AS TO THE ADMISSIBILITY OF

Application No. 23576/94
by E. S.
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 29 November 1995, the following members being present:

Mr. C.L. ROZAKIS, President
Mrs. J. LIDDY
MM. E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
M.P. PELLONPÄÄ
B. MARXER
B. CONFORTI
N. BRATZA
I. BÉKÉS
E. KONSTANTINOV
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 February 1994 by E. S. against Germany and registered on 4 March 1994 under file No. 23576/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant, born in 1937, is a German national and resides in Ennsdorf. In the proceedings before the Commission, he is represented by M. P. Becker, a lawyer practising in Marburg.

The applicant was a professional soldier in the service of the Federal Republic of Germany since 1960. In 1982 he was appointed as fleet admiral. Since 1984 he was the Head of the Bergisch Gladbach Office for Research and Training (Amt für Studien und Übungen) of the Federal Armed Forces (Bundeswehr).

On 21 December 1989 the Federal Minister of Defence (Bundesminister der Verteidigung) went to see the Federal President (Bundespräsident) with a view to requesting the applicant's suspension (Versetzung in den einstweiligen Ruhestand) and explaining the reasons therefor. These reasons, listed in a memorandum, concerned the disciplinary punishment (disziplinare Maßregelung) of the applicant in view of his critical remarks about the Federal Chancellor (Bundeskanzler) and the Federal Minister of Defence, contained in a press communique on a conference of commanding officers of the Federal

Armed Forces of December 1988, as well as his three interviews on television in November 1989 on military and military policy questions.

On 12 January 1990 the Federal President suspended the applicant. The applicant was informed accordingly on 16 January 1990.

On 15 February 1990 the applicant, assisted by counsel, filed an action with the Cologne Administrative Court (Verwaltungsgericht) against his suspension. He complained that he had not been heard by the Federal President prior to his suspension, that no reasons were mentioned in the decision and that, should the decision be based upon his critical remarks in public, it would amount to a violation of his right to freedom of expression.

On 2 July 1990 the Cologne Administrative Court dismissed the applicant's action. The Administrative Court, referring to S. 50 para. 1 of the Soldiers Act, found that his suspension was lawful.

In its decision, the Administrative Court recalled that according to this provision the Federal President was entitled to suspend, at any time, professional soldiers from the rank of a brigade commander up. Referring to the case-law of the Federal Constitutional Court (Bundesverfassungsgericht) and the Federal Administrative Court (Bundesverwaltungsgericht), the Administrative Court observed that this provision of the Soldiers Act, like the similar provision of the Federal Civil Service Act (Bundesbeamtengesetz), envisaged that high-ranking, so-called "political" civil servants and soldiers would be expected, in view of their prominent position, to support government policy at all times. Accordingly, the Federal President enjoyed a very wide margin of appreciation, limited only by the prohibition on arbitrariness, and was not required to give any reasons for the suspension.

The Administrative Court, applying these principles to the applicant's case, considered that, taking into account the disturbance in the relationship of confidence between the applicant and the defendant, his suspension could not be objected to. The Court considered that the decision on the suspension as such did not require any further reasoning, the reasons having been set out in the course of the administrative court proceedings. As regards the question of whether the applicant's suspension had been arbitrary, the Administrative Court noted that the applicant had already received the disciplinary punishment of a warning, confirmed by the Federal Administrative Court in October 1989, in respect of his critical remarks of December 1988. Taking into account these disciplinary proceedings which had only terminated shortly before the applicant's suspension, there was no necessity to hear him again on the matter.

On 1 October 1991 the North-Rhine Westphalia Administrative Court of Appeal (Oberverwaltungsgericht) dismissed the applicant's appeal (Berufung). It confirmed the Administrative Court's finding that the applicant's suspension was lawful.

The Administrative Court of Appeal rejected the applicant's arguments as to the alleged procedural errors. In particular, it considered that, according to the S. 50 para. 1 of the Soldiers Act, there had been no necessity to hear the applicant prior to his suspension. This was in line with the aim and purpose of S. 50 para. 1 of the Soldiers Act, as well as of the analogous provision of the Federal Civil Service Act, namely to ensure that high-ranking civil servants and military commanders were in constant agreement with the Government policy. The civil servants and soldiers covered by the said provisions held key positions in ensuring an effective implementation of Government policies. They should not only refrain from hindering the Government policy, but were obliged always actively to support it, and they, therefore, required the full confidence of the Government at all times. There was a lack of confidence if the political views of

the person concerned deviated from the Government policy. However, the necessary full confidence was also lacking if the Government only had doubts as to whether his professional or personal qualifications, his discharge of official duties or even the conduct of his private life guaranteed to the highest possible degree his efficient cooperation implementing Government policy. Such doubts could arise on the basis of "imponderables". A hearing on these matters did not appear meaningful. Moreover, the persons covered by S. 50 para. 1 of the Soldiers Act and the relevant provision of the Federal Civil Service Act knew about the risk inherent in their post when taking up their duties and about the fact that, in case of a suspension, they had a considerably better entitlement to maintenance and pension benefits than other suspended civil servants.

The Administrative Court of Appeal found that, for the same considerations, the decision on the suspension did not require any reasoning. However, under the rule of law, the person concerned should be informed about the reasons for his suspension in the context of any administrative court proceedings with a view enabling him effectively to argue his case. In the course of the proceedings brought by the applicant, the defendant Government had plausibly explained that, taking into account the relevant events, a relationship of full confidence between the Government, notably the Federal Minister of Defence, and the applicant had ceased to exist.

Furthermore, the Administrative Court of Appeal found that, to the extent that the events relied upon related to the meeting in December 1988, the defendant had not been prevented from attending the outcome of the above-mentioned disciplinary proceedings. It considered that the decision on the applicant's suspension for loss of confidence was facilitated by the fact that, in the context of administrative court proceedings, the disciplinary punishment of the applicant for having disparaged the Federal Chancellor and the Federal Minister of Defence had been confirmed. In this respect, the Administrative Court of Appeal referred in detail to the findings of the Federal Administrative Court in its decision of October 1989. The Administrative Court of Appeal recalled that the Federal Administrative Court had considered the applicant's aim to create a private lobby for his ideas as to the command of the Federal Armed Forces to be a serious breach of the applicant's duty of loyalty, which was at the core of his guilt of the disciplinary offence. Thus, he had in a contentious and tendentious manner imparted his criticism regarding a military meeting and the statements made by the Federal Chancellor and the Federal Minister of Defence on that occasion without considering that his disparaging statements, made in reliance on his rank, offered themselves to abuse and questionable emotionalism.

Moreover, in a television interview, the applicant, upon the question of whether, even in case of emergency, he would not shoot, had answered that he thought that this was so. He had thereby given rise to doubts as to his obligation under the Soldiers Act, namely truly to serve the Federal Republic of Germany. In a further television interview he had made statements to the effect that any soldier could become a potential murderer, taking into account the effects of modern weapons of mass destructions, and had not made any difference between having recourse to such weapons in the context of a war of aggression or a defensive war. Such statements not only justified the assumption of a loss of confidence, but also affected soldiers in general and called the applicant's authority as a superior into question. Finally, the applicant had, in the context of a television broadcast, contradicted statements of a State Secretary on the question of the stationing of parts of the US Air Force in Germany and, in criticising the "secret-mongering" ("Geheimniskrämerei") regarding matters of modernisation, nuclear arms and the NATO strategy, discredited the information policy of the Federal Government.

The Administrative Court of Appeal finally observed that a

soldier was free to engage in political activities and to express his opinions in public. However, his commitments and statements were only protected to the extent that they were compatible with the special duty of self-restraint flowing from the position of a soldier, and necessary to ensure the functioning of the Federal Armed Forces. The Court, having regard to the above events, concluded that the applicant had not displayed such self-restraint.

On 26 May 1992 the Federal Administrative Court dismissed the applicant's request for leave to appeal on points of law (Beschwerde gegen die Nichtzulassung der Revision) on the ground that his case was not of fundamental importance within the meaning of the relevant procedural provisions.

The Federal Administrative Court, referring to its own and the Federal Constitutional Court's case-law, confirmed that the suspension of high ranking soldiers pursuant to S. 50 of the Soldiers Act aimed at securing that the professional conduct of those persons was in constant agreement with Government policy and that, at all times, they actively supported Government policy and had the Government's full confidence in their willingness and qualification to do so. If such full confidence ceased to exist, the suspension of the person concerned was possible and in general justified. Taking into account the particular nature of the suspension, no explicit reasoning was required. The legal protection of the person concerned was ensured in the context of the administrative court proceedings. Moreover, in view of the nature of the suspension, the person concerned did not have to be heard prior to his suspension. The Federal Administrative Court finally observed that the suspension did not presuppose professional misconduct on the part of the person concerned, but any behaviour, including behaviour covered by the right to freedom of expression, could result in a loss of confidence justifying the suspension.

On 7 July 1993 the 3rd Chamber of the Federal Constitutional Court refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde) on the ground that it offered no prospect of success.

The Constitutional Court, in its decision, found that the applicant's suspension, pursuant to S. 50 para. 1 of the Soldiers Act, did not infringe his right to freedom of expression or his other constitutional rights. It confirmed that S. 50 para. 1 was, like the similar provision of the Federal Civil Service Act, designed to ensure the smooth functioning of the process of implementation of Government policy in the military hierarchy. Doubts as to the capacity or willingness of a high ranking soldier to guarantee the continued agreement of his professional conduct with defence policy were sufficient to justify his suspension. The loss of confidence between the Government and a high ranking soldier however was not limited to situations of a lack of agreement between Government policy and the views on defence policy stated by the person concerned, but covered all elements relevant for the professional and personal qualification of the soldier to implement Government policy, such as a lack of flexibility or considerations as to the age structure of the Federal Armed Forces. The statement of political views was, therefore, not a constituent element of such a suspension.

According to the Federal Constitutional Court, political statements made by a high ranking soldier could, however, be a relevant criterion in establishing the Government's loss of confidence. Nevertheless, in such a situation, the suspension under S. 50 para. 1 of the Soldiers Act was not intended to penalise particular statements criticising the Government. The suspension could rather be considered whenever the respective political statements of the soldier concerned were at variance with the respective Government policy, irrespective of the contents or the value of the statement concerned.

Furthermore, the interpretation and application of S. 50 para. 1 of the Soldiers Act in the circumstances of the applicant's case could not be objected to. In this context, the Federal Constitutional Court noted the wide margin of appreciation enjoyed by the Federal President to the effect that the administrative courts only had to review whether his decision had been arbitrary. There was no arbitrariness as the political statements made by the applicant in public were of such a nature as to raise doubts regarding his agreement with defence policy, and it was irrelevant whether the applicant had made the statements concerned on duty or in private. Moreover, in the course of the administrative court proceedings, the defendant Government had explained the reasons for the applicant's suspension and the applicant had sufficient opportunity to comment thereupon.

COMPLAINTS

1. The applicant complains under Article 6 paras. 1 and 3 (a) of the Convention that he was not heard prior to his suspension and that no reasons were given in the decision on his suspension.

2. The applicant complains under Article 10 of the Convention that his suspension violated his right to freedom of expression.

3. The applicant further complains under Article 14, taken together with Article 10, of the Convention that his suspension amounted to discrimination on the grounds of his political views and his status of a high ranking soldier.

THE LAW

1. The applicant complains under Article 6 (Art. 6) of the Convention about the alleged unfairness of the proceedings regarding his suspension from serving as a high ranking soldier in the Federal Armed Forces.

The Commission recalls that disputes relating to the recruitment, employment and retirement or dismissal of civil servants are as a general rule outside the scope of Article 6 (Art. 6) (Eur. Court H.R., Francesco Lombardo judgment of 26 November 1992, Series A no. 249-B, pp. 26-27, para. 17; Giancarlo Lombardo judgment of 26 November 1992, Series A no. 249-C, p. 42, para. 16)

The Commission notes that the applicant, a fleet admiral, was suspended by the Federal President pursuant to S. 50 para. 1 of the German Soldiers Act, according to which the Federal President was entitled to suspend, at any time, professional soldiers from the rank of a brigade commander up. In applying this legal provision, the Federal President exercised discretionary powers, his wide margin of appreciation regarding the question of loss of confidence by the Government in a high ranking soldier being confirmed by the domestic courts.

Consequently, in this area, the State acts in the field of public law and no determination of the applicant's "civil rights" was at issue in the administrative court proceedings concerned.

Furthermore, the applicant's suspension did not involve a determination of any "criminal charge" against him.

Article 6 (Art. 6) of the Convention is, therefore, not applicable in the present case.

It follows that this part of the application is incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

2. The applicant complains under Article 10 (Art. 10) of the

Convention that his suspension by the Federal President on 12 January 1990 infringed his right to freedom of expression.

Article 10 (Art. 10) of the Convention, as far as relevant, 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 ...
>
> 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 the reputation or rights of others, for preventing the disclosure of information received in confidence, ..."

The Commission notes that the applicant, a fleet admiral, was suspended by the Federal President pursuant to S. 50 para. 1 of the Soldiers Act. As established in the course of the ensuing administrative court proceedings, the suspension was based upon the Government's loss of confidence that, having regard to various public statements, the applicant was in agreement with and fully supported the Government policy, in particular its defence policy.

As regards the question whether there was an interference with the applicant's right under Article 10 (Art. 10), the Commission recalls that the right of recruitment to the civil service was deliberately omitted from the Convention. However, as a general rule the guarantees in the Convention extend to civil servants and a person who has been appointed to the civil service, or who is a professional soldier in the armed forces, can complain on being dismissed that the dismissal violates one of his or her rights under the Convention (cf. Eur. Court H.R., Vogt judgment of 26 September 1995, Series A no. 323, paras. 43-44, with further references).

The applicant was a professional soldier in the service of the Federal Republic of Germany since 1960, and he was appointed as fleet admiral in 1982. On 12 January 1990 the Federal President, upon the request of the Federal Minister of Defence in view of the applicant's disciplinary punishment for critical remarks about the Federal Chancellor and the Federal Minister of Defence, contained in a press communique on a conference of commanding officers of the Federal Armed Forces of December 1988, as well as in three interviews on television on military and military policy questions in 1989, ordered the applicant's suspension pursuant to a special provision of the Soldiers Act relating to high ranking soldiers.

The Commission finds that in these circumstances there was an interference with the exercise of the applicant's freedom of expression. Such interference is in breach of Article 10 (Art. 10) , unless it is justified under paragraph 2 of Article 10 (Art. 10-2), i.e. it must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (Art. 10-2) and be "necessary in a democratic society".

The legal basis of the interference under consideration was S. 50 para. 1 of the Soldiers Act. The applicant's suspension was, therefore, "prescribed by law" for the purposes of Article 10 para. 2 (Art. 10-2).

Moreover, the interference in question aimed at securing efficiency in implementing Government policy, in particular defence policy, by requiring that high ranking soldiers should be in constant

agreement with the actual Government policy and should support it. Such an obligation on high ranking officials, in particular in the armed forces, can reasonably be regarded as pursuing legitimate aims under Article 10 para. 2 (Art. 10-2), namely the protection of national security, the prevention of disorder and the protection of the rights of others.

It remains to be determined whether the interference complained of was "necessary in a democratic society" and proportionate to the legitimate aims pursued.

The Commission recalls that the adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision. In carrying out the review whether a fair balance has been struck between the right of the individual to freedom of expression and the legitimate interests of the respondent State, the Commission will bear in mind that whenever civil servants', or soldiers', rights to freedom of expression are in issue, the "duties and responsibilities" referred to in Article 10 para. 2 (Art. 10-2) may assume a special significance (cf. Eur. Court H.R., Vogt judgment, loc. cit., para. 52).

The Commission notes that the applicant, a professional soldier in the Federal Armed Forces for many years and appointed fleet admiral in 1982, had worked as Head of an Office for Research and Training of the Federal Armed Forces since 1984. As regards his critical remarks in the press communique of December 1988, the applicant received the disciplinary punishment of a warning, confirmed by the Federal Administrative Court in October 1989. On 21 December 1989 the Federal Minister of Defence requested the applicant's suspension in view of his disciplinary punishment for critical remarks in the press communique of December 1988, as well as in his three interviews on television in November 1989 on military and military policy questions. The Federal President suspended the applicant on 12 January 1990.

The applicant's suspension was ordered pursuant to S. 50 para. 1 of the Soldiers Act which entitles the Federal President to suspend, at any time, professional soldiers from the rank of a brigade commander up. According to the relevant case-law of the Federal Constitutional Court and the Federal Administrative Court, this provision related, like the similar provision of the Federal Civil Service Act, to the high-ranking, so-called "political" civil servants and soldiers who are expected, in view of their prominent position, to support the government policy at any time. The domestic law therefore accorded the Federal President a very wide margin of appreciation, limited only by the prohibition on arbitrariness.

The administrative courts, applying these principles to the applicant's case, considered that there was such a disturbance in the relationship between the applicant and the respondent Government that his suspension could not be objected to. The German courts, examining the reasons advanced by the respondent Government in the course of the proceedings before them, noted the disciplinary punishment imposed upon the applicant for having disparaged the Federal Chancellor and the Federal Minister of Defence in the press communique of December 1988 for the purpose of creating, in breach of his duty to loyalty, a private lobby for his ideas as to the command of the Federal Armed Forces. On the occasion of three television broadcasts in November 1989, the applicant's further comments on questions of military policy had given rise to doubts whether, in case of emergency, he would fulfil his obligation under the Soldiers Act truly to serve the Federal Republic of Germany; he had condemned modern warfare without exception and called all soldiers "potential murderers" and had also discredited the information policy of the Federal Government.

The Commission finds that, balancing the applicant's interest in criticising the Government policy and stating his above-mentioned views on essential military matters and the Government's interest in the proper functioning of the Armed Forces, there were relevant and sufficient reasons for the applicant's suspension.

Moreover, considering all circumstances and in particular the applicant's entitlement to continuing maintenance payments, the Commission finds that the interference in question does not appear disproportionate to the legitimate aims pursued.

The interference complained of can, therefore, be regarded as "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

Accordingly, there is no appearance of a violation of the applicant's right under Article 10 (Art. 10) of the Convention.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains under Article 14, taken together with Article 10 (Art. 14+10), of the Convention that his suspension amounted to discrimination on the grounds of his political views and his status of a high ranking soldier.

Article 14 (Art. 14) reads 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."

Article 14(Art. 14) affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (cf. Eur. Court H.R., Hoffmann judgment of 23 June 1993, Series A no. 255-C, p. 58, para. 31; The Sunday Times (no. 2) judgment of 26 November 1991, Series A no. 217, p. 32, para. 58).

To the extent that S. 50 para. 1 of the Soldiers Act subjected the applicant to a particular regime on the ground of his high ranking post in the Federal Armed Forces, he was not in a situation comparable to other soldiers of lower grades. Moreover, having regard to the reasons advanced by the Government for the applicant's suspension, there is no appearance that there has been any difference in treatment on account of the applicant's political opinion.

Consequently, there is no appearance of a violation of Article 14 taken in conjunction with Article 10 (Art. 14+10).

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2).

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the First Chamber — President of the First Chamber

(M.F. BUQUICCHIO) — (C.L. ROZAKIS)