2012 onwards she worked as a nurse at the health care centre in Malmköping. In autumn 2013 she applied for leave to become a midwife. The County granted her leave of absence to train as a midwife and agreed to pay her a student salary. On 3 February 2014 the applicant and the County signed a contract according to which the applicant would receive a monthly salary of 17,000 Swedish kronor (SEK) in return for an obligation to work

full-time as a midwife for two years at the women's clinic in Nyköping after the conclusion of her studies. According to the contract, if the employment were to end on the initiative of the applicant within the two-year period, she would be obliged to reimburse the salary. If she did not complete the studies, she was to return to her "ordinary employment". The applicant started midwifery studies in the spring semester of 2014.

4. On 16 March 2015 the applicant contacted the childbirth/delivery section at the women's clinic in Nyköping and informed the employer that she would be unable to assist in carrying out abortions. She was told that she could not start at the clinic unless she agreed to perform abortions. She was asked to reconsider and, if she did not change her mind, the Human Resources Department of the County would see what was to be done with the contract.

5. The applicant then contacted the women's clinic at Mälar Hospital in Eskilstuna and she was given an appointment for an interview on 10 April 2015. When the Human Resources Department of the County learned about this, the interview was cancelled as the County had a common policy not to employ midwives who would not perform abortions.

6. On 5 May 2015 the applicant was transferred, against her wishes, to her previous post as a nurse at the health care centre in Malmköping. On 16 August 2015 the County and the applicant settled the salary issue. The applicant's studies were concluded in June 2015 and she received her midwifery certificate on 15 July 2015.

### *2. Compensation proceedings*

7. On 4 September 2015 the applicant brought the matter to a court, seeking compensation directly on the basis of the Convention.

8. On 4 November 2016 the Nyköping District Court (*tingsrätten*) rejected the applicant's action, finding that there had been no violation of Articles 9 and 10 of the Convention. The court considered that the contract signed on 3 February 2014 between the applicant and the County did not constitute an employment contract but only obliged the County to pay the applicant a student salary. It appeared that the County required that all midwives should be able to perform all duties inherent in a midwife's post, including abortions. Referring to the case-law of the Court, especially the case *Eweida v. the United Kingdom,* the District Court held that the applicant's religious faith and conscience were protected by Article 9 of the Convention and that there had thus been an interference under that Article. However, according to the Swedish legislation, employers had the right to request that an employee perform all the tasks which naturally fell within the scope of work in question. The requirement to take part in abortions was thus "prescribed by law" and pursued the legitimate aim of protecting health since it guaranteed an effective access to abortion in Sweden. The court noted that the applicant knew, when seeking employment, that the duties

inherent to the vacant post could limit her possibilities to manifest her religion. When she was refused a post as a midwife, she could still keep her post as a nurse. She was also given a possibility to work in the children's section where she could use her newly-acquired competences. The court concluded that the County's actions had been proportionate to the applicant's protected interest. The interference with the applicant's freedom of religion had thus been necessary in a democratic society and, consequently, there was no violation of Article 9 of the Convention.

9. As to Article 10 of the Convention, the District Court noted that the applicant was refused employment only because of her refusal to perform abortions. Even the applicant herself seemed to think so. It was not her opinions as such which had led to the refusal of employment, but solely her refusal to perform abortions. There was thus no violation of Article 10 of the Convention. Furthermore, the court held that the Swedish Discrimination Act provided for an effective remedy under Article 13 of the Convention.

10. On 24 November 2016 the applicant appealed to the Labour Court (*arbetsdomstolen*).

11. On 9 May 2017 the Labour Court, with a final decision, refused the applicant leave to appeal.

## COMPLAINTS

12. The applicant complained under Article 9 that, by prohibiting her to work as a midwife, the Swedish authorities had interfered with her right to freedom of thought, conscience and religion, and that this interference had not been in accordance with the law and had not pursued a legitimate aim, and that it had been discretionary and arbitrary. Nor had the interference been necessary in a democratic society or proportionate.

13. Further, she complained under Article 10 of the Convention of the violation of her freedom of expression since she had held a different opinion from that of the hospital, clinic and County concerned.

14. Lastly, the applicant complained under Article 14 of the Convention of discrimination against her.

## THE LAW

### A. Complaint under Article 9 of the Convention

15. The applicant complained under Article 9 of the Convention that her right to freedom of thought, conscience and religion had been violated.

16. Article 9 of the Convention reads as follows:

> "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."

17. The Court notes at the outset that the Convention does not guarantee a right to be promoted or to occupy a post in the civil service (see *Regner v. the Czech Republic* [GC], no. 35289/11, § 111, 19 September 2017). Therefore, the applicant had no right under the Convention to obtain any of the vacant posts.

18. The Court reiterates that religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practise in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 105, ECHR 2005 XI, and *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, § 80, ECHR 2013 (extracts)). Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 § 2. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

19. According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (see *Leyla Şahin*, cited above, § 110, and *Eweida and Others*, cited above, § 84).

20. The Court notes that the applicant's refusal to assist in abortions due to her religious faith and conscience constitutes such a manifestation of her religion which is protected under Article 9 of the Convention. There was thus an interference with her freedom of religion under Article 9 § 1 of the Convention. This interference was, as was considered also by the District Court, prescribed by law since, under the Swedish law, an employee is under a duty to perform all work duties given to him or her (see *Wretlund v. Sweden* (dec.), no. 46210/99, 9 March 2004). The Court is thus

satisfied that the interference had a sufficient basis in Swedish law and that it was prescribed by law. It also pursued the legitimate aim of protecting the health of women seeking abortion.

21. The interference was also necessary in a democratic society and proportionate. The Court observes that Sweden provides nationwide abortion services and therefore has a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of such services. The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified. The employers have, under Swedish law, great flexibility in deciding how work is to be organised and the right to request that employees perform all duties inherent to the post. When concluding an employment contract, employees expressly accept these duties. In the present case, the applicant had voluntarily chosen to become a midwife and to apply for vacant posts while knowing that this would mean assisting also in abortion cases. Moreover, as a result of the refusals, the applicant was not left unemployed but could continue to work as a nurse at the health care centre in Malmköping where she had a post.

22. Furthermore, the Court notes that the District Court carefully balanced the different rights against each other and provided detailed conclusions which were based on sufficient and relevant reasoning. A proper balance was thus struck between the different, competing interests.

23. Accordingly, the Court finds that this complaint is manifestly ill-founded and it must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

### B. Complaint under Article 10 of the Convention

24. The applicant complained under Article 10 of the Convention of the violation of her freedom of expression for having a different opinion from that of the hospital, clinic and County concerned.

25. Article 10 of the Convention reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This freedom is subject to the exceptions set out in Article 10 § 2 which must, however, be strictly construed. The need for any restrictions must be established convincingly (see, for example, *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103, and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

27. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I).

28. The Court's task in exercising its supervision is not to take the place of national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

29. The Court notes that the District Court established that the applicant had not concluded any binding contract to work at the women's clinic in Nyköping (see paragraph 8 above).

30. The applicant argued that there was an interference with her freedom of expression since, due to her opinion on abortion, she was not employed by the women's clinic in Nyköping. On the other hand, the District Court established 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 vacant posts, including abortions (see paragraph 9 above).

31. The Court considers that there has been no separate interference with the applicant's freedom of expression under Article 10 of the Convention. It has not even been alleged that the applicant's opinion produced any adverse effects on the applicant, other than the loss of the job opportunity at the women's clinic in Nyköping. The Court has already examined this issue above and concluded that the complaint under Article 9 of the Convention is inadmissible (see paragraph 23 above). Equivalent conclusions apply under Article 10 of the Convention.

32. In conclusion, the Court finds that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

### C. Complaint under Article 14 of the Convention

33. Finally, the applicant complained under Article 14 of the Convention of discrimination against her.

34. Article 14 of the Convention reads as follows:

> "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."

35. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. It is for the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX). The Court has recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 116, ECHR 2007-XII).

36. In the present case, the Court notes that the applicant did not raise any complaint under Article 14 of the Convention before the domestic courts. The applicant has therefore 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. It follows that this complaint must be rejected for non-exhaustion of domestic remedies under Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 12 March 2020.

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| Stephen Phillips<br>Registrar | Georgios A. Serghides<br>President |