



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

FIRST SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45631/99  
by Helmi BAŞPINAR  
against Turkey

The European Court of Human Rights (First Section), sitting on  
5 December 2000 as a Chamber composed of

Mrs W. THOMASSEN, *President*,

Mr L. FERRARI BRAVO,

Mr GAUKUR JÖRUNDSSON,

Mr R. TÜRMEŒ,

Mr B. ZUPANČIČ,

Mr T. PANŦIRU,

Mr R. MARUSTE, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application introduced on 14 December 1998,  
and registered on 25 January 1999,

Having deliberated, decides as follows:

## THE FACTS

The applicant is a Turkish national, born in 1975 and living in Çorum, Turkey.

### A. Particular circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In 1996 the applicant requested to have a social security card for his wife. This request was refused on the grounds that photography showing his wife carrying an Islamic scarf was not acceptable for the social security identity cards.

On 16 June 1998 the Supreme Military Council (Yüksek Askeri Şura) decided to discharge the applicant from the army on grounds of acts of insubordination and immoral conduct pursuant to Article 94(b) of Law 926.

### B. Relevant domestic law and practice

#### *1. The Constitution*

The relevant provisions of the Constitution are as follows:

##### Article 14 § 1

“None of the rights and freedoms set forth in the Constitution may be exercised with the aim of undermining the territorial integrity of the State or the indivisible unity of its people, imperilling the existence of the Turkish State and the Republic, abolishing fundamental rights and freedoms, handing over control of the State to a single individual or group or bringing about the dominance of one social class over the others, establishing discrimination on the grounds of language, race, religion or adherence to a religious sect or setting up by any other means a State order based on such beliefs and opinions.”

##### Article 24

“Everyone shall have the right to freedom of conscience, faith and religious belief. Prayers, worship and religious services shall be conducted freely, provided that they do not violate the provisions of Article 14. No one shall be compelled to participate in prayers, worship or religious services or to reveal his religious beliefs and convictions; nor shall he be censured or prosecuted because of his religious beliefs or convictions.

...

No one may exploit or abuse religion, religious feelings or things held sacred by religion in any manner whatsoever with a view to causing the social, economic, political or legal order of the State to be based on religious precepts, even if only in part, or for the purpose of securing political or personal influence thereby.”

Article 125

“All acts or decisions of the administration are subject to judicial review

...

Decisions of the President of the Republic concerning matters within his sole jurisdiction and decisions of the Supreme Military Council shall not be subject to judicial review.

...”

Article 129 §§ 2, 3 and 4 of the Turkish Constitution provides that a disciplinary action cannot be imposed to the civil servants provided that the right to defence is respected. Moreover, it lays out that the disciplinary actions, other than the warnings and the reprimands are subject to legal control. The provisions concerning the soldiers are reserved. Article 21 of Law on the Military Administrative High Court stipulates that the disciplinary actions imposed to the soldiers are not subject to legal control.

### 2. Law no. 357 (“the Military Legal Service Act”)

Section 22 (c) of the Military Legal Service Act provides:

“Irrespective of length of service, servicemen whose continued presence in the armed forces is adjudged to be inappropriate on account of breaches of discipline or immoral behaviour on one of the grounds set out below, as established in one or more documents drawn up during their service in the last military rank they held, shall be subject to the provisions of the Turkish Pensions Act.

...

Where their conduct and attitude reveal that they have adopted unlawful opinions.”

### 3. Law no. 926 (“the Military Personnel Act”)

Section 50 (c) of the Military Personnel Act provides:

“Irrespective of length of service, servicemen whose continued presence in the armed forces is adjudged inappropriate on account of breaches of discipline and immoral behaviour shall be subject to the provisions of the Turkish Pensions Act. The Regulations for Military Personnel shall lay down which authorities have jurisdiction to commence proceedings, to examine, monitor and draw conclusions from personnel assessment files and to carry out any other act or formality in such proceedings. A decision of the Supreme Military Council is required to discharge an officer whose case has been submitted by the Chief of Staff to the Supreme Military Council.”

Section 94 (b) of the Military Personnel Act provides:

“(b) Discharge from the army for the acts of insubordination and immoral conduct:

Notwithstanding the seniority in the service, the non-commissioned officers whose maintenance is considered to be inappropriate for the acts of insubordination and immoral conduct are subject to Law on the Turkish Pension Fund. The investigation, examination and follow-up of the notation reports and the formalities and the competent authorities fulfilling these duties are subject to the provisions of The Regulations on assessment of officers and non-commissioned officers. The General Staff determines which non-commissioned officers’ cases concerning their discharge from the army should be examined by the Supreme Military Council.

*4. The Regulations on assessment of officers and non-commissioned officers*

Article 99 of the Regulations on assessment of officers and non-commissioned officers provides:

“Irrespective of length of service, the compulsory retirement procedure shall be applied to all servicemen whose continued presence in the armed forces is adjudged to be inappropriate on account of breaches of discipline or immoral behaviour on one of the grounds set out below, as established in one or more documents drawn up during their service in the last military rank they held:

...

(e) where by his conduct and attitude the serviceman concerned has provided evidence that he holds unlawful, subversive, separatist, fundamentalist and ideological political opinions or takes an active part in the propagation of such opinions.”

## COMPLAINTS

The applicant complains under Article 6 of the Convention that, having regard to its consequences and its degree of severity, his discharge from the army imposed by the Supreme Military Council can be regarded as a penal sanction rather than a disciplinary one. The applicant further complains that he had no recourse to challenge the decision of the Supreme Military Council. He points out that the decisions of the Supreme Military Council are not subject to judicial review according to Article 125 of the Turkish Constitution.

The applicant complains under Article 8 of the Convention that the decision of the Supreme Military Council constitutes a breach of his right to respect for his private and family life, insofar as it was based on his family’s and his wife’s way of life and behaviour.

The applicant complains under Article 9 of the Convention that the decision of the Supreme Military Council amounts to a violation of his right

to freedom of thought, conscience and religion. He maintains that the implicit reason for the aforementioned decision was based on his religious convictions and his wife's Islamic scarf.

The applicant complains under Article 13 of the Convention taken in conjunction with Articles 8 and 9 of the lack of any independent national authority before which complaints can be brought with any prospect of success.

The applicant complains under Article 14 of the Convention taken in conjunction with Article 6 § 1 that the legislation concerning the retirement of soldiers creates discrimination between soldiers whose cases are subject to the examination of the Supreme Military Council and those whose cases are subject to the examination of the General Staff.

The applicant complains under Article 17 of the Convention taken in conjunction with Article 6 § 1 of the Convention that his discharge from the army constitutes a violation of his rights guaranteed by the Convention since he had no recourse to challenge the decision of the Supreme Military Council.

## THE LAW

1. The applicant complains that his right to a fair trial has been violated insofar as there exists no recourse to challenge the decision to discharge him from the army in Turkish law. He submits that he had been unable to present his defence before the Supreme Military Council. He points out that the decisions of the Supreme Military Council are not subject to judicial review according to Article 125 of the Turkish Constitution. He further claims that the decision of the Supreme Military Council must be considered as a penal sanction rather than a disciplinary one. He invokes Article 6 § 1 of the Convention.

### **The Applicability of Article 6**

#### **a) On the existence of “any criminal charge”**

The Court notes that the applicant was discharged from the army for insubordination and immoral conduct by a decision of a military body. The Court already examined a similar issue in two cases relating to military disciplinary proceedings (see, the *Engel and others v. the Netherlands* judgment of 8 June 1976, Series A-22) and to prison disciplinary proceedings (see, the *Campbell and Fell v. the United Kingdom* judgment of 28 June 1984, Series A-80).

In those cases the Court held that the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. However, the Court does not follow that the classification thus made is decisive for the purposes of the Convention (see the above-mentioned the *Engel and others v. the Netherlands* judgment, §§ 81-82 and the *Campbell and Fell v. the United Kingdom* judgment, §§ 68-69). It is important, therefore, to ascertain whether or not the text defining the offences in issue belongs, according to the domestic legal system, to criminal law, disciplinary law or both concurrently (see the above-mentioned *Engel and Others* judgment, § 82).

In the instant case the Court observes that the acts of insubordination and immoral conduct, which the applicant was accused of, are punished under Turkish law by the disciplinary statutes.

As to the nature of the disciplinary sanction, the Court recalls that “disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct” (see, the *Weber v. Switzerland* judgment of 22 May 1990, Series A-177, § 33).

The Court observes that in choosing a military career the applicant was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see the above-mentioned the *Engel and Others v. the Netherlands* judgment of 8 June 1976, p. 24, § 57). States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service (see the *Kalaç v. Turkey* judgment of 1 July 1997, Reports 1997-IV, § 28).

The Court notes that the essence of the sanction of discharge imposed to the applicant falls into the field of disciplinary proceedings in the armed forces and addresses itself only to one given group with a particular statute. Consequently, the Court concludes that the decision of discharge cannot be considered as a “criminal charge” within the meaning of Article 6 of the Convention.

#### **b) On the existence of a “determination” of “civil rights”**

As to the question of the applicability of Article 6 to the disputes concerning civil rights and obligations the Court notes that the applicant was employed as an officer in the Turkish army. Having regard to the nature

of the functions and responsibilities which it incorporates, the applicant's employment can be regarded as a direct participation in exercise of the public authority and functions aiming at safeguarding the general interests of the State. (see, *Pellegrin v. France*, no. 28541/95, § 66, ECHR 1999-II).

Against this background the Court considers that Article 6 § 1 of the Convention is not applicable in the instant case. It follows that the applicant's complaints under this head must be rejected as being incompatible *ratione materiae* within the meaning of Article 35 §§ 3 and 4 of the Convention.

2. The applicant complains under Article 14 of the Convention taken in conjunction with Article 6 § 1 that the legislation concerning the retirement of soldiers creates discrimination between soldiers whose cases are subject to the examination of the Supreme Military Council and those whose cases are subject to the examination of the General Staff.

The Court recalls that Article 14 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 necessarily presuppose a breach of those provisions - and to this extent it has an autonomous meaning -, 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, *inter alia*, the *Van der Musselle* judgment of 23 November 1983, Series A no. 70, p. 22, § 43).

Having regard to the above considerations related to inapplicability of Article 6 of the Convention in the instant case the Court considers that the applicant's complaint under this head is inadmissible *ratione materiae* within the meaning of Article 35 §§ 3 and 4 of the Convention.

3. The applicant complains that his discharge from the army constitutes a violation of his rights guaranteed by the Convention since he had no recourse to challenge the decision of the Supreme Military Council. He invokes Article 17 of the Convention in conjunction with Article 6 § 1 of the Convention.

Having regard to the above considerations related to inapplicability Article 6 of the Convention in the instant case the Court considers that the applicant's complaint under this head must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

4. The applicant complains under Article 8 of the Convention that the decision of the Supreme Military Council constitutes a breach of his right to respect for his private and family life, insofar as it was based on his family's and his wife's way of life and behaviour.

The applicant complains under Article 9 of the Convention that the decision of the Supreme Military Council amounts to a violation of his right to freedom of thought, conscience and religion.

The applicant complains under Article 13 of the Convention taken in conjunction with Articles 8 and 9 of the lack of any independent national authority before which complaints can be brought with any prospect of success.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of its Rules of Procedure, to give notice of them to the respondent Government.

For these reasons, the Court, unanimously,

*Decides* to adjourn the examination of the applicant's complaints that the decision of the Supreme Military Council amounts to a violation of his right to respect for his private and family life and his right to freedom of thought, conscience and religion and that there existed no independent national authority before which complaints can be brought with any prospect of success;

*Declares* inadmissible the remainder of the application.

Michael O'BOYLE  
Registrar

Wilhelmina THOMASSEN  
President