A Lesson for Applicants: Don’t Agree to a Relinquishment to the Grand Chamber

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I have just read the judgment in *S.A.S. v. France*, where the Grand Chamber held that the face-veil ban in France does not violate the European Convention. Others have commented on the merits of the case (see Saïla and Lourdes’ post), but one thing struck me that needs to be aired as a lesson for applicants generally: don’t agree to a relinquishment to the Grand Chamber.

When the case first reached the Court in 2012, it was assigned to the Court’s Fifth Section, which was made up of seven judges: Mark Villiger, Angelika Nußberger, Boštjan M. Zupančič, Ganna Yudkivska, André Potocki, Paul Lemmens and Aleš Pejchal. However, these judges considered the case so important, that they decided to relinquish jurisdiction to the 17-judge Grand Chamber.

According to the judgment, the applicants did not object to this relinquishment. In hindsight, however, this was arguably regrettable for two reasons: The first is procedural: under the Court’s rules, when a Section relinquishes jurisdictions, all seven judges from that Section sit in the subsequent Grand Chamber (rule 24c). We now know from the judgment in *S.A.S.* that six of the Fifth Section judges voted in favour in upholding the face-veil ban in the Grand Chamber. Only the German judge, Angelika Nußberger, voted to find the ban in violation of the Convention.
So what would have happened had the applicants objected to the relinquishment, and forced the Fifth Section to decide the S.A.S. judgment? (They were entitled to do so under rule 72). Well the applicants would have still lost, in a six-to-one vote. But in any subsequent appeal to the Grand Chamber, under the Court’s rules (rule 24d), only two judges from a Section which has issued a judgment can sit in any subsequent appeal (the Section president, Mark Villiger, and the national judge, André Potocki).

This would mean that France would have automatically lost four votes for the ban in the Grand Chamber, and opened up four slots for new judges who may vote against the ban. This might have resulted in a larger bloc of judges signalling that they would vote against the ban, and persuaded more judges to join them. Instead, we only had two judges from Germany and Sweden, Angelika Nußberger and Helena Jäderblom, voting against the face-veil ban. Of course, the applicants could never have known that six of the seven Fifth Section judges would have voted to uphold the ban. Hindsight is everything.

But the second reason for considering the applicant’s decision to agree to relinquishment regrettable is much more compelling. Had the Fifth Section been forced to decide the case, we would have a had a Fifth Section judgment which would have included the laughable “face-veils-undermine-the-notion-of-living-together” rationale for upholding the ban.

We would also have had Angelika Nußberger’s excellent dissent, and critical academic commentary on the Fifth Section’s judgment. We can also safely assume that the Grand Chamber would have accepted an appeal from the Fifth Section’s judgment, as the face-veil ban undoubtedly satisfies the criteria for a Grand Chamber appeal. The parties’ briefs, oral argument, and amicus briefs could have rightly torn apart the “living-together” rationale.
Instead, S.A.S. continues a trend where Sections relinquish jurisdiction to the Grand Chamber, only for the Grand Chamber to issue majority opinions based on highly questionable rationale for finding government action consistent with the Convention, and which cannot be appealed (such as police kettling (Austin), and political-expression bans (Animal Defenders)).

It is a real pity S.A.S. was not decided by the Fifth Section, and its flimsy rationale for upholding the face-veil ban subject to serious critique. Instead, we are stuck with a highly questionable Grand Chamber judgment.