



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

1959 · 50 · 2009

FIRST SECTION

CASE OF KOPPI v. AUSTRIA

(Application no. 33001/03)

JUDGMENT

STRASBOURG

10 December 2009

FINAL

10/03/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Koppi v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,

Nina Vajić,

Elisabeth Steiner,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 19 November 2009,

Delivers the following judgment, which was adopted on that date.

PROCEDURE

1. The case originated in an application (no. 33001/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Matthias Stefan Koppi (“the applicant”), on 29 September 2003.

2. The applicant was represented by Mr R. Kohlhofer., a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant alleged that he had been discriminated against in the exercise of his rights under Articles 4 and 9 of the Convention on account of his religion as he was liable for military or alternative civilian service, whereas members of recognised religious societies holding religious functions comparable to his own were exempted.

4. By a decision of 5 January 2006 the Court declared the application partly admissible.

5. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1982 and lives in Rankweil.

7. The applicant is a member of the “Bund Evangelikaler Gemeinden in Österreich”, which became a registered religious community (*eingetragene Bekenntnisgemeinschaft*) under the Registered Religious Communities Act 1998 (*Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften*) on 11 July 1998.

8. From 2000 to 2001 the applicant attended the one-year course of the St Chrischona theological seminary (*Bibelschule*) in Switzerland. Since then he has been giving religious instruction to the youth and has been working as a municipal preacher (*Prediger*).

9. On 27 September 2000 the applicant filed a request with the Federal Minister for Internal Affairs (*Bundesminister für Inneres*) for recognition as a conscientious objector (*Zivildiensterklärung*).

10. On 16 November 2000 the Minister for Internal Affairs recognised the applicant as a conscientious objector. Accordingly, he was exempted from the duty to perform military service but liable to perform civilian service (*Zivildienst*).

11. On 20 December 2000 the applicant requested the Minister of Internal Affairs to apply section 13a § 1 of the Civilian Service Act in conformity with the Constitution and to exempt him from the obligation to perform civilian service. He submitted that this provision exempted members of recognised religious societies who performed specific services relating to worship or religious instruction from the obligation to perform civilian service, whereas he, as a student of the theological seminary St. Chrischona, had a comparable clerical position within a registered religious community, namely the “Bund Evangelikaler Gemeinden in Österreich”. Consequently, he should be also exempted from civilian service.

12. On 18 January 2002 the Minister of Internal Affairs dismissed the applicant's request. The decision referred to the findings of the Constitutional Court (*Verfassungsgerichtshof*) in a decision of 11 November 1998, in which it had held that exemption from the obligation to perform civilian service under section 13a of the Civilian Service Act merely applied to members of recognised religious societies and could not be extended to members of registered religious communities.

13. On 13 March 2002 the applicant filed a complaint with the Constitutional Court.

14. On 7 October 2002 the Constitutional Court declined to deal with the complaint for lack of prospects of success.

15. On the applicant's request the Constitutional Court transmitted his complaint to the Administrative Court (*Verwaltungsgerichtshof*).

16. On 18 February 2003 the applicant supplemented his complaint.

On 18 March 2003 the Administrative Court, referring to the above-mentioned decision of 11 November 1998 by the Constitutional Court, dismissed the complaint. This decision was served on the applicant's counsel on 9 April 2003.

II. RELEVANT DOMESTIC LAW

A. The Civilian Service Act

17. Section 13a § 1 of the Civilian Service Act (*Zivildienstgesetz*) provides as follows:

“An exemption from the obligation to perform civilian service shall apply to the following members of recognised religious societies:

1. ordained priests,
2. persons involved in spiritual welfare or in clerical teaching after graduating in theological studies,
3. members of a religious order who have made a solemn vow, and
4. students of theology who are preparing to assume a clerical function.”

B. Religious societies and religious communities

18. For a detailed description of the legal situation in Austria in this field see *Löffelmann v. Austria*, no. 42967/98, §§ 23-39, 12 March 2009.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 9

19. The applicant complained that the fact that he was not exempt from military service or alternative civilian service, while assuming a function within the Federation of Evangelical Communities in Austria (*Bund Evangelikaler Gemeinden in Österreich*) which was comparable to those of members of recognised religious societies who were exempt from such

service, constituted discrimination on the ground of his religion, as prohibited by Article 14 of the Convention taken together with Article 9.

20. Article 14 of the Convention 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.”

Article 9 provides as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

21. The Government pointed out that the obligation to perform civilian service was a substitute service for conscientious objectors who refused military service. Section 13a § 1 of the Civilian Service Act stipulated exemptions from this obligation which were linked to membership of a recognised religious society. However, there were also further criteria with which the applicant did not comply either. The applicant had stated that his function would be comparable to that of persons involved in spiritual welfare or in clerical teaching after graduating in theology or who were preparing for such functions. In this connection, the Government stressed that the applicant had not stated during the domestic proceedings that he would study theology at a university or any equivalent institution. Furthermore, the applicant's submissions that he would perform divine service and engage in preaching activity had not been substantiated and were, in any event, irrelevant, as he had started doing that work long after the impugned decisions in the present case were issued. In his application the applicant had stated that he was still a “student”. Therefore, notwithstanding his religious denomination, the applicant had failed to prove that he complied with the criteria of the above provision. Thus, there was no need to consider whether or not the applicant had been discriminated against on account of his confession. Furthermore, members of recognised religious societies who did not comply with the criteria laid down in section 13a § 1 of the Civilian Service Act were not exempt from civilian service.

22. The Government further submitted that, as the Contracting States were under no obligation to accept a refusal to perform military service for religious reasons, non-exemption of a person from military or alternative civilian service did not raise any concerns under Article 9 of the

Convention. In any event, the applicant's submissions did not indicate that the obligation to perform military or alternative civilian service entailed any concrete interference with his rights under Article 9.

23. The applicant contested these arguments and maintained that if the relevant domestic legislation provided for exemptions from military or alternative civilian service, it should do so without any discrimination.

24. He further maintained that he held a function comparable with that of members of a recognised religious society. While it was true that the Bund Evangelikaler Gemeinden in Österreich had neither chairs nor faculties within state or church universities, it offered nonetheless intensive clerical training which consisted of theoretical studies and practical exercises. The applicant pointed out that the Biblical seminary he visited had prepared him to exercise pastoral care (*Seelsorge*) and to do preaching and had to be considered as comprehensive training for a clerical function. The applicant had been giving religious instruction to adolescents aged between 11 and 14 years in his municipality, had worked as a preacher and had performed divine service since February 2002 at the latest. In any event, the above provisions did not require the exercise of a clerical function but were complied with when the person concerned was preparing for such function. The Austrian authorities and courts had only linked the granting of an exemption from civilian service to membership of a recognised religious society and had not examined whether or not the person concerned performed comparable functions for the purposes of section 24(3) of the Military Service Act.

25. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 34, ECHR 2000-X).

26. Furthermore, the freedom of religion as guaranteed by Article 9 entails, *inter alia*, freedom to hold religious beliefs and to practise a religion. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see, as a recent authority,

Leyla Şahin v. Turkey [GC], no. 44774/98, §§ 104-105, ECHR 2005-XI, with further references).

27. In the Court's view, the privilege at issue – namely the exemption from the obligation to perform military service and also alternative civilian service, afforded to religious societies in respect of those who are part of their clergy – shows the significance which the legislature attaches to the specific function these representatives of religious groups fulfil within such groups in their collective dimension. Observing that religious communities traditionally exist in the form of organised structures, the Court has repeatedly found that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 62, ECHR 2000-XI).

28. As the privilege at issue is intended to ensure the proper functioning of religious groups in their collective dimension, and thus promotes a goal protected by Article 9 of the Convention, the exemption from military service granted to specific representatives of religious societies falls within the scope of that provision. It follows that Article 14 read in conjunction with Article 9 is applicable in the instant case.

29. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 51-52, ECHR 2006-VI; *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, 29 April 2008).

30. In the instant case, the Court first observes that the exemption from military service under section 24(3) of the Military Service Act is exclusively linked to membership of recognised religious societies performing specific services of worship or religious instruction. The applicant claimed that he performed similar services within the Bund Evangelikaler Gemeinden in Österreich. However, the Bund Evangelikaler Gemeinden in Österreich was at the time a registered religious community and not a religious society, and there was thus no room for an exemption under the above-mentioned legislation.

31. The Government argued that the applicant had not been discriminated against, because the criterion that a person applying for exemption from military service must be a member of a religious society was only one condition among others and the applicant would not, in any

event, have fulfilled the further conditions as he had not completed a course of theological studies at university or at a comparable level of education. The Court is not persuaded by this argument. Since the competent authority explicitly based its refusal of the applicant's request on the ground that he did not belong to a religious society, there is no need to speculate as to what the outcome would have been if the decision had been based on other grounds.

32. The Court has to examine therefore whether the applicant, who does not belong to a religious group which is a religious society within the meaning of the 1874 Recognition Act, may claim to be in a relevantly similar or analogous position to a member of such a group performing one of the functions described in Section 13a § 1 of the Civilian Service Act.

33. The Court would point out at the outset that the criterion of belonging to a recognised religious society, on which the Austrian authorities had relied in refusing the applicant's request for exemption from civilian service is not, as such, discriminatory. In the case of *Religionsgemeinschaft der Zeugen Jehovas and Others* (no. 40825/98, 31 July 2008) the Court made it clear that a difference in treatment between religious groups which resulted in granting a specific status in law – to which substantial privileges were attached – while refusing this preferential treatment to other religious groups which had not acceded to this status, was compatible with the requirements of Article 14 read in conjunction with Article 9 as long as the State set up a framework for conferring legal personality on religious groups to which a specific status was linked, all religious groups which so wished had a fair opportunity to apply for this status and the criteria established were applied in a non-discriminatory manner (*ibid.*, § 92). In other words such a privileged status is a right which a religious community may apply for if it feels that such status would facilitate the religious society's pursuance of its religious aims. By its very nature, such a decision on the status of a legal person has repercussions for those persons who are affected by legal provisions in their position as members of that community and, accordingly, have to assume the consequences arising from their membership.

34. It is therefore essential that the religious community of which the applicant is a member and on the basis of which membership he sought exemption from civilian service should have been registered, upon its own request, as a religious community within the meaning of the 1988 Religious Communities Act. Further there is no indication that the religious community applied for recognition as a religious society within the meaning of the 1874 Recognition Act and that such a request was refused, even less that it was refused on grounds incompatible with the requirements of Article 9 of the Convention.

35. This being so the Court considers that the applicant, being a member of a registered religious community when applying for exemption from

civilian service under section 13a (1) of the Civilian Service Act had not been in a relevantly similar or analogous situation as a member of a recognised religious society. There has therefore been no violation of Article 14 taken in conjunction with Article 9 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

36. The applicant also relied on Article 9 of the Convention in complaining that he was not exempt from military service, unlike persons assuming a comparable function in religious communities recognised as religious societies.

37. In the circumstances of the present case the Court considers that the substance of this complaint has been sufficiently taken into account in its above assessment that led to the finding that there had been no violation of Article 14 read in conjunction with Article 9 of the Convention. It follows that there is no cause for a separate examination of the same facts from the standpoint of Article 9 of the Convention alone.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 4

38. The applicant complained that the fact that he was not exempt from military service while assuming a function within a religious community which was comparable to that of members of recognised religious societies who were exempt from military service constituted discrimination on the ground of his religion prohibited by Article 14 of the Convention, taken together with Article 4.

Article 4 §§ 2 and 3 of the Convention reads as follows:

“2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.”

39. The Court considers that, in view of its finding under Article 14, read in conjunction with Article 9 of the Convention, there is no need to examine this question also from the point of view of Article 14 read in conjunction with Article 4, all the more so as the core issue, whether the difference in treatment was based on the criterion of “being a member of a religious society”, has already been sufficiently dealt with above.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 14 of the Convention taken in conjunction with Article 9 of the Convention;
2. *Holds* that there is no separate issue under Article 9 of the Convention alone;
3. *Holds* that it is not necessary to examine the complaint under Article 14 taken in conjunction with Article 4 §§ 2 and 3 (b) of the Convention.

Done in English, and notified in writing on 10 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President