Paul KARA v. United Kingdom

AS TO THE ADMISSIBILITY OF
Application No. 36528/97
by Paul KARA
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 22 October 1998, the following members being present:

MM M.P. PELLONPÄÄ, President
N. BRATZA
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
I. BÉKÉS
G. RESS
A. PERENIC
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 12 November 1996 by Paul KARA against the United Kingdom and registered on 17 June 1997 under file No. 36528/97;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British citizen born in May 1960, resident in London. He is represented before the Commission by Mr Philip Leach, a solicitor practising in London.

The applicant is a bisexual male transvestite and wears clothes which are conventionally considered as "female". He is not transsexual and does not wish to become a woman. He dresses in this way to give expression to his identity and sexuality and to what he regards as the innate feminine aspects of his personality. He also describes himself as a "Berdache Shaman" which is said to be an American indigenous tradition in which certain men express themselves through dressing in conventionally female clothing.

From 1986 to 1991, the applicant was employed by the Inner London Education Authority (ILEA) until his employment was transferred to Hackney Council in April 1991. He was initially a Careers Adviser in the Directorate of Education and was promoted to Training Administrator. Throughout the period of his employment he had, from time to time, worn at work items of clothing which might conventionally be regarded as female, including leggings, tights, tee shirts with halter tops (which tie up behind the neck) and belts. On two occasions he wore a dress.

Following the second occasion on which he wore a dress, the applicant was interviewed by a manager in the Social Services Department who told him that his style of dress had become an issue in the department. As a result the applicant volunteered to desist from wearing "female" clothing. The matter was placed under internal review.

In October 1993, the matter was referred to the Deputy Director of Social Services who interviewed the applicant at length. During the interview it was found that two principal issues arose out of the restrictions on the applicant’s preferred mode of dress. The first concerned his religious beliefs and the second was whether such restrictions raised an equal opportunities issues.

On 16 November 1993, the applicant received a letter from the Deputy Director instructing him to desist from wearing women’s clothing at work as it was contrary to the Council’s Code of Conduct and it was likely to bring the Council into disrepute. Moreover, it was stated in the letter that this matter did not raise an equal opportunities issue.

The Council did not at the relevant time have a written dress policy. There was, however, in place a requirement that all staff should attend work looking clean, neat and appropriately dressed. In April 1994, the Council adopted a written dress policy which was said to have been designed to enhance its image in its dealings with the public, the business community and the representatives of Government. This policy applied equally to male and female members of staff.

On 21 January 1994, the applicant brought proceedings against the Council before an Industrial Tribunal alleging direct discrimination on grounds of gender contrary to section 1 of the Sex Discrimination Act 1975. In particular, he alleged that female employees had not been given similar instructions in relation to male clothing and other members of staff who had engaged in what was described as "cross dressing" had not been disciplined by the Council. On 13 January 1995, the tribunal dismissed the applicant’s claim on the grounds that the Council genuinely and on reasonable grounds believed that the clothes worn by the applicant were in breach of their policy with regard to clothing and further found that there was no element of prejudice in the respondents’ actions to the applicant. Moreover, on the

basis of the respondent's evidence it was satisfied that at all material times the policy was applied equally to both their male and female members of staff.

On 20 March 1995, the applicant appealed against this decision to the Employment Appeal Tribunal on the grounds that the industrial tribunal erred in law because they misdirected themselves as to the correct legal test for determining whether the applicant had suffered unlawful direct sex discrimination contrary to section 1(1)(a) of the Sex Discrimination Act 1975. On 13 May 1996 the appeal was dismissed, on the same grounds. On 10 September 1996 the applicant was advised that an appeal to the Court of Appeal had no prospect of success.

COMPLAINTS

1. The applicant complains of a violation of his right to respect for his private life. In particular, he submits that the dress code policy imposed by Hackney Council effectively preventing him from wearing a dress at work, constitutes an arbitrary interference with his private life. He invokes Article 8 para. 1 of the Convention.

2. The applicant also complains that he is prevented from expressing himself as he wishes, through his dress. He invokes Article 10 para. 1 of the Convention.

3. The applicant further complains of a violation of Article 13 of the Convention in that he has no effective remedy before a national authority in respect of the violation of his rights under Articles 8, 1 and 10 of the Convention.

4. The applicant further complains that there is a breach of Article 14 when read in conjunction with Articles 8 and 10 of the Convention. He submits that he was discriminated against on grounds of sex.

THE LAW

1. The applicant complains that the dress code policy imposed by Hackney Council effectively preventing him from wearing a dress at work, constitutes an arbitrary interference with his private life contrary to Article 8 of the Convention which provides as relevant:

"1. Everyone has the right to respect for his private and family life.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society … for the protection of the rights and freedoms of others".

The Commission finds that constraints imposed on a person's choice of mode of dress constitute an interference with the private life as ensured by Article 8 para. 1 of the Convention (see McFeeley v. the United Kingdom No. 8317/78, Dec. 15.5.80, D.R. 20, p. 91). It is therefore necessary to examine whether this interference was justified under Article 8 para. 2, for which three conditions must be satisfied: the interference must be "in accordance with the law", it must pursue one or more of the legitimate aims enunciated in paragraph 2 of Article 8 and it must be "necessary in a democratic society" to achieve any one of those legitimate aims (Eur. Court HR, Olsson judgment of 24 March 1988, Series A

no. 130, p. 29, para. 59, referring to Eur. Court HR, W v. UK judgment of 8 July 1987, Series A no. 121, p. 27, para. 59).

The Commission recalls that the Council's restriction on the choice of mode of dress of its employees was based on its internal policy which was confirmed by the Industrial Tribunal to be lawful. Accordingly, the Commission considers that the interference was "in accordance with the law" within the meaning of Article 8 para. 2 of the Convention.

The Commission further recalls that the aim of its dress policy as stated by the Council in April 1994 was to enable it to enhance its image in its dealings with the public, the business community and representatives of Government. Accordingly, the Commission considers that the interference could be said to pursue the legitimate aim of "the protection of the rights of others", in the sense of protecting its own proper functioning and carrying out of its duties on behalf of the public.

As to whether the interference was "necessary in a democratic society", the Commission recalls that this phrase corresponds to the existence of a "pressing social need" in particular, the interference must be proportionate to the legitimate aim pursued (Eur. Court HR, Beldjoudi v. France judgment of 26 March 1992, Series A no. 234, p. 27, para. 74). The Contracting States however, have a certain margin of appreciation in assessing whether such a need exits, but this goes hand in hand with a European supervision (Eur. Court HR, Silver and others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, pp. 37-38, para. 97).

The Commission notes that the rules as to the mode of dress at work affected the applicant during work hours on work premises and that at other times he remained at liberty to dress as he wished. The Commission considers that employers may require their employees to conform to certain dress requirements which are reasonably related to the type of work being undertaken eg. safety helmets, hygienic coverings, uniforms. This may also involve requiring employees, who come into contact with the public or other organisations to conform to a dress code which may reasonably be regarded as enhancing the employer's public image and facilitating its external contacts. While the applicant has disputed that the Council provided support for its claims that the way he dressed prejudiced its external image and the extent to which he came into contact with members of the public and the representatives of other bodies in his daily work, the Commission notes that the applicant did not deny that he had contacts outside his own office and it is satisfied that the requirements in this case, that employees dress "appropriately" to their gender, may be reasonably regarded by the employer as necessary to safeguard their public image. Having regard to the circumstances of the case, any restrictions on the applicant's ability to dress at work in the manner which he perceives as expressing his personality and fostering personal relationships was not disproportionate.

The Commission finds that the interference in this case may be regarded as necessary in a democratic society for the aim of protecting the rights of others within the meaning of Article 8 para. 2 of the Convention.

This complaint must therefore be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant complains that the restriction on his mode of dress constitutes an interference with his right to freedom of expression in violation of Article 10 which provides as relevant :

"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".

The Commission finds that although the right to freedom of expression may include the right for a person to express his ideas through the way he dresses (No. 11674/85, Dec. 3.3.86, D.R. 46, p. 245 at p. 247), it has not been established on the facts of this case that the applicant has been prevented from expressing a particular opinion or idea by means of his clothing.

The Commission concludes, therefore, that an examination of this complaint as it has been submitted fails to disclose any appearance of a violation of Article 10 of the Convention.

It follows that this part of the application must also be rejected as being manifestly ill founded within the meaning of Article 27 para. 2 of the Convention.

3. The applicant further complains of a violation of Article 14 when read in conjunction with Articles 8 and 10 of the Convention. Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this 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."

The case-law of the Convention organs establishes that it is not every difference in treatment which constitutes discrimination within the meaning of Article 14 of the Convention. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that there is no reasonable or objective justification for this distinction (see eg. Eur. Court HR, Van der Mussele judgment of 21 November 1982, Series A no. 70, Fredin v. Sweden (No. 1) judgment of 18 February 1991 Series A no. 192, p. 19, para. 60).

The Commission recalls that the applicant claims that he has been sanctioned for dressing as a "female" whereas the same restrictions have not been applied to women who have been permitted to wear masculine clothes at work. The Commission notes that this complaint was considered by the Industrial Tribunal which accepted the evidence of the Council that, in respect of the example relied on by the applicant of a woman wearing black trousers and a white shirt, this style of dress was smart and wholly appropriate to the job which she did. It found no indication that the policy of requiring appropriate dress was not applied to both genders. The Commission observes that the range of dress which is considered appropriate for a woman may be wider than that available to a man. However, that does not disclose any basis on which the Commission may find that the applicant was subjected to a different rule on the basis that he was a man, rather than a woman.

The Commission concluded that the applicant’s complaints disclose no appearance of discrimination on the ground of sex. They must therefore be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

4. The applicant also complains under Article 13 of the Convention which provides that :

"Everyone who's rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

The Commission recalls that Article 13 does not require a remedy under domestic law in respect of any alleged violation of the Convention. It only applies if the individual can be said to have an arguable claim of a violation of the Convention (Eur. Court HR, Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

The Commission finds that the applicant cannot be said, in light of its findings above to have an arguable claim of a violation of his Convention rights.

It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	M.P. PELLONPÄÄ
Secretary to the First Chamber	President of the First Chamber