

ERIK FEJES

RESTRICTIONS
ON THE RIGHT TO FREEDOM OF EXPRESSION OF
MEMBERS OF THE ARMED FORCES AND
THE LAW ENFORCEMENT BODIES
IN THE CASE-LAW OF
THE EUROPEAN COURT OF HUMAN RIGHTS



Hungarian Society of Military Law and the Law of War
2025

ERIK FEJES

**RESTRICTIONS
ON THE RIGHT TO FREEDOM OF EXPRESSION
OF MEMBERS OF THE ARMED FORCES AND
THE LAW ENFORCEMENT BODIES
IN THE CASE-LAW OF
THE EUROPEAN COURT OF HUMAN RIGHTS**



**Hungarian Society of Military Law and the Law of War
2025**

Restrictions on the right to freedom of expression of members of the
armed forces and the law enforcement bodies in the case-law of the
European Court of Human Rights

Written and edited by / írta és szerkesztette:

© Dr. Erik Fejes

Published by / kiadja:

© Hungarian Society of Military Law and the Law of War

/

Magyar Katonai Jogi és Hadijogi Társaság

H-1055 Budapest, Markó utca 27. III. emelet 15–17/A.

katonai.jog@gmail.com

www.hadijog.hu

Representative of the publisher / kiadó képviselője:

Dr. Pál Kádár PhD

Printed by:

ISBN 978-615-6248-12-1

The volume was published with the support of the Hungarian Ministry of
Defense. / A kötet a Honvédelmi Minisztérium támogatásával valósult meg.

All rights reserved, including the right of reproduction and the right to publish extended
or abridged versions of this work. No part of this publication may be reproduced or
distributed in any form (photocopy, microfilm, or other medium) without the written
permission of the publisher. / Minden jog fenntartva, beleértve a sokszorosítás, valamint
a mű bővített és rövidített változatának kiadási jogát. A mű a kiadó írásbeli hozzájárulása
nélkül – semmilyen formában (fotokópia, mikrofilm vagy más hordozó) – nem
reprodukálható, illetőleg terjeszthető.

Content – Tartalom

Preface	9
Előszó	11
1. Introduction	15
2. The topic	18
3. Specificities of the functioning of the armed forces and law enforcement bodies	19
4. Case law	21
4.1. Case of Engel and others v the Netherlands	21
4.1.1. Facts	21
4.1.2. The decision	23
4.2. Case of Hadjianastassiou v Greece.....	24
4.2.1. Facts	24
4.2.2. The decision	24
4.3. Case of Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria	25
4.3.1. Facts	26
4.3.2. The decision	26
4.4. Case of Grigoriades v Greece	27
4.4.1. Facts	27
4.4.2. The decision	30
4.5. Case of Rekvényi v Hungary	31
4.5.1. Facts	31
4.5.2. The decision	31
4.6. Case of Szima v Hungary.....	33
4.6.1. Facts	33
4.6.2. The decision	35
4.7. Case of Jokšas v Lithuania.....	38
4.7.1. Facts	38
4.7.2. The decision	39
4.8. Case of Soares v Portugal	40
4.8.1. Facts	40
4.8.2. The decision	41
5. Findings of principle in the decisions made in the different cases.....	43

6. Evaluation of judicial practice	44
6.1. The emotional basis of military life and its protection	45
6.2. The possibility to make criticisms or critical remarks.....	48
6.3. Proving the veracity of statements	48
6.4. Discontent or insubordination?	49
6.5. Expressions concerning the leaders of the armed forces.....	50
7. Summary	51
In Hungarian	55
1. Bevezetés	59
2. Témafelvetés	63
3. A hon- és rendvédelmi testületek működésének sajátosságai ...	63
4. Esetjog	65
4.1. Az Engel and Others v. the Netherlands ügy	65
4.1.1. A tények	65
4.1.2. A döntés.....	67
4.2. A Hadjianastassiou v. Greece ügy	68
4.2.1. A tények	68
4.2.2. A döntés.....	69
4.3. A Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria ügy	69
4.3.1. A tények	70
4.3.2. A döntés.....	71
4.4. A Grigoriades v. Greece ügy	72
4.4.1. A tények	72
4.4.2. A döntés.....	73
4.5. A Rekvényi v. Hungary ügy	74
4.5.1. A tények	74
4.5.2. A döntés.....	75
4.6. A Szima v. Hungary ügy.....	77
4.6.1. A tények	77
4.6.2. A döntés.....	79
4.7. A Jokšas v. Lithuania ügy.....	82
4.7.1. A tények	82
4.7.2. A döntés.....	83
4.8. A Soares v. Portugal ügy	84
4.8.1. A tények	84
4.8.2. A döntés.....	85

5. Az eseti döntések elvi jellegű megállapításai	86
6. Az ítélezési gyakorlat értékelése	88
6.1. A katonai életviszonyok érzelmi alapja és annak védelme	89
6.2. A bírálatok és a kritikai észrevételek megtételének lehetősége.....	92
6.3. A valóság bizonyítása	92
6.4. Elégedetlenség vagy engedetlenség?.....	93
6.5. A fegyveres testületek vezetőit érintő megnyilvánulások.....	94
7. Összegzés.....	94
Bibliography - Forrásjegyzék	97
Appendix - Függelék	99
Case of Engel and others v. the Netherlands	100
Case of Hadjianastassiou v. Greece	147
Case of Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria	160
Case of Grigoriades v. Greece	174
Case of Rekvényi V. Hungary	193
Case of Szima v. Hungary.....	214
Case of Jokšas v. Lithuania.....	226
Case of Soares v. Portugal	246

Preface

Over the course of nearly thirty years of its operation, the Hungarian Society for Military Law and Law of War has contributed through numerous events and publications to the presentation of the traditions, background, and specific features of the regulation concerning defence and law enforcement organisations, as well as to the scholarly exploration of both theoretical and practical questions arising in connection with this field of law.

Our volumes address various areas of military and war law, including the historical roots, development, and system of the relevant norms, the careers of prominent military jurists, the characteristics of the service relationship between bodies organised along military principles and their members, defence and security administration, crisis management, as well as a wide range of specific issues relating to operation under the special legal order.

In our latest publication, Major Erik Fejes, a member of our society's board responsible for military criminal law research and a military prosecutor at the Central Chief Prosecution Office of Investigation, has set out to examine the case law of the European Court of Human Rights in relation to the right of professional personnel in the armed forces and law enforcement agencies to freedom of expression.

Freedom of expression is one of the most important fundamental rights and a cornerstone of the functioning of democratic societies. Under Article 10 of the European Convention on Human Rights, everyone has the right to freedom of expression and to seek and impart information – regardless of the form of expression. However, this freedom is not unlimited: it is a particularly sensitive area when it comes to the rights of the professional staff of the bodies responsible for the external and internal security of the State. Members of the armed forces, police, gendarmerie, border guard, customs and financial guard, coast guard and penitentiary system – as representatives of the armed power of the state –

have a special legal status. The nature of their service, the hierarchical structure, and the need for discipline and loyalty often justify restrictions on their freedom of expression.

This volume seeks to explore the key elements of the relevant case law of the European Court of Human Rights, assessing the principles on which it balances freedom of expression against the restrictions imposed on the grounds of the service relationship with the defence and law enforcement organisations. The aim is not merely to present the judgments, but also to understand the legal and social frameworks within which the freedom of expression of personnel in bodies organised according to military principles can be interpreted in the twenty-first century.

In our publication, we publish the study in Hungarian, accompanied by an appendix containing the official English texts of the examined judgments.

We are convinced that analyses of this kind, and their wider dissemination, serve the effective functioning of the bodies responsible for the State's external and internal security, while simultaneously ensuring the protection of fundamental rights.

Budapest, October 1, 2025.

Brigadier General Pál Kádár, PhD

President

of the Hungarian Society for Military Law and Law of War

Előszó

A Magyar Katonai Jogi és Hadijogi Társaság közel harminc éves működése során számos rendezvénnyel és kiadvánnyal járult hozzá a hon- és rendvédelemi szervezeteket érintő szabályozás hagyományainak, hátterének, illetve sajátosságainak a bemutatásához, továbbá a jogterülettel kapcsolatban felmerülő – elméleti és gyakorlati – kérdések tudományos igényű megválaszolásához.

Köteteink a katonai és hadijog különböző területeit, így a vonatkozó normák történeti gyökereit, kialakulásának folyamatát, valamint rendszerét, meghatározó katonai jogászok életútját, a katonai elvek mentén szervezett testületek és az állomány tagjai között fennálló szolgálati jogviszony jellemzőit, a védelmi- és biztonsági igazgatást, a válságkezelést, továbbá a különleges jogrendi működés legkülönbébb részkérdéseit tárgyalják.

Legújabb kiadványunkban egyesületünk katonai büntetőjogi kutatásokért felelős elnökségi tagja, Fejes Erik őrnagy, főügyészszégi katonai ügyész az Emberi Jogok Európai Bírósága ítélkezési gyakorlatának feldolgozását tűzte ki célul a honvédek és a rendvédelmi feladatokat ellátó szervek hivatásos állományának véleménynyilvánításhoz való joga kapcsán.

A szólás szabadsága az egyik legfontosabb alapjog, amely a demokratikus társadalmak működésének sarokköve. Az Emberi Jogok Európai Egyezményének 10. cikke értelmében mindenki jogosult arra, hogy szabadon kifejezze véleményét, információkat szerezzen és terjesszen – függetlenül attól, hogy milyen formában történik az önkifejezés. Ugyanakkor e szabadság nem korlátlan: különösen érzékeny terület, amikor az állam külső és belső biztonságáért felelős szervek állományának jogairól van szó. A honvédek, a rendőrök, a csendőrök, a határőrök, a pénzügyőrök, továbbá a parti őrség és a büntetés-végrehajtási szervezet

tagjai – mint az állam fegyveres hatalmának megtestesítői – különleges jogi státusszal rendelkeznek. Szolgálatuk természete, a hierarchikus struktúra, valamint a fegyelem és lojalitás iránti elvárás gyakran indokolja a véleménynyilvánítási szabadságuk korlátozását.

Kötetünk arra vállalkozik, hogy feltárja az Emberi Jogok Európai Bírósága vonatkozó esetjogának meghatározó elemeit, értékeli azokat az elveket, amelyek mentén a testület mérlegeli a szólás szabadsága, valamint a hon- és rendvédelmi szervezetekkel fennálló szolgálati jogviszonyból fakadó korlátozások közötti egyensúlyt. A cél nem csupán az ítéletek bemutatása, hanem annak megértése is, milyen jogi és társadalmi keretek között értelmezhető a katonai elvek mentén szervezett testületek állományának szólásszabadsága a 21. században.

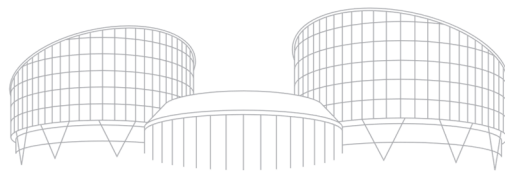
Kiadványunkban a tanulmányt magyarul is közreadjuk, valamint függelékként a feldolgozott ítéletek hivatalos angol nyelvű szövegeit is.

Meggyőződésünk, hogy az ehhez hasonló elemzések és azok szélesebb körben történő megismerése jól szolgálják az állam külső és belső biztonságáért felelős szervek hatékony működését – az alapvető jogok érvényesülése mellett.

Budapest, 2025. október 1.

Dr. Kádár Pál PhD dandártábornok
Magyar Katonai Jogi és Hadijogi Társaság
elnöke

**Restrictions on the right to freedom of expression
of members of the armed forces and the law
enforcement bodies in the case-law of the
European Court of Human Rights**



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1. Introduction¹

All legal systems that are based on unconditional respect for human freedom recognise and guarantee the right to freedom of expression without exception. Accordingly, the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe, signed in Rome on 4 November 1950 (hereinafter the European Convention on Human Rights or ECHR) states that everyone has the right to freedom of expression. The Convention also stipulates that this right shall include freedom to hold opinions and to receive and impart information and ideas without interference from public authorities and regardless of frontiers, which guarantees both self-expression and participation in social and political processes.²

The ability to express our emotions, desires and meaningful thoughts – verbally, in writing, through non-verbal signs, in artworks or in any other way – is a characteristic of our humanity. Without it, our personal development and our community life would be equally unthinkable. The freedom to share with others our reaction to the events that directly or indirectly affect our daily lives, and hence our evaluation of certain situations in life and our opinions formed as a result, is the basis of our individual autonomy and the guarantee of shaping our own destiny.³

The right to freedom of expression also plays an indispensable role in creating and shaping public opinion, which determines the functioning of civil societies. Open debate, where everyone can express their views, is a prerequisite for, and reinforces, democratic decision-making in a state governed by the rule of law. By ensuring the free exchange of opinions, it is possible to express all the ideas that can contribute to solving our social

¹ We wish to extend our sincere appreciation to Ipso Jure Legal Translation Office (official Hungarian name: Ipso Jure Jogi Fordítóiroda) for their valuable contribution to the translation.

² European Convention on Human Rights, Article 10(1).

³ Cf. *Pretty v The United Kingdom* ECHR 2002-III 196 62.

problems and to represent a wider range of individual and collective interests. Freedom of expression, in the form of criticism of government action, is thus one of the most important cornerstones for the establishment and maintenance of a democratic state, and is both a tool and a guarantee against possible abuses of public power.⁴ All this shows that there is an overriding interest in guaranteeing the right to freedom of expression at both individual and societal level.

The State's obligation to respect and protect freedom of expression extends beyond guaranteeing the exercise of this fundamental right, free from interference by organisations and persons exercising public functions, to creating the conditions indispensable for its exercise. To this end, Contracting States must ensure that the public interest information necessary for the formulation of opinions is made available in a satisfactory and timely manner, in particular with regard to objective information on public affairs. They must also respect the beliefs of those under their jurisdiction, which means that they cannot impose their own views on them or discriminate between them on the basis of their views. In this context, there is also the negative freedom of expression, which means that no one can be obliged to express their thoughts.⁵

Freedom of expression is an indispensable tool for the exercise and protection of all other fundamental rights, and thus occupies a prominent place among human rights. Although the right to freedom of expression is not absolute, its exercise can only be restricted in a narrow range of cases, usually where the harm to interests underlying the restriction is particularly serious. In this context, the European Convention on Human Rights draws attention to the fact that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. The Convention's exhaustive list of possible reasons for restrictions includes the interest of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, the prevention of the disclosure of information

⁴ Cf. *Handyside v United Kingdom* App 5493/72 (ECtHR, 7 December 1976) 49.

⁵ Dominika BYCHAWSKA-SINIARSKA: *Protecting the right to freedom of expression under the European Convention on Human Rights* (Strasbourg, Council of Europe, 2017) 13 and 15.

received in confidence, or the maintenance of the authority and impartiality of the judiciary (Article 10(2).)

However, even in these cases, the restriction may only apply to certain aspects of the exercise of the right to freedom of expression and may not affect its essential content. Nothing in the Convention may be interpreted as implying, for any State, group or person, any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention (Article 17).

Respect for the freedoms recognised and protected by the Convention is ensured by the European Court of Human Rights through its rulings on applications in individual cases. The Court considers a restriction of fundamental rights to be justified only if the restriction

- is based on a legal rule which is sufficiently precise and clear in its wording to enable the persons concerned to know in advance, within a reasonable time, the rules applicable to them and to assess the possible consequences of their conduct in the light of those rules,
- is designed to protect one of the interests listed in the Convention, and
- is a necessary and proportionate measure for the functioning of democratic societies.⁶

In order to establish a uniform case law, the Court endeavours to draw up or issue binding guidelines on the possible restrictions of the freedoms contained in the Convention, including the right to freedom of expression, and the scope of such restrictions.

However, Contracting States have a certain amount of discretion in assessing the need for and the extent of restrictions, as national authorities, which are familiar with local – social, cultural and historical – specificities, are in a better position than the international court to resolve conflicts of interest in specific cases.⁷ As a result of the legal principles developed in the judicial practice and the analysis of the decisions, it can be concluded that the stringency of the tests accepted and applied in terms of the

⁶ *Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) 49., *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 Mai 1991) 57., *Observer and Guardian v United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) 56. and *Rekvényi v Hungary* ECHR 1999-III 440–441 62.

⁷ *Sunday Times* (fn. 6.) 59.

permissibility of restrictions may vary for the different fundamental rights and even within them.⁸ This is particularly true for freedom of expression, where the nature and content of the expression is of decisive importance in the context of the permissibility of restricting the right. While the protection granted based on this fundamental right extends to opinions, regardless of their value and truth, statements of fact are subject to a stricter assessment, as their veracity can be made subject to scrutiny.⁹ If the statement is found to be false or not sufficiently substantiated as a result of the scrutiny, it cannot be afforded the same level of protection as value judgments. At the same time, excessive opinions without any factual basis can also be excluded from protection under freedom of expression.¹⁰

It is for the authorities of the Contracting States to decide whether a statement constitutes a statement of fact or a value judgment.¹¹ The Court considers political expressions to be the most protected core of freedom of expression, given their prominent role in the development and functioning of civil societies; therefore, the freedom of public debate and, with it, the right to criticise public figures, are given a higher level of protection than any other form of expression in Strasbourg case law, even if it involves harm to the interests of others.¹² The fact that the discretionary power of the Contracting States to assess the necessity of restrictions on freedom of expression does not extend to political speech is an indication of the special protection afforded to such political expressions.¹³

2. The topic

The right to freedom of expression is guaranteed to the members of the army, police, gendarmerie, border guards, coastguard, finance police and prison services in the same way as to any other persons; however, the armed forces and the law enforcement bodies can only carry out their functions if there are legal provisions in place and enforced that guarantee

⁸ András KOLTAY: *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban.* (*The Basic Aspects of the Freedom of Speech in Hungarian, British, American and European Comparison*) (Budapest, Századvég, 2009) 108.

⁹ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) 46.

¹⁰ *Jerusalem v Austria* ECHR 2001-II 84 43.

¹¹ *Pedersen and Baadsgaard v Denmark* ECHR 2004-XI 137 76.

¹² *Handyside v United Kingdom* (fn. 4.) 49. and *Lingens v Austria* (fn. 9.) 42.

¹³ *Sunday Times* (fn. 6.) 59., 65–66.

the maintenance of discipline, order of service and chain of command which ensure their effective operation.¹⁴ The European Court of Human Rights has on several occasions examined the compatibility of these requirements with the right to freedom of expression, and has made a number of important findings of principle.

This paper seeks to answer the questions – by examining the relevant cases – as to which aspects the Court considers relevant in relation to the restriction of the right to freedom of expression of these special subjects, and to what extent these aspects fit into the general framework of restrictions on the exercise of this fundamental right. However, before presenting and analysing the cases, it is worth reviewing the specific features that characterise the functioning of armed organisations.

3. Specificities of the functioning of the armed forces and law enforcement bodies

The protection of independence, territorial integrity and national borders, the protection of national security interests and the maintenance of public safety and public order are among the most important obligations of the State. These tasks are carried out by the armed forces and law enforcement bodies, which can only fulfil their function if they are under unified command and there is discipline, and a strict chain of command and order of service within their organisations. Discipline is defined as the fulfilment of the requirements specified by law, by the internal instructions governing the operation of the armed forces and by the superiors, which is the duty of all members of the armed forces. Discipline – as Helmuth von Moltke (1800-1891) aptly put it – is the „[a]uthority from above and obedience from below – in one word, discipline is the whole soul of an army. Discipline alone makes the army what it should be, and an army devoid of discipline is, under all circumstances, a costly institution, insufficient for the requirements of war, and a source of danger in peace time”.¹⁵ The order of service means a well-developed and practical organisational and operational structure for the performance of duties and tasks, a precise

¹⁴ Cf. *Engel and others v the Netherlands* App no 5100-5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976) 100.

¹⁵ Helmuth MOLTKE: *Essays, speeches, and memoirs of Field-Marshal Count Helmuth von Moltke* (New York, Harper & Brothers, 1893) 70.

definition of rights and obligations for all, and the provision of the human and material resources for the activities of the armed forces and law enforcement bodies. These requirements ensure that discipline is established and maintained on a permanent basis; as such, the order of service must be observed and maintained at all times and under all circumstances.

The chain of command is the basis of discipline and order of service, guaranteeing the right of a superior officer or supervisor to issue orders and other instructions and specifying the subordinate's obligation to obey them. This implies a specific legal relationship between the armed organisations and the members of such organisations. The performance of the duties of the armed forces and law enforcement bodies can only be ensured if the members of the personnel fulfil their obligations on the basis of voluntary commitment, as a life vocation, subordinating themselves to the interests of the country and society, and – where appropriate – at the risk of their physical integrity and their lives, accepting the obligations necessarily associated with the performance of their duties, including the restriction of the exercise of certain fundamental rights. The full implementation of the provisions applicable to the service is guaranteed by a willingness to obey, based on absolute respect for the chain of service, without which, by our human nature, we are unable to submit to the will of others.¹⁶

Armed organisations must also be imbued with a spirit of comradeship, which means that members of the armed forces must show each other the respect due to each other, respect the honour and rights of their fellow officers, and support each other in times of need or rescue each other from danger.¹⁷ These factors are essential for the proper and efficient functioning of the military, police, gendarmerie, border guards, coastguard, finance police and prison services, and their protection is therefore of paramount social interest.

¹⁶ Emil SCHULTHEISZ: *A katonai büntetőtörvény [1930. évi II törvénycikk] magyarázata II. – Különös rész I. Füzet – Függelomsértés. (Explanation of the Military Criminal Law [Act II of 1930] Part II – Special Part, Book I – Violation of the Chain of Command)* (Budapest, Radó, 1934) 3.

¹⁷ Article 12 of the German law on the status of soldiers (*Wehrstrafgesetz*).

4. Case law

The position of the European Court of Human Rights on the enforceability of these requirements against the freedom of expression can be found in the decisions of individual cases, which also provide an overview of the development of case law on the issue.

4.1. Case of *Engel and others v the Netherlands*¹⁸

In the early 1970s, Dutch nationals successively brought cases before the court, challenging the legality of disciplinary penalties imposed on them in the course of their military service, and contesting the legality of proceedings at first and second instance brought against them by their commanding officers and the Supreme Military Court. Among them, Johannes C. Dona and Willem A. C. Schul considered that their right to freedom of expression had also been violated during the disciplinary proceedings.¹⁹

4.1.1. Facts

On 13 August 1971, the Dutch Association of Conscript Soldiers (Vereniging van Dienstplichtige Militairen) held a demonstration in the town of Ermelo with the participation of persons then serving in the armed forces. After the commander of the local barracks became aware of this, he ordered his subordinates present at the event to return to the barracks immediately. He also promised that no disciplinary sanctions would ensue if the order was carried out. Although the persons concerned complied with the call, some of them were shortly afterwards transferred to other service locations, allegedly because they had taken part in the demonstration.

Objecting to this, the applicants, who were conscripts and also editors of the journal „Alarm”, distributed by the association in the barracks,

¹⁸ Engel (fn. 14.).

¹⁹ They also claimed, like the other applicants, that their rights to liberty and security and to a fair trial had been violated and that they had been discriminated against by the authorities because of their military status; as a result, the court – having regard to the factual context – considered their applications within a single procedure. However, these aspects of the decision are not relevant to our topic, so I will not discuss them.

contributed to the publication of an opinion piece entitled „The law of the strongest”, which contained the following statements.

There happens to be a General Smits who writes to his „inferiors”, „I will do everything to keep you from violating the LAW”! But this very General is responsible for the transfers of Daalhuisen and Duppen. Yet, as you know, measures are never allowed to be in the nature of a disguised punishment. How devoted to the law the General is - as long as it suits him; [...] in addition to ordinary punishments, the army bosses have at their disposal a complete series of other measures - of which transfer is only one - to suppress the soldiers. That does not come to an end by questions in Parliament - that makes them at most more careful. That only comes to an end when these people, who can only prove their authority by punishment and intimidation, have to look for a normal job.

The barracks commander considered these statements to be incompatible with the requirement of discipline, so he temporarily suspended the distribution of the journal and took measures to investigate the incident. As a result of the procedure Johannes C. Dona was sentenced to committal to a disciplinary unit for a period of three months and Willem A. C. Schul to committal to a disciplinary unit for a period of four months for undermining military discipline under Article 147 of the then applicable Dutch Military Penal Code.²⁰ For both applicants, the fact that they had been previously convicted for similar offences was considered an aggravating circumstance. Acting on the basis of the appeal submitted by the parties concerned, the Supreme Military Court upheld and confirmed the decision of the commanding officer in substance, but reduced Willem A. C. Schul’s sentence to three months.

²⁰ According to the relevant provision of the law „any person who, by means of a signal, sign, facial expression, speech, song, writing or picture, endeavours to undermine discipline in the armed forces or who, knowing the tenor of the writing or the picture, disseminates or exhibits it, posts it up or holds stocks of it for dissemination, shall be liable to a term of imprisonment not exceeding three years.” The committal to the disciplinary unit was served under strict conditions; for a month at least, they were not entitled to leave the establishment.

4.1.2. The decision

The Strasbourg Court pointed out that in general the European Convention on Human Rights applies to members of the armed forces in the same way as to any other person subject to the jurisdiction of the Contracting States, but that its application must take into account the specific circumstances of their situation (para. 54.). In the case at hand, the Chamber first established that the penalties imposed constituted an interference with the exercise of the right to freedom of expression and then examined whether the restrictions in question were a measure directed at a legitimate aim or were necessary for the functioning of a democratic society (para. 96.).

The Dutch government argued that the procedures and penalties challenged were aimed at preventing disorder within the army, meaning that they served an interest which, as the Convention states, justifies the restriction of the freedom concerned (para 97.). The Grand Chamber had established the principle that the protection of public order also extends to the maintenance of the regulated relations prevailing within the particular groups of society, since their disruption may affect the community as a whole. This is particularly true for bodies performing State functions, including the armed forces, and therefore the prevention of disorder within the armed forces qualifies as a legitimate aim for the purposes of the Convention (para. 98.).

The court also pointed out that freedom of expression is as much a right for soldiers as for anyone else, but that the proper functioning of the army can hardly be imagined without rules aimed at preventing discipline from being undermined, for example by written works (para. 100.). The statement of reasons to the judgment states that, when reviewing measures restricting the right of expression of soldiers, in addition to the specific conditions of the life and service of the armed forces and the special obligations and responsibilities of members of the armed forces, it cannot be ignored that the Contracting States have some leeway in assessing the necessity and extent of the restrictions (para. 100.)

In addition, the Grand Chamber also took into consideration that the distribution of the writing had begun at a time when there was already a tense atmosphere in the barracks, hence the actions of Johannes C. Dona and Willem A. C. Schul posed an increased threat to the order within the

army. In these circumstances, the Dutch authorities were justified in concluding that the applicants' actions were aimed at undermining military discipline, and that the initiation of the challenged proceedings and the imposition of the penalties were therefore justified and necessary measures, given the abusive exercise of the right to freedom of expression (para. 101.). In the light of this, the Grand Chamber found that there had been no violation of Article 10 of the European Convention on Human Rights and rejected the relevant parts of the applications.

4.2. Case of Hadjianastassiou v Greece²¹

4.2.1. Facts

Captain Constantinos Hadjianastassiou, an aeronautical engineer in the Greek Air Force, was commissioned by the economic company Elfon to write a study summarising his technical views on the design and production of guided missiles, which he submitted to the client in 1983. As the study also contained classified military information, he was sentenced to 2 years 6 months imprisonment for misuse of classified information, as a result of the criminal liability investigation. However, the court of second instance found that the accused had only disclosed information of minor importance to unauthorised persons, and therefore reduced the term of imprisonment to 5 months, taking the lesser serious nature of the offence into account, and suspended the sentence for a probationary period. After the Court of Cassation rejected his appeal, the applicant asked the European Court of Human Rights to declare that his right to freedom of expression had been violated.

4.2.2. The decision

The Court pointed out that the Charter of Fundamental Rights also protects views expressed on professional matters, so the contested measure should be assessed as a restriction on the right to freedom of expression (para. 39.). According to the statement of reasons to the judgment, the disclosure of technical knowledge relating to the design and production of military equipment may harm or endanger the national security interests of the Contracting States, and therefore the prevention

²¹ Hadjianastassiou v Greece App no 12945/87 (ECtHR, 16 December 1992).

or sanctioning of the disclosure of such information constitutes a legitimate aim for the purposes of the Convention (para. 43–45.).

The Chamber underlined that, in assessing the admissibility of the restriction of this fundamental right, it should be taken into account that, in addition to the specific „duties” and „responsibilities” incumbent on the members of the armed forces, the applicant, as a military officer and as a person in charge of the Air Force’s experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties (para. 46.). In the light of the above, the Chamber considered that the decision taken by the Greek courts was based on societal expectations of the protection of national security interests, and was therefore in accordance with the provisions of the Convention.

4.3. Case of Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria²²

The application, lodged by a private association defending the interests of Austrian conscripts and Mr Berthold Gubi, a conscript who began his military service on 1 July 1987, alleged that the officials of the Schwarzenberg barracks in Salzburg and the Ministry of Defence had breached the provisions of the Charter by restricting their right to freedom of expression. Those aspects of the judgment have relevance to the present study – taking the special subject-matter into account – which concern the applicant, who was a member of the Austrian armed forces at the time of the contested measures.²³

²² Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria App no 15153/89, (ECtHR, 19 December 1994).

²³ The association complained that the Minister of Defence did not allow the free distribution of their magazine entitled „der Igel” in the barracks, together with the official military magazine, although other military magazines published by private associations were alternately allowed to do so. The justification for rejecting the application was that the publication had given space to articles which portrayed the institution of conscription in a negative light, thus undermining its prestige, and to articles expressing the views of certain political parties in this regard. However, the distribution of the magazine to subscribers was not prevented in military establishments.

4.3.1. Facts

Berthold Gubi, a member of the local Communist Party, on the occasion of his taking the oath, made a protest directed against the President of the Republic of Austria, and then wrote an open letter to his comrades objecting to the fulfilment of certain service obligations, and was involved in the launch of a petition calling for conscientious objection to military service (para. 9.). As a result, his superiors warned him on several occasions to refrain from engaging in insubordinate behaviour. On 29 December 1987, however, the applicant was also involved in the distribution – within the barracks – of the then current issue of the magazine „der Igel”, which contained several critical articles.

The authors of these, including Berthold Gubi, criticised military training, the proceedings resulting from complaints lodged and the principles governing national service, and discussed criticisms of the army that had appeared in the press and at the congress of the trade union youth movement (para. 10.). The distribution and display of the publications would have required the approval of the barracks commander under the relevant legal provisions and, in the absence of such approval, his superiors issued a further warning to the applicant. Berthold Gubi lodged a complaint about this, which was rejected by the Council of the Ministry of Defence as unfounded. He then appealed to the Austrian Constitutional Court, but the court declined to entertain his appeal on the ground that it did not raise genuine constitutional issues and had insufficient prospects of success.

4.3.2. The decision

The Court found that there was a restriction on the exercise of the fundamental right and that the contested measure was aimed at preserving order within the armed forces. It then examined whether the interference met an overriding social need and was proportionate to the legitimate aim pursued. Reiterating its previous position, it explained that legal provisions restricting freedom of expression or imposing legal constraints in order to prevent expressions that threaten the proper functioning of the armed forces are necessary measures for the functioning of a democratic society. It also pointed out, however, that freedom of expression is also applicable to „information” or „ideas” that offend, shock or disturb the State or any

section of the population (para 36.). Consequently, soldiers cannot be excluded from making criticisms or critical remarks, as they are also entitled to the right of freedom of expression.

As the next step, the Court sought to answer the question of whether Berthold Gubi's opinion pieces, as well as other articles published in the magazine he distributed, posed a real threat to the discipline of the army and, consequently, to the performance of its duties. In the view of the Court, the writings, despite their often polemical tone, while containing a number of complaints about the functioning of the military, putting forward proposals for reforms or encouraging the readers to institute legal complaints or appeals proceedings, did not incite *insubordination* or *violence*, or even question the usefulness of the army. The expression of such ideas must be tolerated in the army of a democratic State, just as it must be in the society that such an army serves, and therefore these expressions did not overstep the bounds of what is permissible in the context of a mere discussion of ideas (para. 38.).

Although the magazine had caused tension among the soldiers serving in the Schwarzenberg barracks, the Chamber's view was that there was no real risk of this spreading to the army as a whole (para. 39.). On this basis, the Court concluded that the contested measure was not proportionate to the aim pursued and that the restriction on the exercise of the right to freedom of expression therefore violated the relevant provision of the Convention.

4.4. Case of Grigoriades v Greece²⁴

4.4.1. Facts

Panayiotis Grigoriades, a conscripted probationary reserve officer cadet holding the rank of second lieutenant in the Greek Armed Forces, did not wish to renew his service two years after his recruitment, and gave the following reasons for his decision in a letter of 10 May 1989 to his commanding officer.

²⁴ Grigoriades v Greece App no 24348/94 (ECtHR, 25 November 1997).

PERSONAL STATEMENT

After two whole years of military service as reserve officer cadet, I am obliged to inform you that I object to the prolongation of my military service following a penalty imposed on me for defending soldiers' rights. Judging from my experience to this date, I think that it was imposed as part of a general approach intended to suppress both freedom of personality and the vindication of constitutional rights and personal freedom. Apart from the personal cost, I generally consider that imposing a penalty on young soldiers is inadmissible and unconstitutional, all the more so when such penalty is related to the struggle of young people for respect for the ideological – social human rights of people and [their struggle] to defend their personality against the humiliations of the military apparatus. Having maintained for twenty-four months a fighting stance and a conscious position on that subject, I reserve the right, which is also a duty, to establish social justice and peace, now more than ever and, being fully aware of my actions which are imperatively dictated to me in the interests of society, hereby to DENOUNCE: That the army is an apparatus opposed to man and society and, by its nature, contrary to peace. I am now absolutely certain that the process of military service is responsible for crimes and aggressiveness in society since it has created a psychology of violence, overcoming in this manner all moral and psychological resistance to violence. The army remains a criminal and terrorist apparatus which, by creating an atmosphere of intimidation and reducing to tatters the spiritual welfare of the radical youth, clearly aims at transforming people to mere parts of an apparatus of domination which ruins human nature and transforms human relations from relations of friendship and love to relations of dependence, through a hierarchy of fear guided by an illiberal and oppressing set of Standing Orders (No. 20-1), records of political beliefs, etc. The truth is that the living conditions in the army are unacceptable to the point of being destructive and any healthy form of resistance and any effort towards dialogue are persecuted and brought defenceless before the military justice, a dangerous institution that should be abolished. All this happens despite the electoral announcements of the Ministry of National Defence concerning respect for the personality of the soldiers; in reality, the Ministry participates in and encourages such oppressive processes. By this means of protest, I and all young people who feel a deep sense of injustice because their life has been reduced to tatters, FIGHT: To stop all forms of persecution of those who have participated in processes that promote social justice, peace and the right to have an opinion on issues that concern our lives; for the Ministry to have the political will to control in a meaningful manner the military power and to prosecute those who are really responsible for this

authoritarianism, instead of systematically covering for them; for the State to establish once and for all respect for the initiatives and social choices of young people, by eliminating all penalties for the promotion of such ideals. It should not content itself with „socialist vocabulary” and then follow the practice of extermination; to declare that the elimination of these authoritarian institutions is a matter of a multi-faceted and long struggle at a personal, political and social level; to put an end to discrimination, favouritism and dependency, all of these being methods used by corrupt organs. Thus, having gone through this experience, I have developed a free conscience which prevents me from taking part in and being an accomplice to this criminal process, both in its operation and in its structure, and refuse from now on to wear my uniform in these conditions. If I were to wear it, I feel that I would find myself in a crisis of conscience, contrary to my nature and beliefs as a man brought up with liberal ideas. We, the young generation, will resist any attempt to be burdened with weaknesses and become vehicles of the military establishment. This is why my stance cannot be lawfully considered to be desertion or insubordination, since it stems from fundamental human rights and is in conformity with the provisions of the Greek Constitution. I consider that I remain a citizen and a free man who sought to remain true to his conscience and the free will flowing from it. I also consider that my stance and the voicing of my protest against this humiliation are the most genuine expression of solidarity with and support for conscientious objectors because I firmly believe that this is how the struggle for social liberation and peace is carried on.

One fellow reserve officer cadet reported that the applicant gave him a copy of the letter, but there was no evidence that additional copies were made.

The Ioannina Permanent Army Tribunal sentenced Panayiotis Grigoriades to three months' imprisonment, for the crime of insult to the army, under Article 74 of the then Greek Military Criminal Code.²⁵ The courts of second and third instance upheld the decision on the grounds that its reasons were correct, and the person concerned appealed to the European

²⁵ According to the relevant legal provision, a member of the armed forces who insults the flag, the armed forces or an emblem of their command shall be punished by a term of imprisonment of maximum six months. If he is an officer, he shall also be stripped of his rank.

Court of Human Rights, claiming that his right to freedom of expression had been infringed.

4.4.2. The decision

In its judgment, the Chamber noted that the Greek authorities had restricted the applicant's exercise of his right to freedom of expression, but that the penalty imposed was intended to protect the essential interests of national security and to maintain public safety (para. 41.) For that reason, the Chamber had to rule only on the question of whether the interference could be considered necessary and proportionate to the enforcement of those claims, which were recognised by the Convention as legitimate grounds for the restriction.

Freedom of expression applies to servicemen, just as it does to other persons; however, its exercise may be subject to restrictions – without affecting the substance of the fundamental right – in order to ensure fulfilment of the tasks of the armed forces. Nevertheless, in the Court's view, statements criticising the army as an institution in general, as opposed to expressions aimed at undermining the discipline that ensures its effective functioning, do not provide sufficient grounds for the application of restrictive measures (para. 45.)

Based on the analysis of the letter, the Grand Chamber pointed out that it undoubtedly contained strong and intemperate remarks about the Greek army; however, these remarks were made in the context of a general and lengthy discourse that was critical of army life and the army as an institution. It also found that the letter *was not published* by the applicant or *disseminated to a wider audience* – it did not contain any insults directed against either the recipient of the letter or any other person (para. 46–47.). In the light of the above, the Chamber considered that the expression had an insignificant impact on military discipline and therefore the contested measure was not necessary in a democratic society (para. 48.).

4.5. Case of *Rekvényi v Hungary*²⁶

4.5.1. Facts

According to the provision of the Constitution of the Republic of Hungary in force from 1 January 1994, „career members of the armed forces, the police and the civil national security services shall not join any political party and shall not engage in any political activity.”²⁷ According to the explanatory memorandum, this amendment was intended to ensure that the armed forces and law enforcement bodies operate in a non-political manner. The president of the Independent Police Trade Union, László Rekvényi, a member of the Hungarian police, complained about this and filed a motion calling for an ex post review of the unconstitutionality of the legislation – restricting the political rights of professional members of the armed forces, border guards, police and civil national security services – and of its infringement of an international treaty and for its annulment, but the Constitutional Court rejected the motion without examining the merits, citing its lack of jurisdiction. On 20 April 1994, the police officer appealed to the European Court of Human Rights, seeking a declaration that, through this amendment, the Hungarian state had violated his right to freedom of expression and freedom of association and the principle of non-discrimination as enshrined in the Convention.

4.5.2. The decision

First of all, the Grand Chamber stated that political activity is a form of expression, and therefore Article 10 of the European Convention on Human Rights covers this type of expression as well. Since this civil liberty is also enjoyed by professional members of the law enforcement bodies – just as soldiers and civil servants – the Court held that the contested constitutional provision restricted the applicant’s right to freedom of expression (para. 26.).

The court, based on the three criteria of its case law mentioned in the introduction, first examined whether the restriction was sufficiently

²⁶ Rekvényi (fn. 6.) 423–470.

²⁷ See Act CVII of 1993 on the Amendment of the Constitution, Section 3.

precise and whether it was laid down in a way that gave the persons concerned the opportunity to know in advance the rules that applied to them. In the context of this criterion, the Court pointed out that foreseeability is not an absolute requirement, as legislation cannot be expected to regulate all aspects of life. Moreover, it cannot be ignored that the level of precision required of the rules depends to a considerable degree on the field it is designed to cover and the number and status of those to whom it is addressed. This is also the reason for the judgment's finding that the level of precision required of constitutional provisions may, by their general nature, be lower than that required of other laws para. 34.). With regard to the legislation in question, the Chamber pointed out that the term „political activities”, by their very nature, cannot be defined in absolute terms.

On the basis of the above, the Grand Chamber found that the constitutional provision restricting the political rights of soldiers was sufficiently clear and unambiguous, having regard to the nature of the activities that could lawfully be carried out in this context, as defined by the lower level legislation in force at the time of the decision,²⁸ for the applicant to foresee the possible consequences of his conduct (para. 36–38.). In the reasoning of its judgment, the Court also recalled that it is primarily for the national authorities to interpret and apply domestic law, and thus it is for the Hungarian courts to interpret the content of the provision at issue in the absence of further detailed rules. As to the aim of the restriction, the court explained that the obligation imposed on certain categories of public officials, including police officers, to refrain from political activities is intended to depoliticise the services concerned and thereby to contribute to the maintenance of pluralistic democracy in the country. Since the police, in the course of their activities in the interests of public safety and the protection of internal order, also exercise acts of public authority which restrict the personal freedom of citizens, it is

²⁸ See Act XXXIV of 1989 on the Election of Members of Parliament, Section 2 (1) and (3), Section 5 (1), Section 10 (1) and (3); Act LV of 1990 on the Legal Status of Members of Parliament, Section 1 (1) and (4), Section 8 (1), Section 23 (1), Section 25 (1); Act XXXIV of 1994 on the Police, Section 2 (3), Section 7 (9) and (10); Decree No. 1/1990 (I.10.) of the Minister of the Interior on the Service Regulations of the Police of the Republic of Hungary, Sections 430, 432–435, 437–438, 470, 472–474 and 477; Decree No. 3/1995 (III.1.) of the Minister of the Interior on the Service Regulations of the Police, Section 106 (5)–(6) and (9)–(10).

particularly important to ensure that their actions are free from influence. The Court pointed out that, on the basis of these considerations, many states outside Hungary also restrict the political rights of police officers.

In the light of this, the Grand Chamber considered that the consolidation and maintenance of political neutrality could be a legitimate aim in any democratic state. In its statement of reasons, the Court also pointed out that this objective takes on a special historical significance in countries whose former totalitarian regimes relied heavily on the direct commitment of their police to the state party (para. 41.). In the opinion of the Court, the constitutional provision at issue – without affecting the substance of the political freedom of police officers – exclusively prohibited expressions that threatened the independent and impartial functioning of the police force. Consequently, police officers were able to continue to exercise their political rights, including the right to vote, which is the primary means of expressing their views on public affairs, in a manner provided for by lower legislation, and therefore the measure was proportionate to the legitimate aim pursued (para. 49).

Since the restriction on the applicant's rights to freedom of expression and freedom of association, partly arising from the special status of police officers, was justified under the Convention, the discriminatory character of the provision at issue could also be ruled out (para. 61–62). The Court therefore ruled that the restriction, which did not entail a total deprivation of freedom of expression or freedom of association and was applied in pursuit of the legitimate aim, did not infringe any of the freedoms guaranteed by the Convention.

4.6. Case of Szima v Hungary²⁹

4.6.1. Facts

In 2007 and 2009, Judit Szima, a police lieutenant colonel in the Hungarian police force, published several articles on the website of the Tettrekész Hungarian Police Trade Union (www.tmrsz.hu), which also included the following statements.

²⁹ Szima v Hungary App no 29723/11 (ECtHR, 9 October 2012).

The staff are regularly required to work overtime without remuneration...

For years, clearly due allowances have not been paid to low-ranking staff...

Currently it is almost a prerequisite of becoming a senior police officer to have a political background or to be a relative or a descendant of other senior police officers.

Why are we wondering at the infringements of police officers if law-breaking and tyrannising senior police officers go unpunished? Police staff are becoming increasingly underprivileged and humiliated by their own leaders.

The senior police officers again demonstrated that they were incapable of upholding the public order in a party-neutral and politically neutral way... It is proven again that the Hungarian Police's primary objective is first and foremost not to maintain public order for the taxpaying citizens but to uphold the reign of current political leaders who have led Hungary into economic and moral distress.

The reputation of the Police has reached previously unseen depths because of the acts of the unprofessional and anti-national senior police officers not complying with the spirit of the police oath.

The Head of the National Police Department is demonstrating every day that he is much more able to write obscene poems than to lead the Police; moreover, he is considerably better at being an obstacle to the work of the 'Tettekés' Police Trade Union and in managing a police pop band than in cooperating with a representative trade union of the Police with the highest number of police officer members.³⁰

By uploading the documents containing the above quotes to the Internet, Judit Szima's statements became available to the general public and were read by a number of police officers, including those who can be identified by name. On 29 April 2010, the Military Bench of the Budapest Regional Court sentenced the police officer to a fine equalling to 400 euros and demotion for the offence of repeatedly committing the crime of incitement, and ordered her to pay the criminal costs incurred during the investigation.³¹

³⁰ The expressions examined by the Hungarian court are not fully covered by the judgment.

³¹ According to Section 357 (1) of the Hungarian Criminal Code in force at the time (Act IV of 1978), incitement is defined as follows: any person – qualifying as a soldier in the sense of substantive criminal law – who incites discontent among soldiers towards a

In the second instance proceedings, the Military Bench of the Budapest Court of Appeal, changing the judgment, classified the act as a misdemeanour of two counts of repeated incitement, but upheld the first instance judgment in other respects. The motion for a review filed by the accused and her lawyer was unsuccessful, so on 28 April 2011 they filed an application with the European Court of Human Rights, claiming that the right to freedom of expression had been violated. They also complained that the Hungarian authorities did not allow Judit Szima to prove the veracity of her statements, which, in their view, violated the right to a fair trial as enshrined by the Convention.

4.6.2. The decision

The Court found that the contested measure constituted an interference with the applicant's right to freedom of expression, which could only be lawful if the restriction was aimed at the pursuit of any of the social interests listed in the Charter as possible grounds for restriction. The Court also recorded that the police officer was convicted under a statutory criminal provision for the offence of incitement, and the legitimate aim pursued by the conviction was to protect the order of service and discipline. Therefore, the decision can be considered as an action to prevent disorder or crime within the police force, hence it served a legitimate aim (para. 22–24.).

In the light of the above, the Court only examined the merits of the case as to whether the grounds put forward to justify the interference were relevant and sufficient, and whether the measure taken was proportionate to the legitimate aim pursued. The Chamber explained that police officers have the same right to freedom of expression as soldiers; however, the proper functioning of the law enforcement bodies is hardly imaginable without legal rules designed to prevent servicemen from undermining the requisite discipline (para. 25.).

In the context of the applicant's capacity as a trade union leader, the Chamber pointed out that organisations engaged in advocacy activities can only fulfil their function if they are free to express their proposals for

superior officer, a command, or command or with respect to the order of service or discipline, commits a misdemeanour and shall be punishable by imprisonment of up to one year.

improving the living and working conditions of workers. In order to ensure the free exercise of this right, the Contracting States must ensure that trade union officials are not discouraged from carrying out their representational activities by disproportionate penalties. The statement of reasons to the judgment states that the promotion or protection of employment-related interests is in the public interest and that it is therefore only possible to restrict expressions made for that purpose within a narrow range (para. 28.). However, even in this case, the relevant provisions of the Convention do not guarantee the unrestricted exercise of the right to freedom of expression. If the Contracting State provides sufficient justification for the restriction and the decision is in line with case law, strong arguments are needed to overrule the national authorities' decision in cases of prevention of disorder, in this case insubordination, which endangers the functioning of the police (para. 29.).

In the Court's view, the applicant's right to freedom of expression had to be balanced against her obligations in the context of a service relationship, taking these general principles into account. The Court noted that in some of the statements on which the proceedings were based, the applicant brought up labour issues, such as outstanding remunerations, which concerned servicemen including trade union members. However, the applicant also uttered, repeatedly, critical views about the manner in which police leaders managed the force, and accused them of disrespect for citizens and of serving political interests in general. For the Court, these latter views overstepped the mandate of a trade union leader, because they are not at all related to the protection of the labour-related interests of trade union members. Therefore, those statements, being made outside the legitimate scope of trade union-related activities, were considered from the general perspective of freedom of expression rather than from the particular aspect of trade union-related expressions. In this regard, the Court reiterated that the Contracting States are obliged to respect the right to freedom of expression – similarly to freedom of association –, subject to the possible imposition of lawful restrictions on the exercise by members of its armed forces, police or administration of the rights protected. However, the restrictions imposed are to be construed strictly; that is, these restrictions must not impair the very essence of the right (para. 31.).

In analysing the proportionality of the penalty imposed, the Court considered that the some of the statements were clearly related to trade union activities and their sanctioning therefore appears difficult to reconcile with the prerogatives of a trade union leader. Moreover, the Court also noted that the defamatory statements on the Head of the National Police Department were pure value judgments and enjoy as such a high level of protection under the relevant provision of the Convention. With regard to certain utterances not specifically mentioned in the judgment, the Chamber would have preferred if the criminal courts had ensured the opportunity for the applicant to provide evidence and thereby prove the veracity of her allegations. In the event that the applicant had been convicted solely on these grounds, the failure to allow the applicant to present evidence would in itself raise doubts as to the legality of the penalty imposed – according to the statement of reasons of the judgment.

However, the Court shared the views of the Hungarian government regarding the nature of the criticism expressed about the practice of senior police management. It accepted that those allegations – in particular the ones accusing senior police management of political bias and agendas, transgressions, unprofessionalism and nepotism – were, even if representing predominantly value-judgments, indeed capable of causing insubordination, since they might discredit the legitimacy of police actions, all the more so since the applicant did not provide any clear factual basis for those statements.

The Court found that the protection of loyalty and the trust in the constitutionality of police leaders' actions is not a matter of administrative convenience. The applicant, as a senior police officer (lieutenant colonel) and trade union leader, had considerable influence on trade union members and other servicemen, among other things by controlling the trade union's website. Therefore, she should have had to exercise her right to freedom of expression in accordance with the duties and responsibilities which that right carries with it in the specific circumstances of her status and in view of the special requirement of discipline in the police force – and this even in the face of the general interest attached to enabling criticism as to transparency, professionalism and law-abiding within the police force.

The Court noted that, by entering the police, the applicant should have been aware of the specific nature of her profession and of the restrictions

that apply to staff in the exercise of their right to freedom of expression. Moreover, the limitations on the applicant's right to freedom of expression did not require her to exercise her profession in violation of the fundamental convictions of her conscience (para. 32.). The maintenance of discipline by sanctioning accusatory opinions which undermine the trust in, and the credibility of, the police leadership represents a „pressing social need”, and the reasons adduced by the national authorities to justify it are relevant and sufficient, especially in view of the relatively mild sanction imposed on the applicant. The foregoing considerations were sufficient to enable the Court to conclude that there had been no violation of the applicant's right to freedom of expression – as guaranteed by the Convention – and to a fair trial.

The European Court of Human Rights, in considering the application, recognised that the *service obligations* and *living conditions* of police officers and soldiers *are very similar*, given their essentially identical legal status.³² For that reason, the decision made in the case extended the rights of the Contracting States to prevent expressions aimed at undermining discipline, order of service and authority within the service or their dissemination within the staff to the law enforcement bodies.

4.7. Case of Jokšas v Lithuania³³

4.7.1. Facts

On 1 March 2006 the Lithuanian daily *Kauno Diena* published an article entitled „War without constitutional rights”, in which the Alvydas Jokšas, a member of the Baltic State's army, criticised the new Army Disciplinary Statute, adopted by the Lithuanian Seimas almost unanimously a couple of months previously. In his opinion, expressed in public, the applicant argued that the new Disciplinary Statute restricted the servicemen's rights to defence when they were the subject of disciplinary proceedings, since they do not have the opportunity to acquaint themselves with the substance of any internal investigation report against them, and also claimed that, during disciplinary proceedings, servicemen had only a

³² The term *military life* will hereinafter also include the working conditions of members of law enforcement bodies, since these bodies are also based on discipline and the order of service and chain of command.

³³ Jokšas v Lithuania App no 25330/07 (ECtHR, 12 November 2013).

limited opportunity of having recourse to legal representation. For that reason, he stated that he did not consider the Statute to be binding on him and proposed that the President of the Republic should not sign it.

The Ministry of Defence considered that the expression could have been a threat to the order of service and the disciplinary situation of the armed forces, and took action to investigate the incident. However, as a result, they concluded that no breach of discipline had occurred and the procedure was terminated. On 13 March 2006, *Kauno Diena* published a new article, „Criticism of the Statute angers the Ministry”. In this article, Alvydas Jokšas criticised the Ministry of Defence for initiating an internal investigation, and also stated that he was disappointed with the Seimas for adopting the new Disciplinary Statute and with the State President for promulgating it. The soldier, who was later retired, argued that his contractual service had not been extended because of his previous statements and therefore initiated a review procedure. His appeal having been rejected by both the administrative courts of first and second instance, he asked the European Court of Human Rights to declare a violation of his right to freedom of expression.

4.7.2. The decision

In the present case, too, the Chamber referred to the fact that the right to freedom of expression applies to military personnel as it does to all other persons, but that its exercise may be restricted in the case of expressions that pose a real threat to the discipline required by the army to carry out its duties. Effective functioning presupposes legal norms that prevent acts that go against this. However, States Parties may not invoke these rules to prohibit all expression of opinion, so that, for example, statements against the armed forces as an institution cannot, in the opinion of the Court, constitute grounds for restrictions (para. 70.). The Chamber pointed out that the proceedings to investigate the action had been terminated for a lack of breach of discipline, and therefore the applicant could not rely on a violation of freedom of expression in this context. Having regard to that, the main issue in the present case was whether Alvydas Jokšas' military service was terminated solely as a result of the legal necessity to discharge him because of his age, or whether he was dismissed because of his statements (para. 71.). The Court explained that punishment for expressing an opinion qualifies as a restriction on freedom of expression

but, in the case at hand, there was no evidence that Alvydas Jokšas' expressions and the challenged measure were connected.

Following the publication of the critical opinions, no measures were taken to prevent the applicant's continued employment, nor did his superiors take any action to suggest that his statements had led to his service not being extended. It was also found that it is common practice in the Lithuanian armed forces to terminate service upon reaching retirement age (para. 72.). Although there were exceptions for certain specialised military personnel, such as code breakers, the applicant did not belong to this category (para. 73.). On this basis, the Court ruled that the applicant's right to freedom of expression had not been infringed.

4.8. Case of Soares v Portugal³⁴

4.8.1. Facts

In the autumn of 2009, a rumour spread in the Arganil territorial post in Portugal that the commander had misused part of the money received from the National Republican Guard to organise a Christmas dinner for the staff. Although only one person other than the commander of the post was present at the event, the manager of the restaurant hosting the event issued a receipt for the full amount of the budget.

It was rumoured that the commander, accompanied by his family, later returned to the restaurant, where the difference was deducted from the price of their meal. The rumours also reached the attention of António Alberto Mota Soares, chief corporal in the National Republican Guard, working at the Góis territorial post, who, on 7 November 2009, asked for an investigation into the incident. In his letter to the General Inspectorate of Internal Administration, he noted that his information came from his colleagues serving at the post concerned, who claimed that they had not reported the situation for fear of reprisals. For this reason, he himself requested that his report be treated confidentially, in view of his legal relationship with the military. His submission was forwarded to the General Command of the National Republican Guard and to the Lousã public prosecutor's office, but the proceedings were discontinued on the grounds that, following investigations by the criminal investigation police,

³⁴ Soares v Portugal App no 79972/12 (ECtHR, 21 June 2016).

no evidence of the misuse of public money was found. At the same time, a criminal and disciplinary inquiry into the applicant's unsubstantiated allegations were ordered, in order to investigate the responsibility of the whistleblower.

In the criminal proceedings, the applicant was convicted of aggravated defamation as per Article 180(1) of the Portuguese Penal Code and was sentenced to a fine of EUR 720. The applicant was also ordered to pay EUR 1,000 in damages to the commander.³⁵ The decision was upheld by the court of appeal, having regard to the correct grounds of the judgment.

During the disciplinary proceedings, deputy commander António Alberto Mota Soares was charged with having reported the information to the police, bypassing the chain of command, and was therefore suspended from his duties for 6 days, its enforcement being suspended for a period of twelve months. The applicant considered that the measures violated his right to freedom of expression and lodged an application to the European Court of Human Rights to have this established.

4.8.2. The decision

In general, the Court stated that freedom of expression is a right enjoyed by public sector employees, just like any other employees, but that in exercising it they must respect their specific obligations to their employer. Consequently, employees may disclose information about irregularities at work – with due regard to the duty of loyalty, reserve and discretion they owe to their employer – in the first place to their superior or other competent authority or body. And only if this action they have taken to remedy the problem has not been successful can they disclose the information to the public, as a last resort (para. 39–41.). Preventing and investigating misuse of public money by public officials is in the public interest: therefore, „whistle-blowing” actions warrant special protection

³⁵ Under the relevant legal provisions, anyone who, when addressing a third party, accuses a public official, or makes a judgment that casts a slur on the honour or reputation of the public official, even when reproducing the accusation or judgment, shall be liable on conviction to a maximum of nine months' imprisonment or a fine of up to 3240 euros. If the offender has not complied with their duty to verify the information they have disclosed, they will not be deemed to have acted in good faith.

under Article 10 of the Convention, provided that the information provided is factually accurate (para. 44. and 49.).

In the specific case, the Chamber found that the applicant had made allegations concerning the conduct of the Commander of the Arganil territorial post, which constituted a statement of fact, but had no evidence to support it. The Court also stated that, for a civil servant working for a law-enforcement authority, the accusation that he misused public money was a particularly serious one, capable of affecting his reputation and, to an even larger extent, that of the National Republican Guard (para. 46.). The Court found that the applicant was aware that his allegations were based on a rumour, and made no attempt to verify their authenticity before reporting them (para. 47.).

In the statement of reasons to the judgment, the Court observed that the applicant was aware that he had internal channels within the hierarchy of the National Republican Guard to which he could have reported the rumour – namely the commander of his territorial post or the commander of the territorial unit. By not doing so, the applicant denied his hierarchical superior the opportunity to investigate the veracity of the allegations (para. 48.).³⁶ With regard to the penalties imposed, the Chamber stated that they could not be considered disproportionate in the light of the gravity of the allegations made by the applicant and the harm caused, in particular as they could have been much more severe under the relevant legal provisions (para. 50.). Having regard to the above considerations, the Court found that the reasons advanced by the domestic courts in support of the measures restricting the applicant's right to freedom of expression in order to protect the reputation of others were „relevant and sufficient”

³⁶ The European Court of Human Rights adopted a consistent position in the case of *Guja v. Moldova* (Application no. 14277/04, Judgment of 12 February 2008), where it held that, in the context of the functioning of a public institution, information concerning a measure deemed objectionable may only be disclosed to the public if the employee has already communicated such concerns to their superior or another competent person or body, and such internal reporting has proven ineffective (para. 73.). For a detailed analysis, see Márton Leó ZACCARIA: Szabadság vagy felelősség? Munkavállalói véleménynyilvánítás emberi jogi nézőpontból. (Freedom or Responsibility? Employee Expression from a Human Rights Perspective) In: Lajos PÁL (ed.): A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban. (*Freedom of Expression and Its Limits in Employment Relationships. Proceedings of the Hungarian Labour Law Society's debate session held on 23 June 2021.*) (Budapest, HVG-ORAC, 2021) 156–159.

and that the interference could thus be reasonably considered „necessary in a democratic society” (para. 51.). Accordingly, there was no violation of the relevant provisions of the Convention.

5. Findings of principle in the decisions made in the different cases

As presented above, the balance between freedom of expression and the enforcement of the requirements that ensure the proper functioning of the armed forces and law enforcement organisations can only be struck on a case-by-case basis, taking into account the right of the personnel to self-expression, the social interest in the development and maintenance of a democratic public life and the specificities of military life. The decisions presented above show that, in addition to the relevant provisions of the Convention, the principles of law developed in the judicial practice are of particular importance in the assessment of the individual circumstances of cases. The guidelines set out by the Court on the possibility of restricting the right to freedom of expression of individuals serving in the armed forces, and thus also serving as a benchmark for national authorities, can be summarised as follows.

- The European Convention on Human Rights applies to these special subjects in the same way as to any other person subject to the jurisdiction of the Contracting States, but its application must also take account of the special obligations and responsibilities which they bear.³⁷
- The restriction of freedom of expression in order to preserve and maintain order and political neutrality in the military and in the public bodies responsible for law enforcement is a legitimate aim for the purposes of the Charter.³⁸
- Members of the military, police, gendarmerie, border guards, coastguard, finance police and prison services also have the right to express their opinions, but their exercise may be subject to restrictions and sanctions in order to prevent expressions which pose a real threat to the effective functioning of these organisations,

³⁷ Engel (fn. 14.) 54. and 100., furthermore Hadjianastassiou (fn. 21.) 46.

³⁸ Engel (fn. 14.) 98. and Rekvényi (fn. 6.) 41.

in particular those aimed at undermining discipline, order of service and authority.³⁹

- The expression of criticisms or critical remarks shall be tolerated in the army of a democratic State, just as it must be in the society that such an army serves.⁴⁰
- Statements criticising the armed forces and law enforcement bodies in general cannot in themselves be sufficient grounds for restrictive measures.⁴¹
- Members of these organisations may disclose information about any irregularities in the functioning of these organisations – with due regard to the duty of loyalty, reserve and discretion they owe to their employer – in the first place to their superiors; and only if this action they have taken to remedy the problem has not been successful can they disclose the information to the public, as a last resort.⁴²
- Those who may influence their comrades by virtue of their rank, position or elected office must, in the exercise of their right to freedom of expression, pay particular attention to the requirement of maintaining discipline, even in the face of the general societal interest attached to enabling criticism made in the interest of transparency, professionalism and law-abiding.⁴³
- Senior staff and staff holding a higher rank have increased responsibility for the protection of classified information.⁴⁴

6. Evaluation of judicial practice

The European Court of Human Rights has already recognised in its first cases raising the legal question examined in this paper that the right to freedom of expression of members of the armed forces and law enforcement bodies may conflict with certain social interests that are among the possible grounds for restricting the freedom of expression. Accordingly, when resolving this conflict in the specific cases, the Court

³⁹ Ibid. 100., Vereinigung demokratischer Soldaten Österreichs (fn. 22.) 36., Grigoriades (fn. 24.) 45., Rekvényi (fn. 6.) 26., Szima (fn. 29.) 25. and Jokšas (fn. 33.) 70.

⁴⁰ Vereinigung demokratischer Soldaten Österreichs (fn. 22.) 38.

⁴¹ Grigoriades (fn. 24.) 45. and Jokšas (fn. 33.) 70.

⁴² Grigoriades (fn. 24.) 46–47. and Soares (fn. 34.) 39–41. and 48.

⁴³ Szima (fn. 28.) 32.

⁴⁴ Hadjianastassiou (fn. 21.) 46.

must take a position on which it prefers, weighing up the individual circumstances: freedom of expression or the community's need for armed organisations to operate effectively and free from political interference.

In the course of the assessment of the applications, the Court assessed more and more aspects, which led to a more nuanced and differentiated approach to the issue. In general, however, it can be said that restrictions on freedom of expression are only allowed in the case of expressions that actually endanger the performance of the duties of the army, police, gendarmerie, border guards, coastguard, finance police and prison services. However, the test used to assess the threat to the civil liberty examined in this paper and, therefore, the need for restrictions is far from uniform. In *Engel and others v the Netherlands*, which could be seen as the starting point, the Chamber considered the existence of an abstract danger sufficient for allowing restriction but, in its assessment of Berthold Gubi's action, it considered the restriction of the fundamental right justified only in the case of statements inciting insubordination or violence.

The proceedings initiated on the basis of Judit Szima's application, however, point again in the direction that interference with freedom of expression may be lawful, even in the case of the expression of ideas that indirectly – and adversely – affect the proper functioning of the armed forces and law enforcement bodies. Given this uncertainty in judicial practice, it seems appropriate to examine whether all the relevant circumstances have been taken into account in the proceedings concerning the restriction of the right to freedom of expression of persons serving in the armed forces, and to analyse the errors in the individual decisions.

6.1. The emotional basis of military life and its protection

We constantly evaluate the events around us and, as a result – depending on our innate qualities, upbringing, knowledge and current state of mind – we attach meaning to some events, while others pass away in our minds without having any effect on us. The former events typically evoke emotions – love, joy, happiness, calm, courage, hate, sorrow, sadness, anger, fear, etc. – but they can also inspire action if they are intense

enough.⁴⁵ Although we can relate to our experiences in a variety of ways, as can be seen from the above list, there are two basic ways of looking at a phenomenon: positive or negative.

These circumstances are also of legal significance, because our actions and therefore our behaviour are determined not only by our physiological and psychological needs, but also by our impressions and our attitudes towards objects, persons, groups, institutions and ideas.⁴⁶ The influence of emotions and perceptions on human actions is particularly evident in special situations similar to military life, and therefore we cannot ignore their evaluation in our analysis. As mentioned above, members of the army, police, gendarmerie, border guards, coastguard, finance police and prison services have a particular burden, which goes beyond the basic obligations of employees, because they need to perform their duties

- by subordinating themselves to the interests of the State and society,
- within strict disciplinary rules and a chain of command,
- with courage to the point of self-sacrifice,
- by accepting restrictions on certain fundamental rights, including the right to freedom of expression,
- free from influence,
- in uniform or armed with a weapon or other means of coercion.

Those choosing a career in the military or law enforcement must be ready to meet these expectations. However, this is usually only possible for those who do not harbour anti-militarist sentiments, so the establishment and – given its voluntary nature – maintenance of a professional service relationship presupposes a positive or at least neutral attitude towards the armed forces.⁴⁷ This attitude forms the emotional basis of the legally regulated order of military life, which ensures the fulfilment of job duties

⁴⁵ Cf. Susan NOLEN-HOEKSEMA et al.: *Atkinson & Hilgard's Introduction to Psychology* (15th Edition, UK Andover, Wadsworth - Cengage Learning, 2009) 396–398.

⁴⁶ Ibid. 662–667.

⁴⁷ In the absence of such an attitude, the proper commitment cannot be created – not even by a consensual, conditional engagement based on possible advantages compared to other employment relationships (e.g. higher levels of social security and health care, housing allowances, etc.). Cf. János CSIRSZKA: *A személyiség munkatevékenységének pszichológiája. (The Psychology of Work Activity of the Personality)* (Budapest, Akadémia Kiadó, 1985) 301. This is also true for conscripts, taking into account the possibility of civil service.

and, in turn, the proper functioning of the armed forces and law enforcement organisations.

In the course of their service, staff members are constantly exposed to impressions; some of these impressions are positive and strengthen employee commitment, while others are negative and weaken it, and may even eliminate it beyond a certain point.⁴⁸ Negative psychological events can also have a negative impact on work: they can reduce the quality of performance and, in extreme cases, lead to defiance of those exercising management and control and the instructions they give; in other words, to insubordination. These phenomena can have extremely serious consequences for soldiers and law enforcement personnel, as they can result in the violation of the interests of society in the preservation of the sovereignty, territorial integrity and borders of the State, the protection of national security interests and the maintenance of public safety and public order.

Consequently, attempts to arouse negative feelings or other activities likely to arouse such feelings towards discipline, the order of service and the chain of command, which are the cornerstones of military life, are particularly dangerous for the performance of the tasks assigned to armed forces and should therefore be prevented, even – as a last resort – by means of criminal law measures.⁴⁹ In the light of the above, the most controversial finding of the European Court of Human Rights is that statements critical of the armed forces and law enforcement bodies in general, and specifically of the army as an institution, cannot provide a sufficient basis for restricting the personnel's right to freedom of expression.

Unfortunately, it is not clear from the relevant decisions made in the proceedings brought by Panayiotis Grigoriades and Alvydas Jokšas how the acting Chambers reached this conclusion. However, the reference to paragraph 36 of the judgment in *Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria* suggests that it was based on the general rules that define the scope of freedom of expression, which rules

⁴⁸ Examples of the positive impressions include a sense of achievement due to effective action, promotion, financial or moral recognition, whereas negative impressions include physical and psychological injuries sustained in the course of performing the service, and possible shortcomings in equipment or care.

⁴⁹ SCHULTHEISZ (fn. 16.) 74.

guarantee the possibility for everyone to make critical comments. If this is the case, it can be stated that the Court did not examine the possible consequences of the expressions directed against the armed forces in the context of the problem raised. Since such intentional conduct is also capable of adversely affecting attitudes towards the armed forces and law enforcement bodies and, as a result, of jeopardising their effective functioning, the position of the European Court of Human Rights in this regard requires being reviewed.

6.2. The possibility to make criticisms or critical remarks

The interest in protecting the emotional basis of the military legal order seems to exclude any expression that could negatively affect the armed organisations and their functioning. However, in the case of objective and constructive statements communicated to the superior or supervisor concerning actions and omissions related to the service, working conditions, terms and conditions of employment or the draft decisions of the employer, there is no risk of jeopardising the performance of the duties of the armed forces and law enforcement bodies.⁵⁰ In this respect, the finding of the European Court of Human Rights in *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria* that soldiers cannot be excluded from making critical remarks is correct, but it should be added that such statements must be directed at identifying or resolving specific problems, thereby ensuring trouble-free service, and may only be communicated to the person or persons competent to resolve the situation in question.⁵¹

6.3. Proving the veracity of statements

Expressions by soldiers and persons performing law enforcement duties, regardless of their factual basis, may result in an immediate breach of discipline and of the order of service and chain of command. However, the prevention of harmful consequences and thus the proper functioning of the armed forces cannot be made dependent on the uncertain outcome

⁵⁰ Cf. Grigoriades (fn. 24.) 48. and Soares (fn. 34.) 48.

⁵¹ It is easy to see that the one-sided and difficult to verify criticisms addressed to employees who are unable to remedy perceived or real shortcomings or deficiencies, such as those in *Szima v. Hungary*, are only capable of stirring up anger.

of often protracted legal proceedings, and therefore there is generally no room for proving the veracity of service-related allegations by members of the army, police, gendarmerie, border guards, coastguard, finance police and prison services.⁵² On the other hand, the European Court of Human Rights, in the proceedings based on Judit Szima's application, held that the applicant should have been given the opportunity to prove the veracity of certain allegations – which were not specified in the judgment. The reason for this position is also that the Court did not take into account the social interest in the effective functioning of the armed forces and law enforcement bodies, hence the position of the Court must be corrected in this respect as well.

6.4. Discontent or insubordination?

The most striking error in the judgment in Judit Szima's case was a factual error, as the Strasbourg court – like the applicant – misinterpreted the legal definition of the crime of incitement. According to Hungarian law, this offence can be established if a person who is a soldier in the sense of criminal law incites *discontent* (in Hungarian: *elégedetlenség*) among their comrades towards their superior, the orders, the order of service or discipline. By contrast, the Court has repeatedly referred to *insubordination* (*engedetlenség*), which is subject to a different legal assessment. Incitement is intended to provide protection against acts that are limited to *indirectly* endangering the protected legal object, but are also capable of undermining the factors that ensure the proper functioning of armed organisations, as a result of which – based on the discontent generated – more serious breaches of the chain of command can more easily occur. Anyone who incites insubordination among members of the armed forces will be considered, where appropriate, the instigator of one of the most serious military crimes, mutiny.⁵³

⁵² Section 69 of Act II of 1930 on the Military Criminal Code permitted the presentation of evidence of truth in cases involving conduct that manifested a lack of due respect towards a superior or commanding officer, and which – absent the specific status of the parties – would otherwise have constituted defamation or insult under general criminal law. However, the legislator established several exceptions to this provision, notably that the presentation of evidence of truth was inadmissible where the statement or conduct forming the basis of the proceedings endangered military service interests.

⁵³ According to Section 442 (1) of the currently effective Hungarian Criminal Code, the offence of mutiny is committed by a person who is a soldier in the sense of criminal law

This may lead to the question whether the Court considers it legitimate to restrict the right to freedom of expression only in the case of expressions that directly threaten discipline or the order of service and chain of command, or whether the less serious offence of incitement may also justify it. The decision was taken in the light of the impact of the expressions in question on the protected legal object, so it seems certain that *the European Court of Human Rights sees the possibility of restricting freedom of expression, even in cases of incitement to discontent*.

6.5. Expressions concerning the leaders of the armed forces

Members of the army, police, gendarmerie, border guards, coastguard, finance police and prison services perform their duties in strict accordance with the chain of command, which is based on the execution of the orders issued by the superiors. However, only those who accept and respect their superior can submit to the will of the person giving the orders, and therefore the preservation of authority in military law is of particular importance. Consequently, not even the generally accepted legal principle that the scope of expression of opinion related to the custodians of public authority, including the leaders of the armed forces and law enforcement bodies, is wider than that of other persons, can legitimise the conduct of subordinates intended to undermine authority.

However, in the judgment in *Szima v. Hungary*, the European Court of Human Rights found the opposite position, as the defamatory statements about the Head of the National Police Department were considered permissible by the European Court of Human Rights, on the grounds that they constituted value judgments and therefore enjoyed a high level of protection.⁵⁴ On the basis of the facts of the case, however, it can be concluded that the statements were aimed at arousing negative feelings towards the superior, which, according to the substance of the decision, could be a basis for restricting the expression of opinion as a conduct constituting the crime of incitement. In its decision, the Court also stated

and who partakes in an open insubordination acting with others directed against authority and discipline, thus causing considerable disturbance in the performance of service duties, and therefore he or she is guilty of a felony punishable by imprisonment for between two and eight years. It is worth noting that even the preparation of mutiny entails a more serious legal sanction than the basic (default) form of incitement.

⁵⁴ *Szima* (fn. 29.) 32.

that the excessive opinions without factual basis exceed the limits of freedom of expression; nevertheless, with regard to the statements negatively portraying the Head of the National Police Department, it did not attach any importance to the fact that Judit Szima had not substantiated her claims. In the light of the above, there are strong doubts as to the proper substantiation of the relevant part of the decision.

7. Summary

Article 10(1) of the European Convention on Human Rights states that everyone has the right to freedom of expression. This means, on the subjective side, that anyone can freely express their opinion, position, criticism, feelings, ideas and the data they know, while on the objective side, it imposes an obligation on the state to provide the conditions for the development and functioning of democratic public opinion as a fundamental political institution. The right to freedom of expression is therefore both a fundamental right afforded to the individual and a fundamental political right essential for the functioning of democratic states, an indispensable means of enforcing almost all other fundamental rights. While its privileged role does not mean that freedom of expression is absolute, it certainly means that this fundamental right should be conceded in very few cases. In practice, this usually happens when the harm to interests underlying the restriction is particularly serious.

Democratic legal systems tend to distinguish four groups of interests that can be opposed to freedom of expression.

- The interests of the State, meaning the protection of the constitutional order, the external and internal security of the State, the protection of public officials and state symbols. The expressions relating to these constitute the political dimension of freedom of expression, which is an indispensable condition for the formation and functioning of democratic public opinion.
- The interests of society as a whole, including the protection of public peace, public health and public morals.
- Protection of the interests of certain social groups against expressions of racial, religious and gender discrimination, one extreme manifestation of which is hate speech.

- Personal honour, which means the protection of dignity and privacy.

The extent to which the right to freedom of expression can be restricted varies according to the above grouping, with the smallest restrictions being in the interests of the State and the broadest in the interests of privacy.

Within the interests of the State, we must distinguish a specific category of possible grounds and purposes for restriction, which is also taken into account in Article 10(2) of the European Convention on Human Rights. It is the duty of the State to protect the sovereignty, territorial integrity, borders and law and order of the State, to maintain public safety and public order and, partly through these means, to protect the inviolable and inalienable fundamental rights of the people, which it ensures by maintaining and operating the armed forces and law enforcement organisations. However, these organisations can only be effective if they operate under a unified command and are subject to discipline and a strict order of service and chain of command, which at the same time entails partial but not disproportionate restrictions on certain fundamental rights of members of the armed forces, including freedom of expression.

On several occasions, the European Court of Human Rights has examined the limits of the right to freedom of expression for soldiers and law enforcement officials, and has made a number of important findings of principle. The most important of these is that the members of the military, police, gendarmerie, border guards, coastguard, finance police and prison services also have the right to express their opinions, but their exercise may be subject to restrictions and sanctions in order to prevent expressions that pose a real threat to the effective functioning of these organisations, in particular those aimed at undermining discipline, order of service and authority. While the Court considers expressions inciting insubordination or violence, as well as the dissemination of such expressions within the staff, to be sanctionable in all circumstances, the assessment of conduct that poses a direct threat to the performance of the duties of the armed forces is less uniform.

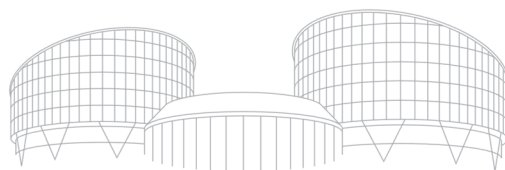
The Strasbourg court has also stated in several decisions that the application of the European Convention on Human Rights must take into account the specificities of military life, but it has not always met this requirement itself, for example, it has applied only the general rules in determining the scope of freedom of expression regarding the statements

criticising the armed forces and law enforcement bodies in general, the opportunity of proving the veracity of statements, and the expressions concerning the leaders of organisations.

In summary, the European Court of Human Rights has made several important findings on the restriction of the right to freedom of expression of soldiers, police officers, gendarmes, border guards, coastguards, finance police and prison officers, but inconsistencies in its judicial practice have left numerous open questions. Answering these questions in the future is certainly justified and necessary in order to ensure the full and effective fulfilment of the State's obligation to ensure proper functioning of the armed forces and law enforcement bodies. All this is underlined by the fact that the role of the military and law enforcement personnel and the importance of their work is becoming more and more important as a result of increasing migration and the escalating and multiplying armed conflicts.

In Hungarian

A hon- és rendvédelmi testületek állományába tartozó személyek véleménynyilvánításhoz való jogának korlátozhatósága az Emberi Jogok Európai Bíróságának ítélkezési gyakorlatában



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1. Bevezetés⁵⁵

Az emberi szabadság feltétlen tiszteletén alapuló jogrendek kivétel nélkül elismerik és biztosítják a véleménynyilvánításhoz való jogot. Ennek megfelelően rendelkezik úgy az Emberi Jogok Európai Egyezménye (a továbbiakban: EJEE), hogy mindenkinek joga van a kifejezés szabadságához, ami állami szervek beavatkozásától mentesen és országhatárokon tekintet nélkül gyakorolható. Az EJEE rögzíti továbbá, hogy e jog magában foglalja a véleményalkotás, az információk és eszmék megismerésének, valamint közlésének szabadságát, amiből adódóan egyszerre biztosítja az önkifejezés, továbbá a társadalmi és politikai folyamatokban való részvétel lehetőségét.⁵⁶

Érzelmek, vágyaink és értelemmel bíró gondolataink – szóban, írásban, nonverbális jelekkel, alkotásokkal vagy bármely egyéb módon történő – kifejezésének képessége emberi mivoltunk egyik sajátossága. Nélküle személyiségünk kibontakoztatása és közösségi létünk egyaránt elképzelhetetlen lenne. A mindennapjainkra közvetlenül vagy közvetve hatással bíró történésekre adott válaszaink, azaz az egyes élethelyzetek értékelésének, majd az annak eredményeként kialakított véleményünk másokkal történő megosztásának szabadsága egyéni autonómiánk alapja, sorsunk formálásának biztosítéka.⁵⁷

A véleménynyilvánítás joga mindezek mellett a polgári társadalmak működését meghatározó közvélemény megeremtésében és alakításában is nélkülözhetetlen szerepet játszik. A jogállamokat jellemző demokratikus döntéshozatal feltétele, illetve megerősítője a nyílt vita, amelynek során mindenki hangot adhat nézeteinek. A vélemények szabad ütköztetésének biztosítása által nyílik lehetőség valamennyi olyan gondolat kinyilvánítására, amely hozzájárulhat társadalmi problémáink megoldásához és az egyéni, valamint a közösségi érdekek mind szélesebb

⁵⁵ Megjelent az In Medias Res folyóirat 2023/1. számában (109–137.).

⁵⁶ Emberi Jogok Európai Egyezménye 10. cikk 1. bekezdés.

⁵⁷ Vö. *Pretty v. the United Kingdom*, no. 2346/02, 2002. április 29-i ítélet, 62. pont.

körének megjelenítésére. Ezáltal a demokratikus állami berendezkedés kialakításának és fenntartásának egyik legfontosabb pillére a szólás-szabadság, amely – a kormányzati intézkedésekkel szemben megfogalmazott kritika formájában – eszköz és egyben garancia a közhatalmat gyakorlók esetleges visszaéléseivel szemben.⁵⁸ Mindezek alapján látható, hogy a véleménynyilvánításhoz való jog érvényesüléséhez mind egyéni, mind társadalmi szinten elemi érdek fűződik.

A kifejezés szabadságának tiszteletben tartására és védelmére vonatkozó állami kötelezettség az alapjognak a közfeladatot ellátó szervezetek és személyek beavatkozásától mentes gyakorlása szavatolásán túl az ahhoz elengedhetetlenül szükséges feltételek megteremtésére is kiterjed. Erre tekintettel az EJEE szerződő államainak biztosítaniuk kell a véleményalkotáshoz szükséges közérdekű információk kielégítő módon és kellő időben történő megismerésének lehetőségét, különös tekintettel a közügyeket érintő objektív tájékoztatásra. Emellett kötelesek tiszteletben tartani a joghatóságuk alá tartozó személyek meggyőződését, amiből következően saját álláspontjukat nem erőltethetik rájuk és – nézeteik alapján – nem tehetnek különbséget közöttük. E körben említendő továbbá a véleménynyilvánítás negatív szabadsága, ami annyit tesz, hogy senkit sem kötelezhetnek gondolatai kifejezésére.⁵⁹

A szólásszabadság minden más alapvető jog érvényesíthetőségének és védelmének nélkülözhetetlen eszköze, így kitüntetett helyet foglal el az emberi jogok között. Mindazonáltal a véleménynyilvánításhoz való jog sem abszolút hatályú, gyakorlása azonban csak szűk körben korlátozható, általában akkor, ha a megszorítás alapjául szolgáló érdeksérelem különösen súlyos. Az EJEE ezzel összefüggésben felhívja a figyelmet, hogy a kifejezés szabadsága kötelezettségekkel és felelősséggel is jár, így törvényben meghatározott olyan alakszerűségeknek, feltételeknek, korlátozásoknak vagy akár szankcióknak vethető alá, amelyek a demokratikus társadalmakban elismert és szükséges intézkedéseknek minősülnek. Az EJEE taxatív felsorolása a megszorítások lehetséges okai között említi a nemzetbiztonság, a területi integritás és a közbiztonság megóvásának, a zavargás és a bűncselekmények megelőzésének, a

⁵⁸ Vö. *Handyside v. the United Kingdom*, no. 5493/72, 1976. december 7-i ítélet, 49. pont.

⁵⁹ Dominika BYCHAWSKA-SINIARSKA: *Protecting the Right to Freedom of Expression under the European Convention on Human Rights*. Strasbourg, Council of Europe, 2017, 13. és 15.

közegészség, az erkölcsök, valamint mások jó hírneve és jogai védelmének, a bizalmas értesülések nyilvánosságra hozatala megakadályozásának, továbbá a bíróságok tekintélyébe és pártatlanságába vetett hit fenntartásának érdekét (10. cikk 2. pont).

A korlátozás azonban ezekben az esetekben is csak a véleménynyilvánításhoz való jog gyakorlásának egyes módozataira vonatkozhat, annak lényeges tartalmát nem érintheti. Ugyanis az EJEE egyetlen rendelkezését sem lehet úgy értelmezni, hogy az bármely állam, csoport vagy személy részére lehetőséget biztosítana olyan tevékenység folytatására vagy cselekedet végrehajtására, amely az egyezményben elismert szabadságok megsértésére vagy a megszorítással elérni kívánt céllal arányban nem álló, annál nagyobb mértékű korlátozására irányul (17. cikk). Az EJEE által elismert és védelemben részesített szabadságjogok tiszteletben tartását az Emberi Jogok Európai Bírósága (a továbbiakban: EJEB) biztosítja az egyedi ügyekben benyújtott kérelmek elbírálása révén. A testület az alapjogi korlátozást kizárólag abban az esetben látja igazolhatónak, ha a megszorítás

- olyan, megfogalmazását tekintve kellően pontos és világos jogi normán alapul, amelynek címzettjei – észszerű időbeli keretek között – előzetesen megismerhetik a rájuk vonatkozó szabályokat, azok fényében felmérhetik magatartásuk lehetséges következményeit,
- az EJEE-ben felsorolt érdekek valamelyikének megóvására irányul, továbbá
- a demokratikus társadalmak működése szempontjából szükséges és arányos intézkedésnek minősül.⁶⁰

A bíróság – az egységes joggyakorlat kialakítása érdekében – az EJEE-ben foglalt szabadságjogok, köztük a véleménynyilvánításhoz való jog korlátozhatósága és annak terjedelme vonatkozásában kötelező érvényű iránymutatások kialakítására és kiadására törekszik.

Mindazonáltal a megszorítások szükségességének és mértékének megítélése kapcsán a szerződő államok bizonyos terjedelmű mérlegelési

⁶⁰ The Sunday Times v. the United Kingdom, no. 6538/74, 1979. április 26-i ítélet, 49. pont; Oberschlick v. Austria, no. 11662/85, 1991. május 23-i ítélet, 57. pont; The Observer and The Guardian v. the United Kingdom, no. 13585/88, 1991. november 26-i ítélet, 56. pont; Rekvényi v. Hungary, no. 25390/94, 1999. május 20-i ítélet, 34. pont.

jogkörrel rendelkeznek, ugyanis a helyi – társadalmi, kulturális és történelmi – sajátosságokat behatóan ismerő nemzeti hatóságok a konkrét esetekben felmerülő érdekösszeütközések feloldásakor a nemzetközi bíróságnál kedvezőbb helyzetben vannak.⁶¹ Az ítélezési gyakorlat során kimunkált jogelvek és a döntések elemzésének eredményeképpen megállapítható, hogy a megszorítások megengedhetőségét illetően elfogadott és alkalmazott mérce az egyes alapjogok esetében, sőt még azokon belül is eltérő szigorúságú lehet.⁶² Különösen igaz ez a véleménynyilvánítás szabadságára, amelynek korlátozhatóságával összefüggésben a megnyilvánulás jellege és tartalma meghatározó jelentőséggel bír. Míg az alapjogi védelem a véleményekre azok érték- és igazságtartalmára tekintet nélkül kiterjed, addig a tényállítások szigorúbb megítélés alá esnek, ugyanis valóságtartalmuk vizsgálat tárgyává tehető.⁶³ Amennyiben a kijelentés ennek eredményeként hamisnak vagy kellően alá nem támasztottnak bizonyul, nem részesülhet olyan szintű oltalomban, mint az értékítéletek. Ugyanakkor a minden tényalapot nélkülöző, túlzó vélemények szintén túlmutathatnak a kifejezés szabadságának határain.⁶⁴

Annak eldöntése, hogy egy megnyilvánulás tényállításnak vagy értékítéletnek minősül-e, a szerződő államok hatóságainak jogkörébe tartozik.⁶⁵ A bíróság – a polgári társadalmak kialakulásában és működésében játszott kiemelkedő szerepére tekintettel – a szólásszabadság leginkább védett belső magjának a politikai jellegű véleménynyilvánításokat tekinti, így a közéleti viták szabadsága és ezzel együtt a közszereplők bírálhatósága a strasbourgi esetjogban minden egyéb szólásnál magasabb szintű oltalomban részesül, még akkor is, ha ez mások érdekeinek sérelmével jár.⁶⁶ Az ilyen jellegű megnyilvánulások kiemelt védelmét jelzi, hogy a kifejezés szabadságát érintő korlátozások

⁶¹ Sunday Times (60. lj.) 59. pont.

⁶² KOLTAY András: *A szólásszabadság alapvonalai - magyar angol, amerikai és európai összehasonlításban*. Budapest, Századvég, 2009, 108.

⁶³ Lingens v. Austria, no. 9815/82, 1986. július 8-i ítélet, 46. pont.

⁶⁴ Jerusalem v. Austria, no. 26958/95, 2001. február 27-i ítélet, 43. pont.

⁶⁵ Pedersen and Baadsgaard v. Denmark, no. 49017/99, 2004. december 17-i ítélet, 76. pont.

⁶⁶ Handyside (58. lj.) 49. pont; Lingens (63. lj.) 42. pont.

szükségességének megítélése kapcsán a szerződő államokat megillető diszkrecionális jog a politikai beszédre nem terjed ki.⁶⁷

2. Témafelvetés

A véleménynyilvánításhoz való jog a hadsereg, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási szervezet állományába tartozó személyeket ugyanúgy megilleti, mint bárki mást, azonban a hon- és rendvédelmi testületek csak olyan jogi előírások megléte és érvényesülése esetén tölthetik be rendeltetésüket, amelyek szavatolják a hatékony működést biztosító fegyelem, valamint szolgálati és függelmi rend fenntartását.⁶⁸ Az EJEB több alkalommal is vizsgálta, hogy ezek a követelmények miként egyeztethetők össze a kifejezés szabadságával, amelynek eredményeként több elvi jelentőségű megállapítást tett.

A vonatkozó jogesetek feldolgozásával az alábbiakban azokra a kérdésekre keresem a választ, hogy a bíróság milyen szempontokat tekint irányadónak a speciális alanyok véleménynyilvánításhoz való jogának korlátozhatósága kapcsán, valamint ezek mennyire illeszkednek az alapjog gyakorlását érintő megszorítások általános feltételrendszerébe. Még mielőtt azonban a jogesetek ismertetésébe és elemzésébe kezdenénk, indokolt áttekinteni mindazon sajátosságokat, amelyek a fegyveres szervezetek működését jellemzik.

3. A hon- és rendvédelmi testületek működésének sajátosságai

A függetlenség, a területi épség, valamint az országhatárok védelme, a nemzetbiztonsági érdekek érvényesítése, továbbá a közbiztonság és a közrend fenntartása az állam legfontosabb kötelezettségei közé tartozik. E feladatokat a hon- és rendvédelmi testületek látják el, amelyek kizárólag akkor tölthetik be rendeltetésüket, ha egységes irányítás alatt állnak, soraikban pedig fegyelem, szigorú szolgálati és függelmi rend uralkodik. Fegyelem alatt a jogszabályokban, a fegyveres erők működését szabályozó

⁶⁷ Sunday Times (60. lj.) 59., 65., 66. pont.

⁶⁸ Vö. Engel and Others v. the Netherlands, no. 5100-5102/71, 5354/72, 5370/72, 1976. június 8-i ítélet, 100. pont.

belső utasításokban, továbbá az előjárók által meghatározott követelmények teljesítését értjük, ami az állomány valamennyi tagjának kötelessége. A fegyelem – Helmuth von Moltke találó megfogalmazása szerint – „a hadsereg lelke. Kizárólag a fegyelem által válik a hadsereg azzá, aminek lennie kell. A fegyelem nélküli hadsereg [...] háborúban hasznavehetetlen, békében veszedelmes.”⁶⁹ A szolgálati rend a kötelességek teljesítéséhez és a feladatok végrehajtásához szükséges, jól kidolgozott, a gyakorlatban érvényesülő szervezeti és működési struktúrát, a jogosultságok, valamint a kötelezettségek – mindenki számára történő – pontos meghatározását, továbbá a hon- és a rendvédelmi testületek által végzett tevékenység személyi és dologi feltételeinek biztosítását jelenti. E követelmények szavatolják a fegyelem megteremtését és folyamatos fenntartását, így a szolgálati rendet mindig, minden körülmények között be kell tartani és tartatni.

A függelem a fegyelem és a szolgálati rend alapja, ami garantálja az előjáró, más szolgálati közeg és a feljebbvaló jogát parancsok és egyéb rendelkezések kiadására, továbbá meghatározza az alárendelt kötelezettségét azok teljesítésére. Mindez sajátos jogviszonyt feltételez a fegyveres szervezetek és a kötelékükbe tartozó személyek között. A hon- és a rendvédelmi testületek rendeltetés szerinti feladatainak ellátása ugyanis csak akkor biztosítható, ha az állomány tagjai kötelezettségeiket önkéntes vállalás alapján, élethivatásként, magukat az ország és a társadalom érdekeinek alárendelve, adott esetben testi épségük és életük kockáztatásával, továbbá a szolgálat teljesítésével szükségszerűen együtt járó kööttségek, köztük egyes alapjogok gyakorlása korlátozásának elfogadásával teljesítik. A szolgálat ellátására vonatkozó rendelkezések maradéktalan végrehajtását az engedelmességi készség szavatolja, amelynek alapja a szolgálati tekintély feltétlen tisztelete, mivel ennek hiányában – emberi természetünkől adódóan – nem vagyunk képesek alávetni magunkat mások akaratának.⁷⁰

A fegyveres szervezeteket – mindezek mellett – a bajtársiasság szellemének is át kell hatnia, ami annyit tesz, hogy az állomány tagjai kötelesek megadni egymásnak az elvárható tiszteletet, méltányolni társaik becsületét és jogait,

⁶⁹ Helmuth MOLTKE: *Essays, Speeches, and Memoirs of Field-Marshal Count Helmuth von Moltke*. New York, Harper & Brothers, 1893, 70.

⁷⁰ SCHULTHEISZ Emil: *A katonai büntetőtörvény [1930. évi II törvénycikk] magyarázata II. – Különös rész I. Füzet – Függelmeértés*. Budapest, Radó, 1934.) 3.

támogatni a másikat a bajban és kimenteni a veszélyből.⁷¹ E tényezők érvényesülése a katonaság, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási szervezet rendeltetésszerű és hatékony működése szempontjából elengedhetetlen, ezért megóvásuk kiemelten fontos társadalmi érdek.

4. Esetjog

Az EJB azzal kapcsolatos álláspontját, hogy e követelmények milyen feltételekkel érvényesíthetők a kifejezés szabadságával szemben, az egyes ügyekben hozott döntések alapján ismerhetjük meg, amelyek áttekintésével a kérdéskört érintő joggyakorlat alakulásának nyomon követésére is lehetőség nyílik.

4.1. Az Engel and Others v. the Netherlands ügy⁷²

Holland állampolgárok a hetvenes évek elején egymást követően fordultak a bírósághoz a katonai szolgálatuk teljesítése során velük szemben kiszabott fegyelmi büntetések és az ügyükben – az állományilletékes parancsnokuk és a Legfelső Katonai Bíróság által – lefolytatott első- és másodfokú eljárások jogszerűségét vitatva. Közülük Johannes C. Dona és Willem A. C. Schul úgy vélte, hogy a fegyelmi eljárás során a kifejezés szabadságához fűződő joguk is sérült.⁷³

4.1.1. A tények

A holland Sorköteles Katonák Egyesülete (Vereniging van Dienstplichtige Militairen) 1971. augusztus 13. napján demonstrációt tartott Ermelo városában a haderőnél ekkor katonai szolgálatot ellátó személyek részvételével. Miután a helyi laktanya parancsnoka tudomást szerzett erről,

⁷¹ Vö. a katonák jogállásáról szóló német törvény (Wehrstrafgesetz) 12. §-ában foglaltakkal.

⁷² Engel (68. lj.).

⁷³ Ezenkívül – a többi kérelmezőhöz hasonlóan – hivatkoztak a szabadsághoz és a biztonsághoz, valamint a tisztességes eljáráshoz való joguk megsértésére, továbbá arra, hogy a hatóságok katonai jogállásuk miatt diszkriminálták őket, így a bíróság – a tárgyi összefüggésekre tekintettel – egy eljárás keretében bírálta el a beadványokat. A döntés e vonatkozásai azonban témánk szempontjából nem bírnak jelentőséggel, így ismertetésüket mellőzöm.

felszólította a rendezvényen megjelenő alárendeltjeit, hogy haladéktalanul térjenek vissza a kaszárnyába, egyben ígéretet tett arra, hogy az utasítás teljesítése esetén a megmozdulásnak nem lesz következménye. Bár a címzettek eleget tettek a felhívásnak, néhányukat nem sokkal ezt követően más szolgálati helyre vezényelték, állítólag azért, mert részt vettek a tüntetésen.

Ezt kifogásolva a sorkatonai szolgálatot teljesítő kérelmezők az egyesület által a laktanyában terjesztett lap, az Alarm szerkesztőjeként közreműködtek A legerősebb joga című publicisztika megjelentetésében, amely a következő kijelentéseket tartalmazta:

Smits tábornok az „alárendeltjeinek” azt írja: „Mindent meg fogok tenni azért, hogy megakadályozzam a JOGsértéseket!” Ugyanakkor éppen ez a Tábornok felelős Daalhuisen and Duppen áthelyezéséért, pedig tudvalevő, hogy az előjáró törvényi rendelkezések köntösébe bújtatva sem gyakorolhatja jogkörét visszaélészerűen. A Tábornok annyira híve a jognak, amennyire az az ő érdekeit szolgálja. [...] Az általánosan alkalmazható büntetéseken felül a hadsereg vezetőinek intézkedések egész sora áll rendelkezésére a katonák elhallgattatásához, amelyek közül az áthelyezés csupán az egyik eszköz. Mindezt nem szüntetik meg a parlamentben feltett kérdések, legfeljebb óvatosabbá teszik őket. Csak akkor lehet ennek véget vetni, ha azok, akik saját hatalmukat kizárólag büntetések és megfélemlítések révén gyakorolhatják, kénytelenek lesznek valami rendes munka után nézni.

A laktanya parancsnoka úgy ítélte meg, hogy e kijelentések összeegyeztethetetlenek a fegyelem követelményével, ezért a lap terjesztését átmenetileg felfüggesztette, és intézkedett az eset kivizsgálása érdekében. Az eljárás eredményeképpen Donát három, míg Schult négy hónap tartamú – fegyelmező egységben végrehajtandó – elzárás büntetéssel sújtották a katonai büntető törvénykönyvről szóló holland törvény akkor hatályos 147. cikke szerinti fegyelemsértés elkövetése miatt.⁷⁴ Mindkét kérelmező esetén súlyosító körülményként értékelték,

⁷⁴ A vonatkozó törvényi rendelkezés értelmében az a személy, aki szóban, írásban, képi formában, arckifejezéssel vagy taglejtéssel kifejezésre jutatott gondolatai révén a fegyveres erők fegyelmének aláásására törekedett, valamint az, aki, tudva arról, hogy valamely írásmű vagy ábrázolás ilyen valós tartalommal bír, azt terjesztette, kiállította, közszemlére tette, továbbá terjesztés végett raktározta, három évig terjedő szabadságvesztés büntetéssel volt sújtható. Az elzárást annak elszenvedője szigorított

hogy hasonló jellegű cselekmények miatt már a korábbiakban is felelősségre vonták őket. Az érintettek fellebbezésének eredményeként eljáró Legfelső Katonai Bíróság a lényegét tekintve helybenhagyta az állományilletékes parancsnok döntését, azonban Schul büntetését három hónap időtartamra mérsékelte.

4.1.2. A döntés

A strasbourgi bíróság általánosságban rámutatott, hogy az EJEE személyi hatálya a fegyveres erők tagjaira is ugyanúgy kiterjed, mint a szerződő államok joghatósága alá tartozó bármely más személyre, azonban annak alkalmazása során figyelembe kell venni életviszonyuk sajátosságait (54. pont). A konkrét ügyet illetően az eljáró tanács első lépésben megállapította, a kiszabott büntetések beavatkozást jelentettek az érintettek véleménynyilvánításhoz való jogának gyakorlásába, majd azt vizsgálta, hogy a sérelmezett megszorítások legitim célra irányuló, a demokratikus társadalmak működése szempontjából szükséges intézkedésnek minősültek-e (95–96. pont).

A holland kormány érvelése szerint a kifogásolt eljárások, szankciók a hadseregen belüli zavargások megelőzésére irányultak, azaz olyan érdeket szolgáltak, amelynek védelmében – a konvencióban írtaknak megfelelően – igazolható a szabadságjogot érintő korlátozás (97. pont). A nagykamara elvi élel rögzítette, hogy a közrend védelme a társadalom meghatározott csoportjain belül uralkodó szabályozott viszonyok fenntartására is kiterjed, ugyanis azok megbomlása kihatással lehet a közösség egészére. Ez különösen igaz az állami feladatokat ellátó szervekre, köztük a honvédségre, ezért a testületen belüli zavargás megelőzése az EJEE alkalmazása szempontjából legitim célnak minősül (98. pont).

A bíróság kiemelte továbbá, hogy a kifejezés szabadsága a katonákat ugyanúgy megilleti, mint bárki mást, azonban a hadsereg rendeltetésszerű működése aligha képzelhető el olyan szabályok nélkül, amelyek az ezt biztosító fegyelem – például írásművekkel történő – aláásásának megakadályozását célozzák (100. pont). Az ítélet indokolása szerint a katonák véleménynyilvánításhoz való jogát korlátozó intézkedések felülvizsgálata során – a fegyveres erők sajátos élet- és szolgálati

körülmények között töltötte, amelynek során legalább egy hónapig kimenőt sem kaphatott.

viszonyain, valamint az állomány tagjait terhelő különleges kötelezettségeken és felelősségen túl – nem hagyható figyelmen kívül, hogy a megszorítások szükségességének és mértékének megítélése kapcsán a szerződő államok némi mozgástérrel rendelkeznek (100. pont).

A tanács mindezek mellett azt is értékelte, hogy a publicisztikát olyan időszakban kezdték terjeszteni, amikor már eleve feszült légkör uralkodott a laktanyában, így Dona és Schul cselekménye a hadseregen belüli rendre nézve fokozott veszélyt hordozott magában. Ilyen körülmények között a holland hatóságok okszerűen jutottak arra a következtetésre, hogy a kérelmezők tevékenysége a katonai fegyelem aláásására irányult, ezért a kifogásolt eljárások megindítása és a büntetések kiszabása – a véleménynyilvánításhoz való jog visszaélésszerű gyakorolása miatt – indokolt és szükséges intézkedésnek minősült (101. pont). Erre figyelemmel a nagykamara megállapította, hogy nem sértették meg az EJEE 10. cikkét, így a kérelmek vonatkozó részeit elutasította.

4.2. A Hadjianastassiou v. Greece ügy⁷⁵

4.2.1. A tények

A görög légierőnél repülőmérnökként szolgálatot teljesítő Constantinos Hadjianastassiou százados az Elfon gazdasági társaság felkérésére tanulmányban összegezte az irányított rakéták tervezésével és gyártásával kapcsolatos szakmai meglátásait, amelyet 1983-ban a megbízó rendelkezésére bocsátott. Mivel a mű titkos katonai információkat is tartalmazott – a büntetőjogi felelősség kivizsgálása érdekében indított eljárás eredményeként –, minősített adattal visszaélés elkövetése miatt két év hat hónap szabadságvesztés büntetésre ítélték. A másodfokon eljáró bíróság azonban úgy találta, hogy a terhelt csak kisebb jelentőségű információkat tett hozzáférhetővé illetéktelen személyek számára, ezért a szabadságvesztés tartamát – a cselekmény enyhébb jogi megítélésre figyelemmel – öt hónapra mérsékelte, végrehajtását pedig próbaidőre felfüggesztette. Miután a semmítőszék elutasította fellebbezését, a katonatiszt annak megállapítását kérte az EJEB-től, hogy megsértették a kifejezés szabadságához való jogát.

⁷⁵ Hadjianastassiou v. Greece, no. 12945/87, 1992. december 16-i ítélet.

4.2.2. A döntés

A bíróság rámutatott, hogy az EJEE a szakmai kérdésekben kifejtett nézeteket is védelemben részesíti, így a kifogásolt intézkedés a véleménynyilvánítás jogának korlátozásaként értékelendő (39. pont). Az ítélet indokolása szerint a hadiipari eszközök tervezésével, valamint gyártásával kapcsolatos műszaki ismeretek közzététele sértheti vagy veszélyeztetheti a szerződő államok nemzetbiztonsági érdekeit, ezért az ilyen jellegű információk felfedésének megakadályozása és szankcionálása az EJEE alkalmazása szempontjából legitim célnak minősül (43–45. pont).

Az eljáró tanács kiemelte, hogy az alapjogi korlátozás megengedhetőségének vizsgálata során – a fegyveres erők tagjainak különleges kötelezettségei mellett – figyelembe kell venni, hogy a kérelmező katonatisztként, a légierő kísérleti rakéta programjának irányítójaként fokozott felelősséggel tartozott a tudomására jutott bizalmas információk megőrzéséért (46. pont). Mindezekre figyelemmel a testület úgy ítélte meg, hogy a görög bíróságok által - mérlegelési jogkörben - meghozott döntés a nemzetbiztonsági érdekek védelméhez fűződő társadalmi elváráson alapult, ezért összhangban állt az EJEE rendelkezéseivel.

4.3. A Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria ügy⁷⁶

Az osztrák hadkötelesek érdekeit védő társadalmi szervezet és a sorkatonai szolgálatának teljesítését 1987. július 1-jén megkezdő Berthold Gubi által előterjesztett kérelem lényege szerint a salzburgi Schwarzenberg laktanya előljárói és a honvédelemért felelős minisztérium tisztségviselői megsértették az EJEE előírásait, amikor véleménynyilvánításhoz való joguk gyakorlásában korlátozták őket. Témánk szempontjából – a speciális alanyiságra tekintettel – az ítélet azon vonatkozásai bírnak jelentőséggel,

⁷⁶ Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, no. 15153/89, 1994. december 19-i ítélet.

amelyek a kifogásolt intézkedések idején az osztrák haderő kötelékébe tartozó kérelmezőt érintik.⁷⁷

4.3.1. A tények

A helyi kommunista párt tagjai közé tartozó Gubi katonai esküjének letételekor tiltakozását fejezte ki az Osztrák Köztársaság szövetségi elnökével szemben, majd társaival nyílt levélben emelt kifogást egyes szolgálati kötelmek miatt, valamint részt vett egy olyan petíció elindításában, amely a katonai szolgálat lelkiismereti okból történő megtagadására ösztönzött (9. pont). Ennek eredményeként előjárói több alkalommal figyelmeztették, hogy tartózkodjon a fegyelemsértő magatartástól. A kérelmező azonban 1987. december 29-én közreműködött a kritikus hangvételű cikket tartalmazó „Der Igel” magazin akkor megjelent lapszámának laktanyán belüli terjesztésében.

A cikkek szerzői, köztük Gubi, bírálták a kiképzést, a szolgálati panaszok miatt indult eljárások eredményét és a sorkatonaság intézményével kapcsolatos kormányzati irányelveket, továbbá megvitatták a sajtóban megjelent, valamint az újoncok szakszervezetének kongresszusán a hadsereget érintően elhangzott kritikákat (10. pont). A kiadványok terjesztéséhez és közszemlére tételéhez – a vonatkozó jogi rendelkezések értelmében – a laktanya parancsnokának jóváhagyására lett volna szükség, ezért ennek hiánya miatt előjárói ismételtlen figyelmeztetésben részesítették a kérelmezőt. Gubi emiatt panaszt terjesztett elő, amelyet a honvédelemért felelős minisztérium részéről eljáró tanács megalapozatlanságra hivatkozva elutasított. Ezt követően Gubi az osztrák alkotmánybírósághoz fordult, azonban a testület álláspontja szerint az abban foglaltak nem vetettek fel valós alapjogi problémát, így kérelemének érdemi elbírálását mellőzték.

⁷⁷ Az egyesület azt sérelmezte, hogy a honvédelemért felelős miniszter nem engedélyezte az általuk kiadott „Der Igel” című folyóirat ingyenes – a hivatalos katonai magazinnal együtt történő – terjesztését a laktanyákban, holott más érdekvédelmi szervezetek lapjai számára felváltva biztosították ennek lehetőségét. A kérelem elutasítását azzal indokolták, hogy a kiadványban teret engedtek a sorkatonai szolgálat intézményét negatív színben feltüntető, ezáltal annak tekintélyét aláásó, valamint egyes politikai pártok e körben kifejtett nézeteit megjelenítő cikkeknek. Mindazonáltal a folyóirat előfizetés útján történő terjesztését nem akadályozták a katonai objektumokban.

4.3.2. A döntés

A strasbourgi bíróság megállapította az alapjog gyakorlását érintő korlátozás tényét, valamint azt, hogy a kifogásolt intézkedés a haderőn belüli rend megóvására irányult. Ezt követően azt vizsgálta, hogy a beavatkozás nyomós társadalmi szükségletet elégített-e ki és arányban állt-e az elérni kívánt legitim céllal. Korábbi állásfoglalását megismételve kifejtette, hogy a véleménynyilvánítás szabadságát a fegyveres erők rendeltetésszerű működését veszélyeztető megnyilvánulások megakadályozása érdekében korlátozó, valamint joghátrányt kilátásba helyező törvényi rendelkezések a demokratikus társadalmak működése szempontjából szükséges intézkedésnek minősülnek. Rámutatott azonban arra is, hogy a kifejezés szabadsága a sértő, sokkoló, valamint a közösség egészét vagy valamely részét zavaró információkra és véleményekre is kiterjed (36. pont). Ebből következően a katonák sem zárhatók el bírálatok, kritikai észrevételek megfogalmazásától, hiszen a véleménynyilvánítás joga őket is megilleti.

Így a bíróság a továbbiakban arra a kérdésre kereste a választ, hogy Gubi publicisztikája és az általa terjesztett folyóiratban megjelent további cikkek valós veszélyt jelentettek-e a hadsereg fegyelmére és ezzel együtt rendeltetés szerinti feladatainak ellátására nézve. Az eljáró tanács meglátása szerint az írásművek ugyan több, a katonaság működését érintő panaszt tartalmaztak, reformokat javasoltak, valamint a jogorvoslati eljárások igénybevételére ösztönöztek, azonban szatirikus stílusuk, éles hangvételük ellenére sem sarkalltak engedetlenségre vagy erőszakra, és nem vonták kétségbe a haderő hasznosságát. Az ilyen jellegű gondolatok megfogalmazását viszont a demokratikus államok honvédelmi testületeiben éppúgy tolerálni kell, mint a társadalmak keretein belül, amelyeket szolgálnak, ezért a vizsgált megnyilvánulások nem lépték túl a kifejezés szabadságának határát (38. pont).

Bár a folyóirat hatására a Schwarzenberg laktanyában szolgálatot teljesítő katonák között feszültség alakult ki, a kamara álláspontja szerint nem kellett annak reális veszélyével számolni, hogy ez a sereg egészére áterjedhet (39. pont). Mindezek alapján a bíróság arra a következtetésre jutott, hogy a kifogásolt intézkedés nem állt arányban az elérni kívánt céllal, ezért a véleménynyilvánításhoz való jog gyakorlásának korlátozása az EJEE vonatkozó rendelkezésének sérelmével járt.

4.4. A Grigoriades v. Greece ügy⁷⁸

4.4.1. A tények

A görög haderő tartalékos tisztjelölt hallgatója, Panayiotis Grigoriades az állományba vételét követő két év elteltével nem kívánta meghosszabbítani szolgálati jogviszonyát. Döntése indokaként az állományilletékes parancsnokának 1989. május 10-én küldött levelében a következőket adta elő.

MAGÁNVÉLEMÉNY

[...T]iltakozom szolgálati jogviszonyom meghosszabbítása ellen egy olyan büntetés kiszabása miatt, amellyel a katonák jogainak védelme érdekében kifejtett tevékenységem miatt sújtottak. [...Ú]gy vélem, egy általános, a személyiségi jogok szabad gyakorlásának és az alkotmányos jogok, valamint a személyes szabadság elismerésének elfojtására irányuló szemlélet részeként marasztaltak el. A személyes érdektől függetlenül, általánosságban véve is elfogadhatatlannak és alkotmányellenesnek tartom a fiatal katonákat sújtó büntetést, különösen azon esetekben, amikor az ilyen jellegű joghátrány az ifjúság ideológiai és társadalmi vonatkozású emberi jogainak elismerése iránti küzdelemmel és személyiségüknek a katonai testülettel szembeni védelmével áll összefüggésben. Huszonnégy hónapja küzdve ez ellen [...] ezennel FELJELENTÉST teszek [... a]miatt, mert a katonaság ember- és társadalomellenes szervezet, amely természeténél fogva a béke ellen van. [... A] szolgálat menete felelős megannyi bűncselekményért és agresszivitásért társadalmunkban, mivel erőszakossága révén olyan pszichés hatást vált ki, amely legyőzi az ezekkel szembeni – erkölcsből és lélekből fakadó – ellenállást. A honvédség egy bűnöző és terrorista szervezet, ahol megfélemlítésre épülő légkör uralkodik [...] nyilvánvalóan azáltal, hogy az embereket ezen elnyomó testület részévé tegyék. [... A] katonai életkörülmények [...] ártalmasak, és nincs semmilyen egészséges formája az ellenállásnak, valamint üldözik a párbeszéd irányába tett erőfeszítéseket, ami teljes kiszolgáltatottságot eredményez. [... A katonaság éppen ezért] egy veszélyes intézmény, amit meg kellene szüntetni. [... A honvédelemért felelős] minisztérium része ezen elnyomó rendszernek, és ösztönzi azt. A tiltakozás ezen eszközeivel [...] HARCOLUNK, [...] hogy a minisztérium mozgátsa elő a haderő valódi

⁷⁸ Grigoriades v. Greece, no. 24348/94, 1997. november 25-i ítélet.

ellenőrzését, és vonja felelősségre a tekintélyelvű rendszert kialakító és fenntartó személyeket, ahelyett, hogy e jelenségek módszeres elpalástolására törekedne, [...] hogy véget vessünk a megkülönböztetésnek, a kivételezésnek és a személyi függőségnek, amelyek a korrupt rendszerek eszközei. [...] M]ostantól kezdve visszatásítom, hogy ilyen feltételek mellett egyenruhát viseljek. Ha felvenném, úgy érezném, lelkiismereti válságba kerülnék. [...] Mi, az új nemzedék, minden kísérletnek ellen fogunk állni, ami a gyengeségből fakad és a katonai rend szétkértolója. Ez az, amiért nem tudom elítélni a szökést és az engedetlenséget, amelyek az alapvető emberi jogokból erednek és összhangban állnak a görög alkotmánnyal. [...] H]atározottan hiszek abban, hogy ily módon kell küzdeni a társadalom felszabadításáért és a békéért.

Egy tartalékos tisztjelölt hallgató beszámolt róla, hogy társa a levél egy példányát átadta neki, ugyanakkor arra vonatkozóan nem merült fel adat, hogy arról további másolatok is készültek.

A ioanninai katonai törvényszék a honvédség tekintélyének megsértése miatt három hónap tartamú – börtön végrehajtási fokozatú – szabadságvesztés büntetésre ítélte Grigoriadest a katonai büntetőtörvénykönyvről szóló, akkor hatályos görög törvény 74. cikke alapján.⁷⁹ A másod- és harmadfokon eljáró bíróságok helytálló indokaira tekintettel helybenhagyták a döntést, ezért az érintett – véleménynyilvánításhoz való jogának sérelmére hivatkozva – az EJEB-hez fordult.

4.4.2. A döntés

Az eljáró tanács ítéletében rögzítette, hogy a görög hatóságok korlátozták a kérelmezőt véleménynyilvánításhoz való jogának gyakorlásában, azonban a kiszabott büntetés a nemzetbiztonság alapvető érdekeinek védelmét, valamint a közbiztonság fenntartását célozta (41. pont). Erre tekintettel kizárólag abban a kérdésben kellett állást foglalnia, hogy a beavatkozás ezen – az egyezmény által a megszorítás jogszerű indokaként

⁷⁹ A vonatkozó törvényi rendelkezés értelmében a katonai állomány azon tagja, aki a lobogó, a fegyveres erő vagy a parancsnoksága által használt jelkép tekintélyét megsértette, hat hónapig terjedő szabadságvesztés büntetéssel volt sújtható. Ha az elkövető tiszt volt, rendfokozatától is meg kellett fosztani.

elismert – igények érvényesítéséhez szükséges és azzal arányban álló intézkedésnek minősíthető-e.

A kifejezés szabadsága a katonákat is ugyanúgy megilleti, mint bárki más, azonban annak gyakorlása a honvédség rendeltetés szerinti feladatainak ellátása érdekében – az alapjog lényegi tartalmát nem érintő – korlátozásoknak vethető alá. A bíróság álláspontja szerint a hadsereget mint intézményt általánosságban véve bíráló kijelentések azonban - a hatékony működést biztosító fegyelem aláásására irányuló megnyilvánulásokkal szemben - nem szolgáltatnak elegendő alapot megszorító intézkedések alkalmazásához (45. pont).

A levél elemzésének eredményeként a nagykamara rámutatott, hogy az kétségtől erősen és indulatos megjegyzéseket tartalmazott a görög hadseregre nézve, azonban azok egy annak működését érintő általános, valamint hosszas fejtegetés részét képezték. Megállapította továbbá, hogy nem szerepelt benne a címzett vagy bármely más személy ellen irányuló sértő kijelentés, majd kiemelte, hogy a kérelmező nem hozta nyilvánosságra levelének tartalmát, és szélesebb körben sem ismertette (46-47. pont).

Mindezekre figyelemmel a bírói tanács úgy ítélte meg, hogy a megnyilvánulás jelentéktelen hatást gyakorolt a fegyelemre, ezért a kifogásolt intézkedés a demokratikus társadalmak működése szempontjából szükségtelen volt (48. pont).

4.5. A Rekvényi v. Hungary ügy⁸⁰

4.5.1. A tények

A Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény 1994. január 1. napjától hatályos 40/B. § (4) bekezdése úgy rendelkezett, hogy „a fegyveres erők, a rendőrség és a polgári nemzetbiztonsági szolgálatok hivatásos állományú tagjai nem lehetnek tagjai pártoknak, és politikai tevékenységet nem folytathatnak”.⁸¹ Az indokolás szerint e törvénymódosítással a hon- és rendvédelmi testületek politikamentes működését kívánták biztosítani. A magyar rendőrség rendelkezési

⁸⁰ Rekvényi (60. l.).

⁸¹ Lásd 1993. évi CVII. törvény az Alkotmány módosításáról 3. §.

állományába tartozó Rekvényi László rendőr százados, a Független Rendőrszakszervezet elnöke ezt sérelmezve indítványt tett a honvédség, a határőrség, a rendőrség és a polgári nemzetbiztonsági szolgálatok hivatásos állományú tagjainak politikai jogait korlátozó jogszabály alkotmányellenességének, valamint nemzetközi szerződésbe ütközésének utólagos vizsgálatára és megsemmisítésére, azonban a magyar Alkotmánybíróság hatáskörének hiányára hivatkozva érdemi vizsgálat nélkül elutasította azt. Emiatt a rendőrtiszt 1994. április 20-án az EJEB-hez fordult annak megállapítását kérve, hogy a törvénymódosítással a magyar állam megsértette a véleménynyilvánítás, valamint a másokkal való egyesülés szabadságához fűződő jogát, továbbá a hátrányos megkülönböztetés tilalmának az EJEE-ben írt alapelvét.

4.5.2. A döntés

A nagykamara mindenekelőtt leszögezte, hogy a politikai tevékenység a véleménynyilvánítás egy fajtája, így az EJEE 10. cikkének hatálya az ilyen típusú megnyilvánulásokra is kiterjed. Mivel e szabadságjog – a katonákhoz és a köztisztviselőkhez hasonlóan – a rendvédelmi testületek hivatásos állományú tagjait is megilleti, a kifogásolt alkotmányos rendelkezés korlátozta a kérelmező véleménynyilvánításhoz való jogát (26. pont).

A bíróság – ítélezési gyakorlatának a bevezetőben említett hármas kritériumrendszeréből kiindulva – először azt vizsgálta, hogy a megszorítást kellő pontossággal és oly módon foglalták-e törvénybe, amely lehetőséget biztosított az érintettek számára a rájuk vonatkozó szabályok előzetes megismerésére. E kitéttel összefüggésben a testület rámutatott, hogy az előreláthatóság nem abszolút jellegű követelmény, hiszen az élet minden területére kiterjedő szabályozás eleve nem várható el a jogszabályoktól. Emellett nem hagyható figyelmen kívül az sem, hogy a normák meghatározásainak egzaktsága jelentős mértékben függ a rendezni kívánt jogterület sajátosságaitól, a címzettek számától és azok jogállásától. Erre vezethető vissza az ítélet azon megállapítása is, hogy az alkotmányos rendelkezésektől megkívánt pontosság szintje – általános jellegükénél fogva – alacsonyabb lehet az egyéb törvényektől elvártaknál (34. pont). Az eljáró tanács kiemelte, hogy a politikai tevékenység fogalma – annak természetéből adódóan – egyébként sem határozható meg abszolút módon.

Mindezek alapján a nagykamara úgy találta, hogy a katonák politikai jogait korlátozó alkotmányos előírás – az e körben jogszerűen folytatható tevékenységeknek a döntéshozatal idején hatályos alacsonyabb szintű jogszabályokban meghatározott voltára is figyelemmel⁸² – elég világos és egyértelmű volt ahhoz, hogy a kérelmező előre lássa magatartása lehetséges következményeit (36–38. pont). Ennek kapcsán ítéletének indokolásában arra is emlékeztetett, hogy a hazai törvények értelmezése és alkalmazása elsődlegesen a nemzeti hatóságok feladata, így a sérelmezett rendelkezés tartalmának kibontása - további részletszabályok hiányában - a magyar bíróságokra tartozik. A korlátozás célját illetően a testület kifejtette, hogy az állami tisztségviselők – köztük a rendőrök – kötelezése a politikai tevékenységtől való tartózkodásra a közintézmények depolitizálásának, ezáltal a plurális demokrácia fenntartásának célját szolgálja. Mivel a rendőrség a közbiztonság és a belső rend védelme érdekében kifejtett tevékenysége során az állampolgárok személyi szabadságát korlátozó közhatalmi aktusokat is gyakorol, intézkedéseik befolyástól mentes gyakorlásának szavatolása különös jelentőséggel bír. A bíróság kiemelte, hogy e megfontolások alapján – Magyarországon kívül is – számos állam korlátozza a rendőrök politikai jogait.

Minderre figyelemmel a nagykamara úgy ítélte meg, hogy a politikai semlegesség megszilárdítása és fenntartása minden demokratikus államban törvényes cél lehet. Az indokolásában utalt arra is, hogy e célkitűzés különös súllyal esik latba azokban az országokban, amelyek korábbi totalitárius berendezkedése nagymértékben támaszkodott a rendőrségnek az állampárt iránti elköteleződésére (41. pont). A testület álláspontja szerint a sérelmezett alkotmányos rendelkezés – a rendőrök politikai szabadságjogának lényegi tartalmát nem érintve – kizárólag a rendvédelmi testület független és pártatlan működését veszélyeztető megnyilvánulásokat tiltotta. Ebből következően politikai jogait – köztük a közügyeket érintő véleménynyilvánítás elsődleges eszközeként számon

⁸² Lásd 1989. évi XXXIV. törvény országgyűlési képviselők választásáról 2. § (1) és (3) bekezdés, 5. § (1) bekezdés, 10. § (1) és (3) bekezdés; 1990. évi LV. törvény az országgyűlési képviselők jogállásáról 1. § (1) és (4) bekezdés, 8. § (1) bekezdés, 23. § (1) bekezdés, 25. § (1) bekezdés; 1994. évi XXXIV. törvény a rendőrségről 2. § (3) bekezdés, 7. § (9) és (10) bekezdés; 1/1990. (I. 10.) BM rendelet a Magyar Köztársaság Rendőrségének Szolgálati Szabályzatáról 430., 432–435., 437–438., 470., 472–474. és 477. pont; 3/1995. (III. 1.) BM rendelet a Rendőrség Szolgálati Szabályzatáról 106. § (5)-(6) és (9) – (10) bekezdés.

tartott választójogot – alacsonyabb szintű jogszabályokban meghatározott módon a továbbiakban is gyakorolhatták, így az intézkedés arányban állt az elérni kívánt törvényes céllal (49. pont).

Mivel a kérelmezőnek a véleménynyilvánításhoz, valamint a másokkal való egyesülés szabadságához fűződő jogait érintő – részben a rendőrök különleges jogállásból adódó – korlátozás az EJEE alapján igazolható, a sérelmezett rendelkezés diszkriminatív jellege szintén kizárható (61–62. pont). A bíróság mindezek alapján úgy döntött, hogy a véleménynyilvánítás és az egyesülés szabadságának teljes elvonásával nem járó, az elérni kívánt törvényes cél érdekében alkalmazott korlátozás nem sértette az EJEE által biztosított szabadságjogok egyikét sem.

4.6. A Szima v. Hungary ügy⁸³

4.6.1. A tények

A magyar rendőrség rendelkezési állományába tartozó Szima Judit rendőr alezredes 2007-ben és 2009-ben több írást tett közzé az általa képviselt TettekreKész Magyar Rendőrség Szakszervezet honlapján (www.tmrsh.hu), amelyekben az alábbi kijelentések is szerepeltek:

Rendszeres az ellentételezés nélküli túlmunka végeztetése...

Nyilvánvaló járandóságokat nem fizetnek ki évek óta a kisrendőröknek...

Ma már szinte csak az lehet rendőri vezető, akinek vagy politikai támogatottsága van, vagy pedig rendőri vezetők rokona, egyenesági leszármazottja.

Miért csodálkozunk azon, hogy amikor törvénytört, hatalmaskodó kiskirály rendőri vezetők jogsértései következmények nélkül maradnak, akkor egyes kisrendőrök is veszik maguknak a bátorságot, hogy törvénytörtéseket kövessenek el?

A magyar rendőrség beosztotti állománya egyre jobban kisemmizett, saját vezető által sok esetben megaláztatott.

A rendőri vezetés ismét tanúbizonyságát adta annak, hogy [...] képtelen pártsemleges és politikailag is semleges módon fenntartani a közrendet. Ismét

⁸³ Szima v. Hungary, no. 29723/11, 2012. október 9-i ítélet.

bebizonyosodott, hogy a rendőrség elsősorban nem az adófizető állampolgárok közrendjének biztosítása, hanem a Magyarországot gazdasági és morális végveszélybe sodró, regnáló politikai vezetők uralmának a fenntartását tartja elsődlegesnek.

A szakmaiatlan, a rendőri eskü szellemétől idegen, nemzetellenes rendőri vezetők által tanúsított magatartások minden eddig tapasztaltnál mélyebb morális szakmai válságba taszították a rendőri állományt és annak társadalmi megbecsülését.

Az Országos Rendőr-főkapitányság vezetője napról napra tanúbizonyosságát adja annak, hogy a rendőrség vezetésénél sokkal jobban ért pajzán versek írogatásához, a Tettrekész Magyar Rendőrség Szakszervezete munkájának akadályozásához, vagy akár egy rendőrségi popzenekar menedzseléséhez, mintsem hogy együttműködjön a rendőrség azon reprezentatív szakszervezetével, amelynek soraiiban legnagyobb arányban találhatók meg az utcai szolgálatot teljesítő közrendőrök.⁸⁴

A fenti idézeteket tartalmazó dokumentumok internetre történő feltöltésével Szima kijelentései a nagy nyilvánosság számára hozzáférhetővé váltak, azokat számos – név szerint is azonosítható – rendőr olvasta. Az emiatt indult büntetőügyben a Fővárosi Bíróság Katonai Tanácsa 2010. április 29-én folytatólagosan elkövetett bujtogatás vétsége miatt négyszáz napi tétel, napi tételenként 400 forint pénzbüntetésre és lefokozásra ítélte a rendőrtisztet, továbbá kötelezte a nyomozás során felmerült bűnügyi költség viselésére.⁸⁵

A másodfokú eljárásban a Fővárosi Ítéltábla Katonai Tanácsa – az ítéletet megváltoztatva – kétrendbeli folytatólagosan elkövetett bujtogatás vétségének minősítette a cselekményt, egyéb vonatkozásban azonban helybenhagyta az elsőfokú ítéletet. A terhelt és védője által benyújtott felülvizsgálati indítvány nem vezetett eredményre, ezért 2011. április 28-án – a kifejezés szabadságához való jog sérelmére hivatkozva – kérelemmel

⁸⁴ A magyar bíróság által vizsgált megnyilvánulásokat nem tartalmazza teljeskörűen az ítélet.

⁸⁵ A Büntető Törvénykönyvről szóló, akkor hatályos 1978. évi IV. törvény 357. § (1) bekezdése értelmében az a büntető anyagi jogi értelemben katonának minősülő személy, aki társai között az előjáró, a parancs vagy általában a szolgálati rend vagy a fegyelem iránt elégedetlenséget szított – bujtogatás vétsége miatt – egy évig terjedő szabadságvesztéssel volt sújtható.

fordultak az EJEB-hez. Kifogásolták, hogy a magyar hatóságok nem tették lehetővé Szima számára kijelentései valóságtartalmának bizonyítását, ami - álláspontjuk szerint - sértette a tisztességes eljáráshoz való jog EJEE-ben rögzített követelményét.

4.6.2. A döntés

A bíróság megállapította, hogy a kifogásolt intézkedés a kérelmező véleménynyilvánításhoz való jogába történt beavatkozásnak minősül, ami csak akkor lehet jogszerű, ha a megszorítás az EJEE-ben – a korlátozás lehetséges okai között – felsorolt társadalmi érdekek érvényesítésére irányult. Emellett rögzítette azt is, hogy a rendőrtisztet törvényben meghatározott büntetőjogi rendelkezés alapján ítélték el bujtogató vétségének elkövetése miatt, amely bűncselekmény védett jogi tárgya a szolgálati rend és a fegyelem. Ebből adódóan a döntés a rendvédelmi testületen belüli zavargás és bűncselekmény megakadályozásaként értékelhető, azaz legitim célt szolgált (22–24. pont).

Az eljáró tanács mindezekre tekintettel kizárólag azt vizsgálta érdemben, hogy a beavatkozás igazolására felhozott indokok relevánsak és elégségesek voltak-e, valamint a megtett intézkedés arányban állt-e az elérni kívánt törvényes céllal. A kamara kifejtette, hogy a véleménynyilvánítás joga a katonákhoz hasonlóan a rendőröket is megilleti, azonban a rendvédelmi szervek rendeltetés szerinti feladatainak ellátása nem szavatolható olyan jogszabályok nélkül, amelyek a hatékony működést biztosító fegyelem aláásásának megakadályozását célozzák (25. pont).

A kérelmező szakszervezeti vezetői minőségével összefüggésben a testület rámutatott, hogy az érdekvédelmi tevékenységet folytató szervezetek csak akkor tölthetik be rendeltetésüket, ha a munkavállalók élet- és munkakörülményeinek javítását célzó javaslataikat szabadon kifejezésre juttathatják. E jog szabad gyakorlása érdekében a szerződő államoknak biztosítaniuk kell, hogy a szakszervezeti tisztségviselőket – aránytalan büntetésekkel – ne tántorítsák el érdekképviselői tevékenységük folytatásától. A munkaviszonnyal kapcsolatos érdekek előmozdítása, megvédése az ítélet indokolása szerint közérdek, ezért az erre irányuló megnyilvánulások korlátozására csak szűk körben van lehetőség (28. pont). Az EJEE vonatkozó rendelkezései azonban ez esetben sem garantálják a véleménynyilvánításhoz való jog gyakorlásának

korlátlanlanságát. Ha a szerződő állam a megszorítás kellő indokát adja, a döntés pedig összhangban áll az ítélkezési gyakorlattal, a zavargás – jelen esetben a rendőrség működését veszélyeztető engedetlenség – megelőzésével kapcsolatos ügyekben erős érvek szükségeltetnek a nemzeti hatóságok döntésének felülbírálásához (29. pont).

Az EJB meglátása szerint a konkrét ügyben – ezen általános elvek figyelembevételével – a kérelmező véleménynyilvánításhoz való jogát kellett egyensúlyba hozni a szolgálati jogviszonyából fakadó kötelezettségeivel. A tanács megjegyezte, hogy az eljárás alapjául szolgáló kijelentések között van olyan, amely munkajogi kérdésekkel, így a rendőrségi munkavállalóknak - köztük a szakszervezet tagjainak - járó, ki nem fizetett járandóságokkal foglalkozik, azonban a kérelmező a testület vezető tisztségviselőinek tevékenységét is visszatérően kritikával illette, az állampolgárok megvetésével és politikai érdekek kiszolgálásával vádolva őket. A kamara meglátása szerint ez utóbbi megnyilatkozások túlmutatnak a szakszervezeti tisztségviselők által végzett érdekérvényesítő tevékenységen, ugyanis nem a munkavállalók élet- és munkakörülményeinek javítását célozták. Így e kijelentéseket nem a szólásszabadságnak a szakszervezeti tisztségviselőket megillető különös aspektusából, hanem annak általános nézőpontjából vizsgálta. Ezzel összefüggésben rámutatott, hogy a véleménynyilvánításhoz való jogot – az egyesülési szabadsághoz hasonlóan – a szerződő államok azzal a megszorítással kötelesek tiszteletben tartani, hogy annak a rendvédelmi testületek hivatásos állományába tartozó személyek általi gyakorlását az EJE-ben írtak szerint korlátozás alá vethetik. Ez azonban nem érintheti a jog lényegi tartalmát, így a restriktív rendelkezéseket szorosan kell értelmezni (31. pont).

A kiszabott büntetés arányosságának elemzése során a bíróság úgy ítélte meg, hogy az érdekvédelmi tevékenység körébe eső kijelentések szankcionálása nehezen egyeztethető össze a szakszervezeti tisztségviselőket megillető jogosultságokkal. Megjegyezte továbbá, hogy az országos rendőrfőkapitányra vonatkozó dehonesztáló kijelentések értékítéletnek minősülnek, így az EJE vonatkozó rendelkezése alapján magas szintű védelmet élveznek. Az ítéletben konkrétan meg nem jelölt egyes állítások kapcsán az eljáró tanács kíváncsúnak tartotta volna, ha a büntetőeljárást lefolytató bíróságok lehetőséget biztosítanak a valóság bizonyítására. Abban az esetben, ha a kérelmezőt kizárólag ezek alapján

ítélték volna el, ennek elmaradása – az ítélet indokolása szerint – már önmagában is kétségeket ébresztene az alkalmazott szankció jogszerűségét illetően.

Azonban a rendőrség vezető tisztségviselőinek tevékenysége kapcsán megfogalmazott kritikák vonatkozásában a kamara osztotta a magyar bíróság álláspontját. Elfogadta, hogy ezek a megnyilvánulások, különösen a rendőrségi vezetőket politikai részrehajlással, túlkapásokkal, szakmai dilettantizmussal és nepotizmussal vádoló állítások, kikezdhetnék az elöljárói intézkedések legitimitását, így engedetlenséget kelthettek. Ezen az sem változtat, hogy a kijelentések túlnyomórészt értékítéletnek minősültek, különös tekintettel arra, hogy a kérelmező nem hozott fel bizonyítékokat nyilatkozatai ténybeli alapjának alátámasztására.

A bíróság megítélése szerint a lojalitás, valamint a rendőri vezetők intézkedéseinek törvényességébe vetett bizalom megőrzése és fenntartása kiemelt jelentőséggel bír. Az alezredesi rendfokozattal rendelkező kérelmező rendőrtisztként és szakszervezeti vezetőként – egyebek mellett az általa képviselt érdekvédelmi szervezet honlapjának ellenőrzésével – jelentős befolyást gyakorolt az egyesület tagjaira, sőt a rendvédelmi testület állományába tartozó más személyekre is. Így a véleménynyilvánításhoz való jogának gyakorlása során – jogállásából fakadó felelősségéhez mérten – a rendőrség működését meghatározó fegyelem speciális követelményére is figyelemmel kellett volna lennie, még a rendvédelmi testületen belüli átláthatóságot és szakmaiságot, továbbá a jogszabályok tiszteletben tartását célzó bírálat lehetővé tételéhez fűződő társadalmi érdekekkel szemben is.

Az eljáró tanács megjegyezte, hogy a kérelmezőnek szolgálati jogviszonya létesítésekor tisztában kellett lennie vállalt hivatása sajátosságaival, így a véleménynyilvánításhoz való jogát érintő korlátozásokkal. E körben jelentősége van annak is, hogy a szolgálati jogviszonyra vonatkozó speciális szabályok nem kívánták meg a kérelmezőtől, hogy hivatását meggyőződése ellenében gyakorolja (32. pont). A fegyelemnek a rendőri vezetésbe vetett bizalmat és az elöljárók hitelességét aláásó, vádaskodó vélemények szankcionálásával történő fenntartása nyomós társadalmi szükséglet, így a büntetőeljárást lefolytató bíróságok által ennek igazolására felhozott indokok kellőképpen alátámasztottak, különösen a kérelmezővel szemben alkalmazott relatíve enyhe szankciókra figyelemmel. Erre tekintettel a kamara úgy ítélte meg, hogy nem sértették meg a

kérelmezőnek az EJEE által biztosított jogát a véleménynyilvánításhoz és a tisztességes eljáráshoz.

Az EJEB a kérelem elbírálása során felismerte, hogy a rendőrök és a katonák szolgálati kötelezettségei és életviszonyai – jogállásuk lényegében azonos voltára figyelemmel – nagyfokú hasonlóságot mutatnak.⁸⁶ Ezért az ügyben meghozott döntés érdemét tekintve a rendvédelmi testületekre is kiterjesztette a szerződő államokat a fegyelem, a szolgálati rend és a szolgálati tekintély aláásását célzó megnyilvánulások és azok állományon belüli terjesztésének megakadályozása terén megillető jogokat.

4.7. A Jokšas v. Lithuania ügy⁸⁷

4.7.1. A tények

A „Kauno Diena” című litván napilapban 2006. március 1-jén „Háború alkotmányos jogok nélkül” címmel megjelent cikkben a balti állam hadseregének kötelékébe tartozó Alvydas Jokšas kritikával illette a parlament által pár hónappal azelőtt – csaknem egyhangúlag – elfogadott katonai fegyelmi szabályzatot. A nagy nyilvánosság előtt kifejtett véleménye szerint az új norma nem biztosítja megfelelő módon az érintettek védelemhez, védekezéshez való jogát, ugyanis az eljárás alá vont személyek nem ismerhetik meg az ügyükben készített vizsgálati jelentések tartalmát, és a jogorvoslati eljárás során korlátozott a jogi képviselet igénybevételének lehetősége. Ennek alapján kijelentette, hogy a jogszabályt nem tekinti kötelező hatályúnak magára nézve, és javaslatot tett a köztársasági elnöknek, hogy azt ne írja alá.

A honvédelemért felelős minisztérium megítélése szerint a megnyilvánulás veszélyt jelenthetett a szolgálati rendre és a haderő fegyelmi helyzetére, ezért intézkedett az eset kivizsgálásáról. Ennek eredményeként azonban arra a következtetésre jutottak, hogy nem történt fegyelemsértés, ezért az eljárást megszüntették. 2006. március 3-án a lap „A kritika haragra gerjeszti a minisztériumot” címmel új cikket közölt, amelyben Jokšas – a fegyelmi eljárás megindítását illető bírálata mellett – sajnálatát fejezte ki amiatt, hogy

⁸⁶ *Katonai életviszonyok* alatt a továbbiakban a rendvédelmi testületek kötelékébe tartozó személyek munkakörülményeit is értem, mivel azok alapja szintén a fegyelem, valamint a szolgálati és függelmi rend.

⁸⁷ Jokšas v. Lithuania, no. 25330/07, 2013. november 12-i ítélet.

a köztársasági elnök végül nem fogadta meg a tanácsát, és a jogszabály a kifogásolt tartalommal lépett hatályba. A későbbi nyugállományba helyezett katona álláspontja szerint szerződésben vállalt szolgálati idejét korábbi kijelentései miatt nem hosszabbították meg, ezért felülvizsgálati eljárást kezdeményezett. Miután jogorvoslati kérelmét mind az első-, mind a másodfokon eljáró közigazgatási bíróság elutasította, véleménynyilvánításhoz való joga megsértésének megállapítását kérte az EJEB-től.

4.7.2. A döntés

Az eljáró tanács ebben az ügyben is utalt rá, hogy a véleménynyilvánítás joga a katonákat is megilleti, azonban annak gyakorlása a hadsereg rendeltetés szerinti feladatainak ellátását biztosító fegyelemre valós veszélyt jelentő megnyilvánulások esetén korlátozható. A hatékony működés ugyanis olyan jogi normákat feltételez, amelyek megakadályozzák az ez ellen ható cselekményeket. Mindazonáltal a szerződő államok e szabályokra hivatkozva nem tilthatnak meg mindennemű véleménynyilvánítást, így például a honvédség mint intézmény ellen irányuló kijelentések - a testület vélekedése szerint - nem alapozhatják meg a megszorításokat (70. pont).

A kamara rámutatott, hogy a cselekmény kivizsgálása érdekében indított eljárást fegyelemsértés hiányában szüntették meg, ezért a kérelmező ezzel összefüggésben nem hivatkozhat a kifejezés szabadságának megsértésére. Erre tekintettel abban a kérdésben kellett állást foglalni, hogy Jokšas szolgálati viszonyát a jogszabályban meghatározottak szerinti nyugdíjkorhatár elérésére vagy nyilatkozataira tekintettel szüntették-e meg (71. pont). A bíróság kifejtette, hogy a véleménynyilvánítás miatti felelősségre vonás a kifejezés szabadságának korlátozását jelenti, azonban a vizsgált esetben nem merült fel arra vonatkozó adat, hogy Jokšas megnyilvánulásai és a kifogásolt intézkedés összefüggésben állnak egymással.

A kritikus vélemények közzétételét követően nem vezettek be olyan intézkedéseket, amelyek ellehetlenítették volna a kérelmező további foglalkoztatását, és az előjárói sem tettek olyat, ami arra utalt, hogy a kijelentései miatt nem hosszabbították meg a szolgálati idejét. Megállapítható volt továbbá, hogy a litván haderőnél általános gyakorlat a szolgálati jogviszony megszüntetése a nyugdíjkorhatár elérésekor (72.

pont). Egyes speciális beosztást betöltő katonák, így például a kódfejtők esetében eltértek ettől, azonban a kérelmező nem tartozott e személyi körbe (73. pont). Mindezek alapján a bíróság kimondta, hogy nem sértették meg a kérelmező véleménynyilvánításhoz való jogát.

4.8. A Soares v. Portugal ügy⁸⁸

4.8.1. A tények

A Portugáliában található Arganil csendőrsén 2009 őszén az a szóbeszéd terjedt, hogy a parancsnok elsikkasztotta annak a pénznek egy részét, amelyet az állomány karácsonyi bankettjének megszervezésére kaptak az előjáróságtól. Bár a rendezvényen a szervezeti egység vezetőjén kívül csak egy személy volt jelen, az eseménynek helyt adó étterem vezetője a költségkeret egészét kitevő összegről állított ki számlát. A híresztelés szerint a parancsnok – családja társaságában – később visszatért a vendéglőbe, ahol a különbözetet levonták a fogyasztásuk árából.

A híresztelések a góisi csendőrőrs állományába tartozó António A. M. Soares szakaszvezetőhöz is eljutottak, aki 2009. november 7-én a történetek kivizsgálását kérte. Az állami szervezetek belső ellenőrzését végző főfelügyelőségnek címzett levelében megjegyezte, hogy értesülései az ott szolgálatot teljesítő kollégáitól származnak, akik az esetleges retorzióktól tartva nem mernek intézkedni. Emiatt maga is kérte, hogy bejelentését – a testülettel fennálló jogviszonyára tekintettel – kezeljék bizalmasan. Beadványát később továbbították a csendőrség főparancsnokságának és a lousai ügyészségnek, de az ennek eredményeként lefolytatott eljárások során nem találtak pénzügyi visszaélésre utaló bizonyítékot. A megalapozatlan állítások miatt ugyanakkor – a bejelentő felelősségének kivizsgálása érdekében – büntető- és fegyelmi eljárást rendeltek el.

A büntetőügyben – a portugál büntető törvénykönyv 180. cikk (1) bekezdésébe ütköző rágalmazás minősített esetének elkövetése miatt – 720 euró összegű pénzbüntetésre ítélték, valamint a sértett kártérítési igényének helyt adva 1000 euró megfizetésére kötelezték.⁸⁹ A döntést a

⁸⁸ Soares v. Portugal, no. 79972/12, 2016. június 21-i ítélet.

⁸⁹ A vonatkozó törvényi rendelkezések szerint az, aki hivatalos személyről más előtt annak becsületét vagy jó hírnevét sértő tényről állít vagy arra közvetlenül utaló kifejezést használ, még abban az esetben is, ha cselekménye kizárólag az ilyen jellegű

másodfokon eljáró bíróság – annak helyes indokaira tekintettel – helybenhagyta. A fegyelmi eljárás során azt rótták Soares szakaszvezető terhére, hogy a szolgálati utat megkerülve tett bejelentést a tudomására jutott információkról, így kötelességszegés miatt hat nap tartamú foglalkozástól eltúttással sújtották, amelynek végrehajtását 12 hónapra felfüggesztették. Az érintett úgy ítélte meg, hogy az intézkedések sértették a véleménynyilvánításhoz való jogát, ezért ennek megállapítása érdekében kérelmet terjesztett elő az EJEB-nél.

4.8.2. A döntés

A testület általánosságban kifejtette, hogy a kifejezés szabadsága – más munkavállalókhoz hasonlóan – a közsférában dolgozó személyeket is megilleti, azonban annak gyakorlása során tiszteletben kell tartaniuk a munkáltató felé fennálló sajátos kötelezettségeiket. Ebből adódóan a munkahelyi szabálytalanságokkal kapcsolatos adatokat – a lojalitás és a diszkréció fokozott követelményére tekintettel – csak akkor hozhatják nyilvánosságra, ha a probléma orvoslása érdekében felettesük vagy más kompetens személy/szerv irányába megtett intézkedésük nem vezetett eredményre (39–41. pont). A hivatalos személyek által elkövetett közpénzeket érintő visszaélések megakadályozása és kivizsgálása fontos társadalmi érdek, így az erre irányuló bejelentések kiemelt védelmet élveznek, feltéve, hogy a közölt információk ténybelileg megalapozottak (44. és 49. pont).

A konkrét ügyet vizsgálva az eljáró tanács megállapította, hogy a kérelmező az arganili őrsparancsnok cselekvőségére vonatkozó tényállításokat fogalmazott meg, amelyeket nem támasztott alá bizonyítékokkal. Utalt továbbá arra, hogy a közpénzekkel való visszaélés vádja különösen súlyos állítás a rendvédelmi szervezetek állományába tartozó személyekre nézve, és alkalmas a róluk, de még inkább a testületről kialakított pozitív kép lerombolására (46. pont). A bíróság meglátása szerint a kérelmező tisztában volt azzal, hogy értesülései kizárólag

megnyilvánulás megismétlésében áll, kilenc hónapig terjedő szabadságvesztéssel vagy legfeljebb 3240 euró összegű pénzbüntetéssel sújtható. Ha az elkövető nem tesz eleget a nyilvánosságra hozott információ ellenőrzésére vonatkozó kötelezettségének, nem hivatkozhat arra, hogy jóhiszeműen járt el.

szóbeszédeken alapulnak, ezért nem ellenőrizte azok hitelességét a bejelentés megtétele előtt (47. pont).

Ítéletének indokolásában rámutatott, hogy a tudomására jutott információkat a csendőrség hierarchikus felépítése által meghatározott eljárási rendnek megfelelően előjáróinak, azaz a góisi csendőrőrs parancsnokának vagy a kerületi csendőrparancsnokság vezetőjének kellett volna jelentenie, aminek az elmulasztásával megfosztotta őket az eset kivizsgálásának lehetőségétől (48. pont).⁹⁰ A kiszabott büntetések kapcsán a kamara rögzítette, hogy azok – a kérelmező súlyos állításaira és az okozott kárra figyelemmel – nem tekinthetők aránytalannak, különösen mert a vonatkozó törvényi rendelkezések alapján sokkal súlyosabb büntetést is kiszabhattak volna (50. pont). Mindezek alapján úgy találta, hogy a kérelmező véleménynyilvánításhoz való jogát – mások jó hírneve védelmének érdekében – korlátozó intézkedések alátámasztására felhozott indokok helytállóak és elegendők voltak, így a beavatkozás nyomós társadalmi szükségleten alapult (51. pont). Ennek megfelelően az EJEE vonatkozó rendelkezéseit nem sértették meg.

5. Az eseti döntések elvi jellegű megállapításai

A szólásszabadság és a hon- és rendvédelmi szervezetek rendeltetésszerű működését biztosító követelmények érvényesülése közti egyensúly megteremtése, mint láthattuk, csak esetről esetre haladva, az állomány önkifejezéshez való joga, valamint a demokratikus közélet kialakulásához és fenntartásához fűződő társadalmi érdek, továbbá a katonai életviszonyok sajátosságainak egyidejű figyelembevételével lehetséges. Az ismertetett döntések alapján megállapítható, hogy az ügyek egyedi körülményeinek mérlegelése során – az EJEE vonatkozó rendelkezései mellett – az ítélezési gyakorlatban kimunkált jogelvek is kiemelt

⁹⁰ Az EJEB ezzel egyező álláspontra helyezkedett a Guja kontra Moldova ügyben is (no. 14277/04, 2008. február 12-i ítélet), amikor egy közintézmény működésével összefüggésben kifejtette, hogy a sérelmesnek tartott intézkedéssel kapcsolatos információk csak akkor hozhatók nyilvánosságra, ha a munkavállaló a felettesével vagy személlyel, vagy szervvel már tudatta ezeket, ám ez nem vezetett eredményre (73. pont). Lásd részletesen ZACCARIA Márton Leó: Szabadság vagy felelősség? Munkavállalói véleménynyilvánítás emberi jogi nézőpontból. In PÁL Lajos (szerk.): *A véleménynyilvánítás szabadsága és korlátai a munkajogviszonyban. A Magyar Munkajogi Társaság 2021. június 23-i vitatülésén elhangzott előadások, hozzászólások*. Budapest, HVG-ORAC, 2021, 156–159.

jelentőséggel bírnak. A fegyveres testületeknél szolgálatot teljesítő egyének véleménynyilvánításhoz való jogának korlátozhatósága kapcsán a bíróság által megfogalmazott, így a nemzeti hatóságok számára is zsinórmértékül szolgáló iránymutatások az alábbiak szerint összegezhetők:

- Az EJEB hatálya e speciális alanyokra ugyanúgy kiterjed, mint a szerződő államok joghatósága alá tartozó bármely más személyre, azonban annak alkalmazása során az őket terhelő különleges kötelezettségekre és felelőssége is figyelemmel kell lenni.⁹¹
- A szólásszabadság a hadsereg vagy a rendvédelmi feladatokat ellátó állami szervek rendjének, politikai semlegességének megőrzése és fenntartása érdekében történő korlátozása az EJEE alkalmazása szempontjából legitim célnak minősül.⁹²
- A véleménynyilvánítás joga a katonaság, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási testület állományát is megilleti, azonban annak gyakorlása az e szervezetek hatékony működésre nézve valós veszélyt jelentő – különösen a fegyelem, a szolgálati rend és a szolgálati tekintély aláásását célzó – megnyilvánulások megakadályozása érdekében korlátozásoknak és szankcióknak vethető alá.⁹³
- A bírálatok, kritikai észrevételek kifejezésre juttatását a demokratikus államok fegyveres egységeinél éppúgy tolerálni kell, mint azon társadalmak keretein belül, amelyeket szolgálnak.⁹⁴
- A honvédséget és a rendvédelmi szerveket általánosságban véve bíráló kijelentések önmagukban nem szolgáltatathatnak elegendő alapot megszorító intézkedések alkalmazásához.⁹⁵
- Az e testületek rendellenes működésével kapcsolatos információkat a kötelékükbe tartozó személyek – a lojalitás és diszkréció fokozott követelményére tekintettel – csak akkor hozhatják nyilvánosságra, ha a probléma orvoslása érdekében az előjáróik irányába megtett intézkedésük nem vezetett eredményre.⁹⁶

⁹¹ Engel (68. lj.) 54. és 100. pont; Hadjianastassiou (75. lj.) 46. pont.

⁹² Engel (68. lj.) 98. pont; Rekvényi (60. lj.) 41. pont.

⁹³ Uo. 100. pont; Vereinigung demokratischer Soldaten Österreichs (76. lj.) 36. pont; Grigoriades (78. lj.) 45. pont; Rekvényi (60. lj.) 26. pont; Szima (83. lj.) 25. pont; Jokšas (87. lj.) 70. pont.

⁹⁴ Vereinigung demokratischer Soldaten Österreichs (76. lj.) 38. pont.

⁹⁵ Grigoriades (78. lj.) 45. pont; Jokšas (87. lj.) 70. pont.

⁹⁶ Grigoriades (78. lj.) 46–47. pont; Soares (88. lj.) 39–41. és 48. pont.

- Akik bajtársaikra beosztásukból, rendfokozatukból vagy választott tisztségükből adódóan befolyással lehetnek, véleménynyilvánításhoz való joguk gyakorlása során különös figyelmet kötelesek fordítani a fegyelem megtartásának követelményére, még a szakmaiságot, az átláthatóságot és a jogkövetést célzó bírálat lehetővé tételéhez fűződő társadalmi érdek ellenében is.⁹⁷
- Az állomány magasabb beosztást betöltő vagy rendfokozattal bíró tagjai fokozott felelősséggel tartoznak a minősített adatok megőrzéséért.⁹⁸

6. Az ítélezési gyakorlat értékelése

Az EJEB már a vizsgált jogkérdést felvető első ügyeiben felismerte, hogy a hon- és rendvédelmi testületek állományába tartozó személyek véleménynyilvánításhoz való joga összeütközésbe kerülhet a szabadságjog korlátozásának lehetséges okai között számontartott társadalmi érdekekkel. Ebből kiindulva a konkrét esetekben felmerülő kollízió feloldásakor – az egyedi körülmények mérlegelésével – abban kell állást foglalnia, melyiket részesíti előnyben: a kifejezés szabadságát, vagy a fegyveres szervezetek hatékony, politikai befolyástól mentes működéséhez fűződő közösségi igényt.

A kérelmek elbírálása során a bírói fórum egyre több szempontot értékel, ami a kérdéskör árnyaltabb, differenciáltabb megközelítését eredményezte. Általánosságban azonban elmondható, hogy a szólásszabadság korlátozására csak a hadsereg, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási szervezet rendeltetés szerinti feladatainak ellátását ténylegesen veszélyeztető megnyilvánulások esetén lát lehetőséget. Mindazonáltal a jogtárgy fenyegetettségének és ezzel együtt a megszorítások szükségességének megítélése kapcsán alkalmazott mérce korántsem tekinthető egységesnek. A kiindulópontot jelentő Engel és társai ügyben az eljáró tanács elegendőnek tartotta az absztrakt veszélyhelyzet meglétét, azonban Gubi cselekményének elbírálása során ennél továbbmenve már csak az engedetlenségre és erőszakra sarkalló kijelentések esetén látta volna igazolhatónak az alapjog korlátozását.

⁹⁷ Szima (83. lj.) 32. pont.

⁹⁸ Hadjianastassiou (75. lj.) 46. pont.

A Szima kérelme alapján indult eljárás ugyanakkor ismét abba az irányba mutat, hogy a kifejezés szabadságát érintő beavatkozások már a hon- és a rendvédelmi testületek rendeltetésszerű működését közvetett módon, károsan befolyásoló gondolatok kifejezésre juttatása esetén is jogszerűek lehetnek. Az ítélkezési gyakorlat bizonytalanságából adódóan indokoltnak tűnik megvizsgálni, hogy a fegyveres szervezeteknél szolgálatot teljesítő személyek véleménynyilvánításhoz való jogának korlátozhatósága tárgyában lefolytatott eljárások során valamennyi releváns körülményt figyelembe vettek-e, és az egyes döntések hibáinak elemzése sem mellőzhető.

6.1. A katonai életviszonyok érzelmi alapja és annak védelme

A körülöttünk zajló eseményeket énünk folyamatosan értékeli, aminek eredményeként – velünk született tulajdonságaink, neveltetésünk, ismereteink és aktuális lelkiállapotunk függvényében – egyes történéseknek jelentőséget tulajdonítunk, míg mások anélkül enyésznek el elménkben, hogy bármiféle hatást gyakorolnának ránk. Az előbbieket jellemzően érzelmeket: szeretetet, örömet, boldogságot, nyugalmat, bátorságot, utálatot, bánatot, szomorúságot, haragot, félelmet stb. váltanak ki belőlünk, azonban kellő intenzitásuk esetén cselekedetekre is ösztönözhetnek.⁹⁹ Bár élményeinkhez – a felsorolásból láthatóan – a lehető legkülönbözőbb módokon viszonyulhatunk, egy jelenség megítélése voltaképpen kétféle lehet: kedvező vagy kedvezőtlen.

E körülmények jogi szempontból is jelentőséggel bírnak, ugyanis tetteinket és ezzel együtt viselkedésünket a fiziológiai és lelki szükségleteinken túl a benyomásaink és az egyes tárgyakkal, személyekkel, csoportokkal, intézményekkel, valamint eszmékkel kapcsolatos viszonyulásunk határozza meg.¹⁰⁰ Az érzelmeink és a képzetek emberi cselekedetekre gyakorolt hatása a katonai életviszonyokhoz hasonló speciális helyzetekben kiváltképp megmutatkozik, ezért vizsgálódásunk során ezek értékelését sem mellőzhetjük. Amint arról a korábbiakban már szó esett, a hadsereg, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási szervezet kötelékébe tartozó

⁹⁹ Vö. Rita L. ATKINSON et al.: *Pszichológia* (ford. Boross Ottilia et al.). Budapest, Osiris, 2005, 417–419.

¹⁰⁰ Uo., 704–706.

személyekre sajátos, a munkavállalók alapvető kötelezettségein túlmutató terhek hárulnak, ugyanis szolgálati feladataikat

- magukat az állam és a társadalom érdekeinek alárendelve,
- szigorú fegyelmi és függelmi rend által meghatározott keretek között,
- önfeláldozásig terjedő bátorsággal,
- egyes alapvető jogok, köztük a véleménynyilvánításhoz való jog korlátozásának elfogadásával,
- befolyástól mentesen,
- egyenruhában és fegyverrel vagy más kényszerítő eszközzel felszerelve

teljesítik.

A katonai vagy a rendvédelmi pályát választóknak készen kell állniuk arra, hogy eleget tegyenek ezen elvárásoknak. Erre azonban rendszerint csak azok képesek, akik nem táplálnak magukban antimilitarista érzéseket, így a hivatásos szolgálati jogviszony létesítése és fenntartása – annak önkéntességéből adódóan – a fegyveres testületek iránti pozitív vagy legalább semleges viszonyulást feltételez.¹⁰¹ Ez az attitűd képezi a katonai életviszonyok jogilag szabályozott rendjének érzelmi alapját, ami biztosítja a munkaköri kötelezettségek teljesítését és ezzel együtt a hon- és a rendvédelmi szervezetek rendeltetésszerű működését.

Szolgálatteljesítés során az állomány tagjait folyamatosan benyomások érik, amelyek közül a kedvezők erősítik, míg a kedvezőtlenek gyengítik, sőt egy ponton túl meg is szüntethetik a munkavállalói elköteleződést.¹⁰² A negatív lelki történések a munkavégzésre is károsan hatnak: csökkenthetik a feladatellátás színvonalát, szélsőséges esetben pedig az irányítási és az ellenőrzési jogkört gyakorló személyekkel és az általuk kiadott

¹⁰¹ Ennek hiányában ilyen jellegű elköteleződés még – a más foglalkoztatási jogviszonyokhoz képest biztosított esetleges előnyökön (például magasabb szintű társadalombiztosítási és egészségügyi ellátás, lakhatási támogatások stb.) alapuló – megegyezésszerű, feltételes vállalással sem jöhet létre. Vö. CSIRSZKA János: *A személyiség munkatevékenységének pszichológiája*. Budapest, Akadémiai, 1985, 301. A megállapítás a polgári szolgálat lehetővé tételére figyelemmel a sorkatonai állományra is igaz.

¹⁰² Az előbbiekre lehet példa az eredményes intézkedések miatti sikerélmény, az előléptetés, az anyagi vagy az erkölcsi elismerés, az utóbbiakra pedig a szolgálat ellátása során keletkezett testi és lelki sérülések, valamint a felszerelés vagy az ellátás esetleges hiányosságai.

utasításokkal való szembehelyezkedéshez, azaz engedetlenséghez vezethetnek. E jelenségek a katonák és a rendvédelmi feladatokat ellátó személyek esetében rendkívül súlyos következményekkel járhatnak, ugyanis az állam szuverenitásának, területi épségének és határainak megőrzéséhez, a nemzetbiztonsági érdekek érvényesítéséhez, továbbá a közbiztonság és a közrend fenntartásához fűződő társadalmi érdekek sérelmét eredményezhetik.

Ebből következően a katonai életviszonyokat meghatározó fegyelem, a szolgálati és függelmi rend iránti kedvezőtlen érzelmek felkeltésére törekvés vagy az annak előidézésére alkalmas más tevékenységek különösen veszélyesek a fegyveres szervezetek rendeltetés szerinti feladatainak ellátására nézve, ezért azokat indokolt – legvégső esetben akár a büntetőjog eszközeivel is – megakadályozni.¹⁰³ Mindezek alapján az EJEB leginkább vitatható megállapítása, hogy a hon- és rendvédelmi testületeket, illetve konkrétan a hadsereget mint intézményt általánosságban véve bíráló kijelentések nem szolgáltathatnak elegendő alapot az államnyilvánításhoz való jogának korlátozására.

Sajnos a vonatkozó, a Grigoriades és a Jokšas által indított eljárásokban meghozott döntésekből nem derül ki egyértelműen, hogy az eljáró tanácsok miként jutottak erre a következtetésre. Azonban a Vereinigung Demokratischer Soldaten Österreichs és Gubi ügy ítéletének 36. pontjában írtakra történő hivatkozás alapján valószínűsíthető, hogy az EJEB a szólásszabadság terjedelmét meghatározó általános szabályokból indult ki, amelyek mindenki számára biztosítják a kritikai észrevételek megtételének lehetőségét. Amennyiben ez megfelel a valóságnak, rögzíthető, hogy a bíróság a felmerült probléma kapcsán nem vizsgálta a fegyveres szervezetek ellen irányuló megnyilvánulások lehetséges következményeit. Mivel a honvédség és a rendvédelmi testületek iránti viszonyulás kedvezőtlen irányú megváltoztatására és ennek eredményeként a hatékony működés veszélyeztetésére az ilyen jellegű szándékos magatartások is alkalmasak, az EJEB e körben kifejtett álláspontja felülvizsgálatot igényel.

¹⁰³ Schultheisz i. m. (70. lj.) 283.

6.2. A bírálatok és a kritikai észrevételek megtételének lehetősége

A katonai jogrend érzelmi alapjának védelméhez fűződő érdek érvényesülése látszólag kizár minden olyan megnyilvánulást, amely negatívan érintheti a fegyveres szervezeteket vagy azok működését. A szolgálati jogviszonnyal összefüggő intézkedéseket és mulasztásokat, a munkakörülményeket, a foglalkoztatás feltételeit, valamint a munkáltatói döntések tervezeteit érintően az előjárónál vagy a felettesnél előterjesztett – tárgyilagos és konstruktív – nyilatkozatok esetén ugyanakkor kizárható a hon- és a rendvédelmi testületek feladatellátásának veszélyeztetése.¹⁰⁴ Erre tekintettel az EJEB-nek a Vereinigung demokratischer Soldaten Österreichs és Gubi ügyben kifejtett azon megállapítása, amely szerint a katonák sem zárhatók el kritikai észrevételek megfogalmazásától, helytálló, azonban kiegészítést igényel, mivel a kijelentéseknek – a szolgálatellátás zavartalanúsága biztosítása érdekében – konkrét problémák feltárására vagy megoldására kell irányulniuk, és csak a vitatott helyzet rendezésére kompetens személlyel vagy személyekkel közölhetők.¹⁰⁵

6.3. A valóság bizonyítása

A katonák és a rendvédelmi feladatokat ellátó személyek megnyilvánulásai – azok ténybeli megalapozottságától függetlenül – a fegyelem, a szolgálati és a függelmi rend azonnal bekövetkező sérelmével járhatnak. Azonban a káros következmények elhárítását és ezzel együtt a fegyveres testületek rendeltetésszerű működését nem lehet gyakran elhúzódó jogi eljárások bizonytalan kimenetelű eredményétől függővé tenni, ezért a hadsereg, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási szervezet állományába tartozó személyeknek a szolgálattal összefüggő tényállításai kapcsán általában nincs helye a valóság bizonyításának.¹⁰⁶ Ezzel szemben a Szima kérelme alapján indult eljárásban

¹⁰⁴ Vö. Grigoriades (78. lj.) 48. pont; Soares (88. lj.) 48. pont.

¹⁰⁵ Könnyen belátható, hogy az olyan egyoldalú és valóságtartalmukat illetően nehezen ellenőrizhető, a vélt vagy valós hibák orvoslására eszköztelen munkavállalóknak címezett bírálatok, amelyek a Szima-ügy tárgyát képezték, kizárólag indulatok szítására alkalmasak.

¹⁰⁶ A katonai büntetőtörvénykönyvről szóló 1930. évi II. törvénycikk 69. §-a lehetővé tette a valóság bizonyítását az olyan – az előjáró vagy feljebbvaló iránti köteles tisztelet mellőzésében megnyilvánuló – magatartások esetén, amelyek speciális alany hiányában rágalmazásnak vagy becsületsértésnek minősültek volna. A törvényalkotó azonban a

az EJEB úgy foglalt állást, hogy az ítéletben nem konkretizált egyes állítások valóságtartalmának bizonyításának teret kellett volna engedni. Ennek oka szintén abban keresendő, hogy az eljáró tanács nem vette figyelembe a hon- és a rendvédelmi testületek hatékonyságához fűződő társadalmi érdeket, így a bíróság álláspontja e vonatkozásban is helyesbítésre szorul.

6.4. Elégedetlenség vagy engedetlenség?

A Szima ügyében meghozott ítélet legszembeűnőbb hibája egy tárgyi tévedésre vezethető vissza, ugyanis a strasbourgi bíróság – a kérelmezőhöz hasonlóan – helytelenül értelmezte a bujtogatás törvényi tényállását. E bűncselekmény akkor állapítható meg, ha a büntető anyagi jogi értelemben katonának minősülő személy bajtársai között az előjáró, a parancs, a szolgálati rend vagy a fegyelem iránt elégedetlenséget (*discontent*) szít. Ehhez képest az eljáró tanács visszatérően engedetlenségre (*insubordination*) hivatkozott, ami eltérő jogi megítélés alá esik. A bujtogatás azokkal a cselekményekkel szemben kíván védelmet biztosítani, amelyek kimerülnek a védett jogi tárgy közvetett veszélyeztetésében, ugyanakkor alkalmasak a fegyveres szervezetek rendeltetésszerű működését biztosító tényezők aláásására, aminek következtében – az előidézett elégedetlenség talaján – könnyebben valósulhatnak meg súlyosabb függelemsértések. Aki az állomány tagjai között engedetlenséget szít, az nem a bujtogatás tette, hanem adott esetben az egyik legsúlyosabb katonai bűncselekmény, a zendülés felbujtója lesz.¹⁰⁷

Mindezek alapján felmerülhet a kérdés, hogy a bíróság csak a fegyelmet vagy a szolgálati és függelmi rendet közvetlenül veszélyeztető megnyilvánulások esetén tartja jogszerűnek a véleménynyilvánítás jogának korlátozását, vagy az enyhébb megítélésű bujtogatás elkövetési magatartása is megalapozhatja azt. A döntést a vizsgált megnyilvánulások védett jogi tárgyra gyakorolt hatásának figyelembevételével hozták meg,

rendelkezés alól több kivételt is megállapított, amelyek közül kiemelés érdemel, hogy nem volt helye valóság bizonyításának, ha az eljárás alapjául szolgáló megnyilvánulás katonai szolgálati érdeket veszélyeztetett.

¹⁰⁷ A Btk. 442. § (1) bekezdése értelmében a zendülés büntettét az a büntető anyagi jogi értelemben katonának minősülő személy követi el, aki a szolgálati rend és fegyelem ellen irányuló olyan csoportos, nyílt ellenszegülésben vesz részt, amely a szolgálati feladatok teljesítését jelentősen zavarja. Megjegyzést érdemel, hogy a zendülés előkészülete is súlyosabb jogkövetkezményt von maga után, mint a bujtogatás alapesete.

ezért bizonyosnak mondható, hogy az EJEB elégedetlenség szítása esetén is lehetőséget lát a szólásszabadság korlátozására.

6.5. A fegyveres testületek vezetőit érintő megnyilvánulások

A hadsereg, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási szervezet kötelékébe tartozó személyek szigorú függelmi rendben teljesítik köteleiket, aminek alapja a szolgálati felsőbbség által kiadott utasítások végrehajtása. Azonban a parancsadásra jogosult akaratának csak az tudja magát alávetni, aki elfogadja és tiszteli előjáróját, ezért a szolgálati tekintély megőrzésének a katonai jogban különös jelentősége van. Ebből következően az alárendeltek tekintélyértő magatartásait még az az általánosan elfogadott jogelv sem legitimálhatja, hogy a közhatalom letéteményeseivel, köztük a hon- és a rendvédelmi testületek vezetőivel kapcsolatos véleménynyilvánítás köre tágabb, mint más személyeknél.

A Szima-ügyben meghozott ítéletben ezzel ellentétes állásponttal találkozhatunk, ugyanis az országos rendőrfőkapitány becsületét sértő kijelentéseket az EJEB megengedhetőnek tartotta, arra hivatkozva, hogy azok értéktételnek minősülnek, ezért magas szintű védelmet élveznek.¹⁰⁸ Az ítéleti tényállás alapján ugyanakkor megállapítható, hogy a megnyilvánulások az előjáró iránti kedvezőtlen érzelmek felkeltésére irányultak, ami a döntés lényege szerint a bujtogatás elkövetési magatartásaként alapul szolgálhat a véleménynyilvánítás korlátozására. A bíróság határozatában rögzítette azt is, hogy a ténybeli alapokat nélkülöző, túlzó vélemények túlmutatnak a kifejezés szabadságának határain, az országos rendőrfőkapitányt negatív színben feltüntető kijelentések kapcsán mégsem tulajdonított jelentőséget annak, hogy Szima semmivel sem támasztotta alá állításait. Mindezekre figyelemmel a határozat vonatkozó részének megalapozottsága iránt erős kételyek támadhatnak.

7. Összegzés

Az EJEE 10. cikk 1. bekezdése kimondja, hogy mindenkinek joga van a véleménynyilvánítás szabadságához. Ez szubjektív oldalról annyit jelent, hogy véleményét, állásfoglalását, kritikáját, érzéseit, gondolatait és az általa ismert adatokat bárki szabadon kifejezésre juttathatja, míg objektív

¹⁰⁸ Szima (83. lj.) 32. pont.

oldalról az állam kötelességét írja elő annak vonatkozásában, hogy biztosítsa a demokratikus közvélemény mint alapvető politikai intézmény kialakulásának és működésének feltételeit. A véleménynyilvánításhoz való jog tehát egyfelől egyéni szabadságjog, másfelől a demokratikus államok működéséhez elengedhetetlenül szükséges politikai alapjog, szinte minden más alapvető jog érvényesíthetőségének mellőzhetetlen eszköze. Kitüntetett szerepe ugyan nem jelenti a kifejezés szabadságának abszolút voltát, mindenképpen azzal jár, hogy ezen alapjognak csak igen kevés esetben kell engednie. Erre a gyakorlatban általában akkor szokott sor kerülni, ha a korlátozás alapjául szolgáló érdeksérelem különösen súlyos.

A demokratikus jogrendszerek a szólásszabadsággal szembeállítható érdekek négy csoportját szokták megkülönböztetni:

- az állam érdekei, azaz az alkotmányos rend védelme, az állam külső és belső biztonsága, a közjogi tisztségviselők és az állami szimbólumok védelme – az ezekkel kapcsolatos megnyilvánulások jelentik a véleménynyilvánítás politikai dimenzióját, ami a demokratikus közvélemény kialakulásának és működésének nélkülözhetetlen feltétele;
- a társadalom egészének érdekei, így a köznyugalom, a közegészség és a közérkölcse védelme;
- egyes társadalmi csoportok érdekeinek védelme a faji, vallási vagy nemi alapú diszkriminációt jelentő megnyilvánulások ellen, amelyek egyik végletes megnyilvánulása a gyűlöletbeszéd;
- az egyéni becsület, ami a méltóság és a magánszféra védelmét jelenti.

A felosztásnak megfelelően a véleménynyilvánításhoz való jog korlátozhatóságának terjedelme is különbözik – legkisebb mértékben az állam érdekében, legszélesebb körben pedig a magánszféra védelmében korlátozható.

Az állam érdekein belül el kell különítenünk egy olyan speciális kört, amelyet a korlátozás lehetséges okai és céljai között az EJEE 10. cikk 2. bekezdése is számba vesz. Az ország függetlenségének, területi épségének, határainak, valamint törvényes rendjének védelme, a közbiztonság és a közrend fenntartása, vagy – részben ezek által – az emberek sérthetetlen és elidegeníthetetlen alapvető jogainak védelme az állam kötelessége, amit a hon- és a rendvédelmi szervezetek fenntartásával és működésével biztosít. Ezek hatékonyságáról azonban kizárólag akkor beszélhetünk, ha egységes irányítás alapján működnek, soraikban pedig fegyelem és szigorú

szolgálati és függelmi rend uralkodik, ami együtt jár a hon- és a rendvédelmi testületek kötelékébe tartozó személyek egyes alapjogainak – köztük a szólás szabadságának – részleges, ám aránytalan érdeksérelmet nem eredményező korlátozásával.

Az EJEB több alkalommal is vizsgálta a katonák és a rendvédelmi feladatokat ellátó személyek véleménynyilvánításhoz való jogának határait, aminek eredményeként több elvi jelentőségű megállapítást tett. Ezek közül a legfontosabb, hogy a kifejezés szabadságának joga a katonaság, a rendőrség, a csendőrség, a határőrség, a parti őrség, a pénzügyőrség és a büntetés-végrehajtási testület állományát is megilleti, azonban annak gyakorlása az e szervezetek hatékony működésre nézve valós veszélyt jelentő – különösen a fegyelem, a szolgálati rend és a szolgálati tekintély aláásását célzó – megnyilvánulások megakadályozása érdekében korlátozásoknak és szankcióknak vethető alá. Az engedetlenségre vagy erőszakra sarkalló megnyilvánulásokat és ezek állományon belüli terjesztését a bíróság minden körülmények között szankcionálhatónak tartja, ugyanakkor a fegyveres szervezetek rendeltetés szerinti feladatainak ellátására közvetlen veszélyt jelentő magatartások megítélése már nem ennyire egységes.

A strasbourgi bíróság több döntésében kifejtette azt is, hogy az EJEE alkalmazása során figyelemmel kell lenni a katonai életviszonyok sajátosságaira, azonban e követelménynek maga sem mindig tett eleget, így például a hon- és a rendvédelmi testületeket általánosságban véve bíráló kijelentések, a valóság bizonyítása és a szervezetek vezetőit érintő megnyilvánulások kapcsán kizárólag a szólásszabadság terjedelmét meghatározó általános szabályokat alkalmazta.

Összegzésként elmondható, hogy az EJEB több fontos megállapítást tett a katonák, a rendőrök, a csendőrök, a határőrök, a parti őrk, a pénzügyőrség és a büntetés-végrehajtási testület állományába tartozó személyek véleménynyilvánításhoz való jogának korlátozhatósága tárgyában, de az ítélkezési gyakorlat következetlenségei nyitott kérdéseket is hagytak. Ezek megválaszolása a jövőben mindenképpen indokolt és szükséges a hon- és a rendvédelem biztosítása kapcsán fennálló állami kötelezettség maradéktalan és hatékony ellátása érdekében. Mindennek különös nyomatékot ad, hogy a migráció erősödése, valamint az egyre súlyosodó és szaporodó fegyveres konfliktusok hatására a hadsereg és a rendvédelmi feladatokat ellátó szervek állományának szerepe és az általuk végzett munka jelentősége mindinkább felértékelődik.

Bibliography - Forrásjegyzék

Dominika BYCHAWSKA-SINIARSKA: *Protecting the right to freedom of expression under the European Convention on Human Rights* (Strasbourg, Council of Europe, 2017)

János CSIRSZKA: *A személyiség munkatevékenységének pszichológiája* (*The Psychology of Work Activity of the Personality*) (Budapest, Akadémia Kiadó, 1985)

András KOLTAY: *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban.* (*The Basic Aspects of the Freedom of Speech in Hungarian, British, American and European Comparison*) (Budapest, Századvég, 2009)

Helmuth MOLTKE: *Essays, speeches, and memoirs of Field-Marshal Count Helmuth von Moltke* (New York, Harper & Brothers, 1893)

Susan NOLEN-HOEKSEMA et al.: *Atkinson & Hilgard's Introduction to Psychology* (15th Edition, UK Andover, Wadsworth - Cengage Learning, 2009)

Emil SCHULTHEISZ: *A katonai büntetőtörvény [1930. évi II törvénycikk] magyarázata II. – Különös rész I. Füzet – Függelék*; (*Explanation of the Military Criminal Law [Act II of 1930] Part II – Special Part, Book I – Violation of the Chain of Command*) (Budapest, Radó, 1934)

Appendix - Függlék

COURT (PLENARY)
CASE OF ENGEL AND OTHERS v. THE NETHERLANDS

(Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72)

JUDGMENT
STRASBOURG
8 June 1976

In the case of Engel and others,
The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

MM. H. MOSLER, President,
A. VERDROSS,
M. ZEKIA,
J. CREMONA,
G. WIARDA,
P. O'DONOGHUE,
Mrs. H. PEDERSEN,
MM. T. VILHJÁLMSSON,
S. PETREN,
A. BOZER,
W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
M. D. EVRIGENIS

and also Mr. M.-A. EISSEN, Registrar, and Mr. H. PETZOLD, Deputy Registrar,
Having deliberated in private on 30 and 31 October 1975, from 20 to 22 January and from 26 to 30 April 1976,

Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

1. The case of Engel and others was referred to the Court by the European Commission of Human Rights (hereinafter referred to as „the Commission”) and by the Government of the Kingdom of the Netherlands (hereinafter referred to as „the Government”). The case originated in five applications against the Kingdom of the Netherlands which were lodged with the Commission in 1971 by Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul, all Netherlands nationals.

2. Both the Commission's request, to which was attached the report provided for in Article 31 (art. 31) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as „the Convention”), and the application of the Government were lodged with the registry of the Court within the period of three months laid down in Articles 32 para. 1 and 47 (art. 32-1, art. 47) - the former on 8 October 1974, the latter on 17 December. They referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Kingdom of the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). Their purpose is to obtain a decision from the Court as to whether or not the facts of the case disclose

a breach by the respondent State of its obligations under Articles 5, 6, 10, 11, 14, 17 and 18 (art. 5, art. 6, art. 10, art. 11, art. 14, art. 17, art. 18) of the Convention.

3. On 15 October 1974, the President of the Court drew by lot, in the presence of the Registrar, the names of five of the seven judges called upon to sit as members of the Chamber; Mr. G.J. Wiarda, the elected judge of Netherlands nationality, and Mr. H. Mosler, Vice-President of the Court, were ex officio members under Article 43 (art. 43) of the Convention and Rule 21 para. 3 (b) of the Rules of Court respectively. The five judges thus designated were Mr. A. Verdross, Mr. M. Zekia, Mr. P. O'Donoghue, Mr. T. Vilhjálmsson and Mr. R. Ryssdal (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Mr. Mosler assumed the office of President of the Chamber in accordance with Rule 21 para. 5.

4. The President of the Chamber ascertained, through the Registrar, the views of the Agent of the Government and the delegates of the Commission regarding the procedure to be followed. By an Order of 31 October 1974, he decided that the Government should file a memorial within a time-limit expiring on 14 February 1975 and that the delegates should be entitled to file a memorial in reply within two months of receipt of the Government's memorial. On 22 January 1975, he extended the time-limit granted to the Government until 1 April.

The Government's memorial was received at the registry on 1 April, that of the delegates on 30 May 1975.

5. After consulting, through the Registrar, the Agent of the Government and the delegates of the Commission, the President decided by an Order of 30 June 1975 that the oral hearings should open on 28 October.

6. At a meeting held in private on 1 October 1975 in Strasbourg, the Chamber decided under Rule 48 to relinquish jurisdiction forthwith in favour of the plenary Court, „considering that the case raise(d) serious questions affecting the interpretation of the Convention ...". At the same time, it took note of the intention of the Commission's delegates to be assisted during the oral procedure by Mr. van der Schans, who had represented the applicants before the Commission; it also authorised Mr. van der Schans to speak in Dutch (Rules 29 para. 1 in fine and 27 para. 3).

7. On 27 October 1975, the Court held a preparatory meeting to consider the oral stage of the procedure. At this meeting it compiled two lists of requests and questions which were communicated to the persons who were to appear before it. The documents thus requested were lodged by the Commission on the same day and by the Government on 21 November 1975.

8. The oral hearings were held in public at the Human Rights Building, Strasbourg, on 28 and 29 October 1975.

There appeared before the Court:

- for the Government:

Mr. C.W. VAN SANTEN

Deputy Legal Adviser at the Ministry of Foreign Affairs, Agent;

Mr. C.W. VAN BOETZELAER VAN ASPEREN

Permanent Representative of the Netherlands to the Council of Europe, Substitute Agent;

Mr. E. DROOGLEEVER FORTUIJN

Solicitor for the Government, Mr. R.J. AKKERMAN, Official at the Ministry of Defence,

Mr. W. BREUKELAAR,
Official at the Ministry of Justice,

Mr. J.J.E. SCHUTTE,
Official at the Ministry of Justice,

Mr. A.D. BELINFANTE,
Professor at the University of Amsterdam, Advisers;
- for the Commission:

Mr. J.E.S. FAWCETT, Principal Delegate,

Mr. F. ERMACORA, Delegate,

Mr. E. VAN DER SCHANS, who had represented the applicants
before the Commission, assisting the delegates under Rule 29 para. 1, second sentence.
The Court heard addresses by Mr. Fawcett, Mr. Ermacora and Mr. van der Schans for
the Commission and by Mr. van Santen, Mr. Droogleever Fortuijn and Mr. Belinfante
for the Government, as well as their replies to questions put by the Court.

9. On 30 October, the Commission produced various documents which its
representatives had mentioned during the oral hearings.

10. On the instructions of the Court, the Registrar requested the Commission, on 3 and
13 November 1975, to supply it with details on a particular point of the case; these were
furnished on 4 and 14 November.

As to the facts

11. The facts of the case may be summarised as follows:

12. All applicants were, when submitting their applications to the Commission, conscript
soldiers serving in different non-commissioned ranks in the Netherlands armed forces.
On separate occasions, various penalties had been passed on them by their respective
commanding officers for offences against military discipline. The applicants had appealed
to the complaints officer (*beklagmeerdere*) and finally to the Supreme Military Court
(*Hoog Militair Gerechtshof*) which in substance confirmed the decisions challenged but,
in two cases, reduced the punishment imposed.

The system of military disciplinary law in the Netherlands

13. The disciplinary law concerning the Netherlands Army, applicable at the time of the
measures complained of in this case, was set out in the Military Discipline Act of 27 April
1903 (*Wet op de Krijgstucht* - hereinafter referred to as „the 1903 Act”), the Regulations
on Military Discipline of 31 July 1922 (*Reglement betreffende de Krijgstucht*), the
Military Penal Code of 27 April 1903 (*Wetboek van Militair Strafrecht*) and the Army and
Air Force Code of Procedure in its version of 9 January 1964 (*Rechtspleging bij de Land-
en Luchtmacht*).

This system of law has evolved during the course of the years. In particular, certain
provisions of the 1903 Act, applied in the present case, have been repealed or amended
by an Act of 12 September 1974, which came into force on 1 November 1974.

14. Alongside disciplinary law, there exists in the Netherlands a military criminal law.
Proceedings under the latter are held at first instance before a court martial (*Krijgsraad*)
and subsequently, if appropriate, before the Supreme Military Court on appeal.

The account that follows relates solely to military disciplinary law which, like military criminal law, applies equally to conscript servicemen, such as the applicants, and to volunteers.

Military disciplinary offences

15. Offences against military discipline are defined in Article 2 of the 1903 Act as being: „1. all acts not included in any criminal legislation which are contrary to any official order or regulation or inconsistent with military discipline and order;

2. such criminal acts as fall within the jurisdiction of the military judge, insofar as they are inconsistent with military discipline and order but at the same time of such trivial nature that the matter can be dealt with in proceedings other than criminal proceedings.”

The Regulations on Military Discipline of 31 July 1922 set out the basic principles of military discipline (Section 15 para. 2). Under Section 16 para. 1, the question whether or not the conduct of a member of the armed forces is consistent with military discipline and order must be answered by reference to the general considerations set out in the first part of those Regulations.

Sections 17 to 26 list - by way of example, as stated in Section 16 para. 2 - offences against military discipline, such as membership of extremist organisations, non-observance of secrecy, possession and distribution of objectionable writings, showing discontentment, failure to perform military duties, absence without leave, incorrect or disorderly behaviour, disrespect for property, failure to give assistance, neglect of hygiene and cleanliness, failure to perform watch and patrol duties, etc.

Several of these acts and omissions constitute at the same time criminal offences punishable under the Military Penal Code, for example, absence without leave for one day or more (Article 96), disobedience to a military order (Article 114) and distribution of objectionable writings (Article 147).

Under Article 8 of the Army and Air Force Code of Procedure the competent officer imposes a disciplinary penalty if he considers that the person concerned is guilty of an offence that can be dealt with outside criminal proceedings.

Military disciplinary penalties and measures

16. At the relevant time, the provisions on the various penalties that could be imposed on persons having committed disciplinary offences were contained in Articles 3 to 5 of the 1903 Act.

The nature of the penalties depended on the rank of the offender. Thus, Article 3-A provided for reprimand, „light arrest (licht arrest) of at most 14 days” and „strict arrest (streng arrest) of at most 14 days” as the principal disciplinary punishments for officers. As regards non-commissioned officers, Article 4-A provided, *inter alia*, for reprimand, restrictions to camp during the night, „light arrest of at most 21 days”, „aggravated arrest (verzwaard arrest) of at most 14 days” and „strict arrest of at most 14 days”. Ordinary servicemen were, under Article 5-A, subject, broadly speaking, to the same punishments as non-commissioned officers, with the additional possibility for privates of „committal to a disciplinary unit” (*plaatsing in een tuchtklasse*). All ranks of servicemen could, under paragraph B of each of the above Articles, also suffer loss of wages as „supplementary punishment”.

17. Under the 1903 Act the manner of execution of disciplinary punishments also varied according to rank.

18. Execution of light arrest was governed by Article 8:

„Light arrest shall be carried out:

A. By officers:

1. on land: in their dwellings, tent or barracks or, when bivouacking, in the place designated by the commanding officer;

2. ...

B. By non-commissioned officers and ordinary servicemen:

1. on land: in their barracks, base or dwellings or, when in quarters, camping or bivouacking, in the place designated by the commanding officer;

2. ...

Servicemen undergoing light arrest are not excluded from performing their duties.”

The effect of this provision was that any serviceman under light arrest, irrespective of rank, had usually to remain in his dwelling during off-duty hours if he lived outside the barracks; otherwise he was confined to barracks.

Officers and non-commissioned officers normally lived outside, whereas ordinary servicemen were as a rule obliged to live within, the barracks. In practice, ordinary servicemen had for some time enjoyed a degree of freedom of movement in the evenings between five o'clock and midnight and at weekends. They often made use of this to stay with their families but this did not mean that they were no longer required to live in barracks.

By reason of the above, an ordinary serviceman, unlike an officer or non-commissioned officer, was in general not able to serve light arrest at home, and he thereby lost the privilege of returning to his family home during off-duty hours. Conscripts permitted to live outside the barracks were in the same situation: under Article 123 of the Rules for Internal Service in the Royal Army (*Reglement op de Inwendige Dienst der Koninklijke Landmacht*), the permission was suspended, *inter alia*, in the case of disciplinary arrest; however, this provision, deemed contrary to the 1903 Act, disappeared in 1974.

A serviceman under light arrest at the barracks was allowed visits, correspondence and the use of the telephone; he could move freely about the barracks outside duty hours, being able for instance to visit the camp cinema, canteen and other recreation facilities.

19. The execution of aggravated arrest, which applied only to non-commissioned officers and ordinary servicemen, was governed by Article 9 of the 1903 Act. Those concerned continued to perform their duties but for the rest of the time had to remain, in the company of other servicemen undergoing a similar punishment, in a specially designated but unlocked place. The offender might receive visits if he had the company commander's written permission. Unlike a person under light arrest, he could not move freely about the barracks so as to visit the cinema, canteen or recreation facilities. As far as possible, ordinary servicemen had to be separated from their fellows (*afzondering*) during the night.

20. The execution of strict arrest was governed by Article 10 of the 1903 Act. The period of arrest, covering both duty and off-duty hours, was served by officers in a similar manner to light arrest, that is they usually remained at home, whereas non-commissioned officers and ordinary servicemen were locked in a cell. All ranks were excluded from the performance of their normal duties.

21. Execution of what at the time was the most severe form of disciplinary penalty, committal to a disciplinary unit (*plaatsing in een tuchtklasse*), which applied only to privates, was governed by Articles 18 and 19 of the 1903 Act. This punishment consisted of submitting the offender to a stricter discipline than normal by sending him to an establishment which was specially designated for that purpose (Article 18). According to Article 19, service in a disciplinary unit was imposed for a period, determined when the penalty was pronounced, of from three to six months. In this respect alone did it differ from committal to a punishment unit (*plaatsing in een strafklasse*), a supplementary punishment which, under Article 27 of the Military Penal Code, could be imposed on a serviceman, in the context of criminal proceedings, for a period of from three months to two years.

Committal to a disciplinary unit, when it was ordered towards the end of military service, generally delayed the individual's return to civil life. Its execution was governed by a Decree of 14 June 1971 (*Besluit straf-en tuchtklassen voor de krijgsmacht*) which concerned both committals to a punishment unit and, in principle (Article 57), committal to a disciplinary unit. Those undergoing such punishment were removed from their own unit and placed in a special, separate group; their movements were restricted, they carried out their military service under constant supervision and emphasis was placed on their education (Articles 17, 18 and 20).

The units were divided into three sections. Offenders as a rule passed thirty days in each of the first two, but these periods could be prolonged or shortened according to their conduct (Articles 26 and 27). As far as possible, they spent their nights separated from each other (*afgezonderd* - Article 28). In the first section, they were allowed to receive visits twice a month and to study during off-duty hours (Article 29). In the second, they also enjoyed a degree of freedom of movement on Saturdays and Sundays and at least twice a week could visit the canteen and/or recreation facilities in the evening after duty (Article 30). In the third, the regime was appreciably less strict (Article 31).

22. Under Article 20 of the 1903 Act, a serviceman on whom the punishment of committal to a disciplinary unit had been imposed might, on that ground, be placed under arrest after sentence had been passed and held in custody until he arrived at the establishment where the punishment was to be served. It seems that any of the three forms of arrest outlined above could be employed under the terms of this text.

No provision existed in military disciplinary law to limit or fix in advance or otherwise control the duration of this interim custody, or to provide for the possibility of deducting the period of such custody from the time to be spent in the disciplinary unit.

23. Disciplinary penalties imposed on a serviceman could be taken into account when, for example, the question of his promotion arose. On the other hand they were not entered on his criminal record and, according to the information obtained by the Court at the hearing on 28 October 1975, had no effects in law on civil life.

24. As the result of the Act of 12 September 1974, both the range of disciplinary punishments available and the manner in which they are to be enforced have been made the same for all ranks of servicemen. Strict arrest and committal to a disciplinary unit are abolished. Even before its entry into force (1 November 1974), these punishments had ceased to be imposed in practice, following a ministerial instruction.

While reprimand, light arrest and aggravated arrest remain, the maximum period during which any arrest may be imposed is now fourteen days, and aggravated arrest is

henceforth also applicable to officers (Articles 3, 8 and 9 of the 1974 Act). Aggravated arrest today constitutes the severest form of disciplinary punishment. Three further penalties have been introduced by the 1974 Act: extra duties of between one and two hours a day, compulsory presence overnight in the barracks or quarters, and a fine.

Military disciplinary procedure

25. Articles 39 to 43 of the 1903 Act state who may impose disciplinary punishments. This is normally the commanding officer of the individual's unit. He investigates the case and hears the serviceman accused (Article 46 of the 1903 Act) and questions witnesses and experts if that proves necessary.

For each offence committed the officer chooses which of the various punishments available under the law should be applied. „When determining the nature and severity of disciplinary punishments”, he shall be „both just and severe”, shall have „regard to the circumstances in which the offence was committed as well as to the character and customary behaviour of the accused” and shall base his decision „on his own opinion and belief”(Article 37 of the 1903 Act).

26. Article 44 of the 1903 Act provides that any superior who has sufficient indication to suppose that a subordinate has committed a severe offence against military discipline is entitled, if necessary, to give notice of his provisional arrest (*voorlopig arrest*); the subordinate is obliged to comply immediately with that notification. Provisional arrest is usually served in the same way as light arrest, but, if required either in the interest of the investigation or in order to prevent disorder, it is served in a similar way to aggravated or, as was the case prior to the 1974 Act, strict arrest. The serviceman concerned is as a rule excluded from performing his duty outside the place where he is confined. Article 45 stipulates that provisional arrest shall not last longer than 24 hours and Article 49 states that the hierarchical superior of the officer imposing provisional arrest may set it aside after hearing the latter. The period of such provisional arrest may be deducted in whole or in part from the punishment imposed.

27. Under Article 61 of the 1903 Act the serviceman on whom a disciplinary penalty has been imposed may challenge before the complaints officer his punishment or the grounds thereof unless it has been imposed by a military court. The complaints officer is the hierarchical superior of the officer giving the initial decision rather than a specialist, but he is usually assisted by a colleague who is a lawyer, especially in cases (before the 1974 Act) of committal to a disciplinary unit.

The complaint must be submitted within four days; if the complainant is under arrest he may on request consult other persons named by him (maximum of three), unless the commanding officer considers their presence to be inadvisable (Article 62).

The complaints officer must examine the case as soon as possible; he questions witnesses and experts to the extent he thinks necessary and hears the complainant and the punishing officer. He then gives a decision which must be accompanied by reasons and communicated to the complainant and the punishing officer (Article 65).

28. Appeal against the decision imposing a disciplinary punishment has no suspensive effect although the Minister of Defence may defer the execution of such punishment on account of special circumstances. Article 64 of the 1903 Act provided an exception in the case of committal to a disciplinary unit; the serviceman's appeal did not, however, entail the suspension or termination of any interim custody imposed under Article 20.

29. If the punishment has not been quashed by the complaints officer, the complainant may appeal within four days to the Supreme Military Court (Article 67 of the 1903 Act).

30. The composition of this Court and its functioning are regulated by the „Provisional Instructions” on the Supreme Military Court (Provisionele Instructie voor het Hoog Militair Gerechtshof) promulgated on 20 July 1814 but since amended several times. Under Article 1 the Court shall be established at The Hague and shall be composed of six members: two civilian jurists - one of whom is the Court’s President - and four military officers. A State Advocate for the Armed Forces (advocaat-fiscaal voor de Krijgsmacht) and a Registrar are attached to the Court.

The civilian members (Article 2 of the „Provisional Instructions”) must be Justices of the Supreme Court (Hoog Raad) or Judges of the Court of Appeal (Gerechtshof) at The Hague and Articles 11, 12, 13 and 15 of the Judicature Act (Wet op de Rechterlijke Organisatie) of 18 April 1827, providing, *inter alia*, for tenure of office and grounds for discharge, are applicable to them. They are appointed by the Crown upon the joint recommendation of the Ministers of Justice and of Defence; their term of office is equal to that of the Justices of the Supreme Court or the Judges of a Court of Appeal.

The military members of the Court (Article 2 (a) of the „Provisional Instructions”), who must be not less than 30 nor more than 70 years of age, are likewise appointed by the Crown upon the joint recommendation of the Ministers of Justice and of Defence. They may also be dismissed in a similar manner. In theory, therefore, they are removable without observance of the strict requirements and legal safeguards laid down regarding the civilian members by the Judicature Act. According to the Government, the appointment of the military members of the Court is normally the last in their service career; they are not, in their functions as judges on the Court, under the command of any higher authority and they are not under a duty to account for their acts to the service establishment.

On assuming office, all members of the Court must swear an oath that obliges them, *inter alia*, to be just, honest and impartial (Article 9 of the „Provisional Instructions”). It is true that the military judges on the Court remain members of the armed forces and as such bound by their oath as officers, which requires them, among other things, to obey orders from superiors. This latter oath, however, also enjoins obedience to the law, including in general the statutory provisions governing the Supreme Military Court and, in particular, the oath of impartiality taken by the judges.

31. Cases are never dealt with by a single judge but only by the Court as a body. The Court is required to examine cases as soon as possible and to hear the applicant and, if necessary, the punishing officer, the complaints officer and any witness or expert whose evidence it may wish to obtain (Article 56 of the „Provisional Instructions”). The Court reviews the decision of the complaints officer both in regard to the facts and to the law; in no case has it jurisdiction to increase the penalty (Article 58).

Whereas in criminal cases the Court’s hearings are public (Article 43 of the „Provisional Instructions” and paragraph 14 above), it sits *in camera* in disciplinary cases. On the other hand the judgment is pronounced at a public session; it must be accompanied by reasons and is communicated to the complaints officer, the punishing officer and the appellant serviceman (Article 59).

32. At the time of the measures complained of in this case, no provision in law was made for the legal representation of the complainant. Nevertheless, as a report by the acting

Registrar of the Supreme Military Court, dated 23 December 1970, explains, the Court in practice granted legal assistance in certain cases where it was expected that the person concerned would not be able himself to cope with the special legal problems raised in his appeal. This applied particularly to cases where the Convention was invoked. The assistance was, however, limited to such legal matters.

The position altered in 1973: under a ministerial instruction of 7 November 1973 (Regeling vertrouwensman - KL), a serviceman accused of a disciplinary offence may have the services of a „trusted person” (vertrouwensman) at all stages of the proceedings and even of a lawyer if the matter comes before the Supreme Military Court (Articles 1, 17 and 18 of the instruction).

Facts relating to the individual applicants

Mr. Engel

33. In March 1971, Mr. Engel was serving as a sergeant in the Netherlands Army. He in fact lived at home during off-duty hours. The applicant was a member of the Conscript Servicemen's Association (Vereniging van Dienstplichtige Militairen - V.V.D.M.) which was created in 1966 and aims at safeguarding the interests of conscripts. It was recognised by the Government for taking part in negotiations in this field and its membership included about two-thirds of all conscripts.

Mr. Engel was a candidate for the vice-presidency of the V.V.D.M. and on 12 March he submitted a request to his company commander for leave of absence on 17 March in order to attend a general meeting in Utrecht at which the elections were to be held. He did not, however, mention his candidature.

Subsequently he became ill and stayed home under the orders of his doctor who gave him sick leave until 18 March and authorised him to leave the house on 17 March. On 16 March, the company commander had a talk with the battalion commander and it was agreed that no decision should be taken regarding the above-mentioned request pending further information from the applicant who had given no notice of his absence or return. However, on the following day a check was made at the applicant's home and it was discovered that he was not there. In fact, he had gone to the meeting of the V.V.D.M. where he had been elected vice-president.

34. On 18 March Mr. Engel returned to his unit and on the same day his company commander punished him with four days' light arrest for having been absent from his residence on the previous day.

The applicant considered this penalty a serious interference with his personal affairs in that it prevented him from properly preparing himself for his doctoral examination at the University of Utrecht which had been fixed for 24 March. According to the applicant, he had made several attempts on 18 March to speak to an officer on this point but without success. Believing that under the army regulations non-commissioned officers were allowed to serve their light arrest at home, he left the barracks in the evening and spent the night at home. However, the next day his company commander imposed a penalty of three days' aggravated arrest on him for having disregarded his first punishment.

The applicant, who had just been informed that, with effect from 1 April 1971, he had been demoted to the rank of private, again left the barracks in the evening and went home. He was arrested on Saturday 20 March by the military police and provisionally detained in strict arrest for about two days, by virtue of Article 44 of the 1903 Act

(paragraph 26 above). On Monday 22 March his company commander imposed a penalty of three days' strict arrest for having disregarded his two previous punishments.

35. The execution of these punishments was suspended by ministerial decision in order to permit the applicant to take his doctoral examination which he passed on 24 March 1971. Moreover, on 21, 22 and 25 March Mr. Engel complained to the complaints officer about the penalties imposed on him by the company commander. On 5 April the complaints officer decided, after having heard the parties, that the first punishment of four days' light arrest should be reduced to a reprimand, the second punishment of three days' aggravated arrest to three days' light arrest, and the third punishment of three days' strict arrest to two days' strict arrest. In the last two cases the decision was based on the fact that the previous punishment(s) had been reduced and that the applicant had obviously been under considerable stress owing to his forthcoming examination. The complaints officer further decided that Mr. Engel's punishment of two days' strict arrest should be deemed to have been served from 20 to 22 March, during his provisional arrest.

36. On 7 April 1971 the applicant appealed to the Supreme Military Court against the decision of the complaints officer relying, *inter alia*, on the Convention in general terms. The Court heard the applicant and obtained the opinion of the State Advocate for the Armed Forces. On 23 June 1971, that is about three months after the date of the disciplinary measures in dispute, the Court confirmed the contested decision. It referred to Article 5 para. 1 (b) (art. 5-1-b) of the Convention and held that the applicant's detention had been lawful and had been imposed in order to secure the fulfilment of an obligation prescribed by law. The system under the 1903 Act and the applicable Regulations required in fact that every serviceman should submit to and co-operate in maintaining military discipline. This obligation could be enforced by imposing disciplinary punishments in accordance with the procedure prescribed by the above Act. In these circumstances, the applicant's punishment of two days' strict arrest had been justified in order to secure the fulfilment of that obligation.

The applicant had not received the assistance of a legally trained person at any stage in the proceedings against him; perusal of the file in the case does not reveal if he asked for such assistance.

Mr. van der Wiel

37. Mr. van der Wiel, at the time of his application to the Commission, was serving as a corporal in the Netherlands Army. On the morning of 30 November 1970 he was about four hours late for duty. His car had broken down during his weekend leave and he had had it repaired before returning to his unit instead of taking the first train. On these grounds, the acting company commander, on the same day, imposed a penalty of four days' light arrest on the applicant. The following day he revised the above grounds to include a reference that the applicant had not previously requested the commander's leave of absence.

38. On 2 December, the applicant complained about his punishment to the complaints officer invoking, *inter alia*, Articles 5 and 6 (art. 5, art. 6) of the Convention. In this respect he alleged that he had been deprived of his liberty by a decision which, contrary to the requirements of Article 5 (art. 5), had not been taken by a judicial authority; that furthermore his case had not been heard by an independent and impartial tribunal (Article 6 para. 1) (art. 6-1); that he did not have adequate time and facilities for the preparation

of his defence (Article 6 para. 3 (b)) (art. 6-3-b), and that he did not have legal assistance (Article 6 para. 3 (c)) (art. 6-3-c).

39. On 18 December, following the rejection by the complaints officer of his complaint on 16 December, the applicant appealed to the Supreme Military Court. On 17 March 1971, the Court heard the applicant, who was assisted by a lawyer, Sergeant Reintjes, and obtained the opinion of the State Advocate for the Armed Forces. The Court then quashed the complaints officer's decision but confirmed the punishment of four days' light arrest imposed on the applicant on the original grounds stated on 30 November 1970.

The Court first found that Article 6 (art. 6) of the Convention was not applicable in a case where neither the determination of a criminal charge nor the determination of civil rights and obligations was in question. The Court referred to the definition of military disciplinary offences contained in Article 2 of the 1903 Act (paragraph 15 above) and concluded therefrom that disciplinary proceedings clearly did not fall within the scope of Article 6 (art. 6). Nor was there any substance in the applicant's argument that, since a conscripted man had not volunteered to come within the jurisdiction of the military authorities, any disciplinary measure imposed upon him in fact had a criminal character. As regards the complaints based on Article 5 (art. 5), the Court first held that four days' light arrest did not constitute 'deprivation of liberty'. In the alternative, the Court further stated that the disputed punishment was meant to 'secure the fulfilment of (an) obligation prescribed by law', within the meaning of Article 5 para. 1 (b) (art. 5-1-b).

40. At first and second instance in the proceedings Mr. van der Wiel had not received any legal assistance, and during the proceedings before the Supreme Military Court the legal assistance granted to him had, in line with the practice described above at paragraph 32, been restricted to the legal aspects of the case.

Mr. de Wit

41. Mr. de Wit, at the time of his application to the Commission, was serving as a private in the Netherlands Army. On 22 February 1971, he was sentenced to committal to a disciplinary unit for a period of three months by his company commander on the grounds that, on 11 February 1971, he had driven a jeep in an irresponsible manner over uneven territory at a speed of about 40 to 50 km. per hour; that he had not immediately carried out his mission, namely to pick up a lorry at a certain place, but that he had only done so after having been stopped, asked about his orders and summoned to execute them at once; that, in view of his repeatedly irregular behaviour and failure to observe discipline, he had previously been warned about the possibility of being committed to a disciplinary unit.

On 25 February, the applicant complained about his punishment to the complaints officer alleging, *inter alia*, violations of the Convention. On 5 March, the complaints officer heard the applicant who was assisted by Private Eggenkamp, a lawyer and member of the central committee of the V.V.D.M., such assistance having been granted by reason of the fact that the applicant had invoked the Convention. The complaints officer also examined six witnesses, including one, namely Private de Vos, on the applicant's behalf, and then confirmed the punishment while altering slightly the grounds stated therefore. He rejected the allegations under the Convention, referring to a judgment of the Supreme Military Court dated 13 May 1970.

On 11 March, the applicant appealed to the Supreme Military Court against that decision. In accordance with Article 64 of the 1903 Act, the applicant's successive appeals had the effect of suspending execution of his punishment (paragraph 28 above). The Court heard the applicant and his above-mentioned legal adviser and obtained the opinion of the State Advocate for the Armed Forces. On 28 April 1971, the Court, without mentioning the applicant's previous behaviour, reduced the punishment to twelve days' aggravated arrest, which sentence was executed thereafter. It considered that, in the circumstances, the committal to a disciplinary unit for three months was too heavy a penalty.

42. The applicant alleges that in his case the calling of two other witnesses on his behalf, namely Privates Knijkers and Dokestijn, was prevented at every juncture. He also complains that the legal assistance granted to him had been restricted to the legal aspects of his case.

Mr. Dona and Mr. Schul

43. Mr. Dona was serving as a private in the Netherlands Army at the time of his application to the Commission. As editor of a journal called „Alarm”, published in stencilled form by the V.V.D.M. at the General Spoor barracks at Ermelo, he had collaborated in particular in the preparation of no. 8 of that journal dated September 1971. Acting in pursuance of the „Distribution of Writings Decree”, a ministerial decree of 21 December 1967, the commanding officer of the barracks provisionally prohibited the distribution of this number, whose contents he considered inconsistent with military discipline.

On 28 September, two officers met in commission on the instructions of the commanding officer in order to hold an enquiry into the appearance of the said number. The applicant, among others, was heard by the commission.

On 8 October 1971, the applicant was sentenced by his competent superior to three months' committal to a disciplinary unit for having taken part in the publication and distribution of a writing tending to undermine discipline. The decision was based on Article 2 para. 2 of the 1903 Act, read in conjunction with the first paragraph of Article 147 of the Military Penal Code which provides:

„Any person who, by means of a signal, sign, dumb show, speech, song, writing or picture, endeavours to undermine discipline in the armed forces or who, knowing the tenor of the writing or the picture, disseminates or exhibits it, posts it up or holds stocks of it for dissemination, shall be liable to a term of imprisonment not exceeding three years.”

Entitled „The law of the strongest” (Het recht van de sterkste), the article objected to in no. 8 of „Alarm” alluded to a demonstration that had taken place at Ermelo on 13 August 1971 on the initiative of the executive committee of the V.V.D.M. According to Mr. van der Schans, the demonstration was terminated almost at once since the demonstrators had promptly returned to their quarters following the promise by the commanding officer that, if they did so, no disciplinary sanctions would ensue. Nevertheless, a few soldiers were allegedly transferred soon afterwards for having participated in the incident.

The passages in the article which gave rise to the disciplinary punishment of 8 October 1971 read as follows:

(a) „There happens to be a General Smits who writes to his »inferiors« »I will do everything to keep you from violating the LAW«! But this very General is responsible for

the transfers of Daalhuisen and Duppen. Yet, as you know, measures are never allowed to be in the nature of a disguised punishment. How devoted to the law the General is - as long as it suits him”;

(b) „... in addition to ordinary punishments, the army bosses have at their disposal a complete series of other measures - of which transfer is only one - to suppress the soldiers. That does not come to an end by questions in Parliament - that makes them at most more careful. That only comes to an end when these people, who can only prove their authority by punishment and intimidation, have to look for a normal job.”

44. The decision ordering the applicant's committal to a disciplinary unit referred to the extracts quoted above. Furthermore, the decision took into account some aggravating circumstances: Mr. Dona had collaborated in the publication of no. 6 of the journal, which had likewise been prohibited under the „Distribution of Writings Decree” by reason of its objectionable contents; in addition, he had taken part in the demonstrations at Ermelo and had, in particular, published in connection therewith a pamphlet, for which he received on 13 August 1971 a punishment of strict arrest.

45. Mr. Schul, a private in the Netherlands Army at the time of his application to the Commission, was also an editor of the journal „Alarm”. The facts regarding his case are identical to those of Mr. Dona's except that his punishment initially amounted to four months' committal to a disciplinary unit owing to the additional aggravating circumstance of his participation in the publication of an „Information Bulletin” for new recruits the distribution of which had been prohibited by reason of its negative content.

46. As early as 8 October 1971, the two applicants announced their intention to complain about their punishment. According to them, they were then asked to refrain from any further publication while proceedings were pending against them. The Government maintain that they were only requested not to publish other articles tending to undermine military discipline. The applicants replied before the Court that they had not the slightest intention to write such articles and that they had emphasised this on 28 September 1971 before the commission of enquiry. According to the report of the latter, Mr. Dona had declared that it was not at all his aim to write articles that he expected to be prohibited, and Mr. Schul is recorded as saying: „When we produce pamphlets of this kind, it is not our intention that they should be prohibited. The intention is that they should be read. The risk of their being prohibited is great.”

Be that as it may, the applicants refused to give the undertaking requested and they were thereupon both placed under aggravated arrest in accordance with Article 20 of the 1903 Act.

47. The applicants complained about their punishment to the complaints officer who on 19 October confirmed it, while in the case of Mr. Dona slightly modifying the grounds. He rejected the applicants' submissions, including those concerning Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention. In connection with Articles 5 and 6 (art. 5, art. 6), he referred to a decision of the Supreme Military Court delivered on 13 May 1970. The complaints officer also specified that the applicants should remain in interim custody in accordance with Article 20 of the 1903 Act.

48. The applicants appealed to the Supreme Military Court, Mr. Schul on 21 October and Mr. Dona on the next day, invoking Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention.

Pursuant to Article 64 of the 1903 Act, the successive complaints and appeals by the applicants suspended their committal to a disciplinary unit but not their interim custody (paragraph 28 above).

On 27 October 1971, the Court ordered release of the applicants after they had promised to accept the Court's judgment on the merits of the case, to comply therewith in the future and, while proceedings were pending against them, to refrain from any activity in connection with the compilation and distribution of written material the contents of which could be deemed to be at variance with military discipline. According to the applicants, this undertaking was given only in extremis as there was no legal remedy available to terminate their interim custody.

Like Mr. de Wit, the applicants had been assisted before the Court by Private Eggenkamp who was, however, able only to deal with the legal aspects of their case (paragraphs 41-42 above).

49. On 17 November 1971 the Supreme Military Court confirmed Mr. Dona's committal to a disciplinary unit for three months, reduced Mr. Schul's committal from four to three months and modified slightly the grounds for punishment in both cases. The Court rejected as being ill-founded the applicants' allegations. Making mention in both cases of their previous conduct and convictions, the Court recalled particularly that they had previously participated in the publication and distribution of writings that were prohibited on the basis of the decree of 21 December 1967 (paragraphs 44-45 above). When fixing the punishment, the Court deemed these factors to be indicative of their general behaviour.

The Court then dealt with the applicants' allegations under Articles 5, 6 and 10 (art. 5, art. 6, art. 10) of the Convention, and also rejected them.

As regards Article 5 (art. 5), the Court held that the obligation to serve in a disciplinary unit did not constitute „deprivation of liberty”. In the alternative, adopting reasoning similar to that contained in its decision on Mr. Engel's appeal (paragraph 36 above), the Court found that the disputed punishments had been justified under Article 5 para. 1 (b) (art. 5-1-b).

On the issue of Article 6 para. 1 (art. 6-1), the Court considered that the disciplinary proceedings relating to the publication of the journal „Alarm” had involved the determination neither of any „civil right”, such as freedom of expression, nor of any „criminal charge”; on the latter point, the Court based its decision on reasons similar to those given in the decision on Mr. van der Wiel's appeal (paragraph 39 above).

The applicants also contended that the measures taken against them interfered with their freedom of expression. In this respect, the Court relied on paragraph 2 of Article 10 (art. 10-2); in its opinion, the restrictions objected to had been necessary in a democratic society for the prevention of disorder within the field governed by Article 147 of the Military Penal Code.

Finally, the applicants maintained that their interim custody had been inconsistent with Article 5 para. 1 (c) (art. 5-1-c) of the Convention and claimed compensation on this account under Article 5 para. 5 (art. 5-5). The Court held that it had no competence to examine and decide such a claim.

50. A few days after the dismissal of their appeals, Mr. Dona and Mr. Schul were sent to the Disciplinary Barracks (Depot voor Discipline) at Nieuwersluis in order to serve their

punishment. They were not allowed to leave this establishment during the first month; moreover, they were both locked up in a cell during the night.

51. Apart from the particular facts relating to Mr. Dona and Mr. Schul, there was in the background a pattern of conflict between the Government and the V.V.D.M. In mid-August 1971, for instance, there had occurred the demonstration at Ermelo mentioned above at paragraph 43. The applicants also cite the fact that prior to their punishment, and in particular between 1 January and 20 October 1971, the Minister of Defence had decreed a great number of prohibitions on publications by the V.V.D.M. Furthermore, other servicemen, as editors of sectional journals of the Association, had been punished in criminal or in disciplinary proceedings - by aggravated arrest, fines and, in one case, military detention (Article 6 para. 3 of the Military Penal Code) - for writing or distributing publications considered as likely to undermine military discipline within the meaning of Article 147 of the Military Penal Code.

Since a ministerial instruction, dated 19 November 1971, and thus subsequent to the measures presently complained of, all cases involving a possible infringement of Article 147 of the Military Penal Code have had to be submitted to the military criminal courts (paragraph 14 above) and not to the disciplinary authorities. The „Distribution of Writings Decree” of 21 December 1967, mentioned above at paragraph 43, was repealed on 26 November 1971.

Procedure before the commission

52. The applications were lodged with the Commission on 6 July 1971 by Mr. Engel, on 31 May 1971 by Mr. van der Wiel and Mr. de Wit, on 19 December 1971 by Mr. Dona and on 29 December 1971 by Mr. Schul. On 10 February 1972, the Commission decided to join the applications in accordance with the then Rule 39 of its Rules of Procedure.

In common with each other, the applicants complained that the penalties imposed on them constituted deprivation of liberty contrary to Article 5 (art. 5) of the Convention, that the proceedings before the military authorities and the Supreme Military Court were not in conformity with the requirements of Article 6 (art. 6) and that the manner in which they were treated was discriminatory and in breach of Article 14 read in conjunction with Articles 5 and 6 (art. 14+5, art. 14+6).

Mr. Engel also alleged a separate breach of Article 5 (art. 5) in connection with his provisional arrest and a breach of Article 11 (art. 11) on the particular facts of his case.

For their part, Mr. Dona and Mr. Schul contended that their interim custody had been in disregard of Article 5 (art. 5) and that the punishment imposed on them for having published and distributed articles deemed to undermine military discipline had contravened Articles 10, 11, 14, 17 and 18 (art. 10, art. 11, art. 14, art. 17, art. 18).

Furthermore, all five applicants claimed compensation.

The applications were declared admissible by the Commission on 17 July 1972 except that the complaint submitted by Mr. Engel under Article 11 (art. 11) was rejected as being manifestly ill-founded (Article 27 para. 2) (art. 27-2).

In answer to certain objections made by the respondent Government during the examination of the merits, the Commission decided on 29 May 1973 not to reject under Article 29 (art. 29) two heads of complaint raised by Mr. Engel, Mr. Dona and Mr. Schul on 21 June 1972 in support of their respective applications.

53. In its report of 19 July 1974 the Commission expressed the opinion:

- that the punishments of light arrest objected to by Mr. Engel and Mr. van der Wiel did not amount to deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention (eleven votes, with one abstention);
- that the other disciplinary punishments complained of by Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul had infringed Article 5 para. 1 (art. 5-1) since none of the subparagraphs of this provision justified them (conclusion following from a series of votes with various majorities);
- that there had also been violation of Article 5 para. 4 (art. 5-4) in that the appeals by the four above-mentioned applicants against these same punishments had not been „decided speedily” (eleven votes, with one abstention);
- that Mr. Engel’s provisional arrest under Article 44 of the 1903 Act had, for its part, contravened Article 5 para. 1 (art. 5-1) since it had exceeded the period specified under Article 45 of the said Act (eleven votes, with one member being absent);
- that Article 6 (art. 6) was not applicable to any of the disciplinary proceedings concerned (ten votes against one, with one member being absent);
- that in the cases of Mr. Dona and Mr. Schul no breach either of Article 5 (art. 5) of the Convention in respect of their interim custody (Article 20 of the 1903 Act) or of Articles 10, 11, 17 or 18 (art. 10, art. 11, art. 17, art. 18) of the Convention had been established (such conclusions following from several votes with various majorities);
- that no violation of Article 14, whether read in conjunction with Articles 5, 6, 10 or 11 (art. 14+5, art. 14+6, art. 14+10, art. 14+11), had occurred in this case (conclusion following from several votes with various majorities).

The report contains five separate opinions.

As to the law

54. As the Government, Commission and applicants concurred in thinking, the Convention applies in principle to members of the armed forces and not only to civilians. It specifies in Articles 1 and 14 (art. 1, art. 14) that „everyone within (the) jurisdiction” of the Contracting States is to enjoy „without discrimination” the rights and freedoms set out in Section I. Article 4 para. 3 (b) (art. 4-3-b), which exempts military service from the prohibition against forced or compulsory labour, further confirms that as a general rule the guarantees of the Convention extend to servicemen. The same is true of Article 11 para. 2 (art. 11-2) in fine, which permits the States to introduce special restrictions on the exercise of the freedoms of assembly and association by members of the armed forces.

Nevertheless, when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.

55. Having established these preliminary points, the Court will examine successively, Article by Article, each of the complaints raised by all or certain of the five applicants.

I. On the alleged violations of article 5 (art. 5)

A. On the alleged violation of paragraph 1 of Article 5 (art. 5-1) taken alone

56. The applicants all submit that the disciplinary penalty or penalties, measure of measures pronounced against them contravened Article 5 para. 1 (art. 5-1), which provides:

„Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

1. On the right to liberty in the context of military service

57. During the preparation and subsequent conclusion of the Convention, the great majority of the Contracting States possessed defence forces and, in consequence, a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians. The existence of such a system, which those States have retained since then, does not in itself run counter to their obligations.

Military discipline, nonetheless, does not fall outside the scope of Article 5 para. 1 (art. 5-1). Not only must this provision be read in the light of Articles 1 and 14 (art. 1, art. 14) (paragraph 54 above), but the list of deprivations of liberty set out therein is exhaustive, as is shown by the words „save in the following cases”. A disciplinary penalty or measure may in consequence constitute a breach of Article 5 para. 1 (art. 5-1). The Government, moreover, acknowledge this. 58. In proclaiming the „right to liberty”, paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol no. 4) (P4-2). This is clear both from the use of the terms „deprived of his liberty”, „arrest” and „detention”, which appear also in paragraphs 2 to 5, and from a comparison between Article 5 (art. 5) and the other normative provisions of the Convention and its Protocols.

59. In order to determine whether someone has been „deprived of his liberty” within the meaning of Article 5 (art. 5), the starting point must be his concrete situation. Military service, as encountered in the Contracting States, does not on its own in any way

constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 para. 3 (b) (art. 4-3-b). In addition, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5 (art. 5) either.

Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 (art. 5) requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 (art. 5) when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.

2. On the existence of deprivations of liberty in the present case

60. It is on the basis of these premises that the Court will examine whether there has occurred in the present case one or more instances of deprivation of liberty. In the Government's main submission, the question calls for a negative reply as regards all the disputed penalties and measures (paragraphs 15-19 of the memorial, and oral arguments), whereas in the Commission's view light arrest alone raises no problem under Article 5 para. 1 (art. 5-1) (paragraphs 67-76 of the report).

61. No deprivation of liberty resulted from the three and four days' light arrest awarded respectively against Mr. Engel (paragraphs 34-36 above, second punishment) and Mr. van der Wiel (paragraphs 37-39 above). Although confined during off-duty hours to their dwellings or to military buildings or premises, as the case may be, servicemen subjected to such a penalty are not locked up and continue to perform their duties (Article 8 of the 1903 Act and paragraph 18 above). They remain, more or less, within the ordinary framework of their army life.

62. Aggravated arrest differs from light arrest on one point alone: in off-duty hours, soldiers serve the arrest in a specially designated place which they may not leave in order to visit the canteen, cinema or recreation rooms, but they are not kept under lock and key (Article 9-B of the 1903 Act and paragraph 19 above). Consequently, neither does the Court consider as a deprivation of liberty the twelve days' aggravated arrest complained of by Mr. de Wit (paragraph 41 above).

63. Strict arrest, abolished in 1974, differed from light arrest and aggravated arrest in that non-commissioned officers and ordinary servicemen served it by day and by night locked in a cell and were accordingly excluded from the performance of their normal duties (Article 10-B of the 1903 Act and paragraph 20 above). It thus involved deprivation of liberty. It follows that the provisional arrest inflicted on Mr. Engel in the form of strict arrest (Article 44 of the 1903 Act; paragraphs 26, 34 and 35 above) had the same character despite its short duration (20-22 March 1971).

64. Committal to a disciplinary unit, likewise abolished in 1974 but applied in 1971 to Mr. Dona and Mr. Schul, represented the most severe penalty under military disciplinary law in the Netherlands. Privates condemned to this penalty following disciplinary proceedings were not separated from those so sentenced by way of supplementary

punishment under the criminal law, and during a month or more they were not entitled to leave the establishment. The committal lasted for a period of three to six months; this was considerably longer than the duration of the other penalties, including strict arrest which could be imposed for one to fourteen days. Furthermore, it appears that Mr. Dona and Mr. Schul spent the night locked in a cell (Articles 5, 18 and 19 of the 1903 Act, Royal Decree of 14 June 1971 and paragraphs 21 and 50 above). For these various reasons, the Court considers that in the circumstances deprivation of liberty occurred.

65. The same is not true of the measure that, from 8 October until 3 November 1971, preceded the said committal, since Mr. Dona and Mr. Schul served their interim custody in the form of aggravated arrest (Article 20 of the 1903 Act; paragraphs 22, 46, 48 and 62 above).

66. The Court thus comes to the conclusion that neither the light arrest of Mr. Engel and Mr. van der Wiel, nor the aggravated arrest of Mr. de Wit, nor the interim custody of Mr. Dona and Mr. Schul call for a more thorough examination under paragraph 1 of Article 5 (art. 5-1).

The punishment of two days' strict arrest inflicted on Mr. Engel on 7 April 1971 and confirmed by the Supreme Military Court on 23 June 1971 coincided in practice with an earlier measure: it was deemed to have been served beforehand, that is from 20 to 22 March 1971, by the applicant's period of provisional arrest (paragraphs 34-36 above, third punishment).

On the other hand, the Court is required to determine whether the last-mentioned provisional arrest, as well as the committal of Mr. Dona and Mr. Schul to a disciplinary unit, complied with Article 5 para. 1 (art. 5-1).

3. On the compatibility of the deprivations of liberty found in the present case with paragraph 1 of Article 5 (art. 5-1)

67. The Government maintained, in the alternative, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit and the provisional arrest of Mr. Engel satisfied, respectively, the requirements of sub-paragraph (a) and of sub-paragraph (b) of Article 5 para. 1 (art. 5-1-a, art. 5-1-b) (paragraphs 21-23 of the memorial); they did not invoke sub-paragraphs (c) to (f) (art. 5-1-c, art. 5-1-d, art. 5-1-e, art. 5-1-f).

68. Sub-paragraph (a) of Article 5 para. 1 (art. 5-1-a) permits the „lawful detention of a person after conviction by a competent court”.

The Court, like the Government (hearing on 29 October 1975), notes that this provision makes no distinction based on the legal character of the offence of which a person has been found guilty. It applies to any „conviction” occasioning deprivation of liberty pronounced by a „court”, whether the conviction is classified as criminal or disciplinary by the internal law of the State in question.

Mr. Dona and Mr. Schul were indeed deprived of their liberty „after” their conviction by the Supreme Military Court. Article 64 of the 1903 Act conferred a suspensive effect upon their appeals against the decisions of their commanding officer (8 October 1971) and the complaints officer (19 October 1971), a fact apparently overlooked by the Commission (paragraph 85 and Appendix IV of the report) but which the Government have rightly stressed (paragraph 21 of the memorial). Consequently, their transfer to the disciplinary barracks at Nieuwersluis occurred only by virtue of the final sentences imposed on 17 November 1971 (paragraphs 28, 48 and 50 above).

It remains to be ascertained that the said sentences were passed by a „competent court” within the meaning of Article 5 para. 1 (a) (art. 5-1-a).

The Supreme Military Court, whose jurisdiction was not at all disputed, constitutes a court from the organisational point of view. Doubtless its four military members are not irremovable in law, but like the two civilian members they enjoy the independence inherent in the Convention’s notion of a „court” (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 41, para. 78, and paragraph 30 above).

Furthermore, it does not appear from the file in the case (paragraphs 31-32 and 48-49 above) that Mr. Dona and Mr. Schul failed to receive before the Supreme Military Court the benefit of adequate judicial guarantees under Article 5 para. 1 (a) (art. 5-1-a), an autonomous provision whose requirements are not always co-extensive with those of Article 6 (art. 6). The guarantees afforded to the two applicants show themselves to be „adequate” for the purposes of Article 5 para. 1 (a) (art. 5-1-a) if account is taken of „the particular nature of the circumstances” under which the proceedings took place (above-cited judgment of 18 June 1971, Series A no. 12, pp. 41-42, para. 78). As for Article 6 (art. 6), the Court considers below whether it was applicable in this case and, if so, whether it has been respected.

Finally, the penalty inflicted was imposed and then executed „lawfully” and „in accordance with a procedure prescribed by law”. In short, it did not contravene Article 5 para. 1 (art. 5-1).

69. The provisional arrest of Mr. Engel for its part clearly does not come within the ambit of sub-paragraph (a) of Article 5 para. 1 (art. 5-1-a).

The Government have derived argument from sub-paragraph (b) (art. 5-1-b) insofar as the latter permits „lawful arrest or detention” intended to „secure the fulfilment of any obligation prescribed by law”.

The Court considers that the words „secure the fulfilment of any obligation prescribed by law” concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration (Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.

In fact, Mr. Engel’s provisional arrest was in no way designed to secure the fulfilment in the future of such an obligation. Article 44 of the 1903 Act, applicable when an officer has „sufficient indication to suppose that a subordinate has committed a serious offence against military discipline”, refers to past behaviour. The measure thereby authorised is a preparatory stage of military disciplinary proceedings and is thus situated in a punitive context. Perhaps this measure also has on occasions the incidental object or effect of inducing a member of the armed forces to comply henceforth with his obligations, but only with great contrivance can it be brought under sub-paragraph (b) (art. 5-1-b). If the latter were the case, this sub-paragraph could moreover be extended to punishments *stricto sensu* involving deprivation of liberty on the ground of their deterrent qualities. This would deprive such punishments of the fundamental guarantees of sub-paragraph (a) (art. 5-1-a).

The said measure really more resembles that spoken of in sub- paragraph (c) of Article 5 para. 1 (art. 5-1-c) of the Convention. However in the present case it did not fulfil one of the requirements of that provision since the detention of Mr. Engel from 20 to 22 March 1971 had not been „effected for the purpose of bringing him before the competent legal authority” (paragraphs 86-88 of the report of the Commission).

Neither was Mr. Engel’s provisional arrest „lawful” within the meaning of Article 5 para. 1 (art. 5-1) insofar as it exceeded - by twenty-two to thirty hours according to the information provided at the hearing on 28 October 1975 - the maximum period of twenty-four hours laid down by Article 45 of the 1903 Act.

According to the Government, the complaints officer redressed this irregularity after the event by deeming to have been served in advance, that is from 20 to 22 March 1971, the disciplinary penalty of two days’ strict arrest imposed by him on the applicant on 5 April 1971 and confirmed by the Supreme Military Court on 23 June 1971. However, it is clear from the case-law of the European Court that the reckoning of a detention on remand (Untersuchungshaft) as part of a later sentence cannot eliminate a violation of paragraph 3 of Article 5 (art. 5-3), but may have repercussions only under Article 50 (art. 50) on the basis that it limited the loss occasioned (Stögmüller judgment of 10 November 1969, Series A no. 9, pp. 27, 36 and 39-45; Ringeisen judgments of 16 July 1971 and 22 June 1972, Series A no. 13, pp. 20 and 41-45, and no. 15, p. 8, para. 21; Neumeister judgment of 7 May 1974, Series A no. 17, pp. 18-19, paras. 40-41). The Court sees no reason to resort to a different solution when assessing the compatibility of Mr. Engel’s provisional arrest with paragraph 1 of Article 5 (art. 5-1).

In conclusion, the applicant’s deprivation of liberty from 20 to 22 March 1971 occurred in conditions at variance with this paragraph.

B. On the alleged violation of Articles 5 para. 1 and 14 (art. 14+5-1) taken together

70. In the submission of the applicants, the disputed penalties and measures also contravened Article 5 para. 1 read in conjunction with Article 14 (art. 14+5-1) which 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.”

71. Since certain of the said penalties and measures did not involve any deprivation of liberty (paragraphs 61, 62 and 65 above), the discrimination alleged in their connection does not give rise to any problem with regard to Article 14 (art. 14), in that it did not affect the enjoyment of the right set forth in Article 5 para. 1 (art. 5-1). The same does not apply to Mr. Engel’s provisional arrest, nor to the committal of Mr. Dona and Mr. Schul to a disciplinary unit (paragraphs 63 and 64 above).

72. Mr. Engel, Mr. Dona and Mr. Schul complain in the first place of distinctions in treatment between servicemen. According to Articles 10 and 44 of the 1903 Act, provisional arrest imposed in the form of strict arrest was served by officers in their dwellings, tent or quarters whereas non-commissioned officers and ordinary servicemen were locked in a cell (paragraph 20 above). As for committal to a disciplinary unit, privates alone risked this punishment (Articles 3 to 5 of the 1903 Act and paragraphs 16 and 21 above).

A distinction based on rank may run counter to Article 14 (art. 14). The list set out in that provision is illustrative and not exhaustive, as is shown by the words „any ground such as” (in French „notamment”). Besides, the word „status” (in French „situation”) is wide enough to include rank. Furthermore, a distinction that concerns the manner of execution of a penalty or measure occasioning deprivation of liberty does not on that account fall outside the ambit of Article 14 (art. 14), for such a distinction cannot but have repercussions upon the way in which the „enjoyment” of the right enshrined in Article 5 para. 1 (art. 5-1) is „secured”. The Court, on these two points, does not subscribe to the submissions of the Government (paragraph 40, first sub-paragraph, of the Commission’s report), but rather expresses its agreement with the Commission (*ibid.*, paragraphs 133-134).

The Court is not unaware that the respective legislation of a number of Contracting States seems to be evolving, albeit in various degrees, towards greater equality in the disciplinary sphere between officers, non-commissioned officers and ordinary servicemen. The Netherlands Act of 12 September 1974 offers a striking example of this tendency. In particular, by abolishing strict arrest and committal to a disciplinary unit, this Act has henceforth put an end to the distinctions criticised by Mr. Engel, Mr. Dona and Mr. Schul.

In order to establish whether the said distinctions constituted discrimination contrary to Articles 5 and 14 (art. 14+5) taken together, regard must nevertheless be had to the moment when they were in existence. The Court will examine the question in the light of its judgment of 23 July 1968 in the „Belgian Linguistic” case (Series A no. 6, pp. 33-35, paras. 9-10).

The hierarchical structure inherent in armies entails differentiation according to rank. Corresponding to the various ranks are differing responsibilities which in their turn justify certain inequalities of treatment in the disciplinary sphere. Such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law (paragraph 140 of the Commission’s report: Article 88 of the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War). In this respect, the European Convention allows the competent national authorities a considerable margin of appreciation.

At the time in question, the distinctions attacked by the three applicants had their equivalent in the internal legal system of practically all the Contracting States. Based on an element objective in itself, that is rank, these distinctions could have been dictated by a legitimate aim, namely the preservation of discipline by methods suited to each category of servicemen. While only privates risked committal to a disciplinary unit, they clearly were not subject to a serious penalty threatening the other members of the armed forces, namely reduction in rank. As for confinement in a cell during strict arrest, the Netherlands legislator could have had sufficient reason for not applying this to officers. On the whole, the legislator does not seem in the circumstances to have abused the latitude left to him by the Convention. Furthermore, the Court does not consider that the principle of proportionality, as defined in its previously cited judgment of 23 July 1968 (Series A no. 6, p. 34, para. 10, second sub-paragraph *in fine*), has been offended in the present case.

73. Mr. Engel, Mr. Dona and Mr. Schul in the second place object to inequalities of treatment between servicemen and civilians. In point of fact, even civilians subject by

reason of their occupation to a particular disciplinary system cannot in the Netherlands incur penalties analogous to the disputed deprivations of liberty. However, this does not result in any discrimination incompatible with the Convention, the conditions and demands of military life being by nature different from those of civil life (paragraphs 54 and 57 above).

74. The Court thus finds no breach of Articles 5 para. 1 and 14 (art. 14+5-1) taken together.

C. On the alleged violation of Article 5 para. 4 (art. 5-4)

75. In addition to paragraph 1 of Article 5 (art. 5-1), the applicants invoke paragraph 4 (art. 5-4) which provides:

„Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

76. This question arises only for the committal of Mr. Dona and Mr. Schul to a disciplinary unit. Mr. Engel did not raise it, even from the factual aspect, as regards his provisional arrest; as for the other penalties or measures challenged, they had not „deprived” anyone „of his liberty by arrest or detention” (paragraphs 61-66 above).

77. The Court recalls that the committal of Mr. Dona and Mr. Schul to a disciplinary unit ensued from their „conviction by a competent court”, within the meaning of Article 5 para. 1 (a) (art. 5-1-a) (paragraph 68 above). While „Article 5 para. 4 (art. 5-4) obliges the Contracting States to make available ... a right of recourse to a court” when „the decision depriving a person of his liberty is one taken by an administrative body”, „there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings”. „In the latter case”, as for example, „where a sentence of imprisonment is pronounced after ‘conviction by a competent court’ (Article 5 para. 1 (a) of the Convention) (art. 5-1-a)”, „the supervision required by Article 5 para. 4 (art. 5-4) is incorporated in the decision” (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 40-41, para. 76). The Court, like the Government (paragraph 21 of the memorial), thus concludes that there was no breach of Article 5 para. 4 (art. 5-4) in the case of Mr. Dona and Mr. Schul.

II. On the alleged violations of article 6 (art. 6)

A. On the alleged violation of Article 6 (art. 6) taken alone

78. The five applicants allege violation of Article 6 (art. 6) which provides:

„1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

79. For both the Government and the Commission, the proceedings brought against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul involved the determination neither of „civil rights and obligations” nor of „any criminal charge”.

Led thus to examine the applicability of Article 6 (art. 6) in the present case, the Court will first investigate whether the said proceedings concerned „any criminal charge” within the meaning of this text; for, although disciplinary according to Netherlands law, they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law.

1. On the applicability of Article 6 (art. 6)

(a) On the existence of „any criminal charge”

80. All the Contracting States make a distinction of long standing, albeit in different forms and degrees, between disciplinary proceedings and criminal proceedings. For the individuals affected, the former usually offer substantial advantages in comparison with the latter, for example as concerns the sentences passed. Disciplinary sentences, in general less severe, do not appear in the person’s criminal record and entail more limited consequences. It may nevertheless be otherwise; moreover, criminal proceedings are ordinarily accompanied by fuller guarantees.

It must thus be asked whether or not the solution adopted in this connection at the national level is decisive from the standpoint of the Convention. Does Article 6 (art. 6) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification? This problem, the importance of which the Government acknowledge, was rightly raised by the Commission; it particularly occurs when an act or omission is treated by the domestic law of the respondent State as a mixed offence, that is both criminal and disciplinary, and where there thus exists a possibility of opting between, or even cumulating, criminal proceedings and disciplinary proceedings.

81. The Court has devoted attention to the respective submissions of the applicants, the Government and the Commission concerning what they termed the „autonomy” of the concept of a „criminal charge”, but does not entirely subscribe to any of these submissions (report of the Commission, paragraphs 33-34, paragraphs 114-119 and the separate opinion of Mr. Welter; memorial of the Government, paragraphs 25-34; memorial of the Commission, paragraphs 9-16, paragraphs 14-17 of Annex I and paragraphs 12-14 of Annex II; verbatim report of the hearings on 28 and 29 October 1975).

In the Neumeister judgment of 27 June 1968, the Court has already held that the word „charge” must be understood „within the meaning of the Convention” (Series A no. 8, p. 41, para. 18, as compared with the second sub-paragraph on p. 28 and the first sub-paragraph on p. 35; see also the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110).

The question of the „autonomy” of the concept of „criminal” does not call for exactly the same reply.

The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a „mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

In short, the „autonomy” of the concept of „criminal” operates, as it were, one way only. 82. Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given „charge” vested by the State in question - as in the present case - with a disciplinary character nonetheless counts as „criminal” within the meaning of Article 6 (art. 6).

In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government.

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the „criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution

cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, *mutatis mutandis*, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, last subparagraph, and p. 42 in fine).

83. It is on the basis of these criteria that the Court will ascertain whether some or all of the applicants were the subject of a „criminal charge” within the meaning of Article 6 para. 1 (art. 6-1).

In the circumstances, the charge capable of being relevant lay in the decision of the commanding officer as confirmed or reduced by the complaints officer. It was undoubtedly this decision that settled once and for all what was at stake, since the tribunal called upon to give a ruling, that is the Supreme Military Court, had no jurisdiction to pronounce a harsher penalty (paragraph 31 above).

84. The offences alleged against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul came within provisions belonging to disciplinary law under Netherlands legislation (the 1903 Act and Regulations on Military Discipline), although those to be answered for by Mr. Dona and Mr. Schul (Article 147 of the Military Penal Code), and perhaps even by Mr. Engel and Mr. de Wit (Articles 96 and 114 of the said Code according to Mr. van der Schans, hearing on 28 October 1975), also lent themselves to criminal proceedings. Furthermore, all the offences had amounted, in the view of the military authorities, to contraventions of legal rules governing the operation of the Netherlands armed forces. From this aspect, the choice of disciplinary action was justified.

85. The maximum penalty that the Supreme Military Court could pronounce consisted in four days’ light arrest for Mr. van der Wiel, two days’ strict arrest for Mr. Engel (third punishment) and three or four months’ committal to a disciplinary unit for Mr. de Wit, Mr. Dona and Mr. Schul.

Mr. van der Wiel was therefore liable only to a light punishment not occasioning deprivation of liberty (paragraph 61 above).

For its part, the penalty involving deprivation of liberty that in theory threatened Mr. Engel was of too short a duration to belong to the „criminal” law. He ran no risk, moreover, of having to undergo this penalty at the close of the proceedings instituted by him before the Supreme Military Court on 7 April 1971, since he had already served it from 20 to 22 March (paragraphs 34-36, 63 and 66 above).

On the other hand, the „charges” against Mr. de Wit, Mr. Dona and Mr. Schul did indeed come within the „criminal” sphere since their aim was the imposition of serious punishments involving deprivation of liberty (paragraph 64 above). The Supreme Military Court no doubt sentenced Mr. de Wit to twelve days’ aggravated arrest only, that is to say, to a penalty not occasioning deprivation of liberty (paragraph 62 above), but the final outcome of the appeal cannot diminish the importance of what was initially at stake.

The Convention certainly did not compel the competent authorities to prosecute Mr. de Wit, Mr. Dona and Mr. Schul under the Military Penal Code before a court martial (paragraph 14 above), a solution which could have proved less advantageous for the applicants. The Convention did however oblige the authorities to afford them the guarantees of Article 6 (art. 6).

(b) On the existence of a „determination” of „civil rights”

86. Three of the five applicants allege, in the alternative, that the proceedings instituted against them concerned the „determination” of „civil rights”: Mr. Engel characterises as „civil” his freedom of assembly and association (Article 11) (art. 11), Mr. Dona and Mr. Schul their freedom of expression (Article 10) (art. 10).

87. Article 6 (art. 6) proves less exacting for the determination of such rights than for the determination of „criminal charges”; for, while paragraph 1 (art. 6-1) applies to both matters, paragraphs 2 and 3 (art. 6-2, art. 6-3) protect only persons „charged with a criminal offence”. Since Mr. Dona and Mr. Schul were the subject of „criminal charges” (paragraph 85 in fine above), Article 6 (art. 6) applied to them in its entirety. The Court considers it superfluous to see whether paragraph 1 (art. 6-1) was relevant on a second ground, since the question is devoid of any practical interest.

As for Mr. Engel, who had not been „charged with a criminal offence” (paragraph 85 above, third sub-paragraph), the proceedings brought against him were occasioned solely by offences against military discipline, namely having absented himself from his home on 17 March 1971 and subsequently having disregarded the penalties imposed on him on the following two days. In these circumstances, there is no need to give any ruling in the present case as to whether the freedom of assembly and association is „civil”.

88. In short, it is the duty of the Court to examine under Article 6 (art. 6) the treatment meted out to Mr. de Wit, Mr. Dona and Mr. Schul, but not that complained of by Mr. Engel and Mr. van der Wiel.

2. On compliance with Article 6 (art. 6)

89. The Supreme Military Court, before which appeared Mr. de Wit, Mr. Dona and Mr. Schul, constitutes an „independent and impartial tribunal established by law” (paragraphs 30 and 68 above) and there is nothing to indicate that it failed to give them a „fair hearing”. For its part, the „time” that elapsed between the „charge” and the final decision appears „reasonable”. It did not amount to six weeks for Mr. Dona and Mr. Schul (8 October - 17 November 1971) and hardly exceeded two months for Mr. de Wit (22 February - 28 April 1971). Furthermore, the sentence was „pronounced publicly”.

In contrast, the hearings in the presence of the parties had taken place in camera in accordance with the established practice of the Supreme Military Court in disciplinary proceedings (paragraph 31 above). In point of fact, the applicants do not seem to have suffered on that account; indeed the said Court improved the lot of two of their number, namely Mr. Schul and, to an even greater extent, Mr. de Wit. Nevertheless, in the field it governs Article 6 para. 1 (art. 6-1) requires in a very general fashion that judicial proceedings be conducted in public. Article 6 (art. 6) of course makes provision for exceptions which it lists, but the Government did not plead, and it does not emerge from the file, that the circumstances of the case amounted to one of the occasions when the Article allows „the press and the public (to be) excluded”. Hence, on this particular point, there has been violation of paragraph 1 of Article 6 (art. 6-1).

90. Mr. Dona and Mr. Schul complain that the Supreme Military Court took account of their participation in the publication, prior to no. 8 of „Alarm”, of two writings whose distribution had only been provisionally forbidden under the „Distribution of Writings Decree” and for which they had never been prosecuted (paragraph 49 above). The Supreme Military Court, it is alleged, thereby disregarded the presumption of innocence proclaimed by paragraph 2 of Article 6 (art. 6-2) (report of the Commission, paragraph 45, antepenultimate sub-paragraph).

In reality, this clause does not have the scope ascribed to it by the two applicants. As its wording shows, it deals only with the proof of guilt and not with the kind or level of punishment. It thus does not prevent the national judge, when deciding upon the penalty to impose on an accused lawfully convicted of the offence submitted to his adjudication, from having regard to factors relating to the individual's personality.

Before the Supreme Military Court Mr. Dona and Mr. Schul were „proved guilty according to law” as concerns the offences there alleged against them (no. 8 of „Alarm”). It was for the sole purpose of determining their punishment in the light of their character and previous record that the said Court also took into consideration certain similar, established facts the truth of which they did not challenge. The Court did not punish them for these facts in themselves (Article 37 of the 1903 Act and the memorial filed by the Government with the Commission on 24 August 1973).

91. Mr. de Wit, Mr. Dona and Mr. Schul do not deny that sub-paragraph (a) of paragraph 3 of Article 6 (art. 6-3-a) has been complied with in their regard and they are evidently not relying upon sub-paragraph (e) (art. 6-3-e). On the other hand, they claim not to have enjoyed the guarantees prescribed by sub-paragraphs (b), (c) and (d) (art. 6-3-b, art. 6-3-c, art. 6-3-d).

Their allegations, however, prove far too vague to lead the Court to conclude that they did not „have adequate time and facilities for the preparation of (their) defence” within the meaning of sub-paragraph (b) (art. 6-3-b).

Then again, each of the three applicants has had the opportunity „to defend himself in person” at the various stages of the proceedings. They have furthermore received the benefit before the Supreme Military Court and, in Mr. de Wit's case, before the complaints officer, of „legal assistance of (their) own choosing”, in the form of a fellow conscript who was a lawyer in civil life. Mr. Eggenkamp's services were, it is true, limited to dealing with the legal issues in dispute. In the circumstances of the case, this restriction could nonetheless be reconciled with the interests of justice since the applicants were certainly not incapable of personally providing explanations on the very simple facts of the charges levelled against them. Consequently, no interference with the right protected by sub-paragraph (c) (art. 6-3-c) emerges from the file in this case.

Neither does the information obtained by the Court, in particular on the occasion of the hearings on 28 and 29 October 1975, disclose any breach of sub-paragraph (d) (art. 6-3-d). Notwithstanding the contrary opinion of the applicants, this provision does not require the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words „under the same conditions”, is a full „equality of arms” in the matter. With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6 (art. 6). Article 65 of the 1903 Act and Article 56 of the „Provisional Instructions” of 20 July 1814 place the prosecution and the defence on an equal footing: witnesses for either party are summoned only if the complaints officer or the Supreme Military Court deems it necessary. As concerns the way in which this legislation was applied in the present case, the Court notes that no hearing of witnesses against the accused occurred before the Supreme Military Court in the case of Mr. de Wit, Mr. Dona and Mr. Schul and that it does not appear from the file in the case that these applicants requested the said Court to hear witnesses on their behalf. Doubtless Mr. de Wit objects that the complaints

officer heard only one of the three witnesses on his behalf allegedly proposed by him, but this fact in itself cannot justify the finding of a breach of Article 6 para. 3 (d) (art. 6-3-d).

B. On the alleged violation of Articles 6 and 14 (art. 14+6) taken together

92. According to the applicants, the disciplinary proceedings of which they complain did not comply with Articles 6 and 14 (art. 14+6) taken together since they were not attended by as many guarantees as criminal proceedings brought against civilians (report of the Commission, paragraph 37).

Whilst military disciplinary procedure is not attended by the same guarantees as criminal proceedings brought against civilians, it offers on the other hand substantial advantages to those subject to it (paragraph 80 above). The distinctions between these two types of proceedings in the legislation of the Contracting States are explicable by the differences between the conditions of military and of civil life. They cannot be taken as entailing a discrimination against members of the armed forces, within the meaning of Articles 6 and 14 (art. 14+6) taken together.

C. On the alleged violation of Articles 6 and 18 (art. 18+6) taken together

93. According to Mr. Dona and Mr. Schul, the decision to take disciplinary rather than criminal proceedings against them had the result, or even the aim, of depriving them of the benefit of Article 6 (art. 6). The choice made by the competent authorities allegedly had an arbitrary nature that cannot be reconciled with Article 18 (art. 18) (report of the Commission, paragraph 53).

The Court's conclusions on the applicability and observance of Article 6 (art. 6) in the case of these two applicants (paragraphs 85 and 89-91 above) make it unnecessary for it to rule on this complaint.

III. On the alleged violations of article 10 (art. 10)

A. On the alleged violation of Article 10 (art. 10) taken alone

94. Mr. Dona and Mr. Schul allege violation of Article 10 (art. 10) which provides:

„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. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The complaint, as declared admissible by the Commission, concerns solely the disciplinary punishment undergone by the applicants after 17 November 1971 for having collaborated in the publication and distribution of no. 8 of „Alarm”. It does not relate to the prohibition under the „Distribution of Writings Decree” of this number, of no. 6 of „Alarm” and of the „Information Bulletin” for new recruits nor to the strict arrest imposed on the applicants on 13 August 1971 for their participation in distributing a pamphlet during the incidents at Ermelo (paragraphs 43-45 above).

95. The disputed penalty unquestionably represented an „interference” with the exercise of the freedom of expression of Mr. Dona and Mr. Schul, as guaranteed by paragraph 1 of Article 10 (art. 10-1). Consequently, an examination under paragraph 2 (art. 10-2) is called for.

96. The penalty was without any doubt „prescribed by law”, that is by Articles 2 para. 2, 5-A-8o, 18, 19 and 37 of the 1903 Act, read in conjunction with the Article 147 of the Military Penal Code. Even in regard to the part played by the accused in the editing and distribution, prior to no. 8 of „Alarm”, of writings prohibited by the military authorities, the punishment was based on the 1903 Act (paragraph 90 above) and not on the „Distribution of Writings Decree”. The Court thus does not have to consider the applicants’ submissions on the validity of this decree (report of the Commission, paragraph 45, fifth sub-paragraph).

97. To show that the interference at issue also met the other conditions of paragraph 2 of Article 10 (art. 10-2), the Government pleaded that the measures taken in this case were „necessary in a democratic society”, „for the prevention of disorder”. They relied on Article 10 para. 2 (art. 10-2) only with reference to this requirement.

98. The Court firstly emphasises, like the Government and the Commission that the concept of „order” as envisaged by this provision, refers not only to public order or „ordre public” within the meaning of Articles 6 para. 1 and 9 para. 2 (art. 6-1, art. 9-2) of the Convention and Article 2 para. 3 of Protocol no. 4 (P4-2-3): it also covers the order that must prevail within the confines of a specific social group. This is so, for example, when, as in the case of the armed forces, disorder in that group can have repercussions on order in society as a whole. It follows that the disputed penalties met this condition if and to the extent that their purpose was the prevention of disorder within the Netherlands armed forces.

Mr. Dona and Mr. Schul admittedly maintain that Article 10 para. 2 (art. 10-2) takes account of the „prevention of disorder” only in combination with the „prevention of crime”. The Court does not share this view. While the French version uses the conjunctive „et”, the English employs the disjunctive „or”. Having regard to the context and the general system of Article 10 (art. 10), the English version provides a surer guide on this point. Under these conditions, the Court deems it unnecessary to examine whether the applicants’ treatment was aimed at the „prevention of crime” in addition to the „prevention of disorder”.

99. It remains to be seen whether the interference with the freedom of expression of Mr. Dona and Mr. Schul was „necessary in a democratic society”, „for the prevention of disorder”.

100. Of course, the freedom of expression guaranteed by Article 10 (art. 10) applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings. Article 147 of the Netherlands Military Penal Code (paragraph 43 above) is based on this legitimate requirement and does not in itself run counter to Article 10 (art. 10) of the Convention.

The Court doubtless has jurisdiction to supervise, under the Convention, the manner in which the domestic law of the Netherlands has been applied in the present case, but it must not in this respect disregard either the particular characteristics of military life

(paragraph 54 in fine above), the specific „duties” and „responsibilities” incumbent on members of the armed forces, or the margin of appreciation that Article 10 para. 2 (art. 10-2), like Article 8 para. 2 (art. 8-2), leaves to the Contracting States (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, para. 93, and Golder judgment of 21 February 1975, Series A no. 18, p. 22).

101. The Court notes that the applicants contributed, at a time when the atmosphere in the barracks at Ermelo was somewhat strained, to the publication and distribution of a writing the relevant extracts from which are reproduced above (paragraphs 43 and 51 above). In these circumstances the Supreme Military Court may have had well-founded reasons for considering that they had attempted to undermine military discipline and that it was necessary for the prevention of disorder to impose the penalty inflicted. There was thus no question of depriving them of their freedom of expression but only of punishing the abusive exercise of that freedom on their part. Consequently, it does not appear that its decision infringed Article 10 para. 2 (art. 10-2).

B. On the alleged violation of Articles 10 and 14 (art. 14+10) taken together

102. Mr. Dona and Mr. Schul allege a dual breach of Articles 10 and 14 (art. 14+10) taken together. They stress that a civilian in the Netherlands in a comparable situation does not risk the slightest penalty. In addition, they claim to have been punished more severely than a number of Netherlands servicemen, not belonging to the V.V.D.M., who had also been prosecuted for writing or distributing material likely to undermine military discipline.

103. On the first question, the Court emphasises that the distinction at issue is explicable by the differences between the conditions of military and of civil life and, more specifically, by the „duties” and „responsibilities” peculiar to members of the armed forces in the field of freedom of expression (paragraphs 54 and 100 above). On the second question, the Court points out that in principle it is not its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must, just like the Contracting States, respect the independence of those courts. Such a decision would actually become discriminatory in character if it were to depart from others to the point of constituting a denial of justice or a manifest abuse, but the information supplied to the Court does not permit a finding of this sort.

C. On the alleged violation of Article 10 taken with Articles 17 and 18 (art. 17+10, art. 18+10)

104. Mr. Dona and Mr. Schul further claim that, contrary to Articles 17 and 18 (art. 17, art. 18), the exercise of their freedom of expression was subject to „limitation to a greater extent than is provided for” in Article 10 (art. 10) and for a „purpose” not mentioned therein.

This complaint does not support examination since the Court has already concluded that the said limitation was justified under paragraph 2 of Article 10 (art. 10-2) (paragraphs 96-101 above).

IV. On the alleged violation of article 11 (art. 11)

105. According to Mr. Dona and Mr. Schul, after their cases, many conscripts who were members of the V.V.D.M. incurred penalties for having written and/or distributed publications tending to undermine discipline, within the meaning of Article 147 of the Military Penal Code. In their submission, these were systematic measures calculated to

impede the functioning of the V.V.D.M., thereby infringing Article 11 (art. 11) of the Convention which provides:

„1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

106. The Court may take into consideration only the case of the two applicants and not the situation of other persons or of an association not having authorised them to lodge an application with the Commission in their name (De Becker judgment of 27 March 1962, Series A no. 4, p. 26 in fine, and Golder judgment of 21 February 1975, Series A no. 18, p. 19, para. 39 in fine).

107. Insofar as Mr. Dona and Mr. Schul rely also upon their own freedom of association, the Court finds that they were not punished by reason either of their membership of the V.V.D.M. or of their participation in its activities, including preparation and publication of the journal „Alarm”. While the Supreme Military Court punished them, it was only because it considered that they had made use of their freedom of expression with a view to undermining military discipline.

108. In view of the absence of any interference with the right of the two applicants under paragraph 1 of Article 11 (art. 11-1), the Court does not have to consider paragraph 2 (art. 11-2), or Articles 14, 17 and 18 (art. 14, art. 17, art. 18).

V. On the application of article 50 (art. 50)

109. Under Article 50 (art. 50) of the Convention, if the Court finds „that a decision or measure taken” by any authority of a Contracting State „is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said (State) allows only partial reparation to be made for the consequences of this decision or measure”, the Court „shall if necessary afford just satisfaction to the injured party”.

The Rules of Court specify that when the Court „finds that there is a breach of the Convention, it shall give in the same judgment a decision on the application of Article 50 (art. 50) of the Convention if that question, after being raised under Rule 47 bis, is ready for decision; if the question is not ready for decision, the Court shall reserve it in whole or in part and shall fix the further procedure” (Rule 50 para. 3, first sentence, read in conjunction with Rule 48 para. 3).

110. At the hearing on 29 October 1975, the Court, pursuant to Rule 47 bis, invited those appearing before it to present observations on the question of the application of Article 50 (art. 50) in the present case.

It emerges from the reply of the Commission’s principal delegate that the applicants make no claim for compensation for material damage. However, they expect to be granted just satisfaction should the Court find failure to comply with the requirements of the Convention in one or more instances, but they do not for the moment indicate the amount of their claim were such satisfaction to take the form of financial compensation.

On their side the Government, through their Agent, declared that they left this point completely to the discretion of the Court.

111. The question of the application of Article 50 (art. 50) of the Convention does not arise in the case of Mr. van der Wiel, or for those complaints of Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul which the Court has not retained. On the other hand, it does arise for the breach of Article 5 para. 1 (art. 5-1) in the case of Mr. Engel and of Article 6 para. 1 (art. 6-1) in that of Mr. de Wit, Mr. Dona and Mr. Schul (paragraphs 69 and 89 above). The information supplied by the Commission's principal delegate shows however that the question is not ready for decision; it is therefore appropriate to reserve the question and to fix the further procedure in connection therewith.

For these reasons, the court,

1. Holds, unanimously, that Article 5 (art. 5) was not applicable to the light arrest of Mr. Engel (second punishment) and of Mr. van der Wiel;
2. Holds, by twelve votes to one, that it was also not applicable to the aggravated arrest of Mr. de Wit, or to the interim aggravated arrest of Mr. Dona and Mr. Schul;
3. Holds, by eleven votes to two, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit did not violate Article 5 para. 1 (art. 5-1);
4. Holds, by nine votes to four, that the whole period of Mr. Engel's provisional strict arrest violated Article 5 para. 1 (art. 5-1), since no justification is to be found for it in any sub-paragraph of this provision;
5. Holds, by ten votes to three, that apart from that it violated Article 5 para. 1 (art. 5-1) insofar as it exceeded the period of twenty-four hours stipulated by Article 45 of the Netherlands Military Discipline Act of 27 April 1903;
6. Holds, unanimously, that the committal of Mr. Dona and Mr. Schul to a disciplinary unit and Mr. Engel's provisional arrest did not violate Articles 5 para. 1 and 14 (art. 14+5-1) taken together;
7. Holds, by twelve votes to one, that there has been no breach of Article 5 para. 4 (art. 5-4) as regards the committal of Mr. Dona and Mr. Schul to a disciplinary unit;
8. Holds, by eleven votes to two, that Article 6 (art. 6) was not applicable to Mr. Engel on the ground of the words „criminal charge”;
9. Holds, unanimously, that it was also not applicable to this applicant on the ground of the words „civil rights and obligations”;
10. Holds, unanimously, that neither was it applicable to Mr. van der Wiel;
11. Holds, by eleven votes to two, that there was a breach of Article 6 para. 1 (art. 6-1) in the case of Mr. de Wit, Mr. Dona and Mr. Schul insofar as hearings before the Supreme Military Court took place in camera;
12. Holds, unanimously, that there was no breach of Article 6 para. 2 (art. 6-2) in the case of Mr. Dona and Mr. Schul;
13. Holds, unanimously, that there was no breach of Article 6 para. 3 (b) (art. 6-3-b) in the case of Mr. de Wit, Mr. Dona and Mr. Schul;
14. Holds, by nine votes to four, that there was no breach of Article 6 para. 3 (c) (art. 6-3-c) in the case of these three applicants;
15. Holds, by nine votes to four, that there was no breach of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. de Wit;

16. Holds, by twelve votes to one, that there was no breach of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. Dona and Mr. Schul;
17. Holds, unanimously, that there was no breach of Articles 6 and 14 (art. 14+6) taken together in the case of Mr. de Wit, Mr. Dona and Mr. Schul;
18. Holds, unanimously, that there is no need to rule on the complaint based by Mr. Dona and Mr. Schul on the alleged violation of Articles 6 and 18 (art. 18+6) taken together;
19. Holds, unanimously, that there was no breach of Article 10 (art. 10) taken alone or together with Articles 14, 17 or 18 (art. 14+10, art. 17+10, art. 18+10) in the case of Mr. Dona and Mr. Schul;
20. Holds, unanimously, that there was no breach of Article 11 (art. 11) in the case of Mr. Dona and Mr. Schul;
21. Holds, unanimously, that the question of the application of Article 50 (art. 50) does not arise in the case of Mr. van der Wiel, or for those of the complaints of Mr. Engel, Mr. de Wit, Mr. Dona and Mr. Schul which the Court has not herein retained (items 1 to 3, 6 to 10 and 12 to 20 above);
22. Holds, by twelve votes to one, that the question is not yet ready for decision as regards the breaches found in the case of Mr. Engel (Article 5 para. 1, items 4 and 5 above) (art. 5-1) and in the case of Mr. de Wit, Mr. Dona and Mr. Schul (Article 6 para. 1, item 11 above) (art. 6-1);

Accordingly,

- (a) reserves the whole of the question of the application of Article 50 (art. 50) as it arises for these four applicants;
- (b) invites the Commission's delegates to present in writing, within one month from the delivery of this judgment, their observations on the said question;
- (c) decides that the Government shall have the right to reply in writing to those observations within a month from the date on which the Registrar shall have communicated them to the Government;
- (d) reserves the further procedure to be followed on this aspect of the case.

Done in French and English, the French text being authentic, at the Human Rights Building, Strasbourg, this eighth day of June, one thousand nine hundred and seventy-six.

Hermann MOSLER

President

Marc-André EISSEN

Registrar

The separate opinions of the following Judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 50 para. 2 of the Rules of Court.

Mr. Verdross;

Mr. Zekia;

Mr. Cremona;

Mr. O'Donoghue and Mrs. Pedersen;

Mr. Vilhjálmsson;

Mrs. Bindschedler-Robert;

Mr. Evrigenis.

Separate opinion of judge Verdross

(Translation)

I have voted for the operative provisions of the judgment as they are in line with the Court's established case-law. However, I cannot, to my great regret, accept the proposition underlying the judgment, namely, that Article 5 (art. 5) of the Convention is violated by any detention imposed by a competent military authority whose decision is not subject to a judicial remedy having a suspensive effect.

Here are my reasons. If one compares disciplinary detention in a cell in the barracks with incarceration of a civilian or a serviceman in a prison (paragraph 1 (a) of Article 5) (art. 5-1-a), one is bound to see that there is a fundamental difference between the two. In the second case, the convicted person is completely cut off from his ordinary environment and occupation since he is removed from his home. On the other hand, the soldier detained for disciplinary reasons stays in the barracks and may, from one moment to the next, be ordered to carry out one of his military duties; he thus remains, even whilst so detained, potentially within the confines of military service. It seems to me from this that such detention does not in principle amount to a deprivation of liberty within the meaning of Article 5 para. 1 (art. 5-1). This does not mean that all disciplinary detention imposed by the competent military authority escapes the Court's supervision. It may contravene the Convention if it violates Article 3 (art. 3) or if its duration, or its severity, exceeds the norm generally admitted by the member States of the Council of Europe in the matter of disciplinary sanctions; I take the view that, in the final analysis, the nature of a punishment depends on this yardstick which can, of course, vary with the requirements of international military life.

Separate opinion of judge Zekia

I have respectfully subscribed to the main part of the judgment dealing with views and conclusions reached and criteria formulated for demarcation of the line where deprivation of liberty in the case of a conscript or an army serviceman occurs or does not occur within the ambit of Article 5 para. 1 (art. 5-1) of the Convention. Admittedly a certain amount of restriction on the right to liberty of a conscript or soldier might be imposed without infringement of Article 5 (art. 5) whereas such restriction cannot lawfully be imposed in the case of a civilian. Full reasons having been given in the judgment I need not repeat them.

I felt, however, unable to associate myself with the line of interpretation taken in determining the scope of application to the present case of certain Articles of the Convention, namely, Articles 5 para. 1 (a), 6 para. 1, 6 para. 3 (c) and (d) (art. 5-1-a, art. 6-1, art. 6-3-c, art. 6-3-d). In my view, once, in the light of the criteria enunciated by this Court, a conscript or soldier is charged with an offence which entails deprivation of his liberty such as committal to a disciplinary unit, and proceedings are directed to that end, such conscript or soldier is fully entitled to avail himself of the provisions of the Articles under consideration. For all intents and purposes the proceedings levelled against him are criminal in character and as far as court proceedings are concerned there need not be any difference between him and a civilian. I am not suggesting that such proceedings should be referred to civil courts. On the contrary, I consider it very appropriate that military courts composed of one or more judges, assisted by assessors or lawyers if needed, might take cognisance of cases where army servicemen are to be tried.

Mr. de Wit, Mr. Dona and Mr. Schul were all of them serving as privates in the Netherlands Army. The first was charged with driving a jeep in an irresponsible manner over uneven ground at a high speed. His company commander committed him to a disciplinary unit for three months. He complained to the complaints officer who heard the applicant and one out of three witnesses whom he wanted to be heard. He had the assistance of a lawyer who could assist him only on legal points. He lodged an appeal with the Supreme Military Court which, after hearing the appellant and his legal adviser and obtaining the opinion of the State Advocate, reduced the punishment to twelve days' aggravated arrest to be executed thereafter. The date of his original sentence was 22 February 1971 and the Supreme Military Court gave its decision on 28 April 1971.

On 8 October 1971 Mr. Dona and Mr. Schul, as editors of a journal called „Alarm”, were sentenced by their superior commanding officer to committal to a disciplinary unit for a period of three and four months respectively, for publications undermining military authority in the Army. Both complained to the complaints officer who confirmed the sentence. Then they appealed to the Supreme Military Court. On 17 November 1971 their case was heard. Both were assisted on the legal aspects of the case by a lawyer. Sentences were confirmed. Mr. Schul's sentence was reduced to three months. Both Mr. Dona and Mr. Schul, pending their appeal before the Supreme Military Court, were placed under aggravated arrest from 8 to 19 October and remained under interim arrest as from the latter date to 27 October. They were then released until their case came up for hearing before the Supreme Military Court.

It is evident from the statement of facts made in the judgment and from the short reference I have given to certain facts that the superior commanding officer assumed the status of a judge who constituted a court of first instance and after hearing the case convicted the applicants and sentenced them for committal to a disciplinary unit. Likewise, the complaints officer assumed the status of a revisional court in dealing with complaints made by persons convicted and sentenced by a lower court, here by the superior commanding officer. The decision of the complaints officer is also subject to appeal to the Supreme Military Court which is empowered to confirm or reverse conviction and sentence or to alter them. The Supreme Military Court exercises an appellate jurisdiction over the decisions of the commanding and complaints officers. The conviction and sentence do not emanate from this Court. The sentence for committal to a disciplinary unit originated in the decision of the superior commanding officer who is neither a judge nor entitled to constitute a court. The proceedings before him are conducted partly in a quasi-judicial manner and not in full compliance with Articles 6 para. 1 and 6 para. 3 (c) and (d) (art. 6-1, art. 6-3-c, art. 6-3-d) of the Convention. The same considerations more or less apply to the status of the complaints officer. The Supreme Military Court is correctly denominated as a court although the proceedings before the court are conducted in camera in contravention of Article 6 para. 1 (art. 6-1). This court is not supposed to take the place of a trial court but rather to correct decisions already taken and convictions and sentences already passed. Therefore I am of the opinion that the requirements of Article 5 para. 1 (a) (art. 5-1-a) have not been met. It is a great advantage to persons facing charges to have a hearing, first before a trial court which affords equality of arms and observes the rules of fair trial. In case of conviction and receiving sentence, again it is a further advantage for a convicted man to have the chance to assert his innocence before a higher court. Usually a court of appeal considers

itself as bound by the findings of fact of the lower court unless there is strong reason to upset such findings. The significance in the administration of justice of a trial court of first instance cannot be regarded as over-emphasised. On the other hand if I am right in my way of thinking that, once a soldier is sought to be deprived of his right to liberty to the extent inadmissible and impermissible with regard to his status as a soldier or conscript, he is entitled to be treated as a civilian, then the detention of the applicants either in the form of aggravated arrest or interim arrest before their cases were heard by the Supreme Military Court amounted to a detention before a conviction by a competent court had been passed. Furthermore, the detention of the applicants for the period indicated above before the Supreme Military Court heard the case was made on the strength of a conviction and sentence passed by a superior commanding officer who was not a competent court and such detention was not linked with the exigencies of service. I have little to say in respect of infractions of Articles 6 para. 1 and 6 para. 3 (c) and (d) (art. 6-1, art. 6-3-c, art. 6-3-d). Violation of Article 6 para. 1 (art. 6-1) is found by the Court. I have nothing to add. Coming to Article 6 para. 3 (c) (art. 6-3-c), it appears from the record that the applicants were assisted only on the legal aspects of their case and very probably because they had recourse to the Articles of the Convention. This, to my mind, does not satisfy the provisions of the aforesaid sub-paragraph. As to Article 6 para. 3 (d) (art. 6-3-d), it appears again that the applicants could not obtain the attendance and examination of some witnesses they wanted to call for their defence. The omission or refusal to call such witnesses for the defence does not appear to be based either on the irrelevancy of their evidence or on some other good reason. The applicants were not fully afforded the chance to examine witnesses against them either directly or through their counsel or through the court as envisaged in sub-paragraph 3 (d) of Article 6 (art. 6-3-d) of the Convention.

Separate opinion of judge Cremona

I have agreed with the majority of my brother judges in the finding of the violations of the Convention indicated in the judgment. But having come to the conclusion, along with them, that certain punitive measures complained of in this case (strict arrest and committal to a disciplinary unit) were in fact deprivations of personal liberty also in the context of the special characteristics and exigencies of military life, I feel that certain other points become pertinent, and on these points, which I am briefly setting out hereunder, I find myself, with respect, in disagreement with the conclusions reached by the majority of my colleagues.

In the first place, having already excluded certain punitive measures (also described as arrests) from the purview of deprivation of liberty for the purposes of Article 5 para. 1 (art. 5-1) of the Convention solely on the accepted ground that „when interpreting and applying the rules of the Convention in the present case, the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces” (paragraph 54 of the judgment), then, in proceeding to identify as possible charges of a criminal nature (for the purposes of Article 6 para. 1 of the Convention) (art. 6-1) certain „disciplinary charges” which involve liability to punishments entailing unquestionable deprivation of liberty, I am unable to distinguish further, as the majority of my colleagues do (paragraph 82), particularly on the basis of the relative duration of such deprivation of liberty.

Thus I find that also in the case of Mr. Engel (and not only in that of Mr. de Wit, Mr. Dona and Mr. Schul, as stated in paragraph 88 of the judgment) the position was one of the determination of a criminal charge against him, and since the hearing in his case too, as in that of the others, took place in camera, there is also in respect of him a violation of Article 6 para. 1 (art. 6-1), irrespective of the short duration of the strict arrest to which he was liable. The question of the assessment of the risk to which he was in practice exposed on 7 April 1971 cannot in my view alter the existing legal situation.

In paragraph 63 it is accepted in the judgment that the provisional arrest inflicted on Mr. Engel in the form of strict arrest did have the character of deprivation of liberty and this, as therein stated, despite its short duration. While appreciating that what I am about to say is not quite the same thing though the basis is essentially common, I feel that when considering the true nature of a criminal charge, liability to a punishment entailing unquestionable deprivation of liberty should also be viewed irrespective of its duration. In such a case the nature of the punishment itself in fact overrides its duration. An established deprivation of personal liberty cannot, without injury to the spirit of the Convention, be considered as obliterated by the shortness of its duration, also in the process of determining, for the purposes of Article 6 para. 1 (art. 6-1) of the Convention, the true nature of a criminal charge. With particular reference to what is stated in the last sub-paragraph of paragraph 82 of the judgment, it is my belief that the detriment involved in a deprivation of personal liberty, once established as such, cannot (as is done there) properly be qualified by the quantitative concept „not appreciable” nor indeed judged by reference to time, except only for the purposes of the relative gravity.

Another point concerns Article 6 para. 3 (c) (art. 6-3-c) of the Convention, which, among certain minimum rights guaranteed to a person charged with a criminal offence, includes the right „to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. I do not propose to controvert the fact that this right as a whole and as formulated in this provision is not in every respect an absolute right. But then I do believe that this important right of the accused cannot be subjected to the limitation that the legal assistance (in this case a fellow-conscript with legal qualifications chosen by the applicants themselves) be confined exclusively to any points of law arising in the case.

It will be recalled in this connection that at the time of the measures complained of, the Supreme Military Court in practice granted legal assistance in certain cases where it was expected that the person concerned would not be able himself to cope with the special legal problems raised in his appeal and such legal assistance was confined to the legal aspects of the case. This limitation is in fact the subject of complaint here and I find that its application in the case of the applicants mentioned in paragraph 91 of the judgment is in violation of Article 6 para. 3 (c) (art. 6-3-c) of the Convention. The legal assistance mentioned in this provision refers to the case as a whole, that is to say, in all its aspects, both legal and factual. Indeed it is only too clear that every case is made up of both law and fact, that these are both important for the defence (which is what this provision is intended to protect) and that at times it may also not be too easy to separate one from the other.

In particular, it is, with respect, hardly reasonable to seek to justify the situation complained of, as the majority of my colleagues do in the third sub-paragraph of

paragraph 91 of the judgment, on the ground that „the applicants were certainly not incapable of personally providing explanations on the very simple facts of the charges levelled against them”. Indeed, quite apart from the questionable simplicity of the facts of the charges or at any rate some of them, the essential point here is not the matter of providing explanations, but the matter of adequately defending oneself against a criminal charge. The right guaranteed in Article 6 para. 3 (c) (art. 6-3-c) is a vital right of the accused and indeed of the defence in general and is designed to ensure that proceedings against a person criminally charged will not be conducted in such a way that his defence will be impaired or not adequately put. Nor is the right to legal assistance of one’s own choosing, as enshrined in this provision, conditional on the person charged being incapable of defending himself (or, as stated in the judgment, providing explanations) in person. Furthermore, here the question clearly was not that the applicants were unable to defend themselves in person, but that they showed themselves unwilling to do so, preferring, as entitled to do under the Convention, to be defended (in respect of not only the legal but also the factual aspects of the charges against them) by a lawyer of their own choosing. That lawyer was in fact accepted, but then his services in the defence of the applicants were, as already stated, in my view unjustifiably restricted.

Another point concerns the failure to call two witnesses for the defence of Mr. de Wit (named by him), a failure of which he also complained in this case, invoking Article 6 para. 3 (d) (art. 6-3-d) of the Convention, which guarantees to a person charged with a criminal offence, among certain other minimum rights, the right „to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. Again, there is no gainsaying the fact that this is not an absolute right and is limited, for instance and to mention but one factor, by the concept of relevance. Now when Mr. van der Schans assisting the delegates of the Commission (he had previously also represented the applicants before the Commission) put it to this Court that the witnesses for the defence who were not ordered to appear were witnesses who could have helped the case for the defence (they were described as „eye-witnesses”), the Government representatives countered by saying that in view of the fact that Mr. de Wit had made a declaration acknowledging certain facts, „there was no need for further witnesses” (verbatim report of the public hearing of 29 October 1975). But, without here wishing to interfere unduly with the decisions of national jurisdictions and apart from the fact that Mr. de Wit’s declaration covered only part of the charge against him (in it he certainly denied certain parts of the charge, as may be seen from the relevant decision), what was stated by the Government representatives seems to indicate that the non-admission of Mr. de Wit’s two witnesses out of the three proposed by him (as against the admission of five witnesses against him) was not grounded on such justifiable considerations as, for instance, relevance, but rather on their becoming unnecessary because of certain of the accused’s statements, which in my view, at least on the basis of what is before me, is not justifiable.

Joint separate opinion of judges O’donoghue and Pedersen

We are in agreement with the view that no breach has been found in any of the cases before the Court under Articles 10, 11, 14, 17 and 18 (art. 10, art. 11, art. 14, art. 17, art. 18) of the Convention. It is clear from the judgment that the difficulties arise from the consideration of the applicability of two Articles 5 and 6 (art. 5, art. 6). These Articles

(art. 5, art. 6) can be said to have a certain inter-relationship because if Article 5 (art. 5) is applicable in the sense that there has been a deprivation of liberty involving a criminal charge the full impact of the obligation to comply with Article 6 (art. 6) will follow.

We feel unable to adopt the conclusion of the majority of the Court that the clear obligation of members of the armed forces to observe the code of discipline applicable to such forces is an unspecified obligation and therefore outside the reach of Article 5 para. 1 (b) (art. 5-1-b). There is a clear distinction in our opinion between the obligation of citizens at large to obey the law and the special position of military personnel to obey the disciplinary code which is a vital and integral constituent of the force of which they are members.

Apart from the considerations set out in the separate dissenting opinion of MM. Fawcett and others [pp. 74-75 of the Report], with which conclusion we fully agree, there is an elementary factor which should be looked at in the structure and character of a military establishment in any country which is party to the Convention. This factor is the disciplinary code, the maintenance of which is vital to the very continued existence of an armed force, and quite different from any other body or association which purports to exercise a measure of discipline over its members.

The special importance of discipline in an armed force and the recognition of this by its members, lead us to take the view that you have here a clear case of a specific and concrete obligation prescribed by law and imposed on the members. In the light of these considerations we are satisfied that in none of the cases before the Court has there been a breach of Article 5 para. 1 (art. 5-1) of the Convention because of the exception stated in Article 5 para. 1 (b) (art. 5-1-b).

What is described as the provisional detention of Mr. Engel commenced with his arrest on 20 March 1971. The Military Discipline Act of 1903 sanctioned such an arrest and detention but Article 45 of that Act restricted the period of provisional detention to twenty-four hours. In the events which took place in Mr. Engel's case there was an excessive detention of twenty-two hours and this excess was unlawful. But in the case of Mr. Engel we consider that the whole period during March to June 1971 be taken into account. The Ministerial decision to suspend the execution of his punishments to allow him to take his examination and the reduction of the several penalties in April must be balanced against the definite but technically excessive detention of twenty-two hours. In all these circumstances we would not hold that the Netherlands Government committed a breach of Article 5 para. 1 (art. 5-1) of the Convention.

As we regard the breaches of the applicants as disciplinary offences, concerned only with the applicants' conduct as servicemen and with their military obligations (cf. para. 122 of the Commission's report), it follows that the question of „the determination of his civil rights and obligations” as stated in Article 6 para. 1 (art. 6-1) of the Convention does not arise for any of the applicants.

For the same reasons we are of the opinion that there was no contravention of Article 6 (art. 6) in dealing with the cases, and in not treating any of them as in essence criminal charges requiring the application of the process contained in that Article (art. 6).

It is to be recognised that difficulty may be experienced by States in dealing with cases which are a breach of discipline and at the same time an offence under the criminal law. It seems to us that a test should be whether the complaint is predominantly a disciplinary breach or a criminal offence. If the latter, the provisions of Article 6 (art. 6) must be

observed. The nature of the complaint and the punishment prescribed under the disciplinary code and under the criminal law would be helpful pointers as to the course to be followed in order to comply with the Convention. Any attempt to dilute the procedure in the case of a grave crime by treating it as a disciplinary infraction would in our opinion be such a serious abuse, and indeed quite powerless under the Convention to exclude the application of Article 6 (art. 6) and would oblige full compliance with the requirements of that Article (art. 6).

We have derived much assistance from the separate opinion of Mr. Welter and in particular we agree with his view expressed in paragraph 9 of the opinion and his reasons given why Article 6 (art. 6) was not applicable to any of the five applicants.

It follows from the foregoing that no questions arise under Article 50 (art. 50).

Separate opinion of judge Thór Vilhjálmsson

1. I feel unable to go along with the reasoning of the majority of the Court expressed in paragraph 62 of the judgment. There the majority finds that aggravated arrest under the 1903 Act is not a deprivation of liberty within the meaning of Article 5 (art. 5) of the Convention. In my opinion it is. This is both because of its nature and its legal character. As is described in paragraph 19 of the judgment, servicemen undergoing aggravated arrest are not allowed the same freedom of movement as other servicemen. These restrictions deviate clearly from the usual conditions of life within the Netherlands armed forces. Thus the servicemen concerned have to remain during off-duty hours in a specially designated place, cannot go to the recreation facilities open to others in the same barracks and often sleep in special rooms.

The view that this treatment is tantamount to deprivation of liberty is strengthened by its purpose which obviously is punitive. It is also worth noting that we have here a treatment in respect of which the term arrest is used and this in itself indicates a deprivation of liberty.

What is stated above does not lead me to find a breach of Article 5 (art. 5) of the Convention as regards the aggravated arrest of Mr. de Wit (paragraph 41 of the judgment) and of Mr. Dona and Mr. Schul (paragraph 65 of the judgment). This conclusion is based on my interpretation of Article 5 para. 1 (b) (art. 5-1-b) of the Convention dealt with below. In the case of Mr. de Wit it is also based on the fact that he served aggravated arrest after a decision was rendered by the Supreme Military Court of the Netherlands.

2. Article 5 para. 1 (b) (art. 5-1-b) of the Convention permits „the lawful arrest or detention of a person ... in order to secure the fulfilment of any obligation prescribed by law”. The majority of the Court, in agreement with the majority of the Commission, finds this provision not applicable in the present case (paragraph 69 of the judgment). I cannot agree with the majority on this point. Any country which has a military service organises it on the basis of well-established principles, which in the case of the Netherlands are specified in the laws and regulations mentioned in the judgment. These rules form a distinct entity and they impose upon servicemen certain specific obligations. It seems to me that, far from endangering respect for the rule of law, this body of rules falls under the above-cited provision of Article 5 para. 1 (b) (art. 5-1-b).

This conclusion, nevertheless, does not apply to the provisional detention of Mr. Engel in excess of the twenty-four hours permitted by Article 45 of the 1903 Act (paragraph 26

of the judgment). On this particular point I am in agreement with the majority of the Court (see paragraph 69).

3. In paragraph 91 of the judgment, the majority of the Court sets out its opinion in connection with sub-paragraphs (c) and (d) of Article 6 para. 3 (art. 6-3-c, art. 6-3-d) of the Convention. I do not share this opinion.

As to Article 6 para. 3 (c) (art. 6-3-c), a natural reading of the text seems to me to indicate that it is up to the accused to decide whether he defends himself in person or entrusts this task to a lawyer. This, moreover, is in line with the general principles of law reflected in Article 6 (art. 6). I fail to see how, in a given case, a court – not to speak of an administrative authority – can reasonably decide to what degree the accused is capable of conducting his own defence. I therefore find a breach of Article 6 para. 3 (c) (art. 6-3-c) in the case of Mr. de Wit, Mr. Dona and Mr. Schul.

As to Article 6 para. 3 (d) (art. 6-3-d) of the Convention, I agree with the majority of the Court when it states in paragraph 91 of the judgment that this provision does not require the examination of every witness that an accused person may wish to have called. I am also of the opinion, like the majority, that „equality of arms” is an important point when this provision is interpreted. Nevertheless, this provision entitles a person charged with a criminal offence to have witnesses on his behalf heard by the tribunal dealing with his case unless legally valid reasons are given for not doing so. This Court has, it is true, somewhat incomplete information on the facts concerning the alleged violations of Article 6 para. 3 (d) (art. 6-3-d). It is stated that in the case of Mr. de Wit the calling of two witnesses was prevented at every juncture (paragraphs 42 and 91 of the judgment). This has in my opinion not been refuted. Even if the complaints officer on 5 March 1971 heard witnesses (paragraph 41), this cannot count as a fulfilment of the obligation under Article 6 para. 3 (d) (art. 6-3-d) because he is not a court or a tribunal within the meaning of Article 6 para. 1 (art. 6-1). Accordingly I find a violation of Article 6 para. 3 (d) (art. 6-3-d) in the case of Mr. de Wit. On the other hand I agree with the majority of the Court in not finding a breach of this provision in the case of Mr. Dona and Mr. Schul as it has not been established that they made any request to the Supreme Military Court in this respect.

Separate opinion of judge Bindschedler-Robert

(Translation)

I am in agreement with the operative provisions of the judgment, except the two items concerning Mr. Engel's provisional arrest. These items record the finding that this arrest violated Article 5 para. 1 (art. 5-1) of the Convention, firstly, since no justification is to be found for it in any sub-paragraph of this provision (item 4), and secondly, because it exceeded the period of twenty-four hours stipulated by Netherlands law and insofar as it exceeded this period (item 5).

1. The difference of opinion over the first item reflects a fundamental disagreement on the applicability of Article 5 para. 1 (art. 5-1) in the matter.

The first part of the judgment („as to the law”) is based on the idea that Article 5 para. 1 (art. 5-1) is applicable *de plano* to disciplinary measures and penalties occasioning deprivation of liberty imposed in the context of military disciplinary law. It follows from this (i) that disciplinary penalties occasioning deprivation of liberty would comply with the Convention only if imposed by a court, in conformity with Article 5 para. 1 (a) (art.

5-1-a); and (ii) that, in conformity with sub-paragraph (c) (art. 5-1-c), there may be provisional arrest or detention only for the purpose of bringing the person arrested before the competent legal authority, and not before the hierarchical superior even if he is impowered to impose a disciplinary penalty. Whilst, on the facts of the case, the first of these consequences does not result in the finding of a violation of the Convention, the second leads the Court to conclude that there has been a violation of Article 5 para. 1 (art. 5-1) as regards Mr. Engel's provisional arrest.

To my great regret, I cannot share this point of view; I think that, despite the apparently exhaustive nature of Article 5 para. 1 (art. 5-1), the measures and penalties of military disciplinary law should not be put on the scales of Article 5 para. 1 (art. 5-1). Here are my reasons:

(1) Account must be taken of the nature of military service and the role of disciplinary law in instilling and maintaining discipline which is a *sine qua non* for the proper functioning of that special institution, the army. It is not enough to adopt, as does the Court, a narrow concept of deprivation of liberty; what must be borne in mind is the whole system of disciplinary law. Military discipline calls in particular for speedy and effective measures and penalties, adapted to each situation, and which, therefore, the hierarchical superior must be able to impose.

(2) The Convention itself recognises in its Article 4 para. 3 (b) (art. 4-3-b) the special characteristics of military service. This provision reflects a basic choice made by the Contracting States and establishes in a general way the compatibility with the Convention of military service. The derogations from and restrictions on the fundamental rights to which it may give rise - for example, the right to liberty of movement guaranteed by Article 2 of Protocol no. 4 (P4-2) - are thus not contrary to the Convention, even if there is no express reservation about them. Now the system of discipline peculiar to the army constitutes one of these derogations; Article 5 para. 1 (art. 5-1) does not concern military disciplinary law and its exhaustive nature relates only to situations in civil life. Judge Verdross is right to emphasise in his separate opinion that disciplinary penalties in the framework of military service are *sui generis*.

(3) The fact that disciplinary law does not fall under Article 5 para. 1 (art. 5-1) is the only explanation for the wording of this provision and its complete lack of adaptation to the situations which military disciplinary law concerns. These factors, as well as the place of Article 5 (art. 5) in the Convention and its logical link with Article 6 (art. 6), are an indication that the drafters of the Convention really had in mind situations belonging to criminal procedure.

(4) The above points are corroborated by the way in which the States party to the Convention have dealt with the question in their domestic law. Even today, in their military disciplinary law, the hierarchical superior is generally the authority empowered to take measures or impose penalties whether occasioning deprivation of liberty or not. Some States certainly provide for judicial review but this does not always have a suspensive effect; furthermore, Article 5 para. 1 (a) (art. 5-1-a) makes no distinction in its requirements between the different authorities. The governments do not seem to have envisaged the possibility that their military disciplinary law - as opposed to their military penal procedure - could be affected by the Convention. It appears difficult in these circumstances to countenance an interpretation that disregards so widespread a conception, namely, the „common denominator of the respective legislation of the

various Contracting States”, to adopt the Court’s language in another context (paragraph 82 of the judgment).

I conclude from the above that Mr. Engel’s provisional arrest, since it occurred in the framework of disciplinary procedure, was not subject to Article 5 para. 1 (a) (art. 5-1-a) and that, as a result, it has not violated this provision on the ground that Mr. Engel was arrested and detained for the purpose of being brought before his hierarchical superior and not before a legal authority.

2. That Article 5 para. 1 (art. 5-1) is inapplicable to disciplinary law does not mean that disciplinary measures and penalties escape supervision altogether. In point of fact, as is stated in the judgment, Article 6 (art. 6) gives the Convention institutions the possibility of correcting excessive extension of the scope of disciplinary law; furthermore there is ground for saying that the measures and penalties in disciplinary law that involve deprivation of liberty do not escape the requirement of lawfulness which underlies the whole of Article 5 (art. 5).

Mr. Engel’s provisional arrest can certainly be assessed from this angle. However, although I admit that it was initially tainted with unlawfulness to the extent that it lasted more than twenty-four hours, I cannot agree with the item in the operative provisions of the judgment which records a violation of the Convention in this respect. The State which redresses injury caused contrary to international law expunges by that very act its international responsibility; to afford it this possibility is precisely the meaning of the rule on exhaustion of domestic remedies (cf. Guggenheim, *Traité de droit international public*, vol. II, p. 23). In the case before us, the State completely redressed Mr. Engel’s injury when the authority hearing the appeal decided that the two days’ strict arrest to which he had been sentenced would be deemed to have been served during the provisional arrest. In these circumstances it is no longer appropriate for the operative provisions of the judgment to record a violation of the Convention. This approach is not contrary to the Court’s case-law; each time it has held that the reckoning of detention on remand as part of a sentence did not prevent it from taking the unlawfulness of that detention into account, there had been a detention of long duration for which the deduction did not amount to complete reparation. Besides, the question has been pleaded before the Court in the context of affording just satisfaction (cf. for example, the *Neumeister* case, judgment of 7 May 1974, Series A no. 17, pp. 18-19).

Separate opinion of judge Evrigenis

(Translation)

1. To my great regret I have not been able to concur with the majority of the Court on items no. 3, 14, 15 and 16 of the operative provisions of the judgment. These are the points which caused me to disagree:

(a) The majority of the Court thought that the committal of Mr. Dona and Mr. Schul to a disciplinary unit, by virtue of a decision of the Supreme Military Court of the Netherlands, met with the requirements of Article 5 para. 1 (a) (art. 5-1-a) of the Convention. Their sentence to a punishment involving deprivation of liberty emanated, according to the majority of my colleagues, from a „court” within the meaning borne by this term in Article 5 para. 1 (a) (art. 5-1-a). The Military Court, to adopt the terminology used in our Court’s case-law, was a court from the organisational point of view; yet it seems on the other hand difficult to regard the procedure prescribed by law and in fact

followed before it in the present cases as being in conformity with the conditions that should be satisfied by a judicial body corresponding to the notion of a court, within the meaning of Article 5 para. 1 (a) (art. 5-1-a). Two aspects of this procedure appear to me not to fulfil these conditions, namely, the freedom of action allowed to the accused's lawyer on the one hand and the taking of evidence on the other.

On the first aspect, the facts noted by the Court (judgment, paras. 32, 48, 91) reveal an important restriction on the defence lawyer's freedom of action before the Military Court when it hears a disciplinary case like those now before us. The lawyer may not, in fact, take part in the proceedings except to deal with legal problems and, what is more, only with any specific legal problems that might be presented by his client's appeal, such as, for example, the questions that would be raised by the entry into play of the European Convention on Human Rights. Furthermore, there are good reasons for thinking that the lawyer is not allowed to plead during the hearing (cf. the reference to the report dated 23 December 1970 of the acting Registrar of the Netherlands Supreme Military Court, decision on admissibility, report of the Commission, p. 99) . Taking these restrictions into account, it seems difficult to reconcile the procedure in question with the notion of a court within the meaning of Article 5 para. 1 (a) (art. 5-1-a); this, let us not forget, is a court which imposes sanctions involving deprivation of liberty (cf. De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 41-42, paras. 78-79, and (b) below). The same points also apply to the second procedural aspect mentioned above, namely, the procedure prescribed by law and followed in practice for taking evidence before the Military Court when it sits as a disciplinary tribunal. According to the facts noted by the Court and bearing in mind the provisions of Netherlands law applicable in this case (cf. paras. 31 and 91 of the judgment), the attendance and hearing of defence witnesses apparently cannot take place in conditions ensuring the guarantees for the defence which I consider that a trial must provide if it involves the imposition of a punishment occasioning deprivation of liberty and if it is to be fair. For these reasons I have had to conclude that there has been a violation of Article 5 para. 1 (art. 5-1) in the case of Mr. Dona and Mr. Schul.

Having said this, I think that, once the Court had held that the charge against these two applicants was „criminal” (Article 6, judgment paras. 80 et seq., in particular para. 85 in fine) (art. 6), it should have refrained from examining whether the Military Court corresponded to the notion of a court within the meaning of Article 5 para. 1 (a) (art. 5-1-a). Whilst the expression „court” is, in principle, an autonomous concept in each of the above-mentioned provisions, this nevertheless does not alter the fact that the court mentioned in Article 5 para. 1 (a) (art. 5-1-a) must meet the requirements of Article 6 (art. 6) when, as in the present case, the penalty occasioning deprivation of liberty which it imposes is finally deemed to be the outcome of a criminal charge and hence to fall within Article 6 (art. 6). It is permissible, in appropriate cases, for the court mentioned in Article 5 para. 1 (a) (art. 5-1-a) not to fulfil all the conditions stipulated by Article 6 (art. 6) for a criminal court. The converse seems both logically and legally difficult. If a penalty occasioning deprivation of liberty was inflicted by a court that had to meet the conditions of Article 6 (art. 6), there is no point in asking the further question whether that court complied with the notion of a court within the meaning of Article 5 para. 1 (a) (art. 5-1-a).

(b) The same reasons have led me to believe that I must dissent from the opinion of the majority of the Court on items 14, 15 and 16 of the operative provisions of the judgment. I will thus do no more than refer to the remarks set out under 1 (a) above.

The fact remains that I think that the examination of the cases of committal to a disciplinary unit in the light of the notion of „criminal charge” in Article 6 (art. 6) calls for some observations of a more general nature. I take the liberty of putting them forward as I wish to demonstrate that on these points my disagreement with the majority is more pronounced.

When imposing the penalty of committal to a disciplinary unit (case of Mr. Dona and Mr. Schul) or when reviewing such a penalty imposed by a non-judicial authority (case of Mr. de Wit), the Military Court was acting under Netherlands law as a disciplinary tribunal. If and to the extent that the Military Court was not dealing with conduct that could be sanctioned by penalties occasioning deprivation of liberty, its procedure could not in principle be considered contrary to the Convention. However, our Court thought, and rightly moreover, that the above-mentioned cases not only involved punishments occasioning deprivation of liberty, but also were covered by the notion of „criminal charge” within the meaning of Article 6 (art. 6) of the Convention. It thus had to investigate whether the Military Court afforded the guarantees that this provision requires of a criminal court. The majority considered that in the present case those guarantees were present, except the requirement of Article 6 para. 1 (art. 6-1) that the hearings be in public. Now the picture of the criminal court presented by the opinion of the majority seems to me hardly reconcilable with the minimal requirements of Article 6 (art. 6) for the ideal criminal court. Indeed I find it very hard to admit that a criminal court, irrespective of its level or jurisdiction, can, without contravening the provisions of Article 6 (art. 6), operate with a defence lawyer subject to important restrictions on the freedom of action traditionally allowed in the criminal procedure of the democratic countries in Europe and with rules of taking evidence little favourable to the accused. Of course, one cannot attribute these deficiencies to the Military Court which, it must be remembered, was acting under Netherlands law in the present cases as a disciplinary tribunal and did not therefore normally have to enquire whether it was complying with Article 6 (art. 6) of the Convention. It is our judgment which, by drawing the borderline beyond which the disciplinary becomes the criminal, requires retrospectively, by virtue of the Convention, that a disciplinary tribunal should have afforded the guarantees of a criminal court. Now I fear that the majority opinion, to the extent that it restricts these guarantees, may take the interpretation of Article 6 (art. 6), and especially the notion of a criminal court, on a path which, may I say, would not be free of risks. I would also like to point out in the same context that the classification under the Convention of a question as criminal, whether or not this corresponds to the conceptions of the relevant national law, must bring into play the guarantees of Article 7 (art. 7) of the Convention as well.

(c) In finding a violation of Article 5 para. 1 (art. 5-1) for the reasons given in 1 (a) above, I should logically conclude that there was a violation of Article 5 para. 4 (art. 5-4) in the case of Mr. Dona and Mr. Schul (item no. 7 of the operative provisions of the judgment). If the Supreme Military Court, which, according to the judgment, performs cumulatively the functions both of the court mentioned in Article 5 para. 1 (a) (art. 5-1-a) and of the court mentioned in Article 5 para. 4 (art. 5-4), did not comply with the former paragraph’s notion of a court, likewise it would also not comply in principle with the latter paragraph’s

notion of a court. I have, however, agreed with the majority on this point, taking into account that under Netherlands law there is a civil court with general jurisdiction before which the legality of any deprivation of liberty may be challenged by summary application (Article 289 of the Civil Procedure Code and Sections 2 and 53 of the Judicature Act).

2. My vote on item 6 of the operative provisions of the judgment was to the effect that there was no violation, in the cases there mentioned, of Articles 5 para. 1 and 14 (art. 14+5-1 taken together. If the question had been put, I would for the same reasons (judgment, paras. 72 et seq.) have voted the same way as regards the complaints before the Court which were not considered to concern deprivations of liberty. The Court, however, thought it was able not to retain these cases for the reasons set out in paragraph 71 of the judgment. I cannot share this view. According to the Court's case-law (case relating to certain aspects of the laws on the use of languages in education in Belgium, judgment of 23 July 1968, Series A no. 6, pp. 33-34, para. 9; National Union of Belgian Police Case, judgment of 27 October 1975, Series A no. 19, p. 19, para. 44), a „measure which is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe Article 14 (art. 14) for the reason that it is of a discriminatory nature”. Article 14 (art. 14) obliges States to secure „without discrimination” the enjoyment of the rights and freedoms set forth in the Convention. The Convention thus prohibits any discrimination appearing in the context of the enjoyment of a right which it guarantees, whether such discrimination takes the positive form of measures enhancing the enjoyment of that right, or the negative form of limitations, legitimate or otherwise, on that right. I can hardly conceive how one could, a fortiori, make a distinction under Article 14 (art. 14), as interpreted by the Court, between measures involving an unlawful limitation on the right in question and measures tolerated by the Convention. Discriminatory treatment by measures in either of these two categories may lead to a discrimination in the enjoyment of rights that must be subject to supervision under Article 14 (art. 14) of the Convention. The Court should therefore have examined from the point of view of their conformity with Article 14 (art. 14) as well, those of the penalties brought to its attention which it finally considered not to involve deprivation of liberty.

COURT (CHAMBER)
CASE OF HADJIANASTASSIOU v. GREECE

(Application no. 12945/87)

JUDGMENT
STRASBOURG
16 December 1992

In the case of Hadjianastassiou v. Greece,
The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention”) and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, President,
Mr Thór VILHJÁLMSOON,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHÉL,
Mr R. PEKKANEN,
Sir John FREELAND,

and also of Mr M.-A. EISSEN, Registrar, and Mr H. PETZOLD, Deputy Registrar,
Having deliberated in private on 26 June and 23 November 1992,
Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

1. The case was referred to the Court by the European Commission of Human Rights („the Commission”) on 12 July 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12945/87) against the Hellenic Republic lodged with the Commission under Article 25 (art. 25) by a Greek national, Mr Constantinós Hadjianastassiou, on 17 December 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 and 10 (art. 6, art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 29 August 1991, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr J. De Meyer, Mrs E. Palm, Mr I. Foighel, Mr R.

Pekkanen and Sir John Freeland (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Subsequently, Mr S. K. Martens, substitute judge, replaced Mr Cremona, who had left the Court on the expiry of his term of office and whose successor had taken up his duties before the hearing (Rules 2 para. 3 and 22 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Greek Government („the Government”), the Delegate of the Commission and the applicant’s lawyer on the organisation of the procedure (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant’s memorial on 14 February 1992 and the Government’s memorial on 28 February. On 2 June the Secretary to the Commission informed the Registrar that the Delegate would submit oral observations.

On 12 March the Commission had produced various documents as the Registrar, at the Government’s request, had asked it to do.

5. In accordance with the President’s decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 June 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr P. KAMARINEAS,

Adviser at the Legal Council of State, Agent,

Miss F. DEDOUSSI,

Member of the Legal Council of State, Counsel;

- for the Commission

Mr C.L. ROZAKIS,

Delegate;

- for the applicant

Mr R. NISAND,

avocat, Counsel.

The Court heard addresses by the above-mentioned representatives and by Mr Hadjianastassiou in person, as well as their answers to its questions.

AS TO THE FACTS

I. The particular circumstances of the case

6. Mr Hadjianastassiou, a Greek national, is an aeronautical engineer. At the material time he was a captain in the air force.

As the officer in charge of a project for the design and production of a guided missile, he submitted, in 1982, a report to the Air Force Technological Research Centre („K.E.T.A.”) on the missile on which he had been working. In January 1983 he communicated to a private company („ELFON Ltd”) another technical study on guided missiles, which he had prepared himself.

A. The proceedings before the Athens Permanent Air Force Court

7. On 4 July 1984 a chamber of the Permanent Air Force Court of Athens (Diarkes Stratodikeio Athinon) charged the applicant and another person with disclosing military secrets (Article 97 of the Military Criminal Code, see paragraph 21 below).

On 22 October 1984 the court found Mr Hadjianastassiou guilty of having transmitted to ELFON a series of ten items of information together with „all the technical and theoretical data” appearing in the K.E.T.A. report. It sentenced him to two years and six months’ imprisonment.

B. The proceedings before the Courts-Martial Appeal Court

8. The applicant and the prosecutor at the Courts-Martial Appeal Court (Epitropos tou Anatheoritikou Dikastiriou) appealed from that judgment.

9. Following a hearing held on 28 February and 1 March 1985, the Courts-Martial Appeal Court appointed two experts - professors at the Athens Polytechnic School - who, with two other experts, designated by the applicant, compared the two studies.

In their report of 26 September 1985 the two professors concluded as follows:

„... in our opinion, the two studies, for the K.E.T.A. and ELFON, follow different methods, the two missiles are different and the second is not a copy of the first Nevertheless, some transfer of technical knowledge inevitably occurred It is not possible to determine the extent of such transfer beyond what is mentioned above under (b), (c) and (d), because the ELFON study and even more so the K.E.T.A. report were shoddily drafted and were full of imprecisions and omissions; it should be stressed that in both studies the aerodynamic data are erroneous ...”

They noted that Mr Hadjianastassiou had some technical knowledge, acquired during his studies in the United States. However, his participation in the K.E.T.A. project had enriched his experience. The components of the missile and some of the theoretical data contained in the two studies could be found in various manuals included in the file and regarded as „available literature”. These manuals were not classified as „secret”, but it was not established that they were accessible to private individuals.

10. At a new hearing held on 21 and 22 November 1985 the Courts-Martial Appeal Court took evidence from nineteen witnesses on whether the two studies contained common data, whether the information which had formed the basis of the studies was freely available in scientific literature and whether the K.E.T.A. study had been classified as a „military secret”.

11. After the hearing the Courts-Martial Appeal Court deliberated in private and considered the following questions formulated by its President:

„1. Is Constantinos Hadjianastassiou guilty of having, between October 1982 and March 1983, unlawfully and intentionally communicated and disclosed to third parties military plans and information classified as secret and which had to remain secret in the military interests of the Greek State? [In particular, is he guilty of having] ..., in October 1982, after having contacted the company ELFON Ltd ... with a view to preparing and drawing up for the latter’s benefit a study on guided missiles, for a financial consideration to be agreed with the said company when the work was in progress, unlawfully and intentionally, (a) communicated to the above-mentioned company general information concerning the guided missile which was being designed at the K.E.T.A. and its technical characteristics, although as project officer for the K.E.T.A. missile he knew that such information was secret and that the military interests of the Greek State required that it be kept secret; (b) transmitted to the same company several elements deriving from the study, relating to the project and on the same subject-matter, of the K.E.T.A. and from the whole production programme of the Greek guided missile („laser kit”) which existed at the centre and which concerned principally the dimensional diagram of the missile, its

external geometry, its perimetric plan, its aerodynamic elements, its Nd-YAG laser type, its dynamic model, its dome, its schematic diagram, its seeker's fairing, its basic electronics data, as well as any other theoretical or technical elements contained in the ELFON Ltd study ..., which was elaborated entirely on the basis of the information transmitted and disclosed by him to the company and derived from the corresponding K.E.T.A. project and study, although he knew, in his capacity as project officer ..., that the information was secret and that the military interests of the Greek State required that it be kept secret?

2. Has it been established ... that, when he disclosed these military secrets, the accused believed, erroneously, that he was entitled to proceed in such a way or [, on the other hand,] that he reasonably believed that, having drawn up the K.E.T.A. study and used his own knowledge, he was entitled to elaborate a new study and submit it through the intermediary of the company ELFON Ltd to the Weapons Industry Department? Was this belief justifiable?

3. Has it been established ... that the military secrets thus disclosed, namely the general information which [the accused] communicated to the ELFON company concerning the guided missile ... and its technical characteristics, were of minor importance?

4. Should certain factors be taken into account in mitigation, namely that, prior to committing the above- mentioned act, the accused had led an honest and well-ordered private, family and professional life?

12. According to the record of the deliberations, the Courts- Martial Appeal Court replied in the affirmative to questions 1 (a) (four votes to one), 3 and 4 (unanimously) and in the negative to questions 1 (b) (four votes to one) and 2 (three votes to two).

13. Giving judgment in Mr Hadjianastassiou's presence on 22 November 1985, it sentenced him for disclosure of military secrets of minor importance (Article 97 para. 2 of the Military Criminal Code, see paragraph 21 below) to a suspended term of five months' imprisonment, from which it deducted the four months and fourteen days which he had spent in detention on remand.

14. The President of the Courts-Martial Appeal Court read out the judgment, which did not refer to the questions put to the members of the court.

15. In order to obtain the text of these questions and the replies given, the applicant asked, on 23 November 1985, to see the record of the hearing. The registrar allegedly told him that he would have to wait for the „finalised version” of the judgment.

C. The proceedings before the Court of Cassation

16. On 26 November 1985 - within the five days prescribed in Article 425 para. 1 of the Military Criminal Code (see paragraph 24 below) - Mr Hadjianastassiou appealed to the Court of Cassation; in his appeal, which was a page long, he alleged „the erroneous application and interpretation of the provisions under which he [had been] convicted, namely Article 97 para. 2 of the Military Criminal Code”.

17. He received a copy of the appeal judgment on 16 December; it was very short and did not state the grounds on which it was based, merely referring to the fixing of sentence.

18. On 23 December 1985 the applicant again demanded that the record be communicated to him; he received it on 10 January 1986. This document, which was detailed and reproduced in full the six questions and the replies obtained, ended as follows:

The Court, by four votes to one ..., finds the accused Hadjianastassiou guilty of disclosing military secrets, which offence was committed in Attica between October 1982 and March 1983.

By three votes to two ..., the Court dismisses the defence request that Article 31 para. 2 of the Criminal Code (not guilty in the event of mistake) be applied.

The Court unanimously accepts that the military secrets communicated are of minor importance.

The Court unanimously accepts the factors pleaded in mitigation (Article 84 para. 2 (a) of the Criminal Code).

Having regard to the following Articles: ... Article 97 para. 2 taken in conjunction with paragraph 1 and with Article 98 (e) ..., Articles 366, 368 ... of the Military Criminal Code, ...;

... having regard to the gravity of the acts carried out, to the accused's personality, to the damage caused by the offence, to the specific nature of the offence, to the specific circumstances under which the offence was committed, to the degree of criminal intent on the part of the accused, to his character, to his personal and social situation, and to his conduct before and after the commission of the offence;

The Court sentences the accused to five months' imprisonment and orders him to pay the costs ...

It deducts from the above-mentioned term ... the period of four months and fourteen days spent in detention on remand and sets at sixteen days the term still to be served.

In view of the fact that the accused has no previous convictions and has never been sentenced to prison, and having regard to the circumstances under which the offence was committed, the Court considers it appropriate to suspend the remainder of the sentence

...

For these reasons,

Having regard to Articles 99, 100 and 104 of the Criminal Code,

The Court orders that the outstanding term of imprisonment be suspended for a period of three years.

19. The hearing in the Court of Cassation (Areios Pagos) took place on 11 April 1986.

On 14 April Mr Hadjianastassiou filed a memorial in support of his oral pleadings. In his submission the wording of his appeal was sufficient to rule out any danger of its being dismissed for lack of precision. He complained of the shortness of the time-limit for appealing against the decisions of the military courts and the fact that it was impossible for the persons concerned to gain access, in good time, to the contents of the contested judgments. He also challenged the ground on which his conviction rested: the communication of „general information” on the K.E.T.A. missile, the charge which the Courts-Martial Appeal Court found to be proved, did not justify the application of Article 98 of the Military Criminal Code as that provision concerned the disclosure of secret information of military importance, a charge of which the Courts-Martial Appeal Court had acquitted him by its reply to question 1 (b) (see paragraph 11 above). In his view, at the most his case might fall under Article 96 (see paragraph 21 below).

20. On 18 June 1986 the Court of Cassation declared the appeal inadmissible on the following grounds:

„By the appeal before the Court ..., in which it is sought to have judgment no. 616/1985 of the Athens Courts-Martial Appeal Court set aside, the [applicant] challenges the

aforesaid judgment on the ground of erroneous application and interpretation of the provisions under which he was convicted, namely Article 97 para. 2 of the Military Criminal Code. However, this sole ground of appeal, as formulated above, is vague inasmuch as it does not identify any concrete and specific error in the contested judgment which could constitute the basis of the complaint alleging the erroneous application and interpretation of the above-mentioned provision; the appeal must therefore be declared inadmissible by virtue of Articles 476 para. 1 and 513 para. 1 of the Code of Criminal Procedure.”

II. The relevant domestic law

A. The disclosure of military secrets

21. The Military Criminal Code provides as follows:

Article 96

„Communication of military information

Any serviceman or any person employed by the armed forces who, without the consent of the military authorities, communicates or makes public by any means whatsoever information or assessments concerning the army shall be sentenced to a term of imprisonment not exceeding six months.”

Article 97

„Disclosure of military secrets

1. Any serviceman or any person employed by the armed forces who unlawfully and intentionally gives or communicates to others documents, plans, or other objects or secret information of military importance or allows such documents, plans, objects or information to be given or communicated to others, shall be sentenced to a term of imprisonment (katheirxi), or, where the above has been given or communicated to a foreign State or to an agent or a spy of a foreign State, to dishonourable discharge and death.

2. ... where the [information] communicated is of minor importance, the convicted person shall be sentenced to a term of imprisonment (filakisi) of not less than six months ...”

Article 98

„Secret information

‘Secret information of military importance’ means information concerning the Greek State or its allies which relates to:

...

(e) any object officially classified as secret.

B. The courts’ obligation to give the reasons for their decisions

22. The relevant provisions of the 1975 Constitution are worded as follows:

Article 93 para. 3

„All court judgments must be specifically and thoroughly reasoned and shall be pronounced in a public sitting ...”

Article 96

4. Special laws may provide for:

(a) Questions relating to the army, navy and air force tribunals, which shall have no jurisdiction over civilians.

(b) Questions relating to prize courts.

5. The courts specified under sub-paragraph (a) of the preceding paragraph shall be composed of a majority of members of the judicial branch of the armed forces, who enjoy the guarantees of independence, as regards their person and their office, provided for in Article 87 para. 1 of the present Constitution. The provisions of paragraphs 2 to 4 of Article 93 shall be applicable to the hearings and judgments of these courts. The detailed rules for the implementation of the provisions of the present paragraph and the date of their entry into force shall be specified by statute.”

23. According to the consistent case-law of the Court of Cassation, the failure to give reasons in the decisions of the military courts does not render them void. The application to these courts of Article 93 para. 3 of the Constitution requires, under the terms of Article 96 para. 5, the adoption of special laws, and this has not yet happened (judgments nos. 470/1975, 483/1979, 18/1980, 647/1983, 531-535/1984 (Nomiko Vima 1984, p. 1070) and 1494/1986). It is sufficient that such a decision answers the questions put by the President; the questions must indicate accurately all the offences of which the defendant is accused so as to make it possible for a subsequent review by the Court of Cassation to ensure that the provisions of the criminal law have been properly applied to the facts in question as found by the military courts of first or second instance (judgments nos. 456/1986 and 1494/1986).

C. Appeals from the decisions of the military courts

1. The Military Criminal Code

24. The following texts are relevant here:

Article 366

„Formulation of questions. Principal question

1. The President shall put the questions concerning each accused.

2. The principal question shall be based on the operative part of the committal decision ... and shall include the question whether the accused is guilty ... as charged ...”

Article 368

„Supplementary questions (Parepomena zitimata)

In order to supplement the principal question or the alternative question, supplementary questions may be put concerning the accusation and factors aggravating, mitigating or expunging (exalipsin) the offence.”

Article 425 para. 1

„Time-limit

Any appeal to the Court of Cassation (anairesi) must be filed within five days of the delivery of the judgment or, where the judgment has been delivered in the absence of the person convicted or his representative, of its notification ...”

Article 426

„Grounds for appeal to the Court of Cassation

Only the following grounds of appeal may be relied upon:

(B) The erroneous application or interpretation of the substantive provisions of the criminal law.”

2. The Code of Criminal Procedure

25. The Code of Criminal Procedure provides, inter alia, as follows:

Article 473 para. 3

„Time-limit for appealing

The time-limit for filing an appeal with the Court of Cassation begins to run on the date on which the final text of the judgment is entered into the register of the criminal court in question. It shall be so entered within fifteen days, failing which the President of the criminal court shall be liable to disciplinary sanctions.”

Article 509 para. 2

„Memorial for an appeal to the Court of Cassation

In addition to the grounds invoked in the appeal ..., further submissions may be made in a supplementary memorial, which must be lodged with the office of the principal public prosecutor at the Court of Cassation not later than fifteen days before the hearing ...; once this time-limit has expired such memorials shall be inadmissible ...”

3. The relevant case-law of the Court of Cassation

26. According to the case-law of the Court of Cassation (judgments nos. 656/1985 (Nomiko Vima 1985, p. 891), 1768/1986, 205/1988 (Nomiko Vima 1988, p. 588) and 565/1988), Article 473 para. 3 of the Code of Criminal Procedure does not apply to appeals on points of law from the decisions of the military courts, as the time-limit for such appeals is fixed by Article 425 of the Military Criminal Code (see paragraph 24 above).

The grounds of appeal to the Court of Cassation must be set out in the initial appeal memorial. As regards „the erroneous application and interpretation of the substantive provisions of the criminal law”, the appeal must specify clearly the errors which are alleged to have been made in the contested judgment (judgments nos. 234/1968, 459/1987, 1366/1987 (Nomiko Vima 1987, p. 1659) and 1454/1987, as well as the judgment given by the Court of Cassation in the present case).

Finally, supplementary submissions may be taken into account only if the initial appeal memorial sets out at least one ground which is found to be admissible and sufficiently substantiated (judgments nos. 242/1951, 341/1952, 248/1958, 472/1970, 892/1974, 758/1979 (Nomiko Vima 1980, p. 56), 647/1983, 1438/1986 and 1453/1987).

Proceedings before the commission

27. Mr Hadjianastassiou applied to the Commission on 17 December 1986. He relied on Article 6 (art. 6), complaining that the lack of reasons in the judgment of the Courts-Martial Appeal Court and the shortness of the time-limit for appealing had prevented him from further substantiating his appeal to the Court of Cassation. He maintained in addition that his conviction for the disclosure of military secrets of secondary importance had infringed his right to freedom of expression guaranteed under Article 10 (art. 10).

28. The Commission declared the application (no. 12945/87) admissible on 4 October 1990. In its report of 6 June 1991 (made under Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 6 paras. 1 and 3 (b) (art. 6-1, art. 6-3-b), but not of Article 10 (art. 10).

The full text of the Commission’s opinion is reproduced as an annex to this judgment.

As to the law

I. Alleged violation of article 6 (art. 6)

29. Mr Hadjianastassiou relied on paragraphs 1 and 3 (b) of Article 6 (art. 6-1, art. 6-3-b), which are worded as follows:

„1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

(b) to have adequate time and facilities for the preparation of his defence;

He complained of the failure to give reasons in the judgment read out on 22 November 1985 by the President of the Courts-Martial Appeal Court and the shortness of the time-limit for appealing to the Court of Cassation. Despite being present at the hearing, he had not discovered the precise reasons for his conviction until 10 January 1986, which had meant that his appeal on points of law had been bound to fail.

30. The Government contested this view, to which the Commission subscribed in substance. In the former's opinion, the applicant had been aware of the content of the questions put by the President of the Courts-Martial Appeal Court. Questions nos. 2 and 4 had been based on arguments put forward by Mr Hadjianastassiou himself in the Permanent Air Force Court. The reply to question no. 3, which had been formulated for the first time on appeal, was given expressly in the judgment read out by the President. As regards the question concerning the communication of information of „military importance”, the President had divided it into two parts - 1 (a) and 1 (b) (see paragraph 11 above) - in order to take into account the conclusions of the experts and to show leniency to the accused, whose sentence had moreover been reduced. In addition, the questions, far from marking the conclusion of the court's deliberations, had given rise to keen argument during the trial. In short, it had been entirely possible for Mr Hadjianastassiou to submit detailed and admissible grounds for appeal within the statutory time-limit.

31. As the requirements of paragraph 3 of Article 6 (art. 6-3) constitute specific aspects of the right to a fair trial, guaranteed under paragraph 1 (art. 6-1), the Court will examine the complaint under both provisions taken together.

32. The Court notes at the outset that although Article 93 para. 3 of the Greek Constitution (see paragraph 22 above) requires all court judgments to be specifically and thoroughly reasoned, under Article 96 para. 5 the application of this requirement to the military courts is subject to the adoption of a special law. Such a law has still to be enacted. In the meantime the Court of Cassation can review the proper application of the criminal law by those courts only through the questions put by the presidents and the replies given by their colleagues, from which the reasoning is elicited.

33. The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available to him. The Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention.

34. In this instance the judgment read out by the President of the Courts-Martial Appeal Court contained no mention of the questions as they appeared in the record of the hearing (see paragraphs 11 and 18 above). Admittedly it referred to Article 366 et seq. of the Military Criminal Code (see paragraph 24 above) and described the information communicated as of minor importance, but it was not based on the same grounds as the decision of the Permanent Air Force Court. Question 1 (a), dealing with the communication of „general information concerning the guided missile” which had to be kept secret, appeared for the first time in the proceedings before the appeal court. When, the day after the delivery of the judgment, the applicant sought to obtain the full text of the questions, the registrar allegedly informed him that he would have to wait for the „finalised version” of the judgment (see paragraph 15 above). In his appeal on points of law, filed within the five-day time-limit laid down in Article 425 para. 1 of the Military Criminal Code (see paragraph 24 above), Mr Hadjianastassiou could rely only on what he had been able to hear or gather during the hearing and could do no more than refer generally to Article 426.

35. In the Government’s contention, the applicant could have made further submissions by means of an additional memorial, pursuant to Article 509 para. 2 of the Code of Criminal Procedure (see paragraph 25 above); if he had not availed himself of this possibility, it had been because he had had no ground for appeal to put forward.

36. The Court is not persuaded by this argument. When Mr Hadjianastassiou received the record of the hearing, on 10 January 1986, he was barred from expanding upon his appeal on points of law. According to a consistent line of cases, additional submissions may be taken into account only if the initial appeal sets out at least one ground which is found to be admissible and sufficiently substantiated (see paragraph 26 above).

37. In conclusion, the rights of the defence were subject to such restrictions that the applicant did not have the benefit of a fair trial. There has therefore been a violation of paragraph 3 (b) of Article 6, taken in conjunction with paragraph 1 (art. 6-3-b, art. 6-1).

II. Alleged violation of article 10 (art. 10)

38. In Mr Hadjianastassiou’s submission, his conviction by the military courts also infringed Article 10 (art. 10), which provides as follows:

„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 ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

39. It should be recalled that the applicant, a serving officer, was convicted and sentenced for having disclosed military information of minor importance. The study in question was intended for communication to a private arms manufacturing company for a fee. Of course, the freedom of expression guaranteed by Article 10 (art. 10) applies to servicemen just as it does to other persons within the jurisdiction of the Contracting

States (see the *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, p. 41, para. 100). Moreover information of the type in question does not fall outside the scope of Article 10 (art. 10), which is not restricted to certain categories of information, ideas or forms of expression (see the *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* judgment of 20 November 1989, Series A no. 165, p. 17, para. 26).

40. Accordingly, the sentence imposed by the Permanent Air Force Court, then reduced by the Courts-Martial Appeal Court (see paragraphs 7 and 13 above), constituted an interference with the exercise of the applicant's right to the freedom of expression. Such interference infringes Article 10 (art. 10) unless it was „prescribed by law”, pursued one or more of the legitimate aims set out in paragraph 2 (art. 10-2) and was „necessary in a democratic society” in order to attain the aforesaid aims.

A. Was the interference „prescribed by law”?

41. According to Mr Hadjianastassiou, the first of these conditions was not satisfied because the „law” was not sufficiently foreseeable. The application by the Courts-Martial Appeal Court of Articles 97 and 98 of the Military Criminal Code had been erroneous (see paragraph 21 above); although these provisions had served as the basis for that court's decision, it had not mentioned any specific secret data that had been transferred to ELFON.

42. The Court notes, however, that the wording of the provisions in question (see paragraph 21 above) was not incompatible with the manner in which the Courts-Martial Appeal Court interpreted and applied them. Pointing out that it is primarily for the national courts to interpret and apply domestic law (see, among other authorities, the *Kruslin v. France* judgment of 24 April 1990, Series A no. 176-A, p. 21, para. 29), the Court finds, like the Government and the Commission, that the interference was „prescribed by law”.

B. Did the interference pursue a legitimate aim?

43. Clearly the contested sentence was intended to punish the disclosure of information on an arms project classified as secret, and therefore to protect „national security”, a legitimate aim for the purposes of Article 10 para. 2 (art. 10-2).

C. Was the interference „necessary in a democratic society”?

44. Mr Hadjianastassiou denied that the interference was necessary. He argued that a routine technical study based entirely on his own documentation could not be regarded as damaging to national security. By its reply to question 1 (b) (see paragraphs 11 and 12 above), the Courts-Martial Appeal Court had acknowledged the lack of any relationship between the study effected for the air force and that for ELFON. In his view, there should have been regulations prohibiting serving Greek officers from working for private undertakings or allowing them to do so provided that they did not divulge military secrets; the Courts-Martial Appeal Court had not identified a single such secret divulged by him.

45. In this instance the project for the manufacture of a guided missile undertaken by the air force was classified as a „military secret”. The applicant's conviction in the appeal court was, however, based on the disclosure of „general information” which military interests required to be kept secret; the experts appointed by the appeal court had concluded prior to its decision that, although the two studies had employed different methods, none the less „some transfer of technical knowledge [had] inevitably occurred” (see paragraph 9 above).

Like the Government, the Court takes the view that the disclosure of the State's interest in a given weapon and that of the corresponding technical knowledge, which may give some indication of the state of progress in its manufacture, are capable of causing considerable damage to national security.

46. It is also necessary to take into account the special conditions attaching to military life and the specific „duties” and „responsibilities” incumbent on the members of the armed forces (see the Engel and Others judgment, cited above, p. 41, para. 100). The applicant, as the officer at the K.E.T.A. in charge of an experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties.

47. In the light of these considerations, the Greek military courts cannot be said to have overstepped the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security. Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.

In conclusion, no violation of Article 10 (art. 10) has been established.

III. Application of article 50 (art. 50)

48. According to Article 50 (art. 50),

„If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

Under this provision Mr Hadjianastassiou claimed the reimbursement of his costs and expenses incurred first in the Greek courts (650,000 drachmas), and then before the Convention organs (300,000 drachmas and 29,260 French francs).

The Government considered these claims to be excessive, because they far exceeded the fee scales applicable to the legal profession as laid down by Greek law. They stated that they were willing to pay 100,000 drachmas in the event of a finding of a violation.

49. The Court observes that it is not bound in this context by domestic scales or criteria (see, *inter alia*, the Granger v. the United Kingdom judgment of 28 March 1990, Series A no. 174, p. 20, para. 55).

Like the Commission, it takes the view that, for the costs incurred in Greece, only those referable to the Court of Cassation proceedings - 220,000 drachmas - can be reimbursed. The sums claimed in respect of the Strasbourg proceedings are consistent with the criteria laid down in the case-law and should therefore be awarded in their entirety.

For these reasons, the court unanimously

1. Holds that there has been a violation of paragraphs 1 and 3 (b) of Article 6, taken together (art. 6-1, art. 6-3-b);
2. Holds that there has been no violation of Article 10 (art. 10);
3. Holds that the respondent State is to pay to the applicant, within three months, for costs and expenses, 29,260 (twenty-nine thousand two hundred and sixty) French francs and 520,000 (five hundred and twenty thousand) drachmas;
4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1992.

Rolv RYSSDAL

President

Marc-André EISSEN

Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the concurring opinion of Mr De Meyer is annexed to this judgment.

Concurring opinion of judge de Meyer

(Translation)

Like the other members of the Chamber I take the view that there has not been a breach of the right to freedom of expression in this case, but my reasons are simpler than those set out in paragraphs 39 to 47 of the judgment. They are as follows:

1. The applicant was convicted and sentenced under Article 97 para. 2 of the Military Criminal Code for having disclosed secret information of minor importance .
2. Because the members of the armed forces have special „duties and responsibilities”, they must of necessity be barred from communicating to third parties, unless duly authorised to do so, information and ideas of the kind in issue in the present case, even if such ideas and information are the fruit of their own work.

This is particularly the case where the information and ideas in question have been classified as secret by the competent authorities.

3. Where military personnel are found to have contravened this prohibition, it is for the courts within whose jurisdiction they fall to apply to them the penalties laid down by law.
4. In the present case it has not been shown that, in their treatment of the applicant, the Greek courts misused the powers vested in them in this sphere.

COURT (CHAMBER)
**CASE OF VEREINIGUNG DEMOKRATISCHER SOLDATEN
ÖSTERREICHS AND GUBI v. AUSTRIA**

(Application no. 15153/89)

JUDGMENT
STRASBOURG

19 December 1994

In the case of Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention”) and the relevant provisions of Rules of Court A, as a Chamber composed of the following judges:

Mr R. BERNHARDT, President,

Mr Thór VILHJÁLMSOHN,

Mr F. MATSCHER,

Mr C. RUSSO,

Mr A. SPIELMANN,

Mr S.K. MARTENS,

Mrs E. PALM,

Mr I. FOIGHÉL,

Mr L. WILDHABER,

and also of Mr H. PETZOLD, Acting Registrar,

Having deliberated in private on 23 June and 23 November 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

1. The case was referred to the Court by the European Commission of Human Rights („the Commission”) on 9 September 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15153/89) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by a private association under Austrian law, the Vereinigung demokratischer Soldaten Österreichs („the VDSÖ”), and by an Austrian national, Mr Berthold Gubi, on 12 June 1989.

The Commission’s request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10, 13 and 14 (art. 10, art. 13, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the

President of the Court (Rule 21 para. 3 (b)). On 24 September 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr C. Russo, Mr A. Spielmann, Mr S.K. Martens, Mrs E. Palm, Mr I. Foighel and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rules 9 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Deputy Registrar, had consulted the Agent of the Austrian Government („the Government”), the applicants’ lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence the Registrar received the applicants’ memorial on 6 April 1994 and the Government’s memorial on 18 April.

On 7 June the Commission produced various documents from the proceedings before it, as requested by the Registrar on the President’s instructions.

5. In accordance with the President’s decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 June 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr F. CEDE

Head of the International Law Department, Federal Ministry of Foreign Affairs, Agent,

Mr S. ROSENMAYR,

Constitutional Department, Federal Chancellery,

Mrs E. BERTAGNOLI,

International Law Department, Federal Ministry of Foreign Affairs,

Mr G. KELLER,

colonel, Federal Ministry of Defence, Advisers;

- for the Commission

Mr S. TRECHSEL,

Delegate;

- for the applicants

Mr G. LANSKY,

Rechtsanwalt, Counsel.

The Court heard addresses by Mr Cede, Mr Trechsel and Mr Lansky.

6. On 19 July 1994, at the Court’s request, the Government lodged written observations on an additional bill of costs submitted by the applicants at the conclusion of the hearing.

As to the facts

I. Circumstances of the case

A. First applicant

7. The first applicant, a Vienna-based association, published a monthly magazine aimed at the soldiers serving in the Austrian army and entitled *der Igel* („The Hedgehog”). It contained information and articles - often of a critical nature - on military life.

8. On 27 July 1987 the association requested the Federal Minister for Defence (Bundesminister für Landesverteidigung) to have *der Igel* distributed in the barracks in

the same way as the only other two military magazines published by private associations, Miliz-Impuls and Visier. The army had adopted the practice of sending these magazines out, alternately and at its own expense, with the official information bulletin distributed to all conscripts (Miliz-Information).

The minister did not reply to this request. When questioned by members of parliament, he stated in a letter of 10 May 1989 that he would not authorise the distribution of *der Igel* in barracks. In his view, section 46 para. 3 of the Armed Forces Act (Wehrgesetz, see paragraph 18 below) conferred on all armed forces personnel the right to receive without any restriction, through sources accessible to the public, information on political events. However, on military premises the only publications that could be supplied were those which identified at least to some extent with the constitutional duties of the army, did not damage its reputation and did not lend column space to political parties. Even critical magazines such as the journal *Hallo* of the trade union youth organisation would not be banned if they respected these conditions. *Der Igel*, on the other hand, did not comply with them. The minister derived authority for his decision in this matter from Article 79 of the Constitution (Bundesverfassungsgesetz) and sections 44 para. 1 and 46 of the Armed Forces Act, Article 116 of the Criminal Code (Strafgesetzbuch) and Regulation 3 para. 1 of the General Army Regulations (Allgemeine Dienstvorschriften für das Bundesheer, see paragraphs 17-20 below).

B. Second applicant

9. The second applicant, a member of the VDSÖ, began his national service on 1 July 1987 at the Schwarzenberg barracks in Salzburg. On 29 July, on the occasion of his taking the oath, he made a protest directed against the President of the Republic. Over the following months, he lodged several complaints, published with twenty-one of his fellow conscripts an open letter criticising the number of fatigue duties to which he was assigned and circulated a petition in support of a conscientious objector.

On 1, 9 and 22 July he was personally informed of the content of the military law applicable to his situation.

10. On 29 December 1987, while distributing issue no. 3/87 of *der Igel* in the barracks, he was ordered by an officer to cease.

In its editorial, the issue in question mentioned, as being one of the aims of the VDSÖ, co-operation between conscripts and the cadres on the basis of their joint interests and of mutual respect. Some articles adopted a critical stance; they dealt with, among other things, military training, the proceedings resulting from a complaint lodged by Mr Gubi and the principles governing national service. The other articles discussed various contributions that had appeared in the press, the congress of the trade union youth movement, the aims and the activities of the VDSÖ and the complaint of a conscript whose pay had been reduced following alleged loss of equipment.

11. On 12 January 1988 another officer informed Mr Gubi of the content of the circulars of 1975 and 1987 and of the regulations of the Schwarzenberg barracks, as amended on 4 January 1988, which prohibited any distribution or despatching within the barracks of publications without the authorisation of the commanding officer (see paragraph 20 below).

12. On 22 January 1988 Mr Gubi complained about this ban and about the order of 29 December 1987 (see paragraph 10 above) to the Military Complaints Board

(Beschwerdekommision in militärischen Angelegenheiten) at the Federal Ministry of Defence.

On 7 April the Complaints Division (Beschwerdeabteilung) at the ministry rejected the applicant's complaint, in accordance with the Complaints Board's recommendation. In its view, the contested order was validly based on a 1987 circular of the Second Army Corps (Korpskommando II), containing instructions regarding the distribution of printed matter, which were themselves based on Article 5 of the 1867 Basic Law (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger), Regulation 19 of the General Army Regulations and section 13 of the Armed Forces Act (see paragraphs 15 and 18-20 below). The first of those provisions affords the same protection to the property of public-law legal persons as that guaranteed to the property of private individuals; accordingly, the Schwarzenberg barracks were to be regarded as the property of the Federal State, whose rights were exercised by the commanding officer.

The freedom of expression secured under Article 13 of the 1867 Basic Law was subject to „statutory limits“ (gesetzliche Schranken) such as those which stemmed from the duty of discretion and obedience laid down in sections 17 and 44 of the Armed Forces Act and derived from the very nature of this special relationship of subordination (besonderes Gewaltverhältnis). The contested measures had therefore in no way interfered with the freedom in question.

13. Mr Gubi then applied to the Constitutional Court (Verfassungsgerichtshof). On 26 September it declined to entertain his appeal on the ground that it did not raise genuine constitutional issues and had insufficient prospects of success.

14. The same day, however, the Constitutional Court quashed the decision of 15 February 1988 whereby the commanding officer of battalion no. 3 had confirmed the three days' custody imposed on the applicant as a disciplinary penalty for having distributed der Igel in the barracks. It found that the provisions which Mr Gubi was accused of infringing, the 1975 and 1987 circulars (see paragraph 20 below), were not binding on him but on the military authorities. This was not the case in regard to the relevant provisions of the Schwarzenberg barracks regulations, but these rules had been introduced on 4 January 1988 and were therefore not yet in force at the material time.

II. Relevant domestic law

A. Rights under the Basic Law

15. Article 5 of the Basic Law of 21 December 1867 on the general rights of citizens protects property.

16. Article 13 provides as follows:

„Subject to statutory limits, everyone has the right to express freely his opinion orally, in writing, in the printed word or through graphic expression. The Press may not be censored or restricted by a system of licences ... „

B. Military law

17. Article 79 of the Federal Constitution describes the general duties of the Austrian armed forces.

18. At the material time the rights and obligations of military personnel were governed by sections 44 to 46 of the 1978 Armed Forces Act. According to this statute, soldiers are under a duty to support the army in the performance of its tasks and to refrain from doing anything which could damage its reputation (section 44 para. 1). They have the

right to submit requests and complaints and to file appeals (section 44 para. 4). They enjoy the same political rights as civilians (section 46 para. 2). However, the army must not be involved in any political activity and may not be used for political ends (section 46 para. 1). Consequently, such activities while on duty and on military premises are prohibited, with the exception of those which consist in obtaining information as an individual on political events through sources accessible to the public (section 46 para. 3).

19. The General Army Regulations, issued by the Federal Ministry of Defence, set out the obligations attaching to national service. They provide, *inter alia*, that servicemen must always be ready to fulfil their duties in the best possible way and must refrain from doing anything which could damage the reputation of the army and undermine the confidence of the population in the defence of the country (Regulation 3 para. 1). Servicemen have a special relationship of subordination in regard to the Austrian Republic. That relationship requires of them, in addition to the defence of the democratic institutions, discipline, comradeship, obedience, vigilance, courage and discretion (Regulation 3 para. 2). Under Regulation 19 para. 2 barracks' commanders are bound to take all the measures necessary to maintain order and military security in the premises in question; to this end they are under a duty to issue rules (*Kasernordnung*) governing *inter alia* access to the barracks (Regulation 19 para. 3).

20. By a circular of the Federal Ministry of Defence of 14 March 1975 the army general staff (*Armeekommando*) instructed commanding officers to take preventive measures in respect of publications denigrating the army (*negatives wehrpolitisches Gedankengut*). They were, among other things, to ban their distribution and posting up in military areas. A circular from the general staff of the Second Army Corps) of 17 December 1987 instructed the same officers to insert in the barracks rules a prohibition on the distribution or posting up without the commanding officer's authorisation of any non-official publication. The Schwarzenberg barracks rules were amended accordingly on 4 January 1988.

C. Proceedings in the Constitutional Court

21. The Constitutional Court examines, on an application (*Beschwerde*), whether an administrative measure (*Bescheid*) has infringed a right guaranteed to the applicant by the Constitution, or whether it has applied a decree (*Verordnung*) that is contrary to the law, an Act contrary to the Constitution or an international treaty incompatible with Austrian law (Article 144 para. 1 of the Federal Constitution).

Proceedings before the commission

22. The VDSÖ and Mr Gubi applied to the Commission on 12 June 1989. Relying on Article 10 (art. 10) of the Convention, they complained of the prohibition imposed in respect of the magazine *der Igel* in Austrian barracks and, the second applicant, of the order of 29 December 1987 requiring him to cease distributing issue no. 3/87 in the Schwarzenberg barracks. They also maintained that they had not had an effective remedy within the meaning of Article 13 (art. 13) and that they had been victims of discrimination on political grounds in breach of Article 14 read in conjunction with Article 10 (art. 14+10).

23. The Commission declared the application (no. 15153/89) admissible on 6 July 1992. In its report of 30 June 1993 (Article 31) (art. 31) it expressed the following opinion:

- (a) as regards the first applicant:
 - (i) that there had been a violation of Articles 10 and 13 (art. 10, art. 13) (twelve votes to nine);
 - (ii) that no separate question arose under Article 14 read in conjunction with Article 10 (art. 14+10) (unanimously);
 - (b) as regards the second applicant:
 - (i) that there had been a violation of Article 10 (art. 10) (twelve votes to nine) but not of Article 13 (art. 13) (unanimously);
 - (ii) that no separate question arose under Article 14 read in conjunction with Article 10 (art. 14+10) (unanimously).
- The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment.

As to the law

I. Alleged violation of article 10 (art. 10) of the convention

A. First applicant

24. The first applicant complained of the Minister for Defence's refusal to add *der Igel* to the list of periodicals distributed by the Austrian army. It considered that this constituted a breach of Article 10 (art. 10) of the Convention, according to which:

„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. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

25. It was the Government's contention that the *VDSÖ* was in no way to be confused with those of its members who were serving in the armed forces at the material time. The minister had therefore been justified in regarding it as a third party and in exercising one of the rights that the Civil Code conferred on the Federal State as the proprietor of the barracks, namely that of deciding freely the nature of the services to be provided on those premises and of choosing which providers of such services should be solicited in that connection, without having to furnish an explanation to the latter.

The applicant association had asked that its magazine should be distributed by the army in the same way as two other non-official periodicals. In fact the service that it was requesting was based exclusively on private-law arrangements, arrangements which could in any event not be demanded as of right by the publishers concerned. The army authorities could not be expected to help distribute all the magazines that were submitted to them. In short, the minister had exercised a discretionary power and had not infringed a right, no such right being vested in the applicant association.

26. In the light of the different arguments adduced, the Court must first consider whether there was an interference with the exercise by the VDSÖ of its right to impart information and ideas.

1. Whether there was an interference

27. As the Court has consistently held, the responsibility of a Contracting State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 (art. 1) to secure those rights and freedoms in its domestic law to everyone within its jurisdiction (see, as the most recent authority, the *Costello-Roberts v. the United Kingdom* judgment of 25 March 1993, Series A no. 247-C, p. 57, para. 26).

In the present case the authorities effected themselves and at their own expense the distribution on a regular basis of military periodicals published by various associations, by sending them out with their official publications. Whatever the legal status of this arrangement, such a practice was bound to have an influence on the level of information imparted to the members of the armed forces and, accordingly, engaged the responsibility of the respondent State under Article 10 (art. 10). Freedom of expression applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States (see, as the most recent authority, the *Hadjianastassiou v. Greece* judgment of 16 December 1992, Series A no. 252, p. 17, para. 39).

The Court notes further that, according to the case file, of all the periodicals for servicemen, only *der Igel* was not allowed access to this type of distribution (see paragraph 8 above). The VDSÖ could therefore reasonably claim that this situation should be remedied. It follows that the Minister for Defence's rejection of its request was an interference with the exercise of its right to impart information and ideas.

2. Whether the interference was justified

28. The interference in issue infringed Article 10 (art. 10) if it was not „prescribed by law”, if it did not pursue one or more of the legitimate aims referred to in paragraph 2 of that Article (art. 10-2) or if it was not „necessary in a democratic society” in order to attain such aims.

(a) Was the interference „prescribed by law”?

29. According to the applicant association, none of the provisions of military law on which the Minister for Defence might have relied could be regarded as „law” within the meaning of the Convention. This was true in the first place of sections 44 to 46 of the Armed Forces Act and Regulation 3 of the General Army Regulations, the very vague wording of which opened the way to arbitrariness. This was also the case in regard to the 1975 and the 1987 circulars, which had not, moreover, been accessible to the VDSÖ.

30. The Government pointed out that, far from having adopted an administrative measure, the minister had merely refused to give a favourable reply to the applicant association's request. In so far as was necessary, sufficient basis for his decision was to be found in the Civil Code and that basis satisfied Article 10 (art. 10) in this respect. The provisions of military law cited, in particular the 1975 circular, had at most served as a guide for the minister's decision.

31. The Court observes that although those provisions could not strictly constitute the legal basis of the minister's action, as the minister did not take a formal decision, he nevertheless followed them in this instance. This is clear in particular from his reply to a

parliamentary question (see paragraph 8 above). It is accordingly necessary to ascertain whether they qualified as „law”.

The Court acknowledges that the provisions in question were formulated in general terms. It should however be recalled that the level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed (see, as the most recent authority, the *Chorherr v. Austria* judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, para. 25).

As far as military discipline is concerned, it would scarcely be possible to draw up rules describing different types of conduct in detail. It may therefore be necessary for the authorities to formulate such rules more broadly. The relevant provisions must, however, afford sufficient protection against arbitrariness and make it possible to foresee the consequences of their application.

In the Court's view, the provisions in question, in particular the circular of 14 March 1975, provided sufficient legal basis for the refusal of the VDSÖ's request. The first applicant had among its members servicemen who had access to these rules and it could therefore have been expected to be aware of the possibility that the minister might regard himself as bound to refer to them in relation to it. In conclusion, the interference in issue was „prescribed by law”.

(b) Did the interference pursue a legitimate aim?

32. The impugned decision was evidently taken with a view to preserving order in the armed forces, a legitimate aim for the purposes of Article 10 para. 2 (art. 10-2) (see the *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, p. 41, para. 98).

(c) Was the interference „necessary in a democratic society”?

33. The VDSÖ denied that the refusal of its request had been necessary. It had been motivated solely by the desire to prevent a current of opinion regarded by the authorities as hostile to the army from being spread among the troops by the distribution of *der Igel*. Yet, the applicant association maintained, the Government were gradually implementing most of the reforms proposed by the magazine, such as the reduction of curfew restrictions, the introduction of a five-day week, pay increases and free public transport. The journal could not therefore be seen as a genuine threat.

34. The Commission in substance accepted the first applicant's view. It noted that *der Igel* contained no incitement to violence, to disobedience or to break the rules; at the very most it provided information on complaints and appeals procedures.

35. According to the Government, the magazine sought to undermine the effectiveness of the army and of the country's system of defence. Its distribution had been particularly undesirable because at the material time, when the cold war had still been in progress, there had been a certain amount of friction in the Schwarzenberg barracks. This situation, which was comparable to that found to exist in the case of *Engel and Others* (cited above, p. 42, para. 101), had arisen because of unrest among the servicemen as a result of various deliberately provocative actions (see paragraph 9 above), carried out by Mr Gubi, an active member of the VDSÖ.

Confronted with this situation, the Minister for Defence had even shown restraint as he had merely refused to allow the army to assist in the distribution of *der Igel*. This measure

had been necessary in order to maintain discipline, but it had not prevented the applicant association from making the publication available to the soldiers through any other means. They could for instance receive it through the post and no restrictions were placed on their freedom to read it in the barracks. In short, the authorities had not overstepped their margin of appreciation, which was necessarily wider in this area because they alone were in a position to assess with full knowledge of all the circumstances, in a given situation, the specific duties and responsibilities of members of the armed forces.

36. The Court reiterates that freedom of expression is also applicable to „information” or „ideas” that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no „democratic society” (see, *inter alia*, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, p. 30, para. 59, and the *Castells v. Spain* judgment of 23 April 1992, Series A no. 236, p. 22, para. 42).

The same is true when the persons concerned are servicemen, because Article 10 (art. 10) applies to them just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings (see the *Engel and Others* judgment, cited above, p. 41, para. 100, and the *Hadjianastassiou* judgment, cited above, p. 17, para. 39).

37. The Court observes that at the material time the army distributed free of charge in all the country’s barracks its own publications and those of private associations of soldiers. It appears that only *der Igel* was denied this facility, which undoubtedly reduced considerably its chances of increasing its readership among service personnel. The fact that the VDSÖ retained the possibility of sending its journal to subscribers could not offset such a handicap. It could therefore only have been justified by imperative necessities since exceptions to the freedom of expression must be interpreted narrowly (see the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 41, para. 65).

38. The Government sought support for their argument from the content of *der Igel*. The periodical, which was critical and satirical, had represented a threat to discipline and to the effectiveness of the army.

It is the Court’s opinion that such an assertion must be illustrated and substantiated by specific examples. None of the issues of *der Igel* submitted in evidence recommend disobedience or violence, or even question the usefulness of the army. Admittedly, most of the issues set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints or appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such an army serves.

39. The Government also cited friction in the Schwarzenberg barracks, for which, they claimed, the publications of the applicant association and Mr Gubi’s activities were essentially responsible (see paragraph 9 above). This situation had led to a large number of complaints from the conscripts.

In the Court’s view, this situation, peculiar to a single barracks, was not sufficiently serious to justify a decision whose effects extended to all the military premises on the national territory. On this point the facts may be distinguished from the *Engel and Others*

case. In that case the banned journal had been distributed solely in the place where the unrest cited by the authorities had occurred (see the above-mentioned judgment, p. 18, para. 43).

40. In conclusion, the refusal by the Minister for Defence to include *der Igel* among the magazines distributed by the army was disproportionate to the legitimate aim pursued. It follows that the first applicant was the victim of a violation of Article 10 (art. 10).

B. Second applicant

41. Mr Gubi likewise claimed to have been the victim of a breach of Article 10 (art. 10) inasmuch as he had been prohibited from distributing issue no. 3/87 of *der Igel* (see paragraph 10 above).

1. Whether there was an interference

42. It is not in dispute that there was an interference with the exercise by Mr Gubi of his right to impart information and ideas.

2. Whether the interference was justified

43. It must therefore be determined whether the interference was „prescribed by law”, whether it pursued one or more of the legitimate aims referred to in paragraph 2 of Article 10 (art. 10-2) and whether it was „necessary in a democratic society” in order to attain such aims.

(a) Was the interference „prescribed by law”?

44. The applicant complained that there had been no legal basis for the order of 29 December 1987 requiring him to cease distributing *der Igel*. Neither the 1975 and 1987 circulars nor the regulations of the Schwarzenberg barracks could be regarded as „law” within the meaning of the Convention; they had not been published in the Official Gazette and their wording lacked sufficient precision. Only the barracks regulations contained a relevant provision, but it had been inserted with effect from 4 January 1988, in other words after the events giving rise to this case.

45. The Government contended that the impugned measure had been based on sections 44 para. 1 and 46 of the Armed Forces Act, the requirements of which were set out in greater detail in Regulations 3 and 19 of the General Army Regulations and in the different barracks regulations. Indeed Mr Gubi had been personally informed of their content and how they applied in practice on 1, 9 and 22 July 1987 (see paragraph 9 above).

46. On the question of the wording of these provisions, the Court refers to its reasoning in paragraph 31 above. Having regard in particular to the information given on the rules in force (see paragraph 9 above), the Court takes the view that, if need be having sought appropriate advice, the applicant was in a position to foresee, to a degree that was reasonable in the circumstances, the possibility of such a ban being imposed on him (see, *mutatis mutandis*, the *Sunday Times* (no. 1) judgment, cited above, p. 31, para. 49, and the *Open Door and Dublin Well Woman v. Ireland* judgment of 29 October 1992, Series A no. 246-A, p. 27, para. 60).

(b) Did the interference pursue a legitimate aim?

47. The Court considers that the contested measure served, like the refusal complained of by the first applicant, to maintain order in the armed forces (see paragraph 32 above).

(c) Was the interference „necessary in a democratic society”?

48. The Government explained the order in issue by referring to Mr Gubi’s conduct. Not only had he, when taking the oath, made a protest directed at the President of the Republic, he had also lodged several complaints and circulated a petition and an open

letter (see paragraph 9 above). The applicant had thus borne a large share of the responsibility for the friction existing at the time in his barracks. He was in addition a member of the Austrian communist party, whose manifesto called for the abolition of the army. By ordering him to cease distributing *der Igel*, the officer in question had sought to prevent him from destabilising his fellow soldiers even further.

49. The Court refers in the first instance to its reasoning at paragraphs 36 and 37 above. It shares the Government's opinion that the particular incident must be viewed in its general context. This approach does not, however, remove the necessity of first examining the content of the publication in issue. Like the Commission, the Court notes that issue no. 3/87 of *der Igel* was essentially devoted to articles on the conditions of national service (see paragraph 10 above). These articles were written in a critical or even satirical style and were quick to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly the magazine could scarcely be seen as a serious threat to military discipline. It follows that the measure in question was disproportionate to the aim pursued and infringed Article 10 (art. 10).

II. Alleged violation of article 13 (art. 13) of the convention

A. First applicant

50. The VDSÖ complained in addition that no effective remedy had been available to it in Austria in respect of its grievance under Article 10 (art. 10). It relied on Article 13 (art. 13) of the Convention, which provides:

„Everyone whose rights and freedoms as set forth in [the] 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.”

51. The Commission in substance subscribed to this view.

52. The Government denied in the first place that the applicant association's complaints were „arguable” for the purposes of the Convention. In the alternative, they contended that the association could have submitted its request to have *der Igel* distributed to the civil courts by means of an action for performance (*Leistungsklage*), an action for an order requiring the defendant to permit something to be done (*Duldungsklage*), or even an action for a declaration (*Feststellungsklage*).

53. In the light of the conclusion at paragraph 40 above, the requirement that the complaint be „arguable” is satisfied in respect of the submission in question (see, *inter alia*, the *Boyle and Rice v. the United Kingdom* judgment of 27 April 1988, Series A no. 131, p. 23, para. 52).

As regards the possible remedies cited by the Government, they have not put forward any example showing their application in a case similar to the present one. They have therefore failed to show that such remedies would have been effective.

It follows that the first applicant has been the victim of a violation of Article 13 (art. 13).

B. Second applicant

54. Mr Gubi likewise complained of a breach of Article 13 (art. 13). In the circumstances of the present case, neither the Complaints Division nor the Constitutional Court could be regarded as a „national authority” within the meaning of that provision. The Complaints Division was under the authority of the Ministry of Defence and did not

therefore afford the necessary guarantees of independence; the Constitutional Court had not examined the merits of the applicant's complaint.

55. Like the Commission and the Government, the Court notes that, under Article 144 of the Constitution, the Constitutional Court is competent to hear complaints of servicemen alleging a violation of their right to freedom of expression (see paragraph 21 above).

It is true that in this instance the Constitutional Court declined to entertain Mr Gubi's complaint (see paragraph 13 above). However, the effectiveness of a remedy for the purposes of Article 13 (art. 13) does not depend on the certainty of a favourable outcome (see, among other authorities, the Costello-Roberts judgment, cited above, p. 62, para. 40). The second applicant consequently had available to him a remedy satisfying the requirements of that provision.

It is not therefore necessary for the Court to consider whether the Complaints Division constitutes a „national authority” within the meaning of A of Article 13 (art. 13).

III. Alleged violation of article 14 of the convention taken in conjunction with article 10 (art. 14+10)

56. The applicants complained finally that they had each been the victim of a breach of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10). The violation of their right to freedom of expression amounted to discrimination on political grounds.

Having regard to its conclusions concerning Article 10 (art. 10), the Court does not consider it necessary to rule on this complaint.

IV. Application of article 50 (art. 50) of the convention

57. Under Article 50 (art. 50) of the Convention,

„If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. Pecuniary damage

58. The VDSÖ claimed 14,800,000 Austrian schillings (ATS) for pecuniary damage. This sum represented the amount that the Ministry of Defence would have had to pay the association if it had decided to buy and distribute der Igel from 27 July 1987, the date of the association's request (see paragraph 8 above).

59. The Court agrees with the Delegate of the Commission that the violation of Article 10 (art. 10) derives not from the failure to pay the VDSÖ but solely from the refusal of the military authorities to distribute der Igel. The claim is accordingly unfounded.

2. Non-pecuniary damage

60. The VDSÖ and Mr Gubi claimed in addition compensation for non-pecuniary damage in an amount which they left to the discretion of the Court.

61. The Delegate of the Commission supported this claim.

62. Like the Government, who pointed out that *der Igel* ceased publication in 1988, the Court considers that the present judgment affords the applicants sufficient just satisfaction for any non-pecuniary damage that they may have suffered.

B. Costs and expenses

63. The applicants claimed a total of ATS 360,952.34 for costs and expenses: ATS 113,267.56 for the proceedings before the national authorities and ATS 247,684.78 for those before the Convention institutions.

64. The Government agreed to pay ATS 110,000.

65. Having regard to the criteria laid down in its case-law and making an assessment on an equitable basis, the Court awards the applicants ATS 180,000 in respect of all their costs and expenses.

For these reasons, the court

1. Holds by six votes to three that there has been a breach of Article 10 (art. 10) of the Convention in respect of the first applicant;
2. Holds by eight votes to one that there has been a breach of Article 10 (art. 10) of the Convention in respect of the second applicant;
3. Holds by six votes to three that there has been a breach of Article 13 (art. 13) of the Convention in respect of the first applicant;
4. Holds unanimously that there has been no breach of Article 13 (art. 13) of the Convention in respect of the second applicant;
5. Holds unanimously that it is not necessary to consider whether there has been a breach of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10);
6. Holds unanimously that the present judgment constitutes in itself sufficient just satisfaction for the alleged non-pecuniary damage;
7. Holds unanimously that the respondent State is to pay the applicants, within three months, 180,000 (one hundred and eighty thousand) Austrian schillings for costs and expenses;
8. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 December 1994.

Rudolf BERNHARDT

President

Herbert PETZOLD

Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Thór Vilhjálmsson;

(b) partly dissenting opinion of Mr Matscher, joined by Mr Bernhardt.

Dissenting opinion of judge thór vilhjálmsson

In this case I have not found a violation of Article 10 (art. 10) of the Convention, or of Article 13 (art. 13).

With regard to the first applicant, I agree with the opinion of Mr Matscher joined by Mr Bernhardt.

In respect of the second applicant, Mr Gubi, I would make the following remarks:

In paragraph 36 of the judgment the Court makes what appears to me to be the obvious point that „the proper functioning of the army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline ...”. Certain restrictions were undoubtedly imposed on Mr Gubi when he was ordered by an officer to stop distributing the magazine *der Igel* in his barracks. However, these restrictions were limited to his conduct within the barracks. They did not affect the distribution of this publication in any other way. Applying the principle of proportionality, I have, unlike the Court, found that the Austrian officer acted within the permissible boundaries of Article 10 (art. 10) in issuing the said order to Mr Gubi.

Partly dissenting opinion of judge Matscher, joined by judge Bernhardt

(Translation)

I agree with the finding of a violation as regards the second applicant but not as regards the first applicant.

The latter complained that there had been a violation of Article 10 (art. 10) of the Convention on account of the refusal of the Minister for Defence to include the magazine *der Igel* in the list of periodicals distributed by the army. Article 10 (art. 10) protects the freedom of expression and information but does not guarantee publications a right to be distributed by the public authorities. The „official” distribution of the journal in question would have amounted in a way to identifying at least implicitly with the content of the magazine, which, in my view, the relevant military authorities could not be expected to do.

It was, moreover, entirely open to the conscripts who were interested in reading the magazine to subscribe to it, to have it mailed to them privately or to buy it when they went outside the barracks, which they did virtually every day, and bring it back to the barracks. In addition, the first applicant could send the magazine free of charge to the conscripts either at the barracks or at their private address. The requirements of Article 10 (art. 10) were in this manner fully complied with in relation to the applicant association.

In these circumstances, as regards the first applicant there was no interference with the right protected under Article 10 (art. 10); it follows that there could likewise be no breach of Article 13 (art. 13) in relation to it.

CASE OF GRIGORIADES v. GREECE

(121/1996/740/939)

JUDGMENT

STRASBOURG

25 November 1997

In the case of Grigoriades v. Greece ,
The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A , as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, President,

Mr R. BERNHARDT,

Mr F. GÖLCÜKLÜ,

Mr L.-E. PETTTI,

Mr B. WALSH,

Mr R. MACDONALD,

Mr C. RUSSO,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mr I. FOIGHEL,

Mr R. PEKKANEN,

Mr A.N. LOIZOU,

Mr J.M. MORENILLA,

Sir John FREELAND,

Mr L. WILDHABER,

Mr P. JAMBREK,

Mr K. JUNGWIERT,

Mr U. LÖHMUS,

Mr J. CASADEVALL,

Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, Registrar, and Mr P.J. MAHONEY, Deputy Registrar,
Having deliberated in private on 26 June, 29 August and 24 October 1997,
Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

1. The case was referred to the Court by the European Commission of Human Rights („the Commission”) on 16 September 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention”). It originated in an application (no. 24348/94) against the Hellenic Republic lodged with the Commission under Article 25 by a Greek national, Mr Panayiotis Grigoriades, on 17 March 1994.

The Commission’s request referred to Articles 44 and 48 and to the declaration whereby Greece recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 7 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the Greek language (Rule 27 § 3).

3. The Chamber to be constituted included ex officio Mr N. Valticos, the elected judge of Greek nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 17 September 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Pekkanen, Mr A.N. Loizou, Mr L. Wildhaber, Mr K. Jungwiert and Mr J. Casadevall (Article 43 in fine of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Greek Government („the Government”), the applicant’s lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government’s memorial on 20 March 1997. No memorial was received from the applicant within the time-limit set by the President of the Chamber. A document setting out the applicant’s claims for just satisfaction under Article 50 was received at the registry on 26 May 1997. The Delegate of the Commission did not reply in writing.

5. On 21 March and 2 April 1997 the Commission produced certain documents contained in the file on the proceedings before it, as requested by the Registrar on the President’s instructions.

6. In accordance with the President’s decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 June 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr P. GEORGAKOPOULOS,

Senior Adviser, Legal Council of State, Delegate of the Agent,

Mr V. KYRIAZOPOULOS,

Legal Assistant, Legal Council of State, Adviser;

(b) for the Commission

Mr L. LOUCAIDES,

Delegate;

(c) for the applicant

Mr IPP. MYLONAS,

of the Athens Bar, Counsel.

The Court heard addresses by Mr Loucaides, Mr Mylonas, Mr Kyriazopoulos and Mr Georgakopoulos.

7. Following deliberations held on 26 June 1997 the Chamber relinquished jurisdiction in favour of a Grand Chamber (Rule 51).

The Grand Chamber to be constituted included ex officio Mr Ryssdal, the President of the Court, and Mr R. Bernhardt, the Vice-President, together with the members and the four substitutes of the original Chamber, the latter being, Mr I. Foighel, Mr R. Macdonald, Mr F. Gölcüklü and Mr A. Spielmann (Rule 51 § 2 (a) and (b)). On 3 July 1997, the President, in the presence of the Registrar, drew by lot the names of the seven additional judges needed to complete the Grand Chamber, namely Mr C. Russo, Mr J.M.

Morenilla, Sir John Freeland, Mr P. Jambrek, Mr U. Löhmus, Mr V. Butkevych and Mr V. Toumanov (Rule 51 § 2 (c)).

Mr Toumanov was prevented from taking part in the consideration of the case.

8. On 3 July 1997 the Government submitted a further document, having been given leave to do so by the President at the hearing.

9. Having taken note of the agreement of the Agent of the Government, the Delegate of the Commission and the applicant, the Court decided on 29 August 1997 that consideration of the case should continue without resumption of the oral proceedings (Rule 26).

As to the facts

I. Particular circumstances of the case

A. Background to the case

10. The applicant was a conscripted probationary reserve officer holding the rank of second lieutenant.

11. In the course of his military service, the applicant claimed to have discovered a number of abuses committed against conscripts and came into conflict with his superiors as a result. Criminal and disciplinary proceedings were instituted against him. The former ended with his acquittal. However, a disciplinary penalty was imposed on him, as a result of which he had to serve additional time in the army.

12. On 30 April 1989 the applicant was granted twenty-four hours' leave. He failed to return to his unit after its expiry. He was declared a deserter on 6 May 1989 and criminal charges were brought against him.

13. On 10 May 1989 the applicant sent a letter to his unit's commanding officer through a taxi driver.

14. The letter read as follows:

„PERSONAL STATEMENT

After two whole years of military service as reserve officer cadet, I am obliged to inform you that I object to the prolongation of my military service following a penalty imposed on me for defending soldiers' rights. Judging from my experience to this date, I think that it was imposed as part of a general approach intended to suppress both freedom of personality and the vindication of constitutional rights and personal freedom. Apart from the personal cost, I generally consider that imposing a penalty on young soldiers is inadmissible and unconstitutional, all the more so when such penalty is related to the struggle of young people for respect for the ideological – social human rights of people and [their struggle] to defend their personality against the humiliations of the military apparatus. Having maintained for twenty-four months a fighting stance and a conscious position on that subject, I reserve the right, which is also a duty, to establish social justice and peace, now more than ever and, being fully aware of my actions which are imperatively dictated to me in the interests of society, hereby to DENOUNCE:

That the army is an apparatus opposed to man and society and, by its nature, contrary to peace.

I am now absolutely certain that the process of military service is responsible for crimes and aggressiveness in society since it has created a psychology of violence, overcoming in this manner all moral and psychological resistance to violence. The army remains a criminal and terrorist apparatus which, by creating an atmosphere of intimidation and

reducing to tatters the spiritual welfare of the radical youth, clearly aims at transforming people to mere parts of an apparatus of domination which ruins human nature and transforms human relations from relations of friendship and love to relations of dependence, through a hierarchy of fear guided by an illiberal and oppressing set of Standing Orders (No. 20-1), records of political beliefs, etc. The truth is that the living conditions in the army are unacceptable to the point of being destructive and any healthy form of resistance and any effort towards dialogue are persecuted and brought defenceless before the military justice, a dangerous institution that should be abolished. All this happens despite the electoral announcements of the Ministry of National Defence concerning respect for the personality of the soldiers; in reality, the Ministry participates in and encourages such oppressive processes. By this means of protest, I and all young people who feel a deep sense of injustice because their life has been reduced to tatters, FIGHT:

To stop all forms of persecution of those who have participated in processes that promote social justice, peace and the right to have an opinion on issues that concern our lives; for the Ministry to have the political will to control in a meaningful manner the military power and to prosecute those who are really responsible for this authoritarianism, instead of systematically covering for them; for the State to establish once and for all respect for the initiatives and social choices of young people, by eliminating all penalties for the promotion of such ideals. It should not content itself with „socialist vocabulary” and then follow the practice of extermination; to declare that the elimination of these authoritarian institutions is a matter of a multi-faceted and long struggle at a personal, political and social level; to put an end to discrimination, favouritism and dependency, all of these being methods used by corrupt organs.

Thus, having gone through this experience, I have developed a free conscience which prevents me from taking part in and being an accomplice to this criminal process, both in its operation and in its structure, and refuse from now on to wear my uniform in these conditions. If I were to wear it, I feel that I would find myself in a crisis of conscience, contrary to my nature and beliefs as a man brought up with liberal ideas. We, the young generation, will resist any attempt to be burdened with weaknesses and become vehicles of the military establishment. This is why my stance cannot be lawfully considered to be desertion or insubordination, since it stems from fundamental human rights and is in conformity with the provisions of the Greek Constitution. I consider that I remain a citizen and a free man who sought to remain true to his conscience and the free will flowing from it. I also consider that my stance and the voicing of my protest against this humiliation are the most genuine expression of solidarity with and support for conscientious objectors because I firmly believe that this is how the struggle for social liberation and peace is carried on.”

15. A fellow reserve officer testified before the Ioannina Permanent Army Tribunal (see paragraph 18 below) that the applicant gave him a copy of the letter on 10 May 1989. It has not been alleged that any further copies were circulated.

B. The criminal proceedings against the applicant

16. Taking the view that the content of the letter constituted an insult to the armed forces, the commanding officer instituted further criminal proceedings against the applicant under Article 74 of the Military Criminal Code (see paragraph 26 below).

17. On 12 May 1989 the applicant appeared before the investigating officer, a member of the army judicial corps, who remanded him in custody on a charge of desertion.

1. Proceedings in the Permanent Army Tribunal

18. The applicant was tried on 27 June 1989 by the Permanent Army Tribunal of Ioannina on charges of desertion and insulting the army.

At the outset of the trial the defence challenged the constitutionality of the second charge on the ground that the relevant criminal provision was not *lex certa* and that the expression of criticism could not amount to an insult. That preliminary objection was dismissed.

19. At the close of the hearing the president of the court formulated a series of questions which the members of the court had to address before deciding on the applicant's guilt. The questions relating to the insult charge were the following:

„(a) Did the accused commit the offence of insulting the Greek army when, on 10 May 1989, while a reserve officer on probation, he sent a two-page typed personal statement to the commanding officer of the X unit, which came to the latter's knowledge on the same day and which contained, *inter alia*, the following expressions contemptuous of, and disparaging, the authority of the army: ‘... [T]he army is an apparatus opposed to man and society ... [t]he army remains a criminal and terrorist apparatus which, by creating an atmosphere of intimidation and reducing to tatters the spiritual welfare of the radical youth, clearly aims at transforming people to mere parts of an apparatus of domination which ruins human nature and transforms human relations from relations of friendship and love to relations of dependence, through a hierarchy of fear guided by an illiberal and oppressive set of Standing Orders (No. 20-1), records of political beliefs, etc. ...’. In so doing, did he wilfully insult the Greek army as a constitutionally entrenched institution of the Nation?

(b) ... [did the applicant act] in the mistaken but *bona fide* belief that he was engaging in permissible criticism, in accordance with Article 14 of the Constitution currently in force?’

20. In a judgment delivered the same day the court, by a unanimous vote, answered the first question in the affirmative and the second in the negative. The applicant was found guilty of desertion and insulting the army. Taking into account the fact that the applicant was a first-offender, the court sentenced him to imprisonment for one year and eight months for the first offence and three months for the second offence, and ordered him to serve a global sentence of one year and ten months.

2. Proceedings in the Military Appeal Court

21. The applicant lodged an appeal with the Military Appeal Court which was heard on 5 September 1989. In a judgment delivered the same day the court quashed the applicant's conviction for desertion. However, it upheld, by three votes to two, his conviction for insulting the army after dismissing his objection that the relevant provision was contrary to the Constitution and, taking into account that the applicant had no previous convictions, sentenced him to three months' imprisonment. The applicant was immediately released, the time he had spent in detention on remand being credited against his sentence.

3. Proceedings in the Court of Cassation

22. On 20 September 1989 the applicant lodged an appeal on points of law to the Court of Cassation (Arios Pagos), on the ground that Article 74 of the Military Criminal Code

had not been correctly construed and applied. He argued, *inter alia*, that general criticism of the armed forces could not be considered an insult. He claimed in addition that the provision in question violated the Constitution because of its vagueness and could not be considered *lex certa*, and also that it imposed unwarranted limitations on the right to freedom of expression.

23. The applicant's appeal on points of law was heard by a Chamber of the Court of Cassation on 12 March 1991. On 26 June 1991 the Chamber of the Court of Cassation decided to submit the case to the plenary court, having considered, by three votes to two, that Article 74 of the Military Criminal Code did not violate the Constitution and that it had been correctly applied in the applicant's case.

24. In a judgment delivered on 22 September 1993 the plenary Court of Cassation considered that Article 74 of the Code sufficiently circumscribed the elements of the offence, namely the insult and the intention of the culprit. Elaborating on this point, the court held that

„[t]he concept of ‘insult’ includes every show of contempt damaging the esteem, and respect for, and the reputation of, the protected value. To qualify as an insult, such expression must convey contempt, taunt and denigration; it is not sufficient merely to call into question the protected value. This value is the armed forces and, more particularly, not the army or air force and the navy individually, but the armed forces in their entirety as an idea and an institution entrusted with defending the freedom and independence of the country and the necessary training of Greeks who are able to bear arms. Article 74 of the Military Criminal Code does not specify the nature of the insult nor the manner and means by which the insult is made, as it was not the intention of the legislature to make insulting behaviour of a particular kind, or committed in a particular manner, or by a particular means, a criminal offence. Any insult of the army by a member of the armed forces constitutes a criminal offence. This does not create any uncertainty as to the elements of the offence. Any further specification would have limited the scope of the criminal prohibition, which the legislature did not intend. Article 14 of the Constitution, which protects freedom of opinion, does not in any way preclude the legislature from making every instance of insulting the army by a member of the armed forces a criminal offence. The protection of Article 14 is subject to limitations provided for by law ...”

For these reasons, the plenary Court of Cassation upheld the applicant's conviction.

II. Relevant domestic law

25. Article 14 § 1 of the Greek Constitution provides:

„Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State.”

26. Article 74 of the Military Criminal Code provides:

„Insults to the flag or the armed forces

A member of the armed forces who insults the flag, the armed forces or an emblem of their command shall be punished by a term of imprisonment of at least six months. If he is an officer, he shall also be stripped of his rank.”

27. A corresponding civilian offence is defined by Article 181 of the Criminal Code, which provides as follows:

„Insults to authorities and to symbols

1. Any person shall be punished with imprisonment for up to two years who:
 - a) publicly insults the Prime Minister of the country, the Government, Parliament, the Speaker of Parliament, the leaders of the political parties recognised by the Rules of Parliament and the judicial authorities;
 - b) insults or, as a display of hatred or contempt, damages or disfigures an emblem or symbol of State sovereignty or the President of the Republic.
2. Criticism in itself shall not constitute an insult of an authority.”
28. A new Military Criminal Code entered into force in 1995. Article 58 of that Code provides:
„A member of the armed forces who, by speech, actions or any other means whatsoever, publicly expresses contempt for the flag, the armed forces or a symbol of their authority, shall be punished by a term of imprisonment of at least three months.”

Proceedings before the commission

29. Mr Grigoriades applied to the Commission on 17 March 1994. He alleged a violation of the right to freedom of expression guaranteed by Article 10 of the Convention. He also claimed to have been convicted under an imprecise provision of criminal law, contrary to Article 7 of the Convention.
30. The Commission declared the application (no. 24348/94) admissible on 4 September 1995. In its report of 25 June 1996 (Article 31), it expressed the opinion that there had been a violation of Article 10 of the Convention (twenty-eight votes to one) but not of Article 7 (unanimously). The full text of the Commission’s opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment .

Final submissions to the court by the government

31. The Government concluded their memorial by expressing the opinion that the applicant’s allegations that Articles 7 and 10 of the Convention had been violated were unfounded.

As to the law

I. Alleged violation of article 10 of the convention

32. The applicant alleged that his conviction for insulting the army constituted a violation of Article 10 of the Convention, which provides as follows:
 - „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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The Commission agreed with the applicant that there had been a violation of that provision. The Government disputed this.

A. Whether there has been an „interference” with the applicant’s rights under Article 10 33. It was common ground that the applicant’s conviction of insulting the army, and the sentence of three months imposed on him, constituted an interference with his freedom of expression, guaranteed by paragraph 1 of Article 10.

The Court sees no reason to hold otherwise.

B. Whether the interference was „prescribed by law”

34. It was not disputed by the applicant that his conviction had a basis in national law, namely Article 74 of the Military Criminal Code as in force at the time. On the other hand, the applicant maintained that that provision had not been precise enough to satisfy the foreseeability requirement that flows from the expression „prescribed by law”.

The wording of the provision was, in his contention, over-broad. As had been recognised by the Greek Court of Cassation itself in its judgment concerning the present case, Article 74 did not define the concept of „insult” or specify acts considered to be insulting. Nor was there any case-law under that provision which might offer guidance.

The case-law cited by the Government concerning Article 181 of the Criminal Code, which defined the corresponding civilian offence of insulting authorities and symbols of authority, was irrelevant. Firstly, Article 181 of the Criminal Code was a different and unrelated provision in any case, and secondly, the expression used in that provision and accordingly construed by the case-law was based on a verb meaning „to insult”, unlike Article 74 of the Military Criminal Code, which used another verb which could be more accurately translated as „to offend”.

35. The Government argued that the offence of insulting the army under Article 74 of the Military Criminal Code was a specific instance of insulting authority as defined by Article 181 of the Criminal Code, so that the construction placed on the latter provision could serve to clarify the former as well.

36. The Commission considered that Article 74 of the Military Criminal Code did not differ in any way from other statutory provisions which made „insult” a criminal offence.

37. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

38. It is true that Article 74 of the Greek Military Criminal Code was couched in very broad terms. Nonetheless, in the Court’s view, it met the above standard. On the ordinary meaning of the word „insult” – which is akin to the expression „offend” – it ought to have been clear to the applicant that he risked incurring a criminal sanction. It follows that the interference complained of was „prescribed by law”.

C. Whether the interference pursued a legitimate aim

39. The Government contended that the measures taken against the applicant under Article 74 of the Military Criminal Code had been intended to safeguard the effectiveness of the army in fulfilling its purpose, which

was to protect Greek society against external or internal threats. They had therefore pursued the aims of protecting national security, territorial integrity and public safety, which were legitimate under Article 10 § 2.

40. The applicant offered no argument to the contrary. The Commission considered that the applicant's conviction pursued a legitimate aim „to the extent that it [had been] imposed to maintain discipline in the army”.

41. The Court has no doubt that an effective military defence requires the maintenance of an appropriate measure of discipline in the armed forces and accordingly finds that the interference complained of pursued at any rate the legitimate aims of protecting national security and public safety invoked by the Government.

D. Whether the interference was „necessary in a democratic society”

1. Arguments before the Court

42. The applicant, with whom the Commission concurred in substance, argued that his conviction for insulting the army had not been necessary.

He pointed, first of all, to the factual context in which he had written the letter in question to his commanding officer. Throughout the two years of his military service, he had striven to improve the lot of conscripted soldiers. He alleged that it was as a result of this activity that a disciplinary penalty had been imposed on him in the form of an additional period of military service. When he had refused to serve for this additional period, he had been charged with desertion; it was at that point that, indignant at what he perceived as an injustice, he had written the letter. Ultimately, the trial courts had acquitted him of desertion and thus shown his indignation to have been justified.

Admittedly, the letter had contained strong views but they had to be seen as permissible criticism, the limits of which were wider with regard to the various arms of the executive than in relation to a private citizen. The letter did not contain any insults directed at any individual. More importantly, the letter was not a public document, having been sent only to the applicant's commanding officer; to the extent that it had later become public, that had been due solely to the latter's actions in bringing about the applicant's prosecution. In those circumstances, and despite the fact that the letter had been seen by one other conscript, its potential for undermining military discipline had been insignificant.

Finally, the applicant expressed the opinion that the penal sanction imposed, namely a term of imprisonment of three months, had been disproportionate. His commanding officer had had the option of imposing a disciplinary penalty instead of resorting to full-blown criminal proceedings, or a lesser sentence could have been imposed.

43. The Government did not agree that the sanction imposed on the applicant had gone beyond what could be considered „necessary in a democratic society”.

Making it an offence to insult the army did not, in their view, affect the essence of the freedom of expression. It merely met the need to counter excessive use of that freedom, namely, by a member of the armed forces and against the army. In particular, given the special exigencies of military life, it was necessary to resort to the criminal law to maintain military discipline and thus the effectiveness and prestige of the armed forces.

The letter itself had been phrased in insulting terms, calling the Greek army a „criminal and terrorist apparatus”. It had not contained any specific criticism or allegations of actual violations of the rights of conscripts.

The nature of the letter as a threat to discipline was also apparent from the fact that it had been addressed to a superior officer. The applicant's remarks had not been made in the more innocuous context of, for instance, an informal discussion between officers of the same rank.

Moreover, the applicant had had the letter delivered to his commanding officer by a taxi driver. That method of delivery did not offer the guarantees of privacy offered by the Greek postal service. In addition, the applicant had given a copy of the letter to a fellow conscript officer. In the circumstances, it was incorrect to consider the letter a mere private expression of opinions.

Finally, since the time the applicant had spent in prison was set off against the time spent in detention on remand and he had not sought a suspended sentence, as he might have done, the sanction imposed had not in itself been disproportionate.

2. The Court's assessment

44. The Court has stated the applicable principles as follows in its judgment in the case of *Vogt v. Germany* (judgment of 26 September 1995, Series A no. 323, pp. 25–26, § 52):

„(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or

disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see the following judgments: *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, p. 23, § 49; *Lingens v. Austria*, 8 July 1986, Series A no. 103, p. 26, § 41; and *Jersild v. Denmark*, 23 September 1994, Series A no. 298, p. 26, § 37).

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' (see the *Sunday Times v. the United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217, p. 29, § 50). In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see the above-mentioned *Jersild* judgment, p. 26, § 31)."

45. Article 10 does not stop at the gates of army barracks. It applies to military personnel as to all other persons within the jurisdiction of the Contracting States. Nevertheless, as the Court has previously indicated, it must be open to the State to impose restrictions on

freedom of expression where there is a real threat to military discipline, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining it (see the *Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria* judgment of 19 December 1994, Series A no. 302, p. 17, § 36). It is not, however, open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution.

46. In the present case the applicant had a letter delivered to his commanding officer which the latter considered insulting to the armed forces (see paragraph 14 above). The commanding officer decided for that reason to take the matter further and to institute proceedings against the applicant under Article 74 of the Military Criminal Code (see paragraph 16 above).

47. It is true that the contents of the letter included certain strong and intemperate remarks concerning the armed forces in Greece. However, the Court notes that those remarks were made in the context of a general and lengthy discourse critical of army life and the army as an institution. The letter was not published by the applicant or disseminated by him to a wider audience – apart from one other officer who apparently had been given a copy of it – and it has not been alleged that any other person had knowledge of it. Nor did it contain any insults directed against either the recipient of the letter or any other person. Against such a background the Court considers the objective impact on military discipline to have been insignificant.

48. The Court accordingly considers that the prosecution and conviction of the applicant cannot be justified as „necessary in a democratic society” within the meaning of paragraph 2 of Article 10 (see paragraph 44 above). There has thus been a violation of that Article.

II. Alleged violation of article 7 of the convention

49. The applicant also claimed that Article 74 of the Military Criminal Code was not sufficiently precise to satisfy the requirement of foreseeability. He alleged a violation of Article 7 of the Convention, which provides:

„1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

50. This complaint coincides with the applicant’s allegation that his conviction and sentence were not „prescribed by law”. The Court refers to paragraph 38 above and finds, on the grounds there stated, that there has been no violation of Article 7.

III. Application of article 50 of the convention

51. Article 50 of the Convention provides as follows:

„If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows

only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.” The applicant sought damages as well as reimbursement of his costs and expenses.

A. Damage

52. The applicant claimed 5,000,000 drachmas (GRD) for non-pecuniary damage caused by his imprisonment and by the difficulties which, owing to his conviction, he had had in finding a job as a journalist.

53. The Government noted that the applicant had not had to spend a single day in prison following his conviction. The sentence had been set off against the time which he had spent in detention on remand on the charge of desertion. It had never been suggested that his detention as such had been in violation of the Convention.

54. The Delegate of the Commission did not comment.

55. The Court agrees with the Government. Given that the actual reason for the applicant’s detention, the desertion charge, was not before the Court, no award related to the applicant’s prison sentence can be made.

Nor can it be accepted without corroboration that the applicant would have found employment any sooner had he not been convicted.

It follows that no causal link has been established between the violation of Article 10 found and the damage alleged. That being so the Court holds that the finding of a violation provides sufficient just satisfaction for any non-pecuniary damage which the applicant may have suffered.

B. Costs and expenses

56. The applicant claimed GRD 1,000,000 in respect of costs and expenses incurred in the proceedings before the domestic courts.

His costs and expenses before the Convention institutions were itemised as follows:

- (a) GRD 1,000,000 for the proceedings before the Commission;
- (b) GRD 800,000 for the proceedings before the Court;
- (c) GRD 500,000 for travel and subsistence expenses incurred in connection with his appearance and that of his representative before the Court.

His claims in respect of costs and expenses thus totalled GRD 3,300,000.

57. As regards the domestic proceedings, the Government noted that the applicant had been tried on two charges, on one of which (the desertion charge) he had been acquitted. Only the costs referable to the charge of insult of the army fell to be considered by the Court. They considered GRD 400,000 to be a reasonable sum.

58. As regards the Strasbourg proceedings, the Government did not contest the sum claimed in respect of the proceedings before the Commission. However, they pointed out that the applicant had not submitted a memorial to the Court and contended that the Court should award no more than GRD 250,000 for the proceedings before it. They further stated that the applicant’s presence in person at the Court’s hearing had served no useful purpose and therefore asked the Court to award only half the sum claimed in respect of travel and subsistence expenses, to cover only the costs incurred by his lawyer.

59. As regards the costs and expenses incurred in attending the hearing, the Court cannot agree with the Government that the applicant’s presence served no useful purpose (see, *inter alia*, the *Sunday Times v. the United Kingdom* judgment of 6 November 1980, Series A no. 38, p. 16, § 33).

Deciding on an equitable basis, the Court awards the applicant a global sum of GRD 2,000,000, plus any value-added tax that may be payable, in respect of costs and expenses.
C. Default interest

60. According to the information available to the Court, the statutory rate of interest applicable in Greece at the date of adoption of the present judgment is 6% per annum.

For these reasons, the court

1. Holds by twelve votes to eight that there has been a violation of Article 10 of the Convention;
 2. Holds unanimously that there has been no violation of Article 7 of the Convention;
 3. Holds by seventeen votes to three
 - (a) that the finding of a violation of Article 10 of the Convention constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage which the applicant may have sustained;
 - (b) that the respondent State is to pay the applicant, within three months, 2,000,000 (two million) drachmas, plus any value-added tax that may be payable, in respect of costs and expenses;
 - (c) that simple interest at an annual rate of 6% shall be payable from the expiry of the above-mentioned three months until settlement;
 4. Dismisses unanimously the remainder of the claim for just satisfaction.
- Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1997.

For the President

Signed: Rudolf BERNHARDT

Vice-President

Signed: Herbert PETZOLD

Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Bernhardt and Mr Wildhaber;
- (b) concurring opinion of Mr Jambrek;
- (c) dissenting opinion of Sir John Freeland joined by Mr Russo, Mr Valticos, Mr Loizou and Mr Morenilla;
- (d) joint dissenting opinion of Mr Gölcüklü and Mr Pettiti;
- (e) dissenting opinion of Mr Casadevall.

Concurring opinion of judges Bernhardt and Wildhaber

In paragraph 37 of its judgment, the Court reiterates that the relevant law must be formulated with sufficient precision. Earlier cases have repeatedly stated that, where a law confers a discretion, the scope of the discretion and the manner of its exercise must be indicated with sufficient clarity. In the instant case, the issue is not so much the scope of the discretion but rather the alleged vagueness of the law. What the Court has said with respect to discretion could usefully be expanded so as to include also the problem of vagueness of the instant case. After the *Grigoriades* case therefore, the rule could be formulated as follows:

„A law that uses general terms or confers a discretion is not in itself inconsistent with the requirement of sufficient precision and foreseeability, provided that the terms used are not too vague and the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against interference.”

Concurring opinion of judge Jambrek

1. The key reasons for the finding of a violation in the present case are to be found in paragraph 47 of the judgment. There, the point was made that critical remarks were made „in the context” of a general and lengthy discourse critical of army life and the army as an institution, that they were not published or disseminated to a wider audience, that they were not directed against the recipient or any other person, and that therefore their impact on military discipline was insignificant. It is the aim of this opinion to amend and elaborate on these reasons in some respects.

2. A number of remarks made by the applicant and described in the judgment as „strong”, „intemperate” or „insulting” may be characterised as „opinions”, i.e., subjective attitudes whereby facts and ideas are assessed, in contrast to factual claims. The protection of „opinions” by Article 10 of the Convention relates both to their substance and to their form; the fact that their wording is offensive, shocking, disturbing or polemical does not take them outside the scope of protection.

3. In the proceedings in the Greek courts the impugned remarks were characterised as „insults”. The Court notes that they were not directed against the recipient commanding officer, and that he himself considered them „insulting to the armed forces”. The legal concept of an „insult” protects mainly personal honour. State institutions, and the army in particular, do not possess „personal honour” to be protected as a personality right. In this sense, the legitimate aim of the interference with the applicant’s freedom of expression could hardly be the „protection of the rights and freedoms of others”.

4. The remarks made by the applicant come close to the concept of a „collective insult” which is not directed at any individual. In the present case the critical and even derogatory remarks were directed at the army as a national institution, respect for which is protected by Greek law. According to the Court of Cassation judgment of 22 September 1993, the protected value is not only the army as an organisation, but also the army as an idea, thus symbolically related to „the defence of the freedom and independence of the country”.

5. Defamation of the military may of course have an objective impact on military discipline. For that reason the army should also be protected against „insults” which aim at degrading its public acceptance and may thereby undermine fulfilment of its functions. On the other hand, the army, like other State institutions, should not be shielded from criticism. Nor may permissible criticism on relevant issues be prevented by fear of punishment (compare the judgment of the German Constitutional Court, BVerfGE 93, 266, „Soldiers are murderers”).

6. I also agree, in general terms, with the logic of the American „flag burning” cases where, inter alia, the public interest to show proper respect for the national emblem could not justify government interference with the symbolic act of casting contempt upon the American flag. This act may be considered analogous to a „collective insult”, directed at highly respected national values (see the following judgments of the United States Supreme Court: *Street v. New York*, 394 U.S. 576 (1969) ; *Texas v. Johnson*, 491 U.S.

397 (1989) ; United States v. Eichman, 496 U.S. 310 (1990)). „Symbolic speech”, offensive even to the supreme national values, in my view deserves, *mutatis mutandis*, protection under Article 10 of the Convention whenever an interference is not proportional and necessary in a democratic society.

7. I would also suggest, as an obiter dictum, that limitations of the Convention, restricting the exercise of the right to freedom of expression, should be applied – and here I quote from the opinion of Mr Justice Jackson in *Board of Education v. Barnette*, 319 U.S. 624 (1943) – „with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organisation ... Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order” (quoted in *Street v. New York*, 394 U.S. 576 (1969)).

Dissenting opinion of judge Sir John Freeland, joined by judges Russo, Valticos, Loizou and Morenilla

1. We are unable to agree that there has been a violation of Article 10 of the Convention in this case.

2. Our disagreement centres on the question whether the interference with the applicant’s right to freedom of expression represented by his conviction under Article 74 of the Military Criminal Code should be regarded, in the circumstances of this case, as „necessary in a democratic society” within the meaning of Article 10 § 2. Like the majority of the Court, we accept that that interference was „prescribed by law” and that it pursued a legitimate aim, in so far as it was intended to maintain order and discipline in the armed forces.

3. As the Court pointed out in its *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria* judgment of 19 December 1994 (Series A no. 302, p. 17, § 36), Article 10 applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States, but „... the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline ...”.

4. The primary purpose of military discipline is to ensure that in all circumstances, including situations of extreme stress, lawful orders from a superior in rank are unquestioningly and immediately carried out by the serviceman to whom they are addressed. The rigidity with which military discipline is enforced, and the nature of the legal rules adopted to ensure that it is not undermined, differ from time to time and from State to State. They are no doubt conditioned by a variety of factors, including national characteristics and military traditions as well as the extent of military readiness considered necessary at the relevant time by the State concerned.

5. At the time of the events which gave rise to the applicant’s conviction, the Greek armed forces were apparently in a state of mobilisation as a consequence of circumstances existing in the area. The applicant was a reserve officer on probation holding the rank of second lieutenant. He had performed two years of military service, in the course of which he would undoubtedly have been trained in the requirements of military discipline. He claimed to have discovered abuse against conscripts in the course of his service, as a result of which he came into conflict with his superiors and, after disciplinary proceedings against him, was required to serve additional time in the army.

On 10 May 1989, after having overstayed a period of leave and having been declared a deserter he sent to his commanding officer, not through the post but by the hand of a taxi driver, a letter in the terms set out in paragraph 14 of the judgment. On the same day he gave a copy of the letter to a fellow reserve officer.

6. The letter included references to the army as being „... an apparatus opposed to man and society ...” and „ ... a criminal and terrorist apparatus which, by creating an atmosphere of intimidation and reducing to tatters the spiritual welfare of the radical youth, clearly aims at transforming people to mere parts of an apparatus of domination which ruins human nature and transforms human relations from relations of friendship and love to relations of dependence, through a hierarchy of fear guided by an illiberal and oppressing set of Standing Orders ...”. The applicant could not have assumed that this letter would remain a private matter as between himself and his commanding officer: quite apart from his disclosure of a copy to the fellow officer, he must have realised that it would be the duty of the commanding officer to make the contents of the letter known within the military hierarchy.

7. Whether or not the aim of the applicant throughout his letter was, as he claimed, that of „improving the living conditions of soldiers and creating the prerequisites for a more humane army”, there can surely be no doubt that some of the language which he used (see above) could reasonably be regarded by the military authorities as calling into question the legitimacy of the army as an institution and hence the extent of his willingness to obey orders emanating within it – in short, as being the language of insubordination rather than that of permissible criticism. More than that, it could reasonably be regarded as being, if left unpunished, a possible encouragement to other soldiers to waver in their duty of obedience – a consideration which gained in importance because of the disclosure of a copy of the letter to a fellow officer and the risk that knowledge of its contents would go further.

8. In the circumstances, and having regard to the margin of appreciation left to the national authorities, we consider that there was sufficient justification for treating the actions of the applicant as having a significant potential for undermining military discipline and the maintenance of order in the army. As regards the proportionality of the measures taken against him, it is to be noted that he was immediately released in the wake of his conviction and subsequent unsuccessful appeals, the time spent in detention on remand having counted against his sentence of three months’ imprisonment.

9. In the light of the above, we conclude that the interference with the applicant’s freedom of expression is indeed properly to be treated as „necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention and gave rise to no violation. It is no part of the Court’s function to express a view on whether the means chosen by the national authorities to deal with the applicant’s situation were or were not the most suitable, and we, accordingly, refrain from doing so.

Joint dissenting opinion of judges Gölcüklü and Pettiti

(Translation)

We voted with the minority against finding a violation because we consider that the Grand Chamber’s decision departs from the European Court’s case-law.

It has always been accepted that, when applying Article 10, the Court must take both paragraphs of that Article into account.

Interference by a State may be justified on public-order grounds.

It has always been accepted that military and prison discipline come within the sphere of public order and require rules that differ from those normally applying.

Every civilised State with an army has a military code on its statute book. Such codes have never been outlawed by any international instrument. They are based on the discipline to which soldiers and particularly officers in active service or in reserve are subject for so long as they have service obligations.

In all States it is an offence to insult the army. In every European State, the State, the army and patriotic public opinion demand that respect be shown for the nation's army, at least by its officers.

The case-law of the institutions of the European Convention on Human Rights on conscientious objectors is consistent with that approach (*idem* with regard to military courts; see the *De Jong, Baljet and Van den Brink v. the Netherlands* judgment of 22 May 1984, Series A no. 77). The *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, p. 41, § 100 is instructive as to the Court's position:

„Of course, the freedom of expression guaranteed by Article 10 applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings ...”

It is not, therefore, possible to compare the freedom of expression of a citizen who is no longer in the army with the more limited freedom of expression of a soldier required to respect rank while doing national service. On the other hand, historians are totally free to criticise the army.

Military justice is not prohibited by the European Convention on Human Rights. Military discipline is by its nature necessary in a democratic society, otherwise anarchy or anti-democratic subversion ensues, contrary to the aims of the Convention.

All the member States of the Council of Europe have disciplinary and sanction systems comparable to Greece's, which are acceptable even on the proportionality principle. To hold otherwise would be to change the very basis of the European Convention on Human Rights and to construe „public order” wrongly, both under domestic law and when concerned with the concept of European public order.

There is a risk that the Court's judgment will be misunderstood by the member States. Permitting a soldier or officer who still has military service obligations to publish material presenting military service as a criminal institution, without any risk of the soldier or officer responsible being prosecuted by the military or judicial authorities under the Military Code, seems unwise. The Court has relied too heavily on the sole criterion of the nature of the letter.

In our opinion, the Grand Chamber has distorted the meaning of the letter and in so doing has not followed the Court's case-law precluding any reopening of a national court's finding of fact where such finding is not contrary to the Convention. The domestic courts, after analysis of the letter, found that it was intended for the applicant's superiors. In our view the Court misconstrued the letter in holding that it was personal, private and not addressed to the military authorities.

As the letter contained a refusal to perform the additional period of service, it was official. As a result the applicant had to be discharged, which required that administrative steps be taken. Save on pain of prosecution for abuse of office, the officer could not withhold

it and keep it quiet. He had a duty to bring it to the attention of his superiors. The fact that Mr Grigoriades did not publicise the letter and that it contained no insulting remarks about its addressee is wholly irrelevant to the application of Article 10 (paragraph 45 contradicts paragraph 44).

The letter necessarily came within the scope of acts covered by military disciplinary regulations. The whole of paragraph 45 results in an erroneous justification of Mr Grigoriades' conduct and a condemnation of the Greek State that fails to take into account paragraph 2 of Article 10.

Yet it is accepted in Europe that discipline is essential to maintain the authority of the army and that the army is essential to ensure that democracy is protected from subversion, in accordance with one of the major objectives of the European Convention on Human Rights. The positive results obtained by the international forces in Bosnia emphasise the need to ensure respect for their professional code of ethics, especially as they have for a number of years agreed to incorporate teaching on human rights.

Dissenting opinion of judge Casadevall

(Translation)

1. I voted in favour of finding that there has been no violation because I consider, in the light of the facts disclosed and in particular the letter sent by the applicant to his superior, that the Greek State has not infringed its obligations under Article 10 of the Convention.

2. It is true that freedom of expression constitutes one of the fundamental pillars of any democratic society and for that reason the States' margin of appreciation must be delimited as strictly as possible. However, paragraph 2 of Article 10 provides that the exercise of freedom of expression, which also carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary for the protection of certain legal interests.

3. Freedom of expression must include freedom to criticise, provided that the criticism is couched in terms that are not excessive and strike a fair balance with regard to the rights of others, order and morals. Certain remarks in the applicant's letter to his superior, such as „...The army remains a criminal and terrorist apparatus ...” to quote but one example, clearly constitute an insult, and even an outrage, to a State institution.

4. Since the case concerned the Greek army, in which the applicant was a probationary reserve officer with the rank of second lieutenant, there could be no difficulty in justifying the applicant's conviction by one of the legitimate aims set out in the second paragraph of Article 10 such as „the prevention of disorder” – because it was an offence which discredited a State institution („prevention of disorder” in the wider sense given to it by the Court in the *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, p. 41, § 98) – and „... the functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings” (*ibid.*, pp. 41–42, § 100).

5. Over and above the fact that the applicant was a member of the armed forces, insulting or offending State institutions (the army, judiciary, Parliament or even emblems) constitutes a punishable offence under the ordinary law in most member States of the Council of Europe and the criminal-law provisions concerned are, in my opinion, compatible with the Convention and in particular freedom of expression.

6. The interference in this case was prescribed by domestic law, pursued a legitimate aim and was necessary in a democratic society under paragraph 2 of Article 10.

CASE OF REKVÉNYI v. HUNGARY

(Application no. 25390/94)

JUDGMENT
STRASBOURG

20 May 1999

In the case of Rekvényi v. Hungary,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention”), as amended by Protocol No. 11, and the relevant provisions of the Rules of Court, as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, President,

Mrs E. PALM,

Sir Nicolas BRATZA,

Mr A. PASTOR RIDRUEJO,

Mr G. BONELLO,

Mr J. MAKARCZYK,

Mr P. KÜRIS,

Mr R. TÜRMEN,

Mrs F. TULKENS,

Mrs V. STRÁŽNICKÁ,

Mr M. FISCHBACH,

Mr V. BUTKEVYCH,

Mr J. CASADEVALL,

Mrs H.S. GREVE,

Mr A.B. BAKA,

Mr R. MARUSTE,

Mrs S. BOTOCHAROVA,

and also of Mr P.J. MAHONEY, Deputy Registrar,

Having deliberated in private on 28 January, 1 February and 21 April 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

1. The case was referred to the Court, as established under former Article 19 of the Convention, by the European Commission of Human Rights („the Commission”) on 15 September 1998, by a Hungarian national, Mr László Rekvényi („the applicant”), on 21 September 1998 and by the Hungarian Government („the Government”) on 5 October 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 25390/94) against the Republic of Hungary lodged with the Commission under former Article 25 by Mr Rekvényi on 20 April 1994.

The Commission’s request referred to former Articles 44 and 48 of the Convention and to the declaration whereby Hungary recognised the compulsory jurisdiction of the Court (former Article 46); the applicant’s application referred to former Article 48 as amended by Protocol 9, which Hungary had ratified; the Government’s application referred to

former Article 48. The object of the request and of the applications was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 11 of the Convention taken either alone or together with Article 14.

2. The applicant designated the lawyer who would represent him (Rule 31 of former Rules of Court B).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr R. Bernhardt, the President of the Court at the time, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 30 November 1998. The Government replied on 9 December 1998.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr A.B. Baka, the judge elected in respect of Hungary (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, Sir Nicolas Bratza, President of Section, and Mr M. Fischbach, Vice-President of Section (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Küris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

5. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mrs M. Hion, to take part in the proceedings before the Grand Chamber.

6. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 28 January 1999.

There appeared before the Court:

(a) for the Government

Mr L. HÖLTZL, Deputy Secretary of State, Agent,

Mr T. BÁN, Co-Agent,

Mr Z. TALLÓDI,

Ms M. WELLER, Advisers;

(b) for the applicant

Mr V. MASENKO-MAVI, of the Budapest Bar, Counsel;

(c) for the Commission

Ms M. HION, Delegate,

Ms M.-T. SCHOEPFER, Secretary to the Commission.

The facts

I. The circumstances of the case

7. At the material time, the applicant was a police officer and the Secretary General of the Police Independent Trade Union.

8. On 24 December 1993 Law no. 107 of 1993 on certain amendments to the Constitution (az Alkotmány módosításáról szóló 1993. évi CVII. törvény) was published in the Hungarian Official Gazette. This Law amended, inter alia, Article 40/B § 4 of the Constitution to the effect that, as from 1 January 1994, members of the armed forces, the police and security services were prohibited from joining any political party and from engaging in any political activity (see paragraph 13 below for the text of the Article).

9. In a circular letter dated 28 January 1994, the Head of the National Police requested, in view of the forthcoming parliamentary elections, that police officers refrain from political activities. He referred to Article 40/B § 4 of the Constitution as amended by Law no. 107 of 1993. He indicated that those who wished to pursue political activities would have to leave the police.

10. In a second circular letter dated 16 February 1994, the Head of the National Police declared that no exemption could be given from the prohibition contained in Article 40/B § 4 of the Constitution.

11. On 9 March 1994 the Police Independent Trade Union filed a constitutional complaint with the Constitutional Court claiming that Article 40/B § 4 of the Constitution, as amended by Law no. 107 of 1993, infringed constitutional rights of career members of the police, was contrary to the generally recognised rules of international law and had been adopted by Parliament unconstitutionally.

12. On 11 April 1994 the Constitutional Court dismissed the constitutional complaint, holding that it had no competence to annul a provision of the Constitution itself.

II. Relevant domestic law

13. The relevant Articles of the Constitution of the Republic of Hungary (Law no. 20 of 1949, as amended on several occasions) provide:

Article 40/B § 4 (as in force since 1 January 1994)

„Career members of the armed forces, the police and the civil national security services shall not join any political party and shall not engage in any political activity.”

„A fegyveres erők, a rendőrség és a polgári nemzetbiztonsági szolgálatok hivatásos állományú tagjai nem lehetnek tagjai pártnak és politikai tevékenységet nem folytathatnak.”

Article 61 § 1 (as in force since 23 October 1989)

„In the Republic of Hungary everyone shall have the right to freedom of expression and to receive and impart information of public interest.”

„A Magyar Köztársaságban mindenkinek joga van a szabad véleménynyilvánításra, továbbá arra, hogy a közérdekű adatokat megismerje, illetőleg terjessze.”

Article 78 § 1

„... [T]he Government shall ensure that the provisions of the Constitution of the Republic of Hungary are implemented.”

„A Magyar Köztársaság alkotmánya ... végrehajtásáról a Kormány gondoskodik.”

Article 78 § 2

„The Government shall submit to Parliament such bills as are necessary to implement the Constitution.”

„A Kormány köteles az alkotmány végrehajtásához szükséges törvényjavaslatokat az Országgyűlés elé terjeszteni.”

14. Law no. 17 of 1989 on referenda, as in force at the material time, provided:

Section 1(4)

„No signatures may be collected ... from persons serving in the armed forces or armed bodies on station or while such persons are discharging their duties ...”

„Nem gyűjthető aláírás ... fegyveres erőknél és fegyveres testületeknél szolgálati viszonyban levő személyektől, a szolgálati helyen vagy szolgálati feladat teljesítése közben ...”

Section 2(1)

„Citizens eligible to vote or stand in elections ... shall have the right to participate in referenda ...”

„A népszavazásban ... való részvételre választójoggal rendelkező állampolgárok ... jogosultak.”

15. Law no. 34 of 1989 (as amended on several occasions) on parliamentary elections, as in force at the material time, provided:

Section 2(1)

„In the Republic of Hungary every Hungarian citizen ... who has attained his [or her] majority (hereinafter: „constituent”) shall have the right to vote in parliamentary elections.”

„A Magyar Köztársaságban az országgyűlési képviselők választásán választójoga van ... minden nagykorú magyar állampolgárnak (a továbbiakban: választópolgár).”

Section 2(3)

„Everyone who is entitled to vote and has a permanent residence in Hungary shall be entitled to stand for election.”

„Mindenki választható, aki választójoggal rendelkezik és állandó lakóhelye Magyarországon van.”

Section 5(1)

„Constituents ... of each individual constituency shall be entitled to nominate candidates [in relation to that constituency] ...”

„Az egyéni választókerületben a választópolgárok ... jelölhetnek....”

Section 10(1)

„Constituents shall be entitled to collect nomination coupons, expound election programmes, promote candidates and organise election campaign meetings ...”

„Bármely választópolgár gyűjthet jelöltet ajánló szelvényeket, ismertethet választási programot, népszerűsíthet jelöltet, szervezhet választási gyűlést ...”

Section 10(3)

„Nomination coupons may not be collected ... from persons serving in the armed forces or armed bodies ... on station or while such persons are discharging their duties ...”

„Nem gyűjthető jelöltet ajánló szelvény ... a fegyveres erőknél, a rendőrségnél ... szolgálati viszonyban lévő személytől, a szolgálati helyen vagy szolgálati feladat teljesítése közben ...”

16. Law no. 55 of 1990 on the legal status of members of Parliament, as in force at the material time, provided:

Section 1(1)

„Employers of employees who are candidates in parliamentary elections ... shall grant them unpaid leave on request from the moment of their registration as candidates until the end of the elections or, where they are elected, until they take up their seat.”

„Az országgyűlési képviselő ... jelöltet jelöltségének nyilvántartásba vételétől a választásának befejezéséig, illetve megválasztása esetén a mandátuma igazolásáig a munkáltató – kérésére – köteles fizetés nélküli szabadságban részesíteni.”

Section 1(4) (as in force until 30 September 1994)

„Paragraph 1 ... [of Section 1] shall apply as appropriate to candidates ... serving ... in the ... police ...”

„A ... rendőrségnél ... szolgálati viszonyban ... álló képviselőjelöltre az [1.§] (1) ... bekezdés rendelkezéseit kell megfelelően alkalmazni.”

Section 8(1) (as in force until 3 April 1997)

„A member of Parliament ... shall put an end to any situation incompatible with his office within a period of thirty days from the moment he takes up his seat ...”

„A képviselő a mandátuma érvényességének megállapításától ... számított harminc napon belül köteles a vele szemben fennálló összeférhetetlenségi okot megszüntetni ...”

17. Law no. 64 of 1990 on the election of members of local authorities and mayors, as in force at the material time, provided:

Section 23(1)

„Constituents shall be entitled to expound election programmes, canvass on behalf of candidates or organise election campaign meetings ... from the thirty-fifth day prior to the date of the elections.”

„Bármely választópolgár – a szavazást megelőző 35. naptól – ismertethet választási programot, népszerűsíthet jelöltet, szervezhet választási gyűlést ...”

Section 25(1)

„A constituent who exercises his right to vote in an individual constituency shall be entitled to nominate candidates [in relation to that constituency] ...”

„Jelöltet ajánlhat az a választópolgár, aki a választókerületben választójogát gyakorolhatja ...”

18. Law no. 34 of 1994 on the police („the 1994 Police Act”), which entered into force on 1 October 1994, provides:

Section 2(3)

„The police shall discharge their duties in a manner free from any party influence.”

„A Rendőrség a feladatának ellátása során pártbefolyástól mentesen jár el.”

Section 7(9)

„If a police officer wishes to stand as a candidate in elections to Parliament, to a local authority or to the office of mayor, he shall in advance notify the head of the police department [concerned] of his intention to do so. In such cases his service shall be suspended from the sixtieth day preceding the elections until the day on which the results of the elections are published.”

„Ha a rendőr országgyűlési vagy helyi önkormányzati képviselői, illetőleg polgármesteri választáson jelöltként indul, köteles e szándékát a rendőri szerv vezetőjének előzetesen bejelenteni. A választás napját megelőző 60. naptól kezdődően a választás eredményének közzétételéig a szolgálati jogviszonya szünetel.”

Section 7(10)

„Police officers shall have the right to join professional or other organisations which are aimed at protecting or representing their interests and are related to their professional duties, and to hold office therein; they shall not suffer any disadvantage in their careers on account of their membership and activity. Police officers shall inform the head of the police department [concerned] of their existing or intended membership of organisations unrelated to their professional duties. The head of the police department [concerned] may prohibit the police officer in question from becoming or remaining a member of such organisation if it is incompatible with the profession or duties of a police officer, or if it interferes with or endangers the interests of the force. Such a prohibition shall take the form of a decision. An appeal against such a decision lies to the head of the superior police authority. The decision of the superior authority on the appeal may be challenged in the courts.”

„A rendőr a hivatásával összefüggő szakmai, érdekvédelmi, érdekképviselési szervezetnek tagja lehet, abban tisztséget vállalhat, e tagsági viszonya és tevékenysége miatt szolgálati jogviszonya körében hátrányt nem szenvedhet. A rendőr köteles a hivatásával össze nem függő társadalmi szervezettel fennálló, illetőleg az újonnan létesülő tagsági viszonyt előzetesen a rendőri szerv vezetőjéhez bejelenteni. A rendőri szerv vezetője a tagsági viszony fenntartását vagy létesítését megtilthatja, ha az a rendőri hivatással vagy szolgálati beosztással nem egyeztethető össze, illetőleg a szolgálat érdekeit sérti vagy veszélyezteti. E döntést határozatba kell foglalni. A határozat ellen a felettes szerv vezetőjénél panasszal lehet élni. A felettes szervnek a panasz kivizsgálása eredményeként hozott határozata a bíróság előtt megtámadható.”

19. Decree no. 1/1990 of 10 January 1990 of the Minister of the Interior („the 1990 Regulations”), which laid down service regulations for the police, was in force until 30 March 1995 and provided:

Regulation 430

„... No party political activity may be carried out on police premises; no questions related to party politics shall be discussed during staff meetings.”

„... A rendőrségen pártpolitikai tevékenység nem folytatható, munkahelyi értekezleteken pártpolitikai kérdések nem tárgyalhatók.”

Regulation 432

„With the exception of political parties, police officers shall ... be entitled to form and maintain social organisations [társadalmi szervezet] (trade unions, mass movements, organisations protecting their interests, associations, etc.) provided that their aims are not contrary to the legal provisions and rules regulating police service.”

„Rendőrök önmagukból – párt kivételével – ... a szolgálati viszonyra vonatkozó jogszabályokkal, rendelkezésekkel nem ellentétes célú társadalmi szervezetet létrehozhatnak és működtethetnek (szakszervezet, tömegmozgalom, érdekképviselési szervezet, egyesület stb.).”

Regulation 433

„Police officers shall be entitled to join any social organisation [társadalmi szervezet], including a political party, which has been lawfully founded and registered by a court. Police officers shall not enjoy any advantage or suffer any detriment in their career on account of their membership of an organisation or their party affiliation.”

„A rendőr bármely törvényesen megalakult, illetve bíróság által nyilvántartásba vett társadalmi szervezetnek – beleértve a politikai pártot is – tagja lehet. Szervezeti hovatartozása, pártállása miatt szolgálati viszonya keretében semmiféle előnyben vagy hátrányban nem részesíthető.”

Regulation 434

„Party badges and symbols shall not be displayed on police premises. While on duty, police officers shall refrain from wearing badges showing their political preference.”

„A rendőrség hivatali helyiségeiben, körleteiben pártok jelvényei, jelképei nem helyezhetők el. A rendőr szolgálatban politikai hovatartozására utaló jelvényt nem viselhet.”

Regulation 435

„Police officers shall not engage in activities as experts or advisers in relation to questions of police service upon request from political parties unless authorised to do so by the Minister of the Interior.”

„A rendőr pártok részére a rendőri szolgálattal összefüggő kérdésekben szakértői, szaktanácsadó feladatokat csak a belügyminiszter engedélyével végezhet.”

Regulation 437

„On police premises the exercise of the right to freedom of assembly is subject to the approval of the common superior of all the organisers [of any assembly].”

„A rendőrség objektumaiban a gyülekezési jog csak a szervezők közös előjáróinak engedélyével gyakorolható.”

Regulation 438

„Police officers shall have the right to participate in lawfully organised ... gatherings (such as peaceful assemblies, processions and demonstrations) in their leisure time. On such occasions they shall refrain from wearing uniform unless the aim

of the gathering is the representation or protection of interests related to [police] service. They shall refrain from carrying their service gun or other firearms lawfully in their possession. Where the gathering is ordered to be dissolved, they shall immediately leave.”

„A rendőr szabad idejében részt vehet a ... jogszerűen tartott rendezvényen (békés összejövetelen, felvonuláson, tüntetésen). Ilyen esetben egyenruhát csak akkor viselhet, ha a rendezvény célja a szolgálati viszonnal összefüggő érdekek képviselete, védelme. Szolgálati vagy más jogszerűen tartott löfegyverét nem tarthatja magánál. Ha a rendezvény feloszlására kerül sor, köteles a helyszínt azonnal önként elhagyni.”

Regulation 470

„Police officers shall ... be entitled to make statements upon request from the press or radio or television stations on questions related to road safety, public safety or certain offences provided that, [in so doing,] they maintain the confidentiality of service secrets, observe the principle of the presumption of innocence, respect personality rights [személyiséghez fűződő jogok] and do not prejudice the examination and investigation of cases ...”

„A rendőr, a sajtó, a rádió és a televízió megkeresése alapján a közlekedés-, a közbiztonság kérdéseiről, egyes bűncselekményekről, a szolgálati titok megőrzésével, az ügyek vizsgálatának és felderítésének veszélyeztetése nélkül, valamint az ártatlanság vélelmének figyelembe vételével és a személyiséghez fűződő jogok tiszteletben tartásával ... nyilatkozhat ...”

Regulation 472

„... [Police officers] shall be entitled to give lectures on – or to participate in radio or television programmes concerning – politics, science, literature or sport without prior authorisation but on condition that no reference is made to their police service.”

„... [A rendőr] politikai, tudományos, szépirodalmi és sport témájú előadásokat, szereplést (a rádióban és a televízióban is) engedély nélkül vállalhat rendőri állására való utalás nélkül.”

Regulation 473

„Police officers shall have the right to make statements and publish articles in Ministry of the Interior publications without permission, while observing the rules on service and official secrets.”

„A Belügyminisztérium lapjaiban a szolgálati- és az államtitokra vonatkozó szabályok betartásával a rendőr engedély nélkül nyilatkozhat és publikálhat.”

Regulation 474

„Police officers shall not be entitled to publish textbooks and documentary literature related to police activities save with prior authorisation ...”

„A rendőri vonatkozású kérdéseket tárgyaló szak- és tényirodalmi művet a rendőr csak előzetes engedéllyel jelentetheti meg ...”

Regulation 477

„Police officers shall be entitled to publish works of fiction ... and works on science, politics or sport ... that are unrelated to police activities without permission but on condition that no reference is made to their police service.”

„A rendőr – a rendőri állásra való utalás nélkül – szabadon közölheti, illetve kiadhatja a nem rendőri vonatkozású szépirodalmi ..., tudományos, politikai kérdéseket tárgyaló, sporttal foglalkozó műveit ...”

20. Decree no. 3/1995 of 1 March 1995 of the Minister of the Interior („the 1995 Regulations”), which was adopted under the 1994 Police Act in order to implement its provisions and which laid down service regulations for the police, entered into force on 31 March 1995. It provides:

Section 106(5)

„Police officers, in their capacity as representatives of the police or experts, shall not give statements to the press or participate in radio or television programmes or in films, unless permitted to do so by the Head of the National Police or one of his deputies. No permission is needed for giving scientific or cultural lectures or for other public appearances of a similar nature (including participation in radio or television programmes) if no reference is made to police service.”

„A rendőr a rendőrség képviselőjeként, szakértőjeként a sajtóban, a rádió és televízió műsoraiban, filmekben csak az országos rendőrfőkapitány, illetve helyettesei előzetes hozzájárulásával szerepelhet. A rendőri állásra utalás nélkül tartott tudományos, kulturális előadások megtartásához, ilyen irányú egyéb közszerepléshez beleértve a rádióban és televízióban történő szereplést is) engedély nem kell.”

Section 106(6)

„Police officers shall have the right to make statements and publish articles in police publications without permission, while observing the rules on service and official secrets.”

„A rendőrség lapjaiban a szolgálati és az államtitokra vonatkozó szabályok betartásával a rendőr engedély nélkül nyilatkozhat és publikálhat.”

Section 106(9)

„Members of the police force, in their capacity as police officers, shall not make public appearances unless authorised to do so by the head of the police department. On such occasions police officers shall refrain from making political statements and shall evince a neutral attitude towards any social organisation [társadalmi szervezetek].”

„Nyilvános szerepléshez (ha az rendőrként történik) engedélyt kell kérni a rendőrfőkapitánytól. A rendőr ilyen közéleti szereplése során tartózkodjék a politikai nyilatkozatoktól, magatartása a társadalmi szervezeteket illetően semleges legyen.”

Section 106(10)

„Police officers shall have the right to participate in lawfully organised ... gatherings in their leisure time. On such occasions they shall refrain from wearing uniform and carrying their service gun or other firearms lawfully in their possession. Where the gathering is ordered to be dissolved, they shall immediately leave.”

„A rendőr szabad idejében részt vehet a ... jogszerűen tartott rendezvényen. Ilyen esetben egyenruhát nem viselhet. Szolgálati vagy más jogszerűen tartott lőfegyverét nem tarthatja magánál. Ha a rendezvény feloszlására kerül sor, köteles a helyszínt azonnal önként elhagyni.”

Proceedings before the commission

21. Mr László Rekvényi applied to the Commission on 20 April 1994. He alleged that the prohibitions contained in Article 40/B § 4 of the Hungarian Constitution infringed his rights under Articles 10 and 11 of the Convention taken either alone or together with Article 14.

22. The Commission declared the application (no. 25390/94) admissible on 11 April 1997. In its report of 9 July 1998 (former Article 31 of the Convention), it expressed the opinion that there had been a violation of Article 10 (twenty-one votes to nine); that there had been no violation of Article 11 (twenty-one votes to nine); that it was not necessary to examine the applicant's complaint under Article 14 read in conjunction with Article 10 (twenty-five votes to five) and that there had been no violation of Article 14 read in conjunction with Article 11 (twenty-two votes to eight). The full text of the Commission's opinion and of the four partly dissenting opinions contained in the report is reproduced as an annex to this judgment.

Final submissions to the court

23. The applicant requested the Court in his memorial to find the respondent State in breach of its obligations under Articles 10 and 11 of the Convention taken either alone or together with Article 14 and to award him just satisfaction under Article 41.

The Government, for their part, invited the Court to reject the applicant's complaints under Articles 10 and 11 of the Convention both taken alone and together with Article 14.

The law

I. Alleged violation of article 10 of the convention

24. The applicant maintained that the prohibition on engaging in „political activities” contained in Article 40/B § 4 of the Hungarian Constitution amounted to an unjustified interference with his right to freedom of expression, in violation of Article 10 of the Convention, which provides:

„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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

25. The Commission arrived at the same conclusion, finding that the impugned prohibition was vague and sweeping, and could not, therefore, be regarded as being „prescribed by law” as required by paragraph 2 of Article 10.

The Government did not dispute that the applicant could rely on the guarantees contained in Article 10; nor did they deny that the prohibition interfered with the exercise of his rights under that Article. They contended, however, that the interference was justified under the second paragraph of Article 10.

A. As to the applicability of Article 10 and the existence of an interference

26. The Court takes it for granted that the pursuit of activities of a political nature comes within the ambit of Article 10 in so far as freedom of political debate constitutes a particular aspect of freedom of expression. Indeed, freedom of political debate is at the very core of the concept of a democratic society (see the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, § 42). Furthermore, the guarantees contained in Article 10 of the Convention extend to military personnel and civil servants (see the *Engel and Others v. the Netherlands* judgment of 8 June 1976, Series A no. 22, pp. 41-42, § 100; and the *Vogt v. Germany* judgment of 26 September 1995, Series A no. 323, pp. 22-23, § 43). The Court sees no reason to come to a different conclusion in respect of police officers and this has not been disputed by those appearing before the Court.

Nor has it been contested that the prohibition, by curtailing the applicant’s involvement in political activities, interfered with the exercise of his right to freedom of expression. The Court for its part also finds that there has been an interference with the applicant’s right to freedom of expression.

B. As to whether the interference was justified

27. Such an interference gives rise to a breach of Article 10 unless it can be shown that it was „prescribed by law”, pursued one or more legitimate aim or aims as defined in paragraph 2 and was „necessary in a democratic society” to attain them.

1. „Prescribed by law”

(a) Submissions of those appearing before the Court

(i) The applicant

28. The applicant submitted that the prohibition at issue was of an unacceptably general character and was open to arbitrary interpretations. A general constitutional ban on political activities contradicted any legislation of a lower level permitting certain activities of a political nature. Since the notion of „political activities” was not defined in any Hungarian law, it was not foreseeable whether or not a certain activity fell under the prohibition. This legal situation had prevailed without interruption since 1 January 1994 and had not been rectified by any subsequent legislation, including the 1994 Police Act.

(ii) The Government

29. In the proceedings before the Commission, the Government argued that the 1994 Police Act and the 1995 Regulations had provided a legal framework detailed enough to define the restrictions on political activities by police officers in a manner compatible with Article 10 § 2.

30. In their pleadings before the Court, the Government relied on Article 78 of the Hungarian Constitution (see paragraph 13 above) as regards the alleged contradiction between the constitutional restriction and the permissive legislation of a lower level and explained that the two were not in conflict but complemented each other. They maintained that in the Hungarian legal system it was the practice that certain provisions of the Constitution could properly be interpreted only if read together with legislation of a lower level completing and explaining their precise content. Contemporary legislative techniques often left it to laws lower in the hierarchy to define general notions used in higher laws – a law-making method not uncommon at least in continental legal systems and never in principle disapproved by the Convention organs. In any event, the Constitutional Court had the competence to rule on any potential contradiction between the Constitution and other legislation.

31. Furthermore, the legislation in force both prior and subsequent to the adoption of the 1994 Police Act and the 1995 Regulations met the requirements of foreseeability, the latter two instruments having merely recodified provisions already in force. Therefore, the constitutional restriction in question was „prescribed by law” at all times subsequent to its entry into force. Prior to 1 October 1994, the conditions governing various activities of a political nature, whereby police officers have always been permitted to exercise certain rights relating to freedom of expression, were laid down, inter alia, in Law no. 34 of 1989 on parliamentary elections, Law no. 55 of 1990 on the legal status of members of Parliament, Law no. 64 of 1990 on the election of members of local authorities and mayors, and Law no. 17 of 1989 on referenda (the right to collect „nomination coupons”, expound election programmes, promote candidates, organise election campaign meetings, nominate candidates, vote in and stand for elections to Parliament, local authorities and the office of mayor and to participate in referenda) and also in the 1990 Regulations (the right to join trade unions, associations and other organisations representing and protecting police officers’ interests, to participate in peaceful assemblies, make statements to the press, participate in radio or television programmes or publish works on politics, etc.) (see paragraphs 14 to 17 and 19 above).

(iii) The Commission

32. In its report the Commission, after examining the relevant domestic law as presented by the Government in the proceedings before it, observed that the 1994 Police Act and the 1995 Regulations had entered into force only in October 1994 and March 1995

respectively. The Commission, therefore, came to the conclusion that in the relevant period the impugned restriction had been based solely on Article 40/B § 4 of the Constitution. Moreover, it considered that the notion of „political activities” was vague and sweeping and that the Government had not adduced any case-law interpreting this term. The constitutional restriction itself was not, therefore, precise enough to enable the applicant to regulate his conduct in the matter. The Commission concluded that, the requirement of foreseeability thus not having been met, the interference was not „prescribed by law”.

33. In her submissions to the Court, the Commission’s Delegate explained that the various laws referred to by the Government in their memorial and, in particular, the 1990 Regulations, had been adopted prior to the impugned amendment to the Constitution. The only legal provisions which could be regarded as having further defined the constitutional restriction on political activities by police officers were to be found in the 1994 Police Act and the 1995 Regulations. Consequently, it was not until the 1994 Police Act and the 1995 Regulations came into force that the legal situation had met the requirement of foreseeability.

(b) The Court’s assessment

34. According to the Court’s well-established case-law, one of the requirements flowing from the expression „prescribed by law” is foreseeability. Thus, a norm cannot be regarded as a „law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, § 49, and the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A no. 260-A, p. 19, § 40). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, *mutatis mutandis*, the *Cantoni v. France* judgment of 15 November 1996, Reports of Judgments and

Decisions 1996-V, p. 1628, § 32). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see the previously cited *Vogt* judgment, p. 24, § 48). Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation.

35. The Court notes the Government’s submission that Article 40/B § 4 of the Constitution, which contains the generic term „political activities”, is subject to interpretation and is to be read in conjunction with complementary provisions contained in the various laws cited and the 1990 Regulations (see paragraphs 14 to 17, 19 and 31 above). As has been recalled many times in the Court’s case-law, it is primarily for the national authorities to interpret and apply domestic law (see, for example, the *Chorherr v. Austria* judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, § 25). In the absence of any domestic precedents to the opposite effect adduced by the applicant, the

Court considers that the detailed provisions invoked by the Government cannot be held to be in contradiction with the general wording of the Constitution. Further, the adoption of the constitutional amendment in question did not result in the annulment of the 1990 Regulations, which were therefore in force when the impugned circular letters were issued. As a consequence, there appears to have existed at the relevant time a framework of provisions partly permitting – occasionally subject to authorisation – and partly restricting the participation of police officers in certain kinds of political activity.

36. As to the wording of these provisions, it is inevitable, in the Court's opinion, that conduct which may entail involvement in political activities cannot be defined with absolute precision. It seems, therefore, acceptable for the 1990 Regulations (see paragraph 19 above) – as for the 1994 Police Act and the 1995 Regulations (see paragraphs 18 and 20 above) – to lay down the conditions for undertaking types of conduct and activities with potential political aspects, such as participation in peaceful assemblies, making statements to the press, participating in radio or television programmes, publications or joining trade unions, associations or other organisations representing and protecting police officers' interests.

37. The Court is satisfied that in the circumstances these provisions were clear enough to enable the applicant to regulate his conduct accordingly. Even accepting that it might not be possible on occasions for police officers to determine with certainty whether a given action would or would not – against the background of the 1990 Regulations – fall foul of Article 40/B § 4 of the Constitution, it was nevertheless open to them to seek advice beforehand from their superior or clarification of the law by means of a court judgment.

38. Having regard to these considerations, the Court finds that the interference was „prescribed by law” for the purposes of paragraph 2 of Article 10.

2. Legitimate aim

39. The Government submitted that the constitutional provision in question was aimed at depoliticising the police, and this during a period when Hungary was being transformed from a totalitarian regime to a pluralistic democracy. In view of the police's past commitment to the ruling political party, the restriction served the purpose of protecting national security and public safety as well as preventing disorder.

40. Neither the applicant nor the Commission expressed an opinion on this point.

41. In the present case the obligation imposed on certain categories of public officials including police officers to refrain from political activities is intended to depoliticise the services concerned and thereby to contribute to the consolidation and maintenance of pluralistic democracy in the country. The Court notes that Hungary is not alone, in that a number of Contracting States restrict certain political activities on the part of their police. Police officers are invested with coercive powers to regulate the conduct of citizens, in some countries being authorised to carry arms in the discharge of their duties. Ultimately the police force is at the service of the State. Members of the public are therefore entitled to expect that in their dealings with the police they are confronted with politically neutral officers who are detached from the political fray, to paraphrase the language of the recent judgment in the case of *Ahmed and Others v. the United Kingdom* (judgment of 2 September 1998, Reports 1998-VI, pp. 2376-77, § 53, which judgment concerned the compatibility with Article 10 of restrictions on the involvement of senior local government officers in certain types of political activity). In the Court's view, the

desire to ensure that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers is one that is compatible with democratic principles.

This objective takes on a special historical significance in Hungary because of that country's experience of a totalitarian regime which relied to a great extent on its police's direct commitment to the ruling party (see, *mutatis mutandis*, the previously cited *Vogt* judgment, p. 25, § 51).

Accordingly, the Court concludes that the restriction in question pursued legitimate aims within the meaning of paragraph 2 of Article 10, namely the protection of national security and public safety and the prevention of disorder.

3. „Necessary in a democratic society”

(a) General principles

42. In its above-mentioned *Vogt* judgment (pp. 25-26, § 52) the Court summarised as follows the basic principles concerning Article 10 as laid down in its case-law:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to „information” or „ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no „democratic society”. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(ii) The adjective „necessary”, within the meaning of Article 10 § 2 implies the existence of a „pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a „restriction” is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was „proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are „relevant and sufficient”. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.

43. In the same judgment the Court declared that „these principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been

struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate" to the legitimate aim in question (p. 26, § 53). Such considerations apply equally to military personnel (see the previously cited *Engel and Others* judgment, pp. 23 and 41-42, §§ 54 and 100) and police officers (see paragraph 26 above).

(b) Application of the above principles to the instant case

44. The Government contended that for decades preceding Hungary's return to democracy in 1989 to 1990, the police had been a self-avowed tool of the ruling party and had taken an active part in the implementation of the party policies. Career members of the police were expected to be politically committed to the ruling party. Given Hungary's peaceful and gradual transformation towards pluralism without a general purge in the public administration, it was necessary to depoliticise, *inter alia*, the police and restrict the political activities of its members so that the public should no longer regard the police as a supporter of the totalitarian regime but rather as a guardian of democratic institutions.

45. Neither the applicant nor the Commission expressed an opinion on this point.

46. Bearing in mind the role of the police in society, the Court has recognised that it is a legitimate aim in any democratic society to have a politically neutral police force (see paragraph 41 above). In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.

What remains to be determined is whether the particular restrictions imposed in the present case can be regarded as „necessary in a democratic society”.

47. The Court observes that between 1949 and 1989 Hungary was ruled by one political party. Membership of that party was, in many social spheres, expected as a manifestation of the individual's commitment to the regime. This expectation was even more pronounced within the military and the police, where party membership on the part of the vast majority of serving staff guaranteed that the ruling party's political will was directly implemented. This is precisely the vice that rules on the political neutrality of the police are designed to prevent. It was not until 1989 that Hungarian society succeeded in building up the institutions of a pluralistic democracy, leading to the first multi-party parliamentary elections in more than forty years being held in 1990. The impugned amendment to the Constitution was adopted some months prior to the second democratic parliamentary elections in 1994.

48. Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a „pressing social need” in a democratic society.

49. As to the extent of the restriction on the applicant's freedom of expression, although the wording of Article 40/B § 4 might *prima facie* suggest that what is in issue is an absolute ban on political activities, an examination of the relevant laws shows that police officers have in fact remained entitled to undertake some activities enabling them to articulate their political opinions and preferences. Notably, whilst sometimes subject to restrictions imposed in the interest of the service, police officers have had the right to expound election programmes, promote and nominate candidates, organise election campaign meetings, vote in and stand for elections to Parliament, local authorities and the office of mayor, participate in referenda, join trade unions, associations and other organisations, participate in peaceful assemblies, make statements to the press, participate in radio or television programmes or publish works on politics (see paragraphs 14 to 20 above). In these circumstances the scope and the effect of the impugned restrictions on the applicant's exercise of his freedom of expression do not appear excessive.

50. In the light of the foregoing considerations, the Court concludes that the means employed in order to achieve the legitimate aims pursued were not disproportionate. Accordingly, the impugned interference with the applicant's freedom of expression is not in violation of Article 10.

II. Alleged violation of article 11 of the convention

51. The applicant submitted that the prohibition on joining a party, prescribed by Article 40/B § 4 of the Constitution, violated his right to freedom of association guaranteed under Article 11 of the Convention which provides:

„1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

52. Both the Commission and the Government accepted that the facts complained of by the applicant attracted the application of the safeguard set forth in Article 11 and that the prohibition interfered with the exercise of his right under that Article. They took the view, however, that the interference was justified under the last sentence of paragraph 2 of Article 11.

A. Submissions of those appearing before the Court as to whether the interference was justified

1. The applicant

53. The applicant argued that while Regulation 433 of the 1990 Regulations, which remained in force until March 1995, permitted police officers to be members of a party, Article 40/B § 4 of the Constitution expressly prohibited this as from 1 January 1994. This situation, which lasted fifteen months, was contradictory and unconstitutional.

Moreover, the aims of the impugned prohibition were not indicated in Hungarian law. In fact, the prohibition could only be seen as serving political interests, and thus as not pursuing a „legitimate aim” for the purposes of Article 11 § 2.

54. Furthermore, although the last sentence of paragraph 2 of Article 11 did not expressly refer to the requirement of „necessity”, the restriction in issue nevertheless had to be „necessary in a democratic society” in order to be justified under this paragraph, a condition not met in the present case. The fact that Hungary had recently become a pluralistic democracy and a member State of the Council of Europe should not give rise to any leniency when examining the criteria for justification of the interference. Neither could the interference be regarded as „proportionate” to the aims pursued, given that the restriction in fact amounted to a complete ban on police officers’ exercise of their right to freedom of association.

2. The Government

55. The Government expressed the view that, in any event, the last sentence of Article 11 § 2 provided sufficient justification for the impugned restriction on freedom of association, should it not be justified under the first sentence of that paragraph. In their opinion, the justification provided for in the last sentence was entirely independent of that in the first sentence; otherwise the provision would be superfluous.

56. As to the requirement under the last sentence of Article 11 § 2 that a restriction be „lawful”, the Government first pointed out that what was in issue was a provision of the Hungarian Constitution. In reply to the

applicant’s argument that between January 1994 and March 1995 Regulation 433 of the 1990 Regulations had been in contradiction with the contested constitutional provision, they explained that such ambiguities in the law were to be resolved by the Constitutional Court.

They submitted that the wish to depoliticise the police could not be regarded as „unlawful” in the sense of being arbitrary. In this respect they mainly reiterated their arguments concerning Article 10 (see paragraphs 39 and 44 above) and maintained in particular that the prohibition on party membership on the part of police officers had been intended to contribute to the elimination of any direct party political influence on the police by severing the institutional links which had previously existed between the armed forces and the police on the one hand and political circles on the other. Furthermore, the restriction in question could not be regarded as disproportionate to the legitimate aims pursued, since police officers’ right to freedom of association had been restricted exclusively in respect of political parties within the meaning of Law no. 33 of 1989 on political parties.

3. The Commission

57. The Commission was of the view that the prohibition in question fell to be examined under the last sentence of paragraph 2 of Article 11. To be „lawful” for the purposes of that sentence, a restriction must be in accordance with the national law and devoid of arbitrariness. Having been prescribed by the Constitution, the restriction was to be considered as being in accordance with the national law. As regards arbitrariness, the Commission recalled that States must be given a wide discretion when ensuring the protection of their national security (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 25, § 59 in fine). Against the background of Hungary’s recent history and the repercussions of a politically committed police force exploited for decades

by a totalitarian regime, the Commission considered that the efforts to depoliticise the police could not be regarded as arbitrary. The prohibition was, therefore, also „lawful” within the wider meaning of that term in the second sentence of Article 11 § 2.

B. The Court’s assessment

58. Notwithstanding its autonomous role and particular sphere of application, Article 11 must in the present case also be considered in the light of Article 10. As the Court has explained in previous judgments, „the protection of personal opinions, secured by Article 10, is one of the objectives of the freedoms of assembly and association as enshrined in Article 11” (see the *Vogt* judgment cited above, p. 30, § 64).

59. The last sentence of paragraph 2 of Article 11 – which is undoubtedly applicable in the present case – entitles States to impose „lawful restrictions” on the exercise of the right to freedom of association by members of the police.

Like the Commission, the Court considers that the term „lawful” in this sentence alludes to the very same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expressions „in accordance with the law” and „prescribed by law” found in the second paragraph of Articles 9 to 11. As recalled above in relation to Article 10, the concept of lawfulness in the Convention, apart from positing conformity with domestic law, also implies qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness (see paragraph 34 above).

60. In so far as the applicant criticises the basis in domestic law of the impugned restriction (see paragraph 53 above), the Court reiterates that it is primarily for the national authorities to interpret and apply domestic law, especially if there is a need to elucidate doubtful points (see the *S.W. v. the United Kingdom* judgment of 22 November 1995, Series A no. 335-B, p. 42, § 36, and also the previously cited *Chorherr* and *Cantoni* judgments). In the present case, however, the prohibition on membership of a political party by police officers as contained in Article 40/B § 4 of the Constitution is in fact unambiguous (see paragraph 13 above) and it would not appear to be arguable that subordinate legislation introduced some four years earlier (Regulation 433 of Decree no. 1/1990 of 10 January 1990 – see paragraph 19 above) was capable of affecting the scope of this prohibition. In the circumstances the Court concludes that the legal position was sufficiently clear to enable the applicant to regulate his conduct and that the requirement of foreseeability was accordingly satisfied. Further, the Court finds no ground for holding the restriction imposed on the applicant’s exercise of his freedom of association to be arbitrary. The contested restriction was consequently „lawful” within the meaning of Article 11 § 2.

61. Finally, it is not necessary in the present case to settle the disputed issue of the extent to which the interference in question is, by virtue of the second sentence of Article 11 § 2, excluded from being subject to the conditions other than lawfulness enumerated in the first sentence of that paragraph. For the reasons previously given in relation to Article 10 (see paragraphs 41 and 46 to 48 above), the Court considers that, in any event, the interference with the applicant’s freedom of association satisfied those conditions (see, *mutatis mutandis*, the previously cited *Vogt* judgment, p. 31, § 68).

62. In sum, the interference can be regarded as justified under paragraph 2 of Article 11. Accordingly, there has been no violation of Article 11 either.

III. Alleged violation of article 14 of the convention taken in conjunction with articles 10 or 11

63. The applicant further alleged that the impugned prohibition on engaging in political activities and on joining a party was discriminatory. He relied on Article 14 of the Convention, which provides:

„The enjoyment of the rights and freedoms set forth in [the] 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.”

64. In his memorial, the applicant did not address the issue under Article 14 taken in conjunction with Article 10.

As to Article 14 taken in conjunction with Article 11, he argued that there was no objective and reasonable justification for the prohibition on party membership, either in respect of police officers or other groups of public servants. The issue of party affiliation had in fact only very limited connection to the duties and responsibilities peculiar to members of the armed forces and the police. Any difference in treatment as to the possibility of joining a party should not be based on a prohibition of an unacceptably general character.

65. The Government submitted that the restrictions in issue had been imposed not only on police officers but members of the armed forces, judges, Constitutional Court judges and public prosecutors as well. They maintained that any distinction between police officers and other groups of citizens as to the exercise of the right to freedom of expression – and, *mutatis mutandis*, freedom of association – could be justified on the ground of differences between the conditions of military and of civil life and, more specifically, by the duties and responsibilities peculiar to members of the armed forces and the police. They referred in this respect to the *Engel and Others* judgment (judgment cited above, p. 42, § 103).

66. The Commission did not find it necessary to examine the applicant’s complaint under Article 14 taken in conjunction with Article 10.

As to Article 14 taken in conjunction with Article 11, the Commission observed that the specific status of the applicant had already been taken into account when it had examined the justification for the prohibition in question under Article 11 § 2. The Commission found that those considerations were equally valid in the context of Article 14 and concluded that there was no appearance of any discrimination in breach of that Article taken in conjunction with Article 11.

67. The Court’s conclusions that the contested restrictions do not amount to a violation of Articles 10 and 11 (see paragraphs 50 and 62 above) do not preclude the finding of a violation of Article 14 of the Convention. While it is true that the guarantee laid down in Article 14 has no independent existence

in the sense that under the terms of that Article it relates solely to „rights and freedoms set forth in [the] Convention”, a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature (see the case „relating to certain aspects of the laws on the use of languages in education in Belgium” (merits), judgment of 23 July 1968, Series A no. 6, pp. 33-34, § 9).

68. The considerations underlying the Court's conclusions that the interferences with the applicant's freedoms of expression and association were justified under Articles 10 § 2 and 11 § 2 have already taken into account the applicant's special status as a police officer (see paragraphs 41, 46 to 49 and 61 above). These considerations are equally valid in the context of Article 14 and, even assuming that police officers can be taken to be in a comparable position to ordinary citizens, justify the difference of treatment complained of. There has accordingly been no violation of Article 14 taken in conjunction with Articles 10 or 11.

For these reasons, the court

1. Holds unanimously that there has been no violation of Article 10 of the Convention;
2. Holds by sixteen votes to one that there has been no violation of Article 11 of the Convention;
3. Holds unanimously that there has been no violation of Article 14 of the Convention taken in conjunction with Articles 10 or 11.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 May 1999.

Luzius WILDHABER

President

Paul MAHONEY

Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Fischbach is annexed to this judgment.

Partly dissenting opinion of judge Fischbach

(Translation)

While I agree with the majority that there has been no violation of Article 10, I regret that I am unable to share its view that there has been no breach of Article 11 of the Convention.

As I read the travaux préparatoires on Article 11 of the Convention (see paragraph IX, pages 18 and 19), restrictions on freedom of association must not only be lawful, as required by the second sentence of Article 11 § 2, they must also be necessary in a democratic society.

I can see no convincing argument which, in a pluralist, democratic society, could justify a ban on joining a political party.

On the contrary, I consider that the unhappy experiences suffered under the communist regime ought to encourage political leaders to advocate a fresh approach so that the democratic process can be consolidated and the future prepared for in a spirit of open-mindedness and tolerance.

As the police are now no longer at the service of the communist party, but of democracy, it is essential that change be accompanied by an approach fostering awareness of democratic pluralism through divergent political views that fuel debate over ideas.

Banning the police from joining a political party amounts to depriving them of a right, if not the democratic duty, which all citizens have to hold opinions and political convictions, to take a close interest in public affairs and to participate in the fashioning of the will of the people and of the State.

Admittedly, the right to state one's personal convictions by belonging to a party should not be confused with either freedom to express opinions and political convictions irrespective of time or place or, above all, with freedom to comment in public on the actions of political leaders. Those are freedoms that have always to be reconciled with the obligation of discretion to which all public servants and, a fortiori, members of the police are subject by virtue of their duties to the executive of impartiality and loyalty.

It is for that reason that I share the majority's view that there has been no violation of Article 10.

However, the total ban on belonging to a political party and, consequently, the legislature's refusal to allow policemen to take part in the internal workings of a party is, to my mind, disproportionate and made yet more unjust by the fact that the selfsame legislature affords all members of the police the right to stand for elections at national, local or

municipal level on condition that they inform the head of police of their intention to do so and remain off duty from the sixtieth day preceding the election until publication of the results.

I very much doubt the effectiveness of such a right to stand for election since its exercise is highly dependent on the person concerned being given the freedom to familiarise himself with a party's ideas, working methods and machinery and, hence, enough time to acquire a taste for politics and to begin a political career.

SECOND SECTION
CASE OF SZIMA v. HUNGARY

(Application no. 29723/11)

JUDGMENT
STRASBOURG

9 October 2012

FINAL

11/02/2013

In the case of *Szima v. Hungary*,
The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, President,
Danutė Jočienė,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
İşıl Karakaş,
Guido Raimondi, judges,

and Stanley Naismith, Section Registrar,

Having deliberated in private on 11 September 2012,

Delivers the following judgment, which was adopted on that date:

Procedure

1. The case originated in an application (no. 29723/11) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention”) by a Hungarian national, Ms Judit Szima („the applicant”), on 28 April 2011.
2. The applicant was represented by Mr A.I. Molnár, a lawyer practising in Budapest. The Hungarian Government („the Government”) were represented by Mr Z. Tallódi, Co-Agent, Ministry of Public Administration and Justice.
3. The applicant complained under Article 10 of the Convention that her conviction for some statements she had published on the Internet had amounted to a breach of her right to freedom of expression, especially in view of the fact that she could not prove the truth about the impugned allegations.
4. On 23 November 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

The facts

I. The circumstances of the case

5. The applicant was born in 1960 and lives in Szekszárd.
6. The applicant, a retired senior police officer, was at the material time the chairperson of Tettrekész Police Trade Union. Between May 2007 and July 2009 she published a number of writings on the Trade Union’s website, which was effectively under her

editorial control, concerning outstanding remunerations due to police staff, alleged nepotism and undue political influence in the force, as well as dubious qualifications of senior police staff.

7. The applicant was indicted for instigation to insubordination. On 29 April 2010 the Military Bench of the Budapest Regional Court found her guilty as charged and sentenced her to a fine and demotion. The court did not sustain the applicant's defence according to which the publication of such allegations belonged to the core of a trade union's activities. It held that those allegations were capable of causing insubordination and as such were hardly or not at all susceptible to any proof of their veracity.

8. The Regional Court based its judgment *inter alia* on the following statements published by the applicant on the Internet:

(1) „The staff are regularly required to work overtime without remuneration...” „For years, clearly due allowances have not been paid to low-ranking staff...” „Currently it is almost a prerequisite of becoming a senior police officer to have a political background or to be a relative or a descendant of other senior police officers.” „The senior police officers' obvious violations of the law set a bad example for the force.” „This is typical of senior police officers: they commit violations and infringements, and then, if we point this out, their reaction is striking back without any principles, suing and accusing of incitement in order to counter our suggestions to renew and clean up the force.” „Why are we wondering at the infringements of police officers if law-breaking and tyrannising senior police officers go unpunished?”

(2) „The uninhibited infringements of the law committed by senior police officers placing themselves above the law go unpunished, and what is more, they are even decorated when, on order of the political authority in power, thousands, tens of thousands of discontented and underprivileged people are beaten by jaded police officers on the streets.” „The 'Tettrekész' Police Trade Union commiserates with those Hungarian citizens whose human dignity and human rights were violated and affronted by acts of a prostituted leadership and of our criminal 'colleagues' and apologises for that.”

(3) „Police staff are getting more and more underprivileged and humiliated by their own leaders.” „Some senior police officers are active in trying to obtain that average citizens be punished rather than 'served and protected' by the police officers on the streets.” „Some well-paid senior police officers unprofessionally incite ordinary citizens and police officers against each other.” „We constantly request the review of the often unprofessional selection procedure of senior police officers, but to no avail, because there is apparently no need for a citizen-friendly police.”

(4) „The senior police officers again demonstrated that they were incapable of upholding the public order in a party-neutral and politically neutral way... It is proven again that the Hungarian Police's primary objective is first and foremost not to maintain public order for the taxpaying citizens but to uphold the reign of current political leaders who have led Hungary into economic and moral distress.” „The reputation of the Police has reached previously unseen depths because of the acts of the unprofessional and anti-national senior police officers non-complying with the spirit of the police oath.” „It is obvious that the Police's core leadership is, in an unacceptable way, politically committed to the government of the country and that of the capital.”

(5) „The Head of the National Police Department is demonstrating every day that he is much more able to write obscene poems than to lead the Police; moreover, he is

considerably much better in being an obstacle to the work of 'Tetteskés' Police Trade Union and in managing a police pop band than in cooperating with a representative trade union of the Police with the highest number of police officer members." „A chaotic and highly unprofessional leadership is ruining the rest of the Police's reputation from day to day."

9. On 8 December 2010 the Military Bench of the Budapest Court of Appeal upheld the applicant's conviction under section 357 of the Criminal Code. It held that the publication of the documents by the applicant had gone beyond her freedom of expression, given the particularities of the armed body to which she belonged. In the court's opinion, the views contained in the documents constituted one-sided criticism whose truthfulness could and should not be proven.

II. Relevant domestic law

10. Act No. XX of 1949 on the Constitution (as in force at the material time) provides as follows:

Article 59

„(1) In the Republic of Hungary everyone shall have the right to good reputation, the inviolability of his home, and the protection of privacy and personal data."

Article 61

„(1) In the Republic of Hungary everyone shall have the right to freedom of expression and to receive and impart information of public interest."

11. Act no. XLIII of 1996 on the Service of Members of Professional Staff of the Armed Forces provides as follows:

Section 18 – Freedom of expression

„(1) Members of professional staff of the police force and of the civilian national security services shall not be members of a political party and shall not engage in political activities.

(2) Members of professional staff shall not hold a position in a political party and shall not undertake public appearance in the name or interest of a political party, apart from standing as a candidate in parliamentary, European or municipal elections.

(3) Members of professional staff shall not engage in political activities at the place of service or while performing service tasks.

(4) Except for the case regulated under section 69, members of professional staff shall not criticise, or express an opinion about, a measure or order received unless they do so within the scope of their activities securing rights and interests; moreover, they shall not make statements injurious to the order and discipline of the service and shall not express a private opinion in official proceedings by using media publicity.

(5) Members of professional staff shall not produce or disseminate publications harmful to the order and discipline of the service and shall not place such posters, announcements or emblems anywhere.

(6) Announcements of the professional members' representation organisations falling within their scope of activities may be published in the locally customary manner. ..."

Section 29

„(1) For the purposes of this Act, „trade union” shall mean any representation organisation – irrespective of its actual designation – of members of professional staff,

whose aim is the representation and protection of the service-related interests of members of professional staff.

(2) The trade union shall be entitled to

- a) operate within the armed forces and to involve its members in its activity;
- b) provide information for the members of professional staff about their rights and duties affecting their financial, social, cultural, living and service conditions;
- c) represent its members vis-à-vis the organisational unit or before state organs in respect of issues affecting their service relationship or – upon authorisation – before a court or other authority or body in respect of issues affecting their living- and service conditions.

(3) The trade union shall have the right to exercise the following rights vis-à-vis the organisational unit:

- a) may request information on any issues related to members of professional staff's service-related financial, social and cultural interests;
- b) may communicate its position and opinion on the commander's (head's) measure (decision) concerning an issue falling under point a) to the commander in charge of the unit and may initiate consultations in such matters;
- c) may, during official working hours or – in justified cases – in service hours check observance of the rules governing service and working conditions – including healthy and safe service performance – and may request information and data on the implementation of those rules, which information and data shall be provided for the trade union. Such checks may not endanger or hinder the performance of the service tasks.

(4) The trade union may draw the attention of the head of the organ in charge of the implementation of the rules to the shortcomings and omissions perceived in the course of the check. If the head fails to take the necessary action in due time, the trade union may institute appropriate proceedings. The body having conducted the proceedings shall be obliged to inform the trade union of the findings of the proceedings.

(5) The rights specified under subsections (3)-(4) shall, in respect of issues falling into the supervisory bodies' scope of direction, be vested in the representative trade union within the given organisation. ...”

Section 69

“(1) While performing their service, members of professional staff shall be obliged to execute the orders of a supervisor or the instructions of a superior officer, unless they would commit a criminal offence thereby.

(2) Except for the case specified in subsection (1), members of professional staff may not refuse the execution of an unlawful order. Where, however, the unlawful nature of the order was recognised, it shall immediately be drawn to the superior officer's attention. If the supervisor upholds his order or the superior officer upholds his instruction, it must – upon request – be given in writing. Liability for the execution of an unlawful order or provision shall be borne solely by the issuer of the order or the instruction. ...”

Section 194 – Service complaint

„(1) Members of professional staff or – upon their authorisation and on their behalf– a representation organisation or an attorney at law may file a service complaint if they find prejudicial a service-related decision, measure or their omission, not regulated under section 195 of this Act.

(2) A service complaint against an employer's measure in connection with the termination of the service relationship, establishment of conflict of interest, or the unilateral

modification of the service relationship by the armed forces affecting the member's position, shall be filed by the member of professional staff within 15 days from the communication of the employer's measure. In other cases service complaints shall be filed within the period of limitation applicable to the enforcement of the claim at issue.

(3) The complaint shall be filed with the supervisor who took (omitted to take) the decision and who shall – in case he fails to grant it – transfer the case, together with the case files, to the supervisor-commander without delay. Unless specified otherwise under the law, the supervisor-commander shall decide on the complaint within 30 days and shall communicate his decision to the complainant. This time limit may be extended on one occasion for another 30 days.

(4) No person shall be restricted in exercising his right to file a complaint. No complainant shall suffer any detriment in case his complaint is found ill-founded, except where intentional infringement of discipline, regulatory offence, or a criminal offence has been committed.

(5) The exercise of the right of complaint specified in another law shall not be affected by this Act."

Section 195 – Complaint and appeal against a decision

„(1) A first instance decision related to the service relationship and taken in proceedings conducted within the armed forces may – unless this Act provides otherwise – be challenged by a member of professional staff by filing a complaint ... or an appeal ... against the decision within 15 days from its service.

(2) Appeal against a decision brought in relation with the service obligations of a deceased member of professional staff may be lodged by a close relative.

(3) The complaint or appeal shall – unless this Act provides otherwise – be determined within 30 days by the service supervisor or the organ designated by the minister. This time-limit may be extended on one occasion for another 30 days."

12. Act No. IV of 1978 on the Criminal Code provides as follows:

Section 357 – Incitement

„(1) Anyone who incites discontent among soldiers towards a superior, a command or in general towards the order of service or discipline, is guilty of a misdemeanour punishable by imprisonment of up to one year.

(2) The punishment shall be imprisonment for up to three years if:

- a) the incitement is committed in the course of the performance of service;
- b) the incitement entails considerable disadvantage for the service or discipline."

The law

I. Alleged violation of Article 10 read in the light of Article 11 of the convention

13. The applicant complained that the criminal proceedings conducted against her on account of some statements which she had published on the Internet, as part of her trade-union activity, amounted to a breach of her right to freedom of expression as provided in Article 10 of the Convention.

The Court considers that – against the background that the applicant is a trade-union leader – this complaint falls to be examined under Article 10 which will be interpreted in the light of Article 11 of the Convention (see *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 52 in fine, ECHR–2011).

Article 10 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. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 11 provides as relevant:

„1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society ... for the protection of health or morals or for the protection of the rights and freedoms of others ...”

14. The Government contested the applicant’s arguments.

A. Admissibility

15. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

a. The Government

16. The Government did not contest that there had been an interference with the applicant’s freedom of expression. However, they pointed out that according to Article 10 § 2 of the Convention, this right might be subject to certain limitations. Section 18 of the Act on the Service of Members of Professional Staff of the Armed Forces restricted the freedom of expression of the armed forces’ professional staff. Decision no. 8/2004. (III.25.) AB of the Constitutional Court had found this limitation to be in compliance with the Constitution. That court argued that orders and instructions might be criticised by lodging a service complaint (section 194 of the Service Act) or through a representative organisation (section 29). The assessment of criticism should be different depending on the type of service within the armed forces and whether it had occurred in an armed conflict, state of danger or emergency, or in peace. Thus, the limitation on the right to freedom of expression was necessary to ensure the undisturbed performance of tasks of the armed forces, and could not be regarded as disproportionate in view of the specific nature of the service relationship.

17. The Government further observed that according to the Court’s case-law, States had the possibility to impose restrictions on freedom of expression where there was a real threat to military discipline. However, proposals for reforms must be tolerated in the army of a democratic State.

18. As established by the domestic courts, in the present case the applicant’s opinion had not been expressed in connection with the trade union’s operation. The incriminated statements had gone beyond the limits of freedom of expression provided in section

29(2)(c) of the Service Act and had not concerned any proposals for reform. The domestic courts examined them thoroughly and found the incriminated statements to be devoid of factual basis and sometimes even defamatory and libellous. No intention to identify or remedy problems or anomalies had been detected in the applicant's statements; on the other hand, they had been likely to disrupt military discipline.

19. Moreover, the application of a criminal punishment could not be considered as disproportionate in the circumstances. In order to establish incitement, not only should the statement be injurious to the order and discipline of the service, but must also incite discontent among soldiers. In light of the ultima ratio character of criminal law, not all conduct injurious to the order and discipline of the service was sanctioned by criminal punishments. Conduct that did not reach the criminally relevant threshold of dangerousness to society was handled through disciplinary law. However, the applicant's case was different.

20. Lastly, the domestic courts had referred to the Court's case law on the matter and examined the human rights aspects of the case. They had come to the conclusion that the use of criminal sanctions in the instant case had not been disproportionate. The Government could not but endorse this view.

b. The applicant

21. The applicant submitted that she had not been active as a police officer but had only been in charge of representing the trade union in question. The impugned statements had been made exclusively in this context; and although they had been uttered in order to draw attention to issues of improving the working and living conditions of the trade union members, they could in no way be seen as offensive, defamatory or inciting to insubordination. Nevertheless, she had never been given the opportunity to prove their veracity before any competent body.

2. The Court's assessment

a. Whether there has been an interference

22. The Court notes that this issue has not been in dispute between the parties. It concludes that the applicant's conviction represented an interference with her right to freedom of expression.

Such an interference will represent a violation of the applicant's right to freedom of expression, unless it was „prescribed by law”, pursued a legitimate aim and was necessary in a democratic society.

b. Prescribed by law

23. The Court observes that the applicant's conviction was based on section 357 of the Criminal Code and is therefore satisfied that it was „prescribed by law”.

c. Legitimate aim

24. The Court notes that the applicant's prosecution reflected the domestic courts' conviction that her utterances had been capable of instigation to insubordination. It therefore finds that the interference pursued the legitimate aim of „prevention of disorder or crime”, that is, of preserving order in the armed forces (see *Engel and Others v. the Netherlands*, 8 June 1976, § 98, Series A no. 22; *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, § 32, Series A no. 302).

d. „Necessary in a democratic society”

i. General principles

25. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to „information” or „ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no „democratic society” (see *Oberschlick v. Austria* (no. 1), 23 May 1991, § 57, Series A no. 204). As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

Moreover, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see *Uj v. Hungary*, no. 23954/10, § 20, 19 July 2011).

The same is true when the persons concerned are members of the armed forces, because Article 10 applies to them just as it does to other persons within the jurisdiction of the Contracting States. However, the proper functioning of the armed forces is hardly imaginable without legal rules designed to prevent servicemen from undermining the requisite discipline, for example by writings (see *Engel and Others*, cited above, § 100; *Hadjianastassiou v. Greece*, 16 December 1992, § 39, Series A no. 252; *Vereinigung demokratischer Soldaten Österreichs and Gubi*, cited above, § 36).

26. Consequently, account must be taken of the need to strike the right balance between the various interests involved. Because of their direct, continuous contact with the realities of the country, the national courts are in a better position than an international one to determine how, at a given time, the right balance can be struck. For this reason, in matters under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of expression protected by that Article (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 68, ECHR 2004-XI).

27. However, that margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, *mutatis mutandis*, *Peck v. the United Kingdom*, no. 44647/98, § 77, ECHR 2003-I, and *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X). The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation can be reconciled with the Convention provisions relied upon (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 60, ECHR 1999-III; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 41, 21 September 2010; and *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith. The Court looks at the interference complained of in the light of the case as a whole, including the content of the statement held against the applicant and its context (see *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, § 52, ECHR 2000-I).

In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were „relevant and sufficient”, and whether the measure taken was „proportionate to the legitimate aims pursued” (see *Chauvy and*

Others v. France, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see *Csánics v. Hungary*, no. 12188/06, § 37 in fine, 20 January 2009).

28. Furthermore, the members of a trade union must be able to express to their employer their demands by which they seek to improve the situation of workers in their company. A trade union that does not have the possibility of expressing its ideas freely in this connection would indeed be deprived of an essential means of action. Consequently, for the purpose of guaranteeing the meaningful and effective nature of trade union rights, the national authorities must ensure that disproportionate penalties do not dissuade trade union representatives from seeking to express and defend their members' interests (see *Palomo Sánchez and Others*, cited above, § 56). Furthermore, there is little scope for restrictions on debates on matters of public interest (see *Wingrove v. the United Kingdom*, 25 November 1996, § 58, Reports of Judgments and Decisions 1996 V; *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999 IV).

29. In the present case, the Hungarian authorities were required to balance the applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention, against her obligations in the context of a service relationship. As pointed out above, Article 10 of the Convention does not guarantee an unlimited freedom of expression; and the prevention of disorder within the armed forces constitutes a legitimate aim permitting a restriction of that freedom of expression. If the reasoning of the domestic courts' decisions concerning the limits of freedom of expression in cases involving the prevention of disorder – in the present case, the prevention of insubordination inside the police force – is sufficient and consistent with the criteria established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see, *mutatis mutandis*, *Palomo Sánchez and Others*, cited above, § 57; and *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011).

30. The Court would add that in order to assess the justification of the statements in question, a distinction needs to be made between statements of fact and value judgments, in that, while the existence of facts can be demonstrated, the truth of value judgements is not susceptible of proof. The requirement to prove the truth of a value judgment is generally impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103; *Oberschlick v. Austria* (no. 1), cited above, § 63). The classification of a statement as a fact or a value judgment is a matter which, in the first place, falls within the margin of appreciation of the national authorities, in particular the domestic courts (see *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, ECHR 2004 XI). However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it may be excessive (see *Jerusalem v. Austria*, no. 26958/95, § 43, ECHR 2001–II).

ii. Application of those principles to the present case

31. The Court notes that, in some statements published on the website under her effective editorial control, the applicant brought up labour issues, such as outstanding remunerations, which concerned servicemen including trade union members (see paragraph 8 above, quotation 1). However, she also uttered, repeatedly, critical views

about the manner in which police leaders managed the force, and accused them of disrespect of citizens and of serving political interests in general (see paragraph 8 above). For the Court, these latter views overstepped the mandate of a trade union leader, because they are not at all related to the protection of labour-related interests of trade union members. Therefore, those statements, being made outside the legitimate scope of trade union-related activities, must be considered from the general perspective of freedom of expression rather than from the particular aspect of trade union-related expressions. In this connection, the Court would reiterate that paragraph 2 in fine of Article 11 indicates that the State is bound to respect the freedom of association of its employees, subject to the possible imposition of lawful restrictions on the exercise by members of its armed forces, police or administration of the rights protected in that Article; however, the restrictions imposed on the three groups mentioned are to be construed strictly and should therefore be confined to the „exercise” of the rights in question, that is, these restrictions must not impair the very essence of the right to organise (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 96-97, ECHR–2008). The Court will apply the same approach in the context of Article 10 and stresses that the right to freedom of expression pertains to all, including members of the armed forces.

32. In its analysis of the proportionality of the punitive measures curtailing the applicant’s right to express critical views, the Court will consider the extent to which the right to freedom of expression of a member of the police force can be restricted in order to prevent disorder within the police, a hierarchically organised body where discipline is quintessential for the carrying out of its functions. For the Court, some of the impugned statements (concerning in particular outstanding remunerations) are clearly related to trade union activities and their sanctioning therefore appears difficult to reconcile with the prerogatives of a trade union leader. Moreover, the attack on the Head of the National Police Department is a pure value judgment and enjoys as such a high level of protection under Article 10.

The Court also notes that in regard to some other utterances the domestic courts, rather surprisingly, refused to accept evidence (see paragraph 7 above), which fact alone would have cast doubt on the legitimacy of the sanction imposed on the applicant, had that sanction been applied for that sole reason.

However, in any event, the Court shares the views of those courts regarding the nature of the views expressed about the practice of senior police management. It accepts that those allegations – in particular the ones accusing senior police management of political bias and agenda, transgressions, unprofessionalism and nepotism – were, even if representing predominantly value-judgments, indeed capable of causing insubordination since they might discredit the legitimacy of police actions, all the more so since the applicant did not provide any clear factual basis for those statements. It is true that she was barred from submitting evidence in the domestic proceedings – a matter of serious concern – however, in her attacks concerning the activities of police leadership, she failed to relate her offensive value judgments to facts.

The Court finds that the protection of loyalty and the trust in the constitutionality of police leaders’ actions is not a matter of administrative convenience. The applicant, as a senior police officer, had considerable influence on trade union members and other servicemen, among other things by controlling the trade union’s website. As a high-ranking officer and trade union leader she should have had to exercise her right to

freedom of expression in accordance with the duties and responsibilities which that right carries with it in the specific circumstances of her status and in view of the special requirement of discipline in the police force (see also *Rekvényi v. Hungary* [GC], no. 25390/94, § 43 in fine, ECHR 1999 III) – and this even in the face of the general interest attached to enabling criticism as to transparency, professionalism and law-abiding within the police force. The Court notes that, by entering the police, the applicant should have been aware of the restrictions that apply to staff in the exercise of their rights. Moreover, the limitations on the applicant's right to freedom of expression did not require her to exercise her profession in violation of fundamental convictions of her conscience.

In view of the margin of appreciation applicable in such cases (see paragraph 26 above), the maintenance of discipline by sanctioning accusatory opinions which undermine the trust in, and the credibility of, the police leadership represents a „pressing social need”, and the reasons adduced by the national authorities to justify it are relevant and sufficient (see *Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 62, Series A no. 30), especially in view of the relatively mild sanction imposed on the applicant – demotion and a fine – which cannot be regarded disproportionate in the circumstances.

33. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 10 read in the light of Article 11 of the Convention.

II. Other alleged violations of the Convention

34. The applicant also complained under Articles 6, 13 and 17 of the Convention that the proceedings had not been fair.

35. In so far as the applicant's complaint may be understood to concern assessment of the evidence and the result of the proceedings before the domestic courts, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999 I). In the present case, there is no appearance that the domestic courts lacked impartiality or that the proceedings were otherwise unfair or arbitrary.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court

1. Declares unanimously the complaint concerning Article 10 admissible and the remainder of the application inadmissible;
2. Holds by six votes to one that there has been no violation of Article 10 read in the light of Article 11 of the Convention.

Done in English, and notified in writing on 9 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens

President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Tulkens is annexed to this judgment.

Dissenting opinion of judge Tulkens

1. Unlike the majority, I believe that in the present case there has been a violation of Article 10 of the Convention interpreted, as the judgment suggests, in the light of Article 11.

2. The facts are not in dispute. The applicant's offending remarks were made in her capacity as chairperson of the Tettrekész Police Trade Union and on the union's website, which was under her editorial control. She complained, among other things, about unpaid remuneration due to police personnel, alleged nepotism and undue political influence, as well as dubious qualifications of senior police officers (see paragraph 8). The applicant was found guilty of instigating insubordination, for which she was fined and demoted.

3. The judgment rightly points out that Article 10 of the Convention applies to the police and personnel of the armed forces, as it does to everyone within the jurisdiction of the member States. Both the right to freedom of expression guaranteed by Article 10 § 1 and the limitations and restrictions provided for in paragraph 2 must therefore be applied in the same manner and with equal rigour. In that connection, in view of certain issues raised by this case, I am unable to find that the measures taken against the applicant were proportionate to the aim pursued.

4. The majority decided at the outset that the applicant's critical remarks had overstepped the mandate of a trade union leader, because some of them were „not at all related to the protection of labour-related interests of trade union members”. I wonder whether, for its part, the Court itself has not overstepped its mandate by casting this judgment on the role of a trade union leader and on the „legitimate” scope of trade-union activities. Moreover, it confines the role of a union to the protection of workers' interests *stricto sensu*, without considering that such protection could extend more broadly to criticism about alleged failings in the institution itself. In finding, without any other explication or justification, that the offending remarks had been made „outside the legitimate scope of trade union-related activities”, the majority dismissed, artificially in my view, the trade-union dimension of this case to focus it purely on the right to freedom of expression.

5. A second factor also comes into play here. The majority noted that in respect of some allegations by the applicant, „the domestic courts, rather surprisingly, refused to accept evidence” (see paragraph 32, second sub-paragraph). They nevertheless criticised the applicant for not providing a clear factual basis for what amounted to value judgments and somewhat oddly concluded: „It is true that she was barred from submitting evidence in the domestic proceedings – a matter of serious concern – however, in her attacks concerning the activities of police leadership, she failed to relate her offensive value judgments to facts” (see paragraph 32, third sub-paragraph in fine).

6. My last point concerns the harshness of the penalty. Whilst the fine may be regarded as lenient, the same cannot be said of the demotion, which in my view is a harsh sanction and, in the context of the present case, a disproportionate one.

SECOND SECTION
CASE OF JOKŠAS v. LITHUANIA

(Application no. 25330/07)

JUDGMENT
STRASBOURG
12 November 2013
FINAL
12/02/2014

In the case of Jokšas v. Lithuania,
The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, President,
Danutė Jočienė,
Peer Lorenzen,
András Sajó,
İşıl Karakaş,
Nebojša Vučinić,
Helen Keller, judges,

and Stanley Naismith, Section Registrar,

Having deliberated in private on 22 October 2013,

Delivers the following judgment, which was adopted on that date:

Procedure

1. The case originated in an application (no. 25330/07) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention”) by a Lithuanian national, Mr Alvydas Jokšas („the applicant”), on 6 June 2007.
2. The Lithuanian Government („the Government”) were represented by their Agent, Ms E. Baltutytė.
3. The applicant alleged that his right to freedom of expression had been violated because he had been discharged from the military on account of public statements he had made (Article 10 of the Convention), which had also amounted to discrimination on the basis of opinion (Article 14, in conjunction with Article 10). The applicant also complained that the domestic courts which heard those complaints were unfair, in breach of Article 6 § 1 of the Convention.
4. On 20 April 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

The facts

I. The circumstances of the case

A. The applicant

5. The applicant was born on 19 June 1956 and lives in Tryškiai.

6. He joined the Lithuanian army during the 1990s. In 2003 and 2004 respectively the Commander of the Armed Forces awarded him the „Exemplary Service” and „Merit” medals.

7. On 5 August 2002 the Commander of the Armed Forces and the applicant, who had the military rank of senior non-commissioned officer (*vyriausiasis puskarininkis*), concluded a five-year professional service contract. That contract was to come to an end on 5 August 2007. The contract also stipulated that in certain circumstances and in accordance with the rules provided for by the Law on Military Service (hereinafter – „LMS”, see paragraph 43 below), it could be rescinded even before that date (point 6 of the applicant’s contract).

8. In 2003 the applicant graduated from the College of Management, Law and Languages of Šiauliai Region and obtained professional qualifications as a lawyer. These were higher-level non-university studies (*aukštosios neuniversitetinės studijos*).

9. By order of the Commander of the Armed Forces of 18 April 2003 the applicant was assigned military code 42701 as a human resources specialist.

10. On 16 August 2005 the applicant’s duties changed: he was transferred to the post of assistant on legal matters (*vado padėjėjas teisės klausimais*) to the Commanding Officer of the Grand Duke Vaidotas battalion.

11. On 1 March 2006 the daily *Kauno Diena* published an article ‘War without constitutional rights’ (*Karas be konstitucinių teisių*), which was written after the applicant had approached the newspaper with criticism of the new Army Disciplinary Statute, adopted by the Lithuanian Seimas almost unanimously a couple of months previously. In the article the applicant argued that the new Disciplinary Statute restricted a serviceman’s defence rights when he was the subject of disciplinary proceedings. In particular, the Statute was vague on servicemen’s right to acquaint themselves with the substance of any internal investigation report against them. The applicant also claimed that during disciplinary proceedings a serviceman had only a limited opportunity to have recourse to legal representation, which in his view was particularly harmful, since few servicemen had the proper legal knowledge to defend themselves in person. The article further stated that the applicant, discontented with the new Statute, had conveyed his observations and suggestions to the President of the Republic, asking the latter to veto the Statute. According to Presidential office sources, the President took account of the applicant’s proposals but decided to promulgate the Statute anyway. The Chairman of the Committee of National Security of the Seimas commented that the Committee had received numerous suggestions in connection with the text of the Statute, all of which had been given serious consideration before the Statute was adopted.

12. On 1 March 2006 the applicant’s superiors initiated an internal investigation into the applicant’s actions as regards his communication with journalists from the daily *Kauno Diena* and contact with the State President.

13. On 13 March 2006 *Kauno Diena* published a new article, ‘Criticism of the Statute angers the Ministry [of Defence] (*Statuto kritika užrūstino ministeriją*)’. The article noted that the Ministry of Defence had initiated an internal investigation after the publication of the first article. It further quoted the applicant as stating that, disappointed with the Seimas for adopting the new Disciplinary Statute and with the State President for promulgating it, he had a right to show initiative as a citizen and, under the European Convention on Human Rights, to impart information and ideas unobstructed.

14. The internal investigation into the actions of the applicant was terminated on 22 March 2006. It was established that the applicant had had prior permission from his superiors to address the State President. However, he had not obtained permission to contact the newspaper. The army investigator nevertheless considered that as cited in the article 'War without constitutional rights' the applicant had been expressing only his own personal opinion, and had not disseminated any official information. Consequently, Article 21 § 3 of LMS applied, pursuant to which soldiers had a right to express their opinions unless there was a conflict with their duties as soldiers or with military discipline. No disciplinary penalties were imposed on the applicant.

15. On 11 May 2006 the applicant's superiors concluded that the applicant had failed to perform his duties as a legal advisor, namely he had recommended the commanding officer of his battalion to grant childcare leave to another soldier, R.V., in breach of applicable legal norms. The army imposed upon the applicant a disciplinary penalty (drausminę nuobaudą), namely a reprimand (papeikimą).

On appeal against this penalty, on 25 April 2008 the Supreme Administrative Court held that the applicant had acted lawfully and that his recommendation that R.V. be granted childcare leave was lawful. The disciplinary penalty was quashed.

16. On 19 June 2006 the applicant's superiors signed an order dismissing him from the position of battalion commander's assistant on legal matters with effect from 27 June 2006, on the basis of Article 45 § 4 of LMS. The order further stipulated that by 28 June 2006 documents discharging the applicant from the army should be prepared and submitted to the Minister of Defence.

17. On 27 June 2006 the applicant was dismissed from the position of battalion commander's legal advisor on the ground that he had reached retirement age, in accordance with Articles 38 § 1 (7) and 45 § 4 of LMS.

18. On 3 July 2006 the Ministry of Defence issued a decision to terminate the applicant's professional military service contract and to transfer him to the army reserve. The order was based on Articles 38 § 1 (7) and 45 § 4 (2) of LMS, whereby a serviceman of the applicant's statutory rank had to be transferred to the reserve when he reached fifty years of age.

19. On 22 July 2006 the applicant appealed to the Vilnius Regional Administrative Court, asking it to quash the decision of 3 July 2006 and to reinstate him into professional military service. The applicant also claimed that he had been discriminated against because he had defended another serviceman (see paragraph 15 above) and because of his views as expressed in the publication in *Kauno Diena*, in breach of Article 14 of the Convention. The applicant asserted that there were hundreds of soldiers in the Lithuanian army who did not have speciality codes allowing them to serve until 55 years of age. However, they continued to serve in the army until the expiry of their military service contracts, even though they had already reached retirement age. The applicant thus requested the court, on the basis of Article 57 § 4 of the Law on Administrative Proceedings (see paragraph 44 below), to oblige army officials to produce certain documents regarding his dismissal and regarding the situation of four servicemen, R.L., V.S., J.Š. and M.I., who to his knowledge had continued to serve in the military in the same Grand Duke Vaidotas battalion despite the fact that they had reached retirement age. He noted that those documents were in the custody of the battalion commander and he could not obtain them on his own. Lastly, the applicant acknowledged that in 2005

the Minister of Defence had changed the military specialist codes and he had been transferred to other duties, those of legal specialist. All officers with lawyer's duties were given the code of legal specialist, but the applicant, a non-commissioned officer, had not been given a legal specialist code. This meant that at that time he had no legal specialist code at all.

20. The administrative courts found that under the applicable legislation the applicant was obliged before he could bring a court action to exhaust other non-judicial remedies, namely to lodge an appeal with the Minister of Defence.

21. The applicant then appealed to the Minister of Defence against his discharge from the army. On 28 August 2006 the Ministry of Defence held that the decision to discharge the applicant from the army was lawful, and dismissed his appeal.

22. On 23 October 2006 the Vilnius Regional Administrative Court dismissed as unfounded the applicant's complaints regarding the annulment of his professional military service contract and his discharge from the army. The court observed that under Articles 38 § 1 (7) and 45 § 4 (2) of LMS a serviceman must be discharged from the army once his military service contract expired or (arba) he reached retirement age, which in the applicant's case was fifty years. The applicant had reached the age of fifty on 19 June 2006.

The court further noted that under Article 45 § 6 of LMS, soldiers who had been holding military specialist posts under the Minister of Defence's decision of 13 June 2005 could be discharged on reaching 55 years of age. However, the applicant's duties of a legal affairs assistant (*vado padėjėjas teisės klausimais*) to the commander of the Grand Duke Vaidotas battalion had not been included in the list approved by that decision. Accordingly, he could not rely on the age-related exception. In addition, in another case the Supreme Administrative Court had already held that reaching retirement age was the ground for discharge of a soldier from the military, notwithstanding whether or not his military service contract had expired yet (ruling of 12 March 2004 in case no. A2-262-04).

23. The court further observed that Article 46 of LMS gave the Minister of Defence discretion to extend, in the interests of the military, the professional military service of a soldier who had reached the age when he or she should be discharged. However, this was a matter of discretion, and placed no obligation on the Minister.

The court did not address the applicant's argument that four other servicemen of his unit had been allowed to continue military service despite having reached the age of discharge. Nor did it reply to the applicant's request for the military service records of those four servicemen.

24. In the meantime, the applicant also lodged a complaint with the Ombudsman, challenging his discharge from the army. On 2 November 2006 the Ombudsman refused to examine the complaint on the ground that an identical complaint was being examined by the administrative courts, and the law did not allow the Ombudsman to deal with such complaints.

25. On 3 November 2006 the applicant appealed to the Supreme Administrative Court, reiterating his arguments of unlawful dismissal and discrimination. His appeal statement indicates that he reiterated his request that his superiors in the Grand Duke Vaidotas battalion be ordered to produce certain documents from the military service records of the four servicemen mentioned above, who he stated had continued serving in the same

unit as the applicant despite having reached retirement age. The applicant asserted that discrimination would be easy to prove if the court would help him to obtain the military service records of those four servicemen.

26. As regards the military specialist codes, he noted that in August 2002 he had been granted specialist code 0132 on the basis of the military code system established by the Minister of Defence in 1998, thus allowing him to serve until the age of 55. After the Minister of Defence amended the military code system in 2002 the applicant was given military specialist code 42701. When in 2005 the Minister of Defence again changed the system of military specialist codes and the applicant was transferred to the post of legal specialist, no specialist code was assigned to him. The applicant observed that officers who had legal posts had been given the code of legal specialist, but that he, as a non-commissioned officer, did not have such a code. Above all, „at present no specialist code at all had been granted to him” (šiuo metu iš viso man nėra suteiktas joks specialisto kodas).

Lastly, the applicant strongly asserted that the lower court had erred in interpreting and applying Article 38 and other provisions of LMS.

27. By a decision of 22 May 2007 the Supreme Administrative Court dismissed the appeal. In setting out the reasons it observed that pursuant to Article 38 § 1 (7) of LMS, a serviceman had to be dismissed from military service once his contract had expired or he had reached the age of discharge, unless the duration of his military service had been extended. In the applicant's case, as a non-commissioned officer, the age of discharge for him was 50. The court also emphasised that that legal norm was imperative, and applied to contracts which were still valid, and not to those which had already expired (teisės norma skirta reglamentuoti teisinius santykius dėl galiojančios, o ne pasibaigusios karo tarnybos sutarties nutraukimo). This interpretation also followed from Article 31 § 4 of LMS, which provided that a contract could be annulled ahead of time in cases provided for in Article 38 of that Law. Moreover, the possibility of the applicant's military service contract being rescinded had also been mentioned in the contract itself (see paragraph 7 above). Taking into account the imperative nature of Article 38 § 1 (7), it was the army command's duty, and not a right, to rescind a contract once the conditions mentioned in that provision had been met. Furthermore, Article 46 of LMS provided only discretion for and not an obligation on the Minister of Defence to extend a serviceman's military service.

28. The Supreme Administrative Court also noted that according to his duties the applicant did not fall into the sphere regulated by Article 45 §§ 5 and 6 of the Law, that is he did not have military specialist status. Moreover, exceptional extension of term of service under Article 46 had not been applied to him. Consequently, the facts of the case fully matched the circumstances listed in Articles 38 § 1 (7) and 45 § 4 (2) of the Law. The first-instance court's decision was thus fully upheld.

The appellate court did not address the applicant's request for the supplementary documents to be obtained, nor did the court deal with the allegation of discrimination against the applicant because of his service status.

29. In addition to the administrative proceedings concerning his discharge from military service, the applicant also instituted another set of somewhat linked proceedings concerning his dismissal from Vaidotas battalion, which formally preceded the discharge from military service. He reiterated the arguments expressed in the earlier proceedings.

In relation to freedom of expression, the applicant merely mentioned that he had been persecuted for his opinions because of the legal decision he had issued which was favourable towards another serviceman (see paragraph 15 above). It also appears from the summary of the applicant's complaints in the record of the court decision of 12 July 2007 (see the next paragraph), that this time the applicant had made no reference to the publication in *Kauno Diena*, but insisted that he had been discriminated against because of his social status as a non-commissioned officer vis-à-vis the commissioned officers.

30. On 12 July 2007 the Vilnius Regional Administrative Court dismissed the applicant's claim, fully upholding the reasoning that, in accordance with Articles 38 § 1 (7) and 45 § 4 (2) of LMS, the army was under an obligation to discharge him from the military because of his age.

31. The court also noted that the qualifications required for a legal post had been established by the Minister of Defence on 13 June 2005. One of the obligatory requirements was university-level higher education in law (*aukštasis universitetinis teisinis išsilavinimas*). Accordingly, the applicant was not qualified to be appointed to a legal post, because in 2003 he had graduated from Šiauliai College of Law and Management, from the programme of higher-level non-university law studies (*aukštųjų neuniversitetinių teisės studijų programa*).

32. As regards the alleged discrimination against non-commissioned officers vis-à-vis commissioned officers, the court observed that different requirements were applicable to soldiers of different ranks to reflect their experience and qualifications, as had been established in Article 52 § 1 of LMS. Similarly, by a ruling of 28 October 1992, no. 811, the Government had approved the Regulations on Military Service (*Tarnybos statusas*), point 11 of which established that all Lithuanian military officers are in command of soldiers and non-commissioned officers (*visi karininkai yra kareivių ir puskarininkių ir liktinių viršininkai*). Given that legal acts established different social status for officers and non-commissioned officers, the same requirements could not apply to both. The court thus held that the applicant's argument that he had a right to serve until 55 years of age and was not to be discharged from the army was based only on his own ideas and erroneous interpretation of the law. Lastly, the court dismissed the applicant's claim that he had been persecuted for his opinions, having concluded that that claim was based only on the applicant's own suppositions and guesses.

33. The applicant appealed, arguing that he had been persecuted because of his opinion on whether to grant childcare leave to another soldier. It appears from the transcript of the hearing of his complaints in the appellate court decision that the applicant did not mention the publication in the *Kauno Diena* newspaper.

34. On 6 May 2008 the Supreme Administrative Court dismissed the appeal, noting that the applicant's claim had already been decided in another administrative case, by a decision of 22 May 2007 (see paragraphs 27 and 28 above). The court confirmed that Article 38 § 1 (7) of LMS provided for two alternatives when a soldier had to be discharged from the army: when his contract expired or (emphasised by the appellate court) when he reached the age stipulated in Article 45 § 4 of that Law. Accordingly, once a serviceman reached the retirement age, the army had an obligation, and not a right, to discharge him. The court also noted that it was free to assess evidence to establish the circumstances of the case. However, the applicant had not provided any evidence

confirming that he had been persecuted for the opinion he had given on the grant of childcare leave to another soldier.

35. The applicant has been receiving a military pension since 4 July 2006.

B. The four servicemen who served in the same Grand Duke Vaidotas battalion as the applicant

36. It appears from the parties' explanations and the documents presented that the situation of the four servicemen whom the applicant had mentioned in his complaints of discrimination to the administrative courts (see paragraphs 19 and 25 above), was as follows.

37. The five-year professional military service contract with 46-year-old junior sergeant (jaunesnysis seržantas) M.I. was signed (by extending a previous contract) on 16 January 2002. His military rank and the requirements of Article 45 § 4 (1) of LMS stipulate that the serviceman was to be discharged at the age of 40. However, from 2000 M.I. held a military specialist post as a weaponry specialist, which allowed him to serve until the age of 55 under Article 45 § 6 of that Law.

38. The five-year professional military service contract with 49-year-old corporal (grandinis) J.Š. was signed (by extending a previous contract) on 16 January 2002. His military rank and the requirements of Article 45 § 4 (1) of the LMS stipulated that the serviceman was to be discharged at the age of 40. However, from 1999 J.Š. had a military specialist post as a motor repairman and electrician, which allowed him to serve until the age of 55. The contract with the serviceman was later extended until 8 June 2007, his 55th birthday. J.Š. was finally discharged from the army on 21 June 2007.

39. The six-year professional military service contract with 38-year-old junior sergeant V.S. was signed (by extending a previous contract) on 25 December 2001. Her rank and the requirements of Article 45 § 4 (1) of LMS stipulated that she could serve until the age of 40. In addition, in 2000, 2003 and 2005 she was granted specialist status in accounting and human resources management.

40. The five-year professional military service contract with 42-year-old corporal R.L. was signed (by extending a previous contract) on 16 January 2002. Her rank of corporal and the requirements of Article 45 § 4 (1) of LMS stipulated that she could serve until the age of 35. However, in 2000 she had been granted line specialist status (rikiuotės specialistė), which allowed her to serve until the age of 55. Moreover, in 2006 she had been promoted to the rank of senior sergeant, and thus could serve until the age of 50.

C. The situation of two other servicemen

41. The Government provided the Court with two additional examples where servicemen were discharged from professional military service on the ground of age while they still had valid contracts. They firstly noted senior navigator air force major V.Ž., born in 1951, whose contract was valid until October 2005. At the age of 52 he was honourably retired from the army in December 2003, on the basis of Articles 38 § 1 (7) and 45 § 4 (6) of LMS having reached the statutory age, which is 46 for a major. However, it appears from the documents before the Court that he was entitled to serve until the age of 55 because he was a senior navigator and thus a specialist, as provides Article 45 § 6 of LMS.

42. The Government also referred to the case of senior lieutenant L.P., born in 1960. He had a five-year military service contract signed in March 2001. In accordance with Articles 38 § 1 (7) and 45 § 4 (4) of LMS, a person of L.P.'s military rank had to be discharged at the age of 40. However, in 1999 he had been granted specialist status, that of supply

officer (aprūpinimo karininkas), and thus could serve until 55. In June 2002 L.P. had been transferred to a new post which was no longer included in the list of military specialists. L.P. was discharged on the basis of age in March 2003, when he was 43 years old.

II. Relevant domestic law and practice

43. In Lithuania professional military service is regulated by the Law on the Organisation of the National Defence System and Military Service (Krašto apsaugos sistemos organizavimo ir karo tarnybos įstatymas, „the Law on Military Service” or „LMS”). At the time relevant to the instant case, the law read as follows:

Article 21. General serviceman status

„1. A serviceman shall be a defender of the State of Lithuania.

2. A serviceman’s service shall require a special relationship of loyalty to the State, which shall be regulated by laws and other legal acts. The status of a serviceman shall be specified by this Law and other laws, statutes and legal acts regulating the activities of the Army and military service. With the exception of the cases specified by laws and other legal acts, the laws and other legal acts regulating employment and civil service relations shall not apply to servicemen.

3. Servicemen shall exercise the human rights and freedoms guaranteed by the Constitution of the Republic of Lithuania. Exercise by servicemen of the rights to ... dissemination of information and expression of opinion may be restricted by laws and statutes based on the law only to the extent that is necessary for the performance of a serviceman’s duties and to ensure military discipline and obedience as well as to fulfil the requirements of service ...”

Article 31. The professional military service contract

„1. A professional military service contract is concluded between the Ministry of Defence and a citizen of the Republic of Lithuania: the Ministry of Defence accepts a person into professional military service and the citizen pledges to fulfil his service obligation in accordance with the conditions and procedures established in the Law and other legal acts, and to perform all duties ...

4. The contract may be terminated ahead of time in the circumstances set forth in Articles 37 and 38 of this Law.”

Article 36. Restrictions on those engaging in military service

„1. Servicemen in active service shall be prohibited from participating in political activities, including:

1) membership of a political party or organisation ...

3) making political statements, articles or speeches publicly voicing disagreement with policies declared and implemented by the democratically elected government of the State (the Seimas, the President of the Republic, and the Government) or publicly raising political demands to the government of the State ...”

Article 38. Grounds for termination of a professional military service contract or a volunteer military service contract

„1. A professional military service contract or a volunteer military service contract must be terminated (turi būti nutraukiama) and/or a serviceman must be discharged from the service in the national defence system when ...

6) a serviceman in professional military service violates the requirements and restrictions of Article 36 of this Law;

7) the term of validity of a professional military service contract or a volunteer military service contract expires or the serviceman reaches the age specified in paragraph 4 of Article 45 ... of this Law, where the period of service has not been extended in accordance with the established procedure ...

4. The right to terminate professional military service contracts or volunteer military service contracts on the grounds provided for in this Article shall be vested in the Minister of Defence or the Commander of the Armed Forces and other commanders or officials authorised by him.”

Article 45. Transfer to the reserve of servicemen in professional military service

„1. When a professional military service contract is terminated on the grounds provided for in Articles 37 and 38 of this Law (...), or when the term of validity of the professional military service contract expires and is not extended, a serviceman shall be dismissed from office, removed from duties and discharged from professional military service within no more than fourteen calendar days ...

4. With the exception of the servicemen indicated in paragraphs 5 and 6 of this Article, servicemen in professional military service shall be transferred to the reserve on reaching the following age:

1) those with a rank lower than senior sergeant [corporal falls into this category]: 40 years;
2) those with a rank between senior sergeant and non-commissioned officer (inclusive): 50 years;

3) those with the rank of lieutenant: 35 years;

4) those with the rank of senior lieutenant: 40 years;

5) those with the rank of captain: 43 years;

6) those with the rank of major: 46 years ...

5. Military chaplains may, regardless of their current rank, be transferred to the reserve upon reaching the age of 60, and the chief military chaplain of the Army on reaching 65.

6. Servicemen in professional military service who hold military specialist positions on the list of military specialities as approved by an order of the Minister of Defence may be transferred to the reserve on reaching the age of 55.”

Article 46. Extension of service for servicemen who have reached the age of transfer from professional military service to the reserve

„In some cases, the Minister of Defence may, taking into account the needs of the national defence system, extend professional military service for a serviceman up to the rank of colonel who has reached the age specified in paragraph 4 of Article 45 of this Law under a fixed-term contract on professional military service for a period not exceeding two years (or two extensions for a period of one year each). Upon the expiry of this term, the Minister of Defence may further extend professional military service for a period not exceeding two years under such a contract, solely for officers up to the rank of major.”

Article 48. Investigations of military service disputes

„1. In accordance with procedures established by the Minister of Defence, disputes regarding acceptance for military service, removal from duty, transfer to other duty assignments, promotion, and extension of contracts, shall be investigated. Decisions may be appealed against through the chain of command up to the Minister of Defence. Courts shall not try these disputes.

2. If a professional or volunteer serviceman believes that his dismissal from military service is unlawful under the procedure and conditions established by the Military Discipline Statute, he may lodge a complaint with a higher commander or official, up to the Minister of Defence. The decision of the Minister of Defence may be appealed against to the administrative court within one month of receipt of the decision or of the announcement thereof.

3. If the court determines that a professional or volunteer serviceman has been dismissed from service not in compliance with the provisions of this Law, the court may reinstate that serviceman in professional or volunteer military service or place him in the temporary personnel reserve of professional military service. The serviceman is to receive back pay for the period of his imposed absence from the service...

4. If an individual is dismissed from professional military service on the basis of the provisions of this Law but the court decides that the dismissal procedure established by legal acts has not been complied with, the court may not reinstate the serviceman into professional military service or change the basis of his dismissal; however, the court may award monetary compensation equal to up to three months' pay to the professional military serviceman, irrespective of whether or not severance pay was due and has been paid."

Article 52. Military ranks

„1. Military ranks are established in order to regulate relations among servicemen and indicate their skill and service experience. Only active military and reserve servicemen registered in the National Defence System and those retired from service may have military ranks.

2. Servicemen are grouped by ranks as:

- 1) soldiers;
- 2) sergeants;
- 3) senior non-commissioned officers;
- 4) junior officers;
- 5) senior officers;
- 6) generals and admirals."

44. The Law on Administrative Proceedings at the relevant time stipulated:

Article 57. Evidence

„1. Evidence in an administrative case consists of all factual data found admissible by the court which hears the case and on the basis of which the court finds, according to the procedure established by law, that there are circumstances which justify the claims and rebuttals of the parties to the proceedings and other circumstances which are relevant to the fair disposition of the case, or that there are no such circumstances.

2. The above-mentioned factual data shall be established with the help of the following means: statements by the parties to the proceedings and their representatives, witness statements, explanations by specialists and expert opinions, physical evidence, documents, and other written, audio and visual evidence ...

4. The evidence shall be submitted by the parties to the proceedings and other participants in the proceedings. As necessary, the court may advise the said persons to submit additional evidence, or at the request of these persons or on its own initiative compel the production of the required documents and demand that officials provide explanations ...

6. No evidence shall have for the court any value set in advance. The court shall assess the evidence disinterestedly on the basis of scrupulous, comprehensive and objective review of all the circumstances of the case on the basis of the law as well as the criteria of justice and reasonableness.”

Article 81. Comprehensive and objective review of the circumstances of the case

„When hearing administrative cases judges must take an active part in the examination of evidence, establish all the circumstances relevant to the case, and make a comprehensive and objective review of the said circumstances.”

45. The list of military specialities (karinių specialybių sąrašas), approved by the Minister of Defence on 13 June 2005, mentions „lawyer” as a speciality open to an „officer”. A prerequisite for the lawyer speciality is legal education to university level.

46. As regards domestic case-law concerning the practical application of Article 38 § 1 (7) of LMS, on 22 December 2003 in case no. A11-1275/2003 the Supreme Administrative Court pointed out that that provision linked the age reached by the serviceman with the requirement for his professional military service contract to be terminated and for him to be discharged from professional military service. The court also indicated that dismissal of a serviceman because of his age was linked simply to age, and not to the rescission of the military service contract (karinio atleidimas iš pareigų dėl nustatyto amžiaus siejamas su pačiu nustatyto amžiaus suėjimo faktu, o ne su sutarties nutraukimo faktu).

47. On 12 March 2004 in case no. A2-262-04 the Supreme Administrative Court confirmed its position that Article 38 § 1 (7) of LMS was the ground for discharge of a soldier from military service because of age reached, notwithstanding whether or not his military service contract had expired yet.

The law

I. Alleged violation of article 6 § 1 of the convention

48. The applicant complained that the administrative court proceedings concerning his dismissal from the army were unfair. He relied on Article 6 § 1 of the Convention, which reads as follows:

„In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

A. The parties’ submissions

1. The applicant

49. The applicant argued that the Vilnius Regional Administrative Court and the Supreme Administrative Court, in their decisions of 23 October 2006 and 22 May 2007 (see paragraphs 22, 27 and 28), had been partial and unfair, in that they had ignored his procedural rights. Given that the essence of his case concerned allegedly unlawful dismissal from military service on a discriminatory basis, to fully present his case the applicant had asked both courts to order his battalion’s commanding officers to provide evidence, which he was not able to obtain on his own, concerning four soldiers who had served in the same military unit. If reaching a particular age was an absolute ground for dismissal from military service, those four servicemen should already have been dismissed on the same basis, that is, their age, moreover this should have happened much earlier than when the applicant was dismissed. However, the courts simply ignored the request, without even giving reasons for refusal. The applicant thus considered that there

was a breach of his right to adduce evidence which was essential to a fair hearing of his claims of discrimination for his views and ideas.

2. The Government

50. The Government firstly submitted that Article 6 § 1 of the Convention was not applicable to the proceedings regarding the applicant's discharge from professional military service. Those proceedings concerned neither the traditional category of civil servants, nor did they concern an ordinary labour dispute relating to salaries, allowances or similar entitlements. The Government thus took the view that the nature of the responsibilities of those serving in the armed forces of the State involved a special bond of trust and loyalty and exercise of public power. The State therefore enjoyed a wide margin of appreciation regarding discharge from the military and extension of military service contracts. It followed that disputes between the State and its military personnel concerning the application of the provisions of the domestic law on discharge from professional military service should not be regarded as „civil” within the meaning of Article 6 § 1, and thus should fall outside the Court's competence *ratione materiae*.

As an alternative argument for incompatibility of the case under the above provision, the Government noted that Article 48 § 1 of LMS excluded disputes relating to extension of professional military service contracts from the domestic courts' jurisdiction. The instant case was, on the one hand, related to allegedly unlawful discharge. However, on the other hand, it could also be regarded as related to the issue of extension of a contract.

51. Provided the Court found that Article 6 § 1 of the Convention applied to the administrative court proceedings at issue, the Government were fully confident that those proceedings had been fair. They noted that it was for the domestic courts to assess the evidence before them, as well as the relevance of given items of evidence, and that Article 6 of the Convention „does not lay down any rule on the admissibility of evidence as such” (they referred to *Barberà, Messegue and Jabardo v. Spain*, 6 December 1988, § 68, Series A no. 146, and *Galstyan v. Armenia*, no. 26986/03, § 77, 15 November 2007). That being so, even though the Lithuanian courts had the authority to compel items of evidence to be produced in court under Article 57 § 4 of the Law on Administrative Proceedings, those courts were primarily entitled to decide on the relevance of certain evidence in the context of the applicant's case. Similarly, under Article 57 § 6 of that Law, no evidence had any value set in advance. The Government considered that having objectively and scrupulously examined the applicant's case in the light of the relevant legal provisions, the domestic courts had found that the prerequisite conditions necessary to discharge a serviceman because of age, established in Articles 38 § 1 (7) and 45 § 4 (2) of LMS had been met. Once the administrative courts had established the lawfulness of the legal grounds for the applicant's discharge, other circumstances, including those related to the military service of four other military officers relied on by the applicant, were no longer relevant to the examination of his case. Lastly, the Government maintained that the servicemen and servicewomen the applicant had described in his request as not discharged despite their age, actually served within the system of national defence in compliance with the provisions of domestic law, including the provisions establishing the allowed age (see paragraphs 36-40 above).

B. The Court's assessment

1. Admissibility

52. The Court first turns to the Government's objection to the effect that Article 6 § 1 of the Convention is not applicable to the applicant's complaint about his dismissal from professional military service. It reiterates however that in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant, or in this case as a professional soldier, to exclude the protection embodied in Article 6, two conditions must be fulfilled. It will be for the respondent Government to demonstrate, firstly, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (see *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007 II; also see *Igor Vasilchenko v. Russia*, no. 6571/04, § 46, 3 February 2011).

53. In the present case it is common ground that the applicant served in the army on the basis of a professional military service contract concluded between him and the Ministry of Defence on 5 August 2002. It is true that the first paragraph of Article 48 of LMS excludes disputes regarding acceptance for military service or extension of military service contracts. Nevertheless, the Court observes that the applicant's dispute concerned his dismissal from professional military service. Nor was the matter of his dispute the extension of his contract. In fact, he had claimed the right, „civil” in its nature, to continue professional military service until the expiry of the contract he already had. The dispute was genuine and serious and the result of the proceedings was directly decisive for the right in question. It is also plain from the facts that, as regards his dismissal from the military, the applicant had access to administrative courts under national law, in accordance with the second paragraph Article 48 of LMS. Accordingly, Article 6 § 1 is applicable.

54. The Court further considers that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. Therefore, it should be declared admissible.

2. Merits

55. The applicant was dissatisfied that when examining his complaint of dismissal from the military service on discriminatory grounds the administrative courts had based their decisions merely on an interpretation of Article 38 § 1 (7) of LMS and had ignored his repeated requests for access to the military files of four specific servicemen. On this point the Court observes that one of the elements of a fair hearing within the meaning of Article 6 § 1 is the right to adversarial proceedings; each party must in principle have the opportunity to make known any evidence needed for his claims to succeed (see *Mantovanelli v. France*, 18 March 1997, § 33, Reports of Judgments and Decisions 1997 II). Moreover, the requirement of „equality of arms” implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see, for instance, *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274; *Helle v. Finland*, 19 December 1997, §§ 53-54, Reports of Judgments and Decisions 1997 VIII). The Court has also held that the effect of Article 6 § 1 is, inter alia, to place the „tribunal” under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of

whether they are relevant to its decision (see *Kraska v. Switzerland*, 19 April 1993, § 30, Series A no. 254 B, and *Van de Hurk v. the Netherlands*, 19 April 1994, § 59, Series A no. 288).

56. That being so, the Court nonetheless reiterates that it is not within its province to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them (see, among many other authorities, *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247 B). Furthermore, while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law. Nevertheless, the question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Galstyan*, cited above, § 77).

57. Turning to the circumstances of the instant case, the Court recalls that in his written complaint to the Vilnius Regional Administrative Court the applicant argued that he had been discriminated against because of his opinions. He submitted that at least four other servicemen in his military unit had been allowed to continue serving after reaching the age of discharge but before the expiry of their contracts. For the applicant, given that an allegation of discrimination was at the heart of his complaint, a comparison between his situation and that of those four other servicemen was indispensable for him to be able to present his grievance (see paragraph 19 above). The applicant reiterated that request on appeal, arguing that the lower court's refusal to order his military commander to provide evidence related to the service history of those four servicemen had deprived him of the opportunity to show that he was the only soldier to whom the law had been applied so rigorously (see paragraph 25 above).

58. The Court further observes that, despite those arguments by the applicant, the administrative courts limited their examination to the letter of LMS, having examined whether his discharge from the army had been justified under Article 38 § 7 (1) thereof, namely because of his age. The Government have acknowledged that once those courts had established as lawful the applicant's discharge from professional military service on that ground, other circumstances, including those related to the alleged discrimination and those other four servicemen, were not relevant to the examination of the applicant's case. The Court cannot subscribe to this view. Whilst being careful not to substitute its own assessment of the facts and evidence for that of the domestic courts, the Court nevertheless considers that the discrimination aspect of the applicant's complaint should have been addressed by the administrative courts. Although those courts were not bound in law to order the applicant's commanding officer to produce the evidence he requested and which the applicant was unable to obtain himself, and notwithstanding whether the military service history of those four servicemen would have proved the applicant's point, that evidence was likely to have a preponderant influence on the assessment of the applicant's complaint by those courts (see *Mantovanelli*, cited above, § 36). The Court strikes a note of caution in observing that Article 6 § 1 of the Convention obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument (see *Van de Hurk*, cited above, § 61). However, given that the applicant had given full details of which specific evidence he wished to obtain and why it was directly relevant to his complaint and to his wish to influence the courts' decision, and considering that at that stage of the proceedings it was not yet clear whether that

evidence was necessary in order to determine the applicant's discrimination claim, the Court finds that the administrative courts' failure to assist the applicant in obtaining evidence and to give it consideration, or at least to provide reasons why this was not necessary, denied the applicant essential means to argue his case. In disputes concerning civil rights, such as the present one, such a limited review cannot be considered to be an effective judicial review under Article 6 § 1 (see, *mutatis mutandis*, *K.M.C. v. Hungary*, no. 19554/11, § 35, 10 July 2012, and the case-law cited therein).

59. In the light of the above, the Court holds that the proceedings before the administrative courts (see paragraphs 19-28 above), taken as a whole, did not satisfy the requirements of a fair and public hearing within the meaning of Article 6 § 1. There has accordingly been a breach of that provision.

II. Alleged violation of Article 10 of the Convention, taken alone or in conjunction with Article 14

60. Relying on Articles 10 and 14 of the Convention, the applicant complained that he was dismissed from the military for his opinions and in a discriminatory manner.

61. The relevant parts of Article 10 read as follows:

„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...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

62. Article 14 of the Convention reads as follows:

„The enjoyment of the rights and freedoms set forth in [the] 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.”

A. The parties' submissions

1. The applicant

63. The applicant complained of a violation of his right to freedom of speech. He maintained that as a serviceman he had been responsible for many years for giving legal advice to the Commander of the Armed Forces on the question of statutory penalties. His opinion on the statutory penalties the army imposed on soldiers often did not correspond to that of others at the Ministry of Defence. The applicant stated that he had made many proposals with the aim of improving, *inter alia*, servicemen's procedural rights when the new Army Disciplinary Statute was being drafted. As his superiors and the State President had failed to take his proposals into account, the applicant had contacted the *Kauno Diena* daily and expressed his ideas to the press. The internal inquiry into his communication with the daily had been started the same day. Even though that inquiry had later been discontinued by the authorities' acknowledgement that the applicant had not violated military discipline, the appeal to *Kauno Diena* and to the State

President had had direct consequences for the applicant. He was dismissed from professional military service before the expiry of his contract. Most importantly, in order to avoid accusations of interference with freedom of expression, the authorities at the Ministry of Defence chose to dismiss him not on the ground that he had appealed to the media, but formally, on the basis of Article 38 § 1 (7) of LMS, thus leaving no official trace of injustice. If that provision had been applied to others in the same manner, several hundred soldiers would have been dismissed from service, however none of them except the applicant had suffered the same consequences. The example of four soldiers (R.L., V.S., J.S. and M.I.) he relied on during the administrative court proceedings confirmed that there were more soldiers who should have been dismissed from the army, but that this was not done. Lastly, he also challenged as misleading the two examples provided by the Government (see paragraphs 41 and 42 above).

64. The applicant then asserted that the interference with his right to express his opinions had no basis in Lithuanian law. Nor was it justified by any of the grounds listed in Article 10 § 2 of the Convention, because his publicly expressed criticism over the staff reform had not disclosed any classified information or posed a threat to the State's security. The applicant's dismissal from professional military service was nothing other than revenge for his public appeal in the media.

2. The Government

65. The Government maintained at the outset that there had been no interference with the applicant's right to freedom of expression, because he had not experienced any negative effects in relation to the publication in *Kauno Diena*. They noted that the majority of cases examined by the Court under Article 10 of the Convention had involved either final criminal convictions or civil decisions against a person. In the instant case, however, the internal inquiry into the applicant's actions regarding the publication, although opened on the very same day as that of the publication, 1 March 2006, was discontinued on 22 March 2006 on the ground that the acts committed by him did not constitute a disciplinary violation of the Statute of Military Discipline because he had acted within the bounds of his right to impart information, in accordance with Article 21 § 3 of LMS. A mere internal inquiry into the applicant's actions, which in itself did not create any consequences for the applicant, therefore could not be considered as constituting an interference with the right to freedom of expression. Even if the Court assumed that the mere opening of an internal inquiry could be seen as interference, the Government considered that it was authorised by, *inter alia*, Article 36 of LMS which establishes certain restrictions associated with military service, including public expression of disagreement with policies being implemented by the Government of a democratically elected State. The opening of the internal inquiry into the applicant's acts pursued a legitimate aim „in the interests of national security” and „for the prevention of disorder”. Lastly, the inquiry was „necessary” and proportionate, given that the applicant's criticism of the new Statute of Military Discipline had been expressed publicly and not internally (see *E.S. v. Germany* (dec.), no. 23576/94, 29 November 1995; and *Grigoriades v. Greece*, 25 November 1997, § 47, Reports of Judgments and Decisions 1997 VII).

66. The Government also considered that, even if the Court did see the applicant's discharge from the military as an interference with the exercise of his right to freedom of expression, that presumption would be incorrect. The Government categorically rejected

any such considerations, because the applicant had been discharged in accordance with the domestic law for having reached retirement age, and not because of the criticism he had expressed in the article in *Kauno Diena*. The Government also pointed out that in the domestic proceedings concerning his discharge the applicant had raised his allegation of discrimination only very briefly, while in essence disputing the interpretation and application of Article 38 § 1 (7) of LMS. However, having regard to the interpretation of that provision by the administrative courts in the applicant's case as well as in other relevant case-law, the applicant was discharged from the military in accordance with the domestic law, and there was no ground to allege any possible discrimination in any regard.

67. The Government further questioned the applicant's argument that four other servicemen (R.L., V.S., J.Š. and M.I.) had had to be discharged from the military because of their age but had nevertheless continued to serve. On this point the Government referred to the domestic law and facts relating to the service history of those four officers (see paragraphs 36-40 above). In this connection the Government also saw it as relevant to provide the Court with two examples which in their view were analogous to the applicant's case, where the servicemen were discharged from professional military service on the ground of their age, despite the fact that they still had valid military service contracts (see paragraphs 41 and 42 above). Finally, the administrative courts had been consistent in interpreting Article 38 § 1 (7) of LMS as having the effect that once a serviceman reached the age of retirement this was an imperative ground to terminate his military service (see paragraphs 46 and 47 above). Above all, that interpretation also remained consistent in the applicant's case.

B. The Court's assessment

1. Admissibility

68. The Court considers that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring them inadmissible has been established. They should therefore be declared admissible.

2. Merits

69. The Court has held on numerous occasions that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to „information” or „ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness, without which there is no „democratic society”. Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions, which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see *Vogt v. Germany*, 26 September 1995, § 52, Series A no. 323, with further references).

70. Article 10 does not stop at the gates of army barracks. It applies to military personnel as it does to all other persons within the jurisdiction of the Contracting States. Nevertheless, as the Court has previously indicated, it must be open to the State to impose restrictions on freedom of expression where there is a real threat to military discipline, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining it. It is not, however, open to the national authorities to rely on such rules for the purpose of frustrating the expression of opinions, even if these are directed against the army as an institution (see *Grigoriades*,

cited above, § 45; see also *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, § 36, Series A no. 302).

71. The Government argued that there had been no violation of the applicant's right to freedom of expression, because he had not experienced any negative effects from the publication in the *Kauno Diena* newspaper. On this point the Court indeed notes that the internal inquiry into the applicant's actions regarding that publication and his address to the State President were terminated on the ground that the applicant had acted within the boundaries of Article 21 § 3 of LMS, and no disciplinary sanction was imposed on him (see paragraph 14 above). The Court therefore considers that, as far as it concerns that inquiry in itself, in view of its outcome the applicant cannot claim to be a victim of a violation of the Convention. However, it will nevertheless take that investigation into account when examining the main issue in the present case, namely whether the applicant's military service was terminated solely as a result of the legal necessity to discharge him because of his age, as the Government claimed, or whether, as the applicant argued, he was dismissed because of his opinions.

72. The Court finds that although the sequence of events – the applicant's critical remarks in *Kauno Diena*, the internal investigation into his actions, a disciplinary penalty for failing to give proper legal advice (see paragraph 15 above) and, eventually, the decision to start the procedure to discharge him because of his age – assessed in its entirety, might appear to corroborate the applicant's version of events, this does not allow the Court to conclude with certainty that the applicant was punished for his opinions and that termination of his military service was not simply the result of a proper application of Article 38 § 1 (7) of LMS (see, by converse implication, *Ivanova v. Bulgaria*, no. 52435/99, § 83, 12 April 2007). In previous cases the Court has indeed found that disciplinary sanction for public remarks (see *E.S. v. Germany*, cited above), or even prosecution and conviction of the soldier (see *Grigoriades*, cited above, §§ 47-48) had been a clear indication of an interference with the right to impart ideas, at variance with Article 10 of the Convention. However, in the instant case such tangible indications are absent. Unlike the facts in *Ivanova* (§ 84), no new requirements for the applicant's post, which he did not meet, had been introduced after the publication in *Kauno Diena*. None of the applicant's superiors in the army had made public statements to the effect that he should be discharged from the military because of his opinions (see, in contrast and *mutatis mutandis*, *Kosiek v. Germany*, 28 August 1986, § 37, Series A no. 105). It is also noteworthy that the obligation to terminate contracts when the retirement age is reached had been confirmed by the Supreme Administrative Court in its earlier rulings of 2003 and 2004 (see paragraphs 46 and 47 above), which preceded the applicant's case by some three years and thus illustrate the established practice of the domestic courts.

73. The applicant also sought support for his claim of discrimination from the military service record of four soldiers of his unit – R.L., V.S., J.Š. and M.I. He considered that those four soldiers had been in a similar situation to that of himself, but had been treated differently. On this point the Court reiterates that Article 14 of the Convention affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see *Hoffmann v. Austria*, 23 June 1993, § 31, Series A no. 255 C, and *Vojnity v. Hungary*, no. 29617/07, § 29, 12 February 2013). However, having given due consideration to the facts (paragraphs 36-40 above), it is the Court's opinion that such an assertion is not substantiated. The professional military service

histories of those four servicemen show that each of them was entitled to serve until the expiry of their contracts, despite the fact that they had reached retirement age, because, unlike the applicant, they had military specialist codes. Conversely, as the applicant himself acknowledged during the court proceedings, at the time of his discharge from the army he had no such status (see paragraphs 19 and 26 above).

74. In view of the above, the Court finds that the applicant's discharge from professional military service once he had reached retirement age did not amount to interference with the exercise of his right to freedom of expression (see *Harabin v. Slovakia*, no. 58688/11, § 153, 20 November 2012). There has therefore been no violation of Article 10 of the Convention, taken alone or in conjunction with Article 14 thereof.

III. Other alleged violations of the Convention

75. Citing Articles 5, 13 and Article 1 of Protocol No. 1 to the Convention, the applicant lastly brought forward a series of grievances which may be summarised as a complaint that his discharge from the army breached the principles of liberty and security, caused him pecuniary damage, and was not examined by the Ombudsman.

76. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. Application of Article 41 of the Convention

77. Article 41 of the Convention provides:

„If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

78. The applicant claimed that after his dismissal from the military service before the expiry of his contract he suffered pecuniary damage, because he received a lower pension. He asked that the Government be ordered to review the sums paid for his pension and compensate the unpaid part, or, alternatively, to award him 100,000 euros (EUR). The applicant further claimed that he had received no salary, food allowance or housing allowance, which all together were equal to 85,137 Lithuanian litai (LTL, approximately EUR 24,650). Lastly, the applicant claimed EUR 100,000 for non-pecuniary damage he had suffered because of the internal inquiry into his contacts with the media and the courts' unwillingness to defend his human rights.

79. The Government considered that the pecuniary and non-pecuniary damage claimed by the applicant were absolutely unsubstantiated and excessive.

80. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 6,000 in compensation for non-pecuniary damage.

B. Costs and expenses

81. The applicant made no claims for costs and expenses. The Court therefore makes no award under this head.

C. Default interest

82. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court unanimously

1. Declares the applicant's complaints under Articles 6, 10 and 14 admissible and the rest of the application inadmissible;
2. Holds that there has been a violation of Article 6 § 1 of the Convention;
3. Holds that there has been no violation of Article 10 of the Convention, taken alone or in conjunction with 14 thereof;
4. Holds
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Lithuanian litai at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. Dismisses the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith

Registrar

Guido Raimondi

President

FOURTH SECTION
CASE OF SOARES v. PORTUGAL

(Application no. 79972/12)

JUDGMENT
STRASBOURG

21 June 2016

FINAL

21/09/2016

In the case of Soares v. Portugal,
The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

András Sajó, President,
Vincent A. De Gaetano,
Boštjan M. Zupančič,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer, judges,

and Marialena Tsirli, Section Registrar,

Having deliberated in private on 24 May 2016,

Delivers the following judgment, which was adopted on that date:

Procedure

1. The case originated in an application (no. 79972/12) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention”) by a Portuguese national, Mr António Alberto Mota Soares („the applicant”), on 4 December 2012.
2. The applicant was represented by Mr R. Mendes, a lawyer practising in Coimbra. The Portuguese Government („the Government”) were represented by their Agent, Mrs M. F. da Graça Carvalho, Deputy Attorney General.
3. The applicant complained, under Article 10 of the Convention, that his right to freedom of expression had been breached on account of his criminal conviction for reporting an alleged misuse of public money.
4. On 23 June 2015 the application was communicated to the Government.

The facts

I. The circumstances of the case

5. The applicant was born in 1957 and lives in Góis.
 - A. Background of the proceedings
6. At the relevant time, the applicant was a chief corporal in the National Republican Guard (Guarda Nacional Republicana), working at the Góis territorial post.
7. On 7 November 2009 the applicant sent an email to the General Inspectorate of Internal Administration (Inspecção-Geral da Administração Interna) on the subject „Suspected misuse of money”, in which he made reference to an alleged misuse of money

by Commander M.C. of the Arganil territorial post in accordance with what he had heard in a conversation with colleagues at the Arganil territorial post. He asked the General Inspectorate to investigate the alleged facts, stating as follows:

„In the month of December 2008 the Coimbra [National Republican Guard] Territorial Group distributed money to the territorial posts of its area of command ... for the Christmas dinner ...

The only members of the military [in Arganil] who attended the dinner were the Commander of the post and Corporal M.; the total amount of money that had been given to the military from the [territorial] post [to pay for the dinner] was paid to the restaurant's manager in exchange for a receipt ... it seems that the Commander has since then been going with his family to the mentioned restaurant, where the cost of his meals is deducted from the money that was not spent [on the above dinner] ... Note: I have just become aware of this matter through rumours within the military of the mentioned post, who claim that they have not reported the situation for fear of reprisals, and because of that [fear of reprisals] I ask you for secrecy during the investigation because I am also a member of the military ...”

8. On an unknown date the General Inspectorate of Internal Administration forwarded the email to the General Command of the National Republican Guard (Comando Geral da Guarda Nacional Republicana) and to the Lousã public prosecutor's office (Ministério Público).

9. On an unknown date the Lousã public prosecutor's office opened an investigation into the applicant's allegations. On 28 February 2010 the Lousã public prosecutor's office discontinued the proceedings on the grounds that, following investigations by the criminal investigation police (Policia Judiciária), it had found no evidence of the criminal offence denounced by the applicant.

10. The General Inspectorate of Internal Administration also conducted an inquiry into the applicant's allegations. On 21 June 2010 the inquiry was discontinued.

11. The General Command of the National Republican Guard also started an internal inquiry into the allegations on 4 December 2009. On 23 December 2009 Commander M.C. was heard in that respect. He then became aware of the email of 7 November 2009 and its content. On 9 February 2010 the inquiry was converted into disciplinary proceedings against Commander M.C. at the request of the official in charge of the inquiry on the grounds that the management of the cafeteria of the Arganil territorial post showed signs of lack of transparency which required further investigation.

12. On 30 July 2010 the disciplinary proceedings against Commander M.C. were discontinued on the grounds that there was insufficient evidence to take disciplinary action. The decision to discontinue the disciplinary proceedings also took into account the decision of the Lousã public prosecutor's office to discontinue the criminal proceedings against Commander M.C.

B. Criminal proceedings against the applicant

13. On 22 April 2010 Commander M.C. lodged a criminal complaint before the Lousã public prosecutor's office, accusing the applicant of defamation. He alleged that the applicant's email had disseminated injurious statements about him.

14. On 7 July 2011 the public prosecutor brought charges (acusação) against the applicant for aggravated defamation on the grounds that the statements made in his email called

into question Commander M.C.'s honesty, honour and professional reputation, which the applicant had intentionally attacked.

15. On 21 September 2011 Commander M.C. lodged a claim for damages against the applicant in the amount of 5,000 euros (EUR).

16. In a judgment of 17 January 2012 the Lousã Criminal Court convicted the applicant of aggravated defamation and sentenced him to eighty day-fines, totalling EUR 720 euros. The applicant was also ordered to pay EUR 1,000 in damages to Commander M.C. The Court described its findings of fact and the manner in which it had assessed the evidence, and held as follows:

„... since the existence of such a rumor has not been proved in any way, the court is fully convinced that the defendant's intention was to undermine the honour of the offended party, once he knew that this was just a rumour and that therefore he was making an allegation that was not true.

The allegation made in the defendant's complaint, by its content, put into question the offended party's honesty, honour and professional reputation as commander of a territorial post of the National Republican Guard – which was well known to the defendant.

The defendant has therefore acted in a free, voluntary and conscious way, with the achieved aim of attacking the offended party's honour and personal and professional reputation.

The disclosure of irregular situations has to be seen as a duty (as the performance of an obligation) when it falls within the competence and responsibilities of the whistle-blower and when it does not go beyond the facts which were effectively observed. [Whistle-blowing] cannot be used as a basis to cast suspicion which cannot be supported by any factual element.

In the instant case, the defendant accuses the offended party of facts which are objectively dishonorable without having any evidence to substantiate them. Indeed, by submitting that the offended party and his family were using the existing credit to have dinner at the mentioned restaurant, the defendant knew that he was accusing the offended party of a dishonorable deed, all the more because he knew that the offended party was in charge of the National Republican Guard's Arganil territorial post. He further knew that the allegation was inconsistent with the truth and that he could easily have clarified its authenticity with the restaurant owner.

Through such conduct, the defendant acted of his own free will and in the knowledge that ... [his actions] were not allowed.”

17. On an unknown date the applicant appealed against the judgment to the Coimbra Court of Appeal. In particular, he contested the established facts as, in his opinion, he had not acted with the intention of attacking Commander M.C.'s honour and reputation.

18. On 19 September 2012 the Coimbra Court of Appeal upheld the first-instance court's decision. It considered that there were no reasons to change the facts established by the first-instance court and, as such, no reasons to reach a different conclusion with regard to the applicant's guilt and conviction.

C. Disciplinary proceedings against the applicant

19. On 3 August 2011 the General Command of the National Republican Guard instituted disciplinary proceedings against the applicant.

20. On 20 February 2013 the official in charge of the inquiry within the disciplinary proceedings against the applicant submitted a final report in which he concluded that the applicant had breached his duties. The relevant passage of the report reads as follows:

„... the defendant breached the duty of loyalty... as being on duty and being part of the Góis Territorial Post in the quality of Deputy Commander of the Post, he did not inform his hierarchical superiors, in clear disregard of the functional hierarchy principles, of the acts allegedly committed ...”

21. In the report it was also taken into account that the applicant’s allegations had been investigated by different authorities, all of which had discontinued their investigations. Additionally, it had regard to the fact that the applicant had been convicted by the domestic courts in the criminal proceedings against him. The report further analysed the existence of a fine which Commander M.C. had imposed on the applicant before the latter had sent the impugned email. However, the official responsible for the report considered that fact to be innocuous and irrelevant.

22. On 27 March 2013, at the request of the official responsible for the disciplinary proceedings, the General Command imposed on the applicant a disciplinary sanction consisting of suspension from duty for six days, its enforcement being suspended for a period of twelve months.

23. According to the material submitted in the case file, it seems that the applicant did not lodge an appeal against the disciplinary sanction with the Minister of Home Affairs.

II. Relevant domestic law

A. Relevant provisions of the Portuguese Criminal Code

Article 180 § 1

„Anyone who, when addressing a third party, accuses another, even if the accusation takes the form of a suspicion, or makes a judgment that casts a slur on the honour or reputation of the other, even when reproducing the accusation or judgment, shall be liable on conviction to a maximum of six months’ imprisonment or 240 day-fines.”

24. Article 180 § 4 provides that if the reporting agent has not complied with his duty to verify the information he has disclosed, he will not be deemed to have acted in good faith.

25. Article 184 of the Criminal Code increases the sentence by half if the victim is an agent of authority.

B. Relevant provision of the Statute of the Military Service of the National Republican Guard (Law-Decree no. 297/2009 of 27 November)

Article 16

Other duties

„1. Servicemen of the National Republican Guard also have the following duties:

(i) to refrain from making statements which could affect the cohesion and reputation of the [National Republican] Guard or which are in breach of the hierarchic and disciplinary principles ...”

C. Regulation on the disciplinary conduct of the National Republican Guard (Law no. 145/99 of 1 September 1999, in force at the material time)

Article 10

Duty of loyalty

„2. In the exercise of their duty of loyalty, servicemen of the Guard shall:

- (a) truthfully inform their hierarchical superiors about any issue related to their job, when requested to do so;
- (b) when the issue does not fall within their competences, communicate immediately to their hierarchical superiors any service-related faults or acts on the part of other servicemen which are against express legal provisions
- (c) in submitting a petition, request, complaint or any other similar written statement, ensure that it is sent to the competent authority and always through the hierarchical channels ...”

The law

Alleged violation of Article 10 of the Convention

26. The applicant complained under Articles 6, 7, 10 and 13 of the Convention that his conviction by the domestic courts for aggravated defamation had infringed his right to freedom of expression. The Court, being master of the characterisation to be given in law to the facts of the case, will consider this complaint solely under Article 10 of the Convention, which reads as follows:

„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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

28. The applicant submitted that his right to freedom of expression had been breached in that he had been convicted for denouncing an alleged misuse of public money within the National Republican Guard.

29. He maintained that he had acted in good faith in disclosing the suspicion of alleged misuse of money, as the veracity of the rumour could only be proved by means of an investigation. The only reason for his disclosure was to have the alleged facts investigated.

30. The applicant acknowledged that he could have used the existing channels within the internal hierarchy [of the National Republican Guard] to make the disclosure. However, he contended that the disclosure was made by email to an authority which had competence within the Ministry of Home Affairs to investigate the alleged facts. As such, he had complied with the chain of command. He concluded that demanding that the disclosure of information be made only within the hierarchy of the General Republican Guard would limit freedom of expression.

31. Referring to the case of *Heinisch v. Germany* (no. 28274/08, ECHR 2011), the Government contended that the protection of the workplace afforded by Article 10 of the Convention could be guaranteed only when a disclosure of information was made in good faith and favoured the internal channels of disclosure. They considered that the allegations reported by the applicant could have been an issue of public interest given that the alleged misuse of public money was at stake. However, the applicant's allegations were based on a rumour which was none the less investigated by three different entities and not proved.

32. The Government submitted that the duty of loyalty was particularly binding on servicemen in the National Republican Guard, who were subject to special duties arising from the disciplinary regulations to which they were bound.

33. The applicant was subject to a chain of command and should have disclosed the allegations to his hierarchical superiors – namely, the commander of his territorial post or the commander of the territorial unit; there were internal channels of disclosure which, where used, had been proven effective.

34. Lastly, the Government submitted that past events – the fact that the applicant had allegedly been fined by Commander M.C. and that there was a poor relationship between Commander M.C. and the servicemen working at the Arganil territorial post – could lead to suspicion that the applicant may have felt some animosity towards Commander M.C.

2. The Court's assessment

35. It has not been disputed that the applicant's conviction by the domestic courts for aggravated defamation constituted interference by the public authorities with his right to freedom of expression under the first paragraph of Article 10 of the Convention. Such interference will constitute a breach of Article 10 unless it was „prescribed by law”, pursued one or more legitimate aims under paragraph 2 and was „necessary in a democratic society” for the achievement of those aims.

36. The Court observes that the applicant's conviction was based on Article 180 § 1 and Article 184 of the Portuguese Criminal Code, and pursued the legitimate aim of protecting Commander M.C.'s reputation.

37. It remains to be ascertained whether the interference was „necessary” in a democratic society.

(a) The principles established by the Court's case-law

38. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to „information” or „ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no „democratic society”. As set forth in Article 10 § 2, this freedom is subject to exceptions, which must however be constructed strictly, and the need for any restrictions must be established convincingly. The general principles for assessing the necessity of an interference with the exercise of freedom of expression have been summarised recently in *Pentikäinen v. Finland* ([GC], no. 11882/10, § 87, ECHR 2015) and *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016).

39. The Court further reiterates that the protection of Article 10 of the Convention extends to the workplace in general and to the public service in particular (see, among other authorities, *Guja v. Moldova* [GC], no. 14277/04, § 52, 12 February 2008).

40. Furthermore, under the Court's case-law, the signaling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja*, cited above, § 72 and *Heinisch v. Germany*, no. 28274/08, § 63, 21 July 2011).

41. The Court is at the same time mindful that employees owe to their employer a duty of loyalty, reserve and discretion. In the light of these duties, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public. In assessing whether the restriction on freedom of expression was proportionate, the Court must therefore take into account whether the applicant had any other effective means of remedying the wrongdoing which he or she intended to uncover (see *Guja*, cited above, § 73; *Heinisch*, cited above, § 65).

42. The Court also reiterates that when it is called upon to rule on a conflict between two rights that are equally protected by the Convention, it must weight up the interests at stake. The State is called upon to guarantee both rights and if the protection of one leads to an interference with the other, to choose adequate means to make this interference proportionate to the aim pursued. In this context, the Court accepts that the State has a wide margin of appreciation (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 123, ECHR 2014).

43. In the present case, the Court must ascertain whether the domestic authorities struck a fair balance between, on the one hand, the applicant's right to freedom of expression under Article 10 and, on the other, the protection of reputation of Commander M.C., a right which, as an aspect of private life, is protected by Article 8 of the Convention (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 91, 10 November 2015). In this regard, the Court's task is not to take the place of the national courts but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their discretionary powers (see *Stankiewicz and Others v. Poland* (no. 2), no. 48053/11, § 36, 3 November 2015).

(b) Application of the above principles to the present case

44. Turning to the facts of the present case, the Court agrees with the Government's position that the applicant's allegations could concern an important question of public interest: the possible misuse of public money by a civil servant (see paragraph 31 above). It notes that the defamation claim originated in the applicant's correspondence with the General Inspectorate of Internal Administration, which forwarded the applicant's email to the General Command of the National Republican Guard and to the Lousã public prosecutor's office. In his email, the applicant alleged that Commander M.C. had been misusing public money. He claimed that his intention was to prompt an investigation into the allegations, which he admitted were based on a rumour (see paragraph 7 above).

45. In order to assess the justification of a statement which is in issue, a distinction must be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the requirement to prove the truth of a value judgment is

impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, among other authorities, *Pinto Pinheiro Marques v. Portugal*, no. 26671/09, § 43, 22 January 2015).

46. The Court considers that, in the present case, the applicant's allegations constituted a statement of fact. For a civil servant working for a law-enforcement authority, the accusation that he misused public money was a particularly serious one capable of affecting his reputation and, to an even larger extent, that of the National Republican Guard. Thus, even if the applicant had intended to prompt an investigation, he had to have a factual basis on which to base his allegations. However, he based his allegations on a mere rumour and had no evidence to support them. The Court therefore concludes that the domestic courts' finding that he had not acted „in good faith” (see paragraph 9 above) was proportional and justified. In this regard, the situation differs from that examined by the Court in the case *Bargão and Domingos Correia v. Portugal* (nos. 53579/09 and 53582/09), where the applicants believed that the information disclosed was true and were able to prove it (*ibid.*, §§ 41-42).

47. In fact, the applicant, knowing that his allegations were based on a rumour, made no attempt to verify their authenticity before reporting them to the General Inspectorate of Internal Administration. The Court notes that the applicant had no evidence to support his allegations and that none of the three different entities which investigated them were able to establish their veracity. Additionally, none of the three entities established that Commander M.C. had committed a criminal act or had acted unlawfully (see paragraphs 9-12 above). The Court further notes that, in the criminal proceedings against the applicant, the domestic courts were not able to establish the existence of the rumour which had given rise to the applicant's allegations (see paragraph 16 above).

48. As to the addressee of the disclosure, the Court observes that the applicant was aware that he had internal channels within the hierarchy of the National Republican Guard to which he could have reported the rumour – namely, as pointed out by the Government, the commander of his territorial post or the commander of the territorial unit (see paragraph 33 above). Notwithstanding that, he did not convincingly explain why he did not disclose the allegations to a superior. By not doing so, the applicant did not comply with the chain of command and denied his hierarchical superior the opportunity to investigate the veracity of the allegations.

49. In the light of the above, the instant case has therefore to be distinguished from cases of justified information of the superior or „whistle-blowing”, an action warranting special protection under Article 10 of the Convention (compare with *Guja and Heinisch*, both cited above).

50. Finally, as regards the „proportionality” of the sanction, the Court notes that the applicant was ordered to pay a fine of 80 day-fines (EUR 720) plus EUR 1,000 in damages to Commander M.C. Those amounts appear very moderate taking into account the gravity of the applicant's allegations, the harm caused to M.C. and the fact that the applicable maximum fine was 360 days-fine according to Articles 180 and 184 of the Criminal Code. Therefore, the sanction imposed cannot be found disproportionate.

51. Having regard to the above considerations, the Court considers that the reasons advanced by the domestic courts in support of their decisions were „relevant and sufficient” and that the interference was not disproportionate to the legitimate aim pursued, namely, the protection of reputation. The interference could thus be reasonably

considered „necessary in a democratic society” within the meaning of paragraph 2 of Article 10 of the Convention. Therefore, the Court sees no serious reason to substitute its own assessment for that of the domestic courts, which examined the question at issue with care and in line with the principles laid down by the Court’s case-law.

52. Accordingly, there has been no violation of Article 10 of the Convention.

For these reasons, the Court, unanimously,

1. Declares the application admissible;
2. Holds that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 21 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli

Registrar

András Sajó

President

