

APPLICATION N° 25390/94

László REKVÉNYI v/HUNGARY

DECISION of 11 April 1997 on the admissibility of the application

Articles 10, 11 and 14 of the Convention *Constitutional prohibition (Hungary) on members of the police force joining political parties or engaging in political activities (Complaint declared admissible)*

Article 25, paragraph 1 of the Convention *In specific circumstances, an applicant can claim to be the victim of a violation even though he is not able to allege in support of his application that he has been subject to a concrete State measure. The question whether the applicant was actually the victim of any violation of the Convention may exceptionally involve determining whether the contested legislation is in itself compatible with the Convention's provisions*

Police officer complaining about a constitutional prohibition on members of the police force joining political parties or engaging in political activities considered to be the victim of alleged violations of his right to freedom of expression and freedom of association, notwithstanding limited possibilities for expressing his political preferences

Article 26 of the Convention *In Hungary, an applicant who has complained to the Constitutional Court about a constitutional prohibition on members of the police force joining political parties or engaging in political activities has exhausted domestic remedies*

THE FACTS

The applicant, born in 1953, is a Hungarian citizen and resident in Budapest. He is a police officer and the Secretary General of the Independent Police Trade Union. In the proceedings before the Commission he is represented by Mr V. Mavi, a lawyer working at the Hungarian Human Rights Centre in Budapest.

A *Particular circumstances of the case*

The facts of the case as they have been submitted by the parties, may be summarised as follows

On 28 January 1994 the Head of the National Police (*Országos Rendőrfőkapitány*) in a circular letter, demanded, with a view to the parliamentary elections in May 1994, that policemen should refrain from political activities. He referred to S 40/B para 4 of the Constitution (*Alkotmány*), as amended by Act No 107 of 1993 as from 1 January 1994, according to which members of the armed forces, the police and security services are prohibited from joining political parties and from engaging in political activities. He further indicated that those who wished to pursue political activities would have to leave the police.

On 16 February 1994 the Head of the National Police in a second circular letter, declared that no exemption could be given from the prohibition contained in S 40/B para 4 of the Constitution.

On 11 April 1994 the Constitutional Court (*Alkotmánybíróság*) dismissed the applicant's constitutional complaint about S 40/B para 4 of the Constitution. The Constitutional Court held that it had no competence to change a constitutional provision such as S 40/B para 4, which had been incorporated into the Constitution by constitutional amendment requiring the votes of two thirds of the Members of the Parliament.

B *Relevant domestic law*

As from 1 January 1994 Section 40/B para 4 of the Constitution (Act No 20 of 1949 as amended several times) provides: "Career members of the armed forces, the police force and the civil national security services shall not join political parties and shall not engage in political activities."

Moreover, the Constitution provides that judges in general (S 50 para 3) as well as the judges of the Constitutional Court (S 32/A para 5) and also public prosecutors (S 53 para 2) shall not join political parties and shall not engage in political activities.

According to Section 20 para 5 a Member of the Parliament shall not be *inter alia* a career member of the police.

According to Section 8 of Act No 55 of 1990 on the Legal Status of Members of the Parliament (*a képviselők jogállásáról szóló 1990. évi LV törvény*) a Member of the Parliament shall eliminate any state of incompatibility with his mandate within a period of 30 days from the establishment of his mandate's validity.

In its decision No. 16/1994 (16/1994 /III 25/ AB határozat) the Hungarian Constitutional Court held that the incompatibility rules contained in *inter alia*, Section 20 para. 5 of the Constitution do not limit the passive voting right of those concerned in the sense that they could not stand as a candidate for the parliamentary elections.

Section 2 para. 3 of Act No. 34 of 1994 on the police forces (*a rendőrségről szóló 1994. évi XXXIV. törvény* the "Police Act 1994") having entered into force as from 1 October 1994 provides that, while discharging their duties, the police shall be free from any political influence.

Section 7 of the Police Act 1994 concerns the framework of policemen's involvement in local or national elections and their participation in organisations or associations.

Paragraph 9 provides as follows: "If a member of the police wishes to stand for election at national or local level or at mayor's elections, he shall in advance announce his intention to do so to the Head of the National Police. In such cases his service shall be suspended from the sixtieth day preceding the election day until the day when the results of the election are published."

Paragraph 10 provides as follows: "Members of the police shall have the right to join organisations which are related to their duties as policemen, aimed at protecting or representing interests and to hold office therein, in this connection they shall not suffer any disadvantage. Policemen shall inform their superiors about their membership as well as about their intention in advance to join social organisations or related to their duties as policemen. The superior shall have the authority to prohibit membership or the joining of such organisations if it is incompatible with their profession as police officers or with their rank in the service, or if it interferes with or endangers the interests of the service. The prohibition shall take the form of a decision, which is subject to a complaint to be lodged with the head of the superior police authority. The decision of the superior authority can be challenged before a court."

Section 106 of the Decree of the Minister of the Interior No. 3/1995 (III 1) BM on the police service regulation (*Rendőrségi Szolgálati Szabályzat*, "Regulation 1995"), taken upon authorisation by the Police Act 1994 in order to implement its provisions, concerns the framework of public activities carried out by policemen.

It provides *inter alia* that members of the police, in their capacity as representatives or experts of the police, shall not appear in the public media in the press, in radio and television broadcasting or in films, unless authorised to do so by the Head of the National Police or his deputies. Furthermore, members of the police shall have the right to make statements and publications in the newspapers of the police without permission, while observing the rules on service and State secrets. Moreover, members of the police in their capacity as policemen shall not appear in public unless authorised to do so by the Head of the National Police. On such occasions they shall

refrain from making political statements and shall show neutrality towards any social organisation. In their leisure time members of the police shall have the right to participate in social programmes lawfully organised under Act No. 3 of 1989 governing the right to freedom of peaceful assembly. On such occasions they shall refrain from wearing a uniform and from carrying their service gun or other, lawfully possessed firearms. In case the gathering is ordered to be dissolved they shall immediately leave.

Section 5 of Act No. 34 of 1989 on Parliamentary Elections (*az országgyűlési képviselők választásáról szolo 1989. évi XXXIV. törvény*), as amended on 20 January 1994, provides that, in the individual electors, constituents are entitled to nominate a third person as a candidate for the elections by submitting their "nomination coupon" (*"ajánlasi szelvény"*). A candidate's eventual nomination is subject to the receipt of at least 750 nomination coupons signed by constituents. Section 6 para. 2 (c) provides that, on the nomination of a candidate for the elections, the candidate shall declare to the competent election committee that he does not hold a post that is incompatible with his potential mandate or that he would resign from such a post, if elected. According to Section 6 para. 6, the nomination coupons shall be destroyed after the nomination has been confirmed by the election committee. Paragraph 8 requires that the nomination coupons shall be handled confidentially. Paragraph 10 prohibits that record be kept of the nomination coupons.

Sections 5 and 6 of Law-Decree No. 10 of 1971 on the Service of Career Members of the Armed Forces and Armed Bodies (*a fegyveres erők és a fegyveres testületek hivatásos állományának szolgálati viszonyairól szolo 1971. évi 10. törvényerejű rendelet*), as in force in the relevant period, regulated the termination of the service of a career member of the armed forces/bodies. Section 5 para. 2 (e) requires that the service shall be terminated if, *inter alia*, the career member of the armed forces/bodies resigns. Engagement in political activities is no ground for the termination of the service.

COMPLAINTS

1 The applicant complains under Article 10 of the Convention that, in the relevant period, the prohibition contained in S. 40/B para. 4 of the Hungarian Constitution violated his right to freedom of expression. He also complains under Articles 11 and 18 of the Convention that S. 40/B para. 4 of the Constitution violated his right to freedom of association. He submits in particular that the aim of the legal provision in question is not clear, and that he was completely prohibited from exercising such rights.

2 He further complains under Article 10 in conjunction with Article 14 of the Convention about the discriminatory and arbitrary character of S. 40/B para. 4 in that it does not extend to the whole civil service but only applies to members of the armed forces, the police force and the civil national security services.

THE LAW

1 The applicant complains that, in the relevant period, he was prohibited from joining political parties and from engaging in political activities, as a consequence of the amendment of the Hungarian Constitution effective as from 1 January 1994

2 The Government submit that the applicant has failed to specify the political activities, the pursuance of which he feels prevented from. In their view, the applicant has thus failed to substantiate his complaint for the purposes of admissibility. In these circumstances, the Government raise the question whether the applicant can claim to be a victim of any breach of his Convention rights, on account of S 40/B of the Constitution, within the meaning of Article 25 of the Convention

The applicant contests the Government's position. He submits that he was a victim of a continuous violation of his rights. In particular, he was prevented from, *inter alia*, founding and participating in associations, accepting appointment as a candidate for elections, supporting election candidates and joining political parties

Article 25 of the Convention, so far as it is relevant, provides as follows

"1 The Commission may receive petitions from any person, claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention

The Commission recalls that, in specific circumstances, an applicant is entitled to "claim to be the victim of a violation of the Convention, even though he is not able to allege in support of his application that he has been subject to a concrete State measure. The question whether the applicant was actually the victim of any violation of the Convention may exceptionally involve determining whether the contested legislation is in itself compatible with the Convention's provisions (cf. Eur. Court HR, *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 20, para. 38, *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A no. 45, p. 18, para. 41)

The Commission notes that, subsequent to the impugned amendment of the Hungarian Constitution, the Head of the National Police, on 28 January 1994, demanded in a circular letter that policemen should refrain from political activities and indicated that those who wished to pursue political activities would have to leave the police. Moreover, in another circular letter of 16 February 1994, the Head of the National Police declared that no exemption could be given from the prohibition contained in S 40/B para. 4 of the Constitution

It is true that, notwithstanding the impugned provision of the Constitution, in the relevant period the applicant was not completely prevented from engaging in political activities. There is no indication that he could not nominate a third person as a candidate for the elections by submitting his nomination coupon. Moreover, he was free

to accept a nomination as a candidate for the elections on condition that if elected, he should resign from any position incompatible with his mandate. Furthermore, neither the impugned constitutional prohibition nor the other relevant laws entailed any formal sanction for illegitimate political activities potentially assumed by the applicant.

However, the Commission, having regard to the limited nature of these possibilities to articulate political preferences and, in particular, to the circular letters issued by the Head of the National Police, considers that the applicant could be reasonably concerned by the consequences of his expression of political views.

In these circumstances, the Commission finds that the applicant can claim to be a victim within the meaning of Article 25 of the Convention.

3 The Government reiterate that the applicant has failed to specify in what manner he was actually prevented from the pursuance of political activities and, as a consequence, they raise the question whether or not the application is in compliance with the requirements of Article 26 of the Convention.

The applicant argues that although it is disputable whether a complaint to the Constitutional Court can be deemed an effective remedy in the case, he nevertheless brought a constitutional complaint and thus undoubtedly exhausted the available domestic remedies. Moreover, he lodged his application within the six months' time limit as from both the date of amendment of the Constitution and the decision of the Constitutional Court.

Article 26 of the Convention provides as follows:

The Commission may only deal with the matter after all domestic remedies have been exhausted according to the generally recognised rules of international law and within a period of six months from the date on which the final decision was taken.

The Commission notes that the applicant challenged S 40/B para 4 of the Constitution before the Constitutional Court which on 11 April 1994 rejected his constitutional complaint, holding that it had no competence to quash a provision of the Constitution itself.

In these circumstances, the Commission finds that the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para 3 of the Convention.

4 The applicant complains under Article 10 of the Convention that in the relevant period, S 40/B para 4 of the Hungarian Constitution violated his right to freedom of expression.

Article 10 of the Convention, so far as relevant, provides as follows:

"1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority

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 submit that, in addition to the general prohibition of policemen's involvement in political activities contained in S 40/B of the Constitution, the further relevant legislation, namely the Police Act 1994 and the Regulation 1995, provides for a specific legal framework. The provisions of this legal framework are, in their view, detailed enough to specify the restrictions imposed on policemen, as to their right to freedom of expression, in a manner in conformity with Article 10 para 2

The applicant maintains that the prohibition at issue is of an unacceptably general character and is largely prone to arbitrary interpretation. He argues that the legal norms of a lower level, referred to by the Government, allowing for certain types of political activities to be carried out by police members, in fact contradict the overall constitutional ban. He submits that there are no clear *criteria* as to the question whether or not a particular activity falls under the notion of political activity

The Commission finds that this aspect of the application involves serious issues of fact and law under the Convention, the determination of which must be reserved to an examination on the merits. This part of the application cannot, therefore, be declared manifestly ill founded within the meaning of Article 27 para 2 of the Convention, no other ground for declaring it inadmissible having been established

5 The applicant further complains under Article 11 - also invoking Article 18 - that S 40/B para 4 of the Constitution violated his right to freedom of association

Article 11 of the Convention provides as follows

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

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights

and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces of the police or of the administration of the State.

The Government submit that the restriction of policemen's party affiliation has been a necessary safeguard to ensure the disconnection of the institutional links, which, during the totalitarian era, existed between the armed forces and political circles and to prevent the members of armed forces from political commitment or from being involved in political manipulations. In this respect they refer to paragraph 89 of the opinion of the Commission in the *Kosiek v Germany* case (Series A no 105, p 38) and to paragraph 96 of the opinion of the Commission in the *Glaserapp v Germany* case (Series A no 104 p 45).

The applicant argues that the restriction in question is not necessary in a democratic society and is in fact of a political nature. He submits in particular that the aim of the impugned constitutional provision is unclear and that he was completely prohibited from exercising his right to freedom of association.

The Commission finds that this aspect of the application is so closely linked to the complaint under Article 10 of the Convention that it must likewise be reserved to an examination on the merits. This part of the application cannot therefore be declared manifestly ill founded within the meaning of Article 27 para 2 of the Convention, no other ground for declaring it inadmissible having been established.

6 The applicant further complains under Article 10 in conjunction with Article 14 of the Convention about the discriminatory and arbitrary character of S 40/B para 4 in that it prevented policemen as such from any involvement in political activities.

Article 14 of the Convention provides as follows:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Government submit that the prohibition at issue is imposed not only upon policemen but also upon members of the armed forces, judges, Constitutional Court judges and prosecutors. The Government, referring to the *Engel* case (Eur Court HR, *Engel and Others v the Netherlands* judgment of 8 June 1976 Series A no 22, p 42 para 103) further maintain that any distinction made between policemen and other groups of citizens, as to the exercise of the right to freedom of association and expression, can be justified on the ground of differences between the conditions of military and of civil life and more specifically, by the duties and responsibilities peculiar to members of the armed forces.

The applicant argues that there is no objective and reasonable justification for prohibiting a party affiliation neither in respect of policemen nor of the other groups of civil servants, referred to by the Government

The Commission finds that the applicant's complaint under Article 14 is so closely linked to the above issues under Articles 10 and 11 that it cannot be declared manifestly ill founded, either within the meaning of Article 27 para 2 of the Convention, no other ground for declaring it inadmissible having been established

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case