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Spain: Restrictions imposed by schools on the rights to freedom of expression and religion or belief must be in line with human rights standards

On 25 January 2012, a Court of First Instance in Madrid upheld the decision of the Institute José Cela, a public secondary school in Pozuelo de Alarcón (Madrid), to exclude Najwa from regular classes because she wore the headscarf at school.

The internal regulation of the Institute forbids the wearing of any form of dress covering the head. In February 2010, Najwa, a 16 year-old girl at the time, started to wear the headscarf and, on the basis of that regulation, was denied the possibility to attend classes; she received education in the school premises but was isolated from other pupils for a few weeks. Before the end of the school year, she was eventually enrolled in another school in the same municipality where she was allowed to wear the headscarf.

The Court of First Instance noted that the internal regulation of the Institute applied to everyone without any distinction and that the prohibition on headwear aimed at introducing common dress code rules in order to ensure harmonious coexistence of pupils and the avoidance of distractions. The Court found that the restriction introduced by the Institute was necessary to protect public order and the human rights of the others. Further it found that secularism is a constitutional principle and that attitudes which are at odds with this principle can not be considered as a component of the right to freedom of religion.

Wearing religious and cultural symbols and dress is a component of the right to freedom of expression and the right to manifest one's religion or belief. International law permits certain restrictions to be placed on this right but only where three conditions are fulfilled: the restriction must be provided by law; it must be for one of the aims recognized as legitimate under international law, that is, to protect public safety, order, health, or morals or the rights and freedoms of others, and it must be demonstrably necessary and proportionate to the achievement of that aim.

In the area of education there are a number of complex elements that need to be taken into account in order to assess whether a restriction on the wearing of religious and cultural symbols and dress is permissible. As the Special Rapporteur on freedom of religion or belief has pointed out, the starting point should be a general presumption of the students' right to wear religious symbols at school.¹ In some contexts, restrictions may be justifiable in order to protect students from pressure exercised by schoolmates or their community. The goal must always be to equally protect the positive and negative aspects of freedom of religion or belief – that is, the freedom to manifest one's belief and the freedom not to be exposed to pressure to perform religious activities. However, if such a restriction is imposed in order to protect some students from pressure, it must be based on demonstrable facts and not on mere speculation or presumption and the requirement of necessity and proportionality entails also that there should be consideration of other measures which could achieve the aim sought by the

¹ Statement by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, 16th Session of the Human Rights Council, Geneva, 10 March 2011

restriction.

In this specific case, concerns arise on the aims sought by the Institute José Cela in imposing the prohibition enshrined in its internal regulation. The school's assertion that the regulation applied to everyone without distinction fails to take account of its differential impact on students who choose to wear a head-covering as an expression of their religious or cultural identity. As such, the effect of the restriction is to indirectly discriminate against Muslim girls in the exercise of their right to freedom of expression and religion or belief. With regard to the reference made in the court's judgment to the protection of the principle of secularism, this is not per se a legitimate aim under international human rights law the pursuance of which could justify restrictions on the rights to freedom of expression and religion. The judgment refers also to the aim of ensuring public order and the rights of the others, which international human rights law recognises as legitimate aims which may justify restrictions on those rights, but such restrictions must also be demonstrably necessary and proportionate for the stated purpose. In this case, it is far from clear that the restriction on the exercise by Najwa of her rights to freedom of expression and religion was necessary and proportionate to achieve those aims.

With regard to freedom of expression and of religion or belief by children, the Convention on the Rights of the Child clarifies that parents are entitled to provide guidance to their children in matters relating to the exercise of their human rights (including these rights) in a way consistent with the evolving capacities of the child. The Convention also stipulates that the best interest of the child should be a primary consideration in all actions concerning children. In order to ensure that these principles are respected, restrictions on religious and cultural symbols and dress should be adopted only with thorough consultation with parents and students. Concerns arise on whether the best interest of Najwa was respected in this case considering that, because of her exercise of her rights to freedom of expression and religion or belief she was initially isolated from her fellow students and then in order to exercise those rights she had eventually to change school.

Amnesty International calls on the Spanish Ministry of Education and the Minister of Employment and Education of the Madrid Community to ensure that dress restrictions which impact on the exercise of the rights to freedom of expression and religion or belief imposed by the authorities of individual schools are consistent with international human rights law. Notwithstanding the principle of autonomy of each educational institute, both the State and the Madrid Community have the shared responsibility to ensure that the principle of non-discrimination in education is respected.

Background

In Spain, there are no general bans on religious and cultural symbols and dress in education. However, in recent years several cases of girls who have been denied the possibility to wear the headscarf in schools have been reported. Some of them were resolved through mediation between school authorities and the families of the pupils concerned. Others have resulted in disputes eventually resulting in pupils be enrolled in other schools were the wearing of religious and cultural symbols and dress was not restricted.

The case of Najwa in Pozuelo de Alarcón is the first one in Spain leading to a judgement by a Court of First Instance.

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