



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

COURT (PLENARY)

CASE OF GLASENAPP v. GERMANY

(Application no. 9228/80)

JUDGMENT

STRASBOURG

28 August 1986

In the Glasenapp case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. J. CREMONA,
Mr. G. WIARDA,
Mr. Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 and 25 October 1985, and on 24 April and 26 and 27 June 1986,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 July 1984, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 9228/80) against the Federal Republic of Germany lodged

* Note by the Registrar: The case is numbered 4/1984/76/120. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

with the Commission on 7 November 1980 by a national of that State, Mrs. Julia Glasenapp.

The applicant was originally designated by the initial G, but subsequently consented to the disclosure of her identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mrs. Glasenapp stated that she wished to take part in the proceedings pending before the Court and appointed the lawyer who would represent her (Rule 30).

3. On 20 July 1984, the President of the Court decided that in the interests of the proper administration of justice this case and the Kosiek case should be heard by the same Chamber (Rule 21 para. 6).

The Chamber of seven judges to be constituted included, as *ex officio* members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the then President of the Court (Rule 21 para. 3 (b)). On 2 August 1984, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. D. Evrigenis, Mr. F. Gölcüklü, Mr. F. Matscher and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). He consulted, through the Registrar, the Agent of the German Government ("the Government"), the Delegate of the Commission and the applicant's lawyer as to the need for a written procedure. On 6 September 1984, he directed that the Agent and the applicant's lawyer should each have until 31 January 1985 to file a memorial and that the Delegate should be entitled to reply in writing within two months of the date on which the Registrar transmitted to him the last-filed memorial (Rule 37 para. 1). On 23 January 1985, he extended the first of these time-limits until 21 March.

5. On 28 September 1984, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

6. In a letter received on 19 December 1984, a United Kingdom non-governmental organisation, the Prison Officers' Association, sought leave under Rule 37 para. 2 to submit written comments. On 25 January 1985, the President decided not to give leave.

7. The applicant's memorial - drafted in German, with the leave of the President (Rule 27 para. 3) - was lodged at the registry on 19 March 1985 and the Government's memorial on 22 March. The Delegate filed a memorial on 24 May.

8. On 12 June, after consulting, through the Deputy Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, Mr. Ryssdal, who had become President of the Court on 30 May 1985, directed that the oral proceedings should open on 21 October 1985 (Rule 38). On 5 July, he granted the members of the Government's delegation leave to speak in German (Rule 27 para. 2).

9. On 14 October, the applicant submitted her claims under Article 50 (art. 50) of the Convention.

10. The hearing was held in public in the Human Rights Building, Strasbourg, on 21 and 22 October. Immediately before it opened the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin,

Federal Ministry of Justice,

Mr. H. GOLSONG, Legal consultant,

Mr. R. KRAFFT, Ministerialrat,

Federal Ministry of the Interior,

Mr. H. KREUZBERG, Administrative Court Judge,

Federal Ministry of Justice,

Mr. W. MŁODZIAN, Oberregierungsrat,

Ministry of Culture and Education of the Land of North

Rhine-Westphalia,

*Agent,
Counsel,*

Advisers;

- for the Commission

Mr. C. A. NØRGAARD, President,

Delegate;

- for the applicant

Mr. M. CHUCHOŁOWSKI, Rechtsanwalt,

Counsel.

The Court heard addresses by Mrs. Maier and Mr. Golsong for the Government, by Mr. Nørgaard for the Commission and by Mr. Chucholowski for the applicant, as well as their replies to its questions.

11. On various dates from 28 June to 16 December 1985, the Commission, the Government and the applicant filed several documents either at the Court's request or of their own motion.

On 16 December, the Government's Agent replied in writing, as authorised by the President, to the questions put to her by the Court at the hearing.

AS TO THE FACTS

12. Mrs. Julia Glasenapp, who is a German national born in 1947, lives in Cologne. After studying at the Berlin Academy of Fine Art for six years,

she there sat her first State examination to become a secondary-school teacher in July 1972 (Erste Staatsprüfung für das Amt des Studienrats).

In September 1972, she applied to the Land of North Rhine-Westphalia to be admitted to do her teaching practice (Vorbereitungsdienst für das Lehramt). The appropriate authority (Schulkollegium) in the office of the Regierungspräsident (Chief Administrative Officer) in Münster appointed her as a trainee teacher (Studienreferendarin) with effect from 1 December 1972. This gave her the status of temporary civil servant (Beamter auf Widerruf) in the Land education service.

On making her application she had signed the following statement:

"I am aware that an appointment to a post in the civil service must be annulled if it is brought about by 'wilful deceit' (arglistige Täuschung). I am aware that it is taken for granted (als selbstverständlich vorausgesetzt) that candidates for civil-service posts shall not belong or give assistance to any organisation whose activities are directed against the constitutional order or tend to disrupt or imperil the free democratic constitutional system (freiheitliche demokratische Grundordnung), and I am aware that, if any of the activities mentioned ... is not disclosed, the appointment must be regarded as having been brought about by 'wilful deceit'."

13. In accordance with her wishes, she was appointed to the Goethe High School (Gymnasium) in Dortmund where she completed her training on 31 July 1974. She had passed her second State examination on 24 May and thus had become qualified to teach art and handicrafts (Kunsterziehung und Werken).

14. On 7 May 1974, Mrs. Glasenapp had applied to the appropriate authority in Münster for appointment as a secondary-school teacher (Studienrätin zur Anstellung), with the status of probationary civil servant (Beamtenverhältnis auf Probe), as soon as her teaching practice was over. When making her application she had signed the following declaration:

"On the basis of the briefing I have been given (Belehrung) I hereby expressly declare that I accept the principles of the free democratic constitutional system within the meaning of the Basic Law and that I am prepared at all times and by my every word and deed to bear witness to (bekennen) and to uphold <this> system.

I expressly state that I do not support any action (Bestrebungen) directed against <this> system ... or any of its fundamental principles, and in particular that I am not a member of an organisation actively opposed to those principles.

I am aware that any breach of these duties of service and loyalty (Dienst- und Treuepflichten) would lead to my dismissal (Entfernung aus dem Dienst)."

The information preceding the declaration on the signed form explained, among other things, the meaning of the expression "free democratic constitutional system" as defined by the Federal Constitutional Court (Bundesverfassungsgericht) in its judgments of 23 October 1952 and 17 August 1956. On this point the document stated:

"The fundamental principles of this system include:

respect for human rights as defined in the Basic Law, in particular the right to life and free development of the personality;

the sovereignty of the people, the separation of powers, the Government's responsibility to Parliament;

the principle that administrative acts are governed by the rule of law, the independence of the courts, the plurality of political parties;

equal opportunity for all political parties;

the right to found an opposition and to contend with those in power, in accordance with the Constitution."

The form added that it was incompatible with the duties of public servants (*Angehörige des öffentlichen Dienstes*) to take part in any actions directed against these principles, whether as members of an organisation or otherwise. The next two passages read as follows:

"Candidates for civil-service posts may not be appointed if they support activities inimical to the Constitution (*verfassungs- feindlich*). Disciplinary proceedings for dismissal will be brought against civil servants guilty of such a breach of duty."

15. The legal basis of the declaration signed by the applicant was the North Rhine-Westphalia Civil Servants Act in its version of 6 May 1970. Section 6(1)(2) provides that in order to be appointed a civil servant a candidate must give the guarantee that at all times he or she will uphold the free democratic constitutional system within the meaning of the Basic Law. By virtue of section 55(2), a civil servant must undertake to bear witness to and to uphold this system by his every word and deed.

The wording of the declaration - which the relevant Land authorities required every candidate for a post in the civil service to make - corresponded to the directives that the Minister of the Interior in Düsseldorf had drawn up on 21 November 1972 for the implementation of the decree on the employment of extremists in the civil service ("*Ministerpräsidenten-Beschluss*"); these directives were later amended, on 28 April 1976 and 28 January 1980.

The decree on the employment of extremists had been adopted on 28 January 1972 by the Federal Chancellor and the Prime Ministers of the Länder to ensure uniformity of administrative practice in the matter; it reiterates civil servants' legal duty of loyalty to the free democratic constitutional system and in paragraph 2 provides (*Official Gazette - Ministerialblatt - of the Land of North Rhine-Westphalia, 1972, p. 342*):

"2. Every case must be examined and decided according to its particular circumstances. Regard must be had in the process to the following principles:

2.1. Candidates

2.1.1. A candidate who engages in activities inimical to the Constitution shall not be appointed to the civil service.

2.1.2. If a candidate belongs to an organisation engaging in activities inimical to the Constitution, this fact shall cast doubt on whether he is prepared at all times to uphold the free democratic constitutional system. As a rule this doubt shall be sufficient reason for not appointing him.

2.2. Civil servants

If a civil servant <fails to comply with his duty of loyalty to the Constitution> the appointing authority shall draw the necessary conclusions on the basis of the particular facts established in his case and consider whether grounds exist for dismissing him from the service (Entfernung aus dem Dienst)."

German civil servants' special duty of loyalty to the State and its Constitution has been confirmed and clarified by the Federal Constitutional Court, in particular in a judgment on 22 May 1975 (Entscheidungen des Bundesverfassungsgerichts, vol. 39, pp. 334-391).

16. In accordance with the directives of 21 November 1972, the appropriate authority in Münster asked the Land Minister of the Interior on 11 June 1974 for information about possible extremist activities of Mrs. Glasenapp.

On 3 September, the Ministry replied as follows:

"From 1970 to 1972, G lived in Berlin in a commune (Kommune) to which members of Maoist Communist organisations belonged.

At least four members of the Anti-Imperialist League were living in this commune at the time.

The League is a Maoist Communist organisation close to the KPD (German Communist Party). The telephone number of one of the other members of the commune was the 'contact phone' for the Zentrale der Westberliner Oberschüler (Centre for West Berlin High School Pupils), a Communist organisation run by the Communist Students' Association (KSV).

Mrs. Glasenapp did not attract attention by activities of her own."

17. A copy of this letter was handed to Mrs. Glasenapp on 19 September 1974 during an interview to which she had been called by the relevant Land authority to discuss the possibility of her appointment as a secondary-school teacher. She stated that she would reply in writing after consulting her lawyer.

The latter indicated Mrs. Glasenapp's position in a letter of 20 September. In his opinion, the Ministry of the Interior obviously did not know of any circumstances which made Mrs. Glasenapp's attitude towards the free democratic system clear. In her application for appointment she had declared that she was prepared at all times to uphold this system. She was very anxious to point out that she had not lived in a commune in Berlin;

between 1970 and 1972 she had lived in a house in which she occupied one of thirteen rooms as a sub-tenant. Her lawyer added that it scarcely accorded with the principles of a State based on the rule of law to use information relating to third persons who had lived in the same building to the detriment of his client. He called on the authority concerned to take a decision within a week, failing which he would take the matter to court.

18. On the same day, the applicant invited representatives of the Dortmund daily newspapers to attend a press conference on 24 September 1974; she wanted to publicise the delay in appointing her and the fact that it was due to doubts not connected directly with her activities but with the place where she had lived. According to her lawyer, the press conference was intended to promote Mrs. Glasenapp's case (Nachdruck verleihen) by putting the matter before a large section of the public and showing how the decree on the employment of extremists in the civil service was being applied.

19. On 23 September 1974, the relevant authority received the written observations of Mrs. Glasenapp's lawyer. It considered that any doubts about her had been cleared up, and it accordingly decided to appoint her as a secondary-school teacher with the status of probationary civil servant at the Städtisches Aufbaugymnasium (High School) in Dortmund-Brünninghausen. She was immediately notified of this decision.

The very next day, Mrs. Glasenapp took up her duties and was handed her letter of appointment (Ernennungsurkunde).

20. Still on 24 September 1974, the applicant distributed in the school copies of a "personal statement" and of the Minister of the Interior's letter of 3 September (see paragraph 16 above); during the morning break she discussed with pupils outside the school the decree on the employment of extremists (see paragraph 15 above). Then, accompanied by her lawyer, she held the press conference she had arranged (see paragraph 18 above).

21. The next day, the Westfälische Rundschau, one of the daily newspapers which reported the press conference, published an article which included the following passage:

"The art teacher (Kunsterzieherin), who left no doubt that she was neither a member of the KPD nor a Communist sympathiser, added, 'This clearly demonstrates the need for individual political vigilance to counter the erosion of fundamental democratic rights'."

The first part of this sentence prompted Mrs. Glasenapp to write to the paper. As it did not publish her letter she communicated the text to the Teachers' and Research Workers' Trade Union (Gewerkschaft für Erziehung und Wissenschaft) and to a number of organisations interested in "the rules prohibiting appointments" ("Berufsverbote"). The letter was published on 2 October by the journal of the KPD, the Rote Fahne, at the end of a short article. It read as follows:

"With reference to the article 'Living under one roof with Communists' published in the Westfälische Rundschau of 25 September 1974, your sub-editor Hans Leyendecker is using the delay in my appointment as a secondary-school teacher (Studienrätin zur Anstellung) - which was due to unlawful action on the part of the Ministry of the Interior - to indulge in anti-communist propaganda. He interprets my statement 'I am not a member of the KPD' as meaning that I dissociate myself from the KPD or from its policies. That is not the case. On the contrary, I pointed out in the discussion that I support the KPD's policy, e.g. in the north of the city (Nordstadt).

I am a member of a committee to set up an international people's kindergarten. Responsibility for the situation of the children in the north of the city lies with <the> Hoesch <firm> and the Social Democrat city council. The KPD is in fact the only party concerned about the problem.

In my opinion, teachers who take an interest in these matters are better teachers than the NPD <German National Democratic Party> candidates in the regional elections (at the Wickede school) or the teachers who beat the children (as we have been told is the case by pupils in the Oesterholz school)."

Although it bears the same name, this KPD (which broke up in 1980) was not the same organisation as the former German Communist Party, which was banned by the Federal Constitutional Court on 17 August 1956 (Entscheidungen des Bundesverfassungsgerichts, vol. 5, pp. 85-393; see also the Commission's decision of 20 July 1957 on the admissibility of application no. 250/57, Yearbook of the Convention, vol. 1, pp. 222-225). Nor should it be confused with the present German Communist Party, the DKP (Deutsche Kommunistische Partei).

22. In October, the Land Ministry of Education (Kultusministerium) and the responsible authority in Münster, on learning of this letter and other publications in the local press relating to Mrs. Glasenapp, considered whether she should be dismissed for "wilful deceit" under section 12(1)(1) of the Land Civil Servants Act. To give her an opportunity to put her case (section 13(2) of the same Act), the responsible authority invited her to an interview, which took place on 4 November.

According to the minutes of the interview, the authority told the applicant that the letter published in the Rote Fahne had caused it to consider whether her appointment as a probationary civil servant had been obtained by "wilful deceit" and whether she should be dismissed.

She replied that she had written the letter after consulting her lawyer (who was present at the meeting), with whom she had not, however, discussed the exact wording. She added:

"I protest against the fact that this letter is being made the subject of an official interview (Dienstgespräch). I believe that the right to publish such a letter is one of my fundamental democratic rights. I have formed this opinion after getting detailed advice from several lawyers. On this matter I should therefore like to confine myself to saying the following:

I maintain the declaration in which I said that I was ready at all times to uphold the free democratic system, and likewise my written declaration of 20 September 1974 reaffirming that. I am in no doubt that I have so far complied with this undertaking in my conduct. By writing the letter to the Westfälische Rundschau I wished to point out that the KPD's work in the north of Dortmund was well conceived and that I therefore supported it (people's kindergarten). It was not my intention to pass any judgment on the KPD's programme and I cannot do so now. I am not a member of the KPD.

I firmly believe that my criticisms of the Minister of the Interior had no connection with my official duties (Dienstverhältnis) and I therefore do not consider that I have committed a breach of my obligations as a civil servant ..."

In answer to a question, Mrs. Glasenapp said she had not sent her letter to the Rote Fahne but distributed it to relatives and acquaintances (Bekannte).

23. As it was of the view that the applicant had not made her attitude towards the KPD's policies sufficiently clear, the Land authority wrote to her on 6 November 1974 as follows:

"So long as you do not certify in writing that you do not support the KPD's policies we must assume that you do not agree to abide by your declarations of 7 May and 20 September 1974."

The authority pointed out that the KPD, according to its own statements published in the Rote Fahne, was trying to overthrow the political system in the Federal Republic of Germany by force and that to support its policies was contrary to the duties of a civil servant.

The applicant's lawyer replied on 22 November that, in view of her rights protected by the Basic Law, his client did not consider it necessary to state her views; referring to her written declarations and the interview on 4 November, she requested that a final decision should be taken now, without any investigation of her political opinions; she did not intend to answer such questions.

24. On 4 December 1974, the authority recommended to the Land Ministry of Education that Mrs. Glasenapp should be dismissed for "wilful deceit". The Ministry having signified its agreement on 8 December, the authority dismissed her on 20 January 1975.

In its decision, the authority observed that, contrary to her declarations of 7 May and 20 September 1974, the applicant was not prepared to approve or uphold by her conduct the principles of the free democratic constitutional system. As appeared from her letter in the Rote Fahne, Mrs. Glasenapp supported activities directed against that system and its fundamental principles. She had represented herself as favouring a party which worked against that system and whose policy was aimed at overthrowing it in the Federal Republic of Germany by force. She had not explained sufficiently clearly the contradictions between the two aforementioned declarations and her letter, which she had not retracted. She had refused to state that she did not support the KPD's policies. It had therefore to be conceded that she did

not intend to abide by her former declarations. She had thus deceived the authority and improperly obtained her appointment, which must therefore be revoked by virtue of section 12(1)(1) of the Civil Servants Act.

By virtue of section 14(1) of the Act, the legal effect of the authority's decision, once it became final, would be that the applicant had at no time enjoyed the status of probationary civil servant (*das Beamtenverhältnis von Anfang an nicht bestanden*).

25. Mrs. Glasenapp lodged an objection (*Widerspruch*) on 24 January 1975; she filed her grounds on 28 January. She considered that the decision of 20 January was unlawful because the conditions of section 12(1)(1) of the Land Civil Servants Act were not satisfied. Her letter, published as it was after her declarations of loyalty and after her appointment, might possibly lead one to suppose that she was no longer prepared to uphold the free democratic system, but not that she had deliberately deceived the authority in May and September 1974. She had protested to the contrary at the interview on 4 November 1974. She had not been able to dissociate herself from the KPD's programme, for the simple reason that she did not know what it was; a responsible person could not be expected to distance herself from the policy of a party whose aims and objectives she did not know. Nor had she declared that she favoured the KPD: her support for the establishment of a kindergarten originally proposed by that party was evidence of her social commitment and not of an attitude of hostility to the Constitution.

26. As her objection had a suspensive effect, she continued to work at the high school. On 30 January 1975, however, the authority ordered the immediate execution of its decision of 20 January (section 80(2) of the Administrative Courts Act (*Verwaltungsgerichtsordnung*)), as it considered that the applicant's behaviour at the school made proper teaching impossible.

On 5 February, Mrs. Glasenapp applied for a stay of execution but the Gelsenkirchen Administrative Court (*Verwaltungsgericht*) refused the application eight days later. She entered an appeal (*Beschwerde*) which the Land Administrative Court of Appeal (*Oberverwaltungsgericht*) dismissed on 16 June 1975.

According to the findings in the judgment, schoolchildren had distributed a tract outside the school on 27 January 1975 describing the applicant as a "victim of the anti-constitutional decree on the employment of extremists in the civil service" and calling on young people to sign a petition for her "reinstatement". At the same time and place, the applicant and a girl pupil had mounted a demonstration with a strip of material covering their mouths, while the girl carried a placard which read: "The submissive civil servant sees nothing, hears nothing and says nothing." Two days later, Mrs. Glasenapp had distributed outside the school a pamphlet issued by a "Committee against the rules prohibiting appointments ...". Furthermore, a

woman and three children had tried to hold a demonstration inside the school in favour of the KPD and the applicant; on being removed, they had continued their demonstration outside the building and, according to the headmaster, the applicant had joined them there. Finally, the Court of Appeal found that during break on 30 January Mrs. Glasenapp had discussed her case with a large number of pupils, about a hundred of whom, accompanied by the applicant, had demanded that the headmaster should discuss the question of their teacher's "suspension" with them.

27. The Land authority rejected her objection on 12 August 1975. It noted in particular that the letter in question could not but be regarded as an expression of support for the KPD. Neither the wording of it nor Mrs. Glasenapp's attitude left any room for believing that she had simply wished to approve an isolated endeavour by the KPD. Ever since her attention had been drawn to the inconsistency between her declarations of 7 May and 20 September 1974 and her open letter, she had refused to certify in writing - as she had been asked to do on 6 November - that she did not support the KPD. When assessing her declaration in favour of this party, it was of little account that the party was running infant classes which might be desirable from the social point of view; the only relevant consideration was that it was pursuing ends which were contrary to the Constitution.

In view of Mrs. Glasenapp's support of the KPD, her declaration of 20 September (whose importance for her appointment she was not unaware of) was false. She had at that time deliberately deceived the authority.

28. On 15 October 1975, the applicant challenged the decisions of 20 January and 12 August before the Gelsenkirchen Administrative Court. Referring to the grounds of her objection (see paragraph 25 above), she denied having deceived the relevant Land authority and declared that she stood by the statements she had made on 4 November 1974. In answer to the charge that she had failed to repudiate the KPD's policies, her reply was that she could not do so because she did not know what they were. She had merely praised its work in setting up a kindergarten in north Dortmund. Furthermore, her involvement in this matter dated from August 1974; she could not therefore be accused of wilfully misleading the authority on 7 May 1974.

On 19 September 1974, she had been questioned about her accommodation in Berlin when she had been studying there; she had not felt under any obligation to give an account of her support for the kindergarten. If she had wished to deceive the authority, she would not have published her letter. As it was, she had thought that under the constitutional order she had a right to carry on and support legitimate and laudable activities, even if they were encouraged by a party which the Government in power deemed to be opposed to the Constitution.

Mrs. Glasenapp supplemented her pleadings on 1 December 1975. She stressed that she did not unreservedly (*bedenkenlos*) support the KPD; she

had merely helped, together with members of that party, to set up a people's kindergarten in Dortmund. She pointed out that she believed she was entitled under the free democratic constitutional system not to make statements without cause. She was willing to answer questions concerning the KPD's practical objectives, but it was unreasonable to expect her to inform herself of the party's aims, then consider whether they were compatible with the Constitution and dissociate herself from them.

29. The Administrative Court dismissed her claim on 29 July 1976, considering that she did not afford the guarantee required by section 6(1)(2) of the Land Civil Servants Act that she would at all times uphold the free democratic constitutional system.

It was undisputed and a matter of common knowledge that the former German Communist Party, the KPD banned by the Federal Constitutional Court, together with the present party of the same name - still tolerated in the Federal Republic, apparently for reasons of foreign policy -, and the other communist groups (whether they followed the Moscow line or not) sought to set up the "dictatorship of the proletariat" or the "dictatorship of the working class". Admittedly, some West European Communist parties had recently abandoned the expression "dictatorship" and proclaimed their attachment to democracy, but experience in Eastern Europe showed that this was merely an electoral tactic. Under the Basic Law and the system in the Federal Republic of Germany, freedom of each individual citizen and of the State was the highest value to be protected. But it did not exist where Communists were in control. A Communist form of government was incompatible with the Basic Law. A candidate for a civil-service post was clearly not upholding the free democratic system within the meaning of the Basic Law if he belonged to a Communist group. If he was not a member of such an organisation or if his membership could not be proved but he worked for it or for similar ends, he did not afford a guarantee that he would uphold the system.

In Mrs. Glasenapp's case, the Land authority concerned had initially reached the conclusion on the basis of her statements on 7 May and 20 September 1974 that she afforded the necessary guarantee. Her refusal to dissociate herself from the aims of Communism, however, proved that she was not willing to subscribe to the principles of the free democratic system and to uphold them. It was not possible at one and the same time to support the aims of Communism and to support the Basic Law: the one precluded the other. The authority was therefore right subsequently to regard the applicant's declaration as an admission of support for Communism and its aims. The applicant had admittedly said that she did not know what the policies of the KPD were, but in view of her level of education and the campaign by a section of the press against the decree on the employment of political extremists in the civil service (see paragraph 15 above), she could not be believed. Nor could the court accept her claim that she had supported

and wished to support the KPD only in order to establish the kindergarten. Her letter in the Rote Fahne on 2 October 1974 gave the clear impression that she was trying to avoid not being thought of as a Communist. In the most characteristic passage - "That is not the case" - she denied that she was dissociating herself from Communism or its policies. There was nothing to suggest that she did not already approve of the aims of Communism at the time she applied for the appointment. By concealing her true opinions she had deliberately deceived the authority, which was therefore bound to dismiss her under section 12(1)(1) of the Land Civil Servants Act.

30. Mrs. Glasenapp appealed against this judgment on 19 August 1976, filing her grounds of appeal on 13 December 1976 and 13 January 1977.

She argued, *inter alia*, that there was no proof that she had given false information or concealed the real facts and thus deceived the relevant Land authority. As required by the Federal Constitutional Court in such cases (judgment of 22 May 1975 - see paragraph 15 above), it was for the appropriate authority to establish that there had been a specific breach of the duty at all times to uphold the free democratic system. In this connection, the expression of a given conviction could not be taken into account so long as it amounted merely to a criticism of the present state of society or sought to change existing legislation by constitutional means. Even if the impugned letter was regarded as evidence of a lack of loyalty to the Constitution, regard should have been had to the fact that the applicant had not engaged in anti-constitutional activities and that her personal conduct left nothing to be desired. The seriousness of her professions of loyalty could therefore not be doubted; nor could her refusal to dissociate herself from the policies of Communism (which were in any case far from clear, even assuming that one could speak of the "policies of Communism") be doubted or be taken for an anti-constitutional activity, because she was not a member of the KPD and not familiar with its policies. She considered that she could and should support what she felt to be a laudable enterprise, irrespective of what a political party said about it, and that she could do so lawfully, even if her opinion on a particular matter was the same as a Communist's. In short, the authority had not established that there had been "wilful deceit".

Moreover, the judgment had contravened various principles in the Codes of Administrative Procedure and Civil Procedure in that it relied exclusively on the terms of the letter without taking into account the further explanation of their meaning given during the proceedings.

Finally, neither the applicant's conduct in connection with the kindergarten project nor her reaction to the articles in the press could be complained of as anti-constitutional; nor could her refusal to dissociate herself from the policy of the KPD warrant that conclusion if the principles adopted by the Federal Constitutional Court were applied.

31. The Land Administrative Court of Appeal dismissed the appeal on 21 April 1978. It held that the authority was right to consider that the

applicant's appointment had been obtained by "wilful deceit". The declarations of 7 May and 20 September 1974 were not true; they were irreconcilable with the content of the letter. Admittedly, the letter referred to the matter of the kindergarten, but the applicant's support for the KPD had not stopped there; on the contrary, she had stated that she supported the party's policies without expressing any reservations.

Such support, however, was incompatible with a profession of loyalty to the free democratic system. That was clear from KPD manifestos and the policy statements of some of its leaders: the KPD rejected the parliamentary system enshrined in the Basic Law; its aim was social revolution and, as an avant-garde working-class organisation, it sought to bring about social revolution by force in order to establish the dictatorship of the proletariat. Its objective, as stated in its programme, was "the march towards the revolutionary fusion of the working class and the people, towards destruction of the capitalist system and exploitation, towards the establishment of the absolute power of the working class, towards socialism and the classless society and towards Communism". As the governing class was not prepared to yield to the advancement of the proletariat, it was necessary "to bring it down by using revolutionary force". The ends and means of the KPD accordingly ran counter to essential principles of the free democratic system: the KPD's first aim was the destruction of the State. It strove to achieve power not by the means afforded by the Constitution but by revolutionary force; the dictatorship of the proletariat, which was its objective, was contrary to the principles of the Basic Law, such as the sovereignty of the people, plurality of political parties, equal opportunity for all political parties and the right to oppose those in power within the limits imposed by the Constitution.

Given the contrast between Mrs. Glasenapp's professions of loyalty and her letter published in the *Rote Fahne*, it had to be supposed that objectively she had been lying in May and September 1974. Her letter, which was written on her own initiative and not under any pressure, indicated her true position, whereas the need to confirm her allegiance to the Constitution in order to secure her appointment could have led her to make a declaration which was "mere lip service" (*Lippenbekenntnis*). Furthermore, the applicant was aware that her statements were untrue. Having regard to her level of education, it could be presumed that she had directed her mind to the effects of her letter, which was addressed to at least a section of the public. It was incomprehensible that after having stated publicly and in writing her agreement with the KPD on two matters, she should have claimed to her employing authority (*Dienstherr*) that she did not know what the KPD's policies were. In this connection, her behaviour at the interview on 4 November 1974 appeared particularly revealing. If, out of over-eagerness or without thinking, she had included statements in her letter which on mature reflection she no longer entirely approved of, she could

easily have rectified the letter. The explanation she offered on this point (see paragraphs 22, 28 and 30 above) was too far removed from the actual wording of her letter. The employing authority was therefore entitled to ask her how she claimed to resolve the conflict; civil servants' duty of political loyalty required them to dissociate themselves unequivocally from groups which attacked, opposed and defamed the State, its lawful institutions and the existing constitutional system.

If Mrs. Glasenapp really was ignorant of the details of the KPD's policies when she wrote her letter, she could have said so. At the same time she could have admitted that she had gone too far in not wishing to dissociate herself from the party and its policies and in supporting the latter; she could, for example, have said that she was in fact merely engaged in supporting the kindergarten venture. Instead of that, she had given the employing authority a reply not calculated to throw light on the position and she had made no further reply to the substance of the letter which the authority sent her on 6 November 1974. The Court of Appeal drew the conclusion that at least the statements of 20 September 1974, which reiterated those of 7 May, had been knowingly false. The applicant was well aware that her declarations of loyalty to the Constitution were of decisive importance for her appointment as a probationary civil servant. Her appeal must therefore be dismissed.

The Court of Appeal refused the applicant leave to apply to the Federal Administrative Court (Bundesverwaltungsgericht) for review on points of law.

32. On 19 June 1978, Mrs. Glasenapp applied to the same Court of Appeal to have the latter decision set aside: she argued that her case raised a question of principle of vital importance for the uniform interpretation and application of the law (Article 132(2)(2) and (3) of the Code of Administrative Procedure). All the decisions in her case had been based on her refusal to dissociate herself from the policy of the KPD. The question was therefore whether it was allowable to draw adverse inferences from such conduct. There were conflicting authorities on the point. Unlike the Court of Appeal, the Augsburg Administrative Court and the Bremen Labour Court of Appeal (Landesarbeitsgericht) - together with most legal writers - considered that it was not permissible to question candidates about their political opinions or their membership of political parties; they inferred therefrom that the relevant authorities could not rely on replies to such questions or on the refusal to reply.

33. When the Court of Appeal found against her on 22 July 1978, Mrs. Glasenapp applied for legal aid to bring an appeal (Beschwerde) in the Federal Administrative Court. That Court refused her application on 11 December 1979 on the grounds that the proposed appeal had insufficient prospects of success. It did not consider it necessary to decide whether the question raised by the applicant involved a matter of principle, because in the instant case it would have been necessary to determine whether a "wilful

deceit" had been practised on the relevant authority. In the circumstances, however, the authority had been entitled to ask Mrs. Glasenapp to clarify her position in relation to the KPD; and the Court of Appeal could regard her negative reaction as evidence that in May 1974 she had knowingly made a false statement whose importance for her appointment could not have escaped her.

34. On 8 January 1980, the applicant lodged a constitutional complaint with the Federal Constitutional Court. She relied on Article 33(2) (right of access to the civil service), Article 12(1) (right to free choice of one's profession), Article 3(3) (non-discrimination) and Article 2(1) (right to free development of the personality) of the Basic Law.

She argued that there was no evidence of "wilful deceit". The decisions complained of were all expressly based on her refusal to distance herself from the policies of the KPD. She had, however, clearly dissociated herself from them by pointing out that by her letter she neither had wished nor could have wished to express support for the KPD generally but only for the opening of a people's kindergarten in north Dortmund. Admittedly, she had not agreed to repudiate the KPD's policies, but that did not justify drawing unfavourable inferences, in particular because the declaration in question had been made six months before her letter. Such a far-reaching obligation to dissociate oneself from a party's policies could not exist. In any case, she had not joined the KPD and accordingly she could not judge its programme and aims.

In its judgment of 22 May 1975 (see paragraph 15 above), the Constitutional Court had held that membership of a party opposed to the Basic Law was merely one relevant factor when it came to considering an application for a civil-service post; the Court required each case to be considered on its merits. However, it was not admissible to question a candidate about his political opinions or his connections with a party, or to use the answers given to such questions. It also appeared from this judgment and a series of decisions by other courts that even the members of a party whose aims were inimical to the Constitution were not required to disapprove of its objectives in their entirety. This principle should apply a fortiori to non-members.

The measure complained of had not taken these considerations into account; in requiring the applicant to disavow the KPD's policies completely, the authority in question had made an absurd demand and had not complied with the principles laid down in the matter by the courts.

35. Sitting as a panel of three judges, the Federal Constitutional Court decided on 14 July 1980 not to entertain the constitutional complaint, on the ground that it had insufficient prospects of success.

In so far as the competent courts had considered that the applicant's behaviour amounted to "wilful deceit", their assessments and conclusions were not arbitrary. The rule that a civil servant's appointment must be

annulled in such a case was not contrary to the principle of equal access to the civil service (Article 33(2) of the Basic Law). Nor had there been a breach of the other rights claimed by the applicant. Admittedly it was forbidden under Article 3(3) of the Basic Law to prejudice a person on account of his political opinions. That, however, did not mean that deliberately deceptive conduct which misled an appointing authority was protected by the Constitution. Nor did the right secured in Article 12(1) of the Basic Law extend to maintaining rights acquired in such a manner.

PROCEEDINGS BEFORE THE COMMISSION

36. Mrs. Glasenapp's application was lodged with the Commission on 7 November 1980. She complained of the revocation of her provisional appointment as a secondary-school teacher, relying on Article 10 of the Convention taken together with Article 14 (art. 14+10).

The Commission declared the application admissible on 16 December 1982. In its report adopted on 11 May 1984 (Article 31) (art. 31), the Commission expressed the opinion, by nine votes to eight, that there had been a breach of Article 10 (art. 10).

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS BY THOSE APPEARING BEFORE THE COURT

37. At the hearing on 22 October 1985, the Government requested the Court

"to find

(i) that it cannot deal with the merits of the case as the application is incompatible with the provisions of the Convention;

alternatively

(ii) that it cannot deal with the merits of the case owing to the failure to exhaust domestic remedies;

also alternatively

(iii) that the Federal Republic of Germany has not violated the European Convention on Human Rights".

The Government had made the same final submissions in their memorial of 22 March 1985, but in a different order.

38. The Delegate of the Commission, at the close of his address on 22 October 1985, requested the Court

"to find whether there has been an interference with the applicant's right under Article 10 para. 1 (art. 10-1) and, if so, whether such interference was justified under Article 10 para. 2 (art. 10-2)".

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

39. The Government pleaded two preliminary objections, namely incompatibility of the application with the provisions of the Convention and non-exhaustion of domestic remedies.

1. Incompatibility with the provisions of the Convention

40. Under the first head, they submitted that Mrs. Glasenapp was claiming a right that was not secured in the Convention. In their view, the present proceedings concerned issues of access to the civil service - in this case a teaching post - and not the right to freedom of expression relied on by the applicant. At the hearing, the Government stated that they could have submitted their arguments in the form of an objection to jurisdiction, as they had done before the Commission, but that because of "the apparent complexity of the case" they were willing for the problem to be looked at in a wider context, including matters going to the merits. They submitted that Article 10 (art. 10) was inapplicable in the instant case.

The Delegate of the Commission considered this argument to be ambiguous: while submitting that the application was incompatible with the provisions of the Convention, the Government in fact recognised that the issue to be decided in the proceedings before the Court was whether Article 10 (art. 10) applied or not. The issue of incompatibility as such had been determined by the Commission in its decision on admissibility, while the question of the applicability of Article 10 (art. 10) fell to be dealt with on the merits of the case.

41. Mrs. Glasenapp complained of dismissal from a secondary-school teaching post - to which she had been appointed in 1974 with the status of probationary civil servant - following the publication of her open letter in the *Rote Fahne* on 2 October 1974 and her refusal to dissociate herself from the aims of the KPD (see paragraphs 21-24 above); she claimed to be the victim of a breach of Article 10 (art. 10) of the Convention.

Such complaints do not fall "clearly outside the provisions of the Convention" (see the judgment of 9 February 1967 in the "Belgian Linguistic" case, Series A no. 5, p. 18). They relate to the interpretation and application of the Convention (Article 45) (art. 45): in order to decide the case, the Court must inquire whether the disputed revocation of appointment amounted to an "interference" with the exercise of the applicant's freedom of expression as protected by Article 10 (art. 10). For the Court, this is a question going to the merits, which it cannot try merely as a preliminary issue (see, *mutatis mutandis*, the aforementioned judgment of 9 February 1967, pp. 18-19; the Airey judgment of 9 October 1979, Series A no. 32, p. 10, para. 18; and the Barthold judgment of 25 March 1985, Series A no. 90, p. 20, para. 41).

2. Exhaustion of domestic remedies

42. In the alternative, the Government contended that Mrs. Glasenapp had not exhausted domestic remedies since she had not alleged an infringement of her freedom of expression, as secured in Article 5 of the Basic Law, either in the administrative courts or before the Federal Constitutional Court. The domestic proceedings, so the Government argued, related solely to the question whether she was entitled to hold a civil-service post. The claim that freedom of expression had been infringed was made for the first time before the Commission.

43. The Government made this submission to the Commission when the question of admissibility was first being considered, and again subsequently; accordingly, they are not estopped from raising it before the Court (see, as the most recent authority, the *de Jong, Baljet and van den Brink* judgment of 22 May 1984, Series A no. 77, p. 18, para. 34).

44. Mrs. Glasenapp, it is true, never relied in the domestic proceedings on either Article 5 of the Basic Law or Article 10 (art. 10) of the Convention, even though the latter is directly applicable in the Federal Republic of Germany. Moreover, as the Government rightly pointed out, all the proceedings focused on the "wilful deceit" alleged to have been committed by the applicant (see paragraphs 22-24 above).

Although Mrs. Glasenapp was necessarily obliged to endeavour to demonstrate the injustice of such a ground since the revocation of her appointment was based on it, she nonetheless insisted throughout on her right to publish the open letter and to refuse to make any statement concerning, among other things, her views on the policies of the KPD (see, for instance, the minutes of the interview on 4 November 1974, paragraph 22 above; the pleadings filed on 15 October and 1 December 1975, paragraph 28 above; and the appeal of 19 June 1978, paragraph 32 above). In the Federal Constitutional Court, she relied on Article 3(3) of the Basic Law, which prohibits among other things any discrimination based on political opinions (see paragraph 34 above).

In substance Mrs. Glasenapp did, therefore, ventilate before the domestic courts the grievance which she has submitted to the Commission and then the Court. She thereby provided the national authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (art. 26), namely of putting right the violations alleged against them (see, *inter alia*, the Guzzardi judgment of 6 November 1980, Series A no. 39, pp. 26-27, para. 72).

45. Section 92 of the Federal Constitutional Court Act admittedly requires complainants to indicate in their constitutional complaints the right they are claiming has been infringed. This rule, however, is not as absolute as the Government maintained. The Constitutional Court has held that it is not necessary to plead the relevant Article of the Basic Law; it is sufficient that the rights alleged to have been disregarded should be apparent from the complainant's submissions (see, for example, the judgments of 13 June 1952, 12 April 1956, 3 October 1957, 15 February 1967 and 10 November 1981, *Entscheidungen des Bundesverfassungsgerichts*, vols. 1, p. 343; 5, p. 1; 7, p. 115; 21, p. 194; and 59, p. 101). In confirmation of a consistent line of case-law, the Constitutional Court even stated on 4 June 1985 that in cases which are declared admissible it will not necessarily confine itself to ruling on the alleged breach, but may also review the compatibility of impugned measures with the Constitution as a whole (judgments of 30 April 1952, 17 December 1953, 26 February 1954, 5 October 1955, 7 May 1957, 25 February 1964, 27 July 1971, 21 September 1976, 25 March 1980, 17 February 1981 and 4 June 1985, *Entscheidungen des Bundesverfassungsgerichts*, vols. 1, p. 271; 3, pp. 73-74, 136 and 333; 4, p. 295; 6, p. 385; 17, p. 258; 31, p. 333; 42, pp. 325-326; 53, p. 390; 57, p. 241; and 70, p. 162).

That the German courts nonetheless did not consider the case from the point of view of freedom of expression may be explained by reference to the leading case decided by the Federal Constitutional Court on 22 May 1975, which established that in the case of civil servants Article 5 of the Basic Law safeguarded the expression of political opinions only in so far as such expression was reconcilable with the duty of allegiance to the Constitution (*Entscheidungen des Bundesverfassungsgerichts*, vol. 39, p. 367). The Government themselves, moreover, construe this constitutional requirement of loyalty as a *lex specialis* in relation to freedom of expression.

46. Accordingly, the objection that domestic remedies were not exhausted cannot be sustained.

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

47. Mrs. Glasenapp contended that the revocation of her appointment contravened Article 10 (art. 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."

The Government contended that this provision was not material in the circumstances; in their submission, the present case concerned the right - not secured in the Convention - of access to a post in the civil service. This contention did not find favour with the Commission.

48. The Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 16 December 1966 provide, respectively, that "everyone has the right of equal access to public service in his country" (Article 21 para. 2) and that "every citizen shall have the right and the opportunity ... to have access, on general terms of equality, to public service in his country" (Article 25). In contrast, neither the European Convention nor any of its Protocols sets forth any such right. Moreover, as the Government rightly pointed out, the signatory States deliberately did not include such a right: the drafting history of Protocols Nos. 4 and 7 (P4, P7) shows this unequivocally. In particular, the initial versions of Protocol No. 7 (P7) contained a provision similar to Article 21 para. 2 of the Universal Declaration and Article 25 of the International Covenant; this clause was subsequently deleted. This is not therefore a chance omission from the European instruments; as the Preamble to the Convention states, they are designed to ensure the collective enforcement of "certain" of the rights stated in the Universal Declaration.

49. While this background makes it clear that the Contracting States did not want to commit themselves to the recognition in the Convention or its Protocols of a right of recruitment to the civil service, it does not follow that in other respects civil servants fall outside the scope of the Convention (see, *mutatis mutandis*, the *Abdulaziz, Cabales and Balkandali* judgment of 28 May 1985, Series A no. 94, pp. 31-32, para. 60). In Articles 1 and 14 (art. 1, art. 14), the Convention stipulates that "everyone within <the> jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I "without discrimination on any ground" (see, *mutatis mutandis*, the *Engel and Others* judgment of 8 June 1976, Series A no. 22, p. 23, para. 54). And Article 11 para. 2 (art. 11-2) in fine, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by "members of the armed forces, of the police or of the administration of the

State", confirms that as a general rule the guarantees in the Convention extend to civil servants (see, *mutatis mutandis*, the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 14, para. 37; the Schmidt and Dahlström judgment of the same date, Series A no. 21, p. 15, para. 33; and the Engel and Others judgment, *loc. cit.*).

50. The status of probationary civil servant that Mrs. Glasenapp had acquired through her appointment as a secondary-school teacher accordingly did not deprive her of the protection afforded by Article 10 (art. 10). This provision is certainly a material one in the present case, but in order to determine whether it was infringed it must first be ascertained whether the disputed measure amounted to an interference with the exercise of freedom of expression - in the form, for example, of a "formality, condition, restriction or penalty" - or whether the measure lay within the sphere of the right of access to the civil service, a right that is not secured in the Convention.

In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation.

51. The annulment of Mrs. Glasenapp's appointment was consequent upon her refusal to dissociate herself from the policies of the KPD following the publication in the *Rote Fahne* on 2 October 1974 of her letter to the *Westfälische Rundschau* (see paragraphs 21-24 above). The intervention of the responsible Land authority was thus prompted by two actions on her part, namely the expression of a particular opinion in her letter and the refusal to express another opinion during the interview proceedings.

52. Under section 6(1)(2) of the Land Civil Servants Act (see paragraph 15 above), the applicant could not become a secondary-school teacher with the status of probationary civil servant unless she gave the guarantee that she would consistently uphold the free democratic constitutional system within the meaning of the Basic Law (see paragraph 14 above). This is one of the personal qualifications required of anyone seeking a post as a civil servant - whether temporary or established - in the Federal Republic of Germany. This requirement applies to recruitment to the civil service, a matter that was deliberately omitted from the Convention, and it cannot in itself be considered incompatible with the Convention. The responsible authority originally considered that the requirement had been fulfilled, since it had decided on 23 September 1974 to appoint the applicant to a secondary-school teaching post (see paragraph 19 above). Subsequently, however, the authority took the aforementioned letter and refusal as indications that at the time of her appointment Mrs. Glasenapp did not in fact satisfy one of the conditions of eligibility laid down in the Act for the post she was seeking. By way of rectifying its original error of judgment, which it ascribed to deceit on the part of the applicant, the authority

accordingly cancelled the appointment with retrospective effect (section 14(1) of the Land Civil Servants Act; see paragraph 24 above); the domestic courts before which proceedings were brought adopted essentially the same approach (see paragraphs 29 and 31 above). It is not for the European Court to review the correctness of their findings.

53. It follows from the foregoing that access to the civil service lies at the heart of the issue submitted to the Court. In refusing Mrs. Glasenapp such access, the Land authority took account of her opinions and attitude merely in order to satisfy itself as to whether she possessed one of the necessary personal qualifications for the post in question.

That being so, there has been no interference with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1).

FOR THESE REASONS, THE COURT

Holds by sixteen votes to one that there has been no breach of Article 10 (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 August 1986.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

There are annexed to the present judgment:

- in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, a concurring opinion of Mr. Cremona, a joint concurring opinion of Mrs. Bindschedler-Robert, Mr. Pinheiro Farinha, Mr. Pettiti, Mr. Walsh, Mr. Russo and Mr. Bernhardt and a partly dissenting opinion of Mr. Spielmann;

- a declaration by Mr. Pettiti.

R. R.
M.-A. E.

CONCURRING OPINION OF JUDGE CREMONA

While agreeing with the finding of no violation in the judgment, I am unable to agree with the essential reasoning behind it.

The applicant was dismissed from a civil service post which she held in a probationary capacity. The legal fiction of a retrospective cancellation of her appointment cannot alter this fact. Now the crucial question is: why was she dismissed? And here I agree with what is stated in paragraph 51 of the judgment: the intervention of the responsible Land authority was in fact prompted by two actions on the applicant's part, namely the expression of a particular opinion and the subsequent refusal to express another one. Essentially everything revolves around the applicant's letter published in the *Rote Fahne*. The net result was that she lost her job because of her political opinions, thus suffering a serious prejudice.

This in my view discloses an interference with freedom of expression. The majority, on the other hand, taking the view that access to the civil service lies at the heart of the issue, fail to see any such interference because, in their view, in dismissing the applicant the Land authority took account of her opinions and attitude merely in order to satisfy itself as to whether she possessed one of the necessary personal qualifications for the post in question.

But the fact remains that the essential basis of that decision, which indeed resulted in the applicant's dismissal, was undoubtedly the holding and expression of certain opinions. To say, as is done in the judgment, that in dismissing the applicant the relevant authority merely took account of such opinions is an understatement. Indeed, the whole decision was based on them.

In this case, therefore, as in a picture, civil service status provides no more than the general background, whereas the dominant feature in the foreground is a prejudice suffered because of the holding and expression of opinions.

This to my mind brings the case squarely under Article 10 para. 1 (art. 10-1) of the Convention.

Having said that, I would add briefly that in my view the interference in question was justified under paragraph 2 of that Article (art. 10-2) in that, on the established facts, it met the requirements of that paragraph, with the consequence that there was no violation of that Article (art. 10).

JOINT CONCURRING OPINION OF JUDGES
BINDSCHEDLER-ROBERT, PINHEIRO FARINHA, PETTITI,
WALSH, RUSSO AND BERNHARDT*(Translation)*

We held with the majority that there had been no violation of Article 10 (art. 10) because, in our view, Article 10 (art. 10) is not applicable in the instant case.

As is set out in this judgment, neither the Convention nor any of its Protocols expressly recognises a right of access to the civil service, unlike the 1948 Universal Declaration of Human Rights (Article 21 para. 2) and the 1966 International Covenant on Civil and Political Rights (Article 25(c)).

The reason why the Contracting States did not want the right of access to the civil service to be secured in the Convention or its Protocols (and it must be stressed that this was no chance omission but a deliberate one) lies in the great difficulty of bringing before an international court the problem of recruitment and the arrangements for selection and access, which by their very nature differ considerably in Council of Europe member States according to national tradition and the system governing the civil service.

This does not preclude the possibility that Article 10 (art. 10) might apply even to the civil service where all freedom of expression was de jure or de facto non-existent under domestic law.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN

(Translation)

1. My opinion is divided into four parts:

- concurring opinion,
- diverging opinion,
- dissenting opinion,
- final remarks.

I. Concurring opinion as to the applicability of Article 10 (art. 10)

2. I agree with the majority of the Court when it states in paragraph 49 of its judgment:

- "it does not follow <from this background> that in other respects civil servants fall outside the scope of the Convention"; and

- "Article 11 para. 2 (art. 11-2) in fine, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by 'members of the armed forces, of the police or of the administration of the State', confirms that as a general rule the guarantees in the Convention extend to civil servants".

3. The present judgment could, however, have brought out more clearly the principle that even in the case of access to the civil service, Article 10 (art. 10) of the Convention obviously may apply.

4. In this way the Court would have made its interpretation clearer.

5. This would have served as a reminder that, in the Court's view, pluralism, tolerance and broadmindedness are the best guarantees of survival for a true democratic State, which can only be strong when it is democratic.

6. The Court pointed this out in its Handyside judgment in the following terms:

"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued." (judgment of 7 December 1976, Series A no. 24, p. 23, para. 49)

II. Diverging opinion

A. In general

7. The Glasenapp case brings to mind a case which arose in Luxembourg in 1934.

It may seem surprising that one should be mentioning a 1934 decision in 1986.

There is no cause for surprise, however, particularly not as the Government of the Federal Republic of Germany themselves cite the Weimar Republic - a period earlier than 1934 - to justify, at least partly, their "Radikalenerlass".

8. The decision taken by the Government of Luxembourg in 1934 - at a time, then, when the Star of David had already been introduced in Germany and when the first concentration camp, at Dachau, was already operating full time to silence those who exercised the rights which are today enshrined in Articles 9 and 10 (art. 9, art. 10) of the Convention - deserves to be mentioned.

9. It is all the more worthy of mention as there are points of curious similarity between it and the Glasenapp case, as if History was refusing not to repeat itself.

The case was as follows.

10. On 2 July 1934, the Luxemburger Wort informed its readers that with effect from that same day two teachers, J. Kill and D. Urbany, had been dismissed on account of their being members of the Luxembourg Communist Party (which was not a prohibited one).

11. In its edition of 7 July 1934, the aforementioned journal commented on the decision as follows:

"Two dismissals

...

The Government's arguments are well-known and can be briefly summarised: the Education Act requires primary-school teachers to impart to children a knowledge of the Christian, civic and social virtues.

It also requires them to avoid, even when off duty, anything which may discredit them or offend social conventions. As sections 22 and 43 of the Education Act are quite categorical on this, the Government were right to hold that it is impossible for a Communist teacher to be able to comply.

One clarification is called for. For children to be given an education which is Christian - in the fullest sense of the word -, civic and social, it is not enough not to teach exactly the opposite in schools, i.e. Communism; it is essential to present the Christian and civic order to children as an ideal. This really does not mean that the

GLASENAPP v. GERMANY JUGDMENT
PARTLY DISSENTING OPINION OF JUDGE SPIELMANN

current system is the best possible one, but in order to comply with the Education Act, i.e. in order for a teacher to accomplish his or her duty, it is essential to teach the children Christian and civic values. Any teacher who does not do so is not following the spirit of the Act in his or her teaching.

...

That is why this dismissal has absolutely nothing to do with the Constitution, and the fuss being made about a breach of the Constitution is wholly without foundation. As regards the reasons, nothing could be clearer. The Constitution only lays down general rules for the legislation which governs the various spheres of life and which is accordingly of necessity more specific and restrictive. In other words, the law defines and even, quite often, interprets the general meaning of the Constitution. This is the case with the Education Act. Article 24 of the Constitution may well secure freedom of opinion, but the Education Act lays down how it is to be applied in educational matters, while stipulating that primary-school teachers shall give children a positive Christian and civic education and not merely that they should not be opposed to the Christian and civic order. The Federation of Primary-School Teachers itself recently interpreted the Act in this way - the same Federation that has already inveighed against disciplinary education and which the Communists are expecting to endorse their protests again.

If there was the slightest violation of the Constitution, it would be the Education Act that was at fault and not the Government decree. This is not the case, however, given that until now the Education Act has been seen as ideal in teaching and educational matters, at least by those who today are complaining of its application to the letter.

They would be entitled to be indignant if the Act did not mention Christian and civic virtues. That is annoying for them, but happily for us it is still the case. The question is therefore whether our Education Act conforms to Article 24 of the Constitution and not whether it has been properly applied, since that is beyond doubt.

...

We shall calmly wait and see. We wonder merely whether the Government are bound to suffer this senseless campaign against their decree. Above all, do they have to allow even pupils to be incited by leaflets to rebel against them? We only regret that the Socialists have joined this cause, but we are not surprised, and we note with the Tageblatt and Arbeiterstimme that the first step towards a united front has been taken. But we revolt at the arrogance of those newspapers which, once again, are protesting in the name of the whole people and are talking about indignation having swept the whole country, when 80 per cent of the population feel the dismissal has had a liberating effect and it has been applauded everywhere. Nor are Catholic parents the only ones to refuse to entrust their children to Communists.

...."

12. As pointed out above (9), this case and the Glasenapp case have features in common.

There is one common feature in particular which is worth emphasising.

In both cases the main criteria which the relevant authorities took as a basis was that of an obligation to perform something, which was difficult for those affected to discharge - or, at least, difficult to prove.

How, in fact, is a primary-school teacher, who is responsible for teaching children to read and write, to prove that he or she has always "presented the Christian and civic order as an ideal"? (It should be noted that by this time, religious instruction was already the responsibility of the clergy.)

How can a drawing teacher, such as Mrs. Glasenapp, whose main task is to teach the art of drawing to young pupils, prove that she has "constantly upheld the free democratic system"?

B. Application of Article 10 (art. 10) in the present case

13. In paragraph 50 of its judgment, the Court states that "the status of probationary civil servant that Mrs. Glasenapp had acquired through her appointment as a secondary-school teacher ... did not deprive her of the protection afforded by Article 10 (art. 10)".

14. I cannot but share this view, particularly as it is noted in the same paragraph of the judgment that "this provision is certainly a material one in the present case, but in order to determine whether it was infringed it must first be ascertained whether the disputed measure amounted to an interference with the exercise of freedom of expression - in the form, for example, of a 'formality, condition, restriction or penalty' ...". Nevertheless, in deciding in paragraph 53 that there had been no interference with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1), has the Court not implicitly decided that paragraph 1 of Article 10 (art. 10-1) of the Convention was applicable in this case? After all, if access to the civil service was to remain outside the ambit of Article 10 (art. 10), it would surely have been unnecessary to consider whether there had been any interference in the instant case or not.

15. I should have preferred the Court to express its view on this more explicitly, however, as I consider the point raised by Mrs. Glasenapp to be of primary importance in a democratic society.

16. I thus entirely share the Commission's opinion on the admissibility of the application, which reads as follows:

"The Commission considers that the fact that the applicant was required to express her opinions about the KPD, arising as it did as a result of an investigation prompted by the publication of the open letter written by the applicant in the "Red Flag" newspaper, brings her present application within Article 10 (art. 10) of the Convention. The mere fact that the applicant was at the time of these events a civil servant on probation does not preclude the Commission from examining her complaint, since under Article 1 (art. 1) of the Convention the High Contracting Parties undertake to 'secure to everyone within their jurisdiction' the rights and freedoms guaranteed by the Convention. Nor can the fact that the right of access to or employment in the public service is not one of those rights and freedoms restrict the

scope of the operation and protection of the Convention in respect of rights which it does guarantee. ..."

17. I should therefore have preferred there to be a separate examination of the relevant issue, namely that the decision on admission to the civil service was dependent on the assessment concerning Mrs. Glasenapp's freedom of expression and that the Court should accordingly have considered under paragraph 2 of Article 10 (art. 10-2) whether or not there had been legitimate interference.

III. Dissenting opinion

18. My dissenting opinion concerns the following points:

- the question of access to the civil service; and
- the violation of Article 10 (art. 10) in the particular circumstances.

A. Access to the civil service

19. I do not share the opinion of the majority of the Court, who state (at paragraph 50 in fine of the judgment) that the right of access to the civil service is not secured in the Convention. That assertion seems to me to be too categorical.

20. While the Contracting States did not wish to commit themselves to recognising a right of access to the civil service in the Convention or its Protocols, the High Contracting Parties nonetheless undertook in Article 1 (art. 1) of the Convention to secure "to everyone within their jurisdiction" the rights and freedoms guaranteed in the Convention.

It follows that access to the civil service must not be impeded on grounds protected by the Convention (for example, freedom of opinion, freedom of expression).

21. Taken to its extreme, the reasoning of the majority of the Court could authorise a State to refuse to admit to the civil service candidates who, while fulfilling all the requirements of nationality, age, health and professional qualifications, did not satisfy certain criteria of race, colour or religion.

Obviously such a situation is unthinkable for all the member States of the Council of Europe.

B. Violation of Article 10 (art. 10) of the Convention

22. The majority of the Court holds that there was no violation of Article 10 (art. 10) (paragraph 53).

23. It does so in the following terms:

"It follows from the foregoing that access to the civil service lies at the heart of the issue submitted to the Court. In refusing Mrs. Glasenapp such access, the Land authority took account of her opinions and attitude merely in order to satisfy itself as to whether she possessed one of the necessary personal qualifications for the post in question.

That being so, there has been no interference with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1)."

24. First of all, I should like to state that, in my opinion, access to the civil service was not at all at the heart of the issue submitted to the Court.

Quite on the contrary, at the heart of the issue were the freedoms of expression and opinion enjoyed by Mrs. Glasenapp by virtue of the provisions of the Convention.

25. I accordingly think that the crucial matters in the case are the following:

- was there interference by the State?
- was such interference necessary in a democratic State (the question of proportionality)?

(a) Interference

26. In paragraph 51 of the judgment it is noted:

"The annulment of Mrs. Glasenapp's appointment was consequent upon her refusal to dissociate herself from the policies of the KPD following the publication in the Rote Fahne on 2 October 1974 of her letter to the Westfälische Rundschau ... The intervention of the responsible Land authority was thus prompted by two actions on her part, namely the expression of a particular opinion in her letter and the refusal to express another opinion during the interview proceedings."

27. As stated earlier (paragraph 23 above), the majority of the Court, after considering the national legislation on civil servants in paragraph 52 of the judgment, reached the conclusion that there had not been any interference in the instant case with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1).

28. I follow the majority of the Commission (paragraphs 66 to 99 of its report) in thinking that the cancellation of the applicant's appointment was due to specific incidents connected directly with expressing her political opinions or with keeping silent about them.

29. The authorities' reaction must therefore be considered as a manifest interference with the exercise of the rights secured in Article 10 para. 1 (art. 10-1) to all citizens within the jurisdiction of the member States of the Council of Europe and thus likewise secured to Mrs. Glasenapp.

30. This view is also shared by four members of the minority of the Commission (see Mr. Frowein's opinion, with which Mr. Ermacora, Mr. Carrillo and Mr. Soyer agreed, Commission's report, p. 35, para. 1).

(b) Necessary in a democratic society

31. If one accepts that there was interference in Mrs. Glasenapp's case, the crucial point - which was not examined by the Court, but the principle of which, I think, far transcends the particular facts submitted to it - seems to me to be whether such interference was necessary in a democratic society such as the Federal Republic of Germany.

32. It should be remembered that paragraph 2 of Article 10 (art. 10-2) provides:

"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."

33. It follows from this text that many factors may justify interference by the State with the right to freedom of expression.

34. In this connection, it is of interest to bear in mind the position taken up by the Government of the Federal Republic of Germany at the public hearing on 21 October 1985.

The Agent of the Government said (translation from the German):

"The fall of the Weimar Republic was due among other things to the fact that the State took too little interest in the political views of its civil servants, judges and soldiers as a result of a misunderstanding of liberal principles. The officials of the Weimar Republic thus included those whose sympathies lay more with the former monarchy or with movements of the far right or far left and who, in the economic recession of the 1920s and the many political conflicts of that period, did not uphold the democratic Constitution, or the State based on the rule of law. That was a crucial contributing factor in the repeal of the democratic Weimar Constitution, which had established a State based on the rule of law, and in the emergence of the National Socialist dictatorship. The lessons from this historical experience were learned, and special provisions were included in the Basic Law of the Federal Republic of Germany, covering among other things the organisation of the civil service, which was thus constitutionally safeguarded. That is why, in the Federal Republic of Germany, no one can become a civil servant who does not afford a guarantee of constant loyalty to the order established in the Basic Law."

35. I cannot share this excessively generalised view. History has shown beyond any doubt that the Weimar Republic did not collapse on account of a few civil servants "whose sympathies lay more with the former monarchy or with movements of the far right or far left", but for infinitely more complex and more deep-seated reasons.

In this respect the Federal Republic of Germany is not comparable with the Weimar Republic.

36. A second argument expounded by the Agent of the Government to justify current legislation in the Federal Republic of Germany was the following (translation from the German):

"... Germany is a divided nation whose position bordering on the Communist States of the Warsaw Pact exposes it to special dangers. This requires us to take additional precautions to safeguard our free democracy and makes us different from other Council of Europe States."

37. Without wishing to enter into a debate on that argument, I consider nonetheless that the Federal Republic of Germany is not the only country in such a geographical position.

Yet it is the only country to have the legislation complained of.

38. However that may be, I think that in the particular case before the Court both the historical and the geographical arguments advanced show sufficiently in law that the measure taken in respect of Mrs. Glasenapp was clearly disproportionate to the aim pursued.

39. The same conclusion is reached, in my opinion, if one looks, as the Commission did, at the factors which are relevant to the question of justification, namely:

- (i) the nature of the post occupied by the applicant;
- (ii) the applicant's behaviour in the post;
- (iii) the circumstances in which the disputed opinion was expressed; and
- (iv) the nature of the opinions attributed to the applicant.

40. In this connection I wholly endorse the Commission's analysis (paragraphs 102 to 127 of its report) and I conclude with the majority of the Commission that the disputed measure was "not necessary in a democratic society for any of the purposes referred to in Article 10 para. 2 (art. 10-2) of the Convention" (paragraph 128 in fine of the report).

41. I am accordingly of the opinion that in the Glasenapp case there was a violation of Article 10 (art. 10) of the Convention.

IV. Final remarks

42. Looking at the matter generally, I wonder whether in 1986 - nearly sixty years after the Weimar Republic and more than forty years after the end of the Second World War - the impugned practice of the Federal Republic of Germany really is necessary in order to safeguard democracy.

I wonder this all the more as I consider the Federal Republic to be a true democracy. Was it not the first country in postwar Europe to abolish the death penalty in its Constitution?

Is it not also the case that in Saarland the impugned practice has been abolished?

It is desirable that the other Länder and the Federation should follow this example.

43. In particular, while not overlooking that it is not part of the Court's function to seek settlements, I think it would be in the interests of all the

parties if a satisfactory solution to Mrs. Glasenapp's case could be found at national level.

This would also be in the spirit of the European Convention on Human Rights.

DECLARATION BY JUDGE PETTITI

(Translation)

I agree with paragraphs 2 to 6 of Judge Spielmann's separate opinion set out above.