Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

Does the Public Administration of Andalusia Fulfil Its Positive Obligations Concerning Islamic Religious Education?

Question(s) at stake:

Whether the administration did enough to guarantee the defendant's right to have her children receive Islamic religious education.

Outcome of the ruling:

The Court recognized the defendant's right to have her children receive Islamic religious education by dismissing the appeal brought by the Consejería de Educación y Deporte de la Junta de Andalucía (Regional Ministry of Education and Sport of the Andalusian Regional Government).

Topic(s):

- Education

Keywords:

- Freedom of thought, conscience and religion
- Right of parents to ensure the religious and moral education of their children
- Publicly funded education in a minority religion
- State-funded schools
- Religious and life stance education
- Administrative obstacles
- Positive obligations

Tag(s):

- Islamic religious education
- Indoctrination in a particular religion

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Spain

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High Court of Justice Granada, Judgment of 21 October 2022, no. 4399/2022 (Tribunal Superior de Justicia Granada, Sentencia de 21 de octubre de 2022, Sentencia número 4399/2022)

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ECLI:

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Date:

21 October 2022

Jurisdiction / Court / Chamber:

High Court of Justice Granada, Contentious Administration Chamber

Remedy / Procedural stage:

Fundamental Rights Procedure

Previous stages:

Contentious Administrative Court No. 2 of Granada, Judgment of 6 May 2022

Subsequent stages:

No information found

Branches / Areas of law:

Constitutional law, administrative law

Facts:

In her complaint, Ms Brigida stated that, on 29 March 2021, she had submitted a written request to the Consejería de Educación y Deporte de la Junta de Andalucía (Regional Ministry of Education and Sport of the Andalusian Regional Government) requesting that her two minor children, Gabino and Gonzalo, receive Islamic religious education for the 2021/2022 school year.

On 31 May 2021, a letter from the Federación Musulmana de España (Muslim Federation of Spain) was submitted to the Delegación Territorial de Granada de la Consejería de Educación y Deporte de la Junta de Andalucía (Territorial Delegation in Granada of the Regional Ministry of Education and Sport of the Andalusian Regional Government) containing the identity and details of candidates for the position of teacher of Islamic education in public and state-subsidized schools in Granada. The request stated that during the months of January and February 2021, almost 200 applications had been collected in Granada and in towns in the region from parents interested in their children receiving Islamic education in the public and state-subsidized schools where they were educated.

Owing to these applications, 10 educational establishments met the minimum requirement of 10 applicants per educational cycle, including the school of the appellant’s sons. In March 2022, the children were still not receiving Islamic religious education, as shown by the report of 23 March 2022 by the head of the Servicio de Planificación y Escolarización de la Delegación Territorial de Granada de la Consejería de Educación y Deportes (Planning and Schooling Service of the Granada Territorial Delegation of the Regional Ministry of Education and Sport).

The report stated that the children were instead studying “*Valores sociales y cívicos*” (social and civic values), that the school was still waiting for a teacher of this denomination to arrive, and that the Comisión Islámica de España (Islamic Commission of Spain, CIE) had not sent a proposal for the recruitment of teachers of the Islamic religion, which was why there were no teachers of this religion at the school.

According to the judgment of the Contentious Administrative Court, the appellant administration did not complete the processing and resolution of the applications because the CEIP (Nursery and Primary School) in which the children were enrolled had erred in not properly certifying the corresponding Islamic religious enrolment and in not requesting hours for the subject.

The Junta de Andalucía (Andalusian Regional Government) then appealed against the judgment. Its argument is based on the fact that the absence of a proposal for teachers from the CIE does not constitute inaction on the part of the administration, since the CIE is the only body competent to make such a proposal, as stated in Article 10.2 of Law 26/1992 of 10 November 1992 approving the State Cooperation Agreement with the CIE.

Ruling:

The appeal challenges the decision of the Contentious Administrative Court, which upheld the defendant’s right to have her two children educated in the Islamic religion in accordance with Law 26/1992.

Article 10 of Law 26/1992 guarantees Muslim pupils, their parents, and the school authorities who so request the exercise of the right to Islamic religious education in public and state-subsidized schools, provided that the exercise of that right does not conflict with the specific nature of the school and that the requirement of a minimum of 10 students per school is met. The Court referred to Articles 14, 16, and 27 of the Spanish Constitution in order to determine whether the fundamental rights had been infringed. These articles include the principle of non-discrimination on grounds of birth, race, sex, religion, or opinion (14.1), freedom of thought and religion (16.1), the principle of state cooperation with different religious groups (16.3), and the right of parents to ensure that their children receive a religious and moral education in accordance with their own convictions (27.3).

The Court also referred to Organic Law 7/1980 of 5 July 1980 on Religious Freedom, Article 7.1 of which states that the state shall, where appropriate, conclude cooperation agreements or conventions with the churches,

denominations, and religious communities that have well-established roots in Spain. In the field of education, Organic Law 2/2006 of 3 May 2006 on Education (amended by Organic Law 3/2020 of 29 December 2020) states in its second additional provision that the teaching of other religions shall be in accordance with the provisions of the cooperation agreements concluded by the Spanish state with the Federación de Entidades Religiosas Evangélicas de España (Federation of Evangelical Religious Entities of Spain, FEREDE), the Federación de Comunidades Judías de España (Federation of Jewish Communities of Spain, FCJE), the CIE, and, if appropriate, those that may be signed in the future with other religious denominations.

According to Article 10.2 of the Cooperation Agreement with the CIE, Islamic religious education is to be given by teachers designated by the communities belonging to the CIE, with the agreement of the federation to which they belong. Furthermore, as stated in the second additional provision of Organic Law 2/2006 of 3 May 2006 on Education (amended by Organic Law 3/2020 of 29 December 2020), it is the responsibility of the respective religious authorities to design the curriculum and the assessable learning standards that make it possible to verify the achievement of the objectives and the acquisition of the competences corresponding to the subject of religion.

Furthermore, in accordance with the provisions of Article 3.1 of Royal Decree 2438/1994 of 16 December 1994, which regulates the teaching of religion, the parents or guardians of pupils must voluntarily declare to the head of the school – at the beginning of each stage or level of education or when the pupil first enters the school – their wish for their children to study religion. The competent education authorities shall inform the respective Islamic communities in good time of the requests made in the schools under their jurisdiction. Before the beginning of each school year, the CIE shall inform the competent education authorities of the names of the persons designated to give Islamic religious education in the educational establishments where there is a demand for such education.

Royal Decree 1384/2011 of 14 October 2011, which implements Article 1 of the Cooperation Agreement between the State and the CIE, approved by Law 26/1992 of 10 November 1992, refers to the CIE as the representative body of Islam in Spain. The statutes of the CIE authorize its president to approve the designation of persons to teach Islamic religion in schools. In addition, Royal Decree 126/2014 of 28 February 2014, which establishes the core curriculum for primary education, provides in its second additional provision on religious education that the education authorities must ensure that parents or guardians have the opportunity, at the beginning of the school year, to express their wish for their children to receive or not to receive religious education.

The appellant sought recognition of her right to have her children receive Islamic religious education in those schools where the agreed requirements were met. The question whether the appellant's children should receive Islamic religious education in a particular educational establishment is therefore not the subject of the dispute. The Court considers whether the administration has guaranteed the appellant access to Islamic religious education for her children, or whether, notwithstanding its constitutional obligation to do so, it has by its inaction violated the appellant's right to have her children receive such education. The Court therefore concluded that if the exercise of the right to Islamic religious education must be in accordance with the organizational requirements of teaching, this requires the establishment of relations between the education administration and the CIE. Since it is the responsibility of the administration to ensure this, the Court concluded that it was clear that it had not done everything to ensure that the pupils received Islamic religious education. Therefore, the Department of Education and Sport of the Andalusian Regional Government violated the appellant's fundamental right to have her children receive Islamic religious education.

Dissenting opinion

The dissenting opinion of Judge María Del Mar Jiménez Morera is based on the applicability of Royal Decree 2438/1994 of 16 December 1994, which states that it is the duty of the administration to guarantee the exercise of the right to

receive Islamic religious education to those who “request it”, whether for themselves or for their children. Furthermore, the same Royal Decree states that this request must be made at the beginning of the school year, without prejudice to the fact that educational establishments must expressly request this decision when the pupil first enrols in the establishment or at the beginning of each educational stage. Therefore, the dissenting judge considered that the enforceability of such a guarantee obligation depended on the petitioner’s compliance with those legal provisions, which could not be established with regard to the requests made on 29 March 2021. The fact that the administration had not acted in accordance with the petitioner’s request could not constitute an unlawful act, let alone a violation of a fundamental right.

Main quotations on cultural or religious diversity:

“Constan pronunciamientos diversos de la Sala de lo Contencioso Administrativo de La Rioja sobre asuntos similares al de autos. En relación a los requisitos organizativos para impartir la docencia de la enseñanza religiosa, la sentencia de dicha Sala de 20 de abril de 2020 dictada en el procedimiento de derechos fundamentales 317/2019, recuerda con cita del ATC nº 382 de 18 de diciembre de 1996 que *‘los derechos fundamentales, si bien continúan concibiéndose primordialmente como derechos subjetivos de defensa frente al Estado, presentan además una dimensión objetiva, en virtud de la cual operan, como componentes estructurales básicos, que han de informar el entero ordenamiento jurídico. Como consecuencia de este "doble carácter de los derechos fundamentales (STC25/1981, fundamento jurídico 5.º), pende sobre los poderes públicos una vinculación también dual: en su tradicional dimensión subjetiva, les impone la obligación negativa de no lesionar la esfera de libertad por ellos acotada; en su vertiente jurídico-objetiva, reclama genéricamente de ellos que, en el ámbito de sus respectivas funciones, coadyuven a fin de que la implantación y disfrute de los derechos fundamentales sean reales y efectivos, sea cual fuere el sector del ordenamiento en el que los mismos resulten concernidos (SSTC 53/1985, fundamento jurídico 4 º y 129/1989 , fundamento jurídico 3.º). Tal es, ciertamente, la comprensión de los derechos fundamentales*

que se infiere de un texto constitucional que, tras proclamar el Estado social y democrático de Derecho y, por ende, comprometer a los poderes públicos en la promoción de la libertad y la igualdad del individuo (art. 9.2 CE), eleva el libre desarrollo de la personalidad y el respeto a los derechos de los demás a la condición de fundamento del orden político y de la paz social (art. 10.1 CE)'"."

"There are various rulings by the Administrative Chamber of La Rioja on cases similar to the present case. In relation to the organizational requirements for teaching religious education, the judgment of that Chamber of 20 April 2020 handed down in fundamental rights proceedings 317/2019 recalls, citing the ATC no. 382 of 18 December 1996, that '*fundamental rights, although they continue to be conceived primarily as subjective rights of defence against the state, also present an objective dimension, by virtue of which they operate as basic structural components which must inform the entire legal system. As a consequence of this "dual nature of fundamental rights (STC25/1981, legal basis 5), the public authorities are also bound by a dual obligation: in its traditional subjective dimension, it imposes on them the negative obligation not to infringe the sphere of freedom which they delimit; in its positive obligations, it generically requires them, within the scope of their respective functions, to help to ensure that the implementation and enjoyment of fundamental rights are real and effective, whatever the sector of the legal system in which they are concerned (SSTC 53/1985, legal ground 4 and 129/1989, legal ground 3). This is certainly the understanding of fundamental rights that is derived from a constitutional text which, after proclaiming the social and democratic rule of law and, therefore, committing the public authorities to promoting the freedom and equality of the individual (Art. 9.2 CE), raises the free development of the personality and respect for the rights of others to the status of the foundation of political order and social peace (Art. 10.1 CE)"'*." (legal reasoning 3, para. 7)

Main legal texts quoted in the decision:

Domestic law:

- Articles 14, 16, 27, 53 Spanish Constitution

- Article 7 Organic Law 7/1980 of 5 July 1980 on Religious Freedom
- Article 10 Law 26/1992 of 10 November 1992 approving the State Cooperation Agreement with the Islamic Commission of Spain
- Article 10 Law 29/1998 of 13 July 1998 regulating the Contentious Administrative Jurisdiction
- Articles 2, 5, 8 Organic Law 2/2006 of 3 May 2006 on Education
- Articles 4, 6, 12 Organic Law 3/2020 of 29 December 2020 amending Organic Law 2/2006 of 3 May 2006 on Education
- Royal Decree 2438/1994 of 16 December 1994 regulating the Teaching of Religion
- Royal Decree 1384/2011 of 14 October 2011 implementing Article 1 of the State Cooperation Agreement with the Islamic Commission of Spain, approved by Law 26/1992 of 10 November
- Royal Decree 126/2014 of 28 February establishing the Basic Curriculum for Primary Education

Cases cited in the decision:

Relevant Spanish case law:

- Tribunal Superior de Justicia La Rioja, Sentencia de 20 de abril de 2020, Sentencia número 94/2020 (High Court of Justice La Rioja, Judgment of 20 April 2019, no. 94/2020) ECLI:ES:TSJLR:2019:607
- Tribunal Superior de Justicia La Rioja, Sentencia de 20 de abril de 2020, Sentencia número 88/2020 (High Court of Justice La Rioja, Judgment of 20 April 2020, no. 88/2020) ECLI:ES:TSJLR:2020:131

Commentary

Does the Public Administration of Andalusia Fulfil Its Positive Obligations Concerning Islamic Religious Education?

Islamic religious education in Granada

According to the latest data for 2023, recorded by the Ministerio de Educación, Formación Profesional y Deporte (Ministry of Education, Professional Training, and Sport), 75.4% of students in public primary schools in Andalusia follow the course of Catholic religious instruction, whereas 23.3% receive no religious education and only 1.3% receive instruction in other religions, namely Islamic and Evangelical education. Nevertheless, according to the latest report of the Unión de Comunidades Islámicas de España (Union of Islamic Communities of Spain, UCIDE), in 2023 the Autonomous Community of Andalusia had 95 eligible Islamic religious teachers, making it the Autonomous Community with the highest number of teachers. Associations such as Aljibe Dar-Al Anwar in Granada have come together to meet the needs of the Muslim community, refugees, and other groups at risk of exclusion in Granada. This association provides Islamic religious education outside of school (see La asociación Dar Al Anwar 2018). However, the need for these non-governmental associations to exercise the religious rights of families and the fact that they have to rely on the judiciary may indicate that more efforts are needed to properly implement the system of cooperation with religious minorities in the Autonomous Community of Andalusia.

The core issue

In the present case, the Court examines the organizational circumstances and the legal responsibilities for the implementation of Article 10 of Law 26/1992, which guarantees Muslim pupils, their parents, and the school authorities that so request the guaranteed exercise of the right of the former to receive Islamic religious education in public and state-subsidized schools, provided that, as far as the latter are concerned, the exercise of this right does not contradict the specific nature of the school, at the levels of preschool, primary, and secondary education.

What is being assessed in this decision is the recognition of the appellant’s right to have her children educated in the Islamic religion in those educational establishments where the agreed requirements have been met. It is therefore necessary to examine, in the light of the legal framework, whether the school fulfils the necessary conditions for the teaching of this subject and, if so, which

institutional bodies are involved in the exercise of this right and what their obligations are.

Before the beginning of each school year, the CIE should notify the competent education authorities of the persons it considers suitable in the relevant field to give Islamic religious instruction at the different levels of education.

According to the Court, the Territorial Delegation in Granada of the Regional Ministry of Education and Sport of the Andalusian Regional Government tried to evade its responsibility by unduly diverting attention to the school administration and the CIE. In this regard, according to a report issued by the aforementioned Regional Government on 26 October 2021, enrolment for the 2021/2022 school year took place on 1 June 2021 and was certified by the school on 11 June 2021.

“The school management did not correctly certify the corresponding enrolment for Islamic Religion, as no hours were requested for the teaching of this subject. This service urges the management of CEIP DIRECCION000 to correct the certification of the enrolment in religion, including the students who requested Islamic religion. Once this correction has been made, a request is sent to the Dirección General de Planificación y Centros [General Directorate of Planning and Educational Establishments] to ‘include the teaching of the Islamic religion in the educational establishment’” (legal reasoning 3, para. 3).

However, if the school has not fulfilled its obligations at the time of enrolment, the responsibility lies with the Territorial Delegation in Granada of the Regional Ministry of Education and Sport of the Andalusian Regional Government.

Contrary to the dissenting opinion, the Court did not consider it relevant that the request was made in March 2021, since the religious education in question was not requested for the same academic year but for the following one. Royal Decree 2438/1994 of 16 December 1994, which regulates the teaching of religion, and the aforementioned cooperation agreement stipulate that the request for religious education must be made to the director of the educational establishment at the beginning of each stage or level of education or when the pupil first enters the school, without prejudice to the possibility of modifying the

decision at the beginning of each school year. However, the children did not begin any stage or level of education, as they were in the first and second years of primary school and were already enrolled at the school. Nevertheless, the Court considered that the fact that the request was made before the start of the 2021/2022 school year was an advantage for the administration, leaving sufficient time to plan and organize the provision of education. It is essential for the exercise of the fundamental right in question that a request be made and that the administration fulfil its duty to facilitate the exercise of that right. The Court concluded that the time at which the request was made for the 2021/2022 academic year was irrelevant, since it was made before the start of the next academic year.

Alternatives to Islamic religious education

This case illustrates an essential and intrinsic problem of the system of cooperation with religious minorities in the education system with regard to the exercise of their religious rights. As the facts show, the request for Islamic religious education was not made at the school but at the Territorial Delegation in Granada of the Regional Ministry of Education and Sport of the Andalusian Regional Government. As the Court mentions, this may be because it was known that the Territorial Delegation was unlikely to provide such education. It is common for religious minorities not to claim religious rights under the cooperation agreements because they assume, even before asking to exercise these rights, that they cannot be offered to them (Morondo Taramundi and Ruiz Vieytez 2014: 62–63). The fact that the request was made to the Territorial Delegation in Granada of the Regional Ministry of Education and Sport of the Andalusian Regional Government rather than to the director of the school may have created organizational difficulties, but it does not exempt the administration from its responsibility and renders irrelevant the fact that the request was not made within the time limit laid down in the regulation. In most cases, parents are not informed or aware that they have the right to make such a request, so they end up either making their children attend a religious class that goes against their parents' beliefs, which could be in the Catholic religion, or – as is most common,

and as occurred in this case – have them take the alternative secular subject, in this case social and civic values.

One of the main objectives of this subject, as defined by the Andalusian Regional Government, is to give each child the opportunity to develop his or her own personality and sense of well-being, to learn the basics of culture, and to develop social competences to promote the various aspects of his or her development. These values, which essentially concern the areas of coexistence and social life, are to a large extent linked to needs, demands, and problems whose recent evolution makes it necessary to address them. However, it must be borne in mind that this subject may also involve the teaching of educational values that are contrary to the principles that parents wish to instil in their children, thus infringing Article 27.3 of the Constitution, which guarantees parents the right to ensure that their children receive religious and moral education in accordance with their own convictions (Diez de Velasco 2016: 304–305).

While this may be an education based on inclusion and human rights values, the fact that parents have the right under Article 27.3 and the Cooperation Agreement to opt for religious education instead makes the failure to offer this option a violation of a fundamental right. In the present case, there is no evidence that, when they first enrolled their children in the school, the parents were informed of when they could make their requests on this issue, nor were they offered the possibility of Islamic religious education for their children at that time. This is stated in two instructions issued by the Dirección General de Planificación y Centros (General Directorate of Planning and Educational Establishments), dated 23 May 2017, which set out the procedure for collecting information on the teaching of religion in school enrolments for the 2017/2018 school year. It establishes that schools providing such education shall inform the parents or legal guardians of the pupils that the school provides religious education in line with the religious denominations with which the Spanish state has signed international agreements or cooperation agreements on education, and instruction, where appropriate, in the subjects of social and civic values.

Parents or guardians of pupils who wish their children to study religion must complete the form attached to these instructions, which are provided by the school together with the other documents required for enrolment. Once completed, the form must be handed in with the other documents at the time of the first enrolment in the school concerned, without prejudice to the fact that the decision taken may be modified at the time of the formalization of the enrolment. It is therefore the responsibility of the school authorities to make this right visible and accessible to parents and pupils, and of the public administrations to ensure that the school manages this right properly and makes it accessible to families. Cooperation that does not involve the various parties could be detrimental to the minority's reliance on the state as a guarantor of religious freedom. At the same time, it will increase the reluctance of minorities to rely on their religious organizations as their main interlocutors with the state.

The right to Islamic religious education in public and state-funded schools is a right that depends on positive state obligations and cooperation. At the same time, many variables and requirements need to be met for its implementation, requiring the full cooperation of schools, religious organizations, and the state. Therefore, decisions in the form of "administrative silence" constitute a failure of the state to fulfil its positive obligations to "do something" to ensure respect and protection of human rights. If minorities are not even aware that they have these religious rights, or even if they are aware of them but are suspicious of the state's ability to provide them, we may need to rethink the way we manage religious diversity in the Spanish state regarding education.

Literature related to the main issue(s) at stake:

Relevant Spanish case law:

- Tribunal Superior de Justicia La Rioja, Sentencia de 20 de abril de 2020, Sentencia número 94/2020 (High Court of Justice La Rioja, Judgment of 20 April 2019, no. 94/2020) ECLI:ES:TSJLR:2019:607

- Tribunal Superior de Justicia La Rioja, Sentencia de 20 de abril de 2020, Sentencia número 88/2020 (High Court of Justice La Rioja, Judgment of 20 April 2020, no. 88/2020) ECLI:ES:TSJLR:2020:131

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