AS TO THE ADMISSIBILITY OF

Application No. 21522/93
by Anastasios GEORGIADIS
against Greece

The European Commission of Human Rights sitting in private on 10 October 1994, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
A. WEITZEL
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

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

Having regard to the application introduced on 27 February 1993 by Anastasios GEORGIADIS against Greece and registered on 11 March 1993 under file No. 21522/93;

Having regard to :

- reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 13 December 1993 and the observations in reply submitted by the applicant on 17 February 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Greek citizen, born in 1963, and resident in Athens. Before the Commission he is represented by Mr. P. Bitsaxis, an attorney at law practising in Athens.

A. The particular circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows:

On 3 January 1989 the applicant was appointed religious minister for the Prefectures of Karditsa and Larissa by the Central Congregation of the Christian Jehovah's Witnesses of Greece. He was given the authority, inter alia, to perform wedding ceremonies between persons of this religion, in accordance with Article 1367 of the Civil Code, and to notify such weddings to the competent registry offices. By letter of 13 January 1989 the Director of Internal Affairs of the Prefecture of Karditsa notified the registry offices of Karditsa of this appointment. By letter of 24 January 1989 from the Director of Internal Affairs of the Prefecture of Larissa, the registry offices of Larissa were also notified of this fact.

On 11 September 1991, the applicant lodged an application to the Recruiting Office of Serres to be exempted from military service, in accordance with Article 5 of law 1763/1988 which grants such a right to all ministers of "known religions". On 17 September 1991, the Serres Recruiting Office rejected the application on the ground that Jehovah's Witnesses are not a known religion.

On 7 October 1991 the applicant lodged an administrative appeal to the Director for Recruitment of the General Headquarters for National Defence (G.*.*.O.*). His appeal was rejected on 18 December 1991 on the ground that he was not a minister of a known religion. On the same day, the Serres Office ordered him to report for duty at a military training centre in Nafplio on 20 January 1992.

The applicant presented himself at the Nafplio centre, as ordered, but refused to enlist, invoking his status as a minister of a known religion. Considering that the applicant had committed the criminal offence of insubordination, the military commander of the training centre placed the applicant in detention on remand in the centre's disciplinary unit and ordered a preliminary investigation against him. Upon termination of the investigation, the applicant was committed for trial for insubordination on 29 January 1992 by the competent military justice authorities. The order for his detention on remand was renewed and he was transferred to the military prison of Avlona.

On 13 February 1992, the applicant lodged an appeal before the Council of State (Symv*ulio tis *pikrateias) asking for the annulment of the decision of 18 December 1991 of the Director for Recruitment of the General Headquarters for National Defence.

On 16 March 1992, the Athens Military Court acquitted the applicant on the ground that he was exempted from military service, being a minister of a known religion. The director of the Avlona prison released the applicant immediately, granted him leave of absence until 2 April 1992 and ordered him to report for duty on 4 April at the Nafplio centre.

On 4 April 1992, the applicant presented himself to the Nafplio centre where he was ordered to enlist in the military forces. When he refused, he was charged with insubordination and placed in detention on remand. He was committed for trial on 15 April 1992.

On 8 May 1992, the Athens Military Court, expressing doubts as to the applicant's intention to commit the criminal offence of insubordination, acquitted him. It further decided that no compensation should be granted to the applicant for his detention on remand, since this detention was due to his gross negligence.

The applicant was immediately released from the Avlona prison, given a leave of absence and ordered to report for duty at the Nafplio centre on 22 May 1992. He was again ordered to enlist, charged with insubordination and detained on remand.

On 7 July 1992, the Council of State annulled the decision of the General Headquarters for National Defence of 18 December 1991 on the ground that Jehovah's Witnesses are a known religion and the administration had not challenged the evidence produced by the applicant that he was a minister of that religion.

On 27 July 1992, the applicant was provisionally released from the military prison of Thessaloniki pursuant to a decision of the Military Court of Thessaloniki sitting in chambers. A certificate of provisional exemption from military service was issued, on the ground that the applicant was a minister of a known religion.

On 10 September 1992, the Military Court of Thessaloniki acquitted the applicant, considering that he lacked the intention of committing the offence of insubordination. It further found that the applicant was not entitled to compensation, since his detention on remand was due to his gross negligence.

B. Relevant domestic law and practice

1. Article 5 of law 1763/1988 exempts all ministers of "known religions" from military service. The Council of State has repeatedly considered that Jehovah's Witnesses are a known religion.

2. Article 52 para. 2 of the presidential decree 18/1988, which codified the legal rules regarding the Council of State, reads as follows:

> "A committee, established ad hoc by the Chairman of the Council of State and composed of the Chairman or the member of the Council who replaces him in accordance with the applicable rules, the rapporteur of the case and another member of the Council, may, at the request of the person who filed the action for annulment, decide in chambers to suspend the execution of the impugned act. Reasons must be provided."

Three-member committees of the Council of State have on many occasions suspended the execution of administrative acts ordering somebody to enlist in the armed forces. Most of these decisions were issued in respect of persons who were challenging before the Council of State the refusal of the administration to exempt them from military service on the ground that they were students (decisions 263/90, 434/92, 530/92, 570/92, 633/92, 204/93 and 472/93). Some of them, however, concerned religious ministers whom the administration had also refused to exempt (decisions 326/90, 457/92 and 203/93).

3. Article 533 para. 2 of the Code of Criminal Procedure reads as follows:

> "Persons who have been detained on remand and subsequently acquitted .... have the right to request compensation ...., if it has been established in the proceedings that they did not commit the criminal offence for which they have been detained on remand ....".

> Article 535 para. 1 of the same Code provides the following:

> "(t)he State does not have any obligation to compensate a person who ..... has been detained on remand if the latter, intentionally or by gross negligence, was responsible for his own detention."

> Article 536 paras. 1 and 2 of the Code read as follows:

> "The court which heard the case shall decide on the State's obligation to pay compensation in by virtue of a separate

decision issued at the same time as the verdict upon an application submitted orally by the person who has been acquitted. However, the court may also issue such a decision proprio motu .....

The decision regarding of the obligation of the State to pay compensation cannot be challenged separately; it is, however, quashed when the decision on the principal issue of the criminal trial is reversed."

Article 537 paras. 1 and 2 of the Code read as follows:

"The person who has suffered prejudice may request compensation at a later stage before the same court.

In these circumstances, the application must be submitted to the public prosecutor of this court strictly within forty-eight hours from the pronouncement of the judgment in open court."

Article 539 para. 1 of the Code provides the following:

"After it has been decided that the State must pay compensation, the person entitled thereto may bring his claim before the civil courts, which may not re-examine the existence of the State's obligation."

Finally, Article 540 para. 1 of the Code reads as follows:

"Persons who have been unfairly ..... detained on remand must be compensated for any material prejudice they have suffered as a result of their ..... detention. They must also be compensated for moral damage .....".

COMPLAINTS

1. The applicant alleges that he was prosecuted twice for an offence of which he had previously been acquitted. He invokes Article 4 para. 1 of Protocol No 7.

2. The applicant complains that he was deprived of his liberty in breach of Article 5 para. 1 of the Convention. In this respect he submits that he was provisionally detained without any reasonable suspicion that he had committed any offence.

The applicant also complains that the three consecutive prosecutions and incarcerations to which he was subjected aimed at forcing him to alter the contents of his conscience and religion. He alleges that his right to freedom of religion and conscience guaranteed by Article 9 para. 1 of the Convention has been violated.

He further claims that the military authorities' insistence in prosecuting him amounts to degrading treatment prohibited by Article 3 of the Convention.

In this context, the applicant finally alleges that he has been a victim of a discriminatory practice, singling out Jehovah's Witnesses, in breach of Article 14 of the Convention.

3. The applicant next complains that he did not receive compensation for having been unlawfully detained and invokes Article 5 para. 5 of the Convention.

4. The applicant finally complains that the Military Courts issued a final decision on his right to compensation without hearing him, in breach of Articles 6 para. 1 and 13 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 February 1993 and registered on 11 March 1993.

On 30 August 1993 the Commission decided to communicate the application to the respondent Government and to request them to submit their written observations on admissibility and merits.

The Government's observations were submitted on 13 December 1993 after an extension of the time-limit fixed for this purpose. On 17 February 1994 the applicant submitted his observations in reply.

THE LAW

1. The applicant alleges that he was prosecuted twice for an offence of which he had previously been acquitted. He invokes Article 4 para. 1 of Protocol No 7 (P7-4-1).

The Commission notes that Greece has ratified Protocol No. 7 but has not recognised the right of individual petition in respect of the rights guaranteed therein.

This part of the application must, therefore, be rejected as being incompatible with the provisions of the Convention, pursuant to Article 27 para. 2 (Art. 27-2).

2. The applicant complains of a violation of Articles 3, 5 para. 1, and 9 (Art. 3, 5-1, 9) of the Convention, taken on their own and in combination with Article 14 (Art. 3, 5-1, 9+14), in that the Greek military authorities committed him for trial and detained him on remand three times for an offence he could not have committed, because he was a Jehovah's Witness.

Article 3 (Art. 3) of the Convention prohibits inhuman and degrading treatment. Article 5 para. 1 (Art. 5-1) guarantees the right to liberty and security of person. Article 9 (Art. 9) ensures freedom of religion and Article 14 (Art. 14) secures the enjoyment of Convention rights and freedoms without discrimination.

As a preliminary point the Government contend that the applicant failed to comply with the requirements of Article 26 (Art. 26) of the Convention. The applicant sought the annulment by the Council of State of the decision of the army authorities refusing to recognise his status as a minister of a known religion and to exempt him from the military service. Nevertheless, he surrendered himself to the military authorities, without attempting to seize beforehand the competent three-member committee of the Council of State which could have suspended the execution of the decision of the army authorities ordering him to enlist in the armed forces. Moreover, he failed to request his provisional release from the competent military courts, when placed in detention on remand on two occasions, between 20 January and 16 March 1992 and between 4 April and 8 May 1992. As each period of detention related to a distinct criminal offence, the Government further submit that the application has not been submitted within six months from the applicant's release on 16 March 1992 and on 8 May 1992. As regards the third period of detention on remand ordered on 22 May 1992, the applicant applied and obtained his provisional release on 27 July 1992. As a result, he cannot claim to be a victim of a violation of the Convention.

In response, the applicant submits that a request for the suspension of the execution of an administrative act cannot, as a matter of principle, be considered to be a remedy within the meaning of Article 26 (Art. 26) of the Convention. He argues that an order to suspend the execution of the administrative decision would not have necessarily resulted in his provisional release, the administrative

proceedings in his case being separate from the criminal ones, and the army authorities having demonstrated in his case a complete lack of respect for the case-law of the Council of State. The applicant further submits that, at the time of his prosecution, the three-member committee of the Council of State had not developed the practice of suspending the enforcement of decisions ordering religious ministers to enlist. In any event, the successive orders of detention on remand made it impossible for him to lodge such an application. Finally, by way of general observation, he submits that, if the Government were sure that the Council of State would have ruled in his favour, they should not have allowed the army authorities to act in the manner they did.

The applicant further argues that, as a matter of principle, an application for provisional release cannot be considered to be a remedy for the purposes of Article 26 (Art. 26) of the Convention. Moreover, in accordance with a consistent court practice in Greece, the provisional release of accused persons is never ordered one or two months before the trial. He also claims that, contrary to what the Government argue, in July 1992 he was released further to a telephone order, issued after the Council of State had ruled in his favour. As a matter of fact, he had never applied for his release and the military court simply rubber-stamped the telephone order. As regards the Government's argument concerning the six months' rule, the applicant submits that the three periods of detention were inextricably related to each other. As a result, the criminal court which acquitted him on 10 September 1992 could have remedied the violation by granting him appropriate compensation.

The Commission considers that, in the circumstances of the present case, issues could arise under Articles 3, 5 para. 1, 9 and/or 14 (Art. 3, 5-1, 9, 14) of the Convention. However, Article 26 (Art. 26) of the Convention only permits the Commission to deal with a matter after all domestic remedies have been exhausted. It recalls that the Court in its Cardot judgment held as follows:

> ".... Article 26 (Art. 26) .... does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge decisions already given. It normally requires also .... that any procedural means which might prevent a breach of the Convention should have been used" (Eur. Court H.R., Cardot judgment of 19 March 1991, Series A no. 200, p. 18, para. 34).

The Commission notes that the applicant failed on several occasions to seek the appropriate protection of the judicial authorities: He did not apply to the Council of State for a suspension of the execution of the decision ordering him to enlist in the army, although he had the time to do so, given that this decision was issued after the applicant's application for exemption had been refused and at least one month before the date of his enlistment. There was adequate precedent for such a course because the three-member committee of the Council of State had at that time already ordered the suspension of at least one decision ordering a religious minister to enlist.

Moreover, the applicant never applied to the competent military criminal courts for temporary release after he had been placed in detention on remand (cf. mutatis mutandis, No. 9172/80, Dec. 17.12.81, D.R. 27 p. 222).

In these circumstances, the Commission considers that, insofar as his complaints under Articles 3, 5 para. 1, 9 and 14 (Art. 3, 5-1, 9, 14) are concerned, the applicant has not exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention. It follows that this aspect of the case must be rejected pursuant to Article 27 para. 3 (Art. 27-3) of the Convention.

3. The applicant next complains that he did not receive compensation for his allegedly unlawful detention. He invokes Article 5 para. 5 (Art. 5-5) of the Convention, which guarantees an enforceable right to compensation for a breach of the right to liberty.

The Government submit that, insofar as the first two periods of detention on remand are concerned, the application has not been submitted within the six month time-limit laid down in Article 26 (Art. 26) of the Convention. Moreover, the applicant never requested compensation and, as a result, has not exhausted domestic remedies. Finally, they contend that Article 5 para. 1 (Art. 5-1) has not been violated, since the acquittal of the applicant does not necessarily render his pre-trial detention unlawful.

The applicant submits that his detention on remand was clearly unlawful. As regards the question of compliance with the six months' rule in Article 26 (Art. 26) of the Convention, he refers to the arguments he submitted in connection with the previous complaints. As regards the question of exhaustion of domestic remedies under Article 26 (Art. 26), the applicant observes that the Code of Criminal Procedure provides that an acquitted person may present his claim for compensation at the latest 48 hours after the decision of the criminal court. In the circumstances of his case, however, the applicant claims that the military courts effectively prevented him from exercising his rights. The question of his entitlement to compensation was examined proprio motu in the course of the courts' deliberations on the question of his guilt. The applicant had not and could not have been heard at this stage of the proceedings on the issue of compensation. The courts, nevertheless, hastened to join their negative decision on this issue to their verdict on the merits which they pronounced immediately after they had concluded their deliberations.

The Commission recalls that, in accordance with its constant case-law, complaints based on Article 5 para. 5 (Art. 5-5) of the Convention may be examined directly by the Commission only if the domestic authorities have found a violation of any of the provisions of paragrapphs 1 to 4 of this Article. In the absence of such a finding, the Commission itself must first establish the existence of such a violation (No. 7950/77, Dec. 4.3.80, D.R. 19 p. 213). In the present case, however, no such violation has been established by either the domestic authorities or the Commission. In the absence of such a finding, no issue arises under Article 5 para. 5 (Art. 5-5) of the Convention.

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

4. Finally, the applicant complains that the military courts' final rejection of his claim to compensation without hearing him was in breach of Articles 6 and 13 (Art. 6, 13) of the Convention.

Article 6 para. 1 (Art. 6-1) of the Convention guarantees the right to a fair and public hearing in the determination of civil rights and obligations. Article 13 (Art. 13) ensures effective national remedies for Convention breaches.

First, the Government contend that the applicant has not complied with the requirements of Article 26 (Art. 26) of the Convention. He never applied for compensation. The application was, moreover, submitted more than six months after the termination of the first two criminal trials.

The Government further submit that Article 6 (Art. 6) of the Convention does not apply to the proceedings in question. The claim of the applicant was not decided in accordance with the legal rules which

govern the civil liability of the State in general, but in accordance with a special set of rules applying exclusively to detention ordered in the context of a criminal trial. In such cases compensation is granted independently of the illegal character of the detention and the guilt of the State organs involved. Furthermore, the applicable rules are of a public law character and the right to liberty is not a civil right within the meaning of Article 6 (Art. 6) of the Convention.

The Government finally argue that the courts did not hear the public prosecutor before deciding, proprio motu, not to grant the applicant compensation. The majority of the judges being ordinary officers, the military criminal courts which tried the applicant resemble jury courts which do not give reasons for their verdicts. As the applicant had not submitted any claim for compensation, there were no arguments to be refuted and there was, accordingly, no need for detailed reasons to be given.

The applicant submits that he has complied with the requirements of Article 26 (Art. 26) of the Convention for the reasons mentioned above. He argues that the rules governing compensation for detention on remand are nothing other than the application of the general principles of civil liability in the particular context. Several elements point in this direction. Once the obligation of the State to compensate is recognised by the criminal court, it is a civil court which decides on the amount of compensation; the detainee's claim may be transferred, attached and inherited; it is subject to prescription; the detainee is compensated in respect of material and moral damage; persons depending on the detainee may sue as well; the State may in turn sue the civil servants who, acting illegally, became responsible for the detention.

Finally, the applicant submits that Article 6 (Art. 6) of the Convention has been violated in that he was never given the opportunity of being heard in connection with his right to compensation. Military courts in Greece, being composed of judges and lay officers, do not differ in any manner from other mixed criminal courts which give reasons for their decisions.

The Commission notes that the applicant was prosecuted and placed in pre-trial detention on all three occasions as a result of the army authorities' failure to recognise his status as a minister of a known religion. Although the relevant proceedings were formally distinct under national law, the Commission considers them sufficiently related to each other to be able to examine their fairness as a whole. The last decision having been given on 10 September 1992, the Commission considers that the application has been introduced within the six months' time-limit laid down in Article 26 (Art. 26) of the Convention.

The Commission further notes the parties' observations on the question of exhaustion of domestic remedies and, in particular, their disagreement as to whether the applicant had been given the chance to apply for compensation. It considers that this question is related to the substance of the applicant's complaints under Articles 6 and 13 (Art. 6, 13) of the Convention. However, these complaints raise serious questions of fact and law which are of such complexity that their determination should depend on an examination of the merits. This part of the application cannot, therefore, be regarded as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention, and no other ground for declaring it inadmissible has been established.

For these reasons, the Commission,

- unanimously,

DECLARES ADMISSIBLE, without prejudging the merits of the case, the issue arising from the military courts' rejection

of the applicant's compensation claim without a hearing and the inadequate reasoning of the relevant decisions;

- by a majority,

DECLARES INADMISSIBLE the remainder of the application.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)