# FEDERAL SUPREME ADMINISTRATIVE COURT

## IN THE NAME OF THE PEOPLE

## JUDGMENT

BVerwG 1 C 18,95
VGH 1 S 438/94

announced
on 6 November 1997
Wichmann
Justice Office Inspector
as Registrar of the Court Registry

In the Administrative Legal Matter

1. of the State of Baden-Wuerttemberg, represented by the County Presidency Office of Stuttgart, Ruppmannstr. 21, 70565 Stuttgart,

as the defendant, appellee and appellant in the instance for review on points of law,

2. the representative of the public interest, Ministry of Justice of Baden-Wuerttemberg, Schillerplatz 4, 70173 Stuttgart,

as party in interest and appellant in the instance for review on points of law,

- represented as to 1: by attorney Prof. Dr. Ruediger Zuck et al, Robert-Koch-Str. 2, 70563 Stuttgart -

v e r s u s

the association Scientology Neue Bruecke, Mission of the Church of Scientology e.V., represented by the president Rainer Dorfschmidt, Neue Bruecke 3, 70173 Stuttgart,

plaintiff, appellant and appellee in the instance for review on points of law,

- represented by attorneys Wilhelm Bluemel et al, Bayerstr. 13, 80335 Munich -

Party in interest:

The Federal Public Attorney with the Federal Supreme Administrative Court, the 1st section of the Federal Supreme Administrative Court on the basis of the oral hearing of 28 October 1997 with the presiding judge M e y e r and the judges G i e l e n, Dr. M a l l m a n n, R i c h t e r and Dr. G e r h a r d t

have found to be lawful:

The judgement of the State Administrative Court of Appeal of Baden-Wuerttemberg of 2 August 1995 is set aside.

The matter is remanded for renewed hearing and decision as provided for by the State Administrative Court of Appeal.

The decision on the award of costs is reserved to the final decision in the matter.

## R E A S O N S :

### I.

The plaintiff, a subordinate branch of the Church of Scientology, is an incorporated as idealistic association, which according to its statutes pursues religious purposes. It was incorporated into the register for idealistic associations as "Church of Scientology of Stuttgart" on 24 April 1975. Since 1984 it acts under its current name. The statutes were amended several times, the last time by decision of the general member assembly on 25 November 1990.

The defendant withdrew the plaintiff's legal capacity by decree of the county presidency office of Stuttgart of 28 October 1986 according to art. 43, sect. 2 Civil Code. The objection was dismissed by decree of 6 February 1992. The county presidency office argued in its reasoning: Objectively, the plaintiff would maintain a commercial enterprise contrary to the text of its corporate statutes. It might be left open whether the plaintiff would constitute a religious or philosophical community; even if this would apply, it would not prevent the qualification as a commercial association and the enforcement of the civil-legal definition of the various corporate forms. The protection of the general public especially of potential

creditors would outweigh the interest of the plaintiff in the maintenance of its legal capacity; the membership with the plaintiff would be connected to considerable financial risks.

The plaintiff filed an action to rescind the decree. The Administrative Court of 1st instance dismissed the suit by judgment of 30 September 1993. Upon appeal by the plaintiff the State Administrative Court of Appeal with its judgment of 2 August 1995 (NJW 1996, 3358) cancelled the decision under appeal and the prior objection decree and in essence argued the following:

According to the overall image of the practical activities as supported by the will of the members the plaintiff would pursue a commercial enterprise in violation of its corporate statutes. Just as with the comparable sub-branches of the Church of Scientology the activities of the plaintiff would predominantly consist of the offering of goods and services for the improvement of the mental efficiency and for the purpose of help in life. The plaintiff would not have discontinued the area of its commercial activities at the time of the dismissal of the administrative objections; the sale of books through its members in fulfillment of the missionary task would have to be attributed to it; the transfer of activities to the other Stuttgart association "Dianetik e.V.", another subdivision of the Church of Scientology, would be legally irrelevant in view of the hierarchical structure at least to the extent that these activities would extend to the members of the plaintiff; furthermore the plaintiff would be able to restart the discontinued activities at any time. The plaintiff would have to tolerate that the promotion employed for the offerings of the Church of Scientology which would use the ordinary means of commercial promotion must be attributed to it as far as they do not relate to a specific subbranch.

The plaintiff would offer its services in a planned fashion and permanently as well as for a remuneration. The latter would not be the case with respect to book sales to non-members, but would also apply to services towards the members; all substantial services would be provided only after prior payment of a fixed amount which would lack the characteristic of being voluntary which would qualify a donation.

The plaintiff would participate in a competition of providers on the market for philosophical goods and services; it would disseminate its ideas as commercial goods without a noticeable religious characterization via the forms of commercial transaction. A participation on the market ("open internal market") would also exist as far as any services would only be provided to members for a remuneration. In recruiting members - that are solvent and willing to pay - on the general market, the plaintiff would compete with other religions and philosophies and would have to develop its own activities as an entrepreneur beyond the association's internal realm and would factually do so. The commercial purpose of the association would be supported by the size of the payments or work performances expected from the members as well as the fact that rebates for pre-payments, bulk and families would seek to motivate the member to participate in the services; the membership would be aimed at taking non-cash and other services; the member would act as a customer towards the plaintiff. The plaintiff would not be able to take advantage of the so called privilege to conduct a subordinate [commercial] purpose for idealistic associations as the activity of an entrepreneur would not play a clear-cut subordinate role when compared to the idealistic role

but the contrary would be the case; the services of worship which would be free of charge would provide only an immaterial contribution to the accomplishment of the envisioned goals per the self-understanding of the plaintiff when compared to the services for which a remuneration is paid.

Finally a service could constitute a commercial activity even then, if this would serve in pursuing a religious or philosophical goal.

The attacked decrees would be illegal as the defendant would not have established whether the plaintiff would constitute a religious or philosophical community and therefore had failed to recognize the relevance of Art. 4 of the Constitution with respect to the interpretation of Art. 43, sect. 2 of the Civil Code. A clarification of the related facts by the court would be prohibited as the proper use of discretionary powers by a government office would be subject to examination by the court which would satisfy the requirements only, if it would be based on the correct factual findings.

The association law would have to be interpreted in alignment with the Constitution to the effect that the services of a religious community which would be provided as a commercial activity in the realm of the religious practice, would then not disqualify the character as an idealistic association; contrary to other idealistic associations the legal capacity of a religious community could only be withdrawn, if the religious or philosophical teachings would serve as a mere pretense for the pursuit of commercial purposes. All the plaintiff's activities at issue would have to be attributed to the protected sphere of Art. 4 and Art. 140 of the Constitution in connection with Art. 137 of the Weimar Constitution with the religious character taken for granted. By connecting them into the general legal provisions on the corporate forms of associations and by way of withdrawing the legal capacity, these protected activities would not be prohibited. However, the reference to the commercial legal corporate forms would interfere with the right of the religious and philosophical communities to select a corporate form that would be adequate for the nature of a religious community and that would not impose an unnecessary burden on its activities. That a religious community would have to establish itself in the corporate form of a limited liability company or a joint stock company would not be in alignment with this law. The legal form of the non-registered association would not discriminate against the plaintiff but would bring about other burdens. The withdrawal of legal capacity would not constitute a neutral measure that would not interfere with a religious community more than nominally.

To reason their appeal on points of law as admitted by the State Administrative Court of Appeal the defendant and the representative of the public interest both argued in essence as follows:

The application of Art. 43, sect. 2 Civil Code would not depend upon the finding whether the plaintiff would constitute a religious or philosophical community. A constitutional legal interpretation to this effect would be not be feasible nor necessary. Also a religious community would be able to pursue a commercial activity. The status as a religious community would not provide a protection against the withdrawal of legal capacity. The religious freedom to associate would only extend to the right of being an organization for the

realization of the religious purpose that would have a legal form and would have the ability to participate in the general legal transactions. A claim for a specific type of corporate form would not exist. The withdrawal would constitute a very minor and merely indirect and reasonable interference with the freedom of religious practice. The right of self-determination of religious societies would not be touched as a subject. Furthermore, this interference would be justified by the legal limitation of the law generally valid for all. Referring a religious community to the forms of the non-registered association or of a commercial company in alignment with its commercial behavior towards the external world, would neither constitute an unreasonable burden even if one would consider the self-understanding of the religious community. Such would follow from Art. 140 of the Constitution in connection with Art. 137, sect. 4 of the Weimar Constitution.

The appellants in this appeal on points of law apply to change the judgment of the State Administrative Court of Appeal of Baden-Wuerttemberg of 2 August 1995 by dismissing the plaintiff's appeal against the judgment of the Administrative Court of Stuttgart of 30 September 1993.

The plaintiff opposes the appeals on points of law.

The Federal Public Attorney supports the appeals on points of law.

II.

The appeals on points of law are founded. The attacked judgment is based on a violation of federal law and must be set aside. The matter is to be remanded for further hearing and decision to the State Administrative Court of Appeal.

The State Administrative Court of Appeal presumes that the plaintiff pursues a commercial business and that therefore principally its legal capacity could be withdrawn according to Art. 43, sect. 2 Civil Code. However, the court held that it is required under constitutional law that an incorporated association - which pursues religious purposes according to its self-understanding - can be subject to the withdrawal of its legal capacity in the presence of a predominantly commercial activity per Art. 43, sect. 2 Civil Code only, if it does not constitute a religious or philosophical community or if the religious or philosophical teachings serve as a mere pretense to pursue commercial purposes. The clarification of this question in the view of the State Administrative Court of Appeal is the task of the government administration and not of the court. As the defendant had left the question undecided whether the plaintiff constitutes a religious or philosophical community, the State Administrative Court of Appeal had cancelled the decree under attack.

The findings of the appeal court judgment do not justify the withdrawal of legal capacity according to Art. 43, sect. 2 Civil Code but neither do they allow a final decision from the Supreme Court on the merits (1.). The argument of the plaintiff that it would constitute a religious community and that it therefore could not be subject to a withdrawal of its legal

corporate position as a registered association does not change the need to remand the matter to the State Administrative Appeal Court for further clarification of the factual prerequisites of Art. 43, sect. 2 Civil Code (2.). Finally, the judgment under attack does not present itself as legally correct for other reasons especially as the decree under attack is not suffering from a drastic error in the exercise of discretion (3.).

1. The decree under attack can have its legal basis only in Art. 43, sect. 2 of the Civil Code. According to this provision an association - the purpose of which is not directed towards a commercial enterprise - may have its legal capacity withdrawn, if it factually pursues such a purpose.

a) The provision refers to the differentiation made in Art. 21, 22 of the Civil Code for associations the purpose of which is not directed towards a commercial enterprise (so called idealistic associations) and those associations the purpose of which is directed towards such a commercial enterprise (commercial associations). Idealistic associations attain legal capacity by registration in the association register, if they fulfill the legal provisions setting a standard under civil law. Commercial associations predominantly must constitute themselves according to the relevant provisions of company law; the conferment of legal capacity on a commercial association per Art. 22 Civil Code is taken into consideration only as an exception, if it is unreasonable for the association to make use of the legal forms of company law (judgment of 24 April 1979 - BVerwG 1 C 8.74 - BVerwE 58, 26 = NJW 1979, 2261).

The purpose of these provisions is to refer such associations with a commercial purpose to the commercial legal corporate forms for reasons of security in legal transactions, especially the protection of creditors, because an externally directed commercial activity touches creditor interests to a special extent and as these interests are considered much stronger in the provisions applicable for legal persons of commercial law and other merchants than in the provisions for association law. While provisions on creditor protection are limited to the provisions on the board of directors' duty to file for bankruptcy and the liquidation of the association (compare Art. 42, sect. 2, Art. 51 to 53 Civil Code), a legal person of commercial law is subject to compelling provisions such as duties on the minimum capital resources, the filing of balance sheets, the duty to disclose the annual financial statements, the duty for annual audits, as well as the - unlimited - power of representation of its legal bodies and empowered representatives (Art. 242 ff Commercial Code; furthermore, as a matter of example for the stock company Art. 7; Art. 36 sect. 2; Art. 37 and 57 ff, Art. 82 and 150 ff Stock Company Law; on the whole subject compare Federal Supreme Civil Court in BGHZ 85, 84 <88 f.> - ADAC Traffic Legal Protection; compare also Federal Supreme Civil Court in BGH NJW 1986, 3201 <3202> - Surveying of TV viewership).

Activities of an association constitute a commercial business, if they are conducted in a planned and permanent way and are directed towards the external sphere, i.e. extending beyond the association internal realm and that constitute entrepreneurial activities which intend to provide property advantages in favor of the association or its members. However, an idealistic association does not transform itself into a commercial association, if it develops entrepreneurial activities for the accomplishment of its idealistic purposes but if these

activities are attributable and subordinate to the non-commercial main purpose of the association and are a means for its accomplishment (the so called "privilege for a subordinate [commercial] purpose"; compare Supreme Civil Court BGHZ 85, 84 <92 f.). According to this the decisive aspect of a commercial business is whether the association is acting as an entrepreneur and carries the risk typically connected with such an activity. This would be the case, if the association would participate in the activities on a market just like a merchant (compare K. Schmidt, Company Law, 3rd Edition, p. 673; same author, Commerce Law, 4th edition, p. 285). However, services offered by an association towards its members in realizing its idealistic purpose, as a matter of principle do not constitute an entrepreneurial activity in this meaning. In such cases the association is typically not subject to a competition which would be connected to risky decisions and which therefore might require legal precautions especially for the protection of creditor interests. However, this does not apply, if an association acts towards its members by offering services which are ordinarily offered also by others independent from membership relations. Associations of such qualification as for example the consumer cooperative associations are also directed towards a commercial business (compare on the whole subject, Reichert/van Look, Manual on Association and Union Law, 6th Edition, annotation 120; Reuter in: Munich Commentary Civil Code, 3rd Edition, Art. 21, 22 annot. 26 f; Hadding in: Soergel, Civil Code, 12th Edition, Art. 21, 22 annot. 28; K. Schmidt, AcP 182 <1982>, 1 <17>).

The question whether an association - the purpose of which according to its corporate statutes is not directed towards a commercial business - pursues such a purpose in the meaning of Art. 43 sect. 2 Civil Code depends upon the overall behavior as carried by the will of the association (compare judgment of 20 March 1979 - Federal Supreme Administrative Court 1 C 13.75 - Buchholz 402,45 Association Law No. 3 = NJW 1979, 2265). Aside from the activities practiced also such plans can have significance in this context that are not being accomplished presently, but that belong to the realm of tasks of the association according to the association's will.

The purpose of Articles 21, 22 and 43 sect. 2 Civil Code - as shall be pointed out in order to clarify - when compared to the purpose pursued by the trade legal classification of an activity is more narrow. The latter pursues the purpose of the protection of the general public or of individuals against dangers, substantial disadvantages or substantial molestations that as a matter of experience may be brought about by certain commercial activities (decision of 16 February 1995 - Federal Supreme Administrative Court 1 B 205.93 - Buchholz 451.20 Art. 14 of the Trade Law No. 6 = NVwZ 1995, 473). According to that commercial activities of an association may be viewed as a trade in the meaning of the trade law even if they do not touch the civil legal qualification of the association as an idealistic association.

b) The application of these principles to the case at hand results in the following:

aa) The plaintiff according to its corporate statutes understands itself to be a religious community that pursues the purpose of the practice and dissemination of the Scientology religion and its teachings. The practice of the religion according to that is accomplished through the spiritual counselling (auditing) and through the conduct of introductory and fundamental seminars and courses. The participation in these services is limited to the

members and bound to certain remunerations - regularly in the form of monetary payments.

The State Administrative Appeal Court has stated on this point that one has to presume, that the ideas of the Church of Scientology as expressed in the goods and services of the association (especially the so called auditing) is only offered by its church organizational structure and its subbranches and that the members recognize the religious character.

This indicates that auditing - understood as spiritual counselling according to the corporate statutes of the plaintiff - and the seminars and courses offered for the attainment of a "higher level of beingness" are carried by the common convictions of the members of which they cannot be separated without these losing their value for the recipient. If this is correct, an association membership is realized through these services that goes beyond the exchange of generally accessible goods and services without the common convictions necessarily having to constitute a religion in the legal meaning. The services offered by the plaintiff internally for a remuneration then do not establish a commercial business in the meaning of the association law.

However, the mentioned arguments from the Appeal Court judgment do not constitute the establishment of facts on the basis of which this Supreme Court Section could base a final judgment. The arguments have more a hypothetical character. This also follows from the fact that the appeal court judgment explicitly leaves the question open whether the plaintiff constitutes a religious community or whether its teachings form a mere pretense for a commercial activity. The arguments furthermore are based on an understanding of the legal characteristics of the term commercial activity which deviates from the above stated concept of this Supreme Court Section.

Also the additional considerations of the State Administrative Court of Appeal do not show that the plaintiff is active as an entrepreneur in the stated meaning.

The statement that the plaintiff would compete on the general "market" with other religions and philosophies for the recruitment of members that are solvent and willing to pay, in itself does not justify the conclusion that the plaintiff in doing so would develop an entrepreneurial activity exceeding the association internal realm.

The term of a market as used in the association law does relate to the exchange of goods and services and not to the competition as such of disseminating religions and philosophies. A commercial activity of the plaintiff can neither be inferred from the statement, that the plaintiff would strive for new members by way of promotion and in competition with other providers of life help services without the plaintiff showing an identifiable religious connection. For from that does not follow either that the services of the plaintiff towards its members can also or could also be provided by other providers in a comparable way. Merely the conceptual summary of various techniques for the satisfaction of mental and spiritual needs to a so called "philosophic market" does not show that we are dealing here with services that - similar to a consumer cooperative association - are ordinarily provided also by others independent from the membership relation. How the association conducts promotion for the recruitment of new members does then not play a role for the question whether the

association pursues the purpose of a commercial activity towards its members, if the services of an association towards its members are limited to the realization of the membership in the stated meaning.

Furthermore, it is irrelevant for the establishment of a commercial activity in which form the members fund the activity of their association. That an association claims remunerations for services provided in itself does not form an indicator for a commercial activity. Also dangers that could result from the membership for the individual member - such as the danger to get into economical difficulties - do not justify the assumption of a commercial activity of an association.

bb) The dissemination of the Scientology religion as required by the corporate statutes may also include the sale of goods such as Scientology literature and the offering of services for a remuneration such as introductory courses to non-members. If the plaintiff is active in this way, it would also participate in market activities. With the reservation of the so called privilege to conduct [commercial] activities subordinate to the main purpose the plaintiff's purpose to that extent can factually be directed towards the pursuit of a commercial business. But the prerequisite for that is that the association acts itself by its own representatives or in a way attributable to itself through members or third persons. Activities of others than its representatives can only be attributed to the association as far as they can lead to financial\ obligations of the association. According to the stated purpose of the relevant association legal provisions, legal relations would have to exist according to which a potential entrepreneurial risk would be carried by the association.

According to the facts established by the appeal court the plaintiff itself does not sell literature to external people. But the State Administrative Appeal Court did not establish either that the stated prerequisites for the sale of literature by members exist. The same applies with respect to the question, to what extent commercial activities of other organizations of the Church of Scientology including their promotional activities at the same time constitute an entrepreneurial activity of the [plaintiff] association. From the viewpoint of the legal standards of association law to be applied here, a commercial activity of the plaintiff could only be considered, if the plaintiff would have transferred portions of its entrepreneurial (promotional) activity outside of itself onto others while the commercial risk in the stated meaning would stay with itself. It cannot be excluded that such interlockings do exist. The appeal court did not clarify this issue factually.

The establishment of such facts cannot be done without on the basis of the consideration that the Scientology Organizations have to be viewed as one unit with the result that it would be irrelevant whether an individual association would not develop certain activities. The withdrawal of legal capacity according to Art. 43 sect. 2 Civil Code is only justified with the view that the specifically concerned association is active as an entrepreneur in the stated meaning and thereby would be a typical subject of financial risks. The general interests in the common good the association law puts forth in other ways.

However, the sale of goods and the offering of services for a remuneration to non-members can also be covered by the already mentioned privilege to conduct a [commercial] purpose

subordinate to the main purpose. This would be the case, if the other activities of the plaintiff would form the main portion in the accomplishment of the overall purpose per the corporate statutes of the practice and dissemination of the Scientology religion and would thereby attribute and subject potential entrepreneurial activities towards non-members to this main purpose and would thereby constitute simply an auxiliary means for the attainment of the overall purpose. The findings of the Appeal Court, however, do not allow for a final adjudication on this either.

2. The argument of the plaintiff that it would constitute a religious community in the legal meaning has no bearing on the decision of the case. The provisions of Art. 21, 22, 43 sect. 2 Civil Code do not impose an unreasonable burden on the participation in legal relations for religious communities, provided that the correct understanding of the prerequisites for a commercial activity are applied, nor do these provisions do so in a way that is incompatible with the guarantee to associate to a religious community as provided for in Art. 4 sect. 1 and 2 of the Constitution in connection with Art. 140 of the Constitution and Art. 137 sect. 2 and 4 of the Weimar Constitution (compare the principles as per the Federal Constitutional Court decision BVerfGE 83, 341 <353, 355 f.>).

3. The judgment under attack cannot be confirmed as correct for other legal reasons. A remand cannot be done without already for the reason that the government office exercised its discretionary powers in a faulty way with the result that its decree would have to be cancelled in any case by reason of that alone and independently from the above considerations. A fault with respect to the exercise of discretionary powers does not exist.

According to Art. 43 sect. 2 Civil Code an association "may" have its legal capacity withdrawn under the stated prerequisites. The text of the law suggests the assumption that the withdrawal of legal capacity would be subject to the discretion of the competent government office (accordingly State Administrative Court of Appeal Munich in NJW-RR 1987, 830 with further references; Hadding, loc. cit., Art. 43 annot. 6; Weick in: Staudinger, commentary to the Civil Code, 13th edition, Art. 43 annot. 13). These considerations are opposed in the literature to the effect that the weighing of the opposing interests - as typical for any authorization to practice discretion - do not apply in this context because the concerned association would not have legitimate interests on its side that would speak in favor of a "possession of legal form" (K. Schmidt, AcP 182 <1982>, 1 <47 ff.>; same author in NJW 1993, 1225 <1227>; Reuter, loc. cit., Art. 43 annot. 4). In fact in the regular case no viewpoints can be conceived of that would speak in favor of refraining from the withdrawal of legal capacity. Especially the relevant association legal provisions do not provide an indication to the effect that the government administration could only interfere in the case of a specific danger to the creditors of an association. The authorization for withdrawal of legal capacity shall enforce observance to the preventive provisions of creditor protection and thus puts itself forth as an instrument of the abstract prevention of danger. Therefore, the withdrawal of legal capacity is principally predetermined with the fulfillment of the legal elements. Discretionary considerations are indicated only in a-typical cases.

Circumstances that would indicate the existence of an a-typical case at hand are not visible.

The appeal court was not allowed to cancel the decree already for the reason that the defendant did not examine whether the plaintiff constitutes a religious community.

4. The decision on the award of costs is reserved to the final decision in the case.

O R D E R

The value of the case is fixed at DM 8.000 for the instance of appeal on points of law.