

APPLICATION No. 8797/79

Reto NIEVERGELT
against
SWITZERLAND

Report of the Commission
(adopted on 13 October 1981)

72.777
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REPORT

THE PARTIES TO THE CASE

1. This report, drawn up by the Commission in accordance with Rule 54 of its Rules of Procedure, concerns an application lodged against Switzerland by Mr Reto Nievergelt and registered under file No. 8797/79.

The applicant presented the application himself. In the proceedings before the Commission the respondent Government was represented by Mr J Voyame, Director of the Federal Office of Justice, Berne.

SUMMARY OF THE FACTS

2. The applicant is a Swiss national born in 1943. He lives at Bioggio (Ticino).

3. In 1978, he failed to take part in compulsory extra-service shooting practice which he was required to perform each year until the age of 42 under Section 124 of the Act on the Organisation of Military Service.

He also failed to apply for exemption from such practice on the ground of serious occupational difficulties.

4. On 23 April 1979, the Military Department of the Canton of Lucerne sentenced him to three days' strict arrest for negligently failing to report for duty. This offence is normally punishable by a period of penal detention imposed by a military tribunal but may, as in the present case, be punished by a disciplinary measure if it is a minor one (Section 83 (1e) and (2) of the Military Penal Code).

The applicant appealed in writing against the disciplinary decision within the statutory 5-day limit, alleging violation of the Convention and of the right to a fair trial (Recht auf rechtliches Gehör).

5. On 9 July 1979, the Federal Military Department confirmed the decision on the ground that it was in keeping with the seriousness of the offence committed by the applicant, who had committed the same offence before.

By law, the cantonal authorities are responsible for executing the sentence.

According to the information supplied by the respondent Government, the applicant did not have to serve his period of detention (see para. 12 below).

6. Before the Commission, the applicant invoked Article 5 of the Convention, arguing that strict arrest could not be covered by that Article.

7. For further details of the arguments put forward by the parties during the proceedings, reference should be made to the decision on the admissibility of the application, appended hereto.

PROCEEDINGS

8. The application was lodged on 23 October 1979 and registered on 2 November 1979.

9. On 11 December 1979, the Commission decided to give notice of the application to the respondent Government and to invite it to submit written observations on admissibility.

The Government's observations were submitted on 24 March 1980. The applicant's reply to those observations was dated 16 April 1980.

10. On 8 July 1980, the Commission declared the application admissible (1) and decided to join it to six other applications which had also been declared admissible and which raised similar problems (2).

11. On 15 July 1980, the Secretary to the Commission informed the applicant of these decisions.

By letter of 8 September 1980, the applicant submitted observations in connection with the attempt at a friendly settlement (Article 28 (b) of the Convention).

On 17 October 1980, the applicant was invited to submit his observations on the merits of his application.

On 4 November 1980, the applicant informed the Commission that by letter of 13 October 1980 the Bellinzona Military Department had ordered him (ordine di arresto) to report to the Mendrisio barracks on 27 November 1980 to serve his period of detention. On 27 October 1980, referring to the proceedings before the Commission, the applicant asked the Ministry of Justice in Berne to suspend execution of the penalty.

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(1) No hearing was held in this case.

(2) These applications are dealt with in a report adopted by the Commission on 13 October 1981.

12. On 13 May and 5 June 1981, the Secretary to the Commission sent two letters to the applicant informing him of the state of proceedings.

On 19 June 1981, the Government submitted its observations on the merits of the seven applications concerning disciplinary arrest in the Swiss armed forces.

With respect to the present application, the Government sent the Commission a copy of a letter sent to the applicant on 5 November 1980 by the Directorate of Federal Military Administration stating that he no longer had to serve his penalty as the relevant limitation period had elapsed (1).

By letter of 24 June 1981, the applicant was invited to comment on the respondent Government's observations of 19 June 1981 on the merits of the case.

13. Noting that the applicant had not replied to this invitation and that he had not contacted the Commission since 4 November 1980, the Secretary asked him, by letter of 17 September 1981, whether he wished to maintain his application. The Secretary specified that if no reply was received by 2 October, he would have to consider that the applicant was no longer interested in pursuing his case.

This letter, whose delivery was recorded with an acknowledgment of receipt, remained unanswered.

14. By letter of 9 October 1981, the respondent Government stated that it left it to the Commission to decide whether to strike the application off the list of cases.

15. On 13 October 1981, the Commission decided to separate the application from the similar cases submitted by Swiss servicemen (Santschi case and others), decided to strike it off the list of cases (Rules 43 (1) and 49 of the Rules of Procedure), adopted the present report (Rule 54 of the Rules of Procedure) and decided to transmit it to the Committee of Ministers, for information and to the parties, as well as to publish it.

(1) The decision given on 5 July 1979 became final on that date (Section 212 (4) of the Military Penal Code, old version). Under Section 183 of the Military Penal Code, the limitation period for the penalty is six months.

The following Members of the Commission were present:

MM J A FROWEIN, Acting President (Rule 7 of the Rules of Procedure)

F ERMACORA
J E S FAWCETT
E BUSUTTIL
L KELLBERG
G JÖRUNDSSON
G TENEKIDES
S TRECHSEL
B KIERNAN
M MELCHIOR
J SAMPAIO
A WEITZEL
J-C SOYER

DECISION OF THE COMMISSION

16. The Commission notes that the applicant has not contacted it since 4 November 1980. Moreover, the applicant did not take advantage of the opportunity offered him to present his observations on the merits of his application (letter of 17 October 1980). Nor did he make any comment on the respondent Government's observations (letter of 24 June 1981). Lastly, he failed to indicate, as requested by the Secretary in a letter of 17 September 1981, whether he wished to maintain his application.

17. The Commission considers that these various facts show that the applicant is no longer interested in the outcome of his application and does not wish to maintain it. The fact that he did not have to serve his penalty, as stated by the Government in its observations, does not seem unconnected with this attitude, since the letter from the Federal Military Administration informing him that the relevant limitation period had elapsed (5 November 1980) was written just after his last letter to the Commission (4 November 1980).

18. Finally the Commission observes that the problems raised by disciplinary arrest in the Swiss armed forces have already been examined by it in depth, namely in its report on the Eggs case, in which the Committee of Ministers adopted Resolution DH (79) 7 on 19 October 1979. Moreover, the provisions of Swiss law which gave rise to the present application were amended with effect from 1 January 1980.

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The Commission is therefore of the opinion that there are no general considerations concerning the observance of the Convention which justify further examination of this application.

For these reasons, the Commission

Having regard to Rules 43 (1), 49 and 54 of its Rules of Procedure,

- Decides to strike Application No. 8797/79 off the list of cases;
- Adopts this report;
- Decides to transmit this report to the Committee of Ministers, for information, and to the parties concerned as well as to publish it.

Secretary to the Commission

Acting President of the Commission

(H C KRÜGER)

(J A FROWEIN)